REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL CASE NO. E001 OF 2021

PUMA SE.....PLAINTIFF

VERSUS

JOHN GITHENDUKA MACHARIA MBURU.....DEFENDANT

RULING

On 20th May 2021, this court allowed the Plaintiff's application for injunction which, *inter alia*, sought to enforce its intellectual property as against the defendant. This court, among other orders, directed the defendant to hand over to the Plaintiff for destruction 190 pairs of footwear that had been found to have infringed the Plaintiff's trade mark. It is this specific order that the Defendant is aggrieved with. He filed an application to review the said decision pursuant to **Order 45 Rule 1** of the Civil **Procedure Rules.** The defendant, *inter alia*, contends that although he was aware that he was not in possession of the 190 pairs of shoes when he filed the response to the application, and indeed defended the application during the hearing of the same, he did not bring this fact to the attention of the court. He explained that after the Chief Magistrate's court had rendered it's decision in a related criminal case, he took possession of the 190 pairs of shoes and stored it in his shop which was within the Kenya Railways grounds. Unfortunately, soon thereafter, the said shop was demolished, with others, by the management of Kenya Railways Corporation. The Defendant asserts that the entire shoe consignment was lost during the demolition exercise. He was not therefore in a position to comply with the order issued by the court. The defendant therefore urged the court to allow the application for review on the ground that this was a new matter which was not within his knowledge at the time the application was argued or that the court should for sufficient reason grant the application. The application is supported by the annexed affidavit of the Defendant and the grounds stated on the face of the application.

The application is opposed. The Plaintiff filed grounds in opposition to the application. The Plaintiff was not convinced by the assertion by the defendant that the fact of the whereabouts of the 190 pairs of shoes was not within knowledge. The Plaintiff was of the view that the defendant had not disclosed the discovery of any new or important matter which the exercise of due diligence could not have been brought to the attention of the court at the time the application was argued. The Plaintiff asserted that the destruction of the 190 pairs of counterfeit pairs of shoes was at the root of the Plaintiff's case and therefore it was not persuaded by the argument put forward by the defendant to the effect that the said shoes were no longer available for destruction. The Plaintiff was of the firm view that the Plaintiff's application did not meet the threshold for the grant of the order of review as provided under **Order 45 Rule 1** of the **Civil Procedure Rules**. The Plaintiff urged the court to dismiss the application.

This court heard the oral rival submission made by Ms Ifedha for the defendant and by Ms Mwangi for the Plaintiff . This court has carefully considered the said arguments. In **Evan Bwire Vs Andrew Aginda CA Civil Appeal No. 147 of 2006 ,** the Court of Appeal held thus:

> **"An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the Applicant had demonstrated the existence of new evidence which he could not get even after exercising due diligence."**

In **Republic Vs Public procurement Administrative Review Board & 20 others [2018] eKLR** the court held that:

> **"A review can be allowed upon discovery of new and important matter or evidence. An applicant has to show to the satisfaction of the Court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. This has not been shown to be the case here. The applicant is coming up with what in my view should be his argument in opposition to the main motion, and is attempting to convert it to a ground of review."**

In the present application, certain facts are not in dispute. From the outset, the defendant knew or ought to have known that the matter in dispute was the allegation by the Plaintiff that the defendant was selling counterfeit goods by which its trademark was being infringed. During the hearing of the application, and prior thereto in the pleadings, the defendant was made aware that the Plaintiff would seek to enforce the decision (if it went in its favour) by having the counterfeit goods surrendered to it so that they may be destroyed.

This court recalls that the defendant vehemently opposed the application. He did not indicate to the court that the shoes that were the subject matter of the case were no longer in his possession. This court agrees with the Plaintiff that the issue as to the existence or otherwise of the shoes was a germane issue that the defendant ought to have brought to the attention of the court at the time the application was being argued. To bring such information in an application for review after the court has rendered its decision smacks of someone who is attempting to evade the consequences of the decision rendered by the court. In any event, the defendant placed no evidence before the court to support his assertion that the shoes disappeared or were destroyed when his shop was demolished by the Kenya Railways Corporation.

In an application for review on the ground of the discovery of new and important piece of evidence, the Applicant must establish to the satisfaction of the court that the "new evidence" was not within his knowledge at the time the case or application was argued, and further

that, he could not have obtained the “new evidence” even after applying due diligence. In the present application, it was clear to the court that the “new evidence” that the Applicant is touting, was actually information that was within the defendant’s knowledge at the time the application was argued. This is the information that the defendant did not avail to the court and now wishes to avail it in an application for review. That cannot be. It was clear to the court that the defendant wants to have a second bite of the cherry by invoking review under **Order 45 Rule 1** of the **Civil Procedure Rules.** This could cannot allow it.

In the premises therefore, this court holds that the defendant‘s application for review lacks merit and is hereby dismissed with costs to the Plaintiff. It is so ordered.

DATED, AT KITALE THIS 23RD DAY OF SEPTEMBER 2021.

L. KIMARU

JUDGE