

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM**

MISCELLANEOUS COMMERCIAL APPLICATION NO. 05720 OF 2024
(Arising from Commercial Case No.5455 of 2024)

HAVELLS INDIA LIMITED APPLICANT

VERSUS

LAMECK MORIS NTABWA RESPONDENT

RULING

Date of last Order: 10/06/2024

Date of Ruling: 06/09/2024

GONZI, J.

The applicant herein filed this application before this Honourable Court under certificate of urgency praying for the following orders:

- 1. That the Honourable Court may, pending Determination of commercial case No.5455 of 2024 be pleased to grant a temporary injunction restraining the respondent or its agents, partners, affiliates, assigns or servants from manufacturing, selling, importing or exporting or commercially dealing in any other manner***

with counterfeit electrical goods and power distribution equipment bearing the HAVELLS Trademark in the Tanzanian market.

2. An order for the respondent to disclose his manufacturers and suppliers who are supplying him with the counterfeit goods bearing the applicants trademark HAVELLS.

3. Any other or further reliefs that this Honourable Court may deem it fit to grant.

4. The cost of this application be awarded to the Applicant.

The application was supported by the Joint affidavit sworn by Mr. Harsh Agarwal and Mr. Roma Arorra Principal Officers of the applicant Company narrating all the facts pertaining to the application. The Respondent Mr. Lameck Moris Ntabwa filed a Counter affidavit and resisted the Application.

The facts obtaining in this application as gathered from the affidavit are that the applicant is a company incorporated and existing under the laws of India, which is engaged, among other things, in the manufacture of

unique and distinct electrical goods and power distribution equipment under its well-known trademark "HAVELLS". It was alleged that the Havells products are manufactured, distributed and sold under a distinctly designed get up and /or trade dressing which has served to distinguish the said products as originating from the applicant and its affiliated companies. It was further stated that the Havells products consist of distinctive industrial and domestic Circuit Protection Switchgear, Cables & Wires, Motors, Fans Power Capacitors, Lamps and Luminaires for Domestic, Commercial & Industrial Applications, Modular Switches, Water Heaters and Domestic Appliances. It was stated that the applicant has been supplying and distributing its Havells products in the Tanzanian market, at least since the year 2008. The dispute arose when the applicant's officers came across counterfeit "Havells" products bearing an identical get up with the genuine Havells products of the applicant. It was further stated that the applicant was able to confirm from the writings on the products and other features that the counterfeit Havells products are being imported and distributed by the respondent and that the level of similarity is such that both products are similar/exactly looking. The products are circuit protection switchgear and distribution boards. Both products bear

the word mark "Havells"" written in the same style and format that the design of the get up of the Respondent's counterfeit products, i.e. the image and colour combination surrounding the image, is identical to the applicant's genuine Havells products.

In his counter affidavit, the Respondent attacked the joint affidavit of the Applicants that the deponents therein did not attach any instrument of authorization from the Applicant Company to make an oath for and on behalf of the Applicant and further that the Deponents in the joint affidavit have not attached any proof of their capacity/status in the Applicant Company and that they have not indicated their gender as men or women. The Respondent stated further that the Applicant has not annexed any documents to evidence the registration of the company or being permitted to manufacture the electronic goods in question. He also testified that annexure 1 to the Applicant's joint affidavit is faint, and that the font size used in it is too small hence illegible for the Respondent to read and understand it for purposes of this matter. The Respondent stated that he was never engaged in any way with counterfeit goods in the name of the Applicant, save for the fact that a raid was conducted by Fair Competition Commission on 13th March, 2022, however, the findings of the said matter was entertained by the Fair

Competition Commission and the issue was marked closed. The Respondent stated that he had never admitted to fair Competition Commission being caught selling counterfeits goods in the name of the Applicant and that he is not engaging in any way with the any goods bearing the name of the Applicant.

At the hearing of the Application, the Applicant was represented by Mr. Patrick Sanga, learned Advocate, while the Respondent was represented by Mr. Alphonse Kubaja, Learned Advocate. I thank both counsel for their useful arguments.

