



IN THE INDUSTRIAL PROPERTY TRIBUNAL

AT NAIROBI

IPT APPEAL NO. 21 OF 2018

IN THE MATTER OF APPEAL AGAINST THE DECISION OF THE MANAGING DIRECTOR DATED 9/4/2018 REFUSING TO REGISTER A PATENT APPLICATION NUMBER KE/P/2013/001836 IN THE NAME OF JOHN KAMONJO MWAURA BY KENYA INDUSTRIAL PROPERTY INSTITUTE

BETWEEN

JOHN KAMONJO MWAURA.....APPELLANT

VERSUS

KENYA INDUSTRIAL PROPERTY INSTITUTE.....1ST RESPONDENT

THE MANAGING DIRECTOR,

KENYA INDUSTRIAL PROPERTY INSTITUTE.....2ND RESPONDENT

AND

NATIONAL COMMERCIAL BANK OF

AFRICA (NCBA).....1ST INTERESTED PARTY

SAFARICOM PLC.....2ND INTERESTED PARTY

JUDGMENT

1. By this appeal Mr. John Kamonjo Mwaura, the Appellant challenges the final decision of the examiner (KIPI) the 1st Respondent, rejecting his application (**KE/P/2013/001836**) for grant of a patent in respect of the invention titled:

"A SYSTEM AND A COMPUTER - IMPLEMENTED METHOD: FOR SHORT-TERM ADVANCED – CREDIT - FINANCE ASSURANCE: FOR PROVIDING SHORT – TERM ADVANCE CREDIT FINANCING; AND FOR MANAGING AND CONTROLLING: LENDING, ACCOUNTS AND TRANSACTIONS SPENDING THEREUPON."

2. The decision appealed from is contained in a report dated 09/04/2018 following a substantive examination of the Appellant's patent application and informed him that the invention as claimed was not patentable for the reasons set out at page 3 of that report, which where material states:

“the application discloses a system for transacting a short term advance credit lending, and more specifically discloses a system and a method for short-term advanced-credit-finance assurance; and for providing–short term advanced-credit-financing; and for managing and controlling: lending, and transactions spending.

.....

The claims in the application fall under section 21 (3) (b) of the Industrial Property Act, they claim a method for doing business and as such does not qualify for protection under patent. In addition, the 26 claims lack inventive steps as they describe the automation of a well-known – conventional procedure. The Applicant is advised to either seek protection under Utility Model or seek redress at the Industrial Property Tribunal.

The examiner has also established that the amended claims that were submitted to the institute were all ambiguous, the claims were not clear; like ”to effect and facilitate the purpose, meaning, spirit of the computer-implemented method of”

A lot of the text that should be in the description was included in the amended claims, like giving the best mode, reference to the drawings. There is also a lot of unnecessary text at every beginning of every page (pg. 1-169).

Note that no new technical features that are not contained in the original description should be claimed in the amended claims.”

The report is signed by Janet Kisio the examiner on 9/4/2018.

3. As can be gleaned from the report the reasons for rejection are threefold: First, the claimed invention is not patentable because it disclosed non-patentable subject matter-- a method for doing business - contrary to section 21(3)(b) of the Act, the claimed invention lacked an inventive step and lastly the amendments to the claims presented by the Appellant were ambiguous, lacked clarity and conciseness contrary to procedural requirements and went beyond the disclosure in the initial 50 claims. This final rejection report was based on an examination of the application on the basis of the amended claims.

4. The initial substantive examination report issued on 16/11/2017 was based on the examiner’s consideration of the patent claims and illustrative drawings as originally filed and informed the Applicant that the application and the claims relate to non-patentable subject matter—[methods for doing business] within the contemplation of S 21[3] b of the Act, which expressly excludes from patent protection; ‘Schemes, rules or methods for doing business, performing purely mental acts or playing games’. The examiner further informed the applicant that the entire application had not been examined as to whether; it was novel, involved an inventive step or was industrially applicable in light of the finding that it consisted of non-patentable subject matter.

5. After citing two US patent documents ;

Ø D1-US 2013/0006845 A1 “ system and methods for underwriting loans” Garry Kremen, Menlo Park CA; 03/01/2013 and

Ø D2- US 2012/0239553 A1; “ Method for processing and funding short term loans to the consumer and a method for converting currency, both to a mobile credit storage facility account” Jonathan A Gohen, Calabasa, CA; ET al of 20-09-2012.....” the examiner stated by way of explanation:

“ the application discloses a system and a method: for short term advanced – credit finance-finance assurance and for providing short – term advance- credit- financing; and for managing and controlling: lending and transactions spending.... And remarked that the application lacked inventive step “as it describes automation of a well-known

conventional procedure. The Applicant is advised to seek protection under utility model.’’

6. Following the initial rejection of the patent application as disclosing non-patentable subject matter, the examiner then invited the Appellant to submit observations and where applicable to amend the application within 60 days of the invitation. The examiner also brought to the attention of the Applicant the provisions of section 36 IPA and regulation 20 (5) which relate to the scope and manner of effecting amendments to patent applications.

7. In response to that initial report the Appellant on 13th February, 2018 forwarded to the 2nd Respondent;

a. A letter of explanation to amend Application to KE/P/2013/001836.

b. Request to amend or divide application,

c. Written submission brief.

d. Amendment replacement sheets and documents of explanation to claims amendment.

8. The appellant’s written submissions brief contained detailed comments, observations on and counter-arguments to the reasons given by the examiner for the initial rejection of his patent application.

On the finding that the claims in the application fell under section 21(3)(b) of the Act and does not qualify for protection under patent, the Applicant states at page 1 of the written submission brief:

Ø ‘‘ I write to counter as follows, the following are facts on construction, interpretation and application of law on issue.

Facts of law

Ø That Kenya ratified and signed at Washington the ‘‘ Patent Co-operation Treaty’’ on the 19th June, 1970; as evidenced under the provisions of section 2 of part 1 of the Industrial Property Act, 2001 Cap 509 laws of Kenya.

Ø That the provisions and regulations of the Patent Cooperation Treaty’’ bind Kenya and Kenya has an obligation in matters relevant to, connected to, or associated to the PCT to effect the provisions and regulations of the PCT in accordance with the community of nations.

Ø That section 21 (1) of the IPA, 2001 Cap 509 of the laws of Kenya provides that: ‘‘ invention’’ means a solution to a specific problem in the field of technology’’

Ø That the whole section 21 (3) (b) of the IPA, 2001 Cap 509 of the laws of Kenya provides that;

a. The following shall not be regarded as inventions and shall be excluded from patent protection.

b. Schemes, rules or methods of doing business, performing mental acts or playing games;

Ø That section 21 (3)(b) of the IPA, cap 509 of the laws of Kenya in this respect is inconsistent with particular provisions, of international patent classification (IPC) of the IPC of 20/00

a. That recognizes and provides or payment scheme of models (2012.01) GO6Q20/24... credit schemes i.e ‘‘pay after’’

b. Wherein the provisions of International Patent Classification (IPC) of the international Bureau of the World intellectual property Organization established by the convention which was fully recognized ratified and signed at Stockholm by Kenya and entered into force on the 14th July, 1967 as evidenced by the provisions of section 2 of part 1 of the IPA, 2001 cap 509 of the laws of Kenya.

c. With that particular a provision of international patent classification (IPC) of:

- G06Q: DATA PROCESSING SYSTEM OF METHOD, specially adopted for administrative, commercial, financial, managerial, supervisory or methods specially adopted for administrative, commercial, financial managerial, supervisory or forecasting purposes, not otherwise provided for (2006.01)

- Including G06Q 10/00-G06Q 50/00 and G06Q 99/00 that covers systems or methods that involve significant data processing operations that need to be carried out by a technological tool e.g. computing system or device’.

9. What we understand the Appellant to be saying in this rather circuitous narration is that his application disclosed a solution to a specific problem in the field of technology, [hence an invention] within the meaning of section 21[1] and the examiner should not have applied the provisions of section 21 (3)(b) IPA to reject the application but should have instead applied unspecified provisions and regulations of the Patent Cooperation Treaty (PCT) and Section G06Q of the International Patent Classification (IPC), which he reckons recognize business methods as patentable subject matter and obliges member states to recognize business methods as proper subject matter for patent protection in national jurisdictions. Further down in his submission brief to the 2nd Respondent, the applicant states that the statute [meaning IPA] cannot conflict with the international law [Treaties] and therefore the basis of rejection used by the examiner is invalid since section 21(3)(b) of the Industrial Property Act, 2001 relied on by the examiner is allegedly inconsistent with a provision of international patent classification (IPC) that allegedly recognize and provides payment scheme or model- credit schemes as inventions worthy of patent protection. We note that the IPC is a search tool for locating technical information for patent purposes at the international sphere and Section G06Q thereof relates to the field of physics and its technical application to data processing methods through inter alia computer technology. On the other hand, the PCT is a Treaty for international cooperation in the field of patents and contains the scheme for processing of international patent applications, such as filing, international search, publication and examinations.

10. The appellant is not disputing that his application constitutes a method of doing business as contended by the examiner but rather says that the examiner should have interpreted section 21[3] b in a manner that would give effect to Kenya’s international obligations under the PCT and IPC. The applicant did not point out the provisions of the PCT with which section 21 [3] b of the Act is inconsistent or any section of the IPC which obliges Kenya or any other member of the PCT to recognize and give patent protection to business methods or schemes of doing business.

11. In a bid to persuade the 2nd Respondent that the examiner was wrong, in finding the subject matter of the patent application not patentable under Section 21[3] b and to reverse the initial rejection the Applicant referred the 2nd Respondent to two cases that concerned decisions on interpretation of municipal laws within the context of European Community law.

a. Re Factortame Vs. secretary of state for transport where the UK courts suspended the operations of a UK Act of parliament for being incompatible with the Treaty of Rome and

b. Re Costa VENEL 1964 EC) a decision of the European Court of Justice which held that the European Community law overrides any national law of member states of the EU that conflicts with it.

12. We observe that those two decisions were not on the point of interpretation of similar or equivalent provisions

of any municipal law of any of the countries of the European Union on the question of patentability of business methods or schemes of doing business or a provision of any EU member state excluding business methods from patent protection and the provisions of PCT and IPC. So the appellant was not exactly comparing likes with likes. Instead, he was drawing from general principles of interpretation of municipal law viz- a-vis provisions international treaties without putting it into context of specific treaty and municipal law provisions. As we understand it there is no difference between EU Patent Law and municipal patent laws in the countries of the EU in the treatment of business methods or schemes for doing business. They both forbid patent registration whenever what is disclosed in a patent application is solely a scheme or method of doing business, the respective municipal patent laws being by and large products of domestication of EU patent laws.

13. As regards the two documents cited by the examiner, the Appellant contended at pages 10 to 16 in his written submission brief that the two were different from his invention as disclosed in the patent application and the examiner's conclusion that those two documents constituted evidence of prior art in relation to the subject patent application was in error and invalid.

14. On the finding that the application and the claims lack inventive step as it describes automation of a well-known conventional procedure the Appellant countered at page 17 of his submissions brief, that his "computer-implemented method was a solution to address a specific problem of automatic disconnection of prepaid credit subscriber of a mobile operator using a telecommunication equipment with prepaid credit subscriber to connect to system and network resource of the mobile operator".

15. He further claimed that three inventive steps were disclosed by his patent application which he formulated as follows;

a. "A claimed inventive step said to be" characterized by characteristics specifically adopted acceptable account transaction processing and control flow technical features of acceptable account transaction processing and control flow models of the computer-implemented method that affects the purpose, meaning and substance of the solution that for which protection is sought aimed to allow and enable the prepaid credit subscribers; as a result of which the prepaid credit subscriber is empowered to continue assessing the system and network resources of the mobile operator and to continue consuming the service(s) or products(s) on the system and network resources of the mobile operator on credit terms after exhaustion of a prepaid credit subscriber's current balance, without loss of" connection.

16. The second characteristic claimed under inventive step 1 is said to be characterized by;

- Specifically adapted computer-implemented methods, technical features linked to the computer technical features to facilitate the purpose, meaning and spirit of the computer-implemented method, further with spirit/purpose, meaning and substance.

17. Claimed inventive step 2 is said to consist of "function(s) of subscriber's accounts enrolment module, linked to the computer-implemented method to better effect and facilitate the purpose, meaning and spirit of the computer-implemented method of the solution of the present claim that for which present protection is sought". By way of elaboration, the appellant continues to state that it is established for" a prepaid subscriber" for subscribing, opening registering and enrolling: an account record of prepaid credit subscriber operated by the prepaid credit subscriber with the computer-implemented method: for short term advanced credit finance assurance as a result of which the prepaid credit subscriber is empowered to select a set of accounts class usage parameter(s) spending limit(s) adaptable to the prepaid credit subscriber's typical transactions spending activities."

18. Claimed inventive step 3 is said to be in respect of "function(s) of an account maintenance module, linked to the computer-implemented method to better effect and facilitate the purpose, meaning and spirit of the computer-

implemented method of the solution of the present claim that for which protection is sought”.

19. On that basis, the Appellant disagreed with the examiner’s finding that there was no inventive step disclosed or that the application described automation of a well- known conventional procedure asserting that the procedure that he describes in the application was a “ solution” that was as at 05th June, 2013,[filing date] “not anticipated by the known art nor was it known or used as claimed and the examiner’s findings to the contrary were not founded on any facts nor any evidence that the invention was in the public domain and that the examiner had not demonstrated that the inventive steps of the invention was either known by the public or used by the telecommunication operator”.

20. Finally, the Appellant declined the examiner’s advice to seek protection under utility model contending that it would be “prejudicial to his rights to the invention of the present claim”. Maintaining that his application for grant of patent was merited, he requested for setting aside of the initial rejection, a reconsideration of his application based on the amended and new claims and grant of patent.

21. The claimed inventive steps in the appellant’s patent application were to be independently examined against his own disclosure of the existing body of knowledge and also against any other relevant prior art disclosed anywhere in the world before the filing date to determine whether they constitute a sufficient advance or contribution to the existing technical knowledge in the claimed area of technology to qualify as an inventive step.

22. The state of the prior art disclosed by the appellant in his patent application is to be found in his vol. 2 of 5 beginning at para. [0004 to [0008]. We deem it necessary to set it out to better understand the appellant’s claimed invention and inventive steps.

“ Brief Discussion of Related Art

[0004] The payment mechanisms widely adopted by mobile operators are the postpaid and the prepaid transaction systems in the supply of goods and provision of services of mobile offerings.

[0005] Under the known art of the prepaid credit transactions system, credit is available to prepaid credit subscribers through an advanced pre-transaction arrangement through micro-lending and nano-lending arrangements, where prepaid credit subscriber’s customers borrow and access airtime on credit terms.

[0006] Key characteristic of the related known art solution include; qualifying subscribers are prompted to access airtime on credit after their calls have already terminated or; upon trying to establish a call without sufficient credit balance to make a call connection. A definite credit amount is then advanced before a flow of transactions events.

[0007] Subscribers may then use their advanced credit for airtime and SMS data transfer or for browsing the internet as they would ordinarily use their prepaid credit balances; subscribers can access advanced credit for airtime and SMS data transfer as many times as they require as long as they have repaid previous advanced credit for airtime.

[0008] The mobile operator can lend various amounts subject to prepaid credit subscribers credit history of the subscriber; repayments

are recovered by established mode from the subscriber’s next top-up[s] until credit is fully paid.”

23. The applicant identifies the challenges and weaknesses within the existing prepaid credit-based systems at para. 0009 and 0010 as the automatic termination or disconnection of the customer by the mobile operator’s manager upon exhaustion of credit leading to disruption or denial of mobile telephone service at a time when the customer is

in the middle of a transaction which causes inconvenience and distress to the customer and financial loss to the mobile operator in lost opportunity to earn on the disconnected service transaction. To overcome these perceived weaknesses he proposes at [0019] to [0025] ‘’, a system and method for a short term advanced credit finance’’ which would ensure non-automatic disconnection of service and guarantee continuous enjoyment of the mobile operators services beyond the subscriber’s pre-paid credit limit.

24. As can be seen from a plain reading of the appellant’s description of disclosed prior art and the identified weaknesses, the gap that the applicant seeks to fill by his proposed solution is really not a solution to a problem in a field of technology as envisaged under section 21[1] IPA, but a business credit arrangement issue. The automatic disconnection or termination of service occurs not due to any inherent technical failure in the existing prepaid mobile credit system but rather due to a deliberate intervention of the mobile operator’s manager to ensure that the customer’s usage does not exceed the prepaid credit. It is basically a financial or business-related control measure.

25. The examiner was not persuaded by the Appellant’s contentions and after conducting, a substantive examination based on the amended claims and the Appellant’s comments/submissions issued a final substantive report rejecting the patent application principally on the ground of non-patentability of subject matter and additionally for lack of inventive step and ambiguity of the amended patent claims.

26. Not surprisingly the Applicant was dissatisfied with the final rejection of his patent application and upon notification instituted this appeal against the whole decision. The appeal was filed on 4/7/2018 by way of what the appellant called a petition/civil action but at the point of filing renamed Appeal. It is in five (5) volumes containing various documents. Volume 1 of 5 titled – APPLICATION, contains:

- a) Notice of appeal under section 71 of the IPA in form IPT 2 (rule 5 (3) (b) dated 4th July 2018,
- b) List of Submissions
- c) Application
- d) Supporting affidavit
- e) Service Notice of summons to enter appearance.
- f) Copies of pleadings
- g) Plaint running to 65 pages
- h) Notification of substantive examination report dated 09/04/2018.
- i) Substantive examination report dated 09/04/2018
- j) Copy of letter of explanations to amend application to KE/P/2018/001836 dated 13th February, 2018.
- k) Request to amend or divide application dated 13/02/2018
- l) WRITTEN SUBMISSION BRIEF dated 13th February, 2018
- m) Notification of Substantive Examination Report/ invitation to amend application dated 16/11/2017.
- n) Substantive Examination Report dated 16/11/2017

- o) United States: Patent application (GOHEN et al Pub. No. US 2012/0239553 AL: PUB date; Sep. 20,2012
- p) United States: PATENT APPLICATION Publication KREMEN: Pub No. US 2013/0006845 AL Pub date: Jan. 3, 2013
- q) Letter dated 26thNovember, 2016 (Request Removal of All Documents and All Amendments of Patent application No. KE/P/2013/0013/001836.
- r) Request to amend or divide application dated 22ndAugust, 2013.
- s) Letter of Explanation of Request to amend patent. Application dated 22/8/2013 Receipt No. 3081115.
- t) Request to amend or divide Application dated 22/8/2013 Receipt No. 6130666.
- u) Request for examination under S. 44 of the Act dated 22/9/2014. Letter dated 20/01/2018.

27. The Appellant's volume 2 of 5 begins with a certified copy of the patent application No. KE/P/2013/1836, which runs to 302 pages followed by the verification of formality examination Report/Invitation to correct defects. Volume 3 of 5 [146 pages] consists of "claims Amendments", while volume 4 of 5 contains Documents of explanation to claims Amendments. Documents 5 of 5 concludes the set of documents initially filed by the Appellant and consist of a list and bundle of Authorities.

28. When the matter came up before us on 29/8/2019 for hearing of the applications for joinder by the two interested parties; we pointed out to the Appellant that the appeal he had filed before the Tribunal did not accord with the provisions of the Industrial Property Act and the Industrial Property Tribunal Rules 2002 relating to institution of appeals from a decision of the Managing Director rejecting an application for grant of a patent -in particular Section 47 and Rule 5(3)(e). We directed the Appellant to consider his pleadings and inform the Tribunal, what he wished to do to rectify the defect at the next sitting. The Appellant did not do this. The appellant was also to file a response to the two applications for joinder by the then proposed interested parties which he indicated he wished to oppose but had not filed any grounds or replying affidavits in opposition thereto as at 29/8/2019.

29. Instead, the appellant filed a multiplicity of applications and other documents in which he included the names of twenty-six new Respondents in addition to Kenya Industrial Property Institute and its Managing Director. Those parties were improperly cited as respondents in these proceedings having not been party to the patent application and the decision appealed from. In our assessment, it is sufficient to include only the Managing Director KIPi as a Respondent in an appeal under section 47 of the Act. It is not even necessary for the hearing and determination of an appeal under that section or indeed any other section of the Act, to include the institute as a Respondent.

30. The documents containing the additional 26 names of persons and organizations were filed on 18th and 19th September 2019 and include:-

- a) Copies of Pleadings
- b) List of Documents to the counterclaim
- c) Service notice if Summons to enter appearance
- d) List of witness to the counterclaim

- e) First witness to counter-claim
- f) Statement of facts proved by Affidavit of first witness M/S Florence Wangari Mwaura
- g) Counter Claim
- h) Verifying affidavit to the counterclaim
- i) A myriad of other documents running from page 203 to 432.
- j) An application on power to state a case for the opinion of Court dated 18th October, 2019.
- k) An application under Section 37 of the copyright Act Directed against Safaricom Public Company (PLC) named in the documents as 5th Respondent.
- l) An application under Section 37 of the Copyright Act Against Vodafone Group of Companies.
- m) An Application for enlargement of time

31. It is important to highlight that what the appellant was expected to file at that point was a response to the two applications by the interested parties for joinder, which he had indicated he wished to oppose. In a curious and quite unexpected twist, the two then proposed interested parties featured as Respondents no. 3 and 5 in the list of 26 new respondents in the appellant's filings on 18th and 19th September 2019. In some of those filings, the appellant sought a multiplicity of orders and reliefs by way of applications and counterclaim all in the context of an appeal against a specific decision refusing the grant of his patent application.

32. We heard the applications by then proposed interested parties on 27TH September, 2019 and in a ruling delivered on 31st October, 2019 allowed them to be enjoined as first and second interested party respectively. We also struck out the Appellant's applications and documents filed on the 18th and 19th September, 2019 as they had been filed without leave of the Tribunal, included 26 persons/organizations not a party to the appeal and not proper respondents to the appeal before us- it is against a specific decision of the Managing Director to reject the Appellant's patent application. The documents filed by the appellant were also not relevant and necessary for the just and fair determination of the appeal. The impugned filings served no useful purpose as all the documents necessary for the prosecution of the appeal namely the notice of appeal, decision appealed from [final substantive examination report], the patent application as initially filed, the amendments to the claims and the appellant's grounds of appeal and arguments against the rejection of his patent application were already on file as part of the documents contained in the five volumes filed by the appellant at inception of the appeal proceedings.

33. We directed the Appellant to amend his notice of appeal and the other documents filed therewith to accord with the provisions of the law relating to appeals under Section 47 of the Act and fixed the matter for hearing of the appeal on 19/12/2019.

34. By 19th December 2019, the Appellant had not amended his notice of Appeal because according to him he had brought the appeal in the right frame as provided for by the Civil Procedure Act. He said that he was going to rely on his pleadings and documents as initially filed and make oral submissions at the hearing.

The interested Parties advocates on their part indicated that they would file written submissions, which they would highlight at the hearing of the appeal and needed time to file responses to the appeal having not done so due to the Appellant's failure to file and serve amended documents.

35. We then directed that the appeal be heard on 8th April 2020 which was not to be due to the requirements for social distancing that were imposed following the advent of the Coronavirus pandemic and the appeal was then heard virtually on 27th May, 2020 when the interested parties made oral highlights of the written submissions and the Appellant submitted orally. The Appellant faults the decision of the managing director rejecting his patent application while the interested parties support it.

36. The substantive issue for determination in this appeal is whether or not the rejection of the Appellant's patent application was correct. As earlier indicated in this judgement the primary reason for rejection of the patent application was that the subject matter claimed in the Appellant's patent claims is not patentable as it consists of a method of doing business which is expressly excluded from patent protection under Section 21(3)(b) IPA.

The second reason for rejection was that the Appellant's patent application did not disclose an inventive step and lastly the amended patent claims failed the test of clarity and precision and exceeded the scope of amendments envisaged under S 34 and 36 IPA.

37. But, before we deal with the substantive issue there is a procedural issue we feel duty-bound to address in this appeal. It concerns the manner in which the appellant approached the Tribunal. The Appellant filed it as a petition describing himself as a petitioner and lodged a notice of appeal in form IPT 2 under section 71 IPA, Rules 5 (3) (b) Industrial Property Tribunal Rules 2002. He also filed a plaint simultaneously with the notice of appeal and declined to amend his documents, as directed contending that he had brought the appeal in the right frame provided in the Civil Procedure Act and Rules.

39. The Jurisdiction of this Tribunal to entertain appeals from a decision of the Managing Director (KIPI) and the manner of instituting such appeals is as set out in the Industrial Property Act and the Industrial Property Tribunal Rules 2002, in particular, Sect 112 IPA and Rule 5 IPT Rules 2002

Section 112 IPA states;

“Where under this Act, provision is made for appeals from the decisions of the Managing Director; all such appeals shall be made to the Industrial Property Tribunal in accordance with this part “

40. As to the manner of initiating an appeal Rule 5 of IPT Rules, in turn, provides that:-

5 (1) a person who may appeal to the Tribunal shall do so by filing a notice of appeal with the Tribunal 2.) Setting out (a) the decision appealed from, (b) whether or not the appeal is against the entire decision or only part of the decision if only part of the decision is appealed against, the part appealed against, (c) the grounds of appeal and (d) the order or any other relief sought.

On the form of Notice of Appeal, Rule 5(3) is pertinent and expressly provides:-

The notice of appeal shall be in the following form –

- a) For an appeal from a decision of the Minister under Section 27 (7) of the Act in form IPT 1;
- b) For an appeal from a decision of the Managing Director under Section 71 of the Act, in form IPT 2;
- c) For an appeal from a decision of the Minister under Section 80 (11) of the Act form IPT 3;
- d) For an appeal from a decision of the Managing Director other than an appeal described in sub rule [b] in form IPT 5.

25. This scheme of the law shows clearly that the instant appeal ought to have been initiated and proceeded with as per the provisions of the Industrial Property Act and Industrial Property Tribunal Rules and not as per the Civil Procedure Act or Rules as claimed by the Appellant to justify his failure to amend his documents in accordance with our direction of 31.10.2019.

26. The Civil Procedure Act and the Rules made thereunder govern proceedings in the High Court and subject to the Magistrate's Courts Act to proceedings in subordinate courts. Furthermore, no provision of the Civil Procedure Act or the Rules permit a party to initiate an appeal by way of petition and plaint as the Appellant contended before us. It is always by way of a memorandum of appeal. The Industrial Property Act creates the Industrial Property Tribunal as a specialized Court to deal specifically with matters relating to patents, industrial designs, utility models, and technovations. In addition to the substantive provisions in the IP Act the IPT Rules 2002 govern the procedure of proceedings before this Tribunal. There is no incorporation of the Civil Procedure Act or Rules by reference in either the IP Act or the IPT Rules. In view of this, it is improper and inappropriate to invoke the Civil Procedure Act or Rules in appeal proceedings before this tribunal.

27. This appeal is correctly an appeal under section 47 and not section 71 of the Industrial Property Act. Though both sections deal with appeals from a decision of the Managing Director, they are not to be confused because they are specific to decisions dealing with specified matters under the Act, the former dealing with decisions on patent applications and the latter with decisions on petitions for contractual licenses. Section 47 of the IPA permits an Applicant to appeal to the Tribunal if dissatisfied with the decision of the Managing Director made in the exercise of his statutory mandate on an application for patent under Part V of the Industrial Property Act and states:-

“the Applicant may appeal to the Tribunal against any decision by which the Managing Director accords a filing date, rejects the application, and treats the application as if it had not been filed, considers any of the claims as withdrawn or refuses to grant a patent”.

28. The Notice of Appeal in respect of an appeal under section 47 of the Act should be in form IPT 5 by dint of Rule 5 (3)(e) of the Industrial Property Rules as it concerns an appeal other than an appeal under section 71 of the Act which ought to be by notice in Form IPT 2 by dint of Rule 5(3)(b) of IPT Rules.

29. As this appeal is against the decision of the Managing Director under section 47 of the Act, rejecting the Appellant's application for grant of the patent, it was improper for the Appellant to institute it by petition and Notice of Appeal in Form IPT 2. That form is only to be used to institute an appeal under section 71 of the Act in terms of Rule 5 (3) (b) of the Rules. Section 71 of the Act governs appeals from decisions of the Managing Director in the exercise of jurisdiction on matters relating to contractual licenses under Part X of the Act. We find that the appellant's notice of appeal is incompetent to the extent that it is brought in IPT form 2 and under section 71 of the Act yet the decision appealed is a decision under section 47 of the Act. Rules of procedure have been described as the handmaidens of justice. To borrow the words of Dulu J in Bayusuf Brothers and Ano. VS Mathew Mureithi HCA NO. 20 /1998 [2005] eKLR., “ Rules of procedure are meant to serve specific purposes and they must be followed...” Critically they ensure the orderly conduct of legal proceedings and are therefore an indispensable component in ensuring that the wheels of justice run smoothly. They are therefore not to be disregarded or ignored and any party who deliberately fails to play by the established rules of procedure does a disservice to the efficient administration of justice.

30. We further find all references to the appellant as ‘petitioner’ in the documents filed before the Tribunal is also irregular and inappropriate in the context of an appeal. The nomenclature of petition and petitioner in the Act is only applicable in the context of an application to the Managing Director for registration of a contractual license under S 68[2] of the Act. Under that section, a party to a contractual license is required to petition for registration to

the Managing Director KIPi; who may upon consideration register or refuse to register the contractual license if in his opinion a clause in the contract license contract imposes unjustified restrictions on the licensee. As far as we can see this is the only part of the Act where the language of petition for registration is used and the remedy of appeal granted to a petitioner in section 71 of the Act can only be understood in that context and not generally in respect to all appeals from the decision of the Managing Director under any other part of the Act.

31. As indicated earlier we do not find anything in the provisions of both the civil procedure Act and the Rules made thereunder to support the Appellants contention that the frame of appeals under the Industrial Property Act is set out in that piece of legislation. Section 7 of the Civil Procedure Act, which the Appellant quoted to us, does not deal with appeals but rather the principle of Res Judicata. The Appellant was thus clearly mistaken to insist that he had brought this appeal in the proper manner and to refuse to abide by the clear directions of the Tribunal to amend and file a proper notice of appeal as well as amend the documents titled plaint and all references to him as a petitioner in his initial filing before the Tribunal. The Civil Procedure Act and the Rules made thereunder do not in any way permit a party to ignore or fail to abide by directions of the Tribunal as the Appellant did. Indeed section 1A (3) of the Civil Procedure Act imposes a legal duty on parties to civil proceedings to comply with all directions and orders of the Court.

32. We now turn to the substantive issue in the appeal namely whether or not the examiner's rejection of the appellant's patent application is correct. The Appellant's grounds challenging the decisions to reject his patent application are set out in the notice of appeal and elaborated in the document he has labelled 'plaint'. The grounds in the notice of appeal are generalized and accuse the Respondents' of committing wrongful acts/ omission(s) contrary to

Ø Section 44 part V IPA,

Ø Section 7 (2) (b) of part III of fair Administrative Act

Ø Section 7 (2) (f) of part II of F.A.A

Ø Section 4 of part II of FAA

Ø Section 12 part IV FAA

Ø Article 47 (1) of the constitution of Kenya 2010

Ø Article 40 (1) of the constitution of Kenya and

Ø Section 5 of Part II of IPA.

33. On the basis of these alleged infractions of various provisions of statute law and the Kenya Constitution [2010] by the Respondents, the Appellant seeks, equitable relief, financial damages and other relief that the Tribunal may deem fit to grant.

34. In addition at page 63 of the document labelled 'plaint,' the appellant seeks remedies as follows:-

Ø A declaration, that none of the reasons specified in the decisions is a valid reason for the decision made under the Industrial Property Act, 2001: and or

Ø A declaration that the reasons specified by the examiner were wrongly constructed, interpreted and applied to the claims and to the invention of myself.

Ø A declaration that the second Respondent acting for and on behalf of the First Respondent, and the second Respondent has: contravened, or failed to comply with, or attempted to contravene, or being in a way, directly or indirectly, knowingly concerned, or party to a contravention of, or a failure to comply with;

I. Section 44 of part V- Application, grant and refusal of patent of the Industrial Property Act 2001 Cap 509 of laws of Kenya and Regulation 28 of the Industrial Property Regulations, 2002.

II. The provisions of Section 7 (2) (b) of part III of Fair Administrative Action Act No. 4 of 2015 of laws of Kenya, that; a mandatory and mandatory and material procedure or condition prescribed by an empowering provision was not complied with.

III. The provisions of section 7(2) of part III of the Fair Administrative Act No. 4 of 2015 laws of Kenya: for failing to take administrative action and to make an administrative decision which is expeditious, efficient, lawful, reasonable and procedurally fair.

IV. Section 12 of part IV under – the Fair Administrative Action Act No. 4 of 2015 laws of Kenya; for failing to take administrative action and to make an administrative decision, which is in accordance with the general principles of common law and the Rules of natural justice.

V. The principles set out in Article 47(1) of the Fair Administrative Action of the constitution of Kenya 2010; for failing to take administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

A declaration that the 2nd respondent has committed wrongful act(s) of failure(s) or omissions, that: constitute a contravention of, or attempting to contravene, or being in a way, directly or indirectly, knowingly concerned in, or party to a contravention of the rights of the petitioner to acquire and own Intellectual Property of the invention of the application of serial No. KE/P/2013/001836 of the petitioner, in accordance with, or which conforms to the principles set out in Article 40(1) of the protection rights to property of the Constitution of Kenya 2010. And the petitioner claims damages.

· A declaration that; the whole of the decision or parts of the whole decision of the decisions of the First Respondent and the Second Respondent that decided that the final rejection of application for a patent of KE/P/2013/001836 is void.

· The first and the second Respondent be ordered and compelled under section 114(1) on powers of the Tribunal of part XVII- Industrial Property Tribunal THAT A patent be granted and issued to the petitioner in the prescribed form under section 45 of the Industrial Property Act, 2001.

· And as soon as practicable, be published by the first and the second Respondent in the manner prescribed in the regulations.

· Cost of suit.

· Such further, of other, reliefs as the Industrial Property Tribunal may deem fit to grant.

35. We observe that the above prayers lifted from ‘‘ the plaint’’ are framed in the form that one would ordinarily find in judicial review and constitutional petition pleadings.

The interested parties advocates took issue with the prayers as framed in the notice of appeal on grounds that they do not constitute proper remedies that can be granted in the context of an appeal under section 47 of the Act. We agree with them that the Tribunal cannot grant equitable relief and financial damages as claimed by the appellant

for the simple reason that they are not the kind of remedies contemplated by Section 114[2] of the Act. That section states;

Upon any appeal to the Tribunal under this Act the Tribunal may-

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

[b] Exercise any of the powers which could have been exercised by the Managing Director in the proceedings in connection with which the appeal is brought; or

[c] Make such orders as to costs as it may deem fit.

36. The Appellant's application for patent having been rejected for three reasons; set out earlier; it was his duty to satisfy us that the examiner was wrong in order for him to succeed in the appeal.

37. The Appellant has in the material presented before the Tribunal and in the oral submissions faulted the examiner for finding that his invention did not meet the test of patentability under Section 21 (3)(b) of the Act, that there was no inventive step and that the amendments were ambiguous.

38. On the question of the finding that a business method is not patentable subject matter, the Appellant argues that S 21 (3) (b) relied upon by the examiner is inconsistent with International Treaties. Specifically, he cited Art. 1 sub art. 1,2 and 3 of the Paris Convention on Industrial Property, The Patent Cooperation Treaty and the International Patent Classification and submitted that as they have force of law in Kenya, the examiner ought not to have relied on the exclusion of business methods for patent protection in the national law to reject his patent application.

39. His arguments on this point can be summarized as follows; Kenya is a member of the Paris Union in terms of Art. 1 [1] of the Paris Convention, whose object is the protection of industrial property, to wit; patents, utility models, industrial designs, trademarks, trade names, indications of source or appellations of origin, and the repression of unfair competition [sub art.2] and "industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper but likewise to agricultural and extractive industries and to all manufactured and natural products..."[sub. Art.3]. He pointed out that sub art. 3 is couched in mandatory terms by which we understood him to say in specific reference to the principal ground of rejection that business methods would be covered as proper subject of patent protection in Kenya under the Paris Convention.

40. But our understanding of sub. Art. 3 of article 1 of the Paris Convention, is that what is to be understood in the broadest sense is the concept of industrial property and not what is proper subject for patent protection. We do not see anything in sub. Art. 3 imposing an obligation on the members of the union to recognize and provide patent protection to business methods or schemes of doing business. Our view is fortified by sub. Art. 4 which leaves the question of what is to qualify for patent protection to the national laws of the countries of the Union to determine. In this regard Art. 1 [4] states; "Patents shall include the various kinds of industrial patents recognized by laws of the countries of the union..."

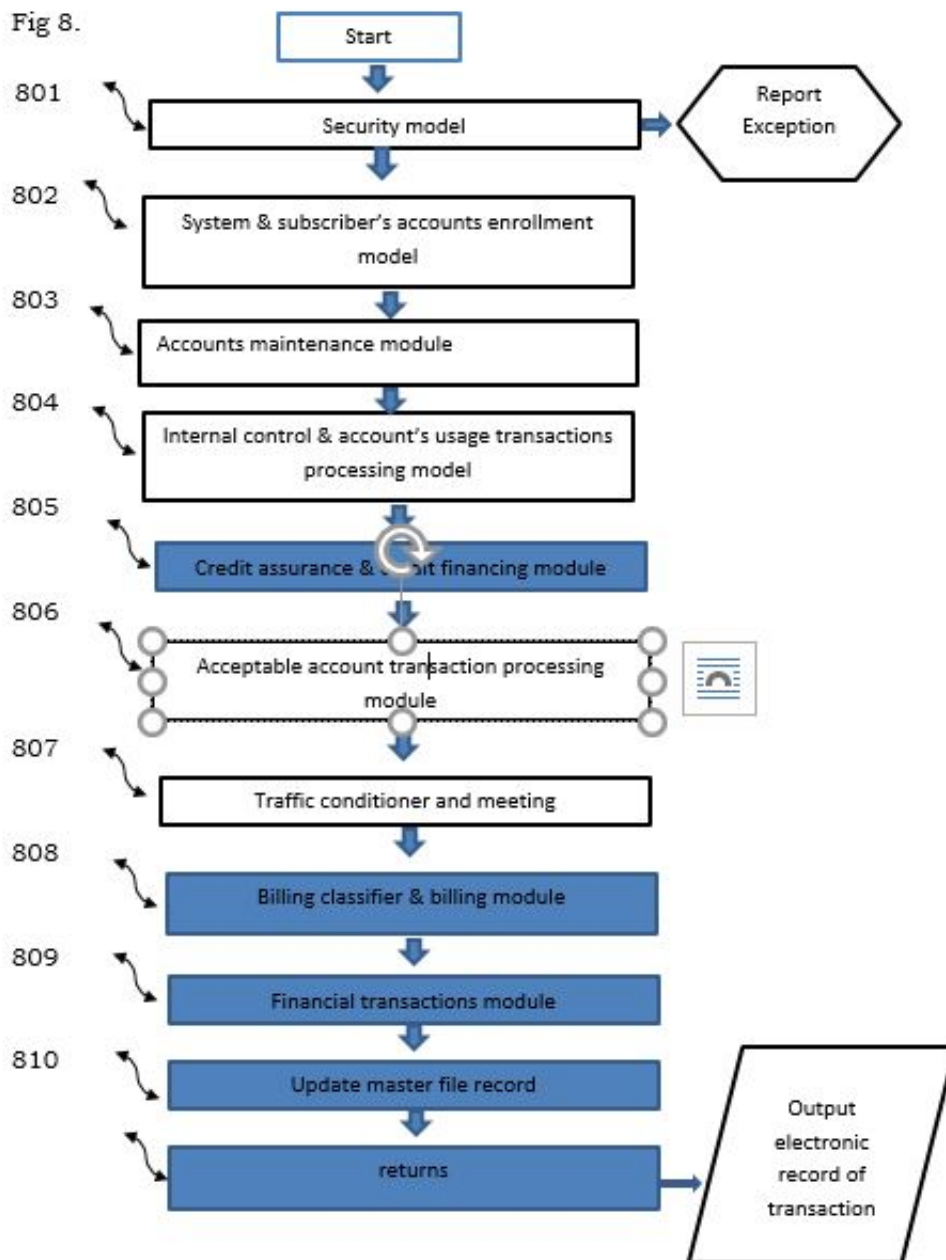
41. We have addressed the appellant's arguments and submissions based on the Patent Cooperation Treaty and the International Patent Classification in another part of this judgement and it is not necessary to set it, here, save to emphasize that the objective of the PCT and IPC is not to define and prescribe subject matter of patent registration to Member states. The only international agreement that defines patentable subject matter is the TRIPS Agreement which in Article 27.1 states;

"Subject to the provisions of paragraphs 2 and 3. patents shall be available for any inventions in the field of technology, provided that they are new, involve an inventive step and are capable of industrial applicability." This

is the closest an international Treaty has come to prescribing patentable subject matter. But even under TRIPS, there are exceptions to subject matter of patent which is left to the laws of the individual member states to determine.

42. On the question of inventive step, the Appellant argues that there was an inventive step disclosed by his alleged invention and faults the prior art relied upon by the examiner contending that the two American patents are different from his invention disclosed in the patent application which he contends is unique and distinct from the known prior art.

43. In particular, he complained that the examiner had wrongly applied or used a category as a basis for determining that his invention was a business method instead of at the essential qualities and characteristics of the subject matter which he framed as follows " Does the subject matter provide a solution to a specific problem in the field of technology" He then referred us to certified copy of his patent application [Vol. 2 of 5] Pg 7 top circled-bottom [1/39] para. 0003 It reads: "aimed: to facilitating a continual consumption of sale contract operation on exhaustion of current credit balance by prepaid credit subscriber for a mobile operator's products and services consumption; to aid a mobile operator to manage and control lending activities; to grow a mobile operator's product offerings sales volumes; and; to aid in a mobile operator sales operations management'. He also referred us to para. 0004 to 0011 and 0012 to 0017 and asserted that the " invention is a combination of prior art elements or components, which are detailed in illustrative figure 8 in the patent application Vol. 2 of 5 pages 64 at the top and 5/14 at the bottom. (incorporate figure 8). The combining steps in figure 8, he contended involved such additional efforts that no one with ordinary skill would have undertaken it without a recognized reason to do so.



44. The appellant acknowledges that there were pre-existing mobile phone credit schemes in use in Kenya before the filing date of his application. He identifies OKOA JHAZI, KOPA CREDO schemes associated with Safaricom Ltd, and Mobile Decisioning Africa Ltd as part of what was in the public domain in Kenya and discusses how they compare with what he is offering as his invention at para. 500 to 570. His proposed solution is described in great detail from para. 581 to 3345, while what is claimed as inventive step runs from page 176 to 255 [1/79 to 79/79]. In summary, the appellant states in relation to existing mobile credit scheme solutions.

- The credit scheme technology for credit schemes i.e pay after existing in the public domain comprises of OKOA JHAZI and KOPA CREDO.

- They are powerful special credit schemes technologies which involve significant data processing operations that are carried out by a technological computing system or device.
- They are data processing technology systems or methods with a precise system and computer-implemented method specifically adapted and used or applied for an enrolled prepaid subscriber to access airtime on credit on request and 'pay later'.
- They address only the problem of lack of airtime for mobile voice, data, SMS, and other commercial purposes of an enrolled prepaid credit subscriber.
- Existing technologies are solutions of a problem of lack of airtime of an enrolled prepaid credit subscriber and provide an alternative remedy and solution of the enrolled prepaid subscriber-only and
- Do not address; automatic dropping/disconnection, which is a specific problem of the enrolled prepaid credit subscriber in the technological field of mobile cellular technology.

45. The proposed solution both in the description and the patent claims to the identified problem of automatic disconnection on exhaustion of credit and premature loss of service, is to enable the subscriber to automatically continue enjoying the service by grant of "automatic assurance and automatic credit financing" by the mobile operator. The appellant describes in diagram 9 and 10 the steps to be taken to bring this automatic continuation of service about. It is instructive to note that the key to this automatic continuation of cellular mobile service is not based on any new technical contribution by the appellant but rather the automatic credit advance by the mobile telephone operator.

46. On the question of ambiguity and use of unnecessary text in the amendments, he faults the examiner for relying on the wrong document namely the document containing explanations to the amendments instead of relying on and considering the amendments as contained in the amendments replacements sheets.

47. The interested parties have both in their responses to the appeal and the written submissions as well as the oral highlights supported the examiner's findings and the three grounds of rejection.

48. First, they argue that the examiner was right to reject the Appellant's patent application because it was a business method, which does not constitute an invention under Section 21(3) (b). Second, there was no inventive step in right of prior art both in Kenya and elsewhere in the world specifically as disclosed in the two US patents relied on by the examiner and lastly that the examiner's findings on the ambiguity of the amendments were correct having regard to the amendments as framed by the Appellant. They have cited relevant case law in their elaborate submissions which for the sake of brevity will shall not rehearse in detail here but we have taken them into account in writing this judgement.

49. From these contending positions, we have identified three basic questions the answer to which will determine whether or the examiner's rejection of the appellant's patent application, on grounds of non-patentability of subject matter, lack of inventive step, and ambiguity of patent claims, was right:-

a) Whether or not the Appellant's application for grant of patent disclosed a business method which is not a proper subject of protection as an intention under Section (21) (3) (b) ; and whether the examiner was right to reject the appellant's patent application on that basis.

b) Whether or not the Appellant's application for patent disclosed an inventive step in light of the prior art in Kenya cited by the appellant and the two US patents registrations relied upon by the examiner as evidence of prior art.

c) Whether or not the Appellant's amendments' were ambiguous and went beyond proper material for inclusion in amendments of claims in accordance with the law.

A positive answer to the first question would dispose of the appeal as non-patentable subject matter is not registerable.

50. On the first question section 21 (3) (b) expressly excludes for patent protection "schemes rules or methods for doing business performing purely mental acts or playing games". Methods of doing business being expressly excluded by statute would not therefore not be a proper subject for grant of patent in Kenya.

51. Though the Act does not define what constitutes a business method and we have not found any local judicial interpretation either, business methods in the context of patent law exclusions, relate to steps, schemes or ways used by organizations in carrying out commercial or economic activities. From the decisions cited to us especially decisions from the UK courts on the construction of the term business methods as used in the European Patent Convention and domesticated in the UK before Brexit, it relates to methods of carrying out commercial or economic activities, often times using some technological tool such as a computer. According to the Halliburton Energy Services Inc's Applications [2012] RPC 129 Case cited to us by Counsel for the 2nd interested Party, the use of a computer to implement a better business method does not confer patentability, where patentability for business methods is expressly excluded. The judges in that case advert to the difficulty experienced in assessing business methods cases for patentability, especially where a computer is claimed to be used to implement the business method but ultimately conclude that they must be excluded notwithstanding that 'the use of a computer gives it a technical effect', because the 'law has resolutely sought to hold a line at excluding such things from patents.'

52. This is the same approach adopted by courts in Australia which has a similar prohibition against the protection of schemes and methods of doing business. In Commissioner of Patents V Roky Pte Ltd [2020], FCAFC 86 the Federal Court of Australia had this to say on patentability of solely business schemes and methods within the context of Australia's patent law; at par. 75.

"The injunction against the grant of patents for mere schemes has long been established. Grant involved a claim for schemes whereby a hypothetical unsecured creditor who recorded judgement against a user of the method could not levy against the user's assets to the extent that they were subject to the charge at [31] The Court noted

[14] Business, commercial and financial schemes have never been considered patentable....."

53. The Aerotel limited V Telco Holdings limited [In the Matter of Application Neal William Macrossam set a four steps criteria for testing business method for patentability in patent claims, which we find helpful as follows; first properly construe the claim, then identify the claimed actual contribution, ask whether it falls solely on an excluded subject matter and lastly check whether the actual or alleged contribution is actually technical in nature.' If this exercise yields a result that shows that the claimed actual contribution "solely falls on the excluded subject matter and there is no new technical contribution disclosed then the application for patent should fail".

54. Turning back to the appellant's application the claimed contribution is described as a " solution to address a specific problem of automatic disconnection of a prepaid credit subscriber of a mobile operator; using a telecommunication equipment with prepaid credit subscriber to connect to the system and network resource of the mobile operator; with a prepaid credit subscriber using the connection object of the telecommunication equipment to consume services and products on the system and network of the mobile operator." As we pointed out earlier, the problem of automatic cellular phone disconnection is not technology-related and the proffered solution is not of technical but rather business credit arrangement nature using the existing mobile operator's platforms. The way the system would work in practice is that the mobile operator would automatically lend or advance to the subscriber some credit to enable him or her to continue say talking on phone upon the latter's exhaustion of his or her prepaid

credit. In our understanding, the proposed solution works along similar lines as existing bank overdraft credit facilities where the bank agrees to honor its customer's cheques payments even after the latter has exhausted the funds in the account. The mobile phone subscriber just like the bank customer is allowed to overdraw the account up to an agreed limit. Beyond this, we do not see anything more to the appellant's claimed invention and agree with the examiner that the application describes the automation of a well-known conventional procedure. It is noteworthy that there is no technical feature in working the system that is attributable to the appellant, the telecommunication platform to be used to operate the appellant's method being that of the mobile operator.

