THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Owiny Dollo, DCJ; Egonda-Ntende; Tuhaise, JJA]

Civil Appeal Number 172 of 2014

Arising from High Court (Commercial Court Division) Civil Suit No. 194 of 2013

Nevia Company Ltd.....Appellant

V

Biersdorf AG.....Respondent

[On appeal from a decision of the High Court of Uganda (Wangutusi, J) delivered on 21st February 2014]

Judgment of Percy Night Tuhaise, JA

Introduction

This is an appeal from the decision of the High Court Commercial Division. The appellant is challenging a judgment on admission which was entered against it by the High Court, based on correspondence which was exhibited during the scheduling conference.

Background

The background to this appeal is that the respondent sued the appellant for trademark infringement in in HCCS No. 194/2013. Among the documents exhibited at the scheduling conference were letters written by Prof. Dr. George William Kanyeihamba of M/S Kanyeihamba & Co Advocates prior to the filing of the suit. The letters were informing MMAKS Advocates, who were counsel for the plaintiff, that the defendant (appellant in this appeal), had agreed to withdraw their trademark application.

After the scheduling conference, the plaintiff's counsel applied for judgment on admission, on account of the admissions of fact (defendant's infringement of the plaintiff's trademark) contained in Prof. Dr. Kanyeihamba's letters to the plaintiff's counsel which had been exhibited at scheduling. The defendant's counsel opposed the application on the ground that documents exhibited at scheduling do not amount to admission of the plaintiff's claim. Counsel also questioned the mandate of Prof. Dr. Kanyeihamba to write such documents. The defendant's counsel maintained that the matter should be heard on the merits to decide whether the contentions of the respective parties are correct or not.

The learned trial judge did not agree with the defendant's counsel. He entered judgment on admission for trademark infringement, issued a permanent injunction against the defendant, and directed that the suit be set down for assessment of damages.

The defendant was aggrieved by the judgment. He filed the instant appeal on 4 grounds, that:-

1. The learned trial Judge erred in law and fact when he held that the appellant had admitted trademark infringement.
2. The learned trial Judge erred in law and fact when he ignored the appellant's pleadings and scheduling memorandum in determining the application for judgment on admission.
3. The learned trial Judge erred in law and fact when he held that under Order 13 rule 6 of the Civil Procedure Rules, admissions can be made even before filing the suit.
4. The learned trial Judge erred in law and fact when he entered judgment against the appellant without a fair or proper hearing.

Representation

At the hearing of this appeal, Mr. Nelson Nerima represented the appellant while Mr. Mathias Ssekatawa represented the respondent. Mr. Dennis Atwijukire, Company Secretary of the appellant, and Mr. Gilbert Kato, Procurement Manager of the appellant, were present in court.

Case Management

The parties filed a joint scheduling memorandum in which three issues were framed for this Court's determination, as follows:-

1. Whether the defendants name/mark 'NEVIA' is an infringement of the plaintiff's NIVEA trademark(s).
2. Whether the defendant's use of its corporate name 'NEVIA COMPANY LIMITED' infringes the plaintiff's rights in its 'NIVEA' marks.
3. Remedies available to the parties.

Submissions for the Appellant

Mr. Nerima, the appellant's counsel, addressed grounds 1, 2 and 4 jointly.

He submitted that the documents the trial court relied on to enter judgment were all written before the filing of the suit, and they were exhibited at the scheduling conference. He contended that merely exhibiting documents at a scheduling conference does not mean that a party has admitted the contents or the legal effect of those documents. According to Counsel, to hold otherwise would have an effect on the willingness of counsel to list and exhibit documents at scheduling conference. Counsel also contended that the letter was not among the agreed documents. He argued that it was actually in issue whether there was trademark infringement.

The appellant's counsel submitted that the questions whether Prof. Dr. G. W. Kanyeihamba was a trade mark agent of the defendant, or whether he had instructions to write the letters, or whether the said letters amount to admission of infringement, were all triable issues to be decided after hearing evidence on both sides.

