



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR. APPLICATION NO. 317 OF 2017
IN THE MATTER OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF THE TRADE MARKS ACT CAP 506
AND
IN THE MATTER OF THE FAIR ADMINISTRATIVE
ACTION ACT 2015
REPUBLIC.....APPLICANT
VERSUS
REGISTRAR OF TRADE MARKS.....RESPONDENT
AND
TAILOR DRINKS COMPANY LIMITED.....INTERESTED PARTY
EX PARTE: KENAFRIC INDUSTRIES LIMITED
JUDGEMENT

Introduction

1. By a Notice of Motion dated 20th June, 2017, the *ex parte* applicant herein, **Kenafri Industries Limited**, seeks the following orders:

1. That this application be certified urgent for hearing on priority basis.
2. That an order of certiorari do issue to quash the decision of the registrar of Trade Marks to cancel the applicant's Trade Mark Certificate issued under class 32 (juices) Trade Mark No. 90365) vide Industrial Property Journal No. 2017/03 of 31/3/017
3. That an order of mandamus do issue against the respondent compelling it to reinstate the

applicant's certificate of Registration of Trade Mark.

4. That costs of this motion and that of the application for leave be granted to the ex parte applicant.

Ex Parte Applicant's Case

2. According to the applicant, it approached the Registrar for purposes of availability of the name "squeezy" which it intended to use for its juice which it produces commercially and conducted a search to confirm the availability of the name "squeezy".

3. According to the applicant, as the name was available for registration, it lodged an application for registration of the said name and paid the requisite fee after which the Registrar received its documents and on 5th August, 2016 issued Trade Mark Certificate No. 90365 under class 32 (Juices) whose effective date was 15th December, 2015 and its expiry as listed is 15th December, 2025.

4. However, the applicant received a letter from the Chief Trade Marks Examiner, a **Mr. Leonard Kosgei** informing the applicant that a technical problem occurred after a system upgrade in which marks were jumbled up in the database disabling them to realize that there existed a similar mark in the register filed on 29th April, 2015. Accordingly, the applicant was asked to return the certificate for cancellation. It was averred that the respondent through the KIPI Journal advertised that the "squeezy" mark had been removed by way of rectification of register, on 21st March, 2017.

5. According to the applicant, on 6th April, 2017, the interested party herein, **Tailors Drink Company Limited**, whose mark is alleged to be similar to the applicant's served the applicant with a letter for Trade Mark infringement which letter indicated that the applicant ceases from marketing any of its products under the name "squeezy" due to the glaring similarities, due to the fact that both are juice products and are packaged in flexible poly material.

6. It was the applicant's case that the registrar has not heard the parties on the allegations and has proceeded to remove the name of the applicant's mark contrary to the law. To the applicant, the respondent in removing the applicant's name from the register by advertising in the KIPI Journal, did not comply with the practice set out in the **Trade Marks Act** Cap 506 and its subsidiary legislation, section 37(1)(c) and Rules 85(3) and 84A respectively.

7. Despite the applicant through its advocate seeking the reinstatement of the Trade Mark, the respondents did not reply.

8. It was contended that the Chief Trade Marks examiner has no power under the **Trade Marks Act** to either rectify or remove the Trade Mark registered under the Act hence the respondent's action was ultra vires.

9. The applicant therefore prayed that the said advertisement in the KIPI Journal be quashed as the procedure for cancellation of a Trade Mark was not in accordance with the statute.

10. According to the applicant, the process of registration involves advertisement in the Journal of Kenya ~Gazette of an application of registration to give opportunity to any person to oppose the registration, as stated in Rule 46 of the **Trade Mark Rules**.

11. It was the applicant's case that its Trademark after receiving no opposition was duly registered and the Interested Party did not even oppose the same. The applicant maintained that the correct procedure to remove a trademark from the register was not followed, as provide for under Rule 82 of the **Trade Mark Rules** which provides that any person aggrieved by any error or defect in any entry in the register may make an application to the Register in Form TM25 which is accompanied by a statement setting out fully the aggrieved applicant's interest and facts upon which he bases his application. The said rule, it was

averred provides that the above application upon being received by the Registrar shall be then transmitted to the registered proprietor. The applicant did not however receive any such application from the registrar and documents attached to the Interested Party's affidavit only show a copy of a letter written to the registrar expressing their displeasure, and the same was not forwarded to the applicant.

12. It was further averred that the notice the applicant received seeking it to return its certificate for cancellation was not from the registrar, but from the Chief Trademarks Examiner and that no formal process was initiated by the Registrar before the purported cancellation.

13. The applicant asserted that the **Trade Mark Act** in its section 3 provides that the Managing Director of KIPI is the Registrar and it is he who has discretionary power under section 35 to rectify entries in the Register. The applicant further relied on section 37(1)(c).

14. According to the applicant, it is evident from the facts of the case that the ex parte applicant's trademark was cancelled, after the registrar was notified by the Interested Party of the apparent similarity in the trademarks and that the respondent was not aware of any mistake in the registry and only became aware after the Interested Party's visit to their offices when they saw the applicant's advertisement, introducing their new juice by the name "squeezy".

15. According to the applicant, upon the above visit, the Interested Party wrote to the respondent urging the respondent to redeem the system fault. Therefore the Interested Party cannot claim that the respondent initiated by his own motion, the process to cancel the ex parte applicant's trademark since the letter seeking to cancel the applicant's trademark was written days after the respondent received a written concern from the Interested Party.

16. The applicant maintained that the respondent did not follow due process as stated in the Trade Mark Rules and neither did the Interested Party, who had various avenues to follow to dress their concern that is, making an application under either Rule 82 or Rule 85 of the **Trademark Rules**. It was the applicant's case that the Ex parte applicant was justified to approach the Court through Judicial Review as provided for by section 7 of the **Fair Administrative Action Act**.

17. It was the applicant's case that the said section further provides that the Court may review an administrative decision where the action or decision was procedurally unfair; the administrator failed to take into account relevant considerations and the administrative action or decision violates the legitimate expectations of persons to whom it relates. In this case it was contended that the respondent's action to cancel the applicant's trade mark amounted to administrative action for which the applicant is aggrieved in that, it violated the applicant's Constitutional Right to fair administrative action and also violated the legitimate expectation of the application, in that the applicant had duly applied for registration of the Trade Mark following due process, and the same was granted without objection from the Interested Party.

18. The applicant also relied on section 4 of the **Fair Administrative Action Act** which provides that where a person is materially affected by any administrative action, the administrator shall give such a person a statement of reasons, which, according to section 6, include reasons for which the action was taken and any relevant documents relating to the matter. It was the applicant's contention that the respondent did not follow the above procedure which is also echoed in the **Trademark Rules**, such that, even in the letter seeking to cancel the Applicant's Trademark, there were no accompanying relevant documents to support the decision to recall the Trade mark.

19. It was therefore contended that the respondent in his action to cancel from the register, the applicant's Trade Mark, did not take into account relevant considerations such as, the fact that the applicant on receiving certificate of registration, had commenced the manufacture, advertisement and sale of its product in the market and the respondent's action would cause great financial loss to the applicant.

20. It was the applicant's case that section 9(4) of the **Fair Administrative Action Act** provides for instances where Judicial Review may be considered, not as a last resort due to the concerns of interest of Justice. In the circumstances, the applicant would be gravely prejudiced by the respondent's action, since

the correct procedure was followed to obtain the Trade Mark certificate, no objections were raised until after its product was manufactured, advertised and sold in the market, hence the need for moving to court through Judicial Review to protect the applicant's interest pending determination of the matter.

21. It was the applicant's case that from the foregoing, the respondent's decision is not procedurally fair and just and the court is justified to review the same.

Interested Party's Case

22. The application was opposed by the interested party herein, **Tailors Drink Company Limited**.

23. According to the interested party, it is a registered owner of the mark "squishy" which was registered in April, 2015 and which was phonetically similar to the applicant's "squeezy" both of which relate to similar products packaged in the same material and targeted primarily for consumption by children; thus are so similar that they cause confusion in the targeted market.

24. It was the interested party's case that the Registrar's decision was made in the Industrial Property Journal was made in the exercise of discretion pursuant to powers donated upon him either expressly or incidentally to the performance of his primary purpose under the **Trade Mark Act**.

25. It was the interested party's case that the motion is an abuse of court process, since the **Trade Marks Act** has established a procedure which is better suited to hear and determine the issues raised by the applicant which procedure the applicant had not exhausted hence was not entitled to invoke judicial review.

26. It was the interested party's submission that the procedure in section 37(1)(c) of the Act and Rule 85(3) of the **Trade Mark Rules** relates to the "**correction of the Register**" and involves an application being made by the Registered Proprietor to the Registrar in the prescribed forms while in this case the decision was headed "**removal by rectification of Register**" and not "**correction of the Register**". In this case it was contended that the impugned decision was grounded on powers granted to the Registrar under section 35 of the Act.

27. According to the interested party, the wording of section 35 vests in the Registrar locus to unilaterally exercise his discretion to rectify the Register. The interested party relied on **Saudia Arabian Airlines Corporation vs. Saudia Kenya Enterprises Limited [1986] eKLR** and contended that the Registrar was therefore empowered under the guise of public policy to exercise his discretion under section 35 against the applicant's mark. It was its case that the Registrar is also vested with an inherent-incident power to preserve the integrity of the Register, pursuant to which he has the discretion to rectify or correct entries wrongly entered in the Register on his own motion, which powers though not hinged on any specific provision of the Act, is evident in the characteristic framing in which Parliament crafted certain relevant provisions of the Act. In this respect the interested party cited section 4(3) which vests in the Registrar the power of management and control of Register of Trade Marks, sections 14 and 15(1) which empowers the Registrar to reject trademarks if opined that they resemble already existing mark, section 22(1) which empowers the Registrar to arbitrarily refuse to Register a mark where an application is accepted in error and section 51 which empowers him to rectify the Register outside the scope of section 35 of the Act. It was submitted that the underlying theme of the said provisions is the power of the Registrar to exercise discretion to register or rectify entries in the register on his own accord pursuant to the inherent-incident power.

28. In support of its submissions the this regard the interested party relied on **Republic vs. Assistant Registrar of Trade Marks ex parte Strategic Industries Limited & Another [2016] eKLR**.

29. It was submitted that the Registrar is expected to manage and control the Register and doing so involves ensuring that the trademarks registered therein are in line with the provisions of the Act and if any mark is wrongly registered, the power to rectify the same by removing the offending mark may be exercised, as it is incidental to the performance of the main purpose.

30. In this case it was submitted that the Registrar's decision was made in the exercise of his discretionary power pursuant to section 44 as read with Rules 103 and 105 of **the Trade Mark Rules** under which the onus was on the applicant to notify the Registrar that it intended to object to the exercise of the discretionary power. The applicant, it was contended, was expected to make an application to the Registrar within 30 days of receiving the notices from the Registrar or from the date of any indication that the Registrar intended to exercise his discretion adversely. In this case the indication was that the exercise of the discretion would be upon receipt of the letter on 6th September, 2016. The applicant however did not make any application to the Registrar until the mark was removed from the Register, after lapse of 6 months from the time of the receipt of the indication.

31. As regards the reasons for the decision, the interested party relied on paragraph 34 of the First Schedule to the Rules and submitted that the onus was on the applicant to take action and no attempt was made to do so within six months hence the applicant was guilty of acquiescence, laches and inordinate delay more so as the orders sought are discretionary and equity calls to those seeking its aid to come before it with clean hands and to act without delay hence the applicant's conduct does not merit the orders sought.

32. It was further submitted that judicial review is a remedy of last resort and is only to be invoked after all other avenues have been exhausted or when the other avenues would not be able to give suitable orders and reliance was placed on **Republic vs. Anti-Counterfeit Agency & 3 Others ex parte Omega Chalk Industries [1993] Limited & Another [2015] eKLR** and **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE Judicial Review Case No. 441 of 2013**. In this case it was submitted that since what is sought is the quashing of the order of the Registrar of Trade Marks, both the Act and the Rules establish a system of redress therefrom and reliance was placed on sections 51 and 52 of the Act as read with rule 117 of the **Trade Mark Rules**. It was therefore submitted that the applicant had the option of moving the court for review or appeal which mode of redress is more convenient and simpler hence best suited for the orders sought herein. In this respect reliance was placed on **General Plastics Limited vs. Industrial Property Tribunal & Another [2009] eKLR**.

33. It was the interested party's position that the purpose of Trade Mark law is to prevent unfair competition by protecting the use of symbol, word, logo, design, and so on, that uniquely distinguishes the good or services of a company or firm and thus protecting the consumers by prohibiting companies from using Trade Marks similar to those of other companies in order to avoid confusion. It was the interested party's case that the order sought herein, if granted would compel the Registrar to register a mark that would cause confusion in the minds of the public and would also violate sections 14 and 15 of the Act. In this regard the interested party relied on the decision of **Emukule, J in Republic vs. District Land Registrar, Mombasa & 5 Others Ex-Parte Super Nova Properties Limited [2016] eKLR** in which it was held that *"it is public policy that courts should not aid in the perpetuation of illegalities."*

34. It was further submitted that since the orders sought herein are equitable remedies, they cannot override specific provisions of the law. To the interested party, the applicant is conspiring (sic) this court into supplanting the express provisions of sections 14 and 15 of the **Trade Mark Act** by invoking this Court's jurisdiction to grant order since they conflict with the Act. The Court was therefore urged to uphold the statutory provisions to refuse to grant the reliefs sought.

Determinations

35. I have considered the foregoing as well as the submissions filed and the authorities cited.

36. Before I deal with the issues raised herein, I wish to comment on the choice of words employed by the interested party in its submissions. According to the interested party, to quote its submissions verbatim, *"the applicant is conspiring (sic) this court into supplanting the express provisions of section 14 and 15 of the Trade Mark Act by invoking this Court's jurisdiction to grant order since they conflict with the Act"*. First the said statement suffers from syntactic malady since one cannot *"conspire the Court"*. Secondly, according to **Concise Oxford English Dictionary**, the word "conspire" means to "make secret

plans jointly to commit an unlawful or harmful act". "Conspiracy" is defined to mean "a secret plan by a group to do something unlawful or harmful". Therefore it is with due respect in bad faith to purport that the applicant is conspiring with the Court to subvert the law. In my view such reckless and I daresay careless choice of words ought to be avoided by counsel and parties.

37. It was the Interested Party's case that there exist alternative remedy that ought to have been followed by the applicant before coming before this Court in the proceedings of this nature. In this case it was submitted that the Registrar's decision was made in the exercise of his discretionary power pursuant to section 44 as read with Rules 103 and 105 of **the Trade Mark Rules** under which the onus was on the applicant to notify the Registrar that it intended to object to the exercise of the discretionary power. The applicant, it was contended, was expected to make an application to the Registrar within 30 days of receiving the notices from the Registrar or from the date of any indication that the Registrar intended to exercise his discretion adversely. In this case the indication was that the exercise of the discretion would be upon receipt of the letter on 6th September, 2016. The applicant however did not make any application to the Registrar until the mark was removed from the Register, after lapse of 6 months from the time of the receipt of the indication.

38. Section 44 of the Act provides as follows:

Where any discretionary or other power is given to the Registrar by this Act or the rules, he shall not exercise that power adversely to the applicant for registration or the registered proprietor of the trade mark in question without (if duly required so to do within the prescribed time) giving to the applicant or registered proprietor an opportunity of being heard.

39. Rules 99, 100, 103 to 106 of the said Rules provide as hereunder:

100. The Registrar shall notify in writing applications under rules 97, 98 and 99 to the registered proprietor and each registered user (not being the applicant) under the registration of the trade mark.

103. Before exercising adversely to any person any discretionary power given to the Registrar by the Act or these Rules, the Registrar shall, if so required, hear that person thereon.

104. An application for a hearing shall be made within thirty days from the date of notification by the Registrar of any objection to an application or the date of any other indication that he proposes to exercise a discretionary power.

105. (1) Upon receiving such application, the Registrar shall give the person applying fourteen days' notice of a time when he may be heard.

(2) Within seven days from the date when the notice would be delivered in the ordinary course of post, the person applying shall notify the Registrar whether or not he intends to be heard on the matter, and if he intends to appear he shall file form TM 8 and pay the prescribed fee thereon.

106. The decision of the Registrar in the exercise of any such discretionary power shall be notified to the person affected.

40. Section 37(8)(c) of the Act empowers the Registrar to cancel the registration of a person as a licensee on the application in writing in the prescribed manner of any person on any of the following grounds -

(i) that the licensee has used the trade mark otherwise than by way of the permitted use, or in such a way as to cause, or to be likely to cause, deception or confusion;

(ii) that the proprietor or the licensee misrepresented, or failed to disclose, some fact material to the application for the registration, or that the circumstances have materially changed since the date of the registration;

(iii) that the registration ought not to have been effected having regard to rights vested in the applicant by virtue of a contract in the performance of which he is interested.

41. According to the Respondent's letter dated 6th September, 2016, following a technical problem that occurred after a system upgrade where marks were jumbled up in its database, it realised that there was a similar mark already in the register filed on 29th April, 2015. It therefore asked the applicant to return the certificate for cancellation as the two were too similar to co-exist in the register. That letter was written by one **Leonard Kosgei** in his capacity as the Chief Trade Marks Examiner.

42. My understanding of section 44 of the Act is that where any discretionary or other power is given to the Registrar by the Act or the rules (such as the power to cancel registration of a registered proprietor's trade mark), he is obliged, prior to exercising that power, if the intended action is adverse to the interests of a registered proprietor (which a cancellation definitely is), to give to the applicant or registered proprietor an opportunity of being heard, as long as the requirement for a hearing is made within the prescribed time. In this case the prescription as to time appears in rule 104 of the Rules which provides that:

An application for a hearing shall be made within thirty days from the date of notification by the Registrar of any objection to an application or the date of any other indication that he proposes to exercise a discretionary power.

43. In other words once the Registrar notifies the person of the intention to take an adverse action, it is upon the applicant to notify the Registrar of his intention to be heard in order to trigger the process of a hearing. It is however my view that the notification from the registrar must be clear that it is intended that such an action be taken. That notification is therefore not the decision but a notification of intent. Section 4(3) of the **Fair Administrative Action Act** provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action. This was the position in **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** where the Court held:

“I would at this stage adopt the observations made in the Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77 where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; “1.if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best...; 4.The person accused must know the nature of the accusation made; 5.A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi-lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it.”

44. In my view, for a notice to be worthy of its purpose, it must not be vague and must not leave room for speculation. If possible the notice should draw the addressee's attention to the legal provision, if any, under which it is being issued and even spell out the consequences that would follow non-compliance. It is these particulars that will distinguish a notification of intent from the decision itself. Where therefore the decision is expressed in a manner suggesting that a decision has already been made, such a notice would fail to meet the purpose for which the notice is prescribed.

45. In my view the letter dated 6th September, 2016 asking the applicant to return the certificate for cancellation did not meet the threshold of a valid notice requiring the applicant to apply for a hearing.

46. It has however been contended that the Registrar is also vested with an inherent-incident power to preserve the integrity of the register, pursuant to which he has the discretion to rectify or correct entries wrongly entered in the register on his own motion, which powers though not hinged on any specific provision of the Act, is evident in the characteristic framing in which Parliament crafted certain relevant provisions of the Act. To that submission I only wish to refer to **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, where it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them. In that respect it was held in **Choitram vs. Mystery Model Hair Salon [1972] EA 525**, by Madan, J (as he then was) that powers must be expressly conferred; they cannot be a matter of implication.

47. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon (supra); Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461.**

48. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

49. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation.

50. It follows that any action taken by the Registrar must comply with the law in this case the provisions of Article 47 of the Constitution as read with the provisions of the **Fair Administrative Action Act** under which the Registrar is obliged to afford parties affected by his decision an opportunity of being heard. Such an opportunity in the context of the **Trade Marks Act** requires that the notice of intention to cancel the registration expressly draws the registered proprietor's attention to the relevant legal provisions and the consequences of the failure to apply for a hearing.

51. Apart from that the applicant averred that the decision to cancel the registration was taken by the Chief Trade Marks Examiner as opposed to the Registrar. In its view, the Chief Trade Marks Examiner has no power under the **Trade Marks Act** to either rectify or remove the Trade Mark registered under the Act hence the respondent's action was ultra vires.

52. As was held by Lord Somervell in Vine vs. National Dock Labour Board [1956] 3 All ER 939, at page 951:

“The question in the present case is not whether the local board failed to act judicially in some respect in which the rules of judicial procedure would apply to them. They failed to act at all unless they had power to delegate. In deciding whether a person has power to delegate, one has to consider the nature of the duty and the character of the person. Judicial authority normally cannot, of course, be delegated...There are on the other hand many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under Crown or not, he would normally, have no authority to delegate. He could take advice, of course, but he could not, by a minute authorise someone else to make the appointment without further reference to him. I am however, clear that the disciplinary powers, whether “judicial” or not, cannot be delegated.”

