REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 57 OF 2015

SAFEPACK LIMITED…….....APPELLANT

- VERSUS -

GENERAL PLASTICS LIMITED.....RESPONDENT

JUDGEMENT

1. On 11th April 2013 the **INDUSTRIAL PROPERTY TRIBUNAL** *(hereinafter "The Tribunal?)* delivered its Ruling on a Preliminary Objection which had been canvassed by the Appellant, **SAFEPACK LIMITED.**

2. The essence of the decision was that the Tribunal allowed the respondent, **GENERAL PLASTICS LIMITED,** to adduce additional evidence.

3. The preliminary objection was presented in the following terms;

> ***"1. The application dated 2nd September, 2011 is Res Judicata in view of the separate rulings delivered by the Industrial Property Tribunal (the "I P Tribunal") on 15th July 2005 and the judgement of the High Court, in Misc Application No. 348/2006 on 30th April 2009 as between the Applicant and the Respondent in IPT Cases Nos. 16/2002, 17/2002, 18/2002, 23/2002 and 37/2002.***
>
> ***2. The application dated 2nd September, 2011 is a grave abuse of the process of this honourable I P Tribunal as the same constitutes a "back door? appeal and is a way of seeking a different ruling from the same IP Tribunal.***
>
> ***3. The I P Tribunal on 17th June, 2011 by consent of the parties, fixed hearing dates for IPT Cases Nos. 16/2002, 17/2002, 18/2002, 23/2002 and 37/2002. It is therefore plainly clear that the application dated 2nd September, 2011 is intended to delay and prevent these cases from proceeding to an expeditious hearing and determination notwithstanding the fact that they have been pending since March, 2002".***

4. In its decision, the Tribunal rejected the preliminary objection in its entirety, and directed that the application dated 2nd September 2011 would proceed to hearing, so that the Tribunal would determine it on merit.

5. The appellant's position was that the Tribunal and the High Court had previously held that the respondent may not adduce further evidence. Therefore, the appellant believes that the Tribunal erred by deciding that it was now open to the respondent to adduce further evidence.

6. At the core of this appeal there is the principle of *Res Judicata.*

7. Section 7 of the Civil Procedure Act provides as follows:

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit which such issue has been subsequently raised, and has been heard and finally decided by such court".***

8. Bearing in mind the fact that the dispute in this case was being handled by the Tribunal, whereas Section 7 of the Civil Procedure Act makes reference to the *?court",* there might arise the question as to whether or not the principle of *res judicata* was applicable to the Tribunal.

9. Section 2 of the Civil Procedure Act gives the following definition of court;

> ***"court means the High Court or a subordinate court acting in the exercise of its civil jurisdiction".***

10. Although tribunals are not specifically mentioned in the definition of *"court?* above, it is informative that Article 169 (1) of the Constitution of Kenya identifies subordinate courts as consisting of;

> ***a) the Magistrate courts;***
>
> ***b) the Kadhis courts;***
>
> ***c) the Courts Martial; and***
>
> ***d) any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2).***

11. In **REPUBLIC Vs BUSINESS PREMISES RENT TRIBUNAL & WESTLANDS TRIANGLE PROPERTIES LIMTIED & 3 OTHERS [2013] e KLR** Odunga J. held as follows;

> ***"27. I have no doubt at all in my mind that the subject Tribunal is a Tribunal established by an Act of Parliament and therefore falls squarely within the definition of a subordinate court and therefore amenable to the supervisory jurisdiction of the Court. Being a subordinate court, the Tribunal is, by virtue of the doctrine of stare decisis, bound by a decision of the High Court…?***

12. I share the same view as my learned brother, Odunga J., and hold that the Industrial Property Tribunal is deemed to be a subordinate court. Therefore, the Tribunal is subject to provisions of Section 7 of the Civil Procedure Act.

13. The next issue for determination is whether or not the principle of *res judicata* was applicable to this case. On the one hand, the appellant insists that it was applicable, whilst on the other hand, the respondent submits that it was not applicable.

14. I understand the appellant to be saying that the alleged new evidence which the respondent sought leave to adduce in addition to the evidence already on the record, was not new at all.

15. On the other hand, the respondent submitted that the additional evidence which it intended to adduce was not known to it, by the time of the previous proceedings.

16. The respondent cited the following words, from the decision in **PANCRAS T. SORAI Vs KENYA BREWERIES LTD [2006] e KLR,** to back its position;

> ***"****LAW J.A held as follows, at page 821 of the* case *of* ***MBURU KINYUA Vs GACHINI TUTI [1978] KLR 69;***
>
> > ***"It was held as long ago as 1932 by the Court of Appeal for Eastern Africa that it is only when the facts on which the party is relying on the second proceedings were not known to him at the time of the former proceedings that the defence of res judicata cannot be sustained'***
> >
> > ***Consequently, as I have already held that the defendant could not have known, prior to the ruling of 10th December 2004, that the plaintiff would fail to comply with the order to deposit the security within the time specified by the court; the plea of res judicata herein cannot be sustained?.***

17. I think that it is vital to elaborate on the words cited above. It is not enough that the facts were unknown to the party who was fighting off the defence of *res judicata;* he or she needs to demonstrate that even though he or she had acted diligently, they had been unable to get that piece of evidence prior to the earlier suit or application.

18. In this instance, the respondent has indicated that it could not have been able to come by the additional evidence prior to July 2005, because the said additional evidence only became available after the Tribunal had rendered its decision on the earlier application.

19. The first piece of *"additional evidence?* is a letter from the Kenya Industrial Property Institute **(KIPI)** dated 26th July 2005.

20. The letter was written in response to a letter from Jane Wanyaga & Co. Advocates, dated 19th July 2005. The said advocates were, evidently, conducting a search on protection of an Industrial Design.

21. KIPI's John Maina provided the following answer;

> ***"There is a similar design that it registered in Kenya with the following details:***
>
> ***Applicant:*** ***Safepack Limited***
>
> ***Filing Date:*** ***22.05.2000***
>
> ***Design No:*** ***ID 177***
>
> ***We have also consulted the Thailand Patent Office website and have also found a similar Design that was registered there with the following particulars:***
>
> ***Filing date:*** ***01-06-1994***
>
> ***Publication No:*** ***16168***
>
> ***Industrial Design registration is territorial and there is no worldwide database for Industrial designs?.***

22. Whereas the date of the letter is 26th July 2005, the information provided by **KIPI** was to the effect that there was a similar design registered in Kenya, by the appellant, on 22nd May 2000.

23. There was also another similar design in Thailand, which dates back to 1st June 1994.

24. In effect, the contents of the letter show that the alleged similar designs in Kenya and in Thailand pre-dated the earlier application brought by the respondent, when it sought leave to adduce additional evidence.

25. The respondent did not provide any reasons why it had not conducted the search earlier.

26. The Statutory Declaration of **MANOJ DHANJIBHAI DHARAIYA** of Ambajee Enterprises, Mumbai, India, was sworn on 3rd January 2006.

27. However, the deponent actually stated that the Design registered at **KIPI,** as ID. No. 190 was identical to or substantially similar to the Bottle Blow mould which Ambajee Enterprises had manufactured in July 1993.

28. The respondent did not demonstrate to the Tribunal why it had not been able to procure Manoj Dharaiya's statutory declaration prior to its earlier application.

29. Another Statutory Declaration was sworn by **RAZA JAGANI** of Razco Food Product Limited. Mr. Jagani stated that the design which the appellant had registered was similar to that which Razco Food Products Limited had used since 1990. If the design had been in use for that long, the respondent should have demonstrated to the Tribunal why it had not obtained Mr. Jagani's statutory declaration prior to the time when the respondent lodged its first application for leave to adduce additional evidence.

30. On his part, **SCHON AHMED NOORANI** swore a Statutory Declaration on 21st December 2005. The information he gave was that the design No. 191 had been in the Kenyan market since before the year 1986. He also added that since the year 1988, **JACK & JILL SUPERMARKETS LTD** had been selling products packaged in bottles whose design was similar to the design registered by the appellant.

31. The respondent did not demonstrate to the Tribunal how evidence that was allegedly available since 1988, could not have been obtained by the respondent prior to 21st December 2005.

32. The same reasoning would apply to the design **ID No. 178.**

33. Although the respondent submitted that it had only become aware of the alleged additional evidence after exercising due diligence, I find that that assertion is not backed by the information provided.

34. In my considered view, if the respondent had carried out due diligence prior to filing its earlier application for leave to adduce additional evidence, there is nothing which would have prevented it from bringing forth the said evidence earlier.

35. The Tribunal held that any decisions made in 2005 and 2009, which may have a bearing to the issues at hand;

> ***"must of necessity be distinguished and no reliance be given to such decisions which includes the judgement of Wendoh J. in Misc Application No. 348 of 2006, involving General Plastics Ltd Vs The Industrial Property Tribunal and Safepack Limited, delivered on 30th April 2009?.***

36. In my considered view, the Constitution of Kenya 2010 did not stipulate that decisions made by the courts in Kenya, prior to its promulgation, have to be distinguished, and were no longer to be relied up.

37. When delivering its decision on 30th April 2009, the court was properly constituted, and it therefore had the requisite jurisdiction to hear and determine the case before it. The said court dismissed the Petition which the respondent had lodged at the High Court to challenge the decision of the Tribunal, when the Tribunal had exercised its discretion *(under Rule 28 (4)]*.

38. The court took cognizance of the Tribunal's discretion to determine whether or not to allow the

respondent to adduce further evidence.