The appellant's counsel pointed out that the written statement of defence (WSD) denies infringement, specifically stating that Prof. Dr. G. W. Kanyeihamba was not a trade mark agent within the meaning of the Trademarks Act and Rules. He also submitted that the scheduling

memorandum which was adopted at the scheduling conference was very specific that Prof. Dr. G. W. Kanyeihamba was not a trade mark agent and he had no instructions to issue the letters.

The appellant's counsel contended that it is a question of fact whether Prof. Dr. Kanyeihamba who was writing letters in a trade marks matter was a trade mark agent, or whether he was instructed, and, if so, what was the extent of his instructions. According to Counsel, those matters were triable issues in both law and fact, and the letters do not indicate an equivocal and unconditional admission of trademark infringement. He argued that the correspondence in question was not final, even if it was assumed that Dr. Kanyeihamba was a lawful trade mark agent.

The appellant's counsel submitted that, for an admission to be a basis for a judgment on admission, it must be clear, unambiguous, unconditional and unequivocal. He also argued that for a trial court to enter judgment on admission, a party must make an admission after the suit, and the admission should be either on his pleadings or otherwise. According to Counsel, the first condition is there must be a suit, then the party must make an admission in that suit, either through his pleadings, or the submissions of his counsel, or any communication to the court or to the opposite party in that suit.

The appellant's counsel contended that there was no admission in the instant case, within the meaning of Order 13 rule 6 of the Civil Procedure Rules (CPR). He relied on the case of **Brian Kagwa V Peter Muramira, Court of Appeal Civil Appeal No. 26 of 2009** regarding circumstances under which a court can enter judgment on admissions. He submitted that the circumstances stated in the foregoing authority did not exist in the instant case.

In addition, the appellant's counsel submitted that since the written statement of defence and the scheduling memorandum disputed trademark infringement, the learned trial judge should have set down the suit for hearing in the ordinary way as required by Order 18 of the CPR.

According to Counsel, to enter judgment declaring trademark infringement and to issue a permanent injunction without hearing the suit violated the defendants' rights to a fair hearing.

In conclusion, the appellant's counsel submitted that the circumstances in the instant case were not a proper case to enter judgment on admission. He prayed that the appeal be allowed with costs here and in the court below, and that the case be remitted to the Commercial Court for hearing on the merits before another judge.

Submissions for the Respondent

Mr. Ssekatawa submitted for the respondent that the authority of **Brian Kagwa V Muramira** cited by the appellant's counsel was inapplicable in the instant case because in that case there was a plaint, a defence, and a counter claim; that when that matter came up for scheduling, even before the judge recorded any form of evidence, he simply looked at a paragraph in the defence and entered judgment. The trial Judge in that matter made no mention whatsoever of the counter claim. According to Counsel, that was the reason why this Court took exception to the way that suit was conducted.

The respondent's counsel referred this Court to the parties' joint scheduling memorandum. He submitted that it is signed by both counsel, and the documents on which each party was to rely on were admitted and marked in evidence as exhibits, and were given exhibit numbers. Counsel contended that, as such, evidence was admitted on to the court record. He argued that in essence, that is why the said documents were marked as exhibits at the scheduling conference, that is, documents which were not contested. According to Counsel, the admission of the documents and their having been exhibited in evidence means no further evidence need be called.

The respondent's counsel submitted that it is trite law that the judge has a discretion under order 13 rule 6 of the CPR, contrary to the appellant's counsel's arguments that there must be a suit in which the admission is

made. He contended that it was a misconception on the part of the appellant's counsel, because Order 13 rule 6 reads that any party may at any stage of the suit apply for judgment on admission. Counsel accordingly argued that it is not right for the appellant's counsel to say that an admission can only be made during the pendency of the suit.

According to Counsel, Order 13 rule 6 creates two positions, that is, either on the pleadings, or otherwise, as was canvassed in **Choitram V Nazari [1976-1985] EA 53** where it was held that a plain and obvious case even, if established after substantial argument or analysis of documents, entitles a plaintiff to judgment on admission. Counsel argued that according to the said case, admissions can be expressed or implied either on the pleadings or otherwise, for example, in correspondence.

The respondent's counsel referred this Court to a letter dated 25th May 2012 written by Prof. Dr. G. W. Kanyeihamba. He submitted that the letter was a further admission, as seen from his words that, *'Our clients have agreed to drop the use of the name Nevia'*, which was exactly what was in issue, and that the appellant does not contest it.

The respondent's counsel further submitted that the question of whether or not there was an infringement is what was up for determination; that however, based on the correspondence the parties had exchanged before, the court exercised its discretion to find the correspondence an admission, and went ahead to enter judgment on admission under Order 13 rule 6 of the CPR.

The respondent's counsel concluded by submitting that the learned trial Judge rightly entered judgment on admission under Order 13 rule 6 of the CPR. He prayed that this appeal be dismissed with costs.

Appellant's Submissions in Rejoinder

The appellant's counsel submitted in rejoinder that the written statement of defence, the scheduling memorandum, counsel's address to court, and the exhibited documents did not admit trade mark infringement within

the meaning of the common law, the Trademarks Act and the Trademarks Rules.

Consideration of the appeal by Court

This Court, as a first appellate court, is required to re-evaluate the evidence and make its own conclusion pursuant to rule 30(1) of the Judicature (Court of Appeal Rules) Directions 2005. However, in doing so, this Court must be aware of, and give allowance to, the fact that the trial court had the advantage of hearing the parties fully on the facts. See **Selle and Another V Associated Motor Boat Company Ltd and Others [1968] EA 123**; **Fr. Narcensio Begumisa & Others V Tibebaaga, Supreme Court Civil Appeal No. 17/2002 [2004] UGSC 18.**

The issue for determination in this case is whether the judge exercised his discretion properly when he entered a judgment on admission against the defendant (appellant in this appeal) under Order 13 rule 6 of the CPR, based on correspondence which had been exhibited as agreed documents during scheduling of the matter.

Order 13 rule 6 of the CPR states as follows:-

> *"Any party may at any stage of a suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon the admission he or she may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon the application make such order, or give such judgment, as the court may think just."*

In **Choitram V Nazari [1976-1985] EA 53** the Court of Appeal of Kenya held that a plain and obvious case, even if established after substantial argument or analysis of documents, entitles a plaintiff to judgment on admission. In that case, an examination of the correspondence exchanged between the parties, read in conjunction with the draft conveyance and its engrossment, showed that by 7th May there was a

binding agreement for the sale of the property, and whatever further proposals were made after that did not affect the bargain as there was no further agreement between the parties to vary it. The court considered the correspondence between the parties to be evidence and based the judgment on admission on it.

The same court stated that before entering judgment on admission, the admissions have to be plain and obvious, and clearly readable because they must result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends on the language used. The admissions must leave no room for doubt that the parties passed out of the state of negotiations onto a definite contract. The circumstances must be such that if, upon a purposeful interpretation of admissions of fact, the case is plain and obvious that there is no room for discretion to let the matter go for trial, then nothing is to be gained by having a trial. The court must not exercise its discretion in a manner which renders nugatory an express provision of the law.

In this appeal, the record shows that during scheduling, the plaintiff's documents were marked exhibits P1 to P19. The defendant's documents were also marked exhibit D1 to D3.

The correspondence of the letter dated 20th June 2012 (exhibit P14) partly states as follows:-

> *"We believe that you understand that the process of complying fully with your clients wishes is not a quick fix. Our client wrote to the Registrar some time ago, and even visited his offices, but apparently those procedures take some time to complete.*
>
> *We wish to repeat our undertaking we made before that as soon as these steps are completed and we receive the results in compliance with the wishes of your client, we shall inform you immediately.*

Similarly we believe you know and appreciate that changing their product labels to a new trademark also takes time. They are currently discussing a new trade mark name and send it to the Registrar of Business Names for approval and communicate with us and you as to the new position, it is then that we shall be in position to communicate with you once and finally.

