



REPUBLIC OF KENYA

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

Misc. Appli. 348 of 2006

GENERAL PLASTICS LIMITED.....
.....APPLICANT

Versus

THE INDUSTRIAL PROPERTY TRIBUNAL.....1ST RESPONDENT

SAFEPACK LIMITED.....2ND RESPONDENT

JUDGMENT

The petition dated 4th April 2006 was filed by the firm of Iseme Kamau & Maema Advocates on behalf of General Plastics, against the Industrial Property Tribunal and Safepak Ltd, the Respondents herein. The Petition is brought pursuant to Section 84 (1) of the Constitution in which the Applicant alleges contravention of her rights and freedoms under S.77 (1) and 77 (9) of the Constitution. The orders sought are as follow;

- (a) The decision of the Tribunal in Industrial Property Case No. 15/26 of 2002, 16/27 of 2002, 17/28 of 2002, 18/29 of 2002, 24/37 of 2002, 23/25 of 2002 on 15/05 be set aside;
- (b) The judgment made by the Industrial Property Tribunal on 3rd February 2006 in Industrial Case No. 15/26 of 2002 be set adie;
- (c) An order be made granting the Petitioner liberty to adduce additional evidence in Industrial Property Cause No.15/26 of 2002, 10/27 of 2002, 17/28 of 2002, 18/29 of 2002, 24/37 of 2002, 23/25 of 2002;
- (d) An order be made granting the Petitioner liberty to adduce additional evidence in Industrial Property Case No. 15/26of 2002;
- (e) An order directing the Industrial Property Tribunal to pay Industrial Property Case No. 15/26 of 2002 do
- (f) Costs of the Petition.

The Petition is supported by the affidavit of Rashik Shah, dated 4th April 2006, a supplementary affidavit sworn on 14th July 2006 and a further affidavit dated 25th April 2006, all sworn by Rashik Shah, the managing director of the Applicant. The application was opposed and an affidavit was sworn by Lilian Wanjira, the Chairperson of the 1st Respondent, dated 6th July

2006 and skeleton arguments filed in court on 20th May 2009 and list of authorities of the same date.

The 2nd Respondent also opposed the notice of motion based on an affidavit sworn by Tushar Shah, the managing director of the 2nd Respondent, dated 20th April 2006, skeleton submissions filed in court on 20th January 2007. The Petitioner was represented by Munyu Advocate, Ms Mureithia appeared for the 1st Respondent and Mr. Malik appeared for the 2nd Respondent. They also filed skeleton arguments.

The facts of this case are contained in the affidavits of Rashik Shah. He deponed that the Petitioner has been a manufacturer of plastic containers and bottles since 1987 and has invested in machinery and moulds in it uses issued in the said business. In October 2002, the Petitioner discovered that the 2nd Respondent, SafePak Ltd., also a manufacturer of Plastic bottles, applied to the Registrar for Industrial Designs that she be registered as the sole proprietor of 12 Industrial Designs ie 177, 178, 186, 187, 191, 192, 214, 235 and 236. The Petitioner was aggrieved by that registration and commenced proceedings for revocation of the 12 designs and 2nd Respondent contested it. (R S 1) (a) to (i)

The causes were not heard for quite along time but meanwhile the Applicant gathered additional evidence in respect of each of the 12 designs which was not in her possession at the time of filing the declarations before the Tribunal. The Industrial Causes Nos 15/26 of 2002, 16/27 of 2002, 17/28 of 2002, 18/29 of 2002, 24/37 of 2002, 23/25 of 2002, in respect of Industrial Designs No. 177, 178, 182, 191, 190 and 192 came up for hearing on 7th July 2005 and the Petitioner sought the leave of the Tribunal to adduce additional evidence in support of its claim and in order to assist the Tribunal in reaching a fair decision and the Tribunal was to determine whether the Industrial property was registered in favour of the 2nd Respondent. On 15th February 2005, the Tribunal declined to accept the additional evidence. It is contended for the Applicant that the refusal by the Respondent to allow the Applicant to adduce further evidence was a breach of the Petitioner's rights under S. 77 (9). That the hearing of Industrial Cause 15.26 of 2002 proceeded and judgment was delivered on 3rd February 2006 when the Petitioner's application for revocation was dismissed. That in its judgment the Tribunal relied on the inadequacy of the evidence, adduced by the Applicant, before it, to dismiss the Petitioner's case. That during the 60 days of gazettelement, the 2nd Respondent applied to register the Industrial designs and only became aware of the matter after the gazettelement period. That the Applicant was prevented from raising objections during the time resulting in the revocation proceedings now before the Tribunal. That the Tribunal's discretion in refusing the adducing of additional evidence was not exercised judiciously because the Tribunal later used the excuse of insufficient evidence as a ground for disallowing IPT case No. 15/02. In reply to the Respondent's replying affidavit, Mr. Munyu contended that access to this court is without prejudice to any other relief that may be available to the Applicant and that prior to the filing of this petition, the appeals that had been pending in the High Court were withdrawn (RS1) Mr. Munyu, further submitted that by the Respondent denying the Applicant a chance to adduce more evidence, under Rule 24(8) of the Industrial Property Rules, the Respondent breached the Applicant's right to fair hearing because though the Respondent declined to allow the said evidence, the Tribunal used the lack of evidence to dismiss the application. That the evidence could not be adduced without leave of the Tribunal and the Tribunal had not been constituted from 2002 and that justifies the delay in making the application to adduce further evidence. Counsel cited the case of JUMA V AG (2003) 2 EA 461 in which it was held that a fair hearing is one which has the following minimum elements, that provision is made for reasonable time, in light of the prevailing circumstances, for one to properly prepare their defence and that justice should be open and be seen to be done. Reliance was also made on HURMAN V PARATINA (1998) 3 LRC 36 where the court held that where one party is given a chance to address the court and the other is denied, it is not a fair trial. Counsel urged that the Applicant was denied a chance to adduce evidence that would have altered the award of the Tribunal. In BOARD OF

EDUCATION V RICE & OTHERS (1911) AC 179 it was held that a party to a controversy must be allowed to put their case and to correct or contradict any relevant prejudicial statement and the Tribunal is enjoined to act in good faith and fairly listen to both sides. Counsel urged that the failure to accept additional evidence amounted to breach of the statutory duty under Section 84 of the Industrial Property Act 2001. This is because the Tribunal should satisfy itself that the Petitioner is the true inventor of the design before refusing an application for revocation. That the evidence to be adduced would have shown whether or not the invention was new. That Petition 15/06 has been considered yet it was not an invention of the 2nd Respondent. Counsel also submitted that Rules of natural justice were not observed and relied on HOFFMAN LA ROCHE & CO VS SECRETARY OF STATE OF TRADE & MINISTRY (1975) AC 295. That the 2nd Respondent is enjoying the benefit of an invention that is not new and denied the Applicant a chance to adduce material to show that the 2nd Respondent did not invent.

In opposing the petition Lilian Wanjira, the chairperson of the 1st Respondent deponed that the Kenya Industrial property office registered the Industrial Designs No. 172, 178, 186, 187, 190, 1st91, 192, 213, 214, 234, 235 and 236 after examining them and finding them registrable. They were deemed to have been registered after 60 days expired as no objection was lodged and it was then published in the Kenya Gazette. That on 4th March 2002, the Applicant filed, an application to revoke the said Industrial designs listed above but there was a delay in doing so as the Tribunal had no members till the current members were gazetted on 20th February 2004.

On 9th February 2005, the advocates took hearing dates but it did not proceed on 3rd May 2005 because the 2nd Respondent's Advocate sought leave to file a further affidavit. It was fixed for hearing on 7th July 2005 when the Applicant sought leave to file new or additional evidence. That application was opposed by the Respondent and the 1st Respondent gave its ruling dismissing the application and gave reasons. An application pending appeal to the High Court was also dismissed on 13th October 2005. On 3rd November 2005 IPT 15/02 was consolidated with IPT 26/02 and were heard and the Tribunal gave its ruling. That in refusing adducing of additional evidence, the Tribunal exercised its discretion in accordance with the Rules. That the Applicant had the right of appeal under S. 115 of the Act but never appealed.

According to Ms Mureithia, the Applicant failed to adduce evidence in good time and this court cannot aid an indolent party. In support of that argument, reliance was made on the case of KBS V AG MISC APPLICATION 413/05. Counsel urged that the Tribunal exercised its discretion and did not rule in favour of the applicant and cannot be said to have denied the petitioner a fair hearing. That based on the KBS CASE and BEN KIPENO V AG MISC APPLICATION 15/07, the Applicant has not disclosed any cause of action against the Respondent. That this court cannot interfere with the discretion bestowed on the 1st Respondent under Regulation 24(8). That the Tribunal was created to expedite and finalize disputes unless there is a misdirection by the Tribunal or it fell into error. And that if that is the case, the Applicant has a right of appeal to the High Court under S. 115 of the Industrial Property Act. That the applicant took part in the proceedings, they were heard and it is only after they were unable to enforce the judgment that they brought this application and the Applicant is therefore abusing the court process because there were other remedies available in law.

Ms. Malik, Counsel for the 2nd Respondent also opposed the petition. Tushar Shah in his replying affidavit dated 24th April 2006, deponed that the 2nd Respondent is in the business of designing, manufacturing and selling containers and bottles in Kenya. That the 2nd Respondent applied for registration of various industrial designs on 22nd May 2000 in relation to manufacture of plastic bottles. They were found to be registerable and were deemed to have been registered after 60 days expired without any objection having been raised after they had been gazetted in the Kenya Gazette. It is denied that the said designs had been in use elsewhere

and that in any event that issue is the subject of revocation proceedings pending at the Industrial property Tribunal. That the revocation proceedings against the designs were filed in March 2002 and pleadings closed in November 2003. That on 1st July 2004, the 2nd Respondent applied for leave under Regulation 24(8) of the Rules, to file a replying affidavit in response to the Applicant's final declaration which contained new evidence which should not have been introduced at that stage. Leave was granted and the statement was filed on 16th June 2005. When the matter came up for mention on 7th July 2005, to confirm whether the 2nd Respondents declarations were in order, the Applicant's Counsel verbally asked for leave to file fresh evidence and indicated that it had been in the public domain for 12 months before the revocation proceedings were filed. The 2nd Respondent objected to the said application which the Tribunal considered and dismissed on 25th July 2005. A copy of the ruling is exhibited as TS 2. It is the 2nd Respondent's contention that the applicant has no automatic right to adduce evidence under R. 24(8) of the Rules and that the Applicant is the author of their own misfortune when they failed to adduce evidence in time. It was urged that the application should not be granted because the Applicant has failed to disclose that they filed appeals against the ruling of the 1st Respondent in respect of the proceedings relating to Industrial designs 187, 177, 191, 192, 178 and 190 and that the same have not been set down for hearing and that an application to stay the revocation proceedings was refused. That the Applicant made several applications which the Tribunal dismissed and on 3rd February 2006, the 1st Respondent delivered its judgment dismissing with costs the application for revocation in respect of design 187 only. That the rest of the causes remain unheard. The 2nd Respondent exhibited the various rulings in the matter as TS 5. That the Applicant has failed to pursue the pending appeals before the High Court or seek a stay order before the High Court under S. 115 of the Act. That there has been inordinate delay in filing this petition since the ruling in refusing of fresh evidence was made in July 2005 and stay was denied on 25th October 2005.

I have now considered all the pleadings on record, the submissions by Counsel and the case law that has been relied upon. Before I delve into the merits of this petition I wish to state that it is trite law that fundamental rights and freedoms are only guaranteed by the state and it is the state against whom they can be enforced. In the KBS CASE (supra) Nyamu J. cited with approval the case of TEITWNNANG V ARIONG & OTHERS (1987) LRC Const where at page 599 Maxwell CJ observed;

“Dealing now with the question can a private individual maintain an action for declaration against another private individual or individuals for breach of the fundamental rights provisions of the Constitution. The rights and duties of individuals and between individuals are regulated by private law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It is my view therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual or a group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals i.e no duty can be owed by an individual or group of individuals to another or individuals under the fundamental rights provisions of the Constitution, no action for a declaration that there has been a breach of duty under the provisions can be or be maintained in the case before me and so I hold.”

This court has similarly held that the above position represents the law in Kenya. In the instant case, the 2nd Respondent which is a corporate entity cannot guarantee an individuals fundamental rights under Chapter 5 of the Constitution. The 2nd Respondent is therefore wrongly enjoined to these proceedings and no orders can be made against them. It is also trite that in such an application the Attorney General, who is the legal advisor of the Government must be enjoined as a defendant because the orders sought are supposed to be enforced against the state. It is not enough to sue the 1st Respondent alone without including the Attorney General as a party.

Whether the Applicant's right to a fair hearing has been breached by the refusal by the Tribunal to allow the Applicant to adduce additional evidence, Rule 24 (8) of the Rules made under the Industrial Property Act gives the Tribunal a discretion to allow or not allow further evidence. The rule reads "(8) No further evidence shall be filed except by leave or discretion of the Tribunal." From the wording of that rule, the Tribunal has a discretion to allow or deny further evidence. Of course that discretion has to be exercised judiciously. A challenge to that discretion can only be made where the Applicant demonstrates that the discretion was not exercised judiciously that is, that it was exercised arbitrarily, in bad faith, or capriciously. There is a ruling on record which is dated 25th July 2005 in which the Tribunal considered the application by the Applicant to tender further evidence, part of annexure TS 2. The Tribunal gave several reasons for its decision in declining to allow the tendering of further evidence and the reasons were:-

- 1) That the case had been filed more than 3 years earlier and if the evidence was available before the case was filed the Applicant would have tendered it.
- 2) If the evidence was available at the time of filing the case or thereafter, the applicant would have filed it.
- 3) That no reason had been advanced to show why the Applicant could not get the evidence since the filing of the action.
- 4) The evidence sought to be introduced is not in response to any new matter raised by the Respondent in their declarations and it was entirely new.
- 5) The delay in seeking to introduce the further evidence was inordinate and they declined to exercise their discretion under rule 24 (8).

It is clear from that ruling that the Tribunal did not just arbitrarily arrive at their decision to decline further evidence, but carefully analysed the application and gave reasons. The decision was ably considered. Can it be said therefore that the Tribunal breached the Applicants right to a fair hearing under S. 77 (9) of the Constitution? I find that the Respondent did not breach the Applicants right to a fair hearing. I do agree with the submission, that requirements of a fair hearing cannot be said to be cast in stone but depend on the circumstances of each case. Tucker J. put it so ably in the case of *RUSSEL V DUKE OF NORFOLK* (1949) 1 ALL ER 109 when he said at page 118. "The requirements of natural justice must depend on the circumstances of the case, the rules under which the Tribunal is acting, the subject matter that is being dealt with, and so forth. One essential is that the person concerned should have a reasonable opportunity of presenting his case...."

Kitoo J echoed similar sentiments when he held in *MOBIL OIL AUSTRALIA V FCT* (1963) hb 113 CLR 475, at page 504:

"what the law requires in the discharge of a quasi judicial function is judicial fairness. That is not a label for any fixed body of rules what is fair in a given situation depends upon the circumstances...."

I also agree with the decision in *HURMAN V PARATHAN* (1998) 3 LRC 36 where it was held that the courts have a discretion to grant leave to an Applicant to address the court and the court should exercise that discretion in such away as to secure a litigant a fair hearing. In the instant case, the hearing was before a quasi judicial body which proceeded under a particular statute and regulations. R.24(8) gives the 1st Respondent the discretion to regulate its own proceedings and allow or refuse further evidence, for good reason. The Tribunal did consider the application to tender further evidence in this case and for the reasons recorded, declined to grant it. The right to a fair hearing applies to both parties. S. 77 (9) guarantees a fair hearing within a reasonable time and litigation has to come to an end because justice delayed is justice denied. The matter before the 1st Respondent had been pending for a long while and as the 1st

Respondent observed in its ruling, no reason was advanced as to why the Applicant did not avail the further evidence during the pendency of that matter. Both the Applicant and Respondents were entitled to a fair and speedy hearing. This is because the constitutional rights of both parties have to be put on the scale and balanced and cannot be enjoyed selectively, so that some selected few trample on the rights of others. See *KBS LTD V AG HMISC 413/05*. I would also cite with approval the decision in *BANIN V MACKINLAY (1985) 1 ALLER 842* and *R V DEPUTY INDUSTRIAL INJURIES ex parte MOORE (1965) 1 ALL ER 81* where the courts held that the Tribunals which are charged with the decision making have a discretion to regulate the proceedings before them within the terms of the various statutes in the way that is convenient to them, provided they observe rules of natural justice. That is what the 1st Respondent did in this case. In my view, the Applicant has not demonstrated that they have any cause of action against the Respondent. The applicant alleges that the Tribunal used the failure to adduce further evidence to dismiss their application. I have read the decision of the Tribunal and nowhere does the Tribunal attribute the Applicant's failure to get a favourable ruling in their favour to the filing of further evidence. The Tribunal merely observed that both parties should have adduced oral evidence to support their allegations. The Applicant had not made any application to adduce oral evidence but sought to adduce new or further evidence. They proceeded by way of affidavit evidence and I believe that is the mode of evidence they intended to adopt. The only conclusion I can arrive at is that, it seems the Applicant is dissatisfied with the decision of the Respondent and that being so, their recourse lies in filing an appeal to the High Court under S. 115 (1) of the Industrial Property Act. And indeed the Applicants did file Appeals C/A 590/05 which is from the ruling of the Tribunal in 15/26 of 2002, CA 586/05 in respect of the Tribunal's ruling in 16/27 of 2002 and CA 589/05 in respect of the ruling of the Tribunal in 17/28 of 2002. That is the remedy they should pursue in addition to the revocation proceedings that are yet to be determined.

In my considered view the Applicants have abused the court process by unnecessarily protracting this matter and making what is not a constitutional issue into one and in the meantime, the Applicant is benefiting from interim orders against the disputed design. The statute under which the 1st Respondent is created provides procedure for a party aggrieved by that decision, that procedure must be followed instead of camouflaging every such grievance as a constitutional issue. The court must prevent abuse of its process by disallowing such applications. (See *BEN KIPENO & OTHERS V AG PET 15/07* and *BAHADUR V AG (1986) LRC CONST 297* where the court said;

“The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can find a claim under substantive law, the proper cause is to bring the claim under that law and not under the Constitution.”

In *SPEAKER OF NATIONAL ASSEMBLY V NJENGA KARUME (1990-1994) EA 546* the Court of Appeal reiterated the above principle, that where the Constitution or A Statute provides a certain procedure to be followed, that procedure must be adhered to. In this case, failure to follow the procedure set out in the Regulations disentitles the Applicant to the Constitutional remedy sought herein. See also *HARRIKISSON V AG (1979) 3 WLR 63*.

The Applicant sought orders that the decisions of the Respondent be set aside and the causes 15/26 of 2002 be heard afresh. As earlier ruled in this judgment, the 1st Respondent acted within its mandate under Rule 24(8) of the Rules made under the Act. This court cannot purport to substitute the decision of the Tribunal with its own decision as it would be usurping that Tribunal's mandate and therefore overstepping its jurisdiction and would be sitting as an appellate court. The Applicant has a remedy of appeal under S. 115 of the Act which they should pursue. Setting aside the order and eventually ordering a rehearing would mean a further delay in resolution of the said dispute. Both parties have a right to a speedy disposal of this matter and the rights should not be seen to favour one party. In addition to the earlier observations that this application is an abuse of the court process, none of the orders sought in

the petition are available to the petitioner and this petition is dismissed with costs to the Respondent and Interested Party.

Dated and delivered this 30th day of April 2009.

R.P.V. WENDOH

JUDGE

Present

Mrs Opiyo for the Applicant

Muturi: Court Clerk