Mr. Patrick Sanga submitted that the application is one for temporary injunction to restrain the continued use of the applicant's trademark by the respondent pending determination of the main suit. It intends to stop the Respondent from manufacturing and supplying the applicant's goods. He argued that the Applicant is a registered company in India and has been manufacturing and distributing electricity equipment under the Trade name "Havells". He argued that the Applicant is a proprietor of other Trade Marks as per paragraphs 9 and 10 of the affidavits. He submitted that the applicant

has filed a suit against the respondent founded on passing off and trademark infringement seeking permanent injunction and other reliefs.

Mr. Sanga, Learned Counsel, submitted that the application is brought under section 68 (c), (e) and Order XXXVII Rule 2(1) of the Civil Procedure Code which are aimed at preventing ends of justice from being defeated. He argued that the conditions for grant of injunction stipulated in the case of **Atilio versus Mbowe** are three. These are that there must be serious questions to be tried also known as overwhelming chances of success or the prima facie case. The second ingredient is existence of irreparable loss in the event the application is not granted. The third one is that the balance of convenience should tilt in favor of the applicant.

On prima facie case, Mr. Sanga, learned counsel, referred the Court to the case of **Bata Limited Canada versus Bora Industries Limited**, Commercial Case 76/2005 (unreported), where at pages 9, 10 and 11 thereof the Court addressed the question of establishment of prima facie case. He submitted that it was held in **Godrej consumer products Limited versus Target International Tanzania Limited** (2019), that a prima facie case is established if the plaintiff has a case with likelihood of

success. He submitted that the resemblance of the trade marks is established by looking at the totality of features of the mark. He argued that the resemblance of the marks establishes a prima facie case in this matter. He reasoned that the counterfeit products of the respondent look so similar to those of the Applicant. Both have the same word "Havells" and it is written in the same style and format. He added that the design of counterfeit products in terms of image and colour combination is identical to that of the applicant. He concluded that there is a prima facie case in the present case.

Mr. Sanga, learned counsel, submitted on the second ground for grant of injunction. That is the likelihood of suffering an irreparable loss. He submitted that the apprehension of the applicant suffering irreparable loss is a necessary ingredient in applications for injunction. He cited the case of **Nicholous Nere Lekure and IPPTL** (1997) TLR 58 and **Tanzania Cotton Marketing Board versus Cogecot Cotton** (1997)⁵³. He argued that the 2 cases were dealing with applications for stay of execution, but that the issue was on what amounts to an irreparable loss. It was held that irreparable loss is a loss that cannot be adequately compensated by an award of damages. He submitted that the Applicant is likely to suffer an irreparable loss if the respondent is not restrained from continued use of the Applicant's

Trademark in the respondent's counterfeit goods which resemble the Applicant's Havells trademark. He submitted that the irreparability that will arise is due to the fact that the continued use of Applicant's trademark of fake goods will spoil the reputation and good will created by the applicant for over 70 years and threaten to ruin the Trademark of the Applicant. Also, the Learned Counsel argued, the applicant is confusing the consumers in the market by thinking that they are buying the applicant's goods while they are buying the fake goods of the Respondent. Mr. Sanga, Learned Counsel submitted that the losses caused by the continued use of the Applicant's trademark by the Respondent would also go to lives of consumers as the goods. He submitted that the goods are electrical switch gears or main switches which are very technical and critical goods. He argued that if any harm occurs due to the use of fake and faulty goods of the respondent which bear the trademark of the Applicant, the harm will be attributed to the Applicant.

On balance of convenience, he submitted that the test thereof was discussed in **Godrej's Case** (2019). He submitted that the applicant as the lawful owner of the trademark will be more inconvenienced if injunction is not granted because his trademark reputation will be lost. He argued that

the Applicant has been supplying and distributing his genuine products in Tanzania since 2008. He is responsible for availability of the genuine products in Tanzanian markets. Therefore, he stands a higher chance of being injured in terms of reputation and goodwill than the respondent. He argued that the Respondent's Trademarks are not genuine and have not yet acquired any reputation and goodwill can be injured. Mr Sanga insisted that the injury to reputation and the goodwill of genuine Havells products cannot be compensated by an action for damages.

The Applicant's counsel prayed that the temporary injunction be granted against the respondent as prayed and with costs.

Mr. Alphonse Kubaja, learned advocate, made reply submissions. He submitted that the chamber summons has two major prayers. The first one is on injunction and the second one is on the order for the Respondent to name the person manufacturing the counterfeit products in the trademark of the Applicant and supplying the same to the respondent as counterfeit goods. Mr. Kubaja, argued that the provisions mentioned in the chamber summons only support the first prayer. There is no enabling provision of the law for the second prayer. He went on to submit that the affidavit also has

no facts supporting the second prayer. He submitted that the second prayer is hanging and should not be granted.

On the first prayer for grant of an injunction, Mr. Kubaja, Learned Counsel submitted that the requirements for the principles established in the **Atilio versus Mbowe case**, are not met. He submitted that under paragraph 14 of the affidavit, it is shown that the respondent is in continued use of the trade mark of the applicant but under paragraphs 13 and 16 of the counter affidavits, the respondent has denied to be associated with the goods bearing the trademark of the applicant. He submitted further that as the respondent has denied to be anyhow involved with products of the respondent, if the Court grants the injunction as prayed, it will be of no practical use.

Mr. Kubaja, learned counsel, submitted that there is no prima facie case disclosed with chances of success. He argued that the injunction cannot anyhow affect the Respondent as he is not involved with the Applicant's goods or trademark.

On the main suit pending in Court, Mr. Kubaja, submitted that the applicant has not mentioned it anywhere in their affidavit. It is just a

statement from the bar. Nor is it attached to the affidavit. He submitted that in the counter affidavit, the respondent had stated that the applicant's annexures 1,2,3,4 and 7 to the affidavit are not readable due to their very small font size and being written in faint letters. He submitted that the right to be heard was not complete where the Respondent was not able to know in full the claims against him due to some annexures not being readable. He submitted that in this case, as the annexures of the applicant are not readable and as the applicant has not supplied the respondent with better version of the Applicant's annexures, the applicant has failed to communicate their complaint against the respondent. He argued that this has, in turn, prevented the Respondent to marshal his defence. He submitted that in the interest of justice the application deserves to be dismissed with costs.

Mr. Patrick Sanga, Learned Advocate, made brief rejoinder submissions. With regard to prayer number two not being supported by any enabling provisions, he submitted that the applicant has cited sections 68(c), (e) and Order XXXVII Rule 2(1) of the Civil procedure Code where the Court may make orders as it appears "just and convenient".

With regard to the allegation that the Respondent is not anyhow involved in the trademark of the Applicant, he argued that under paragraph 13 of the counter affidavit the respondent is vehemently denying that he is not engaging in any way in any goods bearing the name of the applicant but then under paragraph 16 of the counter affidavit the respondent is stating that the claims by the applicant are baseless as the respondent neither sells or distributes the alleged products. Mr. Sanga, Learned Advocate, submitted that if the Respondent is genuine, he should not have resisted the application at hand. He argued further that the applicant's affidavit under paragraphs 11 and 12, clearly states that the respondent was caught by Fair Competition Commission (FCC) on 13th March 2022 selling counterfeit goods and that the counterfeit goods of the respondent were seized and compounded by the Fair Competition Commission (FCC) and copies of seizure notice by FCC are annexed to the affidavit in this application. He argued, therefore, that this evidence is a clear proof that the Respondent was selling fake goods similar to those of the applicant.

Mr. Sanga, Learned Counsel, submitted that under paragraph 13 of the applicant's affidavit, it was stated that during the compounding of the respondent's goods, the respondent admitted to be selling the counterfeit

goods and was fined by the Fair Competition Commission. He added that copies of the compound fine are attached as annexure 9 to the affidavit. He submitted that as it is stated under paragraph 14 of the affidavit in support of this application; despite being penalized, the respondent has continued to sell the counterfeit goods bearing the Applicant's trademark to date.

On the issue of affidavit not mentioning the main suit, Mr. Sanga, submitted that the claim is untenable as the affidavit should be read together with the chamber summons and certificate of urgency whereby in both documents the Applicant has mentioned the main case under which the application at hand is brought.

As for the small font size of some of the annexures rendering them unreadable, Mr. Sanga, Learned Advocate, submitted that indeed the font used in the stated annexures is small. However, he submitted, despite the font being small, the same could be read by the Respondent by using magnifying glasses. He submitted that those documents are crucial as they cement the Applicant's case by showing the products sold and the invoices. Mr. Sanga concluded his rejoinder submissions.

Before going further with determination of the present application, two questions immediately prop into the mind. The first question is as to why the did the Respondent resist the application at hand on merit while essentially the Respondent's stand point has been to distance himself from being anyhow involved in the alleged counterfeit products resembling those of the Applicant. The Respondent argued that even if an injunction is issued, it will not serve any practical purpose since the Respondent is not infringing or passing of the trademark of the Applicant. Now, with that standpoint, wouldn't it have been logical and prudent if the Respondent did not resist this application for injunction? This is because even if the injunction is granted, according to the Respondent, it cannot anyhow touch him in his dealings since he is not in any way involved with any goods bearing the trademark of the Applicant.

The second question that tasked my mind was the propriety of the Applicant's move seeking an interim order of injunction against the Respondent on the allegations of infringement of his trademark in a situation where the respondent intended to be restrained by Court Order, has categorically denied to be involved with the trademark of the Applicant. Wouldn't it have been proper, in the circumstances, for the Applicant to seek

a perpetual injunction instead, as a final relief upon ascertainment of facts to which the injunction could attach, rather than seeking an interim injunction based on unascertained facts?

I consulted the law in respect of the two questions first as a matter of principle because the powers of the Court to grant an interim injunction are discretionary. The Court should exercise its discretionary powers in deserving circumstances. Prof. Makulilo, A.B., in his work entitled "**Trade marks in Tanzania: the prima facie case and interim relief**" appearing in the Journal of Intellectual Property Law & Practice, 2010, Vol. 5, No. 8 at page 566 writes that:

"The purpose of temporary injunction is to preserve the status quo pending the main suit. In the context of trade mark disputes, the main cause of action generally is infringement or passing-off of goods or services, or both. Accordingly, where a party seeks temporary relief in trade mark disputes, he does so in order to restrain an ongoing or imminent infringement. ...trade mark infringement addresses three main principles. First, one must investigate whether the trademarks are identical or similar. One next asks whether such trademarks have been used

in relation to identical or similar goods or services. Finally, is the identity or similarity between the trade marks likely to cause confusion to consumers as to the source of origin of goods or services? From this analysis, it can be argued that the first and second principles governing trade mark infringement are determinants of the first principle of temporary injunction, the prima facie case".

I asked myself whether in the present case, prima facie, there exist signs indicative of likelihood of an ongoing or imminent infringement of the Applicant's trademark "HAVELLS" by the Respondent. The Respondent was categorical in his counter affidavit as well as in the submissions made by his counsel that the respondent is not associating himself with counterfeit goods bearing the trademark of the applicant. He also stated that this denial of involvement in Applicant's goods, has never been replied to by way of reply to counter affidavit by the Applicant. The respondent has denied to be anyhow involved with products of the respondent, stating that even if the Court grants the injunction as prayed, it will be of no practical use as there is no offending conduct by the Respondent necessitating being restrained by way of injunction. The Applicant, on the other hand, has insisted that during the compounding of the respondent's goods by the FCC, the respondent

admitted to be selling counterfeit goods and was fined by the Fair Competition Commission. Copies of the compound fine have been attached as annexure 9 to the affidavit. The Applicant argued further that, despite being penalized, the respondent has continued to sell the counterfeit goods bearing trademark of the Applicant even to date.

I asked myself whether the above disputed facts disclose albeit to a very low standard of proof, elements an ongoing or imminent infringement of the Applicant's trademark "HAVELLS" by the Respondent, necessitating this Court to exercise its discretionary powers to grant an interim injunction pending determination of the main case? In answering this question, I will be cautious not to prematurely decide the main case on alleged infringement of trademark or the tort of passing off. I am of the settled view that the facts of the case at hand as they are, do not indicate an existence of an ongoing infringement of the Applicant's trademark "HAVELLS" by the Respondent. Actually, the Respondent has categorically denied to be anyhow involved with products of the respondent, stating that even if the Court grants the injunction as prayed, it will be of no practical use. This is a fact which the Applicant ought to prove in the main suit by bringing evidence to establish his allegations of continued infringement.

Having found that the facts of the case at hand, as they are, do not indicate an existence of an ongoing infringement, I asked myself whether, alternatively, the prevailing facts of this case, on their face value, disclose an imminent infringement of the Applicant's trademark "HAVELLS" by the Respondent? But what does "imminent infringement of trademark" entail? In ***Intel corporation v. Harpreet Singh & Ors. (27 February, 2019)***, the Delhi High Court made the observation that:

"It is unjust to expect the aggrieved party to wait for actual infringement to occur, particularly where fear of infringement is proven. "A stitch in time always saves nine and that is what is the essence of quia time action. Hence, a cause of action would arise even when there is mere apprehension of infringement. But such apprehension must be so strong and impending that it clearly signals potential future infringements".

I accept the above stated position of the law that for one to seek an injunction on the basis of apprehension of infringement, the apprehension must be so strong and impending that it clearly signals potential future infringements. Also, I am alive to the fact that at this stage of determination of an application for temporary injunction against apprehension of

infringement, a lower standard of proof below the “balance of probabilities” should be applied so as to avoid prematurely determining the substantive claim of infringement in the main case.

It is therefore with the lower standard below the standard of balance of probabilities, that I approach the application at hand. In the first place, I find that the Applicant has successfully disclosed reasonably strong apprehension of future infringement of the trademark by the Respondent. The Respondent has admitted in his counter affidavit that that a raid was conducted by Fair Competition Commission on 13th March, 2022 and the Respondent was implicated with dealing in counterfeit goods. The Respondent stated that the dealing in counterfeit goods case was entertained by the Fair Competition Commission and then marked closed. In my view, the Applicant has produced evidence of past conducts by the respondent dealing in counterfeit goods which when subjected to test, even below the balance of probabilities, indicates the imminent likelihood of infringement by the Respondent of the trademark of the Applicant. The Applicant has produced annexure 9 to the affidavit as indicative evidence that the respondent had admitted to FCC to be selling counterfeit goods and was fined by the Fair Competition Commission. I am settled that in law, one

does not get his offence being compounded by an official empowered to compound offences, unless one admits the offence first. The Copies of the compound fine attached as annexure 9 to the affidavit, are on the balance lesser than probabilities, indicative of the imminent likelihood of infringement by the Respondent. I have taken notice of the protests by the Respondent that he is not anyhow involved in the trademark of the Applicant. But then the past conduct of the Respondent which implicated him with the FCC fine after compounding of offences against him with respect to counterfeit goods, justifiably warrant the Applicant's reasonable apprehension of fear that unless restrained by an order of the Court, the Respondent may infringe the Applicant's trademark "HAVELLS". The strong apprehension of fear of infringement is expressed under paragraph 14 of the applicant's affidavit, that: "despite being penalized, the respondent has continued to sell the counterfeit goods todate". I have taken into account the fact that whereas the Respondent has maintained his standpoint that he is not anyhow dealing in counterfeit products bearing the trademark of the Applicant, he has on the other hand resisted the present application on merit. I, therefore, find that there exists a strong and reasonable apprehension of fear of infringement of the Applicant's trademark "HAVELLS" by the Respondent.

