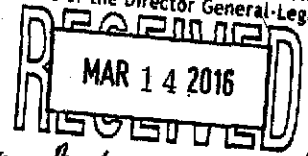


REPUBLIC OF THE PHILIPPINES
COURT OF APPEALS
MANILA

Intellectual Property Office of the Phils.
Office of the Director General-Legal



MINXU XU,
Petitioner,

versus

CA G.R. SP No. 127479

JENNIFER ANG,
Respondent.

X-----X

February 29, 2016
(4:30 pm)

NOTICE OF JUDGMENT

Sirs:

Please take notice that on February 29, 2016 a **DECISION**, copy hereto attached, was rendered by the SIXTH DIVISION of the Court of Appeals in the above-entitled case, the original of which is on the file with this office.

You are hereby **REQUIRED** to inform this Court within five (5) days from receipt hereof, the date when you received this notice. Compliance is strictly enjoined.

Very truly yours,

CAROLINE G. OCAMPO PERALTA, MNSA
Executive Clerk of Court III

COPY FURNISHED:

Atty. Bernardino M. Mortera-reg w/ rc
Unit 205. Eden Plaza Building,
2464 F.B. Harrison St., Pasay City 1300
(counsel for petitioner)

Atty. Carmelo S. Trinidad reg w/ rc
Trinidad Narag & Associates
Unit 1536 City & Land Mega Plaza
ADB Avenue cor. Garnet Road,
Ortigas Center, Pasig City 1605
(counsel for respondent)

Office of the Director General
Intellectual Property Office
World Finance Plaza Building
No. 28 Upper McKinley Road,
McKinley Hill Town Center,
Fort Bonifacio, Taguig City 1634

hvr



Republic of the Philippines
Court of Appeals
Manila

SIXTH DIVISION

MINXU XU,
Petitioner,

CA-G.R. SP NO. 127479

Members:

-versus-

LAMPAS PERALTA, F., *Chairperson*
LANTION, J.A.C., *and*
ANTONIO-VALENZUELA, N.G., *JJ.*

Promulgated:

JENNIFER ANG,
Respondent.

29 February 2016

Lampas Peralta 4:30pm

DECISION

ANTONIO-VALENZUELA, J.:

This is the Petition for Review¹ filed by Minxu Xu (“petitioner Xu”), assailing the Order² dated 15 October 2012 (“assailed Order”), issued by the Intellectual Property Office (“IPO”), Office of the Director General, which dismissed petitioner Xu's Appeal Memorandum,³ from the Decision⁴ dated 25 June 2012 issued by the IPO, Bureau of Legal Affairs.

¹ C.A. Rollo, p. 5.

² *Id.* at p. 34.

³ *Id.* at p. 172.

⁴ *Id.* at p. 167.

THE FACTS

Petitioner Xu filed the Trademark Application Form⁵ for the mark "Verdon Series" ("subject mark") for use on hair lotions, shampoos, hair treatment preparations, hair products perm lotions, hair coloring and conditioners, falling under Class 3 of the International Classification of goods.

Jennifer Ang ("respondent Ang") filed the Notice of Opposition⁶ to petitioner Xu's trademark application.

The Notice of Opposition alleged: petitioner Xu's trademark application over the subject mark should be denied (*i.e.*: respondent Ang had widely used the subject mark in products [hair rebonding perm lotion; hair coloring cream] sold in her stall, and the subject mark had become exclusively associated with respondent Ang; the subject mark was identical and confusingly similar with respondent Ang's mark, which could likely cause confusion to the public; if petitioner Xu's trademark application would be allowed registration, it would cause prejudice to respondent Ang, because respondent Ang incurred advertising costs, and had established goodwill; the subject mark was internationally famous, and was being distributed worldwide by its manufacturer in China).

Petitioner Xu filed the Answer to Opposition,⁷ and countered: respondent Ang had no legal standing to oppose petitioner Xu's application because respondent Ang was not the owner of the trademark nor the manufacturer of the goods subject of the trademark (*i.e.*: respondent Ang admitted in the Notice to Opposition that she was not the manufacturer and/or distributor of the goods bearing the mark "Verdon Series," and neither was respondent Ang the authorized representative of the manufacturer of the goods bearing the mark "Verdon Series;" petitioner Xu was the manufacturer of the goods with the mark "Verdon Series" since 2000, as evidenced by the Certification⁸ of the Guangzhou Lanyuan

⁵ C.A. Rollo, p. 198.

⁶ *Id.* at p. 47.

⁷ *Id.* at p. 75.

⁸ *Id.* at p. 90.

Cosmetic Co. Ltd. [the entity contracted by petitioner Xu in China to produce the goods]); respondent Ang was estopped from opposing petitioner Xu's trademark application (*i.e.*: respondent Ang abandoned her application for registration of the mark "Verdon Series" [*i.e.*: respondent Ang's application for registration of the mark was declared abandoned with finality on 24 May 2010]); assuming that respondent Ang had legal standing to oppose petitioner Xu's application, the mark sought to be registered by petitioner Xu was not similar to the mark respondent Ang sought to be registered in her name (*i.e.*: petitioner Xu's mark contained the words "Verdon Series" with the letters V and S interloping, and with the words "Very Fashion" on top of the word "Verdon," while the mark of respondent Ang did not contain the words "Very Fashion"); petitioner Xu manufactured and sold the goods bearing the mark "Verdon Series" since 2000, prior to respondent Ang's allegation that she had been selling the products bearing the subject mark since 2005.

Respondent Ang filed the Reply to Answer,⁹ and averred: petitioner Xu was not the manufacturer of the goods bearing the subject mark because both petitioner Xu and respondent Ang were mere distributors; the marks of petitioner Xu and respondent Ang were identical because they both contained the dominant and essential feature "Verdon Series," and the addition of the words "Very Fashion" was inconsequential.

The parties failed to arrive at an amicable settlement during the IPO mediation proceedings. Both parties filed their respective position papers.

On 25 June 2012, the IPO Bureau of Legal Affairs issued the Decision. The dispositive portion of the Decision stated:

"WHEREFORE, the instant opposition is hereby SUSTAINED for the reasons stated above. Let the filewrapper of Trademark Application Serial No. 4-2010-001861 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

SO ORDERED."

⁹ C.A. Rollo, p. 97.

The Decision ruled: the subject mark sought to be registered by petitioner Xu was identical to the mark which was previously the subject of the application of respondent Ang, thus respondent Ang could be damaged by the registration of the mark in favor of petitioner Xu, and respondent Ang had legal standing to oppose petitioner Xu's trademark application; evidence showed that the goods bearing the mark "Verdon Series" originated from China (*i.e.*: petitioner Xu failed to refute the Registrability Report where the Trademark Examiner stated that "*The submitted labels in the Declaration of Actual Use [DAU] show that the goods came from other entity in China not from the applicant xxx*"); Guangzhou Lanyuan Cosmetic Co. Ltd., as the manufacturer of the goods, was presumed to be the owner of the trademark attached to the goods; the Certification issued by the Guangzhou Lanyuan Cosmetic Co. Ltd., did not categorically declare that petitioner Xu was the manufacturer of the goods bearing the subject mark, and petitioner Xu failed to explain how petitioner Xu was able to come up with the "Verdon Series" mark; considering that petitioner Xu failed to show evidence that he manufactured the goods bearing the subject mark, petitioner Xu was presumed to be the importer/distributor of the goods, and being a mere importer/distributor of the goods, petitioner Xu had no right to register the mark in his favor; petitioner Xu also did not show that he was authorized by the Guangzhou Lanyuan Cosmetic Co. Ltd., (owner of the trademark) to register the trademark in his favor.

Petitioner Xu filed the Appeal Memorandum¹⁰ before the IPO Office of the Director General.

On 15 October 2012, the IPO Office of the Director General dismissed petitioner Xu's appeal.

The assailed Order ruled: the appeal was filed out of time (*i.e.*: records showed that petitioner Xu received a copy of the Decision of the IPO Bureau of Legal Affairs on 10 July 2012, thus pursuant to the IPO's Uniform Rules on Appeal, petitioner Xu had until 9 August 2012 within which to file an appeal to the IPO Office of the Director General; the appeal was filed

¹⁰ C.A. Rollo, p. 172.

only on 11 September 2012, thus the Decision of the IPO Bureau of Legal Affairs became final and executory).

Thus, this Petition for Review, petitioner Xu raising the following errors:

ASSIGNMENT OF ERRORS

I. THE HONORABLE OFFICE OF THE DIRECTOR GENERAL OF THE INTELLECTUAL PROPERTY OFFICE, WITH ALL DUE RESPECT, GRAVELY ERRED IN DISMISSING OUTRIGHTLY THE PETITIONER'S APPEAL SOLELY ON THE GROUND THAT THE SAME WAS FILED OUT OF TIME IN A STRICT APPLICATION OF ITS OWN UNIFORM RULES ON APPEAL WITHOUT CONSIDERING THE AVAILING CIRCUMSTANCES AND THEREBY DEPRIVING HEREIN PETITIONER HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF THE LAW AS WELL AS HIS RIGHT TO HIS DAY IN COURT;

II. THE HONORABLE OFFICE OF THE DIRECTOR GENERAL OF THE INTELLECTUAL PROPERTY OFFICE, WITH ALL DUE RESPECT, GRAVELY ERRED IN DISMISSING OUTRIGHTLY THE PETITIONER'S APPEAL AND THEREBY DEPRIVED HEREIN PETITIONER TO AVAIL THE RECOURSE EVERY INDIVIDUAL HAS UNDER THE RULES AND TO ASSAIL THE DECISION, DATED JUNE 25, 2012, ISSUED BY THE HONORABLE INTELLECTUAL PROPERTY OFFICE WHICH IN TURN RENDERED THE AFORESAID DECISION DENYING THE APPLICATION OF PETITIONER FOR THE REGISTRATION IN HIS FAVOR OF TRADEMARK VERDON SERIES ON THE BASIS THAT THERE APPEARS AN OPPOSITION;

III. THE HONORABLE OFFICE OF THE DIRECTOR GENERAL OF THE INTELLECTUAL PROPERTY OFFICE, WITH ALL DUE RESPECT, GRAVELY ERRED IN DISMISSING OUTRIGHTLY THE PETITIONER'S APPEAL AND THEREBY DEPRIVED HEREIN PETITIONER TO AVAIL THE RECOURSE EVERY INDIVIDUAL HAS UNDER THE RULES AND TO ASSAIL THE DECISION, DATED JUNE 25, 2012, ISSUED BY THE HONORABLE INTELLECTUAL PROPERTY OFFICE WHICH IN TURN RENDERED THE AFORESAID DECISION DENYING THE APPLICATION OF

PETITIONER FOR THE REGISTRATION IN HIS FAVOR OF TRADEMARK VERDON SERIES ON THE GROUND THAT PETITIONER IS NOT THE OWNER OF THE MARK VERDON SERIES BECAUSE HE IS NOT THE ACTUAL MANUFACTURER OR ORIGINATOR BUT A MERE IMPORTER/DISTRIBUTOR OF THE GOODS BEARING THE MARK;

IV. THE HONORABLE OFFICE OF THE DIRECTOR GENERAL OF THE INTELLECTUAL PROPERTY OFFICE, WITH ALL DUE RESPECT, GRAVELY ERRED IN DISMISSING OUTRIGHTLY THE PETITIONER'S APPEAL AND THEREBY DEPRIVED HEREIN PETITIONER TO AVAIL THE RECOURSE EVERY INDIVIDUAL HAS UNDER THE RULES AND TO ASSAIL THE DECISION, DATED JUNE 25, 2012, ISSUED BY THE HONORABLE INTELLECTUAL PROPERTY OFFICE WHICH IN TURN RENDERED THE AFORESAID DECISION DENYING THE APPLICATION OF PETITIONER FOR THE REGISTRATION IN HIS FAVOR OF TRADEMARK VERDON SERIES BY GIVING MORE WEIGHT ON THE UNSUBSTANTIATED EVIDENCE OF THE RESPONDENT HENCE GROUNDED ITS CONCLUSION AND JUDGMENT ON A MISAPPREHENSION OF FACTS.

The issue is whether the IPO Office of the Director General erred in issuing the assailed Order.

