interlocutory applications, on which statements of his belief may be admitted.

Even assuming that the provisions of this order allow a plaintiff to prove his case by affidavit, what sufficient reason did counsel give to bring his case within the ambit of Order19, rule1 and that he was not disqualified under the proviso to that rule? But we think more important is the consideration that in this case the plaintiff would be required to prove its entire case not isolated or individual facts by affidavit section In the circumstances, we think that this Order should not be used to allow absent plaintiffs to proceed *ex parte*.

For these reasons, we are satisfied that the court was not correct in proceeding the way it did, this non-compliance with the provisions of the Civil Procedure Code resulted not only in very confused proceedings but worse in an unwanted seven years delay before the case could be completed. We think the fair thing to do in such circumstances is to quash the proceedings in the High Court, set aside the judgment and other ancillary orders with an order that the case be retried before another judge who we trust will adhere strictly to the provisions of the Civil Procedure Code.

INTERTEC EAST AFRICA A. S *v.* B AND S INTERNATIONAL

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Lubuva, Samatta and Lugakingira, JJ.A.)

CIVIL APPEAL No. 46 OF 1997

Civil Practice and Procedure – Issues – Issues of law – and Issues of facts – Where issues of law may dispose of the case or part of it – Court must

determine issues of law first – Order 14, rule 2 of the Civil Procedure Code 1966.

Company law – Foreign company- Certificate of compliance by foreign company – Whether a foreign company not incorporated in its own country can take out a Certificate of compliance in Tanzania – Section321 of the Companies Ordinance Chapter 212.

Civil practice and procedure – Companies standing in legal proceedings – Whether a foreign not incorporated in its home country can institute legal proceedings.

The appellant sued the respondent in the High Court for trespass to the property and committing waste. The action failed and the appellant appealed to the Court of Appeal. The appellant claimed to be incorporated in Denmark as public limited company, after its shareholders passed a resolution to convert it from being a private limited company. However when the appellant applied for and obtained a Certificate of Compliance under section 321 of the Companies Ordinance so as to establish a business in Tanzania, the Commerce and Companies Agency had not approved the appellant's conversion from a private to a public limited company, in the event, the agency refused to approve and register that conversion; but the appellant continued with operations in Tanzania as if the conversion was approved and registered and it was in that position when it commenced legal proceedings in the High Court.

Held: (i) Once the court form the opinion that an issue of law may dispose of the case or any part thereof, it has no discretion but to try that issue: Order 14, rule 2 of the Civil Procedure Code;

(ii) The claim that the appellant was never incorporated in Denmark was a fundamental issue implying that it could not maintain a suit in court and required immediate determination; the trial judge, therefore, proceeded with material irregularity while there was a preliminary issue capable of disposing of the whole case.

(iii) A foreign company not incorporated in its home country cannot validly take out a Certificate of Compliance under the Companies Ordinance and establish a place of business nor institute legal proceedings in this country.

(iv) As the appellant never came into existence, there was no valid suit before the trial judge; the suit was a nullity from the start.

Appeal dismissed; no order as to costs

Cases referred to:

(1) *Partab Singh v. Gurmji Singh,* 1959 Punj. 1776

(2) *Nanu Ram v. Vardichand,* 1978 A. Raj. 138

(3) *Mohum Chunder v. Azeem,* (1968) 2 Punj. 309

(4) *Screedhar Pani v. State,* 1979 Uri. 55

Statutory provisions referred to:

(1) Companies Ordinance, section 321

(2) Civil Procedure Code, Order 14, rule 2

Mr Maira, for the Appellant

Dr Mwaikusa, for the Respondent

JUDGMENT

(Dated 03 December 1998)

LUGAKINGIRA, J.A.: The appellant claimed to be a limited liability company incorporated in Denmark and having a place of business in Tanzania. It also claimed to be the beneficial and registered owner of a parcel of land comprised in Certificate of Title Number 21724 and known as Plot Number 29C, Block "A", Makuburi, Dar es Salaam City. The respondent is undisputedly a limited liability company incorporated in Denmark and having a place of business in Tanzania. The appellant commenced action in the High Court at Dar es Salaam alleging that the respondent had trespassed on the property aforesaid, committing waste by installing machinery and equipment thereon, and prayed for the respondent's eviction, a permanent injunction restraining further trespass, mesne profits, general damages, costs and any other relief section. The action failed in its entirety hence this appeal.

