REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Petition 348 of 2006

IN THE MATTER OF SECTION 84 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 77B (1) AND 77 (9) OF THE CONSTITUTION OF KENYA

BETWEEN

GENERAL PLASTICS LTD……..…… APPLICANT

V E R S U S

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

AND

SAFEPAK LIMITED …….…….....…...2ND RESPONDENT

R U LI N G

The Applicant herein is a manufacturer of various types of plastic containers and bottles, and Mr. Rashik Shah, the Applicant's Managing Director, has stated in an Affidavit sworn on 4th April, 2006, that the Applicant has been in that business since the year 1987. He also depones that the Applicant employees are over one thousand Kenyans. By implication therefore the Applicant is saying that it is both an important employer and creator of wealth in the country's economy.

The First Respondent whose decision to exclude additional evidence in terms of rule 24 (8) of the Industrial Property Tribunal Rules 2002, is the subject of the Application herein, is a statutory body established under Section 113 of the Industrial Property Act (***No. 3 of 2001),*** (the Act), for the purposes of hearing and determining of appeals from decisions of the Managing Director of the Kenya Industrial Property Institute ***("KIPI, or supply, the Institute").***

The Second Respondent, ***Safepak Limited,*** according to the Replying Affidavit of Tushar Shah sworn on 20th April, 2006 its Managing Director, is engaged in the business of designing, manufacturing and selling containers and/or bottles in Kenya.

The Applicant's case is that it has invested heavily in the machinery and moulds that it uses in the

manufacture of various types of plastic containers and bottles. However, unknown to the Applicant, or due to lack of adequate research and attention to the developments in the plastic industry, the Applicant's Managing Director swears at paragraph 24 of the Affidavit in support of the Petition that sometime in October, 2002, the Applicant discovered that the 2nd Respondent Safepak Ltd. also a manufacturer of bottles had applied to the Registrar of Industrial Designs at the Kenya Industrial Property Institute (KIPI), and had been registered as the sole proprietor of 12 Industrial Designs, the particulars of which are set out in the said paragraph of the Affidavit.

The Applicant was aggrieved with the said registration, and sensed the danger and cost to its business because it had been manufacturing bottles with the designs registered in the name of the 2nd Respondent, well before they were so registered. Further Mr. Rashik Shah depones in paragraph 5 of his Affidavit that he was aware that the 2nd Respondent was not the inventor of any of those designs. The designs were in use worldwide.

To vindicate its grievance the Applicant moved Industrial Property Tribunal in appeal against the decision of the KIPI in the various cases ***IPT Case Nos 15,-18 of 2002, and IPT Cases Nos. 23-24 of 2002.*** After several skirmishes between Counsel for the respective parties, the Applicant's then Counsel, Jane Wanyaga sought leave of the Tribunal to adduce further or fresh evidence under rule 24 (8) of the Industrial Property Tribunal Rules, 2002, (the said rule 24 (8) provides that "***No further evidence shall be filed except with leave or direction of the Tribunal").***

Unfortunately for the Applicant the Application to adduce further evidence was opposed by Mr. Hime learned Counsel for the 2nd Respondent, on the principal ground that the application to adduce further evidence was being made two years after the Applicant had filed their revocation proceedings, and that they had more than ample time to file evidence in support of their (Applicant's) cases. In addition, that there had been no good reason given as to why the evidence could not have been filed previously, that there had to be finality of pleadings and that the addition of fresh evidence would re-open the pleadings.

To the Applicant's Counsel oral application made on 7th July, 2005, the First Respondent made Rulings on 15th July, 2005. The Tribunal dismissed the Applicant's Counsel's application to adduce further evidence in IPT Cases Nos. 15/26 of 2002, 16/27 of 2002, 17/28 of 2002, 18/29 of 2002, 23/25 of 2002 and 24/37 of 2002. The various Rulings were issued on 25th July, 2005. The application to adduce further evidence were dismissed with no order as to costs. The Principal grounds for dismissal of the application to adduce further evidence were-

- If the evidence was available before the cases were filed, then the Applicant would have tendered it,

- we have not been told when the evidence became available,

- No reason was given why the Applicant could not get the evidence since filing the action,

- the evidence sought to be introduced is not in response to any new matter raised by the Respondents in their declarations – It is entirely new."

The Applicant appealed to the High Court against the Tribunal's decisions dismissing the Applicant's application to adduce further evidence in support of its applications for revocation of the registration of the various industrial designs. Those appeals were later withdrawn by the Applicant. The Applicant's application for stay of proceedings in IPT Case No. 24 of 2002 (consolidated with IPT Case No. 37 of 2002), was dismissed with no order as to costs.

An application for Consolidation of IPT Case No 18 of 2002, with IPT Case No. 29 of 2002, ***Plastic Electronics Ltd. –Vs- Safepak Ltd.)*** was dismissed with costs. Similarly an application in IPT Case No. 30 of 2002 – ***Plastic Electronics Ltd. -vs- Safepak Ltd.)*** to be heard as a test case was dismissed on 12th January, 2006.

Having suffered all these setbacks in its quest for a fair hearing, the Applicant tried perhaps a last resort. The Applicant filed a Petition dated 4th April, 2006 claiming ***inter alia*** that by refusing to grant its application to adduce further fresh evidence in support of its application to revoke the registration of the Industrial Designs, the Tribunal, that is the First Respondent contravened or breached the Applicant's constitutional right to a fair hearing. The Applicant also simultaneously with the filing of the Petition also filed a Chamber Summons (which is the subject of this Ruling) dated 4th April, 2006, pursuant to the provisions of rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 ***(L.N. No. 6 of 2006).***

Rule 20 of the said rules empowers a judge before whom a petition under rule 12 is presented to hear and determine an application for conservatory orders. Rules 21 provides that such an application (***for conservatory orders***) shall be made by Chamber Summons supported by an Affidavit and may also be heard ex parte. The Chamber Summons herein was heard ***inter partes***. By the Chamber Summons the Applicant seeks the following orders-

(a) to stay proceedings in industrial Property Cause Nos 16/27, or 2002, 17/28 of 2002, 18/29 of 2002, 24/37 of 2002, 23.25 of 2002 pending the hearing and determination of the Petition herein.

(b) of an injunction to restrain the 2nd Respondent from invoking the provisions of Section 55 of the Industrial Property Act in execution of the judgment delivered in Industrial Property Cause No. 15/26 of 2002 pending the hearing and determination of the Petition filed herein.

(c) Costs of the Application be provided for.

The Application is premised upon the grounds that the Applicant's rights to a fair hearing and protection of the law would be contravened if the First Respondent were to set down for hearing Industrial Property Cause Nos 16/27 of 2002, 17/28 of 2002, 18/29 of 2002, 24/37 of 2002, 23.35 of 2002 before the hearing and determination of the Petition. The Applicant also pleads that it will suffer irreparable loss to its business if the 2nd Respondent were to proceed to execute the judgement in Industrial Property Cause No. 15/26 through invoking the provisions of Section 55 of the Industrial Property Act.

Finally the Applicant pleads that the Applicant's rights under Section 77 (1) and 77(9) of the Constitution would be contravened if the orders sought are not granted.

Mr. Munyu learned Counsel for the Applicant relied upon the said grounds, the Supporting Affidavit of Rashik Shah in Support of the Chamber Summons sworn on 4th April, 2006 and to which I have already made reference, and the Supplementary Affidavit of Rashik Shah sworn on 14th July, 2006, in response to the Replying Affidavit of Lilian Wanjira, the Chairperson of the Industrial Property Tribunal sworn on 6th July, 2006 and the various lists of authorities filed by the Applicant's Counsel.

I have already referred to the Replying Affidavit of Tushar Shah sworn on 20th April, 2006 and the grounds why the prayers for conservatory orders sought by the Applicant ought not be granted.

The Applicant's case is essentially that had the Tribunal granted leave to the Applicant's Counsel to adduce further evidence, the Applicant would have shown and proved that the Second Respondent was neither the creator nor the inventor, nor was there any novelty (as that term is defined under the Industrial Property Act), in the various designs for which the Second Respondent obtained or secured registration in its favour with the Kenya Industrial Property Institute. It is also the Applicant's contention that had the Tribunal, the first Respondent allowed further evidence to be adduced, the Tribunal would not have arrived at the conclusion it did dismissing the Applicant's application for revocation of the registration of the various designs. The Applicant's Counsel pleaded that the Applicant was denied an opportunity to adduce further evidence, and cited the case of ***JUMA & OTHERS -Vs- Attorney General [2003] 2 E.A. 461***, on what would constitute a fair hearing – "***where allowance is made for reasonable time in light of***

all the prevailing circumstances of a case to investigate properly prepare and present one's defence, where litigation is open, justice is done, and justice is seen to be done by those who have eyes to see, free from secrecy mystery and mystique."

This means that a party must be given a fair and reasonable, full and effective opportunity to present its or his case before any tribunal and where evidence comes into the possession of a party during the hearing of his matter, justice demands that he is granted a full and effective opportunity to adduce that evidence.

In opposition to the Applicant's Counsel's arguments, Miss Kinyenje learned Counsel for the 2nd Respondent, and whose submission were supported by, and Mr. Njuguna, learned Counsel for the Tribunal fully associated himself with, told the court that the Applicant was the author of its own misfortune. The Applicant had failed to oppose the registration of the design during the sixty (60) days period when the Institute had advertised the intended registration of the various designs pursuant to the relevant provisions of the Industrial Property Act.

Counsel for the Respondents also urged me, and cited many authorities that the Applicant's application for conservatory orders was frivolous and vexatious, that it was an abuse of the court process, that it was brought in bad faith (because the Applicant had taken part in and therefore acquiesced with the conduct of the proceedings by the Tribunal), that the Applicant was guilty of material non-disclosure, the Applicant was guilty of inordinate delay in bringing the Petition, that the Applicant had other alternative remedies, including an appeal as is provided for under Section 113 of the Industrial Property Act, that an injunction would greatly prejudice the Second Respondent's business as it cannot take out infringement proceedings against the Applicant under Section 55 of the Industrial Property Act, and for all these reasons, the Applicant's Application for conservatory orders be dismissed with costs.

Those were in essence the submission of Miss Kinyenje learned Counsel for the 2nd Respondent. Mr. Njuguna, learned Counsel for the First Respondent as stated above, fully associated himself with those submissions. In addition thereto, it was Mr. Njuguna's submission that the discretion to allow further evidence to be adduced lies entirely with the Tribunal under rule 24 (8) of the Industrial Property Tribunal's Rules, that the Court cannot exercise that right, that the Applicant having failed to persuade the Tribunal to adduce further evidence is estopped from alleging that it was not granted a fair hearing, that there is need for expeditious disposal of industrial disputes, that the Applicant was given a fair hearing in terms of Section 77 (9) of the Constitution.

For all those reasons, Counsel concluded that there was urgent need to dispose of the Applications filed in the year 2002.

Those were in brief the respective Counsel's points of view on the matter. The issue to be determined in this Ruling is not whether the Applicant's fundamental rights to the secure protection of the law as is envisaged under Section 77, 77(7) and to a fair hearing as is envisaged under Section 77 (9) of the Constitution has been contravened or is likely to be contravened. That is the primary question the Court seized of the Petition herein will determine. I will only observe without saying more, I doubt the competence of the prayer for secure protection of the law under Section 77 (1) and 77 (7) of the Constitution in the light of the Petition herein. I will make no observation regarding the plea under Section 77 (9) of the Constitution for that would be the function of the court or judge hearing the Petition.

The sole issue to be determined in this Ruling is whether or not the Applicant is entitled to conservatory orders, namely a stay of further proceedings between the parties hereto before the Industrial Property Tribunal, and secondly, a prayer for an injunction or restraining orders against the Second Respondent from bringing an infringement suit against the Applicant under Section 55 of the Industrial Property Act. Before I answer this question, I wish to dispel a few fallacies in the submissions of Counsel for the Respondents. These fallacies were-

1. ***Alternative Remedy***

It was the Respondent's Counsel's submissions that the Applicant had a right of Appeal under the Industrial Property Act, and should not have filed a petition under the Constitution. This submission flies right into the face of Section 84 (1) of the Constitution which says-

*" **84(1) Subject to subsection (6) if a person alleges that any of the provisions of Section 70 to 83 (inclusive) has been, is being or likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained persons),** then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress." **(underlining mine).***

In my opinion, Section 84 (1) merely re-echoes the provisions of Section 3 of the Constitution. The Constitution has primacy (only subject to its provisions, such as 84 (6) – the rule making provisions) over all other laws which, so far as are inconsistent with its provisions must yield and give way to its provisions. To read down its provisions so that they accord with other pre-existing rules or principles is to subvert its purpose. In interpreting and applying the Constitution, the protection of guaranteed rights is the primary objective to which the provisions of ordinary statutes or traditional rules of the common law must yield.

This is not a new proposition of law. It is well set out in Section 3 of the Judicature Act, (***Cap. 8 Laws of Kenya),*** that the Courts are enjoined to exercise their jurisdiction in accordance with the Constitution, other statutes, including statutes of general application at the reception date of 12th August, 1897.

The Applicant's right to invoke contravention of its constitutional right supersedes, and is not a derogation from his right to appeal as an alternative remedy.

2. NON-DISCLOSURE OF MATERIAL FACTS

This argument was entirely misplaced. The argument is usually employed where one party has obtained or procured an advantage over the other through an exparte application, in which he failed to disclose facts material to the case. There is no such application here. This argument too is fallacious.

2. Inordinate Delay/latches

Whereas I accept that it would have been much better to file the Petition herein immediately upon the Tribunal's Ruling of 15th July, 2005, I observe that the Ruling upon one of the Applicant's applications for revocation, namely IPT Case No. 15 of 2002, was only made on 3.02.2006. The Petition and the Application, the subject of this Ruling was filed on 5th April, 2006. That is a period of only 60 days. It cannot be said that the Applicant is guilty of inordinate delay or latches.

3. **Waiver of Right/Acquiescence**

No waiver or acquiescence will override or act as an estoppel upon a guaranteed constitutional right under Section 70 of our Constitution. No doctrine of the common law can purport to abridge or otherwise deprive a citizen of that right of access to court to enforce such right.

Having disposed off of several or those fallacies, I turn to the sole issue to be determined in this Application namely, whether the Applicant is entitled to the conservatory orders sought, that is to say, a stay of further revocation proceedings, and an order restraining the Second Respondent from taking out infringement proceedings against the Applicant in respect of the judgement on 3rd February, 2006 regarding IPT Case No. 15 of 2002, (Consolidated with IPT Case No. 26 of 2002 Plastic Electronics Ltd – Vs- Safepak Limited).

I will commence with the prayer for an injunction to restrain the Second Respondent from commencing infringement proceedings under Section 55 of the Industrial Property Act, which provision enables such action to be commenced by a party aggrieved by the infringement of its industrial design.

Whereas it is arguable whether the Tribunal would not have dismissed the Application for revocation of registration on IPT Cause No. 15 of 2002 (in respect of Industrial Design No. 187), if the Applicant had been allowed to adduce further evidence to support its application for revocation, the Second Respondent's statutory right under Section 55 of the Industrial Property Act cannot be taken away by injunction however temporary. In my view the proper course of action for the Applicant in that respect would be to oppose such proceedings if they were commenced and perhaps seek a stay of their determination (if so first filed) pending the determination of the Petition. For those reasons, I decline to grant the prayer for an injunction.

On the first leg of the prayer for a stay of further hearing or proceedings in respect of Industrial Property Cause Nos. 16/27 of 2002, 17/28 of 2002, 18/29 of 2002, 24/37 of 2002, and 23/25 of 2002 for fear of not being accorded a fair trial and protection of the law contrary to Section 77 (1) and 77 (7) of the Constitution), I have already expressed my reservation regarding the efficacy of this prayer but have stated that it is for the judge seized with the hearing and determination of the Petition to make a definitive finding.

The second leg of the prayer for an order of stay of the hearing of those applications, concerns the right to a fair hearing as envisaged by Section 77 (9) of the Constitution. Again what constitutes a fair hearing is for the Judge eventually seized of this matter, that is the Petition. It suffices however to say that the issues raised by the Applicant in its Petition, and indeed this Application are pertinent to the determination of the question of what is a patentable invention under Section 22 of the Industrial Property Act, an invention is patentable only if it is new, involves an inventive step, is industrially applicable or is a new use.

Further under Section 23 of the said Act (***side note – Novelty***) an innovation is new if it is not anticipated by prior art. For purposes of the Act everything made available to the public anywhere in the world by means of written disclosure ***(including drawings or other instructions***) or, by oral disclosure, use, exhibition or other non-written means shall be considered prior art.

Although the Application to adduce further evidence was made orally by the Applicant's Counsel, the Tribunal ought not to have peremptorily dismissed the application without first giving adequate opportunity to the Applicant to indicate the nature of such evidence, for instance in terms of patentability and novelty of the registered innovations. The Applicant's claim though not framed in those words, was that the inventions were not new. They had been anticipated by prior art as defined in the said 23 (2) of the Act cited above.

There was therefore no basis or demonstrated basis for the Tribunal to reject off-hand the Applicant's application to adduce further evidence. Whereas Rule 24 of the Industrial Property Tribunal Rules sets out an exact and precise timetable for filing of evidence, the same rule 24 (8) gives a window to the Tribunal to allow further evidence after the expiration of the prescribed periods.

The Tribunal will only reject an application to allow further evidence to be introduced for good reasons, that is, the Tribunal must exercise its discretion quasi-judicially. The evidence sought to be adduced may be in response to a new issue raised by the Respondents in their declarations. It may indeed be entirely new. There is no restriction under rule 24 (8) of what further evidence may be. It is evidence available to an Applicant or Respondent which would, in the words of the Court in ***Juma & Others –Vs- Attorney General*** (supra) give a party seeking to adduce such further evidence a fair, reasonable, full and effective opportunity to present its case. The discretion of the Tribunal is therefore not merely restricted or confined to considerations of expeditious disposal of litigation, and bringing finality to pleadings and litigation, and prevention of abuse of its process, but more importantly also the discretion must be exercised so as to secure a litigant or litigants a fair hearing.

For those reasons, I do not with respect, accept the Respondent's Counsel's Contention that the Applicant's Petition or Chamber Summons, the ***baby*** of the Petition, is either frivolous or vexatious.

In sum therefore, I would allow the Applicant's application in terms of prayer No. 3 of the Chamber

Summons, and decline to grant prayer 5 thereof. The costs herein shall abide the outcome of the Petition herein.

There shall be orders accordingly.

Dated and delivered at Nairobi this 9th day of February, 2007.

ANYARA EMUKULE

JUDGE.