KIONDO IDEA THEFT: AN INTELLECTUAL PROPERTY MYTH!

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INTRODUCTION

The Question to Answer
Was Kiondo patented in Japan…?

When the word intellectual property (IP) made its serious advent[2] into Kenyan territory, it was not positively received, at least, from Kiondo perspective. It reminded some Kenyans of an already existed myth that kiondo basket was patented as a product in Japan. This meant that its ownership was given to the Japanese patent holder. Since then, a number of commentators have believed in the myth, have argued it and even written several articles on the subsequently popularized myth about the 'Kiondo knowledge-theft' by a Japanese. Despite what has been said and believed, the issue todate still is, whether it is actually true and correct to say that kiondo was indeed patentable and therefore got patented in Japan. Emphasis is initially focused on the word 'patentable,' and not, 'patented'. Whether kiondo was patentable in Japan is what makes the basis of both factual and thought analyses below.

Brief Description of A Kiondo Basket
According to Wikipedia, "A kiondo is a hand-woven handbag made from sisal with leather trimmings. It is indigenous to the Kikuyu and Kamba tribes of Kenya. These Kenyan weavers begin by stripping the Sisal plant's outer layers, leaving the plant still able to grow. The weaver uses threads from the pale colored layers, that have dried out for a day, to make a bag. A design pattern is finalized. The weaver then boils the threads to be used with water and dye sets the bag's colors. Now the weaving begins. Two single threads are twined to form one strong thread. Many such threads are woven. It is from these threads that a sisal bag is made. It takes between two to three weeks to complete a bag. Most weavers have to look after their households; therefore, weaving is done whenever they have the time. Sometimes small beads and shells are woven into the kiondo. Kiondos are exported to western countries where they have been and continue to be quite popular."[3]

Origin of Kiondo
From the above description of kiondo, it is evident that kiondo has its originality from Kenya. Meaning that the knowledge behind weaving it is Kenyan. Although the origin of Kiondo seems not known, it is believed to have existed several generations back[4]. This affirms one pertinent fact to this analysis, that kiondo has been in public domain for ages. In Kenya,

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[1] Includes input on the new outline from Professor James Otieno-Odek, Managing Director, Kenya Industrial Property Institute.

[2] About 1989 when the Kenya's Industrial Property Act Cap 509 was enacted.

[3] http://en.wikipedia.org/wiki/Kiondo

[4] Mr. Joseph M. Mbeva, examination officer, Kenya Industrial Property office, Experiences and Lessons Learned Regarding the use of Existing Intellectual Property Rights Instruments for Protection of Traditional Knowledge, UNCTAD Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, Geneva 30 October – 1 November 2000.

kiondo has remained hand-woven todate. Presently it is woven using sisal, which succeeded banana bucks in the early days of its conception.

Ownership of Kiondo

Although it is not very clear who really owns the idea behind kiondo weaving, numerous information available reveal that it is more associated with the Kamba community[5]. The Kikuyu community is also mentioned as weavers but without serious attachement to ownership. Kiondo seems to lack a clear disclosure of an individual owner. The one whose mental intervention gave birth to the idea behind weaving it. This is an important factor to take into account when looking at protection of kiondo by way of patent, although in a first-to-file country like Kenya, it is not much of a problem for unchallenged grant.

Kiondo Idea as an Object of Industrial Property

Looking at what constitutes an object of industrial property, one would tend to believe that kiondo is one such property, particularly from the fact that the idea behind weaving it is a product of manifestations of human creativity. But the requirements of what qualifies for protection as an object of industrial property by grant of a patent paints a different picture. An invention is such an object and is part of industrial property protected under the Paris Convention for the Protection of Industrial Property of 1883[6]. A patent can be granted for a product or a process. Intellectual property worldwide is considered a personal property, since it originates from the human mental intervention. For one to seek a patent, the name of that individual idea originator has to be mentioned, as a strict requirement of application for grant. In absence of that inclusion, then the application is deemed irreguler and cannot therefore produce a valid patent.

