



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Case 28 of 2011

REPUBLIC.....APPLICANT

VERSUS

INDUSTRIAL PROPERTY TRIBUNAL.....RESPONDENT

COCKRID (K) LTD.....INTERESTED PARTY

EX PARTE

SANITAM SERVICES (EA) LTD

JUDGMENT

The ex-parte Applicant (Sanitam Services (EA) Ltd) and the Interested Party (Cockrid (K) Ltd) are before the Respondent (Industrial Property Tribunal) as the Defendant and the Plaintiff respectively in Case No. 56 of 2008. I will henceforth refer to the Respondent herein as the Tribunal.

The Applicant came to this court vide the application dated 13th September, 2011 praying that the Tribunal be prohibited from proceeding with the case before it and that an order of certiorari quashing its proceedings of 23rd August, 2011 regarding Patent Number AP773 be issued.

The main ground on which the Applicant seeks these orders is that the Tribunal, as constituted, lacks jurisdiction to hear and determine the dispute. The Applicant contends that the Tribunal as constituted offends the express provisions of Section 113(1) of the Industrial Property Act of 2001 (hereinafter simply referred to as the Act).

In brief, when the parties herein appeared before the Tribunal, the Tribunal's chairman recused himself from hearing the matter on the ground that he had acted for one of the parties while practising as an advocate. The Tribunal is by law composed of five members. The remaining members then went ahead and gave directions and a hearing date for the matter. The Applicant has thus approached this Court with an argument that the Tribunal cannot proceed with the hearing of the matter since it is not properly constituted as per the Act.

The issue for the determination of this Court is whether the Tribunal can be said to be legally constituted in the absence of one or more of its five members. Section 113(1) of the Act provides for the composition of the Tribunal as follows:-

“For the purposes of hearing and determining appeals in accordance with section 112 and

exercising the other powers conferred on it by this Act, there is established an Industrial Property Tribunal which shall consist of the chairman and four members appointed by the Minister.”

The parties are agreed that the Act and the Industrial Tribunal Rules, 2002 do not provide for the quorum of the Tribunal. A plain reading of Section 113(1) of the Act gives the impression that all the five members of the Tribunal have to hear a matter in order for its proceedings to be valid. The Applicant also argues that the chairman has to be present in all the Tribunal’s proceedings. The Tribunal and the Interested Party, however, argue that the said section cannot be interpreted in the manner suggested by the Applicant. In my view, it would be unreasonable to imagine that in the event of one member being absent no case can proceed before the Tribunal. This would be a very narrow interpretation of the law which would not give essence to the intentions of Parliament. Such an interpretation would result in absurd outcomes. I believe that the main objective of creating the Tribunal was to have a body composed of persons knowledgeable in industrial property disputes to hear and dispose of such disputes expeditiously.

Although Parliament did not expressly provide for the quorum of the Tribunal, a reading of sub-sections 9 and 10 of Section 113 of the Act clearly shows that Parliament envisaged a situation where a member of the Tribunal can be absent. Parliament further envisaged a situation where replacement of an absent member need not be made by the Minister. The Minister is given room to decide whether or not to replace a member of the Tribunal. For example, sub-section 10 provides that:-

“If any member of the Tribunal appointed under this section is temporarily unable to perform his duties, the Minister may appoint another person to act in his place during the period of his absence.”

The use of the words “the Minister may” in the above cited provision means that Parliament foresaw a situation where the Tribunal can proceed in the absence of one of the five members. I therefore hold the view that not all the five members of the Tribunal have to be present during a hearing in order for its proceedings to be valid.

If the interpretation I have reached is misconceived, then I will seek an answer in the Constitution. Article 47 of the Constitution provides that every person shall have fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 159(2) of the same Constitution provides that in exercising judicial authority, the courts and tribunals shall, among other things, ensure that justice is not delayed. In interpreting the laws of this country, the courts must therefore ensure that the provisions of the Constitution are adhered to. Holding that the Tribunal cannot act in the absence of the chairman or any other member will mean that its operations would at times be paralysed and the result will be delayed resolution of disputes. Such a situation goes against the spirit of the Constitution. I believe that Section 7(1) of the Sixth Schedule of the Constitution which provides that: **“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it in conformity with this Constitution”**, gives this Court the licence to interpret the law as I have done. Such a reading of the Act will ensure that the parties herein can get expeditious and efficient justice from the Tribunal.

In my view, a purposive interpretation is the most appropriate and reasonable way of dealing with Section 113 of the Act. That means that not all the five members have to sit for the proceedings of the Tribunal to be valid. The failure by Parliament to provide for the quorum of the Tribunal has the potential of violating the rights to access to justice and fair administrative action. For purposes of clarity, the Act ought to be amended to include a provision on the quorum of the Tribunal.

In conclusion, I make orders as follows:-

- a) The application is dismissed;
- b) A copy of this decision to be served on the Attorney General for the necessary action; and
- c) The application was not frivolous. However, none of the parties before this Court is to blame for the

defect in the Act. As such, each party will meet own costs of these proceedings.

DATED, SIGNED and DELIVERED this 29th day of November, 2012

W. K. KORIR
JUDGE