



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 305 of 2012

SANITAM SERVICES (EA) LTD PETITIONER

AND

TAMIA LIMITED 1ST RESPONDENT

BENKEN HYGIENE SERVICES LTD..... 2ND RESPONDENT

PINPOINT HYGIENE SERVICES LTD 3RD RESPONDENT

BINS NAIROBI SERVICES LTD 4TH RESPONDENT

HYGIENE BINS LTD 5TH RESPONDENT

COCKRID KENYA LTD 6TH RESPONDENT

JOYCARE ENTERPRISES LTD 7TH RESPONDENT

EVE HYGIENE SOLUTION LTD 8TH RESPONDENT

NAKURU HYGIENE SERVICES LTD 9TH RESPONDENT

PESTMATIC LTD 10TH RESPONDENT

RENTOLINE LTD 11TH RESPONDENT

VECTORCON PEST CONTROL SUPPLIES LTD12TH RESPONDENT

PESTLABD LTD 13TH RESPONDENT

COMFORT LADY BINS LTD 14TH RESPONDENT

CHEMSERVE CLEARING SERVICES LTD 15TH RESPONDENT

ROAN SERVICES LTD 16TH RESPONDENT

THE HON. ATTORNEY GENERAL 17TH RESPONDENT

RULING

Introduction

1. The petitioner is the registered proprietor of Patent No. AP 773 issued by the African Regional Intellectual Property Organisation granted on 15th October 1999 pursuant to Patent Application No. AP/P/98/013772 filed on 4th September 1998. The patent involves an invention by the petitioner of a foot operated litter/sanitary disposal by a cover with a disposable lid on top, with the disposable lid being displaceable by the foot operated pedal at a lift lever to move between open and closed positions. The bin is defined such that the user cannot see the contents of the container, waster scavengers cannot have access to the contents, emission of unpleasant odour is reduced and the contents cannot spill out of the bin if overturned.

Petitioner's Case

2. According to the petitioner, it has been in protracted disputes with the some of the respondents over this patent. In **Milimani HCCC No. 58 of 1999** and **Nairobi Civil Appeal No. 228 of 2008 Sanitam Services (E.A) Limited v Rentokil (K) Limited and Kentainers (K) Limited**, the High Court and Court of Appeal respectively confirmed that it was the registered proprietor of the said patent. In both cases the orders restraining infringement of the patent were issued in favour of the petitioner.

3. In the present petition, the petitioner now seeks the following reliefs;

(a) *Declaration that the petitioner is entitled to protection against violation and or infringement of its intellectual property rights.*

(b) *A declaration that the respondents have hitherto been violating and or infringing on the petitioners intellectual property rights in Patent No. AP 773 contrary to Article 11(2) and Article 40(1) and (5) of the Constitution of Kenya.*

(c) *An injunction restraining the respondents, their employees, agents, servants and or any other person claiming any rights whatsoever from infringing on the petitioner's intellectual property rights in Patent No. AP773 or in any way dealing with patent No. AP773 or foot operated litter/sanitary disposal bins protected by Patent No. AP773.*

(d) *An order of seizure and destruction of any foot operated litter/sanitary disposal bins in possession of the respondents.*

(e) *Costs of this petition.*

(f) *Any other orders as this Honourable Court may deem just to grant.*

Issue for determination

4. When this matter came up for direction on 7th November 2012, I directed the petitioner to show cause why this matter should not be dismissed as there was no cause of action disclosed on the face of the petition.

The Submissions

5. Mr Mutiso, counsel for the petitioner, submitted that his client as a patent holder was entitled to enforce the rights arising out of the registered patent. This right, counsel contended, was well founded and in accordance with the provisions of the Constitution. First, under **Article 2(6)** treaties and convention which are ratified by Kenya are applicable in the country and therefore a patent granted under African Regional Intellectual Property Organisation (ARIPO) was recognised and enforceable in Kenya. Counsel pointed to **Article 11(2)(c)** and **Article 40(5)** of the Constitution which impose obligations upon the state to protect and promote intellectual property. Mr Mutiso argued that under **Article 23**, the Court has jurisdiction to grant injunction to restrain breach of fundamental rights and any other remedies necessary to protect the petitioner's rights.