39. Considering that the Tribunal had dismissed the application for leave to adduce further evidence, the learned Judge held that;

> ***"…a challenge to the exercise of that discretion can only be made where the Applicant demonstrates that the discretion was not exercised judiciously; that is that was exercised arbitrarily, in bad faith, or capriciously?.***

40. But the considered view of the learned Judge;

> ***"….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…***
>
> ***I find that the Respondent (Tribunal) did not breach the Applicant's right to a fair hearing?.***

41. When the Tribunal later said, in the subsequent application by the respondent, that it must of necessity distinguish the decision of the High Court, and also that no reliance could be placed on that decision, I find that the Tribunal totally disregarded the doctrine of stare decisis. That was a grave error of law, which if allowed to take root, would breed uncertainty.

42. In **NICHOLAS KIPTOO ARAP KORIR SALAT Vs INDEPENDENT ELECTROAL AND BOUNDARIES COMMISSIN & 6 OTHERS CIVIL APPEAL No. 228 of 2013,** Kiage J.A said;

> ***"While not espousing a dry, lifeless and uncritical obeisance to rules at the expense of substantive justice I am not prepared to hold that parties can simply wave the Constitution and the oxygen principle in the Act, hoping thereby to obliterate their defaults and cure the incompetencies and defaults of their appeals?.***

43. In this case, the respondent has now resorted to heaping blame on its former advocates. And the Tribunal expressed the view that;

> ***"Due diligence of the new lawyers cannot be faulted and the inordinate delay cannot attach as ruled in IPT Case No. 36 of 2002 by this Tribunal. It is not an issue at all as it is trite law that a party should not be punished for mistakes or lack of diligence by its previous lawyers?.***

44. The Tribunal is understood to be saying that the advocates who previously represented the respondents made mistakes and lacked diligence. Therefore, the Tribunal believes that because the new lawyers for the respondent were now diligent, neither the said new lawyers nor the respondent should be punished.

45. That ruling confirms that if the lawyers previously on record for the respondent had not made mistakes, and had been diligent, the evidence which the respondent is now calling *"further evidence?,* could have been made available to the Tribunal, from the outset.

46. Whilst the Tribunal places the blame solely on the advocates who represented the respondent from the very beginning of the revocation proceedings, it has not been demonstrated that the respondent should be exonerated from blame.

47. To my mind, the respondent cannot escape from the responsibility which a client usually has, which is to make available evidence to support his case, and evidence to counter the opponent's case.

48. The Tribunal's perception of the application was stated in the following words;

> ***"In this application, the tribunal is being asked not to rely on additional evidence but only to a***

grant of leave to adduce such evidence?.

49. In my understanding, once a party is granted leave to adduce evidence, and the party proceeds to adduce the said evidence, the court would have to take the evidence into account when making a determination.

50. I cannot therefore fathom how the Tribunal can expect that although a party who has been given leave to adduce additional evidence, will proceed to do so, the Tribunal would not rely on such evidence.

51. In **GENERAL PLASTICS LIMITED Vs THE INDUSTRIAL PROPERTY TRIBUNAL & SAFEPACK LIMITED Misc. APPLICATION No. 348 of 2009,** the Court made it clear that the Petition before it was in relation to IPT Cases Nos;

i) 15/26 of 2002;

ii) 16/27 of 2002;

iii) 17/28 of 2002;

(iv) 18/29 of 2002;

v) 24/37 of 2002 and

vi) 23/25 of 2002;

52. Those cases were in the nature of revocation proceedings, through which General Plastics Ltd sought to revoke the registration of 12 Industrial Designs, by Safepack Limited. The Designs that were the subject matter of those cases were identified as Numbers:

177, 178, 182, 186, 187, 190, 191, 192, 214, 235 and **236.**

53. On 7th July 2005 the Industrial Causes in respect to Industrial Designs **No. 177, 178, 182, 191, 190** and **192** came up for hearing before the Tribunal.

54. The respondent herein sought leave to adduce further evidence.

55. After giving due consideration to the application, the Tribunal rejected the respondent's application.

56. The respondent lodged the petition, to challenge the decision of the Tribunal. And the High Court later rejected the petition.

57. The determination of the petition constituted an upholding of the Tribunal's rejection of the application for leave to adduce further evidence.

58. As the Tribunal is a subordinate court pursuant to Article 169 (1) of the Constitution of Kenya, it was obliged to recognize the decision handed down by the High Court. I find that the Tribunal erred in law by not only ignoring the judgement of the High Court, but also by purporting to overturn it.

59. For all those reasons, I find merit in the appeal. Accordingly, the appeal is hereby allowed.

60. The Tribunal's decision dated 11th April 2013 is set aside.

61. The respondent in thus denied the opportunity to adduce further evidence before the Tribunal.

62. The respondent is ordered to pay the costs of this appeal, and also the costs of the application dated

2nd September 2011.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **13th day** of **September** 2016.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Nyakundi for Mrs. Opiyo for the Appellant

No appearance for the Respondent

Collins Odhiambo – Court clerk.