

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E1174 OF 2023

ALEX MUIGAI MUCHIRI.....1ST APPELLANT
INTESTYL TECHNOLOGIES.....2ND APPELLANT

VERSUS

CO-OPERATIVE BANK OF KENYA 1ST
RESPONDENT

PROPTECH KENYA 2ND
RESPONDENT

EZEN PARTNERS LIMITED 3RD
RESPONDENT

(Appeal from the judgement and decree, of Mudeshi, Bii, Muchemi & Nyabuti, Members of the Industrial Property Tribunal, of 5th October 2023, in IPT Case No. E002 of 2021)

JUDGEMENT

1. The claim at the Industrial Property Tribunal, was by the appellants against the respondents. They sought orders to injunct infringement of their invention by the respondents, a declaration that their invention had been infringed, disclosure by the 1st respondent about other entities having access to its banking system and the nature of their activities, special and general damages and costs.
2. The 3 respondents resisted the claim, though separately. The 1st respondent averred that it had not developed a technology similar to that of the appellant, nor infringed on its intellectual property rights; that it did not utilize the appellant's technology; and the claim was frivolous. The 2nd respondent averred that the alleged innovation was not new; nor useful; nor relating to an art process machine manufacture or composition to be capable of being industrially applied; the utility model did not fully describe and ascertain the invention in a manner which it could be performed; and when the application for grant was lodged it contained a material misrepresentation. The 3rd respondent described its association with the 1st respondent as one of providing an ERP, which did not require it to develop any banking solution.

3. The claim was disposed of orally. Both sides presented witnesses, who testified and were cross-examined. Judgement was delivered on 5th October 2023. The claim was dismissed. The Industrial Property Tribunal noted that the nature of the invention by the appellant required the 1st respondent to allow its use on its application programming interfaces (API), which was allegedly in existence, and was in use by other fintech companies. It was concluded that the appellant had failed to disclose to the Industrial Property Tribunal the details of its invention which had allegedly been infringed by the 1st respondent, and which had been passed to the other respondents. It was also concluded that the alleged invention was parasitic, to the extent that it required a host to survive, and it could not, therefore, be infringed. It was held that the utility models were not in the first place registered.
4. The appellant was aggrieved, hence the instant appeal. A total of 38 grounds are listed. The grounds revolve around the Industrial Property Tribunal not appreciating the law, failing to apply the law, failing to consider submissions, failing to apply rules of evidence, among others.
5. Directions were taken, on 4th July 2024, for filing of written submissions. Only the appellant filed written submissions, dated 20th May 2024. I have read through them, and noted the arguments made.
6. The case by the appellants, as gleaned from the pleadings and proceedings, is that they are the registered proprietors of Utility Number KE/UM/2020/1466, titled: Computer Implemented Banking System for Real Estate Management. The same was under certificate of registration of utility model number 315. According to them, the intention of the utility model was to provide a platform for landlords and houseowners, through the 1st respondent's core banking system, to enable reconciliation of the house units and real-time mobile payments.
7. The appellants approached the 1st respondent, to commercialise the invention. They entered into API service agreements, where the 1st respondent allowed the appellants to utilise the APIs, including funds transfer, status query, instant notification, Pesalink and MPesa, and callback, for the purposes of putting the invention into practise. The appellants commenced the product testing stage, which included the full disclosure of the invention, as protected by the utility model, and the 1st respondent gave them full access to the core banking system,

and they worked jointly to modify the 1st respondent's banking system, to ensure and enable compatibility and integration with the appellants invention, and systems worked seamlessly.

8. The appellants blamed the 1st respondent, for commissioning the Open Banking Project, which had some features, and their use, which applied and employed their invention. They accused the 1st respondent of even offering a licence and the said invention to third parties, in disregard of the appellants' protected rights over its utility model. They blamed the respondents of manufacturing, commercialising and exploiting their invention, for sale, without their consent and knowledge.
9. The 1st respondent denied the allegations, and requested for revocation and invalidation of the utility model number KE/UM/2020/1466 certificate number 315, on grounds that the invention did not relate to an art, process, use, machine, manufacture or composition of matter, which was capable of being industrially applied. They further argued that the invention, in so far as it was claimed, was not useful, and did not fully describe and ascertain the invention and the manner in which it was to be performed, and it contained a material misrepresentation.
10. I believe that there are 4 issues for determination, around whether the respondents misappropriated the appellants' utility model; whether a permanent injunction ought to have been granted; whether the registration of the appellants' utility model should have been revoked; and costs of the appeal.
11. On the first issue, the onus of proving infringement, lay with the appellants, as was stated in *Sanitam Services (EA) Limited vs. Rentokil (K) Limited & another* [2006] KECA 362 (KLR) [2007] 1 EA 362 (Bosire, Waki & Deverell, JJA). They have submitted that their utility model was registered, and was subsequently infringed by the respondents.
12. A utility model is defined in section 2 of the Industrial Property Act, Cap 509, Laws of Kenya, essentially as an implement or tool which allows a different or better use or functioning than what is available in Kenya before it. The appellants have argued that their utility model operates fully when incorporated into the 1st respondent's system. It is on the basis of that that the 1st respondent argues that, to the extent that it was dependent on its banking

system, the said invention was not unique, but merely an idea, whose expression was dependent on its banking system.

13. *Designers Guild Limited vs. Russel Williams (Textiles) Limited* [2000] 1 WLR 2416 [2001] FSR 113 (Lords Hoffmann & Scott), addressed itself to what copyright law protects, where it was stated: “*It is often said ... that copyright subsists, not in ideas, but in the form in which ideas are expressed.*” That was echoed in *Dedan Maina Warui & another vs. Safaricom Limited* [2014] KEHC 2948 (KLR) (Gikonyo, J), where it was said that, “*the copyright law only seeks to protect the expression of an idea and not the underlying idea itself, method or process ... It could be said that copyright seeks to protect the author’s actual expression and not the ideas, and it does not, therefore, forbid independent creation.*”
14. It has been stated, in *Kibo Capital Group Limited & another vs. Safaricom PLC* [2022] KEIPT 872 (KLR) (Kairaria, Muhanda & Wangari, Members), that “*computer programs are not protectable under patent or utility model, as they do not fit in the definition of inventions under the Act. Issuance of receipts, record keeping and reconciliation of accounts are methods of doing business and would be outside the purview of patentable subject matter ... it is trite that methods of doing business carried through computer programs are not patentable...*” See also *Akuon vs. Safaricom PLC & 2 others* (IPT Case No. 95 of 2020) [2022] KEIPT 873 (KLR) (Kairaria, Muhanda & Wangari, Members).
15. The fact that the appellants’ utility model relied on the 1st respondent’s banking system, disqualified it from infringement. The ITESYL system was to collect MPesa payments on behalf of landlords, and to re-route the payments to the collective merchants’ accounts, via IFT and Pesalink API. That made the system dependent on the 1st respondent’s banking system, to function, and the functioning would have been impossible without the 1st respondent’s banking system.
16. On the second issue, on whether a permanent injunction should have been issued, it should be clear from the discussion above, that the appellants did not prove or establish an infringement, and it should follow that grant of the injunctive prayer would not have been tenable.
17. On the third issue, on the revocation of the utility model, the overwhelming evidence was that the same only enabled certain

activities to be performed, using already existing mechanisms, including the 1st respondent's banking system. It was also computer operated, and required other mechanisms, to support its operations, and it could not spring forth without the software. It was not an independent object or appliance, and it was not unique. The fact that the invention was dependent on the 1st respondent's banking system disqualified its registration, and it was available for revocation, along the parameters set out in section 103(3) of the Industrial Property Act.

18. On the last issue, the costs, the same should follow the event. The appeal herein is unmerited. The determination, by the Industrial Property Tribunal, is hereby upheld. The appeal is, accordingly, dismissed. The respondents shall have the costs.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT
BUSIA, ON THIS 14TH DAY OF NOVEMBER 2025.**

**WM MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Carolyne Oyuse, Court Assistant, Milimani, Nairobi.

Advocates

Mr. Yambasa, instructed by Yambasa & Company, Advocates for the appellant.

Mr. Muchiri, instructed by Waweru Gatonye & Company, Advocates for the 1st respondent.

Mr. Kitonga, instructed by Nzamba Kitonga Advocates LLP, Advocates for the 2nd respondent.

Mr. Makambo, instructed by Makambo Makabila & Company, Advocates for the 3rd respondent.