



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**PETITION NO. 62 OF 2013**

**ABDI GEDI AMIN.....1<sup>ST</sup> PETITIONER**

**GULF SKYPOT LIMITED.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**CASPER M. OLUOCH.....1<sup>ST</sup> RESPONDENT**

**ANTI-COUNTERFEIT AGENCY.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS...3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The 1<sup>st</sup> petitioner is the 2<sup>nd</sup> petitioner's Managing Director whereas the 2<sup>nd</sup> Petitioner is a limited liability company duly registered under the Companies Act Cap 483 Laws of Kenya. The 1<sup>st</sup> respondent is sued as the Anti-counterfeit officer duly appointed under Section 11 of the Anti-counterfeit Act, 2008. The 2<sup>nd</sup> respondent is a body corporate duly established under section 3 of the Anti-counterfeit Act, 2008 and the 3<sup>rd</sup> respondent is sued as an office established under Article 157 of the Constitution, which has a full mandate to exercise state powers of prosecution.

**The Petitioners' case**

2. The Petition was supported by an affidavit sworn by the 1<sup>st</sup> petitioner Abdi Gedi Amin. The Petition contains various allegation and grievances. On 3/9/2013 the 1<sup>st</sup> respondent issued a notice of seizure purportedly seizing 1,468 20 litres jerricans of Reinna vegetable oil, which had been stored at the 2<sup>nd</sup> petitioner's go-down. There was no inventory confirming the identification of the goods alleged to be seized as required by section 25(1)(a) and (b) of the Act and the notice of seizure shows the goods were seized in in-situ in the custody of the 2<sup>nd</sup> petitioner, yet the goods were never sealed off or locked or placed under guard as required by section 25(1)(c) of the Act. Further the 1<sup>st</sup> respondent threatened to arrest and charge the 1<sup>st</sup> petitioner and also to close down the 2<sup>nd</sup> petitioner's go-down situated at Shimanzi, in Mombasa, which is violation of Article 40 of the Constitution. The petitioners are apprehensive that the 3<sup>rd</sup> respondent may institute criminal proceedings upon the irregular Notice of seizure and recommendation of the 1<sup>st</sup> respondent.

3. The respondent's action of threat to arrest has subjected the 1<sup>st</sup> petitioner to psychological torture, who is now unable to continue with business and the business partners have opted to terminate the use of the go-down due to the uncertainty occasioned. It is his averment that the following fundamental rights guaranteed by the Constitution have been violated;

a. Right to an administrative action that is lawful, reasonable and procedurally fair as guaranteed under Article 47(1).

b. Protection of the right to property under Article 40.

c. Violation of Article 73 of the Constitution by a state officer as follows-

I. Exercise of public trust in a manner that is inconsistent with the purpose and objects of the Constitution and also in a manner that diminishes public confidence in the integrity of the office contrary to Article 73(1)(a)(i) and (iv).

II. Exercise of public authority in a total disregard of the respect for the people contrary to Article 73(1)(a)(ii).

d. Violation of Article 232(1)(e) and (f) of the Constitution by a public officer by exercising his duties as follows-

I. In a manner that lacks transparency

II. Failing to provide timely and accurate information

4. The petitioners prayed for the following reliefs:

I. The 1<sup>st</sup> respondent be compelled to forthwith disclose an inventory of the goods that are alleged to be counterfeit and allegedly in the custody of the 2<sup>nd</sup> petitioner as required by section 25(1) (a).

II. An order prohibiting the respondents from instituting any criminal proceedings based on the purported Notice of seizure dated 3/9/13 or complaints made by the 1<sup>st</sup> respondent until this court has given directions on the validity of the petitioner's actions.

III. Costs of the petition.

### **Responses**

5. The respondents filed their response through a replying affidavit sworn by Caspar Mark Oluoch who was the counterfeit inspector employed by the 2<sup>nd</sup> respondent. He averred that he has investigative and inspection powers under the Anti-counterfeit Act. On 3<sup>rd</sup> September 2013 together with his colleague he visited the 2<sup>nd</sup> petitioner's premises for inspection on whether he had possession of counterfeit cooking oil called Reinna. The 1<sup>st</sup> Petitioner herein identified himself as **Abdi Ibrahim Ahmed** then signed the inventory of seized goods, Form ACA2. At that point it was not known that he had given a false and untrue name. The 1<sup>st</sup> petitioner had removed the goods that had been seized. On 31<sup>st</sup> October 2013 he went to the 2<sup>nd</sup> petitioner's premises but he was not there therefore their servant Mohamed Ahmed Sheik was arrested. On 1<sup>st</sup> November 2013 the 1<sup>st</sup> petitioner under the name **Abdi Amin Gedi** took plea.

