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

Civil Case 58 of 1999

Sanitam Services (EA) Limited…….APPLICANT

VERSUS

Rentokil (K) Limited & another…….……RESPONDENT

JUDGMENT

In an amendment plaint dated 16th December 1999, the plaintiff herein Sanitam Services (EA) limited is seeking judgment against the two Defendants herein namely Rentokil (k) Limited, and Kentainers (K) Limited for a permanent injunction restraining the defendants jointly and /or severally from manufacturing and/or using the foot operated sanitary bin and/or holding out to consumers the use of the bin. The plaintiff is also seeking judgment for a permanent injunction to restrain the defendants from training in Kenya in any manner likely to cause the business of the defendants to be confused with the business of the plaintiff; trading in any manner which does not sufficiently differentiate or distinguish the defendants business from that of the plaintiff; using the patent obtained by the plaintiff or any other calculated to confuse the goods sold by the defendants as being goods manufactured or provided by and on behalf of the plaintiff or otherwise infringing any by the plaintiffs registered patent or otherwise passing off the business of the defendants as and/or the plaintiff's business.

Further orders sought are that an inquiry as to the damages caused by the defendants act of passing off/or at the defendants option, an amount of profits and payments of the sum due thereunder; Delivery up, repossession and destruction on oath of all aforesaid sanitary bins and /or all; General damages in addition, costs of the suit, interest thereof at the court rates and any other or further relief that the court deems fit. These are sought, (according to plaint), on grounds that the plaint is the designer and inventor of foot operated litter/sanitary disposal bin, which it designed and invented in the year 1997. It was registered and granted patent under registration certificate Number AP773 in 1999. It claims the Defendants during the pregnancy of the registration and after the grant of the said patent continued to manufacture, supply and pass off to consumers bins similar if not identical to the patented bins manufactured by the plaintiff to the detriment of the plaintiff's interest.

The first Defendant filed statement of Defence and counterclaim in which it desires the plaintiff's allegations and says its parent company Rentokil Singapore PTE Ltd had already obtained a patent for the alleged plaintiff's invention on 20th February 1995 under certificate of registration number 2042739 in the United Kingdom and Malaysia. Further the first Defendant states in its Defence that the device has been in the market for many years and has been anticipated by prior art in terms of section 8(2) of the Industrial Property Act Chapter 509 Laws of Kenya. In the counterclaim, the First Defendant is seeking permanent injunction against the Plaintiff, and delivering up and repossession and destruction of all aforesaid sanitary bins and/or all, costs and any other further or other relief the court may deem fit and just to grant. Later the counter-claim was withdrawn and it dropped the allegation that its parent company had obtained patent.

Second Defendant filed an amendment Defence stating in brief that it denies that it denies the plaintiff designed or invented first operated liter /sanitary disposal bin wholly or principally of plastics (sic) for use in hygienic storage and disposal of sanitary towels, tampons, surgical dressings, serviettes and other waste materials. Foot operated bins have bin on the market for over two dictates. It goes on to deny that the invention is patentable; that it has applied for revocation of the patent AP 733; that in any case no patent has been granted to the plaintiff. It denies that it did manufacture, or supply and/or pass off to consumers bins similar or identical to that allegedly patented; that the Defendant has only has only been manufacturing /selling bins which it had been manufacturing much before the plaintiff applied for patent and lastly ant allegations of loss were denied.

