REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO . 348 OF 2015

IN THE MATTER OF AN APPLICATION BY STRATEGIC INDUSTRIES LIMITED FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF TRADE MARKS AC CAP 506 LAWS OF KENYA

AND

IN THE MATTER OF RULE 52, TRADE MARKS RULES

AND

IN THE MATTER OF THE ASSISTANT REGISTRAR OF TRADE MARK'S DECISION OF 4th SEPTEMBER 2015.

REPUBLIC.....APPLICANT

VERSUS

THE ASSISTANT REGISTRAR OF TRADE MARKS……RESPONDENT

AND

REBECCA FASHION (KENYA) LIMITED.....…INTERESTED PARTY

EX PARTE

STRATEGIC INDUSTRIES LIMITED…….....…….APPLICANT

JUDGEMENT

Introduction

1. By a Motion brought on Notice dated 15th October, 2015 the *ex parte* applicant herein, **Strategic Industries Limited**, seeks the following orders:

1. An Order of Certiorari does issue to bring to the High Court and quash the Respondent's decision of 4th September 2015 and reflected in a Ruling made by the Respondent granting to Rebecca Fashion (K) Limited leave to file further evidence under the provision of Rule 52 of the Trade Mark rules.

2. An Order of Prohibition does issue to restrain the Respondent from considering any evidence presented to the Respondent after the close of the hearing in IN THE MATTER OF TRADE MARK NO. 70124 "FREEDOM" IN CLASS 26 IN THE NAME OF REBECA FASHION (K) LIMITED AND PPOSITION THERETO BY STRATEGIC LIMITED.

3. An order of Mandamus does issue compelling the Respondent to deliver her decision in IN THE MATTER OF TRADE MARK NO. 70124 "FREEDOM" IN CLASS 26 IN THE NAME OF REBECA FASHION (K) LIMITED AND PPOSITION THERETO BY STRATEGIC LIMITED as directed by her through the letter of 28th February 2014.

4. An order of Mandamus does issue compelling the Respondent to forthwith expunge from her record the Notice of Motion by Rebecca Fashion (K) Limited dated 14th August 2014.

5. Costs of this application and the costs for the proceedings before the Registrar in respect of the Notice of Motion be awarded to the Applicant.

Ex Parte Applicant's Case

2. According to the applicant, an advertisement was made in the Industrial Property Journal No. 2011/05 of 31st May 201 1 that indicated that Rebecca Fashion (K) Limited, the Interested Party herein, had made Trademarks application Number 70124 in class 26 to Kenya Industrial Property Institute that was seeking to register the mark FREEDOM as its trademark. It was averred that on 5th July 2011 the Applicant through its advocates **M/s Gradus Oluoch and Company Advocates** issued a notice of its intention to object to the application by the Interested Party to Register the mark 'FREEDOM' because such use of the said mark would cause confusion in the market and deny the applicant its exclusive proprietorship of the mark. The Applicant gave the Interested Party 7 days within which to abandon its claim and intention to register 'FREEDOM' as its mark but the Interested Party never replied to the demand. On 26th July the Applicant filed with Kenya Industrial Property Institute a Notice of Opposition opposing the application by Rebecca Fashion (K) Limited to register Trade Mark No. 70124 'FREEDOM' in class 26 and urged that the said application should not be accepted.
3. It was averred that by a letter dated 3rd August 2011 the Respondent sent the Notice of Opposition by the Applicant to the Interested Party giving them 42 days to file a Counter Statement and on 22nd November 2012 the Interested Party filed with the Registrar its Counter Statement through the law firm of **Henia Anzala and Associates**. By a letter dated 26th November 2012 the Respondent sent to the applicant's Advocates the Counter Statement aforestated giving it 42 days within which to file its Statutory Declaration and on 19th February 2013 the applicant filed its Statutory Declaration after applying for extension of time. The said Statutory Declaration was by a letter dated 2nd May 2013 sent to the Advocates for the Interested Party who were directed to file their Statutory Declaration within 42 days and on 20th June 2013 the Interested Party filed its Statutory Declaration. The said Statutory Declaration by the Interested Party the Interested Party was by a letter dated 28th June 2013 forwarded by the Respondent to the Applicant who was given 30 days within which to reply thereto.
4. According to the applicant, by a letter dated 2nd September 2013, the pleadings having closed the Applicants advocates wrote to the Registrar asking for the matter to be fixed for hearing and upon receipt thereof, the Respondent did on several occasions invite the parties' advocates to table