6. In addition to the above he averred to have power to arrest without warrant. The 1<sup>st</sup> petitioner acted in bad faith by issuing false information. He never sealed off or closed down the go-down, which was suspected to have counterfeit goods. The petition is based on misplaced and misadvised position in law since it does not disclose any evidence of irregularity or illegality. He further averred that the petition is an abuse of the court process and was frivolous and vexatious.

### **DETERMINATION**

7. The Petitioners' in this case moved the court by way of a petition. The court has considered the petition; the affidavits both in support of and in opposition to the application, annexures, responses and the submissions as well as the authorities. The following issues arise for determination.

a. Whether or not the 1<sup>st</sup> and 2<sup>nd</sup> respondents' action for seizure of goods amounted to violation of the Constitution.

b. Whether or not the court may grant the reliefs sought.

8. The petitioners contended that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had violated Article 47(1), 40, 73 and Article 232(1) (e) and (f) of the Constitution. The 1<sup>st</sup> petitioner was apprehensive that his arrest and prosecution was imminent and that he might be charged and prosecuted in derogation of his Constitutional rights. This prompted him to file this petition. Under Article 258(1) every person has the right to institute court proceedings claiming that this constitution has been contravened or is threatened with contravention. The 1<sup>st</sup> petitioner alleged that the 1<sup>st</sup> respondent an anti-counterfeit officer issued a Notice of seizure on 3/9/2013 on 1,468 20-litres jerry cans of Reinna Vegetable oil, which was in violation of their fundamental rights. What leads to a right being violated? The applicant submitted that Article 47(1) has been violated. It provides as follows, "**Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**"

9. The 1<sup>st</sup> respondent on the other hand averred that he visited the 2<sup>nd</sup> petitioner's premises after receiving information that the petitioners were in possession of counterfeit cooking oil by the name Reinna. An inventory of seized goods was taken. The court has had an opportunity to look at the copy and has seen a signature by the depot manager, inspector of the 2<sup>nd</sup> respondent and the owner or agent. The petitioners, however, aver that the act was in violation of their rights. .

10. In **Standard Resource Group Ltd v. A.G & 2 Ors** Nairobi Petition No. 342 of 2016 eKLR the court stated as follows on fair administrative action:

***"Article 47 of the Constitution as implemented by Fair Administrative Action Act No. 4 of 2015 is clear that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair (Section 4(1)). Under Section 4(2) thereof every person has the right to be given written reasons for any administrative action that is taken against them. 3) where an administrative action is likely to adversely affect the right or fundamental freedoms of any person, the administrator shall give the person affected by the decision.***

**32. The Act further lists other essentials as follows:**

- a. Prior adequate notice of the nature and reasons for the proposed administrative action;
- b. An opportunity to be heard and to make representations in that regard;
- c. Notice of a right to a review or internal appeal against an administrative decision, where applicable;
- d. A statement of reasons.
- e. A notice of the right to legal representation, where applicable;
- f. Notice of the right to cross examine, or where applicable”

The applicants had a duty to demonstrate how the respondents had gone against the applicable law.

11. The 1<sup>st</sup> respondent had to carry out his duty in accordance with section 23 of the Ant-counterfeit Act, which provides as follows:

**“23. Powers of inspectors**

(1) An inspector may at any reasonable time—

. (a) enter upon and inspect any place, premises or vehicle at, on or in which goods that are reasonably suspected of being counterfeit goods are to be found, or on reasonable grounds are suspected to be manufactured, produced or made, and search such place, premises or vehicle and any person found in such place, premises or vehicle, for such goods and for any other evidence of the alleged or suspected act of dealing in counterfeit goods, and for purposes of entering, inspecting and searching such a vehicle, an inspector may stop the vehicle, wherever found, including on any public road or at any other public place;

. (b) take the steps that may be reasonably necessary to terminate the manufacturing, production or making of counterfeit goods, or any other act of dealing in counterfeit goods being performed, at, on or in such place, premises or vehicle, and to prevent the recurrence of any such act in future: ? Provided that those steps shall not include the destruction or alienation of the relevant goods unless authorized by an order issued by a court of competent jurisdiction;