The plaintiff called three witnesses in support of its case. Samson Kamau Ngan'nga'a is the Director of the plaintiff company. His company started operating in 1986. The company mainly provides hygienic services. He has a patent. The certificate in respect of the patent is No AP773. He produced it as Exhibit 1. It is dated 25.10.99. it was issued by African Regional Industrial Properties Organization (ARIPO). He started working on the production on Foot operated services were more hygienic than hand operated services. He came up with a design for foot operated bins but this was at a time when there were no foot operated bins in the market. There were other foot-operated bins in the market but not the design of the plaintiff. He had not come across any foot-operated bins of his design. He then produced a foot operated bin which is not of his own making as Exhibit 2A And the one of his as Exhibit 2A. Whereas exhibit 2A allows one to operate it by pressing the foot on to it, the lid open and one throws the waste inside. In case of Exhibit 2B, one does not see the waste thrown inside the bi. The bin mainly used by the ladies when disposing sanitary pads. He then demonstrated how Exhibit 2B is used. In case of Exhibit 2B, he is the one who developed a mechanic of a pedal pushing the lower flap and when the foot is released the lower flap comes in to its lower position. It took the witness three years to develop the invention, as there was none in the market. He made technical drawing for the same invention. He applied for registration of Patent with Kenya Industrial Property office in 1997. The same application was acknowledged and he paid Ksh. 2,500/= Receipt of the same was produced as Exhibit3. Acknowledgment is Exhibit 4. He says KIPO gave him the go ahead with his invention. He also made application to ARIPO and copy of that application was produced as Exhibit 5. The Plaintiff Company gave him the money, which helped him make the invention, and the same invention was made in the name of the company. The bins were being supplied within Kenya. The main customers of the plaintiff to which the bins invented were being supplied were Standard Bank, Gimco Company Ltd, UNEP, National Bank, University of Nairobi, Central Bank, Green Corner Restaurant, Coffee Board of Kenya, Kenya Airways, KCCT and others. He produced contractual documents, payment vouchers and other documents to show plaintiff was supplying its bins to the same institutions. These were produced altogether as Exhibit 6. In the documents, the bins are referred to as Monny bins. That is the brand name and it is registered and was registered in Kenya Gazette of 9.10.98. He produced the same as Exhibit 7. Monthly income was Ksh. 600,000/=. That was gross income. Net income was Ksh 350, 000/=. When he was doing the marketing to various customers, he came to learn that Rentokil was also offering the same bins in the market. He found out that in 1998 and beginning 1999. He witnessed it himself. He saw the bins being displayed. He started getting competition and that affected the plaintiff's business greatly. He and his lawyers warned First Defendant but in vain but in vain. Plaintiff's business continued on the downward trend. Plaintiff got a letter from Kenya Power & Lighting Company terminating the services. Plaintiff got letters from UNEP, KTDA, and Grand Regency Hotel .All were terminating the services of the plaintiff on grounds that they had another party supplying the same services but a competitive rates. There was a letter in EA Standard Newspaper dated 25.5.2000, starting that First Defendant was introducing the new sanitary bins. He also saw a letter from the First Defendant to customer saying their efforts never worked. He then consulted an expert to compare the bins supplied by First Defendant and the Plaintiff's bins to see if there has been any infringed of the patent. The same expert prepared a report, which was produced I the list of bundles for the plaintiff. Further there was another expert who prepared a report on the plaintiff's losses as a result of the infringement.

In cross examination by First Defendant's counsel the witness said that he did not go for any training to enable him work on the product and he worked on the product alone without any assistance. He tried to find out but he could not see in the marked any bin of the type he produced. He went to super markets and to First Defendant to find out whether they had that kind of bin but all had none. There were products

with top flap but he tried to make them better. That bin with top flap was manufactured by Bonar E.A but only after the witness had given them specifications, which he gave about 1986 and 1987. The bin can be operated without the pedal. If one were to use the hand instead of the foot then one would stop the offensive smell in to the environment. Also sterilization can be done to get rid of the smell it is the flap of his bin that controls the bad smell. And once the flap is opened then the bad smell cannot be controlled. He took his invention to 2nd Defendant to manufacture it for the Plaintiff but they declined to manufacture it. He exposed all the details to the 2nd Defendant when he went to second Defendant to manufacture the bin for him. The bin he showed the court if. The plaintiff bin was manufactured by a company called Technoplast in Nairobi but it took a long time to manufacture it about six months. He knew First Defendant and knew it was giving sanitary services to Hotels and other institutions since about 1986 but he did not know the exact year. There was some similarities between the bins that were being supplied between the First Defendant and the Plaintiff but the same similarities were only on the flap. By 1986, First Defendant's bins were already in the market but he did not know for how long they had been in the market. The witness disguised himself to the First Defendant that he wanted to sell the first defendant's products on commission. As soon as he realized that the First Defendant was competing the Plaintiff, he warned the First Defendant. At that time the Plaintiff's invention had not been registered. He had applied for registration but it had not been registered as yet then. On being shown letter terminating their contract with UNEP dated 13.7.2000 (Exhibit 8), he admitted that paragraph 1 of that letter stated that UNEP was looking for the lowest bider and the letter doest not say that First Defendant had interfered with his bid, he maintained that his contract was not renewed because of the competition from the First Defendant.

In cross-examination by the counsel for the second Defendant the witness said that he did his marketing training continuation college in 1964. The college is no longer there now. He invented the bin in 1997 and it was his first invention and it is his last invention. He applied for registration on 4.9.97. He never got registration certificate from Kenya Industrial Properties office (KIPO). He applied to ARIPO in 1998 through KIPO Offices and ARIPO sent the certificate to him directly. He is aware that the Defendants objected to Plaintiff's Application to KIPO and that the same objection proceedings are not yet heard by KIPO but he does not know why his certificate for KIPO has not been issued. He claims the ownership of a bin operated by foot pedal and flap which opens and closes and that is this invention he took to the 2nd Defendant in 1999 or thereabout by way of a certain structure. Second Defendant then deemed to manufacture the bin because they were unable to do it as they said they had never seen anything like that. It is not true that they were already making it for Rentokil. According to the witness between 1997 and 1999 when he got the certificate there could be infringement if one were to make the same bin. The infringement takes place from the date of the issue of the certificate. According to this witness, second Defendant is sued because it is manufacturing the Plaintiff's products but he is not aware that the blue flap, which is the colour of their flaps, is not manufactured by the second Defendant. He made it clear that the bins he is complaining about are the bins made for Rentokil by Kentainers. Thee report of the plaintiff's income is not based on his income but is based on the analysis of the documents from First Defendant and is assessing Rentokil business at Ksh. 22,000,000. his income of Ksh. 350,000 per month was a rough estimate.

In reexamination he said application for registration to both KIPO and ARIPO. KIPO did not proceed with the application because it was no longer relevant as application to ARIPO had succeeded. His invention was new and he knew Defendants were supplying the same products and that is why his contacts were cancelled. His supply to UNEP to Kenya Power & lighting Companies were taken over by Rentokil the first Defendant.

Moses Frank Oduor was the 2nd Plaintiff witness (PW2). He stated in evidence that in April 2000, he received a request through chairman of Mechanical Engineering at Nairobi University where he is a senior lecturer to ex amine plaintiff's products and compare them with others to see if the others had infringed upon the patent of the plaintiff's products. He then compared Exhibit 2(a), 2(b), 2(c) and 2(d). He described the plaintiff's bin ie Monny bin (Exhibit 2(b)) and how it operates he also described the bin labeled Adis (Exhibit 2(a) and how it functions. He then pointed out the differences between the two types. He also described the unlabelled bin Exhibit 2(d) and Rentokil initial bin (Exhibit 2(c), and stated that Rentokil sanitant is essentially of the same design. He then produced his report as Exhibit 9. In cross-

examination by counsel of the First Defendant he said he had not given an opinion as to whether an infringement had occurred or not in his report. All he admitted he had stated was the comparison of the bins. The request made was to check whether there was any infringement but that however was not his duty. He was not presented with technical drawings but he looked at the bins themselves although he admitted referring to the drawings in his report but as he had the bins themselves, he did not need the drawings. He did focus mainly on the mechanism. In cross-examination by the second Defendants counsel he said that he is basically a mechanical Engineer but post graduate level he specialized in other fields. His qualification however does not involve the study of inventions. The requirement he was to establish was whether or not the bins supplied by the Defendants do infringe plaintiff's patent. He did not know who makes the unlabeled bin Exhibit 2(d). He did not know who makes or uses the Aids bin Exhibit 2(a). These two bins were to be compared with what was complained about. He did a comparative exercise and found that all are operated with foot pedal mechanism. Pedal system is not abnormal lid and two flaps are what make the invention different. Monny flap is not airtight. It may stop the odour but it may not be all that odour free. Rentokil bins in issue are not odour free and airtight. He ended by saying he did not know who makes the bins by Rentokil.

PW3 John Anyangu Waka is a consultant in business management.

In the year 1999, he received instructions to carry out analysis of the business the plaintiff was doing. He carried out a rational business analysis and prepared a report Exhibit 10. Plaintiff had asked him to carry out analysis of market based on the sales they had and the sales they expected in the market place as they were losing business because of another organization which had come into the business using their patented base. His duty was mainly to analyze possible lose of business arising from that. He used a series of a assumptions using the documents availed to him which included sales invoice and sales description. he used only the documents he had. 1999 was used as the base year and he did his tabulation from the year 1999 to the year 2001. his findings were that arising from the use of the other sanitary bins the plaintiff lost Ksh. 22,600,000/=.in cross examination by both Defendants counsel this witness said that he did not know the nature of the business the 2nd Defendant carry out. The document on sales Target Focuses is only showing the growth of business. It was the document that was used plus invoice to prepare the report Exhibit 10. 0plaintiff gave the document to him but did not disclose the details of the document to the plaintiff and there is nothing on it to show that the document came from Rentokil. There is no word "bin" appearing on the record. The figures on the report relate to Business of Sanitam but there was no Sanitam datas he was given. Sanitam gave him data orally. the figure of Ksh.22, 600,000 is not an assumption. It is a projection of potential loss. He admitted that at that stage it was difficult to know the actual loss. Data came from Rentokil. It was not part of his brief to find out what the sales of Sanitam were in the year 1999. he did not get any document from plaintiff. He was focusing on the assumption that Rentokil was using the plaintiff's patented goods. He also proceeded on an assumption that Rentokil was the only competitor. If he had any information that there were other competitors using the plaintiff's bin, his report would have bin different. In reexamination he said he said he prepared the report as an economist. Plaintiff had told him the unit cost of its bin was Ksh 750 /=.

First defendant called one witness Walter Daniel Khaduyu, the Sales manager of the First Defendant. He has been with then for 9 months. The First Defendant offers a range of environmental services. These are pest control Services, hygiene division services eg washroom services, cleaning of carpets etc and health care division they have sanitary disposal services. They offer a range of sanitary disposal units ranging from hand operated units, followed by executive sanitary disposal units which is white in colour and is preferred in executive washrooms and hotels and it also hands step on unit for the hands of customers. He has come across a number of others like the ones in the market. The first Defendant started using the foot operated units about 10 years ago but their use was suspended due to mechanical fault.

In the letter exhibit 1 the Pedal operated unit the witness was referring to was Exhibit 2. He produced Exhibit D3 as the letter First Defendant wrote offering the registration of the Plaintiff's work. He also produced as Exhibit D4 and D5 as the certificates of design issued to First Defendants sister company in Malaysia. The main company of Rentokil initial in Kenya is Rentokil initial PLC in Malaysia. The design was registered as a design and not as a patent because it was not prior art. He also produced as Exhibit D7 page 12-83 of the entire Defendants bundle. The first Defendant got the step on units from Malaysia. He

also produced invoices from their suppliers as Exhibit D8. The authority to import the same items such as lids etc was produced as Exhibit D9. All flaps are imported even when they get units from local suppliers in Kenya. The proper name of the First Defendant is Rentokil Initial Kenya Limited as there has been a change of name and there is a certificate for the same change of name. Exhibit D10.

