



REPUBLIC OF KENYA



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Endana Tea Packers Limited & another v Anti Counterfeit Authority (Petition E011 of 2021) [2022] KEHC 11368 (KLR) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
PETITION E011 OF 2021
MM KASANGO, J
MAY 31, 2022**

BETWEEN

ENDANA TEA PACKERS LIMITED 1ST PETITIONER

KAGWE TEA PACKERS 2ND PETITIONER

AND

ANTI COUNTERFEIT AUTHORITY RESPONDENT

JUDGMENT

1. Endana Tea Packers Limited, 1st Petitioner and Kagwe Tea Packers have filed this present petition against the Anti Counterfeit Authority, the respondent. The petitioners seek the following prayers:-
 - i. A declaration be and is hereby issued that the rights of the petitioner have been violated, denied and/or threatened with eminent violation and threat.
 - ii. A permanent injunction restraining the respondent from continuous harassment and infringement of the petitioners' rights by occasionally raiding and seizing the petitions tools of trade.
 - iii. A declaration be and is hereby issued that the petitioners are entitled to compensation as shall be assessed by the court for breach and or threatened violation of the petitioner's rights.
 - iv. General damages violation of the petitioners' constitutional rights and freedoms.
 - v. An order that the costs consent upon this petition be borne by the respondent.
 - vi. Any other relief or orders that this honourable court shall deem just, fit and appropriate to grant in favour of the petitioner.
2. It is stated in the petition that the petitioners are in the business of tea packing in the counties of Kiambu and Nairobi. That the petitioners are authorised by Kenya Bureau of Standards (KEBS) to



package and sell tea branded as Endana Tea. That the petitioners are also authorised by the Agriculture and Food Authority (AFA), Tea Directorate to operate as a Tea Packer in the name of Endana Tea.

3. The petitioners pleaded that on March 12, 2020 the representatives of the respondents without a court order, seized 45 boxes of Endana Tea leaves. That the petitioners were forced by the respondent to pay Kshs.40,000 for destruction of that seized tea.
4. That on September 30, 2020, the respondents, on obtaining an *ex parte* order, raided the petitioners' suppliers of printed material but the respondent failed to find counterfeited material.
5. That following an ex-parte order being issued before the Kiambu Chief Magistrate, the respondent raided the petitioner's factory on March 23, 2021 and seized sachets labelled Endana Tea amongst others.
6. The petitioner further pleaded:-

“At all these times, the petitioners have never been served with any complaint from the respondent. On whether the products the petitioners deal with are counterfeit or not.

Further, the petitioners have never been supplied with any information by the respondent on why they continuously raid the petitioners' premises and confiscate their goods.

The petitioners have equally not received any complaint from either their customers and/or competitors directly regarding the goods and services that are offered by them.

Failure of the respondent to supply and/or inform the petitioners of what the petitioners have violated and/or infringes (sic) remain a mystery despite the fact that the petitioners' premises are constantly being raided by the respondent contrary to the clear provisions of the constitution and the rules of natural justice.”

7. The petitioners in their pleading set out the alleged violations of their constitutional rights.
8. On constitutional right to fair trial, the petitioners pleaded that the respondent's failure to respond to the petitioners' engagement to be informed of any infringement of a trademark was a violation of their right to fair trial.
9. Further, that the respondent had violated the petitioners' constitutional right of rights to access to information in failing to disclose the content of the complaint which led to seizure of their goods.
10. That in the respondent arbitrary seizing the petitioners' goods and eventually destroying the same was a violation of the petitioners' right to property envisaged in article 40 of the constitution.
11. That the respondent violated article 47 of the constitution not affording the petitioners fair administrative action in failing to inform them the nature of the complaint brought against them.
12. The petition is supported by the affidavit of Kelvin Macharia Karanja the Managing Director of the 1st petitioner and the sole proprietor of the 2nd petitioner.
13. He deponed that the petitioners are registered proprietors of the trademark known as “Chai Ssana” which is a dominant feature of the Endana Tea Brand.” That the petitioners carry on the business of tea packing under the name of “Endana Tea Chai Ssana” within the counties of Kiambu and Nairobi. That the petitioners' competitor lodged a complaint with the respondent alleging infringement of their “brand” by the petitioners' brand name of “Endana Tea, Chai Ssana.” Petitioners attached their advocate's letter dated October 26, 2020 sent to the respondent by which the advocate refuted the



allegation of trademark infringement by the petitioners and requested the respondent to dismiss the complaint and to return back to the petitioners the seized goods. The deponent deponed further thus:-

“That the actions of respondent of arbitrarily raiding and confiscating goods branded Endana Tea Chai Ssana without giving any information are illegal and unconstitutional.

That unless stopped by this honourable court, the respondent shall continue unabated to trample on the petitioner’s rights as guaranteed under the constitution.”

14. The petition is opposed through the replying affidavit of Ibrahim Bulle the respondent’s chief inspector. He deponed that the respondent’s mandate is set out in section 3 and 5 of the Anti-counterfeit Act (the Act) to

“... combat counterfeiting trade and other dealings in counterfeit goods in Kenya in accordance with the act ...”

15. That the respondent exercises that mandate either on formal complaint or on its own initiative based on information and intelligence. That the respondent on receiving complaint it undertakes investigation to ensure impartial action is commenced.

16. The deponent tasked two gazetted inspectors of the respondent in respect of the matter relating to infringement of the brand, Eden Tea. The two inspectors on March 12, 2020 seized 45 boxes of Endana Tea brand from Grace Njeri Njuguna at Eastleigh Huduma centre on suspicion that they were infringing Eden Tea trademark. By a letter received by the respondent on March 16, 2020, the said Grace Njeri Njuguna wrote requesting the respondent not to proceed further with court action and requesting that she be allowed to pay destruction fees for the seized goods. There were attached to the respondent’s replying affidavit minutes titled, “Minutes of the alternative dispute resolution” That meeting was attended by two members of respondent and Grace Njeri Njuguna. Those minutes reflect that Grace Njeri Njuguna agreed to pay Kshs.34,920 being storage and destruction fees. There is a receipt evidencing the payment by Grace Njeri Njuguna of that amount by cheque.

17. The deponent stated that the complainant Kaririana Estates Limited provided evidence of its registration of the trademark “Eden” and the complainant also provided objection to that registration. That objection was filed with Kenya Industrial Property Institute (KIPI) and the complainant objected to registration by the petitioners of the trademark, “Endana Tea Chai Fresh.” That the petitioners failed to respond to that objection and KIPI by their letter dated February 10, 2020 addressed to Kelvin M. Karanja in part stated:-

“Your application for registration of the mark “Endana Tea Chai Fresh” (word & device) has now been deemed abandoned under rule 52A of the Trade Mark Rules and the records at the registry of Trade Mark have been marked accordingly.”

18. That the complainant, after lodging a formal complaint with the respondent and on filling Indemnity Form and on paying requisite statutory fees to the respondent, gave the respondent information of printing of counterfeit material by Grace Njeri. The respondent’s inspectors on 24th September, 2020 proceeded to premises of Africa Polysac Limited, in Nairobi but were denied entry by Regional Commissioner of Nairobi who had been summoned to the premises. Due to that denial, the respondent applied and was granted search warrants of that company’s premises. On October 24, 2020, the respondent’s inspectors visited the premises to conduct inspection whereby they were denied access.



19. The complainant on February 18, 2020 lodged another complaint. On March 18, 2021 the respondent obtained search warrant and on March 23, 2021 the inspectors went to a residential house in Githunguri and therein seized 9 pieces of 25 Sachets labelled Endana Tea, Orange in colour. The deponent further stated:-

“That upon seizure of the goods, the goods are deemed to be under the custody of the respondent to allow for further investigation and possible prosecution. The seized goods were stored at the respondent’s depot at Kyangombe and the matter is under investigation.”

20. The respondent through the deponent by the replying affidavit denied breach of constitutional rights, as pleaded and further stated that the goods seized on March 23, 2021 in Githunguri were seized from Grace Njeri, George Karanja and Nancy Njeri Macharia. Indeed, the respondent’s inventory of the seized goods dated 23rd March, 2021 is signed by Nancy Njeri as the owner of the seized goods. The respondent therefore stated that the seized goods were not in possession of the petitioners at the time of seizure. The deponent of respondent’s affidavit further stated:-

“That the petitioners ... are seeking through falsehood and misrepresentation of the law to unduly restrict the exercise of the respondent’s statutory mandate and I urge that the respondent should be allowed by this Honourable Court to carry out its investigative mandate.”

21. The respondent termed the petition before court as premature and stated:-

“That as I have indicated above, the inspection and seizure was based on a formal complaint and consequently there was no illegality or unconstitutionality to warrant the grant of an order of permanent injunction.

That counterfeit is a criminal offence and the respondent, once investigations are complete will prefer appropriate criminal charges against the relevant persons and/or petitioner/ applicants and consequently the ideal situation would be for this honourable Court to allow the ongoing investigations to run their ordinary and normal course without any orders of this Court.”

Analysis

22. I have considered the affidavit evidence and the submissions filed herein.

23. The Anti-counterfeit Authority (the Authority) was established by the Act. Its functions are inter alia to enlighten and inform the public about counterfeiting; to combat counterfeiting trade and dealings in counterfeit goods in Kenya; to promote training in programmes to combat counterfeiting; to and carry out any other functions under the Act. Section 23 empowers the Authority’s inspectors amongst others to enter and inspect any premises where it is suspected counterfeit are to be found; take steps to terminate the manufacture, production or making of counterfeit goods; and seize detain, and where applicable remove for detention all goods in question found at, or such place premises or vehicle.

24. The relevant part of section 27 of the act provides as follows:-

“27. Storage and access to seized goods:



1. Goods that have been seized under section 23(1) shall be stored and kept in safe custody at a counterfeit goods depot until the person in charge of the depot:-
 - (a) is ordered by a court to return, release, destroy or otherwise dispose of those goods as specified in the order: Provided that in the case of counterfeit goods, such goods shall be destroyed at the expense of the local manufacturer or importer, as the case may be, based on the environmental considerations and the capacity of the country to destroy the goods, or shall be reshipped;
 - (b) is directed by an inspector under section 28 to release the goods to the person from whom they were seized.”
25. I need to state that under the Act, a party can file action for determination whether the attached goods are indeed counterfeit. Section 25(3) of the Act provides:-

“ (3) Any person aggrieved by a seizure of goods under section 23 may at any time, apply to a court of competent jurisdiction for a determination that the seized goods are not counterfeit goods and for an order that they be returned to him.”
26. What is before this court is not what is envisaged in section 25(3) of the Act reproduced above. What is before this Court through this petition is the prayer for declaration that the seizure of the goods violated the petitioners’ constitutional right on information, right to fair trial, right to property and right to fair administrative action.
27. It is important to understand the adverse effect of counterfeit. Steve Francis, Assistant Director of HSI Global Trade Investment Division and Director of IPR Centre the USA Home and Security official website status about effects of counterfeited goods:-

“The production and trafficking of counterfeit goods poses a significant health and safety threat to consumers. It also impacts the economic growth of legitimate businesses and consumers through lost revenue, downtime, and replacement costs ...

Counterfeit products not only attack the name and value of a known business, but, in many cases, can cause harm and sometimes fatal consequence for the unsuspecting buyer.”
28. The respondent by its written submissions dated August 16, 2021 also stated:-

“Counterfeit is a major threat to not only investment and manufacturing in the country but also to innovation and currently constitutes a major hindrance to economic growth and consequently is inimical to public interest.”
29. To counter those threats and dangers, the Act provides wide power for the Authority’s inspectors to deal with the same.
30. The petitioners pleaded that the seizure of their tea from Grace Njeri Njuguna March 12, 2020 was unconstitutional. The petitioners confirm the respondents issued Grace Njeri Njuguna with an inventory of the goods seized on March 12, 2020. Grace Njeri thereafter approached the respondent to



settle the matter out of court. Grace Njeri did indeed pay for storage and destruct of the seized goods. That was the first seizure of goods by the respondent.

31. Firstly, the petitioners fail to explain their relationship with Grace Njeri. The goods were seized from Grace Njeri and there is no evidence adduced by the petitioners alleging that the seized goods did not belong to Grace Njeri. It follows that any complaint relating to constitutionality, or otherwise, of the seized goods that were seized on March 12, 2020 can only be raised by Grace Njeri or on her behalf. The petition before court does not reveal such pleading. The pleading in regard to that seizure precedes on the basis that the seized goods belonged to the petitioners. On that ground, the claim in respect to that seizure of March 12, 2020 does fail.
32. Similarly, the second seizure by the Authority on March 23, 2021 was in Githunguri and the seized goods were found by the respondent in possession of Nancy Njeri, Grace Njeri and George Karanja Kungu. The petitioners did plead that those person were associated to the petitioners. Indeed, Nancy Njeri signed the inventory of the seized goods as the owner of those goods. Again, the petitioners did not plead in the petition that they sought orders in the petition on behalf of Nancy Njeri in respect to that second seizure. The claim in this petition therefore, in regard to that second seizure of March 23, 2021, also must fail.
33. Even if this Court does proceed on the presumption that the goods the subject of the second seizure belonged to the petitioners, the petitioners failed to set out with precision what actions of the respondent amounted to violation of their rights bearing in mind the statutory provisions under the Act which mandate the Authority to act when there is evidence of counterfeit. The petitioners would be best advised to consider the holding in the case *Anarita Karimi Njeru v Republic* [1979] eKLR thus:-

“We would however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out what a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

34. The complaints by the petitioners are that they are registered owners of Mark “Chai Ssana”. The certificate of registration trade mark the petitioners relied upon as proof of such registration does not support the pleadings. The certificate of registration shows that the 2nd petitioner registered on January 15, 2020, a drawing in the shape of tea leaf. There are no words registered under that certificate. It follows that the petitioners were not candid in stating they hold a registration of the mark “Chai Ssana” let alone Endana Tea.
35. The petitioners alleged they variously sought information from the respondent to no avail. They produced one letter dated October 26, 2020. By that date, the second seizure of goods had not taken place. The petitioners ought by then to have moved the court as provided under section 25(3) of the Act for determination whether they had counterfeited the complainant’s mark. Since that statutory provision was available the respondents had no obligation to respond to the inquiry in that letter. How does failure to respond to that inquiry amount to violation of constitutional right, when the petitioner had statutory remedial provision to determine what indeed, they were inquiring about?



36. If the complaint of the petitioners was that the respondent failed to inform them before carrying out raid, then, the petitioner need to consider what the court stated in the case *Kenafriic Matches Limited v Anti-counterfeit Agency & another* (2020) eKLR, which holding finds favour with me, thus:-

“To notify a counterfeiter of a planned raid is likely to defeat the object of the statute. A raid is conducted with a view to seizing and preserving evidence. It is at the time of the seizure or after the seizure of the goods that the person found with the goods is given an opportunity to explain why the goods are not counterfeit. That explains the provision in section 28(1) of the AC Act that the goods should be returned to the person from whom they were seized unless a person has been charged with an offence under the Act. The law envisages a situation where mistakes can be made. What the Petitioner did in this case is to dash to Court without bothering to explain its position to the Respondent. In such circumstances, the Respondent cannot be accused of failing to afford the Petitioner an opportunity to be heard. There is therefore no reason for holding that the Respondent did not hear the Petitioner. At this point in time, it is not known whether the product seized from the Petitioner and its distributors is counterfeit. If it is counterfeit then the Petitioner cannot be heard to say that it has been deprived of its property. On the other hand, if the Respondent establishes that the product is not counterfeit then it is obligated to return the goods to the Petitioner. The continued retention of the Petitioner’s property by the Respondent in line with the provisions of the AC Act is therefore not a violation of the Petitioner’s right to property.

37. After the raid, there is evidence that the petitioners or rather the persons found in possession of the seized goods, were issued with an inventory of the goods seized. The petitioners in bringing this case nipped in the bud the statutory process undertaken by the Authority, that is carrying out investigation and if satisfied there is a basis for doing so prosecuting the counterfeits.

38. My scrutiny of the evidence adduce leads me to find that the respondent did not abuse the statutory process available to it. The court in the case *Advance Gaming v Betting Control And Licensing Board & 2 others; Safaricom (Interested Party)* (2019) eKLR although dealing with judicial review, its findings hereafter are relevant to this finding thus:-

“ 103. The role of the court in such cases was well sated in Republic Vs National Water Conservation & Pipeline Corporation & 11 Others where it was held that once a Judicial Review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was prima facie performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament. In such a case, a court will not interfere with the decision. A decision, which falls outside that area, can therefore be described, interchangeably, as: - a decision to which no reasonable decision-maker could have come; or a decision, which was not reasonably open in the circumstances.”

39. The respondent in seizing the goods, the subject of this petition, it was within its assigned area, statutorily provided.

40. The petitioners in alleging violation of their rights alleged the respondent failed to accord them fair administration action. The petitioners did not in making that allegation plead improper motive as a motivator of the seizure of goods. Since the action of the respondent, in seizing the goods was official



action and in the absence of allegation or proof of bad faith, the claim on that ground must and does fail. This was the finding in the case Republic v Anti-counterfeit Agency Exparte Caroline Mangala T/a Hair Works Salon (2019) eKLR, thus:-

“ 53. The starting point is that under section 7 of the *Fair Administrative Action Act*, a decision or administrative action may be judicially reviewed if, among other things, if the decision was taken in bad faith or arbitrarily or capriciously, or the decision is not rational or is otherwise unconstitutional or unlawful. Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest. These motives, which have the effect of distorting or unfairly biasing the decision-maker’s approach to the subject of the decision, automatically cause the decision to be taken for an improper purpose and thus take it outside the permissible parameters of the power.”

41. Before concluding this judgment, it is necessary to consider what the respondent stated in its written submission that the 2nd petitioner was not a ‘person’ capable of mounting an action under the *constitution*. The 2nd petitioner is registered as a business name. Kevin Macharia Karanja confirmed that he is the sole proprietor of end petitioner. In other words, he trades under that name, Kagwe Tea Packers. According to the respondent, the 2nd petitioner is not a person as provided under Article 22(1) of the *constitution* and could not there mount this action.

42. The respondent erred to submit the 2nd petitioner had no locus standi. The definition of person in the definition Section of the *constitution* defines person as:-

“‘Person’ includes a company, association or other body of persons whether incorporated or unincorporated.”

43. In my view, the 2nd petitioner falls within that definition and is correctly before this Court. The *Civil Procedure Rules* Rule 30 also provides that, a suit can be instituted in the business name subject to the plaintiff supplying the identity of the partners to the defendant on request.

44. As stated before, the filing of this petition put a stop to the statutory steps by the Authority, which it undertakes once seizure of counterfeit goods take place. In view of the fact the petitioners have failed to prove their case hereof, then that statutory process ought to now proceed.

DISPOSAL

45. The petitioners have failed to make a case for the reliefs they seek. Accordingly, this petition is dismissed with costs.

JUDGMENT, SIGNED DATED and DELIVERED at KIAMBU this 31st day of MAY, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Mourice

For Petitioners : - Mr. Mwangi

For Respondent : - Ms. Kihamba HB Mr. Adera



COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE

