



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KERUGOYA

CONSTITUTIONAL PETITION NO. 2 OF 2018

PATRICK NJIRU KURIA.....PETITIONER

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

ANTI COUNTERFEIT AGENCY.....5TH RESPONDENT

RULING

1. The Petitioner Patrick Njiru Kuria to be referred to as the petitioner in this ruling, filed a petition dated 26/6/2018 against the Director of Criminal Investigations, Inspector General of National Police Service, the Director of Public Prosecutions, the Attorney General and the Anti Counterfeit Agency seeking the following orders:-

a) A declaration that any of the ungazetted Inspectors outside the ambits of Section 22(6) of the Anti-Counterfeit Act cannot initiate, officiate, overlook and supervise the functions of the 5th Respondent.

b) A declaration that seizure, detention and removal of goods and the destruction of the re-packaging machine without a court order violates Article 40 of the Constitution of Kenya, 2010 Section 23 (1) (b) and (d) of the Anti-Counterfeit Act?

c) A declaration that subsequent to the 1st and 2nd respondent's unlawful actions, the petitioner has suffered great losses including but not limited to loss of business and damage reputation.

d) A declaration that the petitioner's entitled to and order of compensation for the violations.

e) An order directed to the 1st and 2nd respondents for the release of the consignment of goods and the re-packaging machine held by themselves to the petitioner.

f) An order of Judicial Review by way of Certiorari to remove to the High Court and quash the decision of the 1st and 2nd respondents to detain, seize and/or remove the petitioners consignment of sugar and the re-packaging machine from the go-down.

g) An order for Judicial Review by way of a prohibition to remove to the High Court and prohibit the 1st and 2nd respondents or any other agent acting through him from contravening the provisions of the Anti-Counterfeit Act and further from further harassing, confiscating, raiding, cutting, or unlawfully destroying from the petitioner's premises goods and tools of re-packaging.

h) Costs of and incidental to this petition, and

i) Any other order that this honourable court deems fit and just to grant in the circumstances.

2. The grounds upon which this petition is brought are that the petitioner is a businessman and Director of Paleah Stores Ltd who has been licensed by the relevant authorities to import, distribute, re-package and sell brands of sugar namely Brown and white sugar. He operates the business in Wang'uru Town within Kirinyaga County where he has put storage facilities and others in go-downs along the Eastern Bypass within Kiambu County.

3. The petitioner purchased bags of sugar from Hydery(P) Limited Company which is duly licensed to deal, import and distribute sugar by the sugar Board of Kenya. The petitioner was issued with importation documents namely E-slip and delivery order having been cleared by the Kenya Revenue Authority on 22/8/17, certified by AFA Sugar Directorate on 25/8/17, certified by Port Health Fit For Human Consumption on 23/8/2017. After the purchase and delivery, the applicant stored the same consignment in his Go-down which is situated along the Eastern by pass.

4. Thereafter the Director of Criminal Investigations (1st Respondent) acting on mere suspicion that is actuated with malice bad faith, ill motive and in absence of proper detailed investigations, raided and broke into the petitioners Go-down on 11/6/2018 and destroyed, terminated and/or broke down the re-packaging machine and proceeded to seize, detain and confiscate the Sugar that had been supplied to him by Hydery (P) Limited without authority of an order issued by a court of competent jurisdiction.

5. The operation by the 1st & 2nd respondent was not sanctioned by the 5th Respondent, the Anti Counterfeit Agency which the statutory body duly authorized under the Anti-Counterfeit Act No. 3/2008 to combat counterfeit goods and other dealings in counterfeit goods.

6. The 1st and 2nd respondent who were acting illegally and unlawfully did not issue the petitioner with an inventory of the seized goods as required under **Section 25(a)(b) of the Counterfeit Act**. The goods were kept at an ungazetted location at the 1st Respondents Offices at Kiambu road contrary to **Section 29 of the Anti-Counterfeit Act** and the petitioner was not served with a written notice informing him of the address of the designated depot where the seized goods have been kept as required under **Section 25(d) of the Anti-Counterfeit Act**. Further no certificate of Authority was present as required under **rules 5(1) and (2) of the Anti Counterfeit Regulations 2010** for the purpose of identifying the name of the Inspector appointed by the 5th Respondent.

7. The petitioner opines that the officers who carried out the raid were not gazette. The 1st and 2nd Respondent acted without a lawful court order in contravention of **Section 23 of the Anti-Counterfeit Act**.

8. As a mark of good will the Petitioner through mutual understanding assisted the 1st & 2nd respondent with a lorry KCL 670W to ferry the seized goods on condition that the same would be released on arrival. However the 1st & 2nd respondent failed to release the said lorry and continue to detain it unlawfully depriving him the right guaranteed under **Article 40 of the Constitution of Kenya**.

9. The petitioner is apprehensive that the 1st and 2nd respondent would invade other Go-downs and seeks protection of this court for his economic interests and in order to ensure that he gains the full benefit of his goods and services.

LEGAL JUSTIFICATION:-

The petitioner states that he is a citizen of the Republic of Kenya within the meaning of **Article 19(1)(2)(3)(a) and (b) of the Constitution of Kenya 2010** and is entitled to all the rights and fundamental freedoms which are guaranteed under the **Constitution of Kenya**.

10. That **Article 2(1) of the Constitution of Kenya** declares its supremacy and oblige every person to exercise State authority only as provided for under the Constitution. **Article 3(1)** binds all state organs and everybody to respect, uphold and defend the Constitution. **Article 10** declares the National values and principles of Governance and obliges the respondents to 'Inter alia' observe the rule of law, human right, non-discrimination good governance and integrity in exercise of their functions. **Article 20(1) of the Constitution** together with **Article 258(1)** entitles the petitioner to seek redress from the court whenever a right of fundamental freedom in the bill of rights is denied, violated, infringed or threatened. **Article 23(1) and Article 165** gives the High Court jurisdiction to hear and determine applications for redress. The petitioner is entitled to equal protection under the law under **Article 27**. **Article 40** guarantees his right to property and from arbitrary deprivation of his property, while **Article 46(1)** entitles him to protection of economic interests. He also relies on **Article 47(1) and Article 50(2) & (4)**.

11. The petitioner avers that his rights were violated through the abuse of the legal process by the 1st and 2nd respondent with an intention to coerce, force and/or compel him to cede his economic rights on the goods seized and thereby loose the legitimate claim in the goods. It is against this background and the alleged violations that he is before this court.

The appellants reiterated the grounds in his affidavit sworn on 26/6/18.

12. The petitioner had also filed a notice of motion dated 26/6/2018 seeking conservatory orders and release of his motor vehicle KCL 670 W. An ex parte order of injunction restraining the respondents from taking away the alienating or destroying the petitioners goods stored in the applicant's warehouse and go-down located on LR. No. 1604-00572 at Wanguru Town in Kirinyaga County pending interparties hearing. When the matter came u for hearing of the application interpartess the counsel for the petitioner raised various issues orally in court. The court gave a ruling dated 18/10/2019 where I ruled that the goods were seized by the 1st respondent and that he has the power to seize the goods and conduct analysis. I declined to allow the application by the petitioner to collect samples of the commodity and conduct his own private analysis.

13. The petitioner had also filed a Notice of Motion dated 26/6/2018 alleging disobedience of court orders by two contemnours, D.C.IO Parklands Police Station and Gerald Kamwaro on the basis that they arrested the petitioner who had been released on anticipatory bail. The application has not been heard and determined.

14. The 5th respondent Anti Counterfeit Agency had filed grounds of opposition in respect of the Notice of Motion dated and filed 26/6/2018 and it was contending that it was not involved in the alleged unlawful removal, alienation and seizure of the Petitioner's goods as admitted by the petitioner. They also filed a replying affidavit sworn by Naylor Mukofu. All they were saying is that the petitioner had not established a prima facie case to warrant the grant of an injunction.

15. Following these grounds of opposition, on 18/11/18 by consent of all the parties the 5th Respondent was struck out from these proceedings.