In cross-examination by the second Defendants counsel, this witness stated that the sanitary sales produced by the plaintiff could not be sufficient as it did not cover al the Rentokil operations and it was a Rentokil document. Rentokil unit is priced at Ksh. 600/= and they have a chemical in the unit which chemical carries a lifespan of one month. When the unit is sold, the chemical is put inside it to keep away any odour. It is a medically approved chemical, which also kills Hepatitis B bacteria. Rentokil supplies it.

In cross examination by the counsel for the plaintiff he said that though he does not have technical qualifications in the area of manufacturing market. The First Defendant has research and development sections at their Headquarters. First Defendant had not made any application for patenting of their pedal Operated sanitary Bin. It sister company in Malaysia sought registration of the Pedal unit as a design. None of the companies contracted with First Defendant has sought patenting of the Foot Operating system Design. As there are similar foot operated bins in the market. He has seen many being used in the Hotels etc and by other employees in the market. Shown plaintif's exhibit 2, he confirmed that it has been in the market for a long time. They were using the same but as the system could not withstand the load, they suspended it awaiting a superior system. What they were using is similar to plaintif's invention except the rod was weak and could crack easily but the mechanism was the same save that the plaintif's bin has a long life. Shown letter dated 2.9.98 he said that in September 1998, they had bins with poor rod and that is why they wrote the letter. Shown Exhibit D2 he said it was Foot Operated bin but it is imported. Before 1998, First defendant tried local ones but suspended them, as they were not successful. The agreements with their clients were entered in 1999 upwards. It had not taken any business from the plaintiff. There are occasions when such business have been taken but these cases are instances where tenders have been invited and the first Defendant has worn the tender. United Nation's work is one such a case. First Defendant has a wide range of units. The business of Foot Operated bins has been going on since 1998. The unit cost of foot operated bin is Ksh.600/= maximum and that cost is per service but prices are not rigid and sometimes it may go up slightly above Ksh.600/= but not much. He maintained that Exhibit 7 is not a complete report.

In re-examination he said that Exhibit D7 contains contracts at page 26, which were dated 7.7.94 and at page 29, another contract dated 1.7.1998. The agreements are in respect of products that predate 1999. He ended his evidence by saying that tendering is open and all competitors display their products when tendering.

The second defendant also called one witness, Chandulal Shah, who is the Managing Director of Kentainers (K) Limited. The 2nd Defendant manufactures wide ranging products including Bins and containers. It uses a manufacturing process known as Rotational Moulding. It make containers of different sizes and shapes as ordered by its customers. Sometimes in December 1998, 2nd Defendant received a letter addressed to First Defendant by the Plaintiff in which the same plaintiff claimed that it was the owner of a particular bin. The said Defendant upon receipt of the copy of the letter from First Defendant lodged an opposition to the grant of patent to the plaintiff with KIPO. His letter of opposition was dated 21.1.99. That objection has not been heard. He produced letter dated 11.12.98 as Exhibit D3 and letter dated 21.1.99 as Exhibit D4. He also produced Notice of opposition as exhibit D5 as statements of facts as Exhibit D6. His company, the Defendant had been making the type of bin the plaintiff is complaining about similar to Exhibit 2(b) for sometimes. It has been manufacturing them using the mould provided by the customer. The process is known as customer moulding ie one moulds a particular product for a particular customer. 2nd Defendant does not go out to sell it to the market. In this case the top part was not moulded by 2nd Defendant. It was imported by First Defendant and taken to 2nd Defendant by the same first Defendant to attach it to the body, which was being made by 2nd Defendant. 2nd Defendant does not make the lid and the flap. It only makes the body of the bin consist of the outer shell. Exhibit 2b is made exclusively for Rentokil. Pedal system is a separate mould. 2nd Defendant has manufactured bins where different mechanisms have been used but the subject been was made for Rentokil as they wanted it.