6. The respondents were of the view that the case did not disclose any cause of action. Mr Mwilu, counsel for the 2nd respondent, noted that any issue of patent infringement would be handled by the Industrial Property Tribunal established by the **Industrial Property Act**. Mr Issa, counsel for the 3rd respondent, submitted that prima facie there was no cause of action established in the petition as against the respondents as no breach of rights of fundamental freedoms had been alleged as against all the respondents. He noted that the petition merely recited the provisions of the Constitution and the entitlements of the petitioner as regards the patent and sought injunction against the respondents. Mr Kamani, counsel for the 8th respondent, drew the court's attention to the civil cases that had been filed by the petitioner to demonstrate that the subject matter of the petition could be dealt with by the courts exercising their ordinary jurisdiction.

Determination

7. I have considered the petition and the affidavit in support in light of the fact that the notice to show cause is in the nature of a preliminary objection and the court should consider the facts asserted therein as true and correct.

8. **Article 11(2)(c)** provides, "**The state shall promote the intellectual property rights of the people of Kenya.**" **Article 40(5)** provides that, "**The State shall support, promote and protect the intellectual property rights of the people of Kenya.**" It is correct to state that the tenor and purport of **Articles 11(2)(c)** and **40(5)** is to oblige the state to support promote and protect the intellectual property rights of Kenyans.

9. In this respect the state is required to take legal, policy or other measures to achieve these constitutional objectives. The provisions of **Articles 12(2)(c)** and **40(5)** are not self enforcing, they require the state to take steps and the state has done so by enacting and establishing an intellectual property law regime which any intellectual property holder can take advantage of to protect its property rights acquired under the law. The petitioner has had the full benefit of this regime by having its rights enforced through the courts. Under the **Industrial Property Act**, there is also the Industrial Property Tribunal which the petitioner is entitled use to vindicate its rights as against any of the respondents or any other persons breaching it intellectual property rights. It has not been demonstrated or shown in the pleadings and supporting deposition that the State has failed in this respect in its obligations under **Articles 12(2) (c)** and **40(5)**. In short, there is no cause of action against the State.

10. From my reasoning above, it follows that any breach of the intellectual property rights against the respondents can be enforced through the legal mechanisms provided by statute or common law, where applicable, hence it is unnecessary to invoke the provisions of **Article 22** to enforce what are ordinary rights (see **Alphonse Mwangemi Munga and Others v Africa Safari Club Nairobi Petition**

No. 564 of 2004 (Unreported) and *Harrikisoon v Attorney General of Trinidad of Tobago* [1980] AC 265).

11. I would hasten to add that a reading of the petition and the supporting affidavit does not disclose any infringement of any right by the 1st to 16th respondents and the only conclusion I draw is that there is no cause of action against them. Simply stated, there is no relationship between the relief of injunction directed at the respondents and the case pleaded. Having concluded that there is no cause of action against any of the respondents, the petition calls for striking out and it is hereby struck out.

12. The petitioners counsel prayed that this court should not impose costs as the issue was one raised by the court. This is correct. However, the notice was issued after I had appraised myself of the substance of the responding depositions which all raised the issue that there was no cause of action. I am aware and it has been stated that the Court in matter of fundamental rights should be hesitant to award costs lest they become a burden to those who seek to enforce fundamental rights and freedoms but in *Harun Mwau and Others v Attorney General Nairobi* **Petition No. 65 of 2011 (Unreported)** the court recognised that the matter of costs was still in the court's discretion and in an appropriate case the court would still make an award for costs.

13. In my view, no allegation was made against the 1st to the 16th respondents as such they were forced to defend an unnecessary suit. I would therefore award costs but only to those parties who appeared and defended these proceedings. I therefore award costs to the 1st, 2nd, 3rd and 8th respondents and I assess and award the sum of Ksh.40,000/00 all inclusive to each of them.

Disposition

14. My final orders then are as follows;

(a) The petition be and is hereby struck out.

(b) Costs are awarded to the 1st, 2nd 3rd and 8th respondents and the same are assessed at Kshs.40,000/00 to each of the respondents to be paid within 30 days.

DATED and DELIVERED at NAIROBI this 5th day of December 2012

D.S. MAJANJA

JUDGE

Mr R. Mutiso instructed by R. M. Mutiso and Company Advocates for the petitioner.

Mr M. Kangatta instructed by Muchoki Kangata and Company Advocates for the 1st respondent.

Mr Mwilu instructed by Mwilu and Company Advocates for the 2nd respondent.

Mr Issa instructed by Issa and Company for the 3rd respondent.

Mr Kamami instructed by Bowyer Mahihu and Company Advocates for the 8th respondent.



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