REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 241 OF 2013

SAFEPAK LIMITED..……..……APPELLANT / APPLICANT

VERSUS

GENERAL PLASTICS LIMITED.…….....…….….RESPONDENT

RULING

1. The application before me is the Notice of Motion dated 4th July 2013 brought under section 3A & 1B(1) of the Civil Procedure rules 2010. The applicant seeks a temporary stay of proceedings in industrial Property Tribunal (IPT) case No. 16/2002 (16/27 OF 2002) , 17/28 of 2002, 18/29 of 2002, 23/25 of 2002 and 24/37 of 2002 pending the hearing and determination of the intended appeal. That costs of the application be in the intended appeal.

2. The application is based on grounds that; the applicant filed an appeal against the decision of the tribunal in the IPT case dated 11th April 2013. The appeal raises numerous serious points of law and fact which ought at to be determined first before the hearing of the IPT cases nos. 16/2002, 17/28 of 2002, 18/29 of 2002, 23/25 of 2002 and 24/37 of 2002; that one of the issues of law for determination is whether the IPT is bound by the principles of *stare decisis* & *res judicata*; that these issue must be decided first as they have a bearing on the hearing of this matter and whether the tribunal can disregard the decisions to the High Court and whether the same is binding on the lower tribunal, secondly whether the tribunal can re-open litigation based on the facts & issues contrary to the principle of res judicata and article 159(2)(a) and 24(1)(d); that the appeal raises constitutional issues on the interplay between Articles 40(5) and 40(6) of the Constitution vis-à-vis the Industrial Property Act and Industrial Tribunal Rules 2002; that the ruling by the tribunal has occasioned serious prejudice to the appellants it means the matters previously litigated on can be re-opened and re-litigated whenever a party is dissatisfied with a previous decision of the Tribunal & High Court which is not in its favor; that should the proceedings proceed the appeal will be rendered nugatory and the present appeal will be overtaken by events which will lead to severe miscarriage of justice and uncertainty in to the binding effect of the High Court.
3. The application was supported by the affidavit of Catherine Karanja dated 4th July 2013 ,the sales and administration manager of the applicant. She deponed that the respondent filed an application dated 2nd September seeking to adduce additional evidence in IPT case No. 16/2002, 17/28 of 2002, 18/29 of 2002, 23/25 of 2002 and 24/37 of 2002 and called an examiner from KIPI. The appellant filed a statutory declaration in reply indicating the same issues had been raised in by the respondents in their application dated 7th July 2005 and a ruling on the same delivered on 15th July 2005. That subsequently the respondent filed a Constitutional reference which was dismissed on 30th April 2009. The respondent's application was allowed by the tribunal's ruling delivered on 11th April 2013. The appellant's filed its memorandum of appeal against the said ruling on 9th May 2013 and requested for proceedings; that she is advised that the appeal has high chances of

success and that the Memorandum of Appeal raises serious Constitutional & Public Interest issues in respect of intellectual property rights and that should the proceedings in the IPT proceeds before the hearing and determination of the pending appeal the appeal will be rendered nugatory and the appeal will be overtaken by events.

4. The application was opposed and the respondent filed a replying affidavit sworn by Rashik P. Shah the Managing Director of the respondent. He deponed that the respondent filed an application dated 2nd September 2011 seeking leave to adduce more evidence in the IPT case No. 16/2002, 17/28 of 2002, 18/29 of 2002, 23/25 of 2002 and 24/37 of 2002. The applicant on 24th October 2011 raised a preliminary objection on res judicata against the said application. The Tribunal on 26th October directed parties to file written submissions and delivered its ruling on 21st November 2011 found that the application was not res judicata and dismissed the applicant's preliminary objection. The appellant aggrieved by the said ruling appealed the said ruling in Civil Appeal No.640 of 2011and has not filed a record of appeal to-date. The matter before the IPT was scheduled for hearing on 7th august 2012 and the Tribunal directed parties to file written submissions. On 11th April 2013 the tribunal delivered its ruling for the application dated 2nd September 2011 by allowing the orders sought. Aggrieved by the said decision the applicant filed an appeal no 241 of 2012 and the applicant is yet to serve on them with the Memorandum of Appeal and record of appeal; that the High Court's jurisdiction to hear the appeals is donated by section 115 of the Industrial Property Act Cap 3 of 2001 and the same section does not grant the High Court powers to grant the orders sought by the applicant herein; that the application is an abuse of the Court process and that the applicant has not advanced any valid reason why he did not make the current application in Civil appeal no 640 of 2011 to save Court's time; that the appeal lacks merit and does not have any good chances of success for the following reasons; that IPT properly exercised its discretion in allowing the respondent to adduce further evidence, that the I PT substantively determined the issue on the 21/11/2012 as such the issue of res judicata was not available for canvassing in opposition to the Respondent's application, that the appeal militates against application of the right to be heard under rules of natural justice and the constitutional and fundamental right to fair hearing, fair administrative action and access to justice. That the applicant is guilty of laches and delay and inordinate delay filing the application 2½ months from 11th April 2011; that if the orders sought are granted the same will hinder expeditious determination and disposal of the Industrial Property Tribunal; that no substantial loss will be occasioned on the applicant nor will the appeal be rendered nugatory if the orders sought are not granted; that the applicant has not demonstrated sufficient cause to warrant the Court to grant orders sought.
5. Parties filed written submissions. The plaintiff reiterated the grounds on the face of the application and what is deponed in its supporting affidavit. The plaintiff submitted that it will compile the record of appeal once it receives proceedings from IPT .That since Order 41 does not provide for stay of proceedings they were seeking to invoke the Court's inherent jurisdiction. That Justice Onyancha in the case of **Safepak vs. General Plastics Ltd Civil Appeal No. 143 of 2011** granted a stay of proceedings based on a similar application filed under section 3A. That the Memorandum of Appeal raises various arguable points of law and that one of the serious issues of law and public interest is whether the IPT is bound by the principles of *stare decisis & res judicata.* That this issue should be decided first as it will have a bearing on the hearing of this matter and other pending matters at the IPT. The applicant stated the other issues that need to be considered are as stated in the applicant's grounds I need not repeat them. It is submitted that it was important for the Tribunal to get guidance on how the principles are applied in order to make sound decisions and should the stay orders sought is not granted it will lead to uncertainty to the binding effect of decisions of the High Court.
6. The applicant's submitted that in an application for stay the applicant must illustrate whether he has an arguable appeal i.e. if there are triable issues of either fact or law raised in the appeal and not necessarily that the intended appeal will be successful. It relied on the case of ***Kenya Commercial Bank –vs- Hon. Nicholas Ombija Civil Appeal No. 153 of 2009,*** where it was held that *"That an arguable appeal is not one which must necessary succeed, but one which ought to be argued fully before the court."* , and also the case of ***Fidelity Insurance Co. ltd –vs- Raffia Bags HCCC No. 212 of 2008 [2010] eKLR,*** where the court held that *" that the Court should*

consider whether an appeal has merit on the face of it.". It was argued that the appeal will be rendered nugatory if the IPT proceedings proceed before the hearing of the appeal. That this will destroy the substratum of the appeal whether or not additional evidence ought to be allowed in view of principle of *res judicata* and *stare decisis*. The applicant referred to the case of ***SafePak Limited –vs- General Plastics Ltd (supra)*** where the Court held; *"to go to final determination before the appeal is fully determined will remove and destroy the entire substratum of appeal which is whether or not additional evidence to the suit for revocation is proper in law."*

7. It was submitted that the Court of Appeal in the case of **KCB vs. Ombija (supra)** recognized that the fact that a separate appeal could be filed against the final judgment did not undo the fact that the present intended appeal would be rendered nugatory. That the issue in this matter is that the IPT decision though interlocutory was of a final nature allowing the production of additional evidence thus fundamentally changing the character of the IPT proceedings so that the appeal from the final decision would not undo the damage which it sought to be addresses in the current appeal. That the applicant cannot raise this issue again unlike in the decisions of **Wanyiri *Kihoro vs Surinderpal Singh Syan and others [2008] eKLR, Fildelity Shield Insurance & others vs. Rafia Bags, Julia Murithis vs. Housing Finance (supra), Saloce Hotel Ltd –vs- Catering & Tourism Dev. Levy Trustees HCCA 959 of 2006 [2010] eKLR.***

8. On costs the applicant argued that cost would be inadequate and a useless remedy for the applicant as the appeal will be academic if the hearing in the IPT case proceeds. That the High court's decision on appeal in relation to whether additional evidence will be adduced or not will have a profound effect on the rest of the proceedings in the IPT. On the issue of delay it was submitted that once the record of appeal is filed there will be no delay as there are judges in the division to hear the appeal in the civil appeal division and that the Respondent will not be prejudiced. That as long as the revocation proceedings are in place the applicant cannot take out infringement proceedings against the Respondent who continues to use the infringing design in its business. That in revocation proceedings a party seeks to attack the validity of another registered design owner cannot take out infringement proceedings against the applicant until the validity of design has been decided by the IPT and this is to the advantage of the respondent and it will not be prejudiced in any way; that there is no delay in filing the current application as there is no hearing date for the revocation of proceedings in IPT Nos. 16/2002, 17/28 of 2002, 18/29 of 2002, 23/25 of 2002 and 24/37 of 2002 and the only issue to be considers is whether the appeal is arguable and that the same will be rendered nugatory if the orders sought are not granted and that no legal requirements to prove substantial loss as the application herein is for stay of proceedings and not stay of execution. Learned Counsel distinguished the decision in the case of **Fidelity Shield Insurance & others vs. Rafia Bags (supra)** cited by the Respondent in that in that case the applicant was relying on the provisions of Order 41 rule 4 of the CPR which do not apply to stay proceedings and that in applications for stay of proceedings there is no legal requirement to prove substantial loss.
9. The respondent in its submissions reiterated the contents of the replying affidavit and submitted that the law regulating stay of proceedings is provided under Order 42 rule 6 of the Civil Procedure Rules 2010 and acknowledges that the law is silent in respect of stay of proceedings pending before various tribunals; that its trite law that exercise of inherent jurisdiction of the Court is discretionary exercise and the same should be premised on well-known judicial principles; that the application for stay is premised on the principles that;

a. No order for stay of execution shall be made unless the applicant satisfies that he will suffer substantial loss unless the order is made and that the application.
b. The inherent jurisdiction can only be invoked judiciously based on the facts and law and to promote fair and expeditious disposal of cases.

10. That the applicant herein has not demonstrated how he will suffer substantial loss in the instance that the orders sought are not granted and that the applicant in its submissions appears to have confused the jurisdiction of the High Court and the jurisdiction of the Court of appeal under Rule 5(2) (b) which is not applicable in this Honorable Court. Rule 5(2)(b) of the Court of Appeal

Rules provides; " in considering an application for stay of execution , injunction or stay proceedings , the courts only considers whether an appeal is arguable and whether it will be rendered nugatory unless the orders south are not granted. It relied on the following cases; ***HCCA 480 OF 2008 NAIROBI, WANYIRI KIHORO V. SURINDERPAL SINGH SYAN & 2 OTHERS*** where that the applicant filed its application on 5th July 2013 which was 2 months after the delivery of the ruling on 11th April 2013 and that the applicant gave no explanation for the said delay. It also relied on the case of ***HCCC no. 212 of 2008 Nairobi Fidelity Shield Insurance Co. ltd v. Raffia bags ,*** where it was held that, *"this application was brought more than 3 months after the ruling was delivered. This application therefore cannot meet the threshold of having been filed within reasonable period of time."*

11. It was submitted that if the court declines to grant the stay of proceedings there will be no substantial loss occasioned as the proceedings pending before the IPT will proceed for determination on their merits and that the applicant may succeed in the proceedings or may not, in the event it does succeed it will have an opportunity to file an appeal at the High Court against the said decision, which appeal may include the issues raised in the appeal before this court. The respondent relied on the following case; **HCCA 480 of 2008 Nairobi Wanyiri Kihoro-vs Surinderpal Singh Syan & 2 others, HCCC No. 185 of 2002 Nakuru Benjamin Kimani Romoka & 2 Others –vs- Everyday Batteries (K) Ltd [2006] eKLR, HCCA 956 of 2006 Nairobi Solace Hotel Ltd-vs- Tourism Development Levy Trustees [2010]eKLR,** where the courts declined to order stay of proceedings as the applicants had a right to canvass the same issues on appeal from the final decision of the courts.
12. It was further submitted that the applicant is guilty of laches and gross indolence for failing to file the application for stay timeously as the decision appealed against was rendered on the 11th of April 2013 , the applicant filed the appeal on the 9th of May 2013, the application was filed on the 5th of July 2013 a period over 2 months and there is no explanation for the delay. On whether there is an arguable appeal , it was argued that even if the court were to consider whether the applicant had an arguable appeal, the applicant had no arguable appeal as it is not in dispute that the evidence which the Respondent was allowed to adduce at the IPT Case No. 16 of 2002 is evidence that came into their possession after the commencement of the proceedings and that the IPT properly exercised its discretion under section 103 (8) and 114 (1) of the Industrial Property Act as read together with Rule 24 (8) of the said Act. That the IPT did not make a finding that it was not bound to apply the doctrines of *res judicata* to its proceedings, but that the circumstances in which the Respondent's application was made was different from any other which may have been made. Lastly it was argued that the applicant has filed HCCA No. 640 of 2011 Safe Pak Limited vs. General Plastics, that the memorandum of appeal filed in the aid appeal is similar to the one filed in this appeal , that the applicant did not seek a stay of proceedings then to canvass the applicant. That the applicants failure to seek a stay order in HCCA 640 of 2011 shows that the applicant's intention is to unduly delay and or stymie the expeditious disposal of the tribunal proceedings in breach of the overriding objectives of the court. That the overriding objectives of the court when considered together with the provisions of Article 159 (1) (2) of the Constitution lie in favor of allowing the IPT No. 16 of 2002 to proceed for hearing and final determination.
13. I have read and considered the affidavits and submissions made by the parties. It is not in dispute that there several matters before the Industrial Property Tribunal between the two parties. The applicant in the said matters before the tribunal has raised issue on infringement of its patent by the respondent. I note that the Industrial Tribunal Act Cap 509 does not give the Tribunal power to stay its own proceedings. Section 115 of the industrial Property Act gives the High Court power to; Upon the hearing of an appeal under this section, the High Court may—

a. confirm, set aside or vary the order or decision in question;

(b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the High Court may deem fit to give;

(c) Exercise any of the powers which could have been exercised by the Tribunal in proceedings in connection with which the appeal is brought; or

I have read the Memorandum of appeal and find that the same raises crucial points of law that ought to be decided prior to the proceedings in the matters before the Tribunal. The appeal raises issues on whether the Tribunal is bound by the principles of *stare decisis & res judicata,* whether the Tribunal can re-open litigation based on the same facts & issues contrary to the principle of *res judicata* and Articles 159 (2) a & 24 (1) (d). In the cases cited by the Respondent the courts declined to grant a stay of the proceedings for reasons that the applicant would not suffer any loss and that the applicants had a right of appeal. Indeed the applicant in this matter has a right of appeal from the decision of the Tribunal, but it has raised issues of law that need to be dealt with first and in my view the said issues will have a bearing on the pending matters before the Tribunal. I do not agree with the Respondent that the applicant was wrong in citing the case of **KCB vs N. Ombija (supra)**. In the said case the Court of Appeal dealt with an application for stay of proceedings and in considering whether to grant the stay order. The court held in the said case that, " ***The discretion of the Court on an application of this kind has to be exercised upon the established principles which require an applicant to satisfy the Court both that the intended appeal is arguable and unless the order sought is granted, the appeal, if successful, would be rendered nugatory'***. In my view the memorandum of appeal raises arguable grounds of appeal and should this Court decline to grant the orders sought the applicant will be highly prejudiced and the appeals so filed by the applicant will collapse. The record of appeal in Civil Appeal 241 of 2013 has since been filed the appellant should endeavor to obtain directions and proceed with the same. On the issue of delay I find that there was no inordinate delay in filing the application, no prejudice shall be caused to the Respondent. The application is allowed, there shall be a stay of the proceedings in Industrial Property Tribunal Case Number No 16 of 2002, (16/27 of 2002) 17/28 of 2002. 18/29 of 2002, 23/25 of 2002 and 24/37 of 2002 pending the hearing of the appeal, costs of the application shall be in the appeal.

Orders accordingly.

Dated, signed and delivered this **7th** day of ***November*** 2014.

R.E. OUGO

JUDGE

In the presence of:-

……..…..…For the Appellant/Applicant

…….…… ...For the Respondent

……...……Court Clerk