THE PETITIONER'S ARGUMENTS

Petitioner Xu answers in the affirmative. The IPO Office of the Director General erred in issuing the assailed Order.

The Petition for Review thrusts: petitioner Xu's former counsel was grossly negligent in the handling of the case (*i.e.*: records showed that petitioner Xu's former counsel received the copy of the Decision of the IPO Bureau of Legal Affairs on 10 July 2012, and the former counsel gave the copy of the Decision to petitioner Xu, only in August 2012 [when the reglementary period to file an appeal was already expired]; for reasons unknown to petitioner Xu, the former counsel did not prepare and submit an appeal memorandum); the rules should not be strictly applied considering the gross negligence of petitioner Xu's former counsel, and in the interest of

substantial justice (*i.e.*: petitioner Xu had valid claims); on the merits of the case, respondent Ang had no legal standing to oppose petitioner Xu's application because respondent Ang was not the owner of the trademark, nor was respondent Ang the manufacturer of the goods bearing the mark "Verdon Series;" the IPO Bureau of Legal Affairs erred in declaring that petitioner Xu was a mere importer/distributor of the good bearing the mark "Verdon Series" (*i.e.*: petitioner Xu's evidence showed that petitioner Xu was a Chinese national, and had contracted Guangzhou Lanyuan Cosmetic Co. Ltd., to manufacture the products bearing the subject mark; petitioner Xu had continuous use of the mark "Verdon Series" since 2000, while respondent Ang's alleged use of the mark was only in 2005).

THE RESPONDENT'S ARGUMENTS

Respondent Ang answers in the negative. The IPO Office of the Director General did not err in issuing the assailed Order.

The Comment¹¹ parries: respondent Ang's application for the mark "Verdon Series" was revived, and the Certificate of Registration¹² for the "Verdon Series" mark was issued to respondent Ang; jurisprudence provides that appeals before the IPO Office of Director General, when filed out of time, warrant outright dismissal; petitioner Xu could not invoke liberality in interpreting the rules because petitioner Xu's appeal memorandum was not accompanied by an affidavit of merit, nor a motion for leave to admit appeal memorandum, and petitioner Xu cited the alleged negligence of his former counsel only in the Petition for Review, and not in the Appeal Memorandum, thus the alleged negligence of his former counsel was merely an afterthought; the factual findings of the IPO Bureau of Legal Affairs should be upheld because the findings were supported by substantial evidence, and petitioner Xu failed to present evidence to overturn the findings of the IPO Bureau of Legal Affairs.

¹¹ C.A. Rollo, p. 203.

¹² *Id.* at p. 223.

THE COURT'S RULING

We rule in the negative. The IPO Office of the Director General did not err in issuing the assailed Order.

Applicable are Section 2 and Section 5 of the IPO Uniform Rules on Appeal, which read:

“Section 2. *Appeal to the Director General.* - The decisions or final orders of the Bureau Director shall become final and executory thirty (30) days after receipt of a copy thereof by the parties unless, within the same period, a motion for reconsideration is filed with the Bureau Director or an appeal to the Director General has been perfected; Provided, that only one (1) motion for reconsideration of the decision or order of the Bureau Director shall be allowed; and, in case the motion for reconsideration is denied, the appellant or appellants has/have the balance of the period prescribed above within which to file the appeal.

Upon proper motion citing meritorious reasons and the payment of the full amount of appeal fee and other applicable fees before the expiration of the reglementary period to perfect an appeal, the Office of the Director General may grant an additional period of fifteen (15) days within which to file the appeal. No further extension of the period to file the appeal, however, shall be allowed.

Section 5. *Action on the Appeal Memorandum.* -

XXX XXX XXX

b) The appeal shall be dismissed outright on any of the following grounds:

- 1. the appeal is filed out of time;**
2. the subject of the appeal is an interlocutory order, or is not a decision or final order;
3. the appeal fee and other applicable fees are not paid within the reglementary period.

c) If the Appeal Memorandum appeal is filed and the appeal fee and other applicable fees have been paid on time, but is not accompanied by the requisite number of legible copies of the decision, and the proof of service of a copy of the appeal to the adverse party and

the Bureau Director concerned, the Office of the Director General shall order the appellant(s) to submit or complete within five (5) days from receipt of the order the said requirements. Failure to comply with the order shall cause the dismissal of the appeal. (Emphasis supplied.)”