We will attempt to highlight the salient features in the dispute. On 13 August1985, the Danish Commerce and Companies Agency in the Ministry of Industry registered a private limited company of the name APS K BUS 8 NR 1135. At an Extraordinary General Meeting held on 17 April 1986, the shareholders resolved, among other things, to convert the company from a private limited company (APS) into a public limited company (AS) and to change its name to Intertec East Africa AS. A Board of Directors was also elected which included Mr Bjerne Alling and his wife Mrs Hasina Jivraji Alling, the latter being a substantial shareholder in the proposed company. Mr Alling was also elected Managing Director of the company. In order for these changes to take effect they had to be approved and registered by the Danish Commerce and Companies Agency. But towards the end of May 1986, before such approval and registration was obtained, Mr Alling was dispatched to Dar es Salaam to establish a branch of the company.

At Dar es Salaam he delivered to the Registrar of Companies the documents required under section 321 of the Companies Ordinance (Chapter 212) and was on 30 August1986, issued with a Certificate of Compliance in the name of Intertec East Africa AS, the appellant. Less than three months later, on 14 November 1986, to be exact, the Danish Commerce and Companies Agency refused to effect registration of the conversion and change of name of APS KBUS 8 NR1135. In view of the setback the company held a General Meeting on 29 June 1987 at which it was resolved merely to change the name to Intertec East Africa APS. The change was approved and registered by the Commerce and Companies Agency on 13 June 1988.

Meanwhile the appellant was proceeding with operations in Dar es Salaam as if nothing was happening in Denmark. In October 1989, it acquired the suit property by a transfer of the right of occupancy from one Purshottam Gokal Solanki. It was common ground that the respondent moved onto the premises in July-August 1992. The suit was filed on 11 September 1992 and was apparently triggered by the dismissal of Mr Alling as Managing Director and the restructuring of the shareholding which had resulted in the erosion of Mrs Alling's commanding position. Since the dismissal came from the board of Intertec East Africa APS and restructured shareholding obtained in that company, these and related matters are the subject of another suit still pending before the High Court. In its Statement of Defence, the respondent raised two preliminary issues, namely, that the appellant was not incorporated in Denmark and that it filed the suit without leave of the board of directors; alternatively, it averred that the appellant was a sister company, both of them being owned or substantially owned by Intertec Contracting AS, a company incorporated in Denmark, and that it entered the suit premises pursuant to a lease agreement concluded with the appellant. In an amended statement of defence the respondent added another preliminary issue to the effect that the suit was *re judicata* on account of a decision of the Court of Aarhus, Denmark, in a dispute between Intertec East Africa APS and Mr Alling delivered on 29 March 1994. In November 1995, while the suit was pending trial in the High Court, the Registrar of Companies, upon representations by Intertec East Africa APS, cancelled the appellant's registration and Certificate of Compliance. He then issued a Certificate of Compliance in the name of APS KBUS 8 NR1135 retrospectively from 30 August 1986 and at the same time issued a Certificate of Change of Name in the name of Intertec East Africa APS at the first hearing of the suit, the then counsel for the respondent, Mrs Kasonda, informed the trial judge (Kaji, J.) that she had agreed with Mr Maira, who appeared for the appellant at the trial and before us, to withdraw the preliminary issues and include them in the main suit, "because most of them will need witnesses to be proved," (except for the issue of *res judicata* which she withdrew completely. The learned judge agreed and proceeded to frame the following issues for determination.

(1) Whether the plaintiff company has a place of business in Tanzania.