16. The petitioner and the respondent entered a consent on 5/12/2018 in the following terms:-

- a) That the Kenya Bureau of Standards be allowed to take samples of sugar stored at DCI Headquarters along Kiambu road.
- b) That the Directorate of Criminal Investigations or its officers of its choice be present during the collection of the samples.
- c) That the applicant or his counsel be present at the Directorate of Criminal Investigations Headquarters when samples are being collected.
- d) That the Assistant General Operations at the DCI be part of the team present when samples are being collected.
- e) That the DCIO Parklands Police Station be served with these orders.
- f) That subsequent to the taking of samples and analysis the Kenya Bureau of Standards do file a report before this Court within Seven(7) of service of these orders.
- g) That the matter be mentioned on 13th December, 2018.

17. However before the order could be complied with, the respondent filed a report of the analysis of the sugar and served the petitioner.

18. The petitioner then proceeded to file the application by way of Notice of Motion dated 28/3/19. He was seeking the following orders:-

- a) That pending the hearing of this application inter parties, this Honourable court be pleased to grant an order compelling the Respondents herein to release his goods namely M/V Reg.NO.KCL 670W and KBQ 187 B and sugar parking machine stored at the DCI Headquarters.
- b) That pending the hearing and determination of this Petition, this Honourable court be pleased to grant an order compelling the Respondents herein to release his goods namely sugar parking machine, 1062 bags of sugar, 238 bales of 2KGs of sugar, 132 bales of 1KG of sugar, 440 packets of 1Kgs of sugar.

19. It was supported by the affidavit of the petitioner. He reiterates the above grounds.

20. The parties agreed that Petition No. 2/2018 and the Misc. Application No. 10/2018 be heard together. The counsel for the petitioner opted to give oral submissions. On the other hand, Mr. Obiri, Assistant Director of Public Prosecutions representing the respondents filed written submissions.

21. For the petitioner it was submitted that all he is asking is to enforce the rule of law and relies on **Section 25(3) of the Anti-Counterfeit Act**. He submits that the respondents were on a frolic of their own and not to enforce the law but acted with malice and abuse of the process. He submits that the petitioner had a permit to use standardisation mark dated 22/5/2019, the source of the sugar and documents to show suitability and all necessary documents to show where the sugar was sourced.

22. That the issue for determination is whether the seizure was lawful. He submits that it was not and the rights of the applicants were violated. The petitioner submits that he has never known why the sugar was seized.

23. For the respondent Mr. Obiri Deputy Director of Public Prosecutions filed written submissions and submits that they opposed the application by the petitioner to test the impounded sugar as Government of Kenya had an elaborate system of determining standards and quality of goods and services. The Kenya Bureau of Standards had the mandate of testing sugar to confirm whether it was fit for consumption.

He cited the **Section 4 of Standards Act** Cap.496 which provides in part:-

“To make arrangements or facilitate for testing and calibration of precision for testing instruments, gauges and scientific apparatus for determination. Their degree of accuracy by comparison with standards approved by the Ministry on the recommendation of the council and for the issue of certificates in regard thereto.

To provide for testing at the request of the Minister on behalf of the Government locally manufactured and imported commodities with a view of determining whether such commodities comply with the provisions of the Act or any other Law dealing with standards of quality or description.”

24. That the petitioner's sugar was tested by KEBS and a report was filed in this court indicating that the petitioner's sugar was unfit for human consumption. There should be no retesting as the sugar has been tested by a body which is competent.

25. On the issue of Notice of Motion seeking the release of Motor vehicle KCL 670 W and KBQ 187 B and packaging machine it is stated that the two files be handled together as the order in one will effect the other.

I will proceed to consider **Petition No. 2.**

26. The petitioner alleges that the respondents failed to comply with various sections of the Anti-Counterfeit Act. The Anti-counterfeit Agency was sued as the 5th respondent. The Anti-Counterfeit Agency filed a Replying Affidavit sworn by Naylor Mukofu who depones that indeed the 5th respondent is a State Agency established under **Section -3- of the Anti – Counterfeit Act No. 13/2008** with a defined and precise mandate under **Section -5- of the Act** to **“combat counterfeiting trade and other dealings in counterfeit goods in Kenya in accordance with this Act ----“.**

27. The Act mandates the Agency to appoint such number of inspectors as it may deem appropriate. That the Act recognizes other officers including police officers. That 5th respondent is not mandated to appoint or gazette police officers under the charge of 1st and 2nd respondent and is therefore not required to issue certificates of authority to these officers whilst discharging their duties under their respective **Act.**

28. The 5th Respondent was eventually struck out of these proceedings on 18/10/2018 by consent of all the parties.

29. I have considered the petition, the submissions and the law. The crux of the petitioner's case is that the rights under **Article 27 1&2, 28, 29(a) 47(1), 49(1)(a) i ii and iii(c) (d) (c) (i) 50(1)(2)(1), 4 of the Constitution** were violated. **Section 25(3) of the Anti-Counterfeit Act** forms the basis of their case. This matter is filed as a constitutional petition. A constitutional question is one that requires the interpretation of the constitution rather than that of a statute. This court must guard against invocation of constitutional process especially in cases where it is clear that there exists other alternative statutory remedies. In **John Harun Mwau –v- Peter Gastrol & 3 Others** it was stated that:-

“Courts will not normally consider a constitutional question unless the existence of a remedy is dependent on it ----- it is an established practice that where a matter can, be disposed of without recourse to constitution, the constitution should not be involved at all.”

30. It came to light that the Anti-counterfeit Agency (5th respondent was not involved in the seizure of the goods. The petitioner consented to have the Anti-counterfeit Agency struck out from these proceedings. The 5th respondent informed the court that they were not involved in the seizure of the goods and they had nothing to do with the seizure of the goods by the police or any other body.

31. Under the Anti-Counterfeit Act, police officers are designated as Inspectors for the purpose of the Act. This is as provided under **Section 22 of the Act.** The powers of such Inspectors are provided under **Section 23 of the Act.** It gives powers to enter and inspect goods that are reasonably subjected to be counterfeit goods among other powers. This leads to the question as to what amounts to counterfeit goods. **Section 2** defines counterfeit goods to mean:-

“means goods that are the result of counterfeiting any items that bears an intellectual property right and includes any means used for purposes of counterfeiting.

Counterfeiting –“means taking the following action without the authority of the owner of the intellectual property right subsisting in Kenya or outside Kenya in respect of protect goods-

This actions includes, manufacture, production, packaging, re-packaging, labelling and so forth -----“

32. Under **Section 25 of the Act** the duty of Inspector upon seizure of goods are stated. **Section 25(d)** provides that:-

“An Inspector who has seized any suspected counterfeit goods in accordance with Section 23 shall – by written notice inform the following persons of the action taken by the Inspector under Section 23(1) and of the address of the counterfeit goods depot where the seized goods are kept.

i) The persons from whom those goods are seized and

ii) Either the complainant where the Inspector exercised his powers pursuant to a complaint laid in accordance with the Section 33(1).

iii) -----person who qualifies under section 33(1) to be complainant -----“

33. The goods seized were not counterfeit goods as defined under the Act. In a report filed in this court under a covering letter from the Kenya Bureau of Standards, indicates that the goods were seized by the Directorate of Criminal Investigations following a crackdown on illicit trade.

34. In a ruling dated 18/10/18 I did state that the sugar was seized by the Director of Criminal Investigations who had powers under **Section 35 of the National Police Service Act.** The sugar was seized on allegation that it was unfit for human consumption.

35. In affidavit sworn by P. C Timothy Melly it is deponed that the offence of dealing with suspected substandard sugar was committed within Kiambu County.

36. I find that the petition is on alleged violations of the counterfeit Act but it has turned out that this is not the case.

Section 35 of the National Police Service Act provides:-

The Directorate shall—

(a) collect and provide criminal intelligence;

(b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;

(c) maintain law and order;

(d) detect and prevent crime;

(e) apprehend offenders;

(f) maintain criminal records;

(g) conduct forensic analysis;

(h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution;

(i) co-ordinate country Interpol Affairs;

(j) investigate any matter that may be referred to it by the Independent Police Oversight Authority; and

(k) perform any other function conferred on it by any other written law.”

A party in his pleadings must give sufficient information to enable the other party know the case it is facing. In *Mumo Matemu –v- Trusted Society of Human Rights Alliance and Others (2013) eKLR* the court stated that there is need for a party to define with clarity the dispute that is to be determined by the court. The petitioner did not state with clarity the nature of dispute as he alleged violations of the Anti-Counterfeit Act, wanted an order to conduct tests on the sugar after it came out that the sugar was seized on allegation that it was unfit for human consumption. These are matters which in my view would have been filed in court through other alternative means other than as a constitutional petition.

37. In the case of *Paul Kihara t/a Shikanisha Shoes Collection –v- the Attorney General & the Anti counterfeit Agency 2016 eKLR* where the petitioner alleged that the 2nd respondent had no right to enter his business premises and seize goods therein, the court stated:-

“The right to privacy under Article 31 of the Constitution like all other rights in the constitution is not absolute. Article 24(1) of the same constitution provides that this right like other rights and fundamental freedoms maybe limited. Article 40(5) of the Constitution provides that –

The State shall support, promote and protect the intellectual property rights of the people of Kenya.

Further, the court held that-

“A clear reading of the law is that the actions of the Inspector do not necessarily have to be pegged to the existence of a complaint. Therefore there was nothing illegal in the actions of 2nd respondent.”

38. My view is that even under the counterfeit Act it was not unlawful and would not have amounted to violations of the rights of the appellant to privacy and to own property. This was a matter of great public interest as the sugar was alleged to be unfit for human consumption. The seizure of the goods was lawful as the Director of Criminal Investigations had the mandate to undertake investigations seize the commodity and conduct analysis to determine whether a crime was committed and whether the sugar was fit for human consumption. The sugar was tested and a report was filed by KEBS which was competent to conduct the analysis. The petitioner had consented to have the sugar tested but it emerged that the sugar had been tested and a report made. There would be no need of retesting the sugar.

39. In view of what I have stated above, I find that the petition is without merits. The seizure of the goods was lawful. No evidence of violations of his rights was tendered. The actions of the Director of Criminal Investigations were within his mandate as provided under the Statute. I therefore dismiss the petition. Each party to bear its own costs. This matter has taken long. I direct 1st respondent to finalise investigations take such action as may be necessary within 30 days. If not the petitioner will be at liberty to move the court for the return of

his seized goods.

40. In the event that charges are preferred, the petitioner who has been on anticipatory bail, shall present himself in court to answer charges.

41. On the Misc. Application dated 28/3/2019 the applicants seeks the release of his motor vehicles registration Nos. KCL 670W and KBQ 187B and the sugar parking machine stored at the D.C.I Headquarters. He also seeks an order for the release of the sugar.

42. Since I have dealt with the issue of the release of the sugar in the petition, I will only address the prayer for the release of the motor vehicles and the sugar packing machine.

43. The application is based on the grounds that the vehicles had nothing to do with the sugar as the sugar was seized from the Warehouse where it was stored. The applicant through mutual understanding assisted the 1st and 2nd respondent to load the sugar into the two vehicles and ferry it on condition that the vehicles would be released upon arrival. The 1st and 2nd respondents have refused to released the two vehicles to him.

44. The application was not opposed as no replying affidavit was filed. In his submission, Mr. Obiri submitted that a determination in Petition No. 10/2018 will affect the two issues.

45. My view is that based on the averments by the petitioner on how the vehicles ended up where they are held, there is no good reason why the 1st & 2nd respondent should continue detaining the two vehicles and the packing machine. I find that the application has merits. I allow it in terms of prayer -1-. That is to say the Motor Vehicles KCL 670 W and KBQ 187B and the sugar packing machine be released to the petitioner forthwith. I make no orders as to costs.

46. With regard to the petition I have stated earlier that it lacks merits. It is dismissed with no orders as to costs.

It is ordered as follows;

- 1) The Petition is dismissed with no orders as to costs.**
- 2) The 1st Respondent is ordered to finalise investigations within 30 days and take any necessary action within 30 days.**
- 3) In the event that charges are preferred the 1st Petitioner to present himself in court.**
- 4) The Motor vehicles KCL 670 W and KBQ 187 B as well as the sugar parking machine be released to the Petitioner forthwith.**

Dated at KERUGOYA this 17th Day of December 2019.

L. W. GITARI

JUDGE

Read out in Open Court,

Mr. Ndegwa for Petitioner present,

Mr. Ashimoshi for the Respondent.

C/A – Wachira.

L. W. GITARI

JUDGE