



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 238 OF 2009

GENERAL PLASTICS LTD.....APPLICANT

AND

INDUSTRIAL PROPERTY TRIBUNAL.....1ST RESPONDENT

SAFEPAK LTD.....2NDRESPONDENT

(Application for stay of proceedings and injunction pending the hearing and determination of the intended appeal against the judgment and order of the High Court at Nairobi, Wendoh, J dated 30 th April 2009

in

H.C. MISC. APPL. NO 348 OF 2006

RULING OF THE COURT

Before us is an application by way of notice of motion and stated to have been brought “Under Section 3 of the Appellate Jurisdiction Act, Cap 9 of Laws of Kenya, **Rules 5(2)(b), 42 and 47 (1)** of the Court of Appeal Rules”. When the application came up for hearing on 25th November 2009 the learned counsel for the applicant indicated to the Court that the applicant had abandoned other prayers and would pursue only prayer 3 of the application. That prayer stated as follows:

“3 THAT this Honourable Court be pleased to issue a stay of proceedings of Industrial Property Cause Nos. 16/27 of 2002, 17/28 of 2002, 18/29 of 2002, 24/37 of 2002, 23/25 of 2002 pending the hearing and determination of the intended appeal.”

It may be necessary to set out in full the grounds upon which this application was brought. The grounds were that:-

“(i) The applicant’s right of appeal will be rendered nugatory if the stay of proceedings and injunction sought are not granted;

(ii) The applicant has a good appeal with overwhelming chances of success in that;

(a) The superior Court has already found that the applicant was denied the opportunity to adduce additional evidence.

- (b) The learned Judge erred in holding that the 1st respondent did not arbitrarily decline to allow the applicant to adduce additional evidence when it was clear that the 1st respondent did not consider on the merits or nature of the disputed evidence sought to be adduced before arriving at its decision.**
- (c) The learned Judge erred in holding that the 1st respondent did not use the failure to adduce further evidence as the basis for dismissing the applicant's application for revocation when it was clear from the judgment of 1st respondent that it disallowed the applicant's application for revocation on the basis that the applicant had not furnished sufficient evidence to confirm that the respondent was not the owner of the design.**
- (d) The learned Judge erred in making conclusive findings of fact on the whole petition without the benefit of a trial thereon as to the nature and veracity of the additional evidence sought to be adduced.**
- (e) The learned Judge erred in holding that fundamental rights are guaranteed by the State and it is only the State against whom they can be enforced.**
- (f) The learned Judge erred in holding that the 2nd respondent was wrongly enjoined in the proceedings.**
- (g) The learned Judge erred in holding that the Attorney General was a necessary party to the suit.**
- (h) The learned Judge erred in holding that the applicant had failed to demonstrate a genuine constitutional infringement to warrant the filing of the petition.**
- (i) The learned Judge erred in holding that the applicant ought to have pursued the remedy of Appeal under section 115 of the Industrial Property Act 2001 as opposed to filing a petition when it was clear that the appeal had been withdrawn.**
- (j) The learned Judge erred in refusing to give similarly serious consideration to the applicant's evidence as was given to the respondents' evidence and sometimes totally ignoring the applicant's case and denying it consideration.**
- (k) The revocation proceedings before the 1st respondent are geared to or intended to restrain the 2nd respondent from using the industrial designs complained of on the basis that it is not the author or inventor of the said designs. The applicant can only show that there is no novelty if it is allowed to adduce additional evidence. Unless the orders sought herein are granted, the proceedings before the 1st respondent are likely to be concluded before the hearing and determination of the intended appeal. In the result, the outcome of the intended appeal and of the proceedings before the superior court will have been rendered nugatory.**
- (l) To allow the proceedings before the 1st respondent to proceed would amount to sanctioning the conduct complained of.**
- (m) It is in the wider interest of justice that the orders sought be granted.**
- (iii) The applicant will suffer irreparably if the proceedings before the 1st respondent continue."**

