THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL DIVISION

CIVIL APPEAL NO 14 OF 2009

M.M SHEIKH DAWOOD)…… APPELLANT

VERSUS

KESHWALA AND SONS]…….…… RESPONDENT

BEFORE HONOURABLE MR JUSTICE CHRISTOPHER MADRAMA

RULING

This ruling arises out of an application by the respondents counsel to dismiss the appellants appeal for want of service of the appeal on the respondent. The appeal was lodged by the appellant under section 33, 38 (1) and (3) (a) of the Judicature Act Cap 13 laws of Uganda, section 51 of the Trade Marks Act cap 217, rule 115 of the Trademarks Rules, section 98 of the Civil Procedure Act, and order 52 rules 1 and 3 of the Civil Procedure Rules. An appeal under rule 115 of the Trademarks Rules is by notice of motion. The notice of motion was lodged in court on the 30th of November 2009. It was issued by the registrar on 1 December 2009. The appeal is for orders that:

1. The ruling and order of the learned registrar of trademarks entered against the appellant on the 5th day of October 2009 be set aside.

2. That the learned registrar's ruling and order on the appellant's application for registration of the Trademark "Baby" Wax Safety Matches are baseless and arbitrary.

3. That the honourable court orders the registration of the appellants trademark "Baby Wax Safety Matches".

4. Costs of this appeal are provided for.

On 21 April 2011 when the appeal was mentioned Andrew Kibaya holding brief for Peters Musoke appeared for the appellants while Friday Kagoro appeared for the respondents. The appellants counsel prayed that the appeal be stayed pending the hearing of Civil Suit No. 43 of 2010 between the same parties. He argued that there was a civil suit and the need for the appeal does not exist anymore. The respondents counsel opposed the application. Firstly he argued that the appeal had not been formally withdrawn and that they were only served with the hearing notice of the appeal the previous week. He prayed that the court directs that the notice of motion be served on them so that they make a reply thereto. The court adjourned to 26 May 2011.

On 26 May 2011 Peters Musoke appeared for the appellant while Kagoro appeared for the respondent. The respondents counsel again contended that they had neither been served with the notice of appeal nor the notice of motion. He contended that the court had ordered the respondent to be served. He prayed that the appeal be dismissed under the Trade Marks rules, rule 102 thereof. He contended that an appeal is supposed to be instituted within 60 days of the ruling of the registrar of trademarks. He further submitted that the appeal is governed by order 43 rules 11 of the Civil Procedure Rules. Since the respondent was never served with the notice of appeal or a notice of motion, he contended that the court directed that service be effected as no such service had ever been effected. He prayed that the appeal be dismissed for non-service. Counsel further referred to order 52 rules 4. For his part the respondents counsel contended that the last time the matter came to court it was his colleague who attended and give a case report. The report did not mention that the court directed that service be effected. I thereafter reserved ruling on the respondent's prayer for dismissal of the appeal for the 30th of June 2011.

I have carefully considered the objection of the respondents counsel made on 21 April and 26th of May 2011 respectively. There is basically one issue for the court to determine. This is whether failure to serve the notice of motion on the respondent in the circumstances of this case was fatal.

As far as the lodgment of the appeal is concerned, the notice of motion of the appellant pleads that the learned registrar of trademarks made a ruling against the appellant on 5 October 2009. The appeal by way of notice of motion was lodged in court on the 30 November 2009.

Appeals are filed under the Trademarks Rules S.I. No 217 – 1 and particularly regulation 115 thereof which provides:

> "When any person intends to appeal to the court, the appeal shall be made by motion in the usual way, and no such appeal shall be entertained unless notice of the motion is given within 60 days from the date of the decision appealed against or within such other time as the registrar shall allow."

Regulation 116 provides that: "every application to the court under the Act shall be served on the registrar of Trademarks." The notice of motion was issued on 1 December 2009 by the deputy registrar of the High Court. The appeal was therefore instituted within 60 days from the date of the decision appealed against.

On the question of whether failure to serve the respondent is fatal to the appellants appeal, there is no dispute as to a question of fact that the respondent had not yet been served by the time counsel objected to the appeal. Proceedings in the Act are governed by the Trademarks rules SI 217 – 1. Rules are made by the Minister under section 40 of the Act. Section 40 (a) provides that the Minister may make rules regulating the practice under the Act including the service of documents. Regulation 11 of the Trademarks rules provides:

> "11. Service of documents

> (1) all applications, notices, statements, papers having representations affixed or other documents authorised or required by the Act or these rules to be made, left or sent, at or to the office, or with or to the registrar of the court or any other person may be sent through the post by a prepaid or official paid letter."
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> (2) Any application or any document to be sent shall be deemed to have been made, left of sent at the time when the letter containing it would be delivered in the ordinary course of post.
>
> (3) In proving such sending, it shall be sufficient proof that the letter was properly sent and put into the post".

Rule 13 provides for the address of service. Sub rule 1 of rule 13 provides that:

> The registrar may require an applicant, opponent or agent, or a registered proprietor or registered user of a trademark, who does not reside or carry on business within Uganda to give an address for service within Uganda, and that address may be treated as the actual address of that person for all purposes connected with the matter in question.

Under sub rule 5:

> “Any written communication addressed to a party or person as aforesaid at an address given by him or her, or treated by the registrar, as his or her address for service shall be deemed to be properly addressed.

It follows that the Trademarks Rules governs service of documents for purposes of proceedings under the Act before the Registrar and also partially on appeals. Both the Act and regulations made there under do not expressly import the Civil Procedure Rules in case of lacunae. Regulation 12 of the Trademarks Rules provides that any person required by the rules to furnish the registrar with an address shall in all cases make the address of service to be as full as possible for the purpose of enabling any person easily find the place of trade or business of the person whose address is given.

Timelines are given for service of documents and hearings before the registrar of trademarks. These include timelines for opposition to an application for registration of a trademark. Rule 46 requires that the opposition to an application to register a trade mark is filed within 60 days from advertisement of the application. Rule 47 clearly provides that the notice of opposition is to be sent immediately to the applicant by the registrar. Under rule 48 a counterstatement may be filed within 42 days of receipt of the opposition. The counter statement is to be sent to the opponent within 42 days under rule 49. The applicant may then file evidence in support of the application within 42 days under rule 50. Thereafter evidence in reply is supposed to be filed within a month or 30 days. The registrar has discretion to grant an extension of time to do anything outside the

timelines prescribed in the rules under rule 55. Furthermore rule 102 enables the registrar to extend time for the doing of anything under the Act.

In this matter, whereas the notice of motion was issued on 1 December 2009, the copy filed on the court record does not have a date on which it was fixed for hearing by the time it was issued. Another copy of the notice of motion appended on top of the one on court record shows that the hearing of the appeal was fixed for 21 April 2011 at 9.30 o'clock in the morning.

Firstly I must observe that the deputy registrar of the High Court ought to have given a date on the 1st of December 2009 for the hearing of the appeal when issuing the notice of motion under the seal of the court. Notwithstanding, because no specific rules have been made for the service of appeals lodged in the High Court, it follows that the rules of the appellate court will apply. These are the Civil Procedure Rules. Before we examines the Civil procedure Rules it is proper to observe that the High Court is endowed with the same discretionary powers as that of the Registrar of Trademarks. Section 51 of the Trademarks Act cap 217 provides:

> "In any appeal from a decision of the registrar to the court under this act, the court shall have and exercise the same discretionary powers as under this act are conferred upon the registrar."

Section 51 seizes the court with discretionary powers of the registrar of Trademarks but it does not give the court the same timelines for purposes of an appeal from the ruling of a registrar. “Court” under section 1 (b) of the Trademarks Act means the High Court. Furthermore, rule 115 of the Trademarks Rules S.I. 217 – 1 does not give any timelines for service of the appeal on the respondent. In other words there is no express rule in the Trademarks rules which gives timelines for service of the notice of motion filed under rule 115 of the rules.

The respondents counsel referred me to order 43 rules 11 of the Civil Procedure Rules which provides for the service of notice of the day of hearing the appeal. It provides: "notice of the day fixed for hearing of the appeal shall be served on the respondent or on his or her advocate in the manner provided for the service on the defendant of the summons to enter an appearance; and all the provisions applicable to the summons, and proceedings with reference to the service of the summons, shall apply to the service of the notice."

Order 43 rules 12 of the Civil Procedure Rules further provides that the contents of a notice to the respondent shall be clear to the effect that if he or she does not appear in the High Court on the day so fixed, the appeal may be heard ex parte.

Order 43 of the Civil Procedure Rules deals with appeals to the High Court from subordinate courts. Rule 1 thereof provides for the form of the appeal which is to be by memorandum of appeal stating concisely the grounds of the appeal. However the Trademarks regulations provides for an appeal to be commenced by notice of motion and therefore order 43 rule 1 which is couched in mandatory words as to what form an appeal shall take is not applicable. It may be

asserted that order 43 should be applied to cases where no specific rules of procedure have been provided. The Trademarks rules provide for the form of an appeal and the time within which to file the same under rule 115 thereof. Order 43 is therefore not directly relevant on the specific question of timelines to file an appeal and the form it should take. I agree with the respondents counsel that notices of motion are governed by order 52 of the Civil Procedure Rules. Order 52 is an order of general application where no specific rule covers the matter in question as far as the form of an application is concerned. In this case I need to underscore the point that the appeal arose under another enactment namely the Trade Marks Act cap 217 and not from a subordinate court.

