Thermos Hong Kong Limited v Doshi Ironmongers Limited (Civil Appeal (Application) E013 of 2021) [2022] KECA 544 (KLR) (10 June 2022) (Ruling)

Neutral citation: [2022] KECA 544 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) E013 OF 2021

SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA

JUNE 10, 2022

BETWEEN

THERMOS HONG KONG LIMITED .... APPELLANT

AND

DOSHI IRONMONGERS LIMITED .... RESPONDENT

(Being an application to strike out the appeal against the Judgment delivered on 11th December, 2019 by the Hon. Justice P.J.O. Otieno in Mombasa HCA 251 of 2017)

RULING

1. The respondent in this appeal is by its application dated 8th April, 2021 seeking orders to strike out the appeal, or alternatively orders that the documents contained at pages 1247 – 1287 of the Record of Appeal (Volume Four) be struck out and expunged from the record, and that costs of the application and the appeal be paid by the appellant.
2. The application is based on the following grounds: That the appellant has no right of appeal to this Court as no second appeal lies to the Court of Appeal under the provisions of the *Trade Marks Act* and the *Trade Marks Rules*. That the prayers sought in the Memorandum of Appeal seeking the cancellation of Trade Mark Nos. 59464, 66337, and 66338 are not available in law and cannot be granted by this Court.
3. That under Section 21 (7) as read with Rule 117 of the Trade Marks Rules, an appeal to court can only be lodged through a motion and not through a Memorandum of Appeal which motion should in any event be filed within 60 days. That in respect of the alternative prayer, pages 1247 – 1287 of the Record of Appeal were not filed and were not part of the record in the High Court and which came into existence way after the impugned judgment had been delivered. That it is only in the interest of justice that the application is granted.

4. The application is supported by an affidavit dated 8th April 2021 and sworn by Ashok Labhshanker Doshi, a director of the respondent, reiterating the grounds forming the basis of the application. Doshi particularly deponed that the impugned judgment emanated from an appeal lodged against the decision of the Assistant Registrar of Trade Marks, and the appeal was lodged vide a Notice of Motion pursuant to Sections 21 (6), 51 and 52 of the *Trade Marks Act* and Rule 117 of the Trade Marks Rules. That no second appeal lies to the Court of Appeal under the provisions of the *Trade Marks Act* and Trade Marks Rules. The orders which the court can make are those provided under Section 21 of the *Trade Marks Act* and the prayers sought in the Memorandum of Appeal are not provided for in Section 21 and are therefore not available in law and cannot be granted by this Court.

5. The appellant's response came in the form of a replying affidavit dated 30th June 2021 and sworn by Alex Huang, a director and the Chairman of the appellant. Huang deponed that the appellant's appeal was filed in accordance with Section 72 of the *Civil Procedure Act* and Rules 82 and 87 of the *Court of Appeal Rules* and that there is no bar under the *Trade Marks Act* that a second appeal cannot be filed from the decision of the High Court.

6. The grounds of the application concerning the prayers sought in the Memorandum of Appeal cannot be entertained by this Court as they do not fall under the purview of Rule 84 of the *Court of Appeal Rules* and are issues to be argued during the substantive hearing of the appeal.

7. The documents appearing at pages 1247 – 1287 of the Record of Appeal are filed pursuant to Rule 87 (1) (k) of the *Court of Appeal Rules* and contain documents which are part of the application for stay of execution of the impugned judgment. The said documents are relevant to the appeal as they include registration and renewal certificates of the respondent/applicant's Trade Mark Nos. 59464, 66337, and 66338 which were issued to the respondent pursuant to the impugned judgment. The appellant is seeking the cancellation of the said certificates in the Memorandum of Appeal and the said documents will assist this Court in determining the grounds raised in the Memorandum of Appeal.

8. In written submissions, Counsel for the respondent concentrated on the issue of whether the appellant had the right of appeal. Section 21 (6) of the *Trade Marks Act* provides that the decision of the Registrar of Trade Marks relating the opposition to registration of a trademark shall be "subject to appeal to the court"; the "court" defined as the High Court and not the Court of Appeal in Section 2 (1) of the Act. There is no provision for a second appeal to the Court of Appeal. Counsel submitted that jurisdiction is distinguishable from right of appeal and what the respondent was arguing was not that this Court lacks jurisdiction but that the appellant has no right of appeal to come to this Court on second appeal.

9. While this Court has jurisdiction to hear appeals from the High Court, that jurisdiction is not automatic and a party coming to this Court must show what provision of the law grants that party the right to appeal. Counsel relied on *Ramadhan Mohamed Ali v Hashim Salim Ghanim* [2016] eKLR and *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR where this court elucidated the distinction between jurisdiction and the right of appeal; that a right of appeal must be conferred by statute and cannot be based on the reason that it has not been expressly denied.