53. In the Uganda case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, it was held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.” [Emphasis mine.]

54. Similarly in Hardware & Ironmongery (K) Ltd vs. Attorney-General Civil Appeal No. 5 of 1972 [1972] EA 271, the Court expressed itself as follows:

“What matters is the taking of the decision and not the signature. If the Director had taken the decision that the licence was to be cancelled, he then, properly, have told the Trade Officer to convey the decision to the parties. But it is clear from the officer’s evidence that this is not what happened. The fact that the Act makes express provision for delegation of the Director’s powers makes it, if not impossible, at least more difficult to infer any power of delegation. There is no absolute rule governing the question of delegation, but in general, where a power is discretionary and may affect substantial rights, a power of delegation will not be inferred, although it might be in matters of a routine nature. The decision whether or not the licence should be revoked required the exercise of discretion in a matter of greatest importance, since it involved weighing the national interest against a grave injustice to an individual. It was clearly a decision to be taken only by a very senior officer and was not one in respect of which a power of delegation could be inferred.”

55. With respect to disciplinary matters I associate myself with the position adopted in Eliud Nyauma Omwoyo & 2 Others vs. Kenyatta University [2014] eKLR, where the High Court cited with approval the decision in Republic vs. Kenyatta University and 2 Others Ex Parte Jared Juma, HC Misc Civil App No. 90 of 2009, in which it was held that:

“Discipline at the Respondent’s University is necessarily an internal process conducted using internal personnel. It would be impractical to sub-contract or delegate as it were, this function to an outside agency.”

56. This position is restated in section 7(2)(a)(i)(ii) and (iii) of the *Fair Administrative Action Act, 2015* where it is provided that a court or tribunal may review an administrative action or decision, if the person who made the decision was not authorized to do so by the empowering provision; acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in contravention of any law prohibiting such delegation.

57. In this case, the letter notifying the applicant of the cancellation of its Trade Mark was clearly signed by the Chief Trade Marks Examiner as opposed to the Registrar. The Chief Trade Marks Examiner clearly has no power under the Act to cancel the registration of Trade Marks. Accordingly, the notification was issued by a person not authorised to do so and was *ultra vires* the powers of the Chief Trade Marks Examiner since there is no evidence that the Registrar was empowered by the law to delegate the duty of making the decision.

58. It was contended that there were alternative dispute resolution mechanisms which the applicant ought to have resorted to. In my view the remedy for objecting to the intention to cancel a registration is only triggered when a valid notification is given to the person affected. Where no such valid notice is given as it is alleged in this case, that option is non-existent. Again with respect to an appeal, without a decision having been taken on the grievance of a party, it cannot be said that an appeal is the most convenient, beneficial and effectual remedy in those circumstances.

59. It is therefore my view that the applicant cannot be locked from invoking this Court’s judicial review jurisdiction based on the existence of an alternative remedy since such a remedy amounts to a mirage.

60. Having considered the issues raised in this application, the inescapable conclusion I come to is that the decision of the Respondent was tainted with procedural irregularities and cannot stand. In the circumstances this application is merited.

Order

61. In the result an order of certiorari is hereby issued removing into this Court for the purposes of quashing the decision of the registrar of Trade Marks to cancel the applicant’s Trade Mark Certificate issued under class 32 (juices) Trade Mark No. 90365) vide Industrial Property Journal No. 2017/03 of 31/3/017 which decision is hereby quashed. I further issue an order of *mandamus* compelling the Respondent to reinstate the applicant’s certificate of Registration of Trade Mark.

62. I must however make it clear that this decision does not in any way validate the registration of the applicant’s Trade Mark which if the due process if properly followed may well be found improper. That however is a decision for the Registrar.

63. The applicant will have the costs of these proceedings to be borne by the Respondent.

64. It is so ordered.

Dated at Nairobi this 14th day of December, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Miyare for Mr Omogeni for the applicant

Mr Nderitu for the interested party

CA Ooko