As can be seen from the foregoing this is a protracted dispute that was commenced in the Industrial Property Tribunal way back in 2002. Briefly, the facts were that the applicant herein General Plastics Limited has been a manufacturer of plastic containers and bottles since 1987 and has invested in machinery and moulds it uses in the said business. In October 2002 the applicant discovered that Safe Pak

Ltd, the 2nd respondent herein, which is also a manufacturer of plastic bottles had applied to the Registrar of Industrial Designs that it be registered as the sole proprietor of 12 Industrial Designs. The applicant was aggrieved by that registration and hence commenced proceedings for revocation of the said 12 designs. This was, naturally, contested by the 2nd respondent. The dispute took time before being heard by the Industrial Property Tribunal but meanwhile the applicant gathered additional evidence in respect of each of the 12 designs which was not in its possession at the time of filing the dispute. When the dispute finally came up for hearing on 17th July, 2005 the applicant sought leave to adduce additional evidence. The Tribunal considered the applicant's application for further and/or additional evidence and rejected it. Being aggrieved by the Tribunal's refusal to accept additional evidence the applicant filed a petition in the High Court pursuant to **section 84(1)** of the Constitution alleging contravention of its rights and freedoms under **sections 77(1)** and **77(9)** of the Constitution. In that petition the applicant sought the following orders:-

“ (a) The decision of the Tribunal in Industrial Property case No. 15/26 of 2002, 16/27 of 2002, 17/28 of 2002, 18/29 of 2002, 24/37 of 2002, 23/25 of 2002 on 15/05 be set aside;

(b) The judgment made by the Industrial Property Tribunal on 3rd February 2006 in Industrial case no 15/26 of 2002 be set aside.

(c) An order be made granting the petitioner liberty to adduce additional evidence in Industrial Property Cause No 15/26 of 2002, 10/27 of 2002, 17/28 of 2002, 18/29 of 2002, 24/37 of 2002, 23/25 of 2002

(d) An order be made granting the petitioner liberty to adduce additional evidence in industrial Property case No. 15/26 of 2002

(e) An order directing the industrial Property tribunal to pay Industrial Property case No 15/26 of 2002 do

(f) Costs of the Petition.”

The petition was placed before Wendoh J. for determination. The learned Judge considered the rival arguments by the parties and in the end found no merit in the petition. She accordingly dismissed the said petition. In the course of her judgment delivered on 30th April, 2009 the learned Judge said:-

“In my view, the applicant has not demonstrated that they have any cause of action against the respondent. The applicant alleges that the Tribunal used the failure to adduce further evidence to dismiss their application. I have read the decision of the tribunal and no where does the Tribunal attribute the applicant's failure to get a favourable ruling in their favour to the filing of further evidence. The Tribunal merely observed that both parties should have adduced oral evidence to support their allegations. The applicant had not made any application to adduce oral evidence but sought to adduce new or further evidence. They proceeded by way of affidavit evidence and I believe that is the mode of evidence they intended to adopt. The only conclusion I can arrive at is that, it seems the applicant is dissatisfied with the decision of the respondent and that being so, their recourse lies in filing an appeal to the High Court under S. 115 (1) of the Industrial Property Act. And indeed the applicants did file Appeals C/A 590/05 which is from the ruling of the Tribunal in 15/26 of 2002, CA 586/05 in respect of the Tribunal's ruling in 16/27 of 2002 and CA 589/05 in respect of the ruling of the tribunal in 17/28 of 2002. That is the remedy they should pursue in addition to the revocation proceedings that are yet to be determined.

In my considered view the applicants have abused the court process by unnecessarily protracting this matter and making what is not a constitutional issue into one and in the meantime, the applicant is benefiting from interim orders against the disputed design.”