. (c) seize detain, and, where applicable, remove for detention, all the goods in question found at, on or in such place, premises or vehicle;

. (d) seize detain, and, where applicable, remove for detention, any tools which may be used in the manufacturing, production, making or packaging of those goods or applying a trade mark or that exclusive mark on such goods;

. (e) if he reasonably suspects that a person at, on or in such place, premises or vehicle may furnish any information with reference to any act of dealing in counterfeit goods—

(i) question that person and take down a statement from him;

. (ii) demand and procure from that person any book, document, article, item or object which in any way may be relevant to nature, quantity, location, source or destination of the goods in question, or the identity and address of anyone involved or appears to be involved as a supplier, manufacturer, producer.

f. seal or seal off any place, premises or vehicle at, on or in which—

i. the goods in question are found, or are manufactured, produced or made, either wholly or in part;

ii. any trade mark, any exclusive mark or any work which is the subject matter of copyright, is applied to those goods;

iii. the packaging for those goods is prepared; or

iv. the packaging of those goods is undertaken.

(2) Nothing in this section shall be construed as requiring a person to answer any question or give any information if to do so might incriminate him.

(3) An inspector may arrest, without a warrant, any person whom he suspects upon reasonable grounds of having committed any offence under this Act and may search and detain such a person:

*Provided that no person shall be arrested under this section unless he obstructs or hinders the inspector or refuses to give his name and address to the inspector or to produce to him satisfactory evidence of his identity, or gives a name and address which the inspector has reason to believe to be false or it appears to the inspector that such a person may not be found or made answerable to justice without unreasonable delay, trouble or expense.”*

12. The 1<sup>st</sup> respondent urged that he sealed off the premises where the goods had been seized as required by section 23 (1) (c) above. The applicant however decided to remove the goods from the premises to unknown destination and this was confirmed on 31<sup>st</sup> October 2013. The 1<sup>st</sup> respondent realized that the 1<sup>st</sup> applicant had given a false name as Abdi Ibrahim Ahmed yet his real name was Mr. Abdi Gedi Amin. In view of this the 1<sup>st</sup> respondent arrested his employee Mohamed Ahmed sheik and on 1<sup>st</sup> November the 1<sup>st</sup> applicant appeared in court for plea taking. Section 23 gives the 1<sup>st</sup> respondent the power to carry out any seizure of goods. Indeed a person cannot be arrested and charged before seizure of goods. The court agrees with the 1<sup>st</sup> and 2<sup>nd</sup> respondents that it was the right procedure to first seize the goods before arraigning the suspects in court. Under section 23(1)(e)(I & ii) the 1<sup>st</sup> respondent exercised his power well by questioning the 1<sup>st</sup> petitioner and by demanding and procuring any document or book which may be relevant in prosecuting a criminal case. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are mandated by section 23 of the Act and I do agree with them that by asking the 1<sup>st</sup> petitioner to give any useful documentation, the 1<sup>st</sup> respondent did follow the right procedure.

13. In *Dry Associates Ltd v Capital Markets Authority and Another*, Petition No. 328 of 2011 (Unreported) where Article 47 of the Constitution which enshrines the right of every person to fair administrative action and enunciates various values and principles of public service including responsive, prompt, effective, impartial and equitable provision of services and transparency and provision to the public of timely, accurate information was emphasized. Also in *Onyango Oloo v. Attorney General* [1986-1989] EA 456, the court held that there is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not in any way breach the Constitution.

14. In addition to the above, section 25 of the Anti-counterfeit Act provides as follows:

**“25. Duty of inspector upon seizure of goods**

**(1) An inspector who has seized any suspected counterfeit goods in accordance with section 23 shall—**

*(a) forthwith seal, clearly identify and categorize the goods and prepare, in quadruplicate, an inventory of such goods in the prescribed form and cause the person from whom the goods are seized to check the inventory for correctness, and, if correct, cause that person to make a certificate under his signature on each copy of the inventory and if the seized goods are removed under paragraph (c), the inspector shall endorse that fact under his signature on every copy of the inventory, in which case the inventory shall also serve as a receipt;*

*(b) furnish one copy of the inventory to the person from whom the goods are seized and another to the complainant, if any, within five working days after the seizure;*