The 2nd defendant had made such bins long before the plaintiff sent them a notice .The mechanism is not unique, as the same has been used long before the plaintiff's application eg Addis bin Exhibit 2(a) is foot operated with flap and opening at the top. According to the witness, there is nothing new about the mechanism. In 1996 when the Plaintiff went to 2nd Defendant to manufacture the bin for it, the 2nd Defendant refused to manufacture it because of commercial reasons and not because it was complicated. 2nd Defendant has manufactured more complicated merchandise in the past. In this case the quantity was going to be too small and at that time 2nd Defendant was busy with their other developments. Plaintiff got patent in 1999 after this case was filed. It got it from ARIPO and the 2nd defendant has applied for its revocation-Exhibit D7. That objection has been heard. Referring to Exhibit D10- analysis of sale, this witness said that document was based on the premises that the alleged sale would continue throughput the year. It did not give margin of expenses; it does not state the profit margin, and is based on wrong figures and is showing only gross turnover.

In cross-examination, he said he is a lawyer by profession. He has no knowledge of engineering except what he has learnt during his work in the company for making moulds. He agreed that Patent should be respected but here the patent was not properly obtained. Further moulding stopped longtime ago and the first Defendant is now importing the product. Shown Exhibit 2(a) and 2(b) he said the two are assembling the same but he agreed that one had a flap opening and covering the contents inside but general features are the same. The document Exhibit 10 does not reflect the level of business and 2nd Defendant's objection has not been dealt with.

The above were the facts of this case as can be gathered from the evidence adduced in court by all parties. From the evidence it is clear to me that the plaintiff is the owner of patent No AP773 dated 15th October 1999 issued by African Regional Industrial Property Organization (ARIPO). That certificate is in the name of Sanitam Services (EA) Limited which is the Plaintiff. The Defendants maintain that the same patent was not properly obtained and have filed objections with the Kenya Industrial Property Office seeking to have the same Patent Revoked. That objection has not been heard and no decision has been made on it. As I stated in one of my rulings in this file, it is not for me to enquire in to that aspect and I have to accept what is valid on the face of it in so far as the same has not been revoked.

I have also seen the bin that the plaintiff says it did invent. It is true that it has at least one unique difference with the other bins and that is that it has a flap opening to receive the waste and covering the contents inside so that whoever is foot operating it cannot see the contents inside even when using it and also the odour is minimized by the invention. There were other bins shown to me but the subject bin was as far as that aspect is concerned different. I do feel it presented a solution to specific problems and falls under section 6(1) of chapter 509 Laws of Kenya. In any case, the right institution to question the patentability of the product is not the court. It is the Kenya Industrial Property Office. (KIPO) and/or the African Regional Industrial Property Organization (ARIPO) These are the bodies with the technical know how to investigate the patentability or otherwise of such an industrial and one of the two had presumable investigated the invention and found it fit to grant a patent for it. Whoever challenges the same must do so before those institutions and not in court. As far as the court is concerned, the court will accept that this invention was patentable because the right technical bodies found it to be a new invention and fell that it was Patentable. Section 32(3) of Kenya Industrial Properties Act chapter 509 Laws of Kenya sates:

" A patent in respect of which Kenya is designated state granted by ARIPO by virtue of the ARIPO protocol shall have the same effect in Kenya s a patent granted under this Act unless the Director communicates to ARIPO, in respect of the Application thereof, a decision in a accordance with the provisions of the protocol that if a patent is granted by ARIPO that patent shall have no effect in Kenya.

This then means the Patent granted on 15.10.99 and issued on 25.10.99 is valid in Kenya as there is no evidence that the Director has stated has stated it is not valid in Kenya.

The next aspect I need to consider is whether the Patent has been infringed y the defendants.. The evidence I have before me is that the second Defendant has been manufacturing similar bins for the First Defendant. The plaintiff has not stated when this started. Section 16 of the Industrial Property Act chapter

509 Laws of Kenya states:

“116. The burden of proof in matters relating to infringement of industrial property rights shall lie with those who claim their rights have been infringed and any processing using a reversal of the burden of proof shall be null and void under the provisions of this act.”

It is the Plaintiff to prove within the standards of probability that the patent owned by it has been infringed and when it was infringed. This is particularly important in this case as the Defendants maintain all along that they had been manufacturing similar bins long before the patent is issued to the plaintiff. Section 35 (1) of the same act states.

“35(1) The Applicant or the owner of the patent shall have the following rights

(b) after the grant of the patent and with the limits defined in section 16, to preclude any person from exploiting the patented invention in the manner referred to in section 36.”

And section 36 states:

“36 The owner of the patent shall have the right to preclude any person from exploiting the protected invention by ant of the following acts

(a) when the Patent has been granted in respect of product.

(i) making, importing, offering for sale, selling and using the product;

(b) when the patent ahs been granted in respect of a process

(i) using the process; or

(ii) doing any of the acts referred to in paragraph (a) in respect of a product obtained directly by means of the process.”

The Patent granted to plaintiff was granted in respect of a product. The Defendants state that their product which is alleged to infringed the patent of the Plaintiff was in the market before the plaintiff applied for registration of the patent and certainly before the plaintiff obtained the Patent. If I understand them well, they are saying that they could not have infringed the Patent because by the time their product hit the market, the plaintiff had not patented its product and so their was no patent for them to infringe. Secondly they are saying that the offending flap and top of their product is imported and is not made locally. The amended plaint states at paragraph 6A as follows:

“ 6A. The Defendant during the pregnancy of this registration and perpetually often the grant of the said patent, by themselves, their servants and/or agents have and are wrongfully and without any reasonable excuse continued to manufacture, supply and pass of to consumers bins similar if not identical to those patented by the plaintiff.”

The plaintiff is clearly admitting that what it calls infringement took place before it obtained patent and after the Patent was obtained. By the mere fact that this suit was filed in January 1999 while the Patent was issued on 25th October 1999, the plaintiff must be understood to have relied on what he alleged as infringement before Patent was obtained. From the provisions of the act I have reproduced above, it appears to me that the production of what later became similar bins to the Plaintiff’s bin before the Patent was issued. Cannot be termed an infringement of the patent as at the time the same were produced by the Defendants, there was no patent to the existence to the infringed. As I have stated above, the plaintiff has not specifically stated when the Defendants offending products first hit the market or was first manufactured. It has not stated when the one it alleges in the plaint were being produced after the patent

was obtained were actually produced. I have looked at all the agreements between the plaintiff and various customers for the supply of the same product of bin to be able to hazard when its invention came into the market and I found that Plaintiff's agreement with United Nations Office in Nairobi was apparently entered into on 1st July 1998 for that is when it became effective. Agreement with Gatheru Mugo company Limited was on 5th May 1997 Agreement with World Food Programme was on 30th October 1998; one with NSSF Board of Trustees (Bruce House) was on 24th February 1998; one with Kenya Airays was on 3rd July 1997; one with National Bank was on 8th October 1997; one with Kenya College of Communications Technology was on 28th July 1998; one with standard Chartered Bank was on 19th May 1997; one with City Finance Bank was on 5th March 1998; Agreement with Green Corner was on 11th October 1998; one with Varsity Guest House (Stella Winja) was on 25th March 1997 and agreement with Kenya Pipeline was 28th January 1998. These were all for the supply of ":Monny bin was in the market way back in 1997 long before patent was secured to protect the invention. The effect of the is that at that time when it was in the market without any patent, any other competitor including the Defendants was at liberty to produce their own version of a bin and the same was similar to "Monny", it could not be said to have infringed any patent as no patent existed then. Neither could one say it had gone against any application for registration of a patent as the application, in case of some agreements, was made later.

I have carefully considered the evidence of PW2 Frank Oduor and his report and his report–Exhibit 9. He says at the conclusion of his report that the bin a Rentokil Initial Sanitact are not substantially different in their design and operation from the bin Sanitam Monny for which a plaintiff holds a patent as per the patent document No AP 773. That is all very well but was there a patent in existence or had the plaintiff applied for one by the time the Defendants products were manufactured? In any event is there evidence as to which one came first, the Defendants products or the plaintiffs. These are matters that the plaintiff needed to prove in its favour to enable the court find that there had been infringement of the patent. I think PW2 was right when he declined to give a positive answer as to whether the defendants products had infringed the plaintiffs patent because he could only answer that if he knew which product went in to the market. Earlier and if he knew when the patent was obtained.

I am not satisfied that the plaintiff ahs discharged the burden of proving that its Patents' have been infringed by the Defendants products. From the evidence before me I would be tempted to think that the plaintiff possibly sought for and obtained patent to stop clear competition that was already in the market at the relevant time though his invention may very well have been an improvement upon the then existing foot pedal bins. There is nothing to show that the Defendants have "copied" his invention exactly after it obtained patent. At least I was not shown any bin exactly similar to the Plaintiff which was allegedly manufactured wholly or imported in part by the Defendants and no customer gave evidence that the Defendants sold to them any sanitac bins. In any case the patent was obtained too late after the Defendants goods were already in the market. Lastly, I also not that the First Defendant is not sued in its correct name of Rentokil Initial (K) Limited.

Before dismissing the suit as I must do, I need to consider what I could have a warded to the Plaintiff had he succeeded in its suit. Clearly the plaintiff could have been entitled to permanent injunction relief sought, but as I have stated that no customer gave evidence to prove passing off. I would not have granted relief (b) sought in the Plaint. On relief (d) ie general Damages, I do agree with the learned Counsel for the second Defendant that the document PW3 JOHN ANYANGU WAKA relied on for his analysis and Exhibit 10 is not a document upon which any court of justice can rely on in deciding any legal matter. The one page document is not signed. It does not reveal its origin and some parts of it particularly on the bottom are not eligible PW3's evidence is based on the same document and PW3 analyzing the same document came to a conclusion that the damage occasioned to Plaintiff is Ksh 22,600,000 from January 1999 to date of hearing the case. Secondly the analysis is not that of the actual sales by the plaintiff. It is the alleged actual sales of the sanitary units by Rentokil Initial and not by the plaintiff. Further the sales analyzed includes monthly service. I do not think that the mere fact that Rentokil could have earned that amount necessarily mean the Plaintiff could have earned the same. Various companies have various market skills that can dictate their earnings. In any case the price at which Rentokil was selling its units needed not be the same as the price at which Plaintiff would sell its units. Rentokil was selling at Ksh

750/=. There is also evidence that Rentokil was charging service which included medicinal facilities for its units to avoid odour and Hepatitis B. Lastly and even the most important is

That the amount of Ksh 22,600,000 claimed does not seem to have taken into the account the expenditure by the plaintiff on staff etc and the expenditure on the purchase of raw materials for the manufacture of the bins or the actual money paid to the manufacturer. This document does not assist the court at all in assessing the damages suffered by the plaintiff the measure of damages cannot be assessed at gross sales of the competing company assuming for the moment that the document relied on which I was told, was from Rentokil is a valid document. The plaintiff claimed to have been in business. It should have shown a comparative accounting report of its business flow before and after the time it complained infringement took place. Plaintiff's witness said he made net income of Ksh 350,000/= per month. If were so then the amount of loss cannot work to Ksh 22,6000,000 as he claims. It would be less than Ksh 10,000,000/= in two years and when one deducts sales of other products it would be much less than Ksh 8,000,000/=. The plaintiff however did not on its own and with its own documents prove envy that figure of net profit of Ksh. 350, 000/=.

I would have had no basis for arriving at proper a assessment of loss to the plaintiff as there was no evidence to prove the same as the Plaintiff stated that the Defendants interfered with his customers and made some of his erstwhile customer to counsel their contract with it but not a single customer was called to give evidence on that allegation. Faced with that situation that Plaintiff did not prove loss, if it had succeeded in the main case. I would have given a token figure of Ksh 1,000 as general damages. This suit cannot succeed. It is dismissed with costs to the Defendants. Judgment accordingly.

Dated and delivered at Nairobi this 22nd day of May 2002.

May 22, 2002

Onyango Otieno J