55. The Appellant did not dispute the examiner's categorization of his application as disclosing a method for doing business. From his documents and oral submissions, the appellant accepts that characterization; his only objection being that the examiner ought not to have relied on Section 21[3] b of the Act to reject his patent application but instead should have relied on the Paris Convention, the Patent Cooperation Treaty and the IPC. We on our part find that the examiner was bound to apply section 21 [3] b IPA to the appellant's patent application and the section is not inconsistent with any provisions of the Paris Convention or Patent Cooperation Treaty or the IPC as contended by the appellant. In our view, the appellant has misapprehended the import and purpose of the provisions of the Paris Convention, the Patent Cooperation Treaty and the International Patent Classification in contending that section 21[3] (b) exclusion of business methods from patent protection is inconsistent with Kenya's international treaty obligations.

56. Kenya is not the only country member of the Paris Convention or the patent Cooperation Treaty that excludes "business methods" from protection under patent registration. Other countries and regional organizations have exclusion clauses in their patent legislations. A case in point and which was cited by the advocates for the interested parties is Article 52(2)(c) of the European Patent Convention which governs patent regime within the European Union.

That article reads:

- i. European Patents shall be granted for any inventions, which are susceptible of industrial application, which are new and which involve an inventive step.
- ii. The following, in particular, shall not be regarded as inventions within the meaning of paragraph 1:
 - a) Discoveries, scientific theories and mathematical methods.
 - b) Aesthetic creations.
 - c) Schemes, rules and methods of performing a mental act, playing games or doing business, or programs for computers.
 - d) Presentations of information.
- iii. The provisions of paragraph 2 shall exclude patentability of the subject matter or activity referred to in that provision, only to the extent to which a European patent application or European patent relates to such subject matter or activities as such".

57. As can be seen, article 52 (2) (c) EPC is similar to Article 21 (3) (b) IPA and has "business method" as one of the subjects excluded from protection under patent in European patent application.

58. The Paris Convention on Industrial property, the Patent Co-operation Treaty and the International Patent classification do not impose any obligation on any member country to recognize "business methods" as a subject

matter of patent. Both the Paris Convention and the Patent Cooperation Treaty as indeed all intellectual property treaties/agreements and protocols administered by WIPO recognize the principle of territoriality and in the specific area of patent that the national law governs the registration, administration and enforcement of patents. Thus, even where an international patent application is made under the Patent Cooperation Treaty, the national office of any designated country has the final say on whether to refuse or grant registration on the basis of that country's national patent laws, the only rider being the observance principle of national treatment.

59. That being the case the examiner cannot be faulted for rejecting the Appellant's application for being a business method a subject matter that is expressly excluded from patent protection under section 21 (3) (b). The alleged infractions by the examiner of various provisions of statute law, the Constitution of Kenya 2010, the rules of natural justice and Treaties to which Kenya is a signatory have not been substantiated or proved.

60. Contrary to what the Appellant contends the IPC does not impose obligations on the member countries of the Patent Cooperation Treaty to grant patent on "business methods". The objective of the IPC is not to impose obligations on member countries of the Paris Convention or the Patent Cooperation Treaty. The IPC is basically a "means for obtaining an internationally uniform classification of Patent documents whose primary purpose is the establishment of an effective search tool for the retrieval of patent documents by intellectual property offices and other users" in order to establish the novelty and evaluate the inventive step or non-obviousness of the technical disclosure in patent classifications" (see paragraph 6 of the guide international patent classification version 2014 relied upon by the Appellant as well as the current 2020 guide]. On the other hand, the principal objective of the PCT is to simplify the patent system and make it more effective and economical for users and national patent offices (by providing for the filing of international patent applications) the ultimate goal being to obtain protection in a large number of countries. But the decision whether to grant or refuse registration is one for the national patent offices based on the national laws of each member country.

61. Our finding that the appellant's patent application consisted of non-patentable subject matter would dispose of this appeal. We would add that on our own independent examination of both the claims and the amended patent claims we are satisfied that they do not disclose any inventive step as contemplated by section 24 of the Act, they are anticipated by prior art in both Kenya and abroad and the appellant's amendments lack clarity and conciseness expected of patent claims under section 34 and 36 of the Act. In our assessment other than differences in wording there is no real difference between D2 US 2012/0239553 A1 "method for processing and funding short term loans of a consumer and a method for converting currency, both to a mobile credit facility account" and the appellant's proposed "system and method for short term credit finance and for managing and controlling lending transactions spending". They all deal with a system and a method for short term lending through a cellular mobile device. There is also no real difference between Okoa Jahazi and Kopa Chapaa already in use in Kenya before the filing date as they relate to cellular mobile credit advance method system. The policy of patent law is to protect genuine inventions there by encouraging innovation and rewarding creativity for the benefit of society. That policy objective would not be served if patent registration is granted to what is already in existence and in respect of non-patentable subject matter.

62. The unnecessarily text and ambiguity is not just in the explanations to the amendments as contended by the appellants. These deficiencies are also in the claims amendments Replacement sheets (see Vol. 2/5 page 1 to 146. One finds expressions such as "what is claimed" The solution to address what" When" Effected by who" Effected how" Why" The solution further characterized by characteristic... Both the initial claims and the amended claims could have benefited from a professional touch, for drafting of patent claims certainly requires technical expertise. The need for conciseness and clarity of patent claims cannot be over emphasized as they demarcate the monopoly to be protected by patent and warns 3rd parties of the area beyond which they may not venture. We would dismiss the appeal for these additional reasons as well.

63. The last question is the issue of costs. The respondents did not appear in these proceedings and therefore no

costs would be awarded to them. On the other hand, the two interested parties were not brought into these proceedings by the appellant they came on their volition to protect their interests in the appeal and though their input, in particular, the submissions of their advocates is commendable we nevertheless do not find it appropriate to burden the appellant with an order of costs as he was not responsible for their joinder. The order that commends itself is that each party shall bear its own costs of the appeal.

64. In conclusion, we find and hold that this appeal fails on both procedural and substantive grounds. The examiner was right to reject the Appellant's patent application, the reasons for the rejection are valid and well-founded in both substantive and procedural law and there was no infraction of the statute and Constitutional provisions. Accordingly, this appeal lacks merits and is hereby dismissed.

Dated at Nairobi on this 1ST Day of JULY 2020.

Signed:

Brown Kairaria - Chairman

Wycliffe Swanya - Member

Pauline Mudeshi - Member

Brettah Muthuri - Member

Dr. Frasia Wangari - Member

Delivered Virtually before:

1. John Mwaura Kamonjo the Appellant.
2. John Syekei and Effie Omondi for the 1st Interested Party.
3. Patrick Ikimire for the 2nd Interested party.



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