

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM

COMMERCIAL CASE NO. 31 OF 2004

AGRO PROCESSING AND ALIED  
PRODUCTS LIMITED.....PLAINTIFF

VERSUS

SAID SALIM BAKHRESA &  
CO. LIMITED..... DEFENDANT

R U L I N G

KIMARO, J.

In this application for temporary injunction the plaintiff is praying for an order to restrain the respondent/defendant whether acting by its Directors, Officers, servants or agents or any of them or otherwise from using the word "POA" in labelling, advertising, selling, distributing, circulating or otherwise anyhow, in relation to food flour milled, packed sold, distributed, circulated or otherwise by the respondent.

The gist of the plaintiff's complaint against the defendant is that the defendant is passing off goods which are not the goods of the plaintiff as the goods of the plaintiff by use of the word "POA." The plaintiff asserts that the word POA is of significant importance in the applicant's milling business. "POA" is the applicant's get up word and its products have been advertised and referred to by consumers as "unga poa" "ngano poa" and "sembe poa." Special protection is availed to the word poa.

The applicant prays for temporary injunction as shown in the chamber application pending the determination of the plaintiff's case. The suit and the application have been filed by Mr. D.Kesaria Learned Advocate for the plaintiff.

The application has been vehemently resisted by the respondent.

The Advocates filed written submissions as ordered by the court.

It is now long settled that a temporary injunction can only be granted upon the three conditions quoted below being satisfied:

“

- i) The applicant must show a prima facie case with a probability of success.
- ii) The balance of convenience must be in favour of the applicant.
- iii) The applicant might suffer irreparable loss which would not adequately be compensated by award of damages.”

The cases of **Atilio V Mbowe and the CPC International Inc. vs Zainab Grain Millers Ltd** (Civil Appeal No.49 of 1995) (Court of Appeal) (Unreported) are some of the often cited cases to support the principles quoted above. The three principles cited above must all be fulfilled to entitle an applicant to a temporary injunction.

The question is whether the applicant has satisfied the three conditions above.

Mr. Kesaria submitted that the first principle has been satisfied. He relied on Section 31 of the Trade and Service Mark Act 1986 arguing that it gives a registered proprietor the exclusive right to use the trademark in relation to the goods because of the Certificate of Registration held by the Applicant. Mr. Kesaria said the admission made by the respondent is that it is using the word POA in products similar to those of the Applicant and in the promotion and marketing of wheat and maize flour while it is not a registered owner. Mr. Kesaria said –

*“ Save that the Respondent applied for registration of “POA” trademark the application has been put pending since June 2001 when it was made because of failure to comply with conditions for registration i.e to remove the word “POA” completely. The Applicant is the registered proprietor of the mark and the word “POA” is completely and exclusively protected under the Certificate.”*

Mr. Kesaria cited Zainab's case (supra) where the Court of Appeal held that:

*“ It is settled principle that in the matters of passing off a prima facie case could well be shown if upon consideration of the close similarity between trade marks complained of was, on balance such as to cause deception or confusion on the part of the consumers.”*

Mr. Kesaria went on to submit that –

*“ Not only that the respondent's trademark is similar to that of the Applicant but also the respondent has confirmed it and claimed that it is entitled to it concurrently with the Applicant. Obviously this is likely to deceive or confuse the customers as to what products manufactured by who.”*

Although Mr. Kihwello – Learned Advocate appearing for the Respondent/Defendant made a reply to counter Mr. Kesaria's submissions, I did not find it important to refer to them because of the reasons to be shown shortly. I find it extremely difficult to accept Mr. Kesaria's submissions as

being relevant to support an application for temporary injunction. They are more relevant as summing up submission after the trial. The purpose of temporary injunction is to preserve the status quo of the parties. The application has been filed under section 68(e) and Order XXXVII Rule 1 and 2 of the Civil Procedure Code 1966. I find it extremely difficult to determine the issue of a whether a prima facie case exists in this case without going to the merits of the main case. The submissions by Mr. Kesaria hinges on the merits of the case and not temporary orders. Even the case of **Sabuni Detergents Limited Vs Murzah Oil Mills Limited** (Commercial Case No.256 of 2001) (unreported) relied upon by Mr. Kesaria is a judgment which determined the issues between the parties after the trial and not at an interlocutory stage. This is another evidence to strengthen my reasoned opinion that the argument s advanced go to the merits of the case and not to the temporary injunction.

As regards the principle of the balance of convenience the submission made by Mr. Kesaria focus more on the investment employed in building the goodwill in the trademark, the importance of the trade mark to the applicant;

the drastic fall in sales of its products and huge loss but all these are matters of facts to be proved by evidence. No assessment can be made on the face of it and a satisfaction be made that the applicant will be more inconvenienced than the respondent if the temporary injunction is denied. Again I did not see the necessity of going to the arguments made by the Advocate for the respondent because on the face of the submissions made by Mr. Kesaria an impression which comes out is that of final submissions. They do not support an application for temporary orders.

I would also say that even if the applicant would have been inconvenienced, the court has not been shown that the loss which would be suffered by it would not be compensated by money.

Lastly, I would frankly say that my humble views are that this is not a suitable case for temporary injunction. My views are fortified by the observation made by my Brother Judge Kalegeya in the case of **Glaxo Goup Limited Vs. Agri-Vet Limited** (Commercial Case No. 73 of 2002) (Unreported).

He said:

*My views are that in conflicts of trademarks and business names, temporary injunctions should very sparingly be sought by parties and granted by courts because of the intricacy surrounding the first principle of establishment of a prima facie case with probability of success. I am saying so because I fail to see how the Plaintiff/applicant can establish a prima facie case with a probability of success without going into details of what he alleges to be passing offs or infringement and in turn without the court analyzing what is submitted and being satisfied of those allegations and at the same time escape from what befell the High Court in Zainabu's case."*

Following what has been said above and the observation made, I dismiss the application for temporary orders with costs.

N.P.KIMARO,  
JUDGE  
6/09/2004



10/09/2004

Coram: N.P.Kimaro, J.

For Plaintiff – Mr. D.Kesaria.

For Defendant – Mr. Kihwello

CC: Edith.

Court: Ruling delivered today.

Order: The application for temporary injunction is dismissed with costs. Pre trial Conference on 23/09/2004.

N.P.KIMARO,

JUDGE

10/09/2004

1,460 – words

JD.

I Certify that this is a true and correct  
of the original/Order Judgement Rulling

Sign Mr. Kimaro  
Registrar Commercial Court Dsm.

Date 13/9/04