It is for these reasons of consultation and verification that we were unable to respond to your email of 12th June 2012 as you had proposed. We regret and apologize for the delay."

The letter dated 25th May 2012 (exhibit P15), partly states:-

"For mutual respect and avoidance of misunderstanding, our clients have agreed to drop the use of the name Nevia and your logo, if any, from all their products. Consequently, none of your clients disclosed Trademark NIVEA will be used to label or represent their products any longer. They undertake not to allow, present or use your logo as to be confused with their own.

It follows that the products listed in your letter and named from 1.1 to 1.7 can longer bear the name Nevia.

Finally, we are now in consultations with our clients for effecting and complying with your clients requests that our clients accept including the items identified from the contents of your latest letter referred to earlier in this letter."

This Court, in **Brian Kaggwa V Peter Muramira Court of Appeal Civil Appeal No. 26/2009**, cited with approval the case of **Juliet Kalema V William Kalema CACA No. 95/2003**. It observed that the object of Order 13 rule 6:-

"...is to enable a party to obtain judgment speedily at least to the extent of the admissions. Such admissions can be made on the pleadings or verbally because of the use of the word 'otherwise' in the rule. The rule is for the benefit of both parties. However, before

the court can act under the rule to enter judgment, the admission of the claim must be clear and unambiguous. In a case involving complicated questions, which cannot be disposed of conveniently, the court should decline to exercise its discretion against the party who is seeking judgment on admissions. The power given to court to enter judgment on admissions is a discretionary one that must be exercised judiciously and circumspectly."

This would, in my opinion, infer that obtaining judgment on admission is not a matter of right but a matter of exercise of judicial discretion, regard being had to all circumstances of the case.

In this case, the exhibited correspondence (exhibits P14 & P15), when carefully examined, would appear to reveal that Prof. Dr. Kanyeihamba was acquiescing to the plaintiff's allegations of a trademark infringement purportedly as the defendant's counsel. However, the other circumstances of the case, like paragraphs 17 and 18 of the defendant's written statement of defence, reveal that the defendant not only denied infringement, he specifically stated that Prof. Dr. G. W. Kanyeihamba had no instructions to write the two letters, and that he was not a trade mark agent within the meaning of the Trademarks Act and Rules. The scheduling memorandum which was adopted at the scheduling conference is also very specific that Prof. Dr. G. W. Kanyeihamba was not a trade mark agent and he had no instructions to issue the exhibited letters.

The foregoing infers that the question of whether Prof. Dr. Kanyeihamba was writing the letters as a trade mark agent, or whether he was instructed, and if so, what was the extent of his instructions, became a triable issue in both law and fact.

It is clear from the cited authorities that a trial Judge must be satisfied that the admission of a claim on basis of which a judgment should be entered under Order 13 rule 6 is obviously clear, unambiguous and unequivocal. Once this is the position, such admission could, in my

opinion, even override a denial in the pleadings, including what was initially an issue in the case, since the use of the word "otherwise" in Order 13 rule 6 infers that such admission of fact can be deduced from outside the pleadings.

The case decisions however suggest that if a case involves complicated questions which cannot be disposed of conveniently, the court should decline to exercise its discretion against the party who is seeking judgment on admissions. I understand this to mean that once complicated questions arise out of a case, the matter should rather proceed to trial where evidence can be adduced to prove a claim.

In the circumstances of this case, the moment the defendant questioned the authority of Prof. Dr. Kanyeihamba to write the letters containing the admissions, including questioning his being as a trademark agent, complicated questions concerning the said letters emerged which could not be disposed of conveniently through a judgment on admission. At that point, the question of whether Prof. Dr. Kanyeihamba had the authority or mandate to compromise any matter connected with the suit, was rendered a triable issue which had to be determined first before any admission authored by Dr. Kanyeihamba could be accepted by court and be attributed to the defendant (appellant in this case) for purposes of determining the rights of the parties in the suit.

This in essence required the matter to proceed to full trial where the author's mandate to write such letters on behalf of the defendant, or the credibility of such documents, would be determined judiciously after considering evidence from both sides.