Patenting in Kenya

The earliest opportunity for a patent to be granted seeking protection in Kenya was afforded by the Patent Ordinance of 1913. It was on 21 December 1914 that the first patent was granted under the British Colony covering Kenyan territory. However, Kenya had its first nationally granted patent on 09th February 1994 upon repealing of the Industrial Property Act Cap 508, that was until then still based on the British system, to Cap 509, which led to establishment of the now defunct Kenya Industrial Property Office (KIPO). The KIPO's successor Kenya Industrial Property Institute was established upon the repeal of Cap 509 to Industrial Property Act 2001. Kenya is a member of the Paris Convention for the Protection of Industrial Property from 14th June 1965, and her membership is still in force[7].

Patenting in Japan

A small tour of the Japanese patenting scenario reveals that "Patent Monopoly Act" was publically proclaimed in Japan on April 18 of year 18 of the Meiji Era (1885)[8]. Japan became a member of the Convention on 15th July 1899 and the membership remained in force todate[9]. This means that largely, the two countries are bound by the Convention in the sense that among other provisions, the national treatment is applicable to them. For a patentable invention to be granted a patent in Japan, besides other requirements it has to be novel.

[5] According to Karl Gerhard Lindblom (1887-1969), an ethnographer from Sweden who worked in East Africa in the 1910s.

[6] http://www.wipo.int/treaties/en/ip/paris/summary_paris.html

[7] http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=257C

[8] http://www.jpo.go.jp/cgi/linke.cgi?url=/seido_e/rekishi_e/rekisie.htm

[9] http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=254C

Kiondo Existence

It is posted that the East African sisal plant originated in the Yucatan, Mexico (and received its common name from the first port of export) and arrived in what is now Tanzania via Hamburg in 1893. A little later sisal bulbils sent from Kew Gardens were planted in Kenya[10]. In Kenya it is said that even before arrival of the sisal, Kiondo used to be made out of banana bucks, implying that the idea behind it existed long even before the year 1893.

FACTUAL ANALYSIS

Patentability of Kiondo in Kenya

Section 23 of the Kenyan Industrial Property Act 2001 provides for novelty of a patentable invention. It reads in part:

"23. (1) An invention is new if it is not anticipated by prior art.

(2) For the purposes of this Act, everything made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) or, by oral disclosure, use, exhibition or other non-written means shall be considered prior art:

Provided that such disclosure occurred before the date of filing of the application or, if priority is claimed, before the priority date validly claimed in respect thereof"…

Another relevant section of the Act to consider is that on the industrial application requirement of the kiondo weaving process. It is Section 25 and reads:

"25. An invention shall be considered industrially applicable if, according to its nature, it can be made or used in any kind of industry, including agriculture, medicine, fishery and other services."

The age of kiondo, in itself, dating back to before the 17th Century kills the novelty requirement of patentability. This means that it qualified to be prior art of itself assuming that patenting was possible in Kenya. Looking at the industrial application requirement, kiondo basket for all its lifetime hitherto is hand-woven, meaning that the said requirement cannot be fulfilled. Those two unfulfilled conditions are sufficient proof that kiondo was not patentable in Kenya. This implies then that the only protection avenue is through a *sui generis* system, but the question is, for who, against who?! Such form of protection can only apply locally.

Patentability of Kiondo in Japan

The novelty provison in respect to Japan's Patent Act Article 29(1) reads:
"An inventor of an invention that is industrially applicable may be entitled to obtain a patent for the said invention, except for the following:
(i) inventions that were publicly known in Japan or a foreign country, prior to the filing of the patent application;
(ii) inventions that were publicly worked in Japan or a foreign country, prior to the filing of the patent application; or

[10] http://www.wigglesworthfibres.com/products/sisal/history.html

(iii) inventions that were described in a distributed publication, or inventions that were made publicly available through an electric telecommunication line in Japan or a foreign country, prior to the filing of the patent application."[11]

The abovementioned Article implies that if an idea percieved as new only by an applicant and upon filing the application before Japan Patent Office (JPO), ends up getting protected by grant of a patent, it means that such idea is patented in Japan, but that does not necessarily mean that the same is patentable. The grant in such a case stands invalid from the filing date. Meaning that upon a successful contest of that grant by a third party the patent is invalidated.