In the case of **Masaba v Republic [1967] 1 EA 488** Sir Udo Udoma the CJ of Uganda as he then was held that where a statute provides for commencement of proceedings by notice of motion, such a motion is an originating motion and should be treated strictly like any other summons originating an action. Learned counsel referred me to order 52 rules 4 which provides for dismissal or adjournment for want of notice. It provides:

> "If upon the hearing of any motion or other application, the court is of opinion that sufficient notice has not been given or that any person to whom notice has been given ought to have had the notice, the court may either dismiss the motion or application or adjourn the hearing of it in order that the advertisement be given upon such terms, if any, as the court may think fit to impose."

Rule 4 gives the court discretionary powers whether to dismiss the suit in cases where the notice of motion has been fixed for hearing without sufficient notice. The hearing of a motion in that rule presupposes that the pleadings were completed. Notice of the matters in the appeal commenced by the appellant must first be given by service of the same on the respondent. The service of the notice of motion which is the form of an appeal under the Act is not a formal requirement but a principle of fundamental justice. Every person who is being sued should be given a chance to defend the suit or appeal. At the time of issuance of the notice of motion, the respondent is entitled to both notice of the date of the hearing and also of the contents of the appeal against the ruling of the registrar, which ruling is in its favour. Such a motion being an originating motion as held in the case of **Masaba vs. Republic** (Supra), it is the commencement of an action and the rules of pleadings relating to original actions should apply. The motion must be served on the respondent before the date stipulated in the motion for hearing at the time of its issuance by the court. Failure to serve a summons within 21 days under order 5 rule 1 of the CPR is fatal and if time is not extended, it shall be dismissed. The general rules on the service of summons under order 5 of the Civil Procedure Rules must apply. It is the duty of the court to provide in the originating notice of motion (the appeal document) the time within which the Respondent to the appeal should appear in court and also the time within which to put his reply. Under the Trademark Rules quoted above the respondent is entitled to defend the action. Secondly, an appeal must be lodged within 60 days. The lodgment of the appeal must therefore be notified to the respondent and failure to do so would in my view breach the limitation period

of 60 days within which to lodge the appeal in that the Respondent who is the opponent to the appeal is entitled to notice within a reasonable period.

In this case the appeal was lodged at the end of November 2009. The Respondent has not been served with the appeal documents by April 2011 a period of about 2 years. This goes against the principles of fundamental justice enshrined in the bill of rights under article 28 of the Constitution of the Republic of Uganda that a party to a claim or suit or an appeal is entitled to fair notice and must be given opportunity to prepare his or her defence to the claim, suit or appeal within a reasonable time. Without deciding definitely the time within which the respondent should have been served, it is my ruling that in the circumstances of this case, failure to serve the Respondent at the maximum within a period of 42 days from the lodgment of the appeal in the High Court Registry which is the time line stipulated in the Trademarks Rules is a breach of the fundamental principles of justice that fair notice of an appeal, suit or claim lodged before a court or tribunal must be given to the respondent.

Moreover by the time a hearing notice was served on the respondent there was no service of the appeal on it and they have not yet put in a reply to the appeal. Counsel for the appellant prayed that I stay this appeal pending the hearing of a suit between the same parties touching on the same subject matter. The respondent in my view is not yet technically part of the appeal and has not been given an opportunity to defend the same by service of the notice of motion on him. As far as order 43 of the Civil Procedure Rules which deals with appeals to the High Court is concerned, a hearing notice of the appeal cannot be served on the respondent in terms of order 43 rules 11 and 12 of the Civil procedure Rules without service of the appeal itself. The said rules enable an appellant to proceed ex parte when the respondent does not appear on the day fixed for hearing the appeal after service of hearing notice of the appeal on him or her. For the reasons given above, it is my ruling that the appeal is incompetent for failure to serve the same on the principal party against whom it has been brought and it is accordingly struck out with costs under order 52 rule 4 of the Civil Procedure Rules for want of notice of the appeal.

Ruling delivered in open court the 30th day of June 2011.

Hon. Mr. Justice Christopher Madrama

In the presence of:

Kagoro Friday Robert for the Respondent

Peters Musoke for the Appellant,

Ojambo Makoha Curt Clerk,

Patricia Akanyo Court Recording Assistant.

Hon. Mr. Justice Christopher Madrama

30th June 2011