



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 11 OF 2019

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS,
CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF SECTION 25(3) ANTI COUNTERFEIT ACT

AND

IN THE MATTER OF THE TRADE MARKS ACT

BETWEEN

FRM (EA) PACKERS LIMITED.....APPLICANT

VS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

KENYA BREWERIES LIMITED.....1ST INTERESTED PARTY

EAST AFRICAN BREWERIES.....2ND INTERESTED PARTY

RULING

Introduction

1. FRM (EA) Packers Limited, hereinafter “the Applicant”, is a limited liability company incorporated in Kenya under the provisions of the Companies Act, Cap 486 of the Laws of Kenya. It has sued the Inspector General of Police, which is a constitutional office in command of the National Police Service and established by Article 245 of the Constitution as the 1st Respondent herein. Also sued as the 2nd Respondent is the Director of Public Prosecutions, a constitutional office established under Article 157 of the Constitution with the mandate to institute and undertake criminal prosecutions in Kenya. Kenya Breweries Ltd and East African Breweries Limited, which are limited liability companies incorporated under the Companies Act and duly licensed to carry out business of manufacturing, brewing and packing alcoholic and non-alcoholic beverages within the Republic of Kenya are joined as the 1st and 2nd Interested Parties respectively.

2. The Applicant has filed a Chamber Summons application dated 18th January 2019, and is seeking the following orders therein:

1. Leave to institute judicial review proceedings as against the Respondents for the following orders:

a) An order of certiorari to bring to the High Court for purposes of being quashed, the decision of the 1st Respondent to seize the Applicant’s *Santa King Ice* product and its other alcoholic beverages.

b) An order of prohibition restraining the 1st Respondent from entering into premises of the Applicant, its suppliers, distributors or agents and searching, impounding or seizing *Santa King Ice* beverage and or other alcoholic products manufactured by the Applicant.

c) An order of prohibition restraining the 1st and 2nd Respondents from summoning, arresting or charging the Applicant's agents, employees, suppliers, distributors, retailers or anyone in the Applicant's production and supply chain or carrying out any further investigations or any further prosecution of criminal cases in any manner whatsoever over or in relation to *Santa King Ice* and other alcoholic products manufactured by the Applicant.

2. That the grant of such leave do operate as a stay of all prosecution or further prosecution, arrest, detaining and/or charging of the Applicant's agents, distributors and/or retailers and entering into the premises of the Applicant's or its suppliers, distributors or agents and searching, impounding or seizing *Santa King Ice* beverage and or other alcoholic products manufactured by the Applicant.

3. The Court be pleased to grant any further orders that it may deem necessary in the interest of justice.

4. This Court directed that the application for leave be heard and determined *inter partes*, and parties were directed to file their respective pleadings and submissions in this regard. The Applicant in this regard relied on its statement of facts dated 18th January 2019, and verifying affidavit sworn on the same date by William Kamau Warau, its Corporation Manager. The said deponent also filed a further affidavit sworn on 9th April 2019, and the Applicant's Advocates on record, Gichuki Kingara & Company Advocates also filed submission of even date. The Applicant disclosed in its application that it had filed a previous suit in this Court, namely **Judicial Review No. 36 of 2017- Republic vs Anti-Counterfeit Agency and Others ex parte FRM Packers.**

5. The 1st and 2nd Respondent did not file any responses to the application, while the 1st and 2nd Interested Parties filed a replying affidavit in opposition to the application sworn on 1st February 2019 by Nadida Rowlands, its legal director. Their Advocates on record, Iseme Kamau & Maema Advocates in addition filed submissions dated 20th June 2019.

The Applicant's Case

6. The gist of the Applicant's case is that it has been involved in the manufacture and selling of alcoholic and non-alcoholic drinks since its incorporation in 2009, and is fully licenced to do so, after having obtained various licences to brew and package alcohol from various authorities, which it enumerated. Further that in August 2015 it purchased a brand known as ***Santa King Ice*** and registered the said brand name. The Applicant stated that the said brand is sold in universal brown bottles used worldwide by alcoholic beverage manufactures, which bottles are returnable and reusable, and that, being universal bottles, the brown bottles are not available to any beer manufacturer to patent or trademark.

7. However, that in December 2016 when the Interested Parties wrote to the Applicant alleging that the Applicant was infringing in their trademark by using their bottles to repackage and sell its products. Subsequently, that the Applicant's retailers and distributors were arrested, charged and prosecuted on allegation of dealing in or handling counterfeit goods, and the Applicant's products were also being seized, confiscated and detained. Further, that the law enforcement agencies are alleging that the Applicant's product, namely ***Santa King Ice***, is being sold using the Interested Parties embossed bottles and therefore counterfeit.

8. According to the Applicant, the Interested Parties have inscribed their trademark on a universal bottle in a bid to carefully set the stage for engaging in restrictive trade practices, and have instructed the Respondents to intimidate and drive the Applicant's retailers and distributors out of the market. Further, that the said acts are meant to stifle competition and the Respondents are colluding to ward off competition, and have procured and instituted sham criminal proceedings against the Applicant, its officers, distributors and retailers.

9. In addition, that the Interested Parties have accused other competitors in the beer market of using their bottles and therefore infringing their trade mark. The Applicant contended that in 2016, the Interested Parties filed High Court Suit of 88 of 2016 accusing Keroche Breweries Limited of the same. It is the Applicant's case that embossing of universal bottles with initials adds no value in consumer identification of a product, which identification is achieved by the unique product label.

10. Furthermore, that an examination of samples of the Interested Parties' products showed that the trademark thereon has no resemblance at all with the Applicant's brand name which is registered as a Trade Mark, the Interested Parties are also using un-engraved bottles, and that the Applicant's product bears no resemblance to the Interested Party's products either in its packaging, taste, colour or make up. The Applicant annexed photographs of the bottles used by the Interested Parties, and copies of documents of the charges made against it, and of the pleadings filed in the cases brought by the Interested Parties against other competitors.

11. Lastly, the Applicant averred that it has been buying the bottles it uses from Consol Glass Kenya, and that the contents of its products is a question that cannot be determined by this Court which is only involved in questioning the fairness of decision making process. Further, that the content of the Applicant's products has not been questioned by the Respondents or the regulating authorities.

The Interested Parties' Case

12. The Interested Parties stated that they are a leading branded alcohol beverage business with an outstanding collection of brands that range from beer, spirits and adult non-alcoholic drinks which are sold and exported to over 30 countries around the world. Further, that they operate their beer business in Kenya through the 1st Interested Party. They contended that that the issue in contention in these proceedings is the Applicant's claim that it has the right to package its beer products in a brown bottle known as the Euro bottle.

13. According to the Interested Parties, there are many registered manufacturers and importers of alcoholic beverages in Kenya selling various branded beverages, and the industry is vibrant with many competitors serving different consumer needs. Therefore, that there is no monopoly as asserted by the Applicant, and that it is mischievous and false for the Applicant to argue that beer bottles are universal and generally the same worldwide in terms of colour, size, shape and general outlook.

14. Further, that legitimate beer manufacturers purchase their own bottles after taking into account several considerations including physical design, colour, brand identity, light sensitivity, shelf life, storage and product composition. Therefore, that there is nothing like a universal Euro bottle, and all manufacturers choose their bottle design and customize their bottle to meet their unique business requirements. The Interested Parties attached an article on the various types of beer bottles in use.

15. The Interested Parties averred that the Applicant's permits expired on 31st December 2016 and it is not licensed to manufacture or deal in beer. In addition, the permits issued to it by the Kenya Bureau of Standards and the Excise License issued by the Kenya Revenue Authority only authorize the Applicant to manufacture spirits and spirituous beverages but not beer, and that the Applicant is not listed as a beer manufacturer or importer by the Kenya Revenue Authority on its website. Therefore, the Applicant is not and has never been licensed to manufacture, import or have a licensed beer brand, and has no legitimate right to use beer bottles purchased by the Interested Parties, or established at a threshold level that it has a valid interest in Euro Bottles.

16. On the various alleged criminal proceedings against the Applicant, that it claims arise from or in connection with the use of the Euro Bottles, the Interested Parties contended that the Applicant is not party to those cases and has not shown its connection with any of those alleged cases. Further, that the persons charged in the said criminal proceedings are not parties in this suit, and this Court cannot be expected to admit for hearing a matter relating to people and criminal proceedings that are not before it. The Interested Parties averred that the proceedings herein are fatally defective and ought to be struck out.

17. That in any event the alleged criminal cases really revolve around the issue of the quality, content, key identifiers, manufacturing, labelling and packaging of alcohol, which are matters regulated by the Standards Act and the standards made thereunder. On this point, the Interested Parties alleged that the Applicant's product, **Santa King Ice**, is according to its own description, a ready to drink alcohol beverage with an alcohol by volume of 10% and the quantity is 500ml. That the said product is purportedly only made up of purified water, potable spirit and vodka flavours. However, that according to the Kenya Standard 2150:2008, the prescribed alcohol by volume for spirit-based ready to drink alcoholic beverage varies between 3% and 8%. Therefore that the Applicant's product is neither a beer as alleged by the Applicant in its application nor a ready to drink alcoholic beverage as described by the Applicant.

18. The Interested Parties contended that the Applicant has therefore set out to mislead consumers by its act of packaging a spirit based product in a package designed for and labelled "beer only"; that its product does not accord to the standard specification authorized by the Kenya Bureau of Standards; that the Applicant cannot lawfully package or sell its product in a bottle clearly marked "beer only" and which is designated for packaging of beer only; and that the act of supplying **Santa King Ice**, a spirit, in beer bottles amounts to engaging in false trade description of goods which is an offence under Section 3 (b), 9 (1) & (2) of the Trade Descriptions Act. The Interested Parties attached a picture of the Applicant's product, a copy of Kenya Standard 2150:2008, and of a list of licensed manufacturers and registered importers of alcoholic beverages published by Kenya Revenue.

19. That it follows that prosecution meant to stop mis-description of products is intended to protect the public from consuming non-conforming products and is clearly in the public interest and cannot be prevented in the manner sought by the Applicant. In addition, that the Applicant's cause of action is founded on an illegality and/or acts which amount to criminal offences, and in view of the fact that judicial review orders are discretionary in nature, this Court should decline to exercise discretion in favour of the Applicant, as the orders sought herein would aid it in furtherance of an illegality.

20. Furthermore, that the Applicant is seeking in its suit the right to obtain and use the Interested Parties' glass bottles, and intends to expose the Interested Parties to the risk of consumers associating the Applicant's products with the Interested Parties, which is a crafty way of seeking to ride on the goodwill and quality assurance associated with the Interested Parties' products.

21. Lastly, the Interested Parties contended that the Applicant's allegations that the Respondents' officers in collusion with the Interested Parties have lodged a campaign of illegally and maliciously confiscating and detaining the Applicant's beer products; that its agents, distributors and retailers have been harassed, intimidated, arrested and charged by the Respondents at the Interested Parties' instigation; and that its agents and representatives are being constantly subjected to unlawful arrests and prosecution all over the Country the Interested Parties contend that the allegations have not been substantiated.

22. The Interested Parties in this respect averred that no particulars have been provided on:-

- a) how the Interested Parties purportedly colluded with the Respondents;
- b) the identity of the Applicant's agent, distributors and retailers affected;
- c) the dates when the goods were purportedly confiscated;
- d) the quantities confiscated;
- e) the description or brand of goods seized or confiscated;
- f) the dates when the raids and/or inspections were carried out and by whom;
- g) the premises from which the goods were confiscated or seized; or
- h) where the confiscated goods are being detained.
- i) the dates when the arrests, harassment and intimidation took place and by whom;

j) the names of the person(s) charged and/or prosecuted(save for one);

k) details in terms of the case numbers, the court where the proceedings have been filed together with the relevant charge sheets and current status ; or

l) the nexus between the persons charged and the Applicant.

23. In addition, that the Applicant seeks to quash decision(s) of the Respondents, but no details have been provided on when the impugned decision(s) was or were made, and a copy or copies of the impugned decision (s) has or have not been annexed. That it is therefore not possible for the Court to satisfy itself on the existence of the decision(s), whether the same was or were issued by the Respondents, its or their nature and contents and whether the application herein was filed within six (6) months of the impugned decision(s) being made.

The Determination

24. The applicable law on leave to commence judicial review proceedings is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The reason for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

25. The Applicant in this regard submitted that it had tabled evidence to the effect that its products are duly licensed and not counterfeit, and that it is not in dispute that the Respondents have been seizing and confiscating the Applicant’s products. Further, that it is also not in dispute that the Respondents have been harassing, arresting and occasionally charging the Applicant’s agents and customer in relation to the Applicants products. Therefore, that there is a *prima facie* case for consideration to warrant the grant of leave and stay sought.

26. According to the Applicant, there has been a statutory and constitutional violation of its constitutional rights to protection under the law; to Fair Administrative Action as not even visual or other scientific data has been provided to show any counterfeit and that neither is there any inquiry as to whether there was counterfeiting, hence it has been denied fair trial. Further, that the Respondents are not by law endowed with power to enforce the Trade Marks Act, as section 23 of the Anti-Counterfeit Act sets out the steps that are to be undertaken by the Anti Counterfeit Agency where there is reasonable ground to believe that a person has committed a counterfeiting offence. That the Respondents have bypassed that process and usurped the powers of the agency are therefore in abuse of legal process as held in **Kenafriic Industries Limited & Another vs Anti-Counterfeit Agency & 3 Others, [2015] e KLR.**

27. It is the Applicant’s submissions that the arrests, charging and prosecution of its agents and customer are aimed at achieving a collateral goal which is to stifle competition and drive the applicant out of business, and the actions of the Respondent are therefore unfair and unreasonable. That in the circumstances, it is appropriate to stay any further action of seizure or detention of the applicants’ goods or products, while allowing lawful investigations to be carried out on the already seized goods to establish whether there is any breach of the law by the applicants. Reliance was placed on the decisions in **R.H. vs Ashworth Hospital Authority ,[2003] WLR 127** and **Republic vs Anti-Counterfeit Agency & 2 others Ex-parte FRM (EA) Packers Limited & Another, [2017] eKLR**

28. The Interested Parties on their part submitted that the purpose of the requirement that leave must be sought before judicial review proceedings are initiated is designed to ensure that before a party is granted such leave, the court is satisfied that the Applicant has *locus standi* or an interest in the subject matter capable of being protected by law as explained in **Republic vs The Minister For Local Government, [2002] eKLR** and **Lathan Maalim Mohammed & Another vs Principal Secretary Ministry of Interior & Coordination of National Government & 5 others, [2017] eKLR.**

29. The Interested Parties proceeded to analyse the permits exhibited by the Applicants and submitted that it was evident from the analysis that the Applicant is not licensed to manufacture beer, and at best, it is licensed to manufacture or deal in spirits based drinks. That it therefore cannot approach this Court and seek to protect the right to manufacture or package beer and falls in the category of a party that has no interest recognized by law capable of being protected by this Court.

30. Furthermore, that the Applicant is not an accused person and is not party to the alleged criminal cases it makes reference to in its pleadings, and the accused persons in the alleged criminal proceedings have not challenged their said prosecution either directly or by way of sworn affidavits. It was submitted that a court of law cannot issue orders that will affect persons or proceedings not before it, and that the failure to join the alleged accused persons or the court seized of the matters in these proceedings is a serious omission which cannot be cured by amendment. Reliance was placed on the decisions in **Republic vs Kenyatta University Ex parte Ochieng Orwa Domnick & 7 others [2018] eKLR** and **Okiya Omtatah Okoiti vs Communication Authority of Kenya & 8 Others [2018] eKLR** for the submission that a court cannot issue orders which will affect persons who are not parties to the case or against undisclosed persons

31. The Interested Parties further submitted that the second aspect which the Applicant must establish is that it has an arguable case with reasonable chances of success as was explained in **Republic vs Nairobi City County & Another ex parte Muchewa Limited, [2017] eKLR** and **Ocean Freight Transport Co. Ltd vs Purity Gathoni & Another, [2014] eKLR**. According to the Interested Parties, the Applicant has failed to satisfy this threshold for the reasons that firstly, the Applicant is seeking the aid of the Court to perpetuate an illegality by enabling the Applicant to continue packaging and presenting its product falsely which amounts to aiding or abetting wrong doing. Reliance was placed on the case of **Mapis Investment (K) Limited vs Kenya Railways Corporation [2006] eKLR** for this position.

32. Secondly, that the orders sought would also have the undesirable effect of not only causing confusion in the market but also severely eroding the Interested Parties' goodwill, particularly if the Interested Parties are perceived as packaging a spirituous alcoholic beverage in beer bottles. That this Court has a duty in the circumstances, to consider the rights of the Interested Parties and the public interest as against the claims by the Applicant as was discussed in in **Munir Sheikh Ahmed vs Capital Markets Authority [2018] e KLR**. In addition, that Article 40 of the Constitution protects the Interested Parties' right to property in the bottles it has bought and embossed.

33. Thirdly, that that the embossing of the Interested Parties' initials on beer bottles amounts to patenting or trademarking the bottle and deprives this Court the Jurisdiction to entertain this matter as issues involving intellectual property fall under the jurisdiction of the Registrar of Trade Marks under the Trade Marks Act, and this Court would therefore only assume jurisdiction on appeal pursuant to the doctrine of exhaustion of alternative remedies as was stated in the case of **Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme vs Chairman, Rent Restriction Tribunal & 99 Others [2018] e KLR**.

34. Lastly, the Interested Parties submitted that the allegations by the Applicant have not been substantiated and there is therefore no material before this Court warranting an in-depth investigation of the said assertions.

35. On whether leave if granted should operate as a stay, the Interested Parties submitted that the balance of convenience tilts in favor of not granting the orders sought, in view of the dangers inherent if the Applicant was to be permitted to package its product in a misleading manner. Further, that the proceedings herein would not be rendered an academic exercise if stay is not granted as all that the Applicant will be required to do in the interim is to use its own purchased bottles pending the determination of its claims if leave is granted.

36. It was also submitted that the grant of stay would have the effect of curtailing the Respondents' power to arrest and prosecute persons suspected of violating the law and would therefore amount to this Court interfering in the Respondents' constitutional and legal mandate to undertake investigations and prosecutions of persons suspected of committing offences.

37. I have considered the arguments made by the parties on the issue of leave, as well as the criteria for granting leave which is multifarious. The relevant factors to be considered in the grant of leave can be summarized as the capacity and interests of an applicant, the nature of the applicant's claim, the merit or otherwise of the applicant's claim in terms of whether an arguable case has been disclosed, and the propriety of judicial review proceedings to resolve the claim.

38. In the present application, as regards the first factor on the capacity and interests of the Applicant, it is not disputed that the Applicant has legal capacity, and is the manufacturer and seller of a product known as **Santa King Ice**, for which it claims it is being, threatened, arrested, charged, harassed and prosecuted as a result of the packaging of the product in bottles alleged to have the Interested Parties trademark, and on suspicion of dealing in counterfeit goods. It is also alleged the Respondents have commenced sham criminal proceedings against the Applicant as a result. It therefore has *locus standi* and sufficient interest to bring this application.

39. As regards the nature of an Applicant's claim, this factor is relevant to the issue of leave as there are certain decisions and actions that many not be amenable to judicial review, particularly arising from the requirement the decision or actions should emanate from the exercise of a public function. In the present application, the allegations made by the Applicant and Respondents emanates from the statutory functions of the Respondents under the Constitution, and is therefore one that would ordinarily fall under the jurisdiction of this Court as granted by Article 165(3) of the Constitution.

40. However, this fact notwithstanding, this Court notes that the only evidence that the Applicant has provided of the impugned actions and decisions by the Respondents was a bond issued to one Henry Mugambi on 17th December 2018 by the Principal Magistrates Court at Nkubu to appear in Court for being charged with an offence of related to false good descriptions and a cash bail receipt issued to the said person on 5th December 2018, which are annexed as Annexure "WKW 6" to the Applicant's supporting affidavit sworn on 18th January 2016. The said Henry Mugambi is not a party in these proceedings, neither is there any evidence brought of his relationship with the Applicant.

41. It is also notable that the allegations by the Applicant are the subject of ongoing proceedings in **Judicial Review No. 36 of 2017-Republic vs Anti-Counterfeit Agency and Others ex parte FRM Packers** that it has disclosed. I have perused the pleadings filed in the said suit and note that the 2nd Respondent herein is also sued as a Respondent in that suit, and the Applicant herein is seeking similar orders as those for which he seeks leave in the instant application. There is thus the risk of this Court being *sub judice* and issuing contradictory orders to those issued by a Court of concurrent jurisdiction. To this extent, this application is also an abuse of the process of Court, as the Applicant could have proceeded against the 1st Respondent and Interested Parties in the earlier proceedings he filed. To this extent I find that the Applicant has not demonstrated a *prima facie* and arguable case to warrant the grant of the leave it seeks.

42. This brings into play the last factor canvassed by the parties as regards whether this Court is the proper forum to hear the Applicant's claim. The grounds raised by the Applicant are disputed by the Interested Parties, and will require the adducing of evidence and resolution of the dispute as regards the rights of Applicant in relation to the manufacture, marketing and sale of its **Santa King Ice** product, which is relevant in determining his entitlement to the orders he seeks for two reasons.

43. Firstly, it is notable that the exercise of supervisory jurisdiction and grounds of judicial review pursuant to which this supervision is conducted, are premised on the application and interpretation of the law and applicable legal principles on uncontested facts and evidence. It

is normally the case that the body whose decision is under challenge is the primary fact finder and decision maker, and the judicial review Court role is limited to a review of the facts and decisions already made, and is not envisaged as the initiator of the said facts or decisions. In the present application, not only are the Applicant's claims contested by the Interested Parties, there is also no evidence of any decision made on these claims by the Respondents that can be the subject of review, as observed by this Court in the foregoing.

44. Secondly, there are alternative fora that are more appropriate to resolve the factual disputes raised in this application, such as the Civil or Commercial Division of the High Court, where no restrictions or limitations exist as those that arise in judicial review.

45. In the premises, I find that the Applicant's Chamber Summons Chamber Summons application dated 18th January 2019 is not merited, and this suit is hereby dismissed with costs to the Interested Parties.

46. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF OCTOBER 2019

P. NYAMWEYA

JUDGE