(2) If the answer is in the negative, does the plaintiff company have a *locus standi* in these proceedings?

(3) Was the authority of the board necessary before the institution of these proceedings?

(4) Who is the lawful owner of the suit property/premises?

(5) Is the defendant a lawful tenant or a trespasser on the suit property/premises?

(6) What reliefs are the parties entitled to?

We are surprised that the trial had to take this course. Our surprise derives not only from the fact that the decision to postpone the trial of the preliminary issues entailed a longer trial, but also because the decision disregarded the express provisions of the law. It is provided as follows in Order14, rule 2 of the Civil Procedure Code 1966:

> When issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

This provision is evidently mandatory. Once the court forms the opinion that an issue of law may dispose of the case or any part thereof, it has no discretion but to try that issue first: see, for instance, *Partab Singh v. Gurmji Singh* (1). If the answer to the issue disposes of the whole case, the court would be freed from any obligation to inquire into the remaining questions for they might no longer be valid questions or the answers thereto might be academic. That would be the position where, for instance, it is found on a preliminary issue, that the court has no jurisdiction or the suit is incompetent. The position in India has slightly changed since 1976 and their new rule 2 provides for the pronouncement of judgment on all issues notwithstanding that a case may be disposed of on a preliminary issue, except where the issue relates to the jurisdiction of the court or a bar to the suit created by any law. Our rule 2, however, remains what India's was up to 1976 and the change is not relevant to uses.

The question, therefore is, whether in the instant case there was an issue of law the answer to which could have disposed of the whole or part of the case. The learned trial judge does not appear to have given this matter any consideration but we have no hesitation in giving an affirmative answer The charge that it had never come into existence, implied that it could not maintain a suit in a court of law. That was a fundamental issue which went to the root of the entire case, and which therefore called for immediate settlement. The reason assigned for withdrawing the preliminary issues into the main suit, namely, to avoid calling witnesses, cannot be justified under the rule. The rule itself provides for a trial and this, in our view, includes adduction of evidence. In the case of *Nanu Ram v. Vardichand* (2), the Rajasthan High Court in India decided to the effect that the only question of law which could be dealt with as a preliminary issue was not only one which went to the root of the case but also which was capable of being decided without recording evidence. We have not read and therefore cannot criticize that decision but we wish to observe that it does not appear to represent the predominant view among the High Courts in India. There is no doubt, in the final analysis, that the trial judge proceeded with material irregularity when there was evidently a preliminary issue capable of disposing of the whole case; but since the irregularity did not affect the merits of the judgment as a whole, we say no more on the subject but to look at the consequences.

In his judgment the trial judge held with reference to the first and second of the framed issues that the appellant had not established a place of business in Tanzania, after finding that it was not incorporated in Denmark, and that it had no standing in these proceedings. We agree and we think that even at that late hour the learned judge could still have spared himself considerable trouble by stopping there and striking out the suit. As correctly found, the conversion of APS KBUS 8 NR1135 into a public limited company of the name Intertec East Africa AS, and of which the appellant purports to be, never went through. The appellant hence never came into existence under Danish law and was not in existence when it purported to apply for and to

obtain a Certificate of Compliance at the Companies' Registry in Dar es Salaam or when it instituted this suit. A foreign company which is not incorporated in its home country cannot validly take out a Certificate of Compliance under the Companies Ordinance nor can it institute valid proceedings in the courts of this country. The learned judge should therefore have struck out the suit even at that stage without having to enquire into the remaining issues because it was incompetent. But because this never occurred to him, he went further and made these interesting remarks:

> What was purportedly registered on 30 August, 1986 as Intertec East Africa A/S was actually APS KBUS 8 NR 1135 which by then was incorporated in the country of origin (Denmark) bearing Registration Number 102, 895. Therefore in law from 30 August, 1986 when Intertec East Africa A/S was purportedly registered till on 10 June 1988 when APS KBUS NR 1135 changed to INTERTEC East Africa APS, APS KBUS 8 NR 1135 was operating its business in this country under a mistaken name of INTERTEC East Africa A/S and from 13 June 1988 when APS KBUS 8 NR 1135 was changed to Intertec East Africa APS to 17 November 1995 when rectification was made in the office of the Registrar of Companies, Intertec East Africa APS had been operating its business in this country under a mistaken name of Intertec East Africa A/S.