Still dissatisfied by the foregoing the applicant filed a notice of appeal on 7th May 2009. It should be

remembered that the application before us seeks prayer (3) of the Notice of Motion “that this Honourable Court be pleased to issue a stay of proceedings of Industrial Property Cause Nos. 16/27 of 2002, 17/28 of 2002, 18/29 of 2002, 24/37 of 2002, 25/25 of 2002 pending the hearing and determination of the intended appeal.” The intended appeal is against the judgment of Wendoh J. delivered on 30th April, 2009.

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 or appeal (as the case may be) is arguable and that unless the order sought is granted, the appeal if successful, would be rendered nugatory. Counsel appearing for the parties were fully aware of these principles. In a bid to satisfy us on these principles Mr. Martin Munyu the learned counsel for the applicant submitted that the intended appeal was arguable in that the superior court was wrong in holding that the Attorney General should have been joined and yet none of the parties had raised that issue. The second point raised by Mr. Munyu as arguable was that the tribunal had used lack of evidence to dismiss the matter. It was Mr. Munyu’s submission that the High Court should have interfered with the findings of the Tribunal.

On the nugatory aspect of the application Mr. Munyu submitted that if the cases in the Tribunal proceeded it would mean the applicant will be unable to adduce additional evidence

Mr Ombwayo the learned counsel for the 1st respondent opposed the application on the ground that the prayers sought cannot be granted. He was of the view that an order for stay could not be granted unless the applicant sought an injunction. It was further submitted that the applicant invoked the wrong procedure in the High Court. Mr Ombwayo was of the view that the applicant should have pursued an appeal under Industrial Property Act.

On her part Mrs Opiyo the learned counsel for the 2nd respondent echoed Mr. Ombwayo’s submission to the effect that the applicant should have gone to the High Court by way of appeal rather than a petition. Mrs. Opiyo asked us to allow the proceedings in the Tribunal to continue and that in event that the applicant succeeds in its appeal then damages would be an adequate remedy.

We have given the summary of the dispute and the argument advanced for and against this application before us. We remind ourselves that this is only an application for stay of proceedings in the Industrial Property Tribunal and that the applicant intends to appeal against the decision of the superior court which decision dismissed the applicant’s petition. It is for that reason that the applicant’s counsel abandoned the prayer for stay of execution (prayer 2 of the notice of motion) since clearly there was no execution to be stayed. That is when counsel for the applicant concentrated on the prayer for stay of proceedings.

It is to be observed that the applicant’s main complaint was that it has been denied the right to adduce additional evidence and that would be to the detriment of its case in the Tribunal. But the Industrial Property Act has a procedure for a dissatisfied party which procedure is open and available to the applicant. This Court would be slow in declaring any intended appeal frivolous but assuming that the applicant herein has an arguable appeal we think that even if the proceedings were concluded against it but the appeal eventually succeeds the appeal would not have been rendered nugatory. In **Silverstein v Chesoni** [2002] 1 KLR 867 at pp. 873 and 874 this Court said:

“On the second limb regarding whether the applicant’s intended appeal would be rendered nugatory if it succeeded and we refused to grant a stay, we must point out that the appeal whose success would be rendered nugatory if we do not grant a stay is the appeal already filed in this Court, not the appeal pending in the High Court. On this aspect of the matter we think we must follow the decision of this Court in the case of Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd & Another Civil Application No. Nai 50 of 2001 (29/2001 UR). That was also an application to stay the proceedings in the High Court pending the hearing and determination of an intended appeal to this Court. In its ruling regarding whether the intended appeal’s success would be rendered nugatory if a stay was not granted, the Court stated as follows:

“.....The onus of satisfying us on the second condition, that unless stay is granted, the intended

appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless.

These remarks aptly apply to the application before us. What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.”

Applying the foregoing to the facts of this matter we have come to the conclusion that the applicant has failed to satisfy us that without the stay of proceedings applied for its appeal will be rendered nugatory.

The application is therefore dismissed with costs.

Dated and delivered at Nairobi this 15th day of January, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR