



REPUBLIC OF KENYA



Nairobi Beauty World Limited v Sime Darboils Professionals SDN.BHD (Civil Miscellaneous Application E014 of 2024) [2024] KEHC 6366 (KLR) (Civ) (31 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL MISCELLANEOUS APPLICATION E014 OF 2024

AN ONGERI, J

MAY 31, 2024

BETWEEN

NAIROBI BEAUTY WORLD LIMITED APPLICANT

AND

SIME DARBOILS PROFESSIONALS SDN.BHD RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 7/3/2024 brought under Section 1A, 1B and 3A of the *Civil Procedure Act* Chapter 21 of the Laws of Kenya and Order 12 rule 7 and all other enabling provisions of the law seeking the following prayers;
 - i. The matter be certified as urgent and be heard re-parte on first instance.
 - ii. The orders made by the Honourable court on the 7 of March, 2024 dismissing the application dated 9 January 20024 be and hereby set aside and the application be reinstated
 - iii. The matter be fixed for hearing on the earliest possible date
 - iv. Costs be in the cause
2. It is based on the following grounds;
 - i. On the 7th of March 2021, the Matter came up for hearing in Court however, the Court issued an order dismissing this suit due to non-appearance of the Applicant.
 - ii. Counsel on record joined the call on time but after some time. He was logged out and experienced immense difficulty logging back in.



- iii. Due to this technical issue, the Applicant's Advocate was unable to attend Court despite numerous attempts to join the Court online.
 - iv. Later, the Advocate followed up on what transpired in Court and came to the realization that the application had been dismissed.
 - v. Upon finding out, the Applicant's Advocate acted expeditiously in seeking a reinstatement of the suit
 - vi. The Applicant's appeal raises weighty issues of law and facts which ought to be fully heard in court.
 - vii. The Applicant has always attended court without failure and ensured that the delays are avoided.
 - viii. This application has been brought timeously and without delay.
 - ix. Unless the orders sought herein are granted the Applicant stands to suffer irreparable loss and damage.
 - x. It is in the interest of justice that the application is allowed.
 - xi. The Applicant stands to suffer no prejudice whatsoever if the application is allowed.
3. The application is supported by the affidavit of Hillary Casmir Wamunyolo sworn on 7/3/2024 in which he stated as follows;
- i. "That I am a male adult of sound mind. I am the advocate for Applicant herein and conversant with the facts in this matter. I am competent to swear this Affidavit.
 - ii. That I refer to the application for leave to appeal the decision of the Assistant Registrar of Trademarks that forms the substance of the application.
 - iii. That I respectfully state that the failure to attend Court was due to unforeseen and unavoidable technological challenges. As counsel for the applicant, I encountered difficulties logging into the court's virtual platform, which resulted in the dismissal of the application.
 - iv. That my call dropped, and I encountered significant difficulties in logging back into the Court system. This delay caused me to miss a significant portion of the proceedings.
 - v. That I further state that I made several attempts to resolve the technological challenges by exploring alternative methods of logging into Court. However, despite these efforts, I was unable to do so.
 - vi. That the dismissal of the application for leave to appeal has serious consequences for the applicant, as it deprives them of the opportunity to have their appeal heard on its merits and potentially overturn the decision of the Assistant Registrar of Trademarks.
 - vii. That I believe that the applicant has a strong prima facie case on the merits of the appeal. The decision of the Assistant Registrar of Trademarks is contentious and raises significant legal issues that warrant a full hearing before the court.
 - viii. That reinstating the application for leave to appeal will serve the interests of justice by ensuring that the applicant is not denied their right to appeal due to technical difficulties that were beyond their control.



- ix. That this application has been made timeously and that no prejudice shall be occasioned to the respondent.
 - x. That I subsequently reached out to counsel for the respondent seeking to find out the position of the matter. (Attached and marked HCW-I is a true copy of the email sent to counsel)
 - xi. That I also checked the e-filing portal and learnt that the application had been dismissed. I immediately began the preparation of the application for reinstatement.
 - xii. That on behalf of the applicant, I have been very diligent in the prosecution of the matter in its entirety.
 - xiii. That this being the first episode of non-attendance, I urge the Court to reinstate the application and have the matter determined on merit.
 - xiv. That it is in the interest of justice that this application is allowed.
 - xv. That I am swearing this affidavit to implore this Honorable Court to exercise its discretion and jurisdiction in allowing reinstatement of the application for leave to file an Appeal on the Ruling delivered on the 9th day of April, 2021 out of time.”
4. The respondent filed a replying affidavit opposing the application in which he deposed as follows; in it he deposed that the applicant has not demonstrated that it made any effort to reach out to the respondent’s counsel regarding their non-availability due to technical issues.
 5. That at any rate, by the time the applicant’s counsel reached out to the respondent at 12.22pm the application has already been dismissed and the applicant’s counsel only sought on the outcome of the court proceeding. There are no reasons provided by the applicant for its failure to reach out to the respondent’s counsel. It is not enough for the applicant to merely state it was having difficulties.
 6. He further deposed that the instant application and the application dated 9/1/2024 are only attempts made by the Applicant to frustrate the Respondent’s infringement action in HCCOMM/E604/2023: Sime Darby Professionals. SDN. BHD v Nairobi Beauty World Limited. Notably, this is the applicant’s second attempt at pursuing an appeal, since its first appeal against the Ruling of the Assistant Registrar of trade marks dated 9/4/021, hit a deadlock at the Court of Appeal, after it failed to lodge an appeal within timelines granted by Hon. Lady Justice C. Meoli and decided instead to pursue an appeal against the ruling of the said learned judge delivered on the 24/1/2023.
 7. The respondent averred that the question regarding the rightful ownership of the trade mark No 111560 in the name of “C.b.c. Brand” (words And Devices) and the expunged trade mark No KE/T/2011/2138 in the name of “C.B.C. Pure White Coconut Oil” (words And Devices), will also be canvassed and determined by the High court in the infringement action lodged by the Applicant in Hccomm/E604/2023: Sime Darby Professionals. Sdn. Bhd v Nairobi Beauty World Limited. Hence there is no need for the existence of parallel proceedings on the same subject matter.
 8. He further pointed out that the Applicant has since lodged a petition before the High Court in HCCHRPET No E118 of 2024: Abdirahman Abukar Hassan And Fathiya Sheikh Ali v The Anti-counterfeit Agency And The Director of Public Prosecutions And 1 Other, alleging that the
 9. Respondent has irregularly and illegally instituted criminal proceedings against the Applicant for the infringement of its trade mark No 111560 in the name of “c.b.c. Brand” (words And Devices), despite the Respondent herein being the registered owner of the aforementioned trade mark, and despite the



Assistant Registrar of trade marks through its ruling dated 9/4/2021, having affirmed the position to the effect that the Respondent herein is the registered owner of the above trade mark.

10. The parties filed written submissions as follows; the applicant submitted that they acknowledge that the virtual court proceedings are a novel concept and that at the time they had internet connectivity challenges. They deliberated over the type of evidence to attach, especially considering that the internet connectivity issues were specific to our office premises. If the issue had been related to the network provider, we would have attached communication to and from them. However, in our case, we did not have any proof to attach.
11. The applicant noted that there was a change of counsel and that the previous counsel on record for the applicant filed a notice of appeal, he did not pursue the appeal. There was no appeal filed. The proceedings at the Court of appeal were caused by the application by the respondent's counsel seeking to strike out the notice of appeal.
12. As the newly instructed counsel they did not see the need for an appeal as counsel may differ in approach. This cannot be deemed to be an abuse of court process. The applicant argued that the decision of the assistant registrar of trademarks crippled his production. He cannot produce products and use the brand in contention, the longer this case takes prejudices the applicant's interests.
13. The applicant submitted that in this case the respondent in this matter is the plaintiff. The main goal of the proceedings is an order of a permanent injunction restraining the Applicant herein from using the contested trademark rights. In essence, the issues in HCCOMM/E604/2023; Sime Darby Professionals. SDN. BHD v Nairobi Beauty World Limited is substantially and wholly different in terms of matters in issue from those in the present application. The application dated 9/1/2024 seeks an extension of time to appeal the decision of the registrar of trademarks orders and judgment. It was their argument that should the application dated 9/1/2024 be reinstated then it will go along way in settling the dispute between the parties herein.
14. The applicant submitted that matter herein is not subjudice however it is only reasonable and sound that the matter in this court is heard first before case number 604 of 2023 for it has a great bearing and influence on the outcome of 604 of 2023, The reverse leaves the court in a possible state of conflicting decisions. The applicant herein believes he was not accorded a chance to be heard at Registrar of Trademark, a weighty argument founded on substantial justice and it is ready to prove any delay occasioned was not his own making.
15. The respondent alternatively submitted that the Applicant has made no attempt to provide evidence of the technical difficulties that prevented it from attending court and is thus undeserving of the orders sought. The Applicant failed to comply with the timelines and instead lodged a Notice of Appeal, which it also failed to pursue, and the same was subsequently struck out on 30th January 2024, following an application filed by the Respondent to have it struck out.
16. The respondent argued that from the foregoing, it is evident that the Applicant has never been interested in pursuing an appeal against the ruling of the Assistant Registrar of Trademarks. Rather, the Application dated 9th January 2024, which it again failed to prosecute and now seeks to reinstate vide the Application dated 7th March 2024, was triggered by the Respondent's infringement action in HCCOMM/E604/2023: Sime Darby Professionals. Sdn. Bhd v Nairobi Beauty World Limited, filed on 7th December 2023; more than seven (7) months after the Applicant filed a Notice of Appeal against Hon. Lady Justice C. Meoli.
17. The respondent submitted that the Applicant has not demonstrated any sufficient cause to make the Court set aside the orders of 7th March 2024 and reinstate the Application dated 9th January 2024.



- The key reasons being the lack of evidence to support the allegations of technical difficulties hindering its court attendance on 7th March 2024, and the perennial slumber in pursuing the rights it seeks to assert through the Applications dated 7th March 2024 and 9th January 2024.
18. The respondent indicated that there were no pending disputes between parties on 7th December 2023 when the Respondent filed HCCOMM/E604/2023. The timelines set for the Applicant by Hon. Lady Justice C. Meoli to appeal the decision by The Assistant Registrar of Trademarks had lapsed, and based on the decision of the Assistant Registrar of Trademarks, the Respondent filed HCCOMM/E604/2023 seeking a permanent injunction against the Applicant.
 19. The question regarding the rightful ownership of the trade mark application No 111560 "c.b.c. Brand (words And Devices) and the expunged trade mark application No KE/TI 2011/72138 "c.b.c. Pure White Coconut Oil" (words And Devices), will also be canvassed and determined by the High Court in the infringement action in Hccomm/E604/2023: Sime Darby Professionals.sdn. Bhd. v Nairobi Beauty World Limited. Hence there is no need for the existence of parallel proceedings on the same subject matter.
 20. Finally, the respondent argued that the Applicant has demonstrated through conduct that the Application dated 9th January 2024 and the application to reinstate dated 7th March 2024 are part of its protracted attempts to obstruct and delay the cause of justice. The main aim of filing the Application dated 9th January 2024 is not to appeal against the decision of the Assistant Deputy Registrar dated 19th April 2021, but to derail the progress of HCCOMM/E604/2023 where the Respondent seeks to enforce its rights against the Applicant pursuant to the ruling of the Assistant Registrar of Trademarks.
 21. That apart from the current proceedings, the Respondent also further wishes to draw the attention of this Honourable court to the petition lodged by the Applicant before the High Court in Hchcrpet No E118 of 2024: Abdirahman Abukar Hassan And Fathiya Sheikh Ali v The Anti-counterfeit Agency And The Director Of Public Prosecutions And 1 Other. The Applicant initiated this Petition alleging that the Respondent had irregularly and illegally taken over its trade mark application No Ke/T/2011/72138 "c.bc. Pure White Coconut Oil" (words And Devices), and further sought conservatory orders before the court, barring both the Director of Public Prosecutions and the Anti Counterfeit Authority from proceeding with the criminal investigation and prosecution of the criminal case lodged against the Applicant. It is the Respondent's contention, that this is yet another attempt by the Applicant to frustrate the Respondent's efforts towards the protection of its trade mark, from its continuous infringement by the Applicant.
 22. The sole issue for consideration is whether the application dated 9/1/2024 should be reinstated for hearing.
 23. The court has a discretion to reinstate the same subject to certain conditions. It was held in *Bilba Ngonyo Isaac v Kembu Farm Ltd & another & another* [2018] eKLR ((JN. Mulwa J), which echoed the decision of the court in *Shah v Mbogo & another* (1967) EA 116 (Harris J), where the court stated on the matter of discretion:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”
 24. I find that the mistake which necessitated the dismissal was not deliberate and that the same was committed by the applicant's advocate.



- 25. The respondent has not demonstrated that he will suffer prejudice that cannot be compensated by an award of costs.
- 26. The issues raised by the respondents can only be canvassed with finality in the application dated 9/1/2024.
- 27. I allow the application dated 7/3/2024 on the following conditions;
 - i. That the applicant pays thrown away costs of Kshs 20,000/= before the application is heard.
 - ii. That the application dated 9/1/2024 be fully canvassed within 30 days of this date.
 - iii. That the applicant bears the costs of the application dated 7/3/2024.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2024.

.....
A. N. ONGERI
JUDGE

In the presence of:
..... for the Applicant
..... for the Respondent