REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 143 OF 2011

SAFEPAK LIMITED..... APPLICANT/APPELLANT

VERSUS

GENERAL PLASTICS LIMITED.....RESPONDENT

R U L I N G

The application before the court is the Notice of Motion dated 21st September, 2011. It mainly seeks stay of proceedings of the Industrial Property Tribunal case No. 36 of 2002 pending the hearing and final determination of this appeal.

This appeal was filed against a ruling made by the said Tribunal, dated 28th February, 2011 allowing the Respondent herein to file further evidence in the said application No. 36 of 2002 which seeks the revocation of the registration of Industrial Design No. 186 to the Appellant. The Tribunal having heard the application by the Respondent to be allowed to put in more and further evidence material to show that the said Industrial Design No. 186 should not have been registered in the first place on the ground that at the time of such registration it was already a design in the public domain and should not be registered in the exclusive use and ownership of the Appellant, allowed the Respondents application to put in new evidence. This aggrieved the Appellant who then filed this appeal.

The Appellant in the meantime filed this application for stay of the whole proceedings of the Industrial Property Tribunal Case No. 36 of 2002 until this appeal is determined.

The Appellant's arguments in support are that the Appeal raises serious arguable and important issues of law which are indicated in the Memorandum of Appeal and which include: -

a) i) Whether the Industrial Property Tribunal's decisions are bound by the legal principle of stare decisis vis avis the decisions of the High Court. That is to say, whether the decisions of the High Court are binding upon the Tribunal?

ii) Whether the principles of Res sub-Judice and Res Judicata also bind and are applicable in the Tribunals proceedings.

iii) Whether the principle of law contained in Articles 40(5) & 40 (6) of the Constitution affect the operations of the Industrial Property Tribunal Act and the Industrial Property Tribunal Rules, 2002.

b) That if the hearing of the Tribunal Case No. 36 of 2002 is not stayed, but allowed to go into its final decision, it will render the result of this appeal nugatory and rending the appeal to be an academic exercise

c) That costs alone would not be an adequate or useful compensation or remedy in the circumstances of this case.

d) That this application for stay has not delayed in being made and that in any case, delay is not an issue in cases of stay of proceedings since the Respondent Tribunal Case No. 36 of 2002 has never been fixed or even threatened to be fixed for hearing.

The Respondent on the other hand, submitted that the Applicant has not shown sufficient evidence that if stay is not granted and the Tribunal suit is finalized, the entire substratum of the Appeal case will be destroyed and rendered nugatory. The Respondent also said that in case the stay is not granted and the Tribunal case is completed, compensation in costs can be ordered if the appeal finally succeeds.

Both parties referred this court to decided cases on the issue of stay of proceedings and I have carefully perused them and considered their relevance. I have also considered the main issue in this application, which is whether or not a stay of proceedings should be granted.

Taking into account all the relevant issues, I observe at the start of this suit, that it is the Applicant who first and foremost successful obtained the registration of the Industrial Design No. 186 which he still uses todate. It is his property and a property which is clearly substantive. I further observe that the Respondent's Industrial Case No. 36 of 2002 is intended to challenge the rights of the Appellant under the registered Industrial Design No. 186. While the Respondent is legally entitled to challenge the propriety of the registration of the registered design and has and is doing so, the proceedings are not finalized and the protection arising from the registration is still intact and still protectable.

This court accordingly understands the Appellant's act of challenging the Tribunals' order of allowing further evidence to be filed to prove unregistrability of the Industrial design as a further attempt to protect its rights under the registered design under the relevant law. In the view of this court, every party who has filed an appeal, except where the appeal is shown to have no arguable issues, should be given opportunity to have its day in court without fear or arguing an appeal that has already been emasculated by a finally heard and decided suit.

In this court's view and finding allowing the Tribunal Case No. 36 of 2002 to go to a final determination before the appeal is finally determined, will remove and destroy the entire substratum of the appeal which is whether or not additional evidence to the suit for revocation, is proper in law. This fact is clearly borne out by the grounds of appeal which include the ground that allowing additional evidence is inconsistent with and is a contradiction to the legal authorities cited before the Tribunal made the ruling appealed from.

It is also quite clear from the record that the issue of the principle of *stare desis* probably laid in High Court Misc. Case No. 348 of 2006 which was cited before the lower Tribunal, is a substantive issue in this Appeal. Until the same is decided by this court, it would be quite improper in the view of this court, to allow the Tribunal proceed to take the disputed further evidence into its proceedings.

This court on the other hand observes that the Respondent filed the Tribunal case No. 36 of 2002, far back in 2002. The purpose of the suit was to revoke the registration of the Industrial Design No. 186. The record shows that it had introduced and had began to apply a different unregistered design in

contravention of the Appellant's said registered design No. 186, together with all the rights such registration obtain to the registered owner of the design. While it was upon the Appellant to start any infringing proceedings, which apparently it has not started the fact remains that the law protects a registered design until it revoked.

What comes out clearly is that the Respondent filed the lower Tribunal Case No. 36 of 2002 to revoke the Industrial Design No. 186 but did little for a period of about eight (8) years to prosecute it while on the other hand continued to use it competing unregistered design to trade in competition against the registered design No. 186 of the Appellant. What is not clear , is why the Appellant also failed to apply to strike out the suit for lack of prosecution or why it did not itself go ahead to fix it for a hearing to force the Respondent to prosecute the suit.

Be the above what it may, it is clear to this court that the Respondent stands to suffer little or no damage or loss if the stay of proceedings in Tribunal case No. 36 of 2002, is granted. Indeed, the Respondent will continue to benefit by continuing to use its unregistered Industrial Property Design in competition against the Appellant's registered Design No. 186.

The result is that this court finds merit in granting a stay of proceedings, which it hereby orders in this appeal pending the hearing and determination of this Appeal. Since the Record of Appeal is already filed, the court orders that the Appellant should proceed to fix this matter for directions. Costs are in the cause. Orders are made accordingly.

Dated and delivered at Nairobi this 8th day of May, 2012.

.....

D A ONYANCHA

JUDGE