*(c) as soon as possible, remove the goods, if transportable, to a counterfeit goods depot for safe storage, or, if not capable of being removed or transported, declare the goods to have been seized in situ, and seal off or seal and lock up the goods or place them under guard at the place where they were found, and thereupon that place shall be deemed to be a counterfeit goods depot; and*

*(d) 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 person 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 section 33(1); or*

*(iii) the person who, in relation to those goods, qualifies under section 33(1) to be a complainant, but who had not yet so laid a complaint at the time when the inspector exercised those powers on his own initiative in accordance with section 33(4).*

*(2) An inspector may require a complainant to disclose any additional information, which may be relevant to the action that has been taken.*

**(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.**

*(4) The court may grant or refuse the relief applied for under subsection (3) and make such order as it deems fit in the circumstances, including an order as to the payment of damages and costs.”*

15. There is evidence that 1<sup>st</sup> and 2<sup>nd</sup> respondents in this case strictly followed the stipulations of section 25 of the Anti-counterfeit Act. Section 25(1)(c) empowers the respondent to remove the seized goods to a counterfeit goods depot but this did not happen since the petitioners removed the goods from where they had been seized and kept. Further section 25(3) allows an aggrieved person to apply to court of competent jurisdiction for determination that the seized goods were not counterfeit and for an order that the goods be returned.

16. The applicants have not demonstrated to this court that the goods in question are not counterfeit. The petitioner has not taken out proceedings under section 25(3) to demonstrate that the seized goods were not counterfeit.

17. The petitioners asked the court to compel the 1<sup>st</sup> respondent to disclose an inventory of the goods. The court does not agree with the

petitioners for the reason that pursuant to section 25(1)(a) the 1<sup>st</sup> respondent made an inventory of seized goods which is dated 3<sup>rd</sup> September 2013 and **the same was signed by the 1<sup>st</sup> petitioner using the wrong name he had given.** Further the document indicated his signature and name, which is in conformity with the above clause that the 1<sup>st</sup> petitioner checked the correctness of the inventory before appending his signature. He cannot purport that the same inventory was done in his absence. A copy of the inventory had to be given to the 1<sup>st</sup> Petitioner which he has not shown was not complied with. The 1<sup>st</sup> and 2<sup>nd</sup> respondents actions did not violate the provision of Article 232(1) of the Constitution as alleged by the petitioners. The 1<sup>st</sup> prayer of the Petition fails.

18. The petitioners averred that their constitutional right to protection to property was infringed on. Article 40 (1) states as follows:

***“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property.”***

This right is not absolute as the petitioners contend. The 1<sup>st</sup> respondent was justified to arrest the 1<sup>st</sup> petitioner and charge him in court since he had been found with anti-counterfeit goods. The 1<sup>st</sup> petitioner issued a different name and only came to court and issued the correct name after his employee was arrested. He acted in bad faith. The maxim he who comes to court must come with clean hands applies with regard to the 1<sup>st</sup> petitioner’s conduct the court. See ***Kyangavo v Kenya Commercial Bank Ltd & Anor.*** (2004) 1 KLR 126 where **Njagi J.** held at p. 145:

***“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the plaintiff in this case betrays him. It does not endear him to equitable remedies. He admitted in this Court, quite frankly, that since leaving the employment of the bank over four years ago, he has never paid a cent towards redemption of the loan. He admits that he is in default, and yet he is also in possession. He can’t have it both ways. Either he pays the loan, or allows the bank to realize its security. He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The plaintiff has not done that. Consequently he has not done equity. In the hands of the plaintiff, a permanent injunction would wreak havoc to the first defendant, and that would be inequitable. While chargees are enjoined by law to follow the laid down procedures for the realization of their security, the Courts must not at the same time be converted into a haven of refuge by defaulters. Even lenders and chargees have their own rights.”***

19. The court finds that the actions of the 1<sup>st</sup> respondent were in accordance with the law, rules and procedure in the Anti-counterfeit Act. The 2<sup>nd</sup> prayer seeks an order of Prohibition which is a discretionary remedy and, as with equitable remedies, the Petitioner applicant must come to court with clean hands.

## **ORDERS**

20. Accordingly, for the reasons set out above, the petitioners’ Petition dated 16<sup>th</sup> October 2013 is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF MAY, 2018.**

**E.K OGOLA**

**JUDGE**