In the same vein, and in reference to the fourth issue, he held that Intertec East Africa APS was the lawful owner of the suit property, "although the Certificate of Occupancy Exhibit P8 was mistakenly written in the name of Intertec East Africa A/S..." As regards the fifth issue, he found the respondent a lawful tenant of Intertec East Africa APS which was, again according to him, "mistakenly operating under the name of Intertec East Africa A/S". He did not find it necessary to answer the third issue. He concluded with these significant remarks:

> ... that company (i.e. Intertec East Africa A/S has no legal personality and it is incapable of suing and therefore cannot have *locus standi* in these proceedings. However the fate of that company will probably be dealt with better in Civil Case Number 244 of 1992 where the existence

or legality of Intertec East Africa APS is being challenged by the plaintiffs Hasina Alling, Bjarne Alling and Intertec East Africa A/S.

The Memorandum of Appeal consisted of four grounds couched in these terms:

1. The learned trial judge erred in fact and in law in accepting the changes made by the Registrar of Companies in November 1995 when the dispute was already in court and hence *sub judice*.
2. The learned trial judge erred in holding that the suit property does not belong to the appellant company despite the Certificate of Title.
3. The learned trial judge misdirected himself in holding that the respondent was a lawful tenant of the appellant *(sic)* when the purported lease is not witnessed by the Chief Executive of the appellant company.
4. The learned judge erred in law in not holding that the registering of the appellant company and the issuance of certificate under section 321 of the Companies Ordinance was proper.

At the hearing of the appeal, Mr Maira conceded that the appellant company was never incorporated in Denmark. We think that dispose of the fourth ground. As stated earlier, since the appellant was not incorporated in Denmark, it could not validly take out a Certificate of Compliance under the Tanzania Companies Ordinance. To put it differently, the acquisition of the Certificate of Compliance did not bring the appellant into existence in Tanzania in the absence of incorporation in Denmark, but the exercise at the Companies' Registry was a nullity. As regards the third ground, the trial judge actually held that the respondent was a lawful tenant of Intertec East Africa APS, after holding that the latter company was the lawful owner of the suit property, "although the certificate of occupancy exhibit P8 was mistakenly written in the name of Intertec East Africa A/S".

Apart from that correction we do not feel called upon to go into the merits of the first, second and third grounds of appeal because they arise from an adventure that had no basis in law. After it was

found that the appellant never came into existence, the trial judge should have realized that there was no valid suit before him since the appellant had no capacity to institute one. As Dr Mwaikusa, learned Counsel for the respondent put it, once it was determined that the appellant never existed, everything else fell into place. The problem in this case was the trial judge's perception of the issue as one of the appellant's standing or *locus standi* in the proceeding. This inevitably tended to dissociate the proceedings from the appellant while not necessarily impugning the legitimacy of the former. What was at the issue was not standing, which means no more than the right to be heard, but the capacity, as the learned judge realized at the end of his judgment, the appellant did not have. The suit was therefore a nullity from the start. It was like bringing a suit against a person who is found to have died before its institution; it is a nullity from start though it may have been filed in ignorance of his death: see *Mohm Chunder v. Azeen* (3) and *Screedhar Pani v. State* (4). In the light of the foregoing, we are of the view that the pronouncements of the learned judge subsequent to the determination that the appellant did not exist were a nullity, and we declare them so. It is to be observed also that the issues involved in those pronouncements are more directly in issue in Civil Case Number 244 of 1992 which is still pending. This, we think, was additional reason for him to have refrained from expressing any position on the matter.

The appeal is otherwise without merit and it is accordingly dismissed. In view of the peculiar circumstances of this case, we make no order as to costs.