



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 483 of 2009

TAMU TAMU KENYA LIMITED.....APPELLANT

VERSUS

PREMIER COOKIES LIMITED & ROLLFAST HOLDINGSLIMITED.....RESPONDENT

R U L I N G

1. Tamu Tamu Kenya Limited (hereinafter referred to as the appellant), is dissatisfied with the ruling and decision of the Registrar of Trade Marks refusing the application to register TMA No.59683. The appellant has lodged an appeal in this court against that decision under Section 52 of the Trade Marks Act Cap 506 as read with Rule 117 of the Trade Marks Rules. The appellant has filed his appeal by way of a notice of motion dated and filed on 2nd September, 2009. The motion is supported by an affidavit sworn by the appellant's director Mitesh Shah.

2. Premier Cookies Ltd who is the respondent to this appeal, has filed a notice of preliminary objection, to the appellant's notice of motion. The objection is taken on the grounds that the motion does not satisfy the mandatory provisions of the law. The provisions have been identified as Sections 79G of the Civil Procedure Act, Order XLI Rule 1, Rule 2 and Rule 8(2) of the Civil Procedure Rules.

3. Mr. Omuga who argued the preliminary objection on behalf of the respondent, submitted that the objection was two-pronged. Firstly, is the issue of how an appeal to this court, arising from a decision made under the Trade Marks Act, is to be filed. Secondly, is the period within which such an appeal should be filed. Mr. Omuga pointed out that Order XLI Rule 1 of the civil Procedure Rules provides for an appeal to be brought by way of a memorandum of appeal, whilst Order XLI Rule 2 prohibits any appellant from arguing any grounds not contained in the memorandum of appeal. Mr. Omuga contended that the appellant having not filed any memorandum of appeal, there was no proper appeal before the court. Mr. Omuga pointed out that Rule 117 of the Trade Marks Rules is in conflict with Section 79G of the Civil Procedure Act.

4. Rule 117 of the Trade Marks Act 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.”

Whilst Section 79G of the Civil Procedure Act provides as follows:

“Every appeal from a subordinate court to the High court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

5. Mr. Omuga submitted that Rule 117 of the Trade Marks Rules being subsidiary legislation, Section 79G which is part of a substantive Act of Parliament, must prevail. Therefore the appeal ought to have been filed within 30 days. Mr. Omuga noted that the ruling subject of the appeal was delivered on 6th July, 2009, whilst the appeal was filed on 2nd September, 2009. Thus, the appeal was filed outside the 30 days period. Further, Mr. Omuga argued that the powers of this court to determine an appeal is grounded in the Civil Procedure Act and therefore the Rules made under the Civil Procedure Act must be considered superior to the Rules made under the Trade Marks Act.

6. In support of his submissions, Mr. Omuga relied on *Kyuma vs Kyema [1988] KLR 185*, wherein Apaloo JA. (as he then was), ruled that the most important document to be filed in an appeal is a memorandum of appeal, and that if the same is filed outside the 30 day period without leave of the court, the appeal is incompetent. Mr. Omuga also relied on *HCCC No.2054 of 1993 Mohan Galot vs Kenya National Capital Corporation*, wherein Ochieng J. in a similar situation ruled that no memorandum of appeal having been filed, there was no competent appeal before the court. Mr. Omuga argued that since the appellant did not file any memorandum of appeal, the notice of motion filed by the appellant cannot substitute the memorandum of appeal and the appeal was incompetent.

7. In response to the preliminary objection, Mr. Ong'ondi who appeared for the appellant, maintained that the objection was misconceived and without merit. Mr. Ong'ondi argued that whereas Section 79G of the Civil Procedure Act governs appeals from orders and decrees, Section 79 of the Civil Procedure Act, provides that the provision of part VIII of the Civil Procedure Act, applies to orders made under that Act, or under any special or local law in which a different procedure is not provided. He submitted that where a different procedure was provided, part VIII is not applicable. Mr. Ong'ondi maintained that Rule 117 of the Trade Marks Rules provides for appeals to be made by way of a notice of motion, thereby providing a different procedure. Therefore Section 79G or part VIII of the Civil Procedure Act is not applicable. Mr. Ong'ondi submitted that since Rule 117 of the Trade Marks Rules provides for the filing of the appeal within 60 days, and the appeal was filed on the 58th day from the date of delivery of the ruling subject of the appeal, the appeal was filed within time.

8. Mr. Ong'ondi further referred to *Halsbury's Laws of England, 3rd Edition, Vol.38 par.937*, wherein it stated as follows:

“Notice and entry of appeals. Appeals to the court (g) under the Trade Marks Act, 1938(h), must be made by notice of motion (i). All applications to the court under that Act, whether by way of appeal or otherwise (k), must be served on the registrar (l) and may be required to be served on other interested persons (m).”

9. Mr. Ong'ondi also referred to *Atkins's Encyclopaedia of Court Forms in Civil Proceedings 2nd Edition Vol.38 par.14* which states as follows:

“Procedure on applications and appeals to High Court. An application or appeal to the High Court is by motion in the Chancery Division in the normal way (r); notice of motion (s) must be given within one calendar month from the date of the decision appealed against (t). All applications to the court (u), whether by way of appeal or not, must be served on the registrar (a).”

10. Mr. Ong'ondi distinguished the cases which were cited by Mr. Omuga contending that they do not relate to appeals from the Registrar of Trade Marks in respect of which a different procedure is provided.

11. In reply to Mr. Ong'ondi's submissions, Mr. Omuga reiterated that jurisdiction of determining appeals is conferred on the court under part VIII of the Civil Procedure Act i.e. Section 65 to 79G of the Civil Procedure Act as well as Order XLI of the Civil Procedure Rules. Mr. Omuga maintained that the appeal must be commenced by a way of a memorandum of appeal. He noted that there would be no opportunity of the court to give directions in the appeal if a notice of motion is used. Mr. Omuga distinguished the authorities referred to by Mr. Ong'ondi contending that they are foreign decisions which cannot oust the expressed provisions conferred by a local Act of Parliament.

12. I have given due consideration to the preliminary objection which has been raised as well as the submissions made before me. It is common ground that the appeal filed before this court arises from a decision of the Registrar of Trade Marks. The Trade Marks Act Cap 506 gives powers to the Registrar of Trade Marks to deal with all applications for registration of Trade Marks. The right of an appeal to this court against the decision of the Registrar of Trade Marks is conferred by Section 51 and 52 of the Trade Marks Act as read with Rule 117 of the Trade Marks Rules. The High Court's jurisdiction in appeals arising from decision of the Registrar of Trade Marks is therefore, a special jurisdiction conferred by the Trade Marks Act. The question is whether there is conflict between the Trade Marks Act Cap 506, and the Civil Procedure Act Cap 21 of the Laws of Kenya.

13. In my view, Section 3 of the Civil Procedure Act provides an insight. That provision provides as follows.

“In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.”

14. Therefore, since the Trade Marks Act confers a special jurisdiction on this court, that jurisdiction must be exercised in accordance with that Act. The Civil Procedure Act and Rules are only applicable to the extent that they are not inconsistent with the Trade Marks Act and Rules, but are supplementary. This position is further re-enforced by Section 79 of the Civil Procedure Act which provides that the provisions provided under Part VIII of the Civil Procedure Rules which relates to appeals to the High Court and Court of Appeal:

“shall, as far as may be, apply to appeals-

(a) From appellate decrees; and

(b) From orders made under this Act or under any special or local law in which a different procedure is not

provided.” (Underlining added).

15. My understanding of the above provisions is that in the case of a special jurisdiction, where a different procedure has been provided for appeals by the statute conferring the special jurisdiction, it is that procedure that is to be applied and not the procedure provided under the Civil Procedure Act and Rules. Therefore, it matters not that the Civil Procedure Act has provided for an appeal to be lodged within 30 days, an appeal against the decision of the Registrar of Trade Marks may be brought to this court within 60 days as provided under Rule 117 of the Trade Marks Rules.

16. Similarly, the requirement provided under Order XLI Rule 1(1) of the Civil Procedure Rules for an appeal to be in the form of a memorandum of appeal, is not applicable to appeals against the decision of the Registrar of Trade Marks as such an appeal is required under Rule 117 of the Trade Marks Rules to be made by motion. The fact that the appeal is initiated by way of motion, does not in any way derogate from the need to have the appeal listed before a Judge under Order XLI Rule 8B of the Civil Procedure Rules for directions concerning the appeal.

17. The cases of *Kyuma vs Kyema* (supra), and *Mohan Galot vs Kenya National Capital Corporation* (supra), which were cited by Mr. Omuga are distinguishable as they both involve appeals from orders made under the Civil Procedure Act and Rules. They did not involve appeals from orders made under any other special law as is the case herein. I find that the appellant’s appeal having been brought within 60 days, and having been brought by way of motion, it conforms to the requirements of Rule 117 of the Trade Marks Rules and is therefore properly before this court. Accordingly, I overrule the preliminary objection.

18. Following the consent agreed upon by the parties, this ruling shall apply to HCCA.484 of 2009.

Dated and delivered this 23rd day of April, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Ongondi for the appellant

Omuga for the respondent

Eric - Court clerk