I note from the record on pages 158 to 160 that the learned trial Judge attempted to determine this by engaging and interjecting during submissions. This is appreciated in as far as it relates to the trial Judge's desire to seek clarifications from counsel and to guide court on the matter before court. However I note that the learned Judge *"lost himself in the jungle of words"*, a situation which, according to the decision in the

cited case of **Choitram V Nazari**, should not be the case when determining cases of such a nature.

Thus, because of the objections raised by the defendant regarding Dr. Kanyeihamba's mandate to make admissions on behalf of the defendant or as a trademarks agent, the nature of the contention required a more conscious consideration of the totality of the evidence preferred by all the parties before according it probative value. The moment it was put in doubt by the defendant that Dr. Kanyeihamba was its counsel, let alone being a trademarks agent, the authenticity of the admission, in as far as it being attributed to the defendant was concerned, was rendered questionable. The matter was no longer plain and clear since the defendant had raised issues which required court's determination before the admission could be attributed to the defendant.

In the given circumstances, the trial Judge did not appraise all the evidence on record in totality, but rather only concentrated on the factor of the correspondence in question admitting to the infringement. This was a miscarriage of justice to the defendant (appellant) who apparently was distancing himself from the person who had admitted to the infringement.

As was stated by this Court in **Brian Kagwa V Mulamira**, already cited, this required the trial court as an impartial and independent court using regular procedures, to make a decision after considering the evidence as a whole, appraising all the evidence in totality before making a decision. I hasten to add that the trial Judge in such matters must exercise the discretion given by Order 13 rule 6 of the CPR judiciously and circumspectly.

Thus, based on the evidence on record and the cited laws and authorities applicable to this situation, I am satisfied that the learned trial Judge misdirected himself in law and fact when he ignored the appellant's pleadings and scheduling memorandum and entered judgment on admission that the appellant had admitted to trademark infringement.

I would allow this appeal with costs, set aside the decision of the High Court, and order a trial *de novo* of Civil Suit No. 194/2013 by the Commercial Division of the High Court before another Judge. The costs of the suit in the High Court will abide the outcome of the case.

I so order.

Dated at Kampala this 22nd day of October 2019.

Percy Night Tuhaise

Justice of Appeal.

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL AT KAMPALA

CORAM: OWINY - DOLLO DCJ, EGONDA - NTENDE AND TUHAISE JJA.

CIVIL APPEAL NO 172 OF 2014

(Appeal from the judgment of Wangutusi J; in High Court (Commercial Division) Civil Suit No. 194 0f 2013)

NEVIA COMPANY LIMITED ..... **APPELLANT**

VERSUS

BIERSDORF AG ..... **RESPONDENT**

JUDGMENT OF OWINY - DOLLO; DCJ

I had the opportunity to read, in draft, the judgment of my learned sister, Tuhaise, JA. I am in agreement with her that this appeal should succeed. Since Egonda-Ntende JA also agrees, this appeal therefore succeeds; and the orders proposed by Tuhaise JA in her judgment are hereby issued.

Dated, and signed at Kampala this 22nd day of October 2019

Alfonse C. Owiny - Dollo

Deputy Chief Justice

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Owiny-Dollo, DCJ., Egonda-Ntende, & Tuhaise, JJA*]

Civil Appeal No. 172 of 2014

(*Arising from High Court (Commercial Court Division) Civil Suit No. 194 of 2013*)

BETWEEN

Nevia Company Limited==========Appellant

AND

Biersdorf AG==========Respondent

(*On appeal from a decision of the High Court of Uganda (Wangutusi, J.) delivered on 21st February 2014*)

Judgment of Fredrick Egonda-Ntende, JA

[1] I have had the opportunity of reading in draft the judgment of my sister, Tuhaise, JA., and I agree that this appeal should succeed.

[2] I concur in the orders proposed.

Dated, signed and delivered at Kampala this 2nd day of Oct 2019

Fredrick Egonda-Ntende
Justice of Appeal