Another issue to consider is whether the kiondo idea had also become prior art of itself in Japan. In which case, its existence should have lasted more than twelve months[12] from the date the Japanese filed an application for grant of a product patent. The information on the first entry of sisal to Kenya supports the fact that the weaving idea was publicly known and worked prior to the Japanese alleged filing date.

Furthering on the point of novelty, is a question on when did the first Japanese step on Kenyan soil? Information available has it that the earliest date known is in 1920s, that a Japanese company established an office in Mombasa, in order to buy East African cotton[13]. This is a couple of centuries long after the kiondo idea came into existence! The duration being more than twelve months was predatory to the existence of novelty in the idea behind kiondo.

On the issue of existence of the Internet in Japan as another likely source of information to the Japanese applicant, it was only in 1969 when work began on the so called Advanced Research Projects Agency net (ARPAnet), grandfather to the Internet, designed by the military as a computer version of the nuclear bomb shelter in the US[14]. This is another proof that any information that could have landed in Japan electrically was far later than the life of kiondo in Kenya.

A Kiondo Product-Patent

The above arguments, suffice to persuation that the product patent for kiondo in Japan was devoid of validity, it is now appropriate to analyse any existence of force of patent exclusion granted to the alleged Japanese holder. Generally, a patent gives the holder rights to exclude others from accessing the invention in the patented territory. Basically, for a product patent, the rights conferred bar others without the holder's consent from making, selling, offering for sale or importing the patented product. This means that upon grant of a product patent to a holder in the given territory, it is only with his authority that the conferred rights can be exploited.

Enforcement of Patent Rights

It is public knowledge that Kenyans have long been in business with their Japanese counterparts, trading on a number of goods including exportation of artefacts to Japan. So far, there has been no known case, atleast on record, of a Kenyan's kiondo consignment having been barred from entering Japan, with the sole reason of a patent exclusion exercised by or in favour of a Japanese holder. Not even the Kenya's government ministries responsible for

[11] http://www.jpo.go.jp/cgi/linke.cgi?url=/tetuzuki_e/t_tokkyo_e/1312-002_e.htm

[12] Priority claim period under Article 4 of Paris Convention

[13] http://www.ke.emb-japan.go.jp/bilateral.htm

[14] http://inventors.about.com/library/weekly/aa091598.htm

trade issues over the years or even the embassies of the two countries have known or recorded evidence to such information. If this position remains un challenged hitherto, then it is a persuasive proof that product patent for kiondo, if existed, lacked force of exclusion in the Japanese market, a fact that should have been known already to both the alleged holder and the relevant intellectual property enforcement authorities in Japan.

A Kiondo Process-Patent

Assuming that a process patent for making kiondo is what existed in Japan, as opposed to a product patent. That poses a totally different line of argument, whose proper position does not prevent Kenyan kiondos from entering Japan. A patentable invention has to prove presence of three main patentability criterias, namely: novelty (new), inventive-step or non-obviousness (challenging) and industrial application (useful)[15]. A process patent is simply characterised by protection of a 'new way of making an old thing'. In this case, product kiondo having been in the public domain together with the original way of weaving it, a different way of arriving at the same, which is industrially applicable would qualify for a process patent protection. It is only the kiondos which are proven to be woven through that protected method that infringe the process patent in Japan. But that becomes a different issue from the Kenyans' concern.

Life of a Patent

Finally, is the question of a patent life time. A granted patent lasts for a period of twenty years maximum from the filing date. The protection period is not renewable, meaning that the patent falls in the public domain upon expiry of that period. Given that the notion, as people put it, that kiondo was patented in Japan, has lasted for quite some time now, long even before establishment of the then KIPO here in Kenya, all the stress in Kenyans about the purported denial of their rights to ownership, as painful as it could be, should have by now been relieved. Atleast, benefitting from the non-renewable patent life time. As it is reasonably long since the punic was born and twenty years later the protection exists no more in Japan!

Japanese Patent Database

A search was conducted in the Japanese patent office database[16] to bring up any existing information likely to confirm that kiondo is actually patented in Japan and is entered in the Japan Patent Office Register. The search was conducted using very general words like 'fabric basket', 'basket' covering the years 1984 todate. A total of forty six titles were displayed. All those titles abstract various means of industrial weaving of baskets, some made of fabric or paper materials. Given that several baskets are patented the interpretation shows that those protections are restricted to process as opposed to product patents. That means that our kiondo basket suffered no exclusion in the Japanese market.

Japanese Trademark Database

Search was further done in the Japanese trademark database with an aim of establishing whether the word KIONDO was registered as a brand name for fabrics and baskets in Japan. The search result recorded a zero. Meaning that, that word does not exist in the Japanese trademark Register. Using the word basket, forteen titles were displayed basically showing the trade marks that involve labelled, description or mention of the word 'basket'. Again this is another reliable proof that the word has not been trademarked in Japan, hence no exclusion claim in favour of a Japanese. Database on figurative trade marks was also visited to find out what forms of designed trade marks exist for baskets and a total of 108 titles were displayed. None was indicative of kiondo resemblance except in two cases where the letter 'K' was

[15] Emphasis added by way of providing simplified terms in bracket

[16] http://www.ipdl.inpit.go.jp/homepg_e.ipdl (accessed on 09 November 2009)

posted on the plain surface of the front view of the baskets, something not serious at all given the magniture of the matter at hand.

Kiondo as Traditional Knowledge

Lack of clear individual ownership of kiondo has left it a property that belongs to communities. Given that it was created in a local setting to attend to a local need, kiondo seems to fit well as traditional knowledge. This is knowledge passed on from generation to generation by human communities. The problems faced in Kenya with regard to protection of traditional knowledge is that so far there is no legislative framework in place for it.

Failure to get an effective form of protection for kiondo as traditional knowledge, opens wider scope of thinking on whether it is possible to preserve it as a cultural artefact with the Kenya's national museums. The preservation approach again raises more questions to do with the aim of intended protection and the bredth of coverege. In case what is needed is to foreclose it against misappropriation abroad then preservation at the museums is not effective.

Again, if it is not for the Japanese patenting of kiondo issue, the artefact has no problem the way it has existed in the past. The need to offer it exclusive protection can open another chapter where other countries who weave it could claim an act of aggression against them by Kenya over what they also have a stake. It is stated above that sisal came to Tanganyika earlier before entry to Kenya, a reflection that Tanzanians could have used it to weave buskets earlier than Kenyans! In case that did happen then it is Tanzania that could claim owndership to sisal made kiondo as opposed to Kenyan prior banana bucks woven.

THOUGHT ANALYSIS

In doing some thought analysis to weigh the probable impact of the kiondo idea theft myth among Kenyan people, a number of both positive and negative perspectives come to fore. The positive ones, range from imparting seriousness among the elite and political class in coming to the understanding of the proper place intellectual property and rights thereto occupy in this country's social, political, economic and cultural (spec) dimentions, besides its cost and benefits to Kenyans…, to the public's ego in understanding exactly what intellectual property is, its rights, protection and enforcement. While the negative ones, range from creation of a cancerous panic to Kenyans of the lose of their riches pertinent to this country's natural heritage and identity…, to lose of hope that Kenya todate is a country that still has no necessary capacity for a sound understanding and perception of the whole concept of intellectual property and rights thereto. At this stage it is necessary to analyse a few already existing thoughts and interpret them in terms of how the messages they convey impact on Kenyans' interests and concerns, against the otherwise factual positions.

Starting with the caption below, posted on the Internet on 22nd February 2007:

"Last year Kenya lost the Kiondo brand to Japan and other Asian countries that patented it. This means Kenya cannot claim the originality of the name Kiondo ..."[17]

A number of issues come up for clarification from the above statements. First, by literal scrutiny of the wording, it is last year that kiondo was lost! This looks even more worrying to

[17] http://africanpress.wordpress.com/2007/02/22/page/2/

to believe that kiondo was on a new patent protection in Japan again. Or it could mean that the process of patent grant was concluded in that year. Talking about 'kiondo brand' bring a different understanding from the existing perception that kiondo basket was patented. As brand is a trade mark issue all together. The second statement talks of lose of 'originality' in the name, something that does not fit well even with trade marks, but copyrights! It is literary or artistic works that needs to be original by way of creativity, not a trade mark. The message that the statement gives is then deficient, interms of both the structure and meaning and therefore not correct.