hearing dates and preceded to fix the matter for hearing on 22nd November 2013 before her. Following the failure for the matter to proceed on the scheduled dates, by a letter dated 20th November, 2013 the advocates for the Interested Party proposed for parties to file written submissions which proposal was agreeable to the Applicant's advocates who confirmed its position vide a letter dated 2nd December 2013. This proposal was accepted by the Respondent who vide a letter dated 28th February 2014 gave directions on how the matter would proceed.

5. It was averred by the applicant that the parties duly complied with the Respondent's direction after which the hearing was closed waiting the Ruling. However, on 4th September 2014 the Respondent forwarded to the Applicant's Advocates a Notice of Motion by application by the Interested Party made under the provision of the Court (sic) Procedure Rules in which it was seeking leave to adduce more evidence. As the application was opposed by the Applicant, the parties filed written submissions after which on 4th September 2015 the Respondent delivered a Ruling allowing the Interested Party to file further evidence.
6. It was submitted on behalf of the applicant that Rules 46 to 58 of the ***Trade Mark Rules*** (hereinafter referred to as "the Rules") is a code that sequentially sets out the procedure to be followed in proceedings before the Registrar and deals with the sequence in which the parties should file their pleadings. Upon being served with the counter-statement, it was submitted that the applicant must file evidence within 30 days and thereafter parties may only adduce further evidence with leave pursuant to rule 52 of the Rules. It is upon the completion of the evidence that the Registrar pursuant to rule 54 gives notice to the parties of the date for hearing the arguments in the case.
7. It was therefore submitted that leave to adduce further evidence under rule 52 can only be granted before the matter is heard since rule 54 shuts out further action save for the hearing. It was therefore submitted that in this case, the Respondent had no jurisdiction to grant leave to a party to adduce further evidence after hearing the parties. In support of its submissions the applicant relied on **HWR Wade and C F Forsyth** in ***Administrative Law***, 7th Ed. Page 6, **London and Clydeside Estate Ltd vs. Aberdeen D C [1979] 3 All ER 876**, **Cullimore vs. Lyme Regis Corporation (1961) 3 All ER 1008**, **Associate Provincial Picture House Ltd vs. Wednesbury Corporation (1947) 2 All ER 680**, **Republic vs. Commissioner of Co-Corporative ex parte Kirinyaga Tea Growers Co-operative Savings and Credit Society Limited (1999) 1 EA 245**.

The Interested Party's Case

8. The application was opposed by the Interested Party.
9. According to the Interested Party, the applicant has initiated these proceedings in bad faith and as a ploy and/or stratagem to keep the Interested Party out of market and/or to harass the interested party who is a competitor of the applicant. It was averred that based on the perusal of the Court file by the interested party's advocates, it was found that the applicant was required to serve the interested party with the court process, but the applicant informed the court that the interested party could not be found notwithstanding the fact that the applicant and the interested party participated in the proceedings before the registrar of trademarks and they always effected service on the interested party. Further, it was disclosed that the applicant and the interested party are in the same trade and they use the same marketing channels hence the applicant knows where to find the interested party without exerting protracted effort. It was further disclosed that all along, the interested party retained counsel in the proceedings before the registrar of trademark and even assuming that the interested party could not be found, the applicant would have served the interested party's counsel in accordance with Order 5 and order 9 of ***Civil Procedure Rules, 2010***, the counsel being presumably, the last known agent of the Interested party.
10. In the interested party's view, the proceedings pending before both the registrar of Trademarks as well as the instant proceedings are only intended to achieve ulterior purposes other than the real pursuit of justice, the sole object being to delay the interested party's application for trademark registration as a decoy to derail the interested party from the active involvement in the market and as a way and a means to harass the interested party, applying diversionary measures to interrupt the market focus of the interested party. Based on legal advice, it was averred that the instant proceedings are frivolous, unmeritorious unfounded and they are only intended to serve the

collateral objective of vexing and harassing the interested party while wasting precious judicial time and should be struck out for being an abuse of the court process contrary to Order 2 of the ***Civil Procedure rules, 2010***. It was the interested party's position that as at the time of filling this response the applicant had not effected service of the court process or the court order, but only served the Registrar of trademark registration and no more.

11. To the interested party, this court lacks the jurisdiction to determine the proceedings herein and grant the orders sought as sought for the following reasons:-

    a. The determination of the court of the issues raised in these proceedings will have the collateral effect of determining the evidential issues, and thereby the matters of merits of the proceedings pending before the registrar of trademarks which goes to the root of the case pending before the registrar of trademarks since that would amount to usurping the powers and jurisdiction of the registrar of trademarks.

    b. As a matter of prudent judicial practice a judicial review court should exercise restraint in issuing orders or giving determinations that have the effect of determining or affecting the merits of a case.

    c. The Court must be slow to interfere with the exercise of discretion of courts and subordinate tribunals unless where there is abuse of process which interferes with the rights of the applicant or impinges on the right to a fair hearing or where the irregularities render possibility of a fair trial remote or impossible, which is not the case in these proceedings.

    d. Judicial review jurisdiction should not be invoked to deal with issues which can be properly dealt with in a substantive manner either through the trial court or through an appellate process where an option of appeal is available. In the instant case, the applicant can counter the evidence sought to be included by the interested party through other evidence or challenging its probity once it is formerly filed. The applicant will still have the right of appeal to the High court under section 21(6) and section 53 of the trademarks act, cap 506 of the laws of Kenya.

    e. Judicial review deals with issues touching on illegality, irregularities, excess or lack of jurisdiction or other procedural questions but it does not deal with the merits of a particular matter and it does not deal with the exercise e of discretion unless such exercise fall within the challenge of illegality, irrationality and wednesbury unreasonableness

12. It was averred by the interested party, based on the same advice that that the applicant has gravely apprehended the stature, character and the nature of the proceedings before the registrar of trademarks in the judicial system in Kenya. To the interested party, the trademarks tribunal is not *per se* an administrative tribunal, that is a component of an administrative structure, but rather, it is a judicious or a quasi judicial tribunal discharging judicial functions, exercising equivalent to a subordinate court as manifested by sections 2 and 53 of the ***Trademarks Act***.

13. In the interested party's view, whether or not the proceedings before the registrar of Trademarks amounts to proceedings of an administrative tribunal or proceedings of a quasi-judicial tribunal is a distinction that do not make any difference for the following reasons:

    a. An administrative tribunal is guided by the rules of national justice;

    b. The rules of natural justice have now been subsumed in our constitution through various enactments, beginning with **Article 47 of the constitution,** which guarantees the right to a fair administrative action;

    c. That Article 2 and article 10 of the Constitution 2010 make it exceedingly clear that the constitution is the supreme law of the Republic and further that every person and every authority is enjoined by the constitution to uphold the national values and principles of governance which include:-

i. The rule of law;

ii. Equality

iii. Human rights

iv. Integrity; and

v. Non –discrimination

14. According to the interested party, fulfilling the foregoing constitutional edicts is in addition to respecting all the human rights and fundamental freedom encapsulated in the Bill of Rights in Chapter four(4) of the Constitution of Kenya 2010, under which the right to a fair hearing is a non-derogable right guaranteed under Articles 50, 24 and 25 thereof with Article 50(1) specifically guarantees right to a fair hearing before a court or any other independent and impartial tribunal or body. Accordingly the right to a fair hearing is also guaranteed before an administration of body, that which may be conducting a hearing or a trial and that the same right is guaranteed not only to the appellant herein but also to the respondent in any hearing before the Registrar of Trademarks.
15. It was further contended that enjoyment of rights and fundamental freedoms have a stricture under article 24(1)(d) which every court, tribunal and/or authority must weigh and balance the rights of the applicant, or the allegedly aggrieved party as against those of others to ensure that they do not prejudice the rights and fundamental freedoms of others and that the scope of a judicial review application like the instant one, which is largely founded on the violation of a right to a fair hearing, must be reviewed with the foregoing constitutional background in mind.
16. The interested party's position was that whereas the appellant further faults the registrar of trademarks for exceeding jurisdiction and the powers granted upon the registrar of trademarks by rule 52 of the trademarks rules 2003, the registrar of trademarks acted within her powers and jurisdiction and considered all relevant factors and materials relating to the matter before her and this explains why the appellant does not point an impropriety on the part of the registrar of trademarks or fault her for considering irrelevant facts. To it, rules of procedure are handmaidens to justice and not mistresses of justice, a time honoured legal principle that has been codified under Article 159(2) of the constitution of Kenya, 2010 which enjoins courts and tribunals to administer justice without undue regard to technicalities. It was asserted that the applicant will suffer no prejudice when the decision of the registrar is sustained as the registrar only allowed the respondent to include evidence that had been left out inadvertently and at the instance of the mistake of the respondent's former counsel (trademark agent) on record, which inadvertence or mistake ought not be visited on the respondent without proof of inertia or complicity on the part of the interested party. In its view, the application to add more evidence did not finally determine the rights of parties and the applicant herein had the opportunity and still has the opportunity to oppose and/or counter or otherwise challenge the evidence by the respondent at the main hearing of the merits of the opposition proceedings or even through making a similar application to be allowed to produce its own further evidence.
17. It was the interested party's contention that the law allows the hearing before the registrar of trademarks to be either through affidavit evidence or through *viva voce* evidence even when parties have filed statutory declarations in which instance, a party could still adduce further evidence orally and still be considered. It was reiterated that the applicant will suffer no prejudice in permitting adducing of further evidence since, as it is, it has no right guaranteed to face a weak opponent's case, and the applicant further do not enjoy any freedom from facing a strong case by the opponent. To the interested party, the registrar of trademarks was fair and just when she considered the competing rights of the parties and even when the applicant herein did not pray for an opportunity to adduce evidence, the registrar of trademarks made an express order that the applicant herein could adduce further evidence if it so wished.
18. It was therefore contended that the instant application does not meet the threshold for grant of the judicial review prayers as sought. To it, in hearing and determining any applications placed before the Registrar of trademarks, under Rule 52 of the ***Trademark Rules***, the registrar is required to *inter alia* exercise her discretion. However, the High Court must always be slow to interfere with

the discretion of a subordinate court or tribunal except in the glaring of case of departure from established legal principles. Further, an order of mandamus cannot issue to compel the exercise or discharge of a judicious or quasi function such as to make a decision and or to consider or not to consider certain evidence, materials and or factors, or to direct the officer presiding the tribunal how to proceed in making her decision. In this case, it was contended that the Court was being invited to order the registrar of Trademarks to make a decision in a particular way which goes against the principles of independence of statutory bodies and tribunals such as the Registrar of Trademarks and that if such a course were to be adopted, it would be tantamount to this court operating as a trial court and later sit an appeal of its own decision, when such a decision is appealed against under sections 21 and 53 of the ***Trademarks Act***, Cap 506.

19. It was averred that the prayers sought are substantive prayers, leave to adduce more and/or further evidence and grounds were clearly set out on the face of the application. To the interested party, all the evidential materials sought to be further adduced were brought to the notice of the applicant herein and the registrar of Trademarks through the affidavit in support of the application and that in the proceedings before the registrar of trademarks, the applicant expressly admitted that the registrar of trademarks has discretion under Rule 52 of the trademark Rules 2003 to grant the orders as she did.
20. It was therefore stated that the application herein is unmerited and it is just a waste of precious judicial time. Further, the statutory statement of facts which is supposed to be the linchpin of the application do not plead even a single fact to substantially fault the registrar of trademarks, or to demonstrate that the application herein is merited but instead pleads to pure points of law, which is a serious departure from the procedure of pleadings in judicial review application.
21. It was the interested party's view that upon conclusion of the opposition proceedings on merit, the applicant has an opportunity to be heard by way of an appeal and to raise all those points of law that it has raised in these proceedings which proceedings contravene the letter, spirit, purposes, values and principles of the Constitution of Kenya, 2010 and more particular, Articles 50, 159, 165, 258 and 259 of the Constitution of Kenya, 2010 and the same should be dismissed with costs to the respondent. To the interested party, the manner in which these proceedings have been conducted is most casual and flippant hence the Court was urged to award the respondent the costs of this application at the higher scale and that the opposite proceedings to proceed to full hearing.
22. It was submitted on behalf of the interested party that the registrar acted within the limits of jurisdiction and did not exercise her powers perversely but acted fairly and in god faith. It was submitted that this Court lacks the jurisdiction to hear and determine the instant proceedings since the issues the subject of this application are matters challenging the merit by the registrar and the issue of the admissibility of the evidence is still to be determined by the registrar.
23. In this case it was submitted that there exist an alternative remedy of an appeal and there are no exceptional circumstances to warrant these proceedings. It was submitted that the ***Trade Marks Act*** confers on the Registrar, who is also the Manging Director of the Kenya Industrial Property Institute, vast powers in the performance of his functions including hearing of applications challenging registration.
24. It was submitted that where the ***Trade Marks Act*** is silent or deficient as to the procedure, the Registrar like any other Tribunal can import the provisions of the ***Civil Procedure Act***. It was submitted based on **Sony Holdings vs. Sony Corporation Civil Appeal No. 37 of 2013, Republic vs. Registrar of Trade Marks Milimani High Court Misc. Application No. 165 of 2012 and Pulhofer & Anor. vs. Hillingdon London Borough Council [1986]1 AC 484,** that in the instant case evidence was admitted after a formal hearing of both parties hence the Registrar acted judiciously and as the complaint go to the merits of the said decision, this Court has no jurisdiction to grant the orders sought herein.
25. The interested further relied on Article 159(2)(d) of the Constitution and urged the Court not to determine the matter on procedural technicalities.

Determination

26. I have considered the issues raised herein.
27. The only issue for determination on this application is whether the Registrar of Trade Marks has the power under rule 52 of the ***Trade Marks Rules*** to permit further evidence to be adduced after

the statutory declaration has been filed by the respondent under rule 51 of the said Rules. In my view, to ascertain whether a particular act is *ultra vires* or not, the main purpose must first be ascertained, then special powers for effectuating that purpose must be looked for and if the act is neither within the main purpose nor the special powers expressly given by the statute, the inquiry should be made whether the act is incidental to or consequential upon the main purpose. An act, it is my view, is not *ultra vires* if it is found to be within the main purpose, or within the special powers expressly given by the statute to effectuate the main purpose, or if it is neither within the main purpose nor the special powers expressly given by the statute, but incidental to or consequential upon the main purpose and the act is reasonably done for effectuating mandate.

28. Rule 51 aforesaid states:

> ***(1) Within thirty days after the receipt of the statutory declaration of the applicant under rule 50, the opponent may leave with the Registrar evidence, by way of statutory declaration, confined strictly to matters in reply.***
>
> ***(2) The statutory declaration shall be in duplicate.***
>
> ***(3) Upon receipt of the statutory declaration and duplicate the Registrar shall forthwith send the duplicate to the applicant.***

29. Rule 52 on the other hand provides as follows:

> ***No further evidence shall be left on either side, but, in any proceedings before the Registrar, he may at any time give leave to either the applicant or the opponent to leave any evidence upon such terms as to costs or otherwise as he may think fit.***

30. The side note to the said section reads "further evidence". If this section is literally taken as it is, it does not make sense when read with reference to the side note. In **Republic vs. Chief Magistrate's Court, Nairobi & 2 Others ex parte Akoth Nairobi HCMA No. 994 of 2004 [2006] 1 KLR 252**, the High Court held that:

> **"…this court would have power to correctly interpret the relevant section so as to give effect to the intention of the Legislature. Where the language of a statute is in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. The court will endeavour to give some meaning to the section and will not allow the error of the draftsman to destroy the clear intention of the Legislature. Sometimes where the sense of statute demands it or where there has been an obvious mistake in drafting a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act….There is a general presumption against absurdity. It is presumed that Parliament intends that the court, when considering, in relation to the facts of the instant case, which the opposing constructions of an enactment corresponds to its legal meaning, should find against a construction which produces an absurd result since this is unlikely to have been intended by Parliament. Here absurd means contrary to sense or reason."**

31. **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** held that:

> **"It [literal interpretation] is the voice of strict constructionists. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal grammatical construction of words, heedless of the consequences. Faced with staring injustice, the judges are, it is said, impotent, incapable and sterile. Not with us in this Court. The**

literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach." In all cases now in the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision...It is no longer necessary for the judges to wring their hands and say: "There is nothing we can do about it". Whatever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy...by reading words in, if necessary - so as to do what Parliament would have done, had they had the situation in mind…The defect that appears in a statute cannot be ignored by the judge, he must set out to work on the constructive task of finding the intention of the Parliament. The judge should not only consider the language of the statute but also the social conditions which gave rise to it, and supplement the written word so as to give "force and life" to the intention of the Legislature."

32. In **J B Kohli & Others vs. Bachulal Popatlal [1964] EA 219**, it was held that though it is true that the marginal notes do not form part of a statute, yet some help can be derived from the side note to show what the section is dealing with.
33. In my view rule 52 aforesaid deals with the power of the Registrar to allow parties to lead further evidence "at any time". In my view the said provision should be construed to read that:

No further evidence shall be led on either side, but, in any proceedings before the Registrar, he may at any time give leave to either the applicant or the opponent to lead any evidence upon such terms as to costs or otherwise as he may think fit.

34. It therefore follows that the Registrar has the power at any time to lead further evidence. Whether or not she was justified in so doing is a matter which goes to the merit of her decision and such decision can only be challenged by way of an appeal as opposed to judicial review. In the premises I associate myself with the position adopted by **Warsame, J** (as he then was) in **Republic vs. Registrar of Trade Marks** (supra) that:

"The Court will therefore only interfere with the discretion exercised by an inferior body if such discretion is exercised unreasonably, in bad faith or in disregard to the law."

35. I also agree with the position adopted in **Puhlofer & Anor. vs. Hillingdon London Borough Council** (supra) that:

"It is not appropriate that judicial review should be made use of to monitor actions of local authorities under the Act, save in exceptional cases. Where the existence or non-existence of fact is left to the discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision making power save where it is obvious that the public body consciously or unconsciously are acting perversely."

36. In **JR. Misc. Application No. 477 of 2014: Republic vs. Public Procurement Administrative Review Board & 2 Others** this Court expressed itself as follows:

"…the issue for judicial review is not whether the decision is right or wrong, nor whether the Court agrees with it, but whether it was a decision which the authority concerned was lawfully entitled to make since a decision can be lawful without being correct. The Courts must be careful not to invade the field of policy entrusted to administrative and specialized organs by substituting their own judgment for that of the administrative authority. They should judge the lawfulness and not the wisdom of the decision. If the decision was wrong, it should be remedied by an appeal which allows the appellate court to engage in an intrusive analysis of evidence by the trial

tribunal and review the merit of the decision in question…In my view the Respondent was entitled to find that the supplementary grounds did not contain fresh issues or otherwise. The mere fact that it made one decision and not the other does not justify this Court in the exercise of its judicial review jurisdiction in interfering therewith. Similarly, the Respondent's finding that the 2nd interested party did not comply with its directions issued in the respondent's earlier decision is a matter which would go to the merit rather that the process".

37. In this case the applicant has restricted itself to the issue of jurisdiction of the Registrar and all the other issues were just collateral to this issue. Having determined the substantive issue of jurisdiction, all the other collateral issues must of necessity collapse. Whether or not the Registrar exercised her discretion properly, which discretion, I have found she had, is a matter for an appellate tribunal.
38. It follows that the Notice of Motion dated 15th October, 2015 fails and is dismissed with costs to the interested party.
39. It is so ordered.

Dated at Nairobi this 28th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Khasira for Mr Mungu for the applicant

Mr K N Mwangi for the interested party

Cc Mwangi