Therefore, if the application passes the trinity of tests laid down in **Atilio versus Mbowe** (supra), then it deserves to be granted.

20 On prima facie case, in **Tanzania Posts & Telecommunications Corporation V M/S B S Henrita Supplies (1997) TLR 141** the Court of Appeal of Tanzania stated that:

"The chances of success of an intended appeal, though a relevant factor in certain situations, could only be meaningfully be assessed later on appeal after hearing arguments from both sides. This was a general principle which was not without exception."

cases of **Tropical Commodities Supplies Ltd and others vs International Credit Bank (in liquidation)** EALR (2004) 2EA 331 wherein the High Court of Uganda held that:

"Substantial irreparable loss does not represent any particular size or amount but refers to any loss, great or small that is of real worth or value as distinguished from a loss that is merely nominal."

In the case of **Tanzania Cotton Marketing Board vs Cogecot Cotton SA** (1997) TLR 64, the Court of Appeal stressed on the need for the applicant to go beyond a mere assertion that it would suffer great loss and

that its business would be brought to a standstill. Rather the applicant would be required to give details and particulars of the loss.

I have considered the affidavit in support of the application and I am satisfied that the Applicant has given adequate details of the particulars for the losses likely to be suffered including loss of reputation and loss of trust by its customers. The Applicant has shown that the nature of the goods, namely electricity switch gears, is such that if fake products are allowed to be traded there is a likelihood of user's bodily harm or destruction of their properties. The affected users will attribute the harm to the Applicant and shun away the Applicant's genuine goods bearing the Applicant's trademark.

On balance of convenience, in **Tanzania Posts & Telecommunications Corporation V M/S B S Henrita Supplies** (1997) TLR 141 the Court of Appeal held at page 144 that:

"Lastly, I think it desirable to consider the case within the principle of the balance of convenience. It is all the more so in matters involving the exercise of discretionary powers after considering the factors."

In the present case, the Respondent has stated categorically affirmed, under oath in the affidavit and through the submissions advanced by his

Learned Counsel, that any injunction will not affect him as he is not engaging himself in counterfeit goods bearing the trademark "HAVELLS". This tilts the balance of convenience in favor of the applicant who narrated in his affidavit and through the submission by their Counsel the inconvenience he is likely to suffer unless the injunction is granted. The balance of convenience, therefore, tilts in favour of the Applicant. The application at hand is therefore, grantable.

Having granted the Application at hand, next is consideration of the appropriate orders to be imposed. I have considered the Applicant's prayer to require the respondent to disclose his source of counterfeit goods. This prayer, in my settled view, is prematurely brought at this stage of interim reliefs since it presupposes that the Court has already established that the respondent is an infringer of the applicant's trademark. That is not the case. That remains as an issue to be proved by the Plaintiff in the main case. That prayer is thus denied. Since the second prayer is denied, the Application is, therefore, partly granted and partly denied. I exercise my discretion to apportion the costs upon the parties. Each part to bear its own costs.

In fine, I grant the application and this Court does hereby order that:

(a) Pending determination of Commercial Case No.5455 of 2024, a temporary injunction is hereby imposed against the Respondent restraining the respondent, his agents, partners, affiliates, assigns or servants from manufacturing, selling, importing or exporting or commercially dealing in any other manner with counterfeit electrical goods and power distribution equipment bearing the "HAVELLS" Trademark in the Tanzanian market.

(b) The application is granted with no order as to costs.

It is so ordered.



A. H. GONZI

JUDGE

06/09/2024

Ruling is delivered in Court this 6th day of September, 2024 in the presence of Mr. Simon Lyimo, Advocate for the Applicant and Ms. Sarah Matembo, Advocate for the Respondent.



A. H. GONZI

JUDGE

06/09/2024

