



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 251 OF 2017 CONSOLIDATED WITH 252 & 253 OF 2017**

**DOSHI IRONMONGERS LIMITED.....APPELLANT**

**VERSUS**

**THERMOS HONGKONG LIMITED.....RESPONDENT**

**RULING**

**Introduction and outline of tasks**

1. This appeal challenges the decision and finding of the Assistant Registrar of Trade Marks, ELVINE APIYO dated 24/10/2017.
2. When the matter first came before court on the 1/12/2017 the court did grant to the Appellant *ex parte* orders of stay of the decision of the Registrar and directed that the Respondent be served for hearing inter partes on a date to be taken at the registry.
3. Before the date fixed for hearing inter partes of the Application for stay which essentially is also the appeal, the Respondent did file an application seeking to transfer the Appeal for hearing before the High Court sitting in Nairobi. That application is dated 27/12/2017 and supported by the Affidavit sworn by Esther Kinyenje Opiyo Advocate.
4. The grounds disclosed on the face of the Application to premise the application is that the Assistant Registrar having conducted her proceedings, in Nairobi County, Rule 20 of the High Court (organization and Administration) Rules 2015 made pursuant to section 12(3) of the Act as read with Order 47 Rule 6 demanded and mandated that the Appeal be filed and heard in Nairobi and that to have it remain in Mombasa would be to violate and affront those provisions. The Affidavit in support essentially reiterated the grounds in the Application and stressed the assertion that section 12(3) (High Court Organization and Administration) Act and Rule 20 of the Rules under the Act would be affronted if matter be heard in Mombasa as there had not been proffered any reason why the Appellant choose to file the Appeal in Mombasa.
5. The Application was opposed by the Appellant who filed a Replying Affidavit sworn by MR. ASHOK LABHSHANKER DOSHI, on the 15/2/2018. In the Affidavit the Appellant accuses the respondent of a deliberate design to delay the expeditors disposal of the Appeal which had been set for hearing, by the application for transfer. To the Applicant Section 12(3) of the High Court (organization and Administration) Act mandates the Chief Justice to expressly designate and align tribunals by names and stations and the courts with supervisory jurisdiction over the same but the Registrar of Trademarks has not been so designated.
6. Under the rules and being a one station tribunal, the Appellant contends, it has countrywide jurisdiction and cannot be confined to where it chooses to sit. On choice of where to file the Appeal, the Appellant averred that the Respondent is an international company whose offices are not necessarily in Nairobi while the Appellant has its registered offices in Mombasa. It is also added that parties had prior to the proceedings leading to the current Appeal litigated at the Mombasa High Court Registry over a related matter without contestation as to the place hearing.
7. To cap it all, the Appellant inferred bad faith upon the Respondent and contended that the High Court has countrywide jurisdiction and that unless a designation be done, that jurisdiction is not affected by inference otherwise. For that reason and while seeking reliance on Article 265(6), the Appellant asserts that no valid reason had been offered to justify transfer of the Appeal to Nairobi.
8. The Application came up for hearing on the 9/4/2018 when Mr. Kotonya appeared for the Respondent while Mr. Oluga appeared for the Appellant. The counsel largely relied on the Affidavits filed save that Mr. Oluga filed one decision by the High Court being *Hangzhon Agro-chemicals Industries Ltd vs Panda Flowers Ltd [2012] eKLR*. That decision says that the onus is upon he who seeks to have a case

transferred to make out a strong case to the satisfaction of the court but the interests of the litigant must be regarded.

### **Submissions by the Respondent Applicant**

9. According to Mr. Kotonya, his application being clearly and succinctly premised on section 12(3) and Rule 20 of the High Court (Organization and Administration) Act, underscores the position that the Assistant Registrar of Trademarks having sat and made a decision in Nairobi, the law mandated that the Appeal for such a decision be filed in the High Court Registry, Nairobi at Milimani Commercial & Tax Division Deviser and not Mombasa because that tribunal full for supervision under that registry. He refer to the schedule to the rules and asserted that the same obligates that the Appellate Registry for a tribunal sitting in Nairobi must be Nairobi, Milimani Commercial and Tax Division of the High Court. He also placed reliance upon Order 47 Rule 6 to give jurisdiction to court to order that an appeal be heard by a court with supervisory jurisdiction. He cited to court the decision of *Hanzhon Agrichemicals Ltd vs Panda Flower Ltd (supra)* for the proposition that the court has jurisdiction to transfer a matter between registries while considering the registry best suitable or appropriate with interests of parties being had regard of.

