



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 490 of 2009**

**RALSON (INDIA) LIMITED.....APPELLANT**

**VERSUS**

**DOSHI IRON MONGERS LIMITED.....RESPONDENT**

**R U L I N G**

1. Ralson (India) Limited, (hereinafter referred to as the appellant), has lodged an appeal in this court under Rule 117 of the Trademark Rules and Order XLI Rule 1(1) of the Civil Procedure Rules. The appeal was lodged on 4<sup>th</sup> September, 2009 by way of a notice of motion.
2. On the 16<sup>th</sup> September, 2009, Doshi Iron Mongers Limited, who is the respondent to the appeal, filed grounds of opposition contending *inter alia*, that the appellant's notice of motion was misconceived, bad in law, and an abuse of the court process, that the application was fatally defective and cannot be supported in law or in fact.
3. Mr. Omulele who appeared for the respondent argued that the appeal before the court was incompetent and ought to be struck out. He pointed out that under Rule 117 of the Trademarks Rules, an appeal should be made by motion in the usual way, and that the motion must be brought within 60 days. Mr. Omulele argued that the usual way of filing a motion is to file a notice of motion which sets out the grounds upon which the motion is made. The notice must also be supported by an affidavit, so that the court considering the motion has the benefit of the grounds upon which the motion is based and the facts supporting those grounds.
4. Mr. Omulele referred to Order L Rule 3 of the Civil Procedure Rules, and submitted that a party desiring to rely on evidence must avail the evidence through a notice of motion. He pointed out that since the proceedings, subject of the appeal were before the Tribunal, a notice of motion alone filed in this court cannot be of any evidential value.
5. Mr. Omulele noted that the appellant had purported to file an affidavit one month after filing the notice of motion. He noted that that affidavit not having been filed with a notice of motion, cannot be considered by this court as having been filed in support of the motion. Mr. Omulele further noted that the affidavit was filed without leave being sought or granted by the Registrar, as provided under Rule 117 of the Trademarks Rules. He therefore urged the court to strike out the motion for being fatally defective.
6. Mr. Kiragu who appeared for the appellant, urged the court to dismiss the preliminary objection as the same was not merited. Referring to the case of *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd [1969] EA 696*, and *Civil Appeal No.103 of 1996, Eunice Karimi Kibunja vs Mwirigi M'Ringera Kibunja*, Mr. Kiragu pointed out that it was undesirable to raise matters that would require investigations on a preliminary objection. Mr. Kiragu submitted that under Rule 117 of the Trademarks Rules, all that was required to lodge an appeal, was to present a notice of motion to the Registry in the usual way and pay appropriate fees. Mr. Kiragu submitted that the Trademarks Rules were silent on the procedure after filing the motion, and therefore the appellate court must revert to Order XLI of the Civil Procedure Rules, which deals with all appeals to the High Court.
7. Mr. Kiragu noted that under Order XLI Rule 1(2) of the Civil Procedure Rules, a

memorandum of appeal was only required to contain grounds of objection to the decree or order appealed against, without any argument or narrative. Therefore, Mr. Kiragu argued, the notice of motion required under Rule 117 of the Trademarks Rules, is a stand alone document that does not require an affidavit. Mr. Kiragu added that the fact that an affidavit was filed before directions were made by the court under Order XLI Rule 8B(3) of the Civil Procedure Rules, does not change that position. He maintained that there was no requirement that an affidavit must state that it is supporting a motion. He further noted that Order L Rule 1 of the Civil Procedure Rules, does not provide for every motion to be supported by an affidavit.

8. As regards Order L Rule 3 of the Civil Procedure Rules, which requires a motion to state in general terms the grounds upon which it is brought, and where an any affidavit is intended to be used the same to be filed, Mr. Kiragu submitted that the court would need to determine whether the motion is grounded in evidence. He submitted that in this case the motion was an appeal in respect of which directions of the court would be necessary under Order XLI Rule 8B of the Civil Procedure Rules.

9. Mr. Kiragu further referred to Section 1A of the Civil Procedure Act (as amended), which states the overriding objective of the Act, and which requires the court to give effect to that overriding objective. He further referred to Section 1B of the Civil Procedure Act which provides the aim of the Civil Procedure Act to be the just and timely disposal of proceedings. Referring to **Boyes vs Gathure [1969] EA**, Mr. Kiragu argued that wrong procedure does not invalidate proceedings, if it does not go to jurisdiction.

10. Mr. Kiragu further relied on **Olive Cassy Juandoo vs A.G. of Guyana, [1971] (PC) 972** which was cited in **Neffat vs Kenya Bus Services Ltd & another [2002] LLR 2517 8CK**, and also in **Misc. Application No.359 of 2004 in the matter of Richard Muchai vs Kingsway Tyres and Auto Mart Ltd**, for the proposition that, in the absence of any prescribed procedure the applicant is at liberty to approach the court by any other lawful procedure. Mr. Kiragu noted that striking out the notice of motion was in essence striking out pleadings in the appeal, which would be a drastic action. He therefore urged the court if persuaded that an affidavit was necessary, to extend time for the appellant to file one. Mr. Kiragu maintained that the court's discretion to extend time under Order XLIX Rule 5 of the Civil Procedure Rules, was not taken away by Rule 117 of the Trademarks Rules.

11. In response to Mr. Kiragu's submissions Mr. Omulele reiterated that the issue before the court was whether the notice of motion filed by the appellant complies with Rule 117 of the Trademarks Rules. Mr. Omulele submitted that the rule was very clear on what was required and therefore the court could not ignore the rule. He distinguished the case of **Boyes vs Gathure** (supra) as dealing with situations on where there were no clear rules. He argued that that was not the position herein. He maintained that although the Civil Procedure Rules provide for situation where an affidavit may not be necessary, the ordinary usual way for a notice of motion to be supported by an affidavit. Mr. Omulele therefore urged the court to uphold the preliminary objection and dismiss the appeal.

12. I have given due consideration to the submissions made before me and the authorities cited. As simply put by Mr. Omulele, the main issue in this preliminary objection is whether the notice of motion filed by the appellant complies with Rule 117 of the Trademarks Rules. In other words, whether there is a competent appeal before this court. The issue which has been raised is one of procedure. It is an issue which if resolved in the respondent's favour, is capable of determining this appeal. It is therefore a pure point of law as described in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** (supra). I find therefore that the objection has been properly brought as a preliminary issue.

13. Rule 117 of the Trademarks Rules, states as follows:

**“Where a person intends to appeal to the court, the appeal shall be made by motion in the usual way, and no such appeal shall be entertained unless notice of motion is given within 60 days from the date of the decision appealed against or within such further time as the Registrar shall allow.”**

14. It is not disputed that the appellant initiated its appeal in this court by way of a notice of motion. The motion was filed on 4<sup>th</sup> September, 2009 which was within 60 days from the decision appealed against, the decision having been delivered on the 6<sup>th</sup> July, 2009. The notice of motion filed by the appellant was not accompanied by a supporting affidavit at the time of filing. Therein lies the problem. Does a notice of motion filed in the usual way have to be accompanied by a supporting affidavit?

15. Order L Rule 3 of the Civil Procedure Rules provides for the contents of the motion as follows:

***“Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”***

16. The above provision shows that a notice of motion need only be supported by an affidavit where evidence is necessary to support the grounds stated on the motion. The question is whether Rule 117 of the Trademarks Rules envisaged a notice of motion which is based on evidence by affidavit. My considered view is that Rule 117 of Trademarks Rules cannot be read in isolation. That Rule must be read together with the provisions of Order XLI of the Civil Procedure Rules which provides the procedure for appeals.

17. Rule 1 of Order XLI of the Civil Procedure Rules which provides for the form of the appeal, simply requires the setting out of the grounds upon which the decree or order is appealed against. Further, before allowing the appeal to go to hearing, the court is required under Order XLI Rule 8B of the Civil Procedure Rules, to confirm that a proper memorandum of appeal together with all pleadings, proceedings, and judgment of the lower court or Tribunal, subject of the appeal, are before the court. Of importance, is Order XLI Rule 22 of the Civil Procedure Rules, which restricts the production of additional evidence during the appeal stage. Such evidence can only be adduced with leave of the court under specified circumstances which are not obtaining herein.

18. Reading Rule 117 of the Trademarks Rules, together with the provisions of Order XLI of the Civil Procedure Rules, it is apparent that the rule was simply providing for the manner of lodging an appeal as a notice of motion setting out the grounds upon which the appeal is anchored. The use of the word “usual way” cannot have been intended to mean that the notice of motion must be accompanied with affidavit evidence, as such evidence was not admissible at the stage of filing the appeal. The fact that the appeal was to be brought by way of notice of motion did not mean that the appeal was to be determined by way of the notice of motion only, without reference to the provisions of Order XLI of the Civil Procedure Rules. The facts upon which the grounds of appeal were based could only be canvassed at the hearing of the appeal when the record of appeal, the original record of the lower court and any other necessary document were before the court.

19. For the above reasons, I find that an affidavit in support of the notice of motion filed on 4<sup>th</sup> September, 2009 was not necessary and therefore, overrule the preliminary objection. Orders accordingly.

**Dated and delivered this 19<sup>th</sup> day of February, 2010**

**H. M. OKWENGU**  
**JUDGE**

In the presence of: -  
Kiragu for the appellant  
Omulele for the respondent absent  
Eric - Court clerk