

**High Court upholds registrar of trademarks' decision to admit new evidence after close of arguments in opposition proceedings Kenya - Bowmans**

**Examination/opposition  
Court system**

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The High Court of Kenya recently declined to interfere with a decision by the registrar of trademarks to admit new evidence after the hearing of an opposition matter. In *Republic v Assistant Registrar of Trademarks ex parte Strategic Industries Limited* [2016] eKLR, Strategic Industries Limited made an application for orders of judicial review seeking relief against a decision of the registrar of trademarks to accept evidence after the hearing of opposition proceedings.

Rebecca Fashion (Kenya) Limited, the interested party to the proceedings, had applied to register the mark FREEDOM. The mark had advanced for publication in the *Industrial Property Journal* of May 31 2011. Strategic Industries Limited served a notice of its intention to object to the application to Rebecca Fashion, concerned that the proposed registration of the mark would interfere with its exclusive rights to the mark. The applicant thereafter proceeded to file a notice of opposition with the registrar of trademarks, the respondent in the High Court case.

After the registrar had issued a date for ruling of the matter, Rebecca Fashion applied for leave to file further evidence under the Trade Mark Rules. The application for leave, which was opposed by Strategic Industries, was heard by the registrar, who ruled in favour of Rebecca Fashion, allowing it to file further evidence. This ruling was the crux of Strategic Industries' High Court application.

Strategic Industries argued that leave to file further evidence under Rule 52 of the Trademark Rules is available only before the matter is heard. In response, Rebecca Fashion contended, among other things, that the application to file further evidence was not determinative of the rights of the parties, as Strategic Industries still had the opportunity to counter this evidence in the main proceedings before the registrar. Further, it argued that on the conclusion of the opposition proceedings, Strategic Industries had the right to appeal the registrar's decision and raise any points of law that contravened the letter or spirit of the law. If the High Court interfered with the registrar's decision at that point, Rebecca Fashion submitted that the court would be interfering with the independence of the registrar, which would be tantamount to operating as a trial court.

The High Court was persuaded by Rebecca Fashion's arguments. It considered that the sole issue for determination was whether the registrar had the discretion to permit further evidence to be filed under Rule 52.

The court opined that Rule 52 empowers the registrar to allow parties to file further evidence at any time. Further, the registrar had exercised her statutory discretion in allowing Rebecca Fashion to file further evidence. The court pointed out that it will interfere only sparingly with the decision of an administrative body.

The court determined that whether the registrar was justified to exercise her discretion was a matter that went to the merits of her decision, which could be challenged only by way of appeal and not judicial review. Judicial review, in the court's finding, is a judgment of the lawfulness rather than the wisdom of the decision.

This decision confirms that a writ of judicial review is a special remedy used only in the most deserving of circumstances. The judicial review court will seldom interfere with ongoing proceedings before the registrar of trademarks or another administrative body, unless the applicant can show that such proceedings are unlawful. In the absence of such evidence, an aggrieved party must wait for the conclusion of the proceedings and then appeal accordingly.

Strikingly, it appears that under this interpretation of Rule 52, parties can apply to file further evidence even after the submissions have been made before the registrar, as long as a decision has not yet been issued.

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