### **Submissions by the Appellant/Respondent**

10. For the Appellant, Mr. Oluga made submissions that Section 12(3) of the Act must be read together with Rule 20 of the Rules made under the Act and the schedule making the designation.

11. To him the burden to prove and satisfy the court to order transfer rested with the Respondent/Applicant and submitted that there is no law, leave alone Section 12(3) of the Act, that makes it mandatory that appeals from Tribunals sitting in Nairobi must be filed in Nairobi.

12. On Order 47 Rule 6, the Counsel submitted that cause had to be shown including any prejudice that could be visited upon the Applicant or that the party had its residence in Nairobi.

13. In his closing submissions, Mr. Kutonya averred that they were not pleading prejudice to their client because there was an express and explicit law on the matter.

14. On the seat of the tribunal counsel submitted that no tribunal in Kenya was restricted territorial jurisdiction but exercises jurisdiction countrywide and that for the instant case the seat of the tribunal having been at Nairobi the Appeal fell to be held there and not in Mombasa.

### **Analysis and determination**

15. Having regard to the papers filed and the submissions by counsel, the only question that stands out for determination by the court is whether or not all appeals from decisions of the Registrar of Trade Marks, with its seat in Nairobi, must be filed at the Milimani Commercial and Tax Division of the High Court. To interrogate that question the starting point must be the provisions of the High Court (Organization and Administration) Act (The Act) 2015 and the Rules made thereunder in 2016.

16. The preamble to the Act gives its purpose to be the 'giving of effect to *Article 165 (1) a & b of the constitution; and the Administration of the High Court and connected purposes*'.

17. The Act must therefore be viewed at all times to be derivative of the constitution purposed to give effect as far as administration of the High Court is concerned. It, for that reason, must not be seen to give or restrict the jurisdiction of the High Court or its registry. That observation flows for the undoubted fact that the Act is enacted emanated pursuant to Article 165 sub-article 1 and not (3) & (6) which vests jurisdiction of the High Court.

18. That being the court's understanding and interpretation of the purpose and intendment of the statute, how does it relates and affect the matter before me in this appeal?

Section 12(3) of the Act provide:-

**“The filing of appeals, bail applications, and references from the subordinate courts, tribunals and other bodies or authorities within the regions designated by the Chief Justice under the Rules, shall be made at the High Court station with the corresponding supervisory jurisdiction”.**

19. That provision does not by itself prescribe to which registry which appeals shall be filed. Instead it leaves the prescription or designation to the Chief Justice in exercise of his powers as the Head of the Judiciary.

20. Pursuant to that provision the Chief Justice has designated court registries to which appeals from the subordinate courts be filed. However, the schedule to the High Court (Organization and Administration) Rules does not designate to which High Court Registry the Appeals from the decision of the Registrar of Trademarks may be filed. It has therefore not been designated. I think the rationale is that the office of Registrar of Trademarks has a countrywide jurisdiction and the appropriateness of where to file an appeal would depend on which court registry is most proximate for the parties. That must be disclosed in the materials availed to court rather than where the Registrar chooses to sit.

21. The sole purpose of the Act and Rules made thereunder must be seen to be intended to give effect to the provisions of Article 165(1) a & b of the constitution and as of necessity must further the overriding objective of the courts of law in Kenya. The guiding principles of the Act at Section 3 are self-speaking that court must be guided that national values and principles under Article 10 as well as the principle of judicial authority as set out under Article 159 of the constitution. One of the critical values and principles of the constitution is the provision of proximate, easily accessible services throughout Kenya and the decentralization of state organs their functions and services from the capital of Kenya[1].

22. It cannot be disputed that even though judicial services have not been devolved, the need to decentralize and make accessible judicial services to all regions even the very remote parts of the Republic is a matter that cannot be over emphasized. It need no emphasis beyond what the institution, Judiciary, has set to do by its reigning Strategic Plan (2014-2018). That plan, under strategy 3.2.1, headed **access to justice** says in part:-

**“The plan seeks to reduce obstacles that impede public access to information, access to courts and ability to understand court procedure.**

<b>Strategic Objective</b>		<b>Str</b>
<b>Improve physical access to justice</b>	<b>Reduce distance to court</b>	<b>ate</b>
		<b>gy</b>

23. That document says in very elaborate words the fact that in order to enhance access to justice new courts will be built across the country and where need arises mobile courts would be encouraged, all towards meeting the dictate that the judiciary as a state organ is bound by article 174 (f) and (h) to decentralize its services to be proximate, physically, to the people of Kenya.

24. It is not in dispute that all tribunal and offices which perform judicial functions are deemed to be institutions of the judiciary. For that reason none is exempt from the need and dictate to avail its services near the people and in a decentralized manner from the capital city. If I am right in this observation then the office of Registrar of Trademarks is not exempt from the obligation to decentralize its services.

25. While making this observation, I have taken judicial notice of other services of various departments even those under the attorney Generals’ offices like the Registry of Companies and business names which have now been decentralized through the **Huduma Centres** Countrywide. All underscore that Kenyans are entitled to government services wherever they are and they have so commanded the state organs under the constitution.

26. The need to decentralize is therefore a constitutional dictate and the fact that the Registrar of Trade Marks has not done so, cannot by itself the only basis to say that its decision to sit in Nairobi binds the High Court also to accept all the appeals from its decision only at the High Court Registry in Nairobi and nowhere else. The interests of the parties including the convenience and right to proximate service notwithstanding. The court being the custodian of the duty to interpret the law must never be gagged by such default. It must always seek to do what is right according to the law.

27. The designation of registries to accept appeals is to this court administrative informed by the need to meet overriding objective of the court to facilitate, just, expeditious, proportionate and affordable manner of dispensing justice.

28. It follows therefore that the court has no option but to consider in accepting an appeal at any of its registries, which registries would save the litigants from undue and unjustifiable expenses.

29. In this case, it has been asserted by the Appellant/Respondent, and not contested by the Applicant/Respondent, that *“the respondent is an international company which does not necessarily have its offices in Nairobi while the Appellant is based in Mombasa and the dictates of expediency and affordability of justice demanded that the appeal be filed in Mombasa*[2]. Additionally at paragraph 13 the Respondent says:-

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**i. The Respondent has not pleaded what prejudice or difficulty it will suffer if this appeal (which has already been filed in Mombasa and has a hearing date of 27<sup>th</sup> February 2018) is heard and determined in Mombasa.**

**ii. If at all there is any prejudice that may be suffered by the Respondent, the same can be compensated by an award of costs.**

**iii. It is not the first time that the parties herein and the issues relating to the trademarks under dispute are in the High Court in Mombasa. Previously, the parties were engaged in the High Court in Mombasa in Judicial Review Misc. Application No. 19 of 2011: REPUBLIC VS. THE REGISTRAR OF TRADE MARKS EX-PARTE DOSHI IRON MONGERS LIMITED which was heard and determined in Mombasa and no party raised any objection thereto on the basis that the Registrar of Trade Marks is based in Nairobi.**

**iv. Since this appeal already has a hearing date, it has been allocated to a Judge and the parties have filed their respective documents, it is in the interest of justice that the appeal proceeds in Mombasa rather than causing unnecessary delay by transferring this case to Nairobi whereupon the matter will have to be allocated a new serial number and has to be assigned to a fresh Judge and mentioned for directions thereby resulting to inordinate delay.**

**v. It is paradoxical that the Respondent has cited the already existing injunctive orders as reason for urgency of this matter yet it does not want the matter to be expediently heard and determined in the court where it has already been fixed for hearing”.**

30. I have underscored the fact that the proximity of the seat of the court to the parties is a consideration of where a matter be litigated. For this matter where the Chief Justice has not designated Milimani Commercial and Tax Division of the High Court as the only Registry to which this appeal ought to have been filed, and on the face of the assertions of the Appellant/Respondent which have not been controverted, I cannot but find that the Registry of the High Court that is proximate to the parties as to afford them an expeditious and affordable access to justice is Mombasa. It would be different had there been a rebutted of what the Appellant has said.

31. For that reason, I find no merit in the Application and order that it be dismissed with costs to the Appellant/Respondent.

32. This ruling applies to **HCCA No. 252 and 253 both of 2017** with equal effect regarding similar applications in those files.

Dated and delivered at **Mombasa** this **22nd** day of **June 2018**.

**P.J.O. OTIENO**

**JUDGE**

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[\[1\]](#) Article 174(f) & (b)

[\[2\]](#) Para 12 of the Replying Affidavit & Ashock L. Doshi