As above-stated, the decisions of the Bureau Director shall become final and executory, 30 days after receipt by the parties of a copy of the decision, unless within the same period, a motion for reconsideration has been filed with the Bureau Director, or an appeal to the Director General has been perfected. The appeal shall be dismissed outright when the appeal is filed out of time.

In this case, the appeal was filed out of time. It was undisputed that petitioner Xu, through counsel, received a copy of the Decision of the IPO Bureau of Legal Affairs on 10 July 2012. Thus, petitioner Xu had 30 days from 10 July 2012, or until 9 August 2012, within which to file a motion for reconsideration with the Bureau Director, or an appeal to the Director General. However, petitioner Xu filed the Appeal Memorandum before the Director General only on 11 September 2012, or more than a month after 9 August 2012. Pursuant to the IPO Uniform Rules on Appeal, the Decision of the IPO Bureau of Legal Affairs was already final and executory when petitioner Xu filed the Appeal Memorandum.

The rule is that failure to file or perfect an appeal within the reglementary period will make the judgment final and executory by operation of law.¹³ Perfection of an appeal within the statutory or reglementary period is not only mandatory but also jurisdictional; failure to do so renders the questioned decision/resolution final and executory, and deprives the appellate court of jurisdiction to alter the decision/resolution, much less to entertain the appeal.¹⁴

Petitioner Xu alleged that the delay in the filing of the appeal was solely attributable to the gross negligence of his former counsel.

¹³ *Miel v. Malindog*, G.R. No. 143538, 13 February 2009 *citing* *Sapitan v. JIB Line Bicol Express, Inc.*, G.R. No. 163775, 19 October 2007, 537 SCRA 230, 242-243.

¹⁴ *Ibid.*, *citing* *Schwani Incorporated v. In-N-Out Burger, Inc.*, G.R. No. 171053, 15 October 2007, 536 SCRA 225, 233.

We do not agree.

Records show that petitioner Xu was in the habit of disregarding procedural rules especially on the observance of the reglementary period within which to file pleadings. Aside from petitioner Xu's filing the Appeal Memorandum beyond the reglementary period, petitioner Xu also filed the Answer to Opposition, and the Petition for Review, beyond the reglementary period.

Further, in the Appeal Memorandum filed before the IPO Office of the Director General, petitioner Xu did not allege gross negligence of his former counsel. This allegation of counsel's negligence is being raised for the first time before us. Thus, the alleged gross negligence of the former counsel was a mere afterthought.

On the substantial issue, we find that the Petition for Review has become moot upon the registration of the mark "Verdon Series" to respondent Ang on 3 December 2011, and the issuance of the Certificate of Registration of the subject mark in favor respondent Ang.

A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner would be entitled to, and which would be negated by the dismissal of the petition. Courts generally decline jurisdiction over such case or dismiss it on the ground of mootness,¹⁵ as a judgment in a case which presents a moot question can no longer be enforced.¹⁶

In this case, the issuance of the Certificate of Registration of the mark "Verdon Series" in favor of respondent Ang, was a supervening event which

¹⁵ Republic of the Philippines v. Manalo, et al., G.R. No. 192302, 4 June 2014 *citing* Carpio v. CA, G.R. No. 183102, February 27, 2013, 692 SCRA 162, 174.

¹⁶ *Ibid.*, *citing* Sales v. Commission on Elections, 559 Phil. 593, 597 (2007).

rendered petitioner Xu's trademark application moot, and no further reliefs could be granted to petitioner Xu by resolving this case on the merits.

We **DISMISS** the Petition for Review.

IT IS SO ORDERED.

CERTIFIED TRUE COPY

Original Signed
NINA G. ANTONIO-VALENZUELA
Associate Justice


ATTY. CAROLINE OCAMPO-PERALTA
WE CONCUR: Division Clerk of Court

Original Signed
FERNANDA LAMPAS PERALTA
Associate Justice

Original Signed
JANE AURORA C. LANTION
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

Original Signed
FERNANDA LAMPAS PERALTA
Associate Justice
Chairperson, Sixth Division