Similar ones to the above caption are the following:

"Their argument is supported by the fact that Kenya lost its Kiondo basket trademark to Japan after the same was registered there in 2006"[18].

The question here is, which trade mark, the word Kiondo?! That is not product kiondo, whose protection is allegedly subsisting in Japan under a patent. That is not a fact to believe in as there is no proof of what the statement purports.

"Years ago we were fighting japan after they patented the kiondo. It is now a popular accessory in america as a kind of 'africa print' revolution. **..."**

"After losing the kiondo basket trademark to Japan**,** the popular kikoi fabric design is currently at risk of being patented by a British company. **..."**

Again, fighting Japan over which existed kiondo patent?! The statement is more conclusive to the extent of causing worries that kiondo had actually gone into the hands of a Japanese, something that actually needs proof.

"This heart wrenching news was coming hot on the heels of another successful patent in Japan and other Asian countries of another Kenyan brand item, the Kiondo…"[19]

The word successful used in the above statement is a bit pre-emptive and needs to be proved.

"Activists of the Maasai Market Empowerment Trust (MMET) are also working at appealing against the kiondo decision. "We want the kiondo back. It is our wealth, our culture. We will not sleep until we get it back,…""[20]

Above are statements made on a 'decision' probably made on patenting kiondo in Japan. Wanting kiondo back means that the product patent needs to be revoked in favour of Kenyans. It is a valid statement if at all a valid patent existed in Japan by a Japanese. Otherwise, that is a patriotic position that stands the test of day.

"There was uproar sometime back when news broke out that kiondo had been patented in Japan and that there was an application in the UK to patent kikoi."[21]

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[18] http://www.chinaipr.gov.cn/news/chinaworld/282812.shtml

[19] http://www.bornblackmag.com/African-brands.html#

[20] http://ipsnews.net/africa/nota.asp?idnews=37165

[21] http://www.eastandard.net/InsidePage.php?id=1144026706&cid=459#

"The work for example of popularising to Kenyans conditions so as not to replicate a situation where a *kiondo* patented in Korea requires more resources for this awareness and this is what we are trying to do through the KIPO."[22]

This was a positive statement made from our National Assembly, except, in that case kiondo patent existed instead in Korea and not Japan! So, which is which, Japan or Korea?!

"Should Kenya petition UNESCO for KIONDO and KIKOY to be included in the world heritage list?"[23]

That is a fantastic relevant concern, particularly when considering the originality of both kiondo and kikoy, not as objects of industrial property but of cultural preserve.

In case, information held in the above posted captions were correct and factual, intellectual property in Kenya could not be perceived as new any more. As that is, a clear indication that the need to focus on ownership of the intangible property already existed long ago among Kenyans. This projection is further supported by the level of vigilance that has emerged in Kenyans with regard to the need to ascertain ownership of the country's riches in natural heritage and identity. Low level of awareness in embracing the benefits of intellectual property in the country has denied many Kenyans opportunity to appreciate fruits of their mental creativity. This has instead made the country vulnerable to panics caused by any form of misinterpretation of facts surrounding intellectual property rights ownership.

CONCLUSION

The Answer to the Starting Question
Not, at all.

The answer to the starting question, therefore, is that product Kiondo was never patentable in Japan, after all. It failed the novelty test in Japan. It was not patentable in Kenya either, due to its failure in both novelty and industrial application tests. Meaning that such patent, if existed, be it in Kenya or Japan had no force of exclusion due to the presumed invalidity, hence not patented.

Let us meet again on the myth behind loss of Kikoi to the UK.

Note: One is absolutely at liberty to treat views in this article as purely personal and in no way, whatsoever, should they pre-empt or reflect any different opinion held by Kenya Industrial Property Institute on matters relating to kiondo idea theft.

[22] http://www.marsgroupkenya.org/pdfs/governance/Hansards/260706_Hansard_2.pdf

[23] http://ip-kenya.blogspot.com/2008/02/should-kenya-petition-unesco-for-kiondo.html (accessed on 03 November 2009)