

AS-AF CORPORATION
Junior Party-Applicant,

INTER PARTES CASE NO. 1235

INTERFERENCE BETWEEN:

Application Serial No. 29558
Filed : March 19, 1976
Applicant : AS-AF Corporation
Trademark : KOKOYU
Used on : Rice milling machine

- versus -

- and -

Application Serial No. 29428
(now Cert. of Regn. No. 26004
Issued May 30, 1978)
Filed : March 3, 1976
Applicant/
Registrant : Toa Industries, Inc.
Trademark : KOKOYU
Used on : Rice milling machine

TOA INDUSTRIES, INC.,
Senior Party-Registrant.

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DECISION NO. 88-51 (TM)

July 21, 1988

DECISION

This is an interference case declared pursuant to Rules 179 and 180 of the Rules of Practice in Trademark Cases between trademark Application Serial No. 29428 (now Certificate of Registration No. 26004) filed on March 3, 1976, by the herein Senior Party Registrant, Toa Industries, Inc., for the trademark "KOKUYO" used on rice milling machine; and trademark Application Serial No. 29558 filed on March 19, 1976 by the Junior Party-Applicant, AS-AF Corporation, for the same trademark and goods.

Senior Party-Registrant is a domestic corporation with business address at No. 21, Don A. Roces, Quezon City; while Junior Party-Applicant is a Japanese corporation located at 4-14 Midori 4-chome, Sumida-ku, Tokyo 130, Japan.

The declaration of interference was premised on the fact that the application of Junior Party-Applicant, though filed later, alleged an earlier date of use of the mark in commerce (January 2, 1963) than that of Senior Party-Registrant, whose first use of the mark is January 1, 1973.

Accordingly, a Notice of Interference was sent to both parties, through registered mail, requiring them to file within forty (40) days from receipt thereof, a motion to dissolve, or to add, or to shift the burdens of proof, or any other motions, before the case would be set for hearing.

Responsive to such notice, Junior Party-Applicant filed a motion recalling Certificate of Registration No. 26004 on the ground that it was inadvertently or erroneously issued to Senior

Party-Registrant before the resolution of the herein interference case. Senior Party-Registrant, on the other hand, filed a motion to dismiss and dissolve interference on the ground that the application for registration of the subject mark was not made by the applicant itself nor by a qualified attorney or agent in violation of Rule 23 of the Trademark Law.

After considering the arguments of both parties, Junior Party-Applicant's motion for the recall of certificate was granted by this Office, Decision No. 204 dated September 25, 1980, affirmed Junior Party-Applicant's allegation that there was indeed an error or mistake in the issuance of Certificate of Registration No. 26004 in favor of the Senior Party-Registrant. Said decision a subject of a motion for reconsideration but after finding that there being no new matter or matters raised to warrant reversal, the same was denied for lack of merit (Resolution No. 204-A). Unsatisfied with the foregoing ruling, Senior Party-Registrant filed a Petition for Certiorari before the Court of First Instance in Caloocan City, which Petition was dismissed by the said court for lack of jurisdiction.

Regarding the motion to dissolve interference filed by Senior Party-Registrant, the same was denied by this Bureau after finding that Junior Party-Applicant's application was actually signed by Mr. Ishii, the President and Director of the applicant's corporation, in conformity with the requirements of law.

Pursuant to Decision No. 204-A, Junior Party-Applicant filed on May 30, 1983 and on August 26, 1983 motions to surrender Certificate of Registration No. 26004 which resulted to the issuance of Order No. 84-237 dated July 10, 1984 directing Senior Party- Registrant to surrender the said certificate within fifteen (15) days from receipt of the Order, otherwise it would be deemed cancelled from the Trademark Registry. No surrender was ever made by Senior Party-Registrant.

The case became dormant for a long time due to many postponements and inaction of the parties. To break the status quo, the Bureau sent for the last time a notice that the case would be heard on July 28, 1986. In the said hearing, only counsel for the Junior Party-Applicant appeared and was allowed to present his evidence ex-parte, consisting of Exhibits "A" to "A-8-a" and "B" to "B-4" together with the testimony of Mr. Proceso Chua.

For failure of Senior Party-Registrant to appear in the scheduled hearing for its presentation of evidence and having warned the same that the case shall be terminated accordingly should it fail to appear in the scheduled hearing without justifiable cause, Senior Party-Registrant is deemed to have waived its right, to present its evidence.

On the basis of the admitted evidence presented, Junior Party-Applicant has been using the mark in the Philippines as early as August 6, 1966 (Exhs. "A" to "B-4"), the date which approximated Junior Party-Applicant's claim of date of first use in its application. On the other hand, Senior Party-Applicant failed to show proof confirming the alleged date of its first use of the mark in commerce. Applying Rule 173 of the Rules of Practice in Trademark Cases, which reads,

"173. Allegation in the application not evidence on behalf of the applicant. - In all inter partes proceedings, the allegation of date of use in the application for registration of the applicant or of the registrant cannot be used as evidence in behalf of the party making the same. In case no testimony is taken as to the date of use, the party will be limited to the filing date of the application as the date of his first use."

this Bureau considered March 3, 1976 (the filing date of the application), not January 1, 1973 (the date of first use as alleged in the application), as the date that Senior Party-Registrant, first used the mark. Under such circumstances, Junior Party-Applicant would be the prior user of the mark "KOKUYO" and, therefore, entitled to register the same under its name.

WHEREFORE, premises considered, Application Serial No. 29-558 filed on March 19, 1976 by Junior Party-Applicant is hereby given due course. Accordingly, Certificate of Registration No. 26004 is hereby ordered CANCELLED.

Let the records of this case be remanded to the Trademark Examining Division for appropriate action in accordance with this Decision.

SO ORDERED.

IGNACIO S. SAPALO
Director