10. Counsel submitted that the question is not whether the *Trade Marks Act* is silent on the right to second appeal, but rather whether the *Trade Marks Act* expressly provides for a second appeal. That the appellant must show which law donates the right of appeal being exercised. Section 72 of the *Civil Procedure Act* and Rules 82 and 87 of the Court of Appeal Rules as cited by the appellant do not grant the appellant the right to appeal against the High Court decision to this Court.

11. Counsel relied on the *Nyutu* case for the proposition that jurisdiction as well as the right of appeal must be conferred by law and not by implication or inference; and that a party desiring to appeal to this

Court must demonstrate under what law that right to be heard is conferred, or if not, show that leave has been granted to lodge the appeal. Counsel also cited *Republic v Jeffrey Okuri Pepela & 24 others* [2018] eKLR where this Court cited with approval the decision in *Ramadhan Mohamed Ali v Hashim Salim Ghanim* [2016] eKLR to the effect that a party cannot invoke Article 164 of *the Constitution* to move this Court on appeal where no express right of appeal exists.

12. Counsel for the appellant submitted that the appellant's right of appeal arises from Section 72 of the *Civil Procedure Act*. That in *Rothmans of Pall Mall v Independent Tobacco FZE* [2019] eKLR, this Court recognised the fact that a second appeal can be filed in a trademark dispute and relied on Section 72 of the *Civil Procedure Act* to state that the appeal would be restricted to points of law. The words "Except where otherwise expressly provided in this Act or by any other law for the time being in force" appearing in Section 72 of the CPA, are not a statutory bar under the *Trade Marks Act* in respect of a second right of appeal, and therefore the right of appeal arises under Section 72 of the CPA.

13. Counsel further submitted that there is no express bar under Sections 21 (6) and 52 of the *Trade Marks Act* that a second appeal cannot be filed from a decision of the High Court in respect of an appeal from the decision of the Registrar of Trade Marks, and the fact that the 'court' defined under Section 52 is the High Court is not a bar to a second appeal. Counsel pointed out that the respondent cannot rely on the Court of Appeal decision in the Nyutu case as it was reversed by the Supreme Court which held that there was no express bar to the appeals under Section 35 of the *Arbitration Act* and an appeal could lie to the Court of Appeal in exceptional circumstances. Counsel also argued that the decision in *Ramadhan Mohamed Ali v Hashim Salim Ghanim* [2016] eKLR is clearly inapplicable and distinguishable from the present case due to the fact that, Section 15 (4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* provides that a decision of the High Court is final and it was on the basis of this statutory bar that this Court held that there was no right of second appeal.

14. Counsel cited *Judicial Service Commission v Kaplana H Rawal* [2015] eKLR for the proposition that both the jurisdiction and the right of appeal from the High Court to this Court are founded in the first instance on *the Constitution*, and that a constitutional right to appeal can only be denied, limited or restricted by express statutory provision properly justified as required by *the Constitution* itself. Counsel argued that in the absence of a statutory bar to a second appeal in the *Trade Marks Act*, the appellant's right to a fair hearing would be impeded under Articles 50 (1) and 164 (3) of *the Constitution*.

15. Regarding the viability of the prayers sought in the Memorandum of Appeal, Counsel submitted that this is a contested issue that cannot be addressed at this stage, citing *Nakumatt Holdings Ltd & another v Ideal Locations Ltd* [2018] eKLR for the proposition that applications under Rule 84 should not be used to address contested issues. Counsel relied on the same case for the argument that Rule 84, inter alia, provides for striking out of an appeal in limited circumstances where an essential step in the appeal has not been undertaken or has not been taken within the prescribed time. Counsel submitted that the expungement of documents cannot be considered under Rule 84. The documents the respondent seeks to expunge form part of the appellant's application for stay of execution of the impugned judgment and will assist the Court in determining all the grounds raised in the Memorandum of Appeal.

16. We have given due consideration to the rival arguments by the parties herein. Rule 84 of the *Court of Appeal Rules* provides that an affected person may apply to the Court to strike out a notice of appeal or an appeal on the ground that that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. This Rule clearly limits the grounds upon which an application to strike out a notice of appeal and/or an appeal can be made. This Court

in *Nakumatt Holdings Ltd & another v Ideal Locations Ltd* [2018] eKLR addressed the scope of Rule 84 applications as follows:

> "In our considered view, Rule 84 is a summary procedure rule. A party invoking Rule 84 must demonstrate the facts, and the law, relied upon in support of the application. The facts relied upon in an application under Rule 84 must be clear, uncontroverted and un contestable. For instance, generally, an appeal does not lie if there is no right of appeal. Another example is the general principle, subject to limited exceptions, that no appeal lies from a consent order. In such cases, an applicant under Rule 84 must clearly demonstrate that no appeal lies as a matter of law. Circumstances under which an appeal can be struck out were outlined by this Court in Luther *Peter Muia & Another vs. Zuena Ngando Kababu* [2015] eKLR, as hereunder:-
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> > "In our view, rule 84 cannot apply to the circumstances of this case as it is intended to apply to situations where, for instance, it is contended that the notice of appeal has been lodged or served out of time or, where leave to appeal is required and has not been sought and obtained or where no appeal lies or where a step precedent to lodging the notice of appeal or appeal has not been taken." [Emphasis added]

17. The grounds of the present application questioning the viability of the prayers sought in the appellant's Memorandum of Appeal point to contested facts and are not within the limited scope of grounds for striking out the appeal as provided under Rule 84, thereby rendering those grounds untenable.

18. The respondent's prayer that certain documents be expunged from the record of appeal cannot be entertained as well, as it goes beyond the scope of Rule 84 under which this application was brought.

19. The core issue to be determined in this application is whether the silence of Section 21 (6) of the *Trade Marks Act* and Rule 117 of the Trade Marks Rules, on whether a second appeal lies to this Court, ought to be interpreted as excluding such appeals and thereby rendering the High Court the court of last resort when contesting the registration of a trade mark.

20. A five judge bench of this Court in *Judicial Service Commission v Kaplana H Rawal* [2015] eKLR examined the evolution of this Court's approach when dealing with such statutory silences, observing a move from point of view of no right of appeal, without an express statutory conferment of this right, to adopting a holistic interpretation of Article 164 (3) of *the Constitution* as conferring a general right of appeal that may be limited by an express statutory provision setting out such a limitation. Kiage J.A observed:

> "I state and hold, unhesitatingly, that both the jurisdiction and the right of appeal from the High Court to this Court are now founded, in the first instance, on *the Constitution* of Kenya 2010. The jurisdiction invested on this Court is not qualified by words such as 'where a right of appeal arises'. It provides both the right of approach from the High Court and the power to hear those who have so approached. That constitutional right to appeal can only be denied, limited or restricted by express statutory provision properly justified as required by *the Constitution* itself. The wording of Article 164(3) of *the Constitution* admits to no other interpretation."

21. The argument of the appellant that later decisions of this Court in *Ramadhan Mohamed Ali v Hashim Salim Ghanim* [2016] eKLR departs from the determination in the Judicial Service Commission case as the Ramadhan case clearly involved an express statutory exclusion to a second appeal to this Court as

set out under Section 15 (4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.

22. The Supreme Court, however, adopted a different position with regard to the interpretation of Article 164 (3) in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR where it held that:

> "[33] ... In other words, does Article 164(3) grant a litigant a right of appeal to the Court of Appeal? Nyutu urges that Article 164(3) indeed grants such a right of appeal. We disagree. As urged by Airtel, this provision does not confer a right of appeal to any litigant. It only particularises the confines of the powers of the Court of Appeal by delimiting the extent to which a litigant can approach it. In this case, the appellate Court only has powers to hear matters arising from the High Court or any other defined Court or Tribunal. There is thus no direct access to the Court of Appeal by all and sundry. As such, Article 164(3) defines the extent of the powers of the Court of Appeal but does not grant a litigant an unfettered access to the Court of Appeal...
>
> [35] Even more crisply, the *Appellate Jurisdiction Act*, Cap 9, captures our position that a right of appeal is not automatic but rather is a creation of the law. Section 3(1) thereof provides that:
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>> "The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law." [Emphasis added.]
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> [36] By this provision therefore, jurisdiction and the right of appeal are clearly delineated to the extent that jurisdiction is only excised where the right of appeal exists."

23. Despite the foregoing, the appellant's position is that its right to appeal is not anchored on Article 164 (3) but Section 72 of the *Civil Procedure Act*. Section 72 (1) of the *Civil Procedure Act* provides that:

> "Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—
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> (a) the decision being contrary to law or to some usage having the force of law;
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> (b) the decision having failed to determine some material issue of law or usage having the force of law;
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> (c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."

24. There is no express provision in the *Trade Marks Act* excluding an appeal to this Court from an appellate decision made by the High Court on the grounds set out under Section 72 (1) of the Civil Procedure Rules. There is no evidence that a purposive interpretation of Section 21 (6) of the *Trade Marks Act* reveals a legislative intention to make the High Court the last court of resort in disputes relating to the registration of trademarks or alternatively conferring a right to a second appeal to this Court only under certain exceptional circumstances, as was established by the Supreme Court in

respect of Section 35 of the *Arbitration Act* in the Nyutu case. The upshot is that the appellants have demonstrated that their right of appeal is properly founded upon an express statutory provision.

25. In the circumstances, the application fails and is dismissed with costs. The appeal shall be heard and determined on merit.

DATED AND DELIVERED AT MOMBASA THIS 10 TH DAY OF JUNE 2022.

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

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A. MBOGHOLI MSAGHA

JUDGE OF APPEAL

..

P. NYAMWEYA

JUDGE OF APPEAL

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I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR