



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CONSTITUTIONAL PETITION NO. 7 OF 2018

IN THE MATTER OF ARTICLES 2, 3(1), 6(2), 10, 19, 20, 21, 22, 23(1) & 3, 27(1)(2), 27(5), 28, 29(A), 31, 46(1)(3), 47(1), 49(1)(A) (I,II,III)(C)(D)(F)(I)(H), (2), 50(1)(2)(A)(J)(4), 73(1)(2), (B), 157(4), 157(11), 159(2)(C)(E) AND 258(1) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF RULES 10, 11, 22, 23 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES, 2013)

IN THE MATTER OF CONTRAVENTION OF SECTION 22, 23, 25, 26, 27, 28, 29 AND 30 OF THE ANTI-COUNTERFEIT ACT NO. 13 OF 2008, LAWS OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ANTI-COUNTERFEIT REGULATIONS 2010 LAWS OF KENYA

BETWEEN

SIMON MWANGI NDUNG’U.....1ST PETITIONER

MAGDALENE MUNINI MWANGI.....2ND PETITIONER

VERSUS

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

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

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

THE ATTORNEY GENERAL.....4TH RESPONDENT

THE ANTI-COUNTERFEIT AGENCY.....5TH RESPONDENT

COUNTY GOVERNMENT OF KITUI.....6TH RESPONDENT

R U L I N G

1. By an application dated the **28th day of June, 2018**, the Applicants seek a conservatory order restraining the Respondents and/or its agents, employees, appointees and/or successors from taking away, seizing, detaining, removing, alienating and/or destructing the sugar now stored at the Directorate of Criminal Investigations Head Quarters situated along Kiambu Road pending hearing of the Petition herein.

2. Further they have asked the Court to compel the 6th Respondent to return their trading licence and to open their premises forthwith and to direct the 1st and 2nd Respondents to release motor-vehicle Registration Number **KCQ 251H** and **KCK 039Q** to the registered owner.

3. The application is premised on grounds that on the **16th June, 2018** the 1st and 2nd Respondents raided and unlawfully removed, alienated and seized the Applicants’ sugar from their warehouse and go-down located at Matuu Town and Kitui Town. That the said seizure and detention was done contrary to **Section 22** of the **Anti-Counterfeit Act No. 13 of 2008** as the officers in operation were not appointed and gazetted inspectors by the 5th Respondents. The goods were seized and alienated without a lawful Court order contrary to **Section 23** of the

Anti-Counterfeit Act No. 13 of 2008.

4. That following a mutual understanding and good will on the part of the Applicants they assisted the 1st and 2nd Respondent with an unloaded lorry Registration Number **KCQ 251H** and **KCK 039Q** to ferry the seized goods on condition that the motor-vehicle would be released on arrival. That the 1st and 2nd Respondents failed to release the motor-vehicle and thereby arbitrarily deprived them the right guaranteed under **Article 40** of the **Constitution**; No notice of where the goods have been kept has been issued in compliance with **Section 25(d)** of the **Anti-Counterfeit Act No. 13 of 2008**; The seized goods have been kept at an ungazetted location being the 1st Respondent's offices at Kiambu Road contrary to **Section 29** of the **Anti-Counterfeit Act No. 13 of 2008** and Gazette Notice **No. 14525** of **26th November, 2010**.

5. That the Respondents have refused to allow the shop located at Kitui Town to operate by unlawfully and without due process revoking its license without undertaking any proceedings in line with **Article 47** of the **Constitution**, an act that is not related to any ongoing investigation as the alleged contraband goods have already been removed. That closure of the shop in Kitui that deals in fast moving wholesale products and some perishable goods has exposed the Applicants to suffer immense losses and if orders sought are granted the Respondents stand to suffer no damage.

6. The 1st Applicant having been authorized by the 2nd Applicant swore an affidavit in support of the application where he deponed *inter alia* that the 1st and 2nd Respondents were actuated by malice, bad faith and ill motive when they acted in the absence of detailed investigations or lawful authority by confiscating 2029 bags of sugar and 760 cartons of cooking oil that had been supplied by various stockists. That the motor-vehicle Registration Number **KCQ 251H** and **KCK 039Q** that were seized do not belong to either the Petitioner nor **Paleah Stores Limited**, but belong to another legal person who assisted the Applicants. That the 5th Respondent did not authorize seizure of the goods. That the 3rd Respondent has since placed charges in **Criminal Cases No. 371 of 2018** at **Kithimani Magistrate's Court** against the 2nd Petitioner arising out of the unlawful act and abuse of the Court process being contrary to **Article 157(10)** and **(ii)** of the **Constitution** and **Section 50(1)(a)** and **5(b)(i)** of the **Prosecution's Act No. 2 of 2013**.

7. Further, they averred that the 1st and 2nd Respondents usurped the power of the 3rd Respondent by drafting and signing the charge sheet at **Matuu Police Station** which was only received by the 3rd Respondent when the 2nd Applicant was arraigned in Court. That the 1st, 2nd and 3rd Respondents violated the Applicants constitutional rights by subjecting them to an unlawful administrative process, compelling them to make confessions and admissions and that the 6th Respondent has interfered with the rights of the Applicants to ownership of the property.

8. The 1st, 2nd and 4th Respondents filed grounds of opposition where they stated that the grant of a conservatory order in the circumstances of the present dispute will render the Petition nugatory and severally injure the public interest which in this regard is the general health and welfare of the Kenyan people, and which requires recognition and protection by the State. That the impugned actions of the Respondents as outlined by the Applicants were reasonably undertaken in good faith and upon lawful and relevant grounds anchored upon the constitution and statute law, in particular **Article 46** of the **Constitution** and **Section 22(3)** of the **Anti-Counterfeit Act No. 13 of 2008**.

9. The 3rd Respondents filed grounds of opposition where it was stated that the Applicants had not demonstrated or disclosed any sufficient stake or interest in the apprehension that: unless the conservatory order is granted there is real danger and prejudice to them, any compelling reason that would give them *locus standi* to constitute the proceedings herein; they will suffer any appreciable injury that is directly or fairly traceable to the alleged apprehension and that the apprehended injury, if any will be remedied by the relief sought in the proceedings.

10. The 5th Respondent filed grounds of opposition where it stated that it was a stranger to the orders sought. That the application is premised on mere speculations, is misconceived and amounts to abuse of the Court process.

11. On the **27th day of July, 2018** the 5th Respondent filed a Notice of Motion seeking to be struck out of the proceedings on grounds that the claim in the Petition does not disclose any cause of action against it; and the joinder of the 5th Respondent is improper and misguided.

12. In an affidavit in support of the application the legal officer of the Agency (5th Respondent) **Jane Mugambi** deponed that: The 5th Respondent was not involved in the alleged unlawful removal, alienation and seizure of the goods from the Applicant's warehouse and godown located in **Matuu Kitui Towns**; as admitted the goods are not in its possession; It is not alleged that the 5th Respondent has violated the Applicants' constitutional rights; no substantial order has been sought against it; and no cause of action has been demonstrated against them.

13. When the application came up for directions parties entered into a consent where the claim against the 5th Respondent was struck out with no orders as to costs.

14. The application was canvassed by way of written submissions. It was submitted by **Mr. Ndegwa** for the Applicants that the Applicants' consumer rights gave them the right to benefit to the fullest, to economic interest therefore this called for preservation of the rights that are enshrined in the Constitution. He urged that by granting conservatory orders the fundamental rights of the Applicants will be protected and there is no response to release of the motor-vehicle which were not alleged to be contraband. That holding the motor-vehicles without any directions violates **Article 46** in respect to the economic interest of the Applicants.

15. In response, **Mr. Mukofu** who held brief for Counsel representing the 1st, 2nd and 4th Respondents stated that as a result of the raid and seizure conducted, the 2nd Applicant has been charged. The statement of offence discloses 2029 bags of sugar which cannot be held by a consumer therefore she must be a supplier and the goods seized are exhibits in a pending Criminal trial. That the motor-vehicle was used as a conveyance to ferry the exhibits therefore they are intended to be used as exhibits and in the Criminal Court they will be accorded rights of an Accused person and protected by the law.

16. **Mr. Mamba** for the 3rd Respondent submitted that the Applicants have not demonstrated that they are licenced. That there is nothing to show that they traded, exported or imported the goods. Regarding the motor-vehicles he urged that they had no knowledge of who owns the motor-vehicle and to whom they should be released. Further, that the motor-vehicles will be treated as exhibits by the 3rd Respondents therefore should not be released.

17. In response the Applicants' Counsel urged that issues of documentation will be subject matters of the Petition. That the allegation that the Criminal Case will be heard calls for preservation of the exhibits. That the Applicants are suppliers under the **Consumer Protection Act No. 46 of 2012** enacted under **Article 46** of the **Constitution** therefore their consumer rights should be protected. That there is no proof that the sugar is contraband and the motor-vehicles are not part of the charge.

18. I have considered the application, responses by the Respondents except the 5th Respondent where the allegations against it was struck out by consent, oral submissions made and the authorities cited.

19. In the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others Petition No. 16 of 2011 Musinga, J** (as he then was) stated that:

“..... At this stage a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory orders, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution.”

20. In the case of **Judicial Service Commission vs. Speaker of the National Assembly & Another (2013) eKLR** it was stated that:

“Conservatory orders are remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

21. The Supreme Court of Kenya defined conservatory orders in the case of **Gatirau Peter Munya vs. Dickson Kithinji8 & 2 Others eKLR SC. Application No. 5 of 2014:**

“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the applicants case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributed to the relevant causes.”

22. What amounts to a *prima facie* case was stated in the case of **Mrao Ltd vs. First American Bank of Kenya Ltd and 2 Others (2003) KLR 125** thus:

“I would say that in civil cases it is a case in which the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

23. It is urged by the Applicants that a conservatory order should issue to preserve goods seized from their premises because the seizure was done contrary to **Section 22** of the **Anti-Counterfeit Act No. 13 of 2008**. As a result of the act that resulted into the Applicants' goods being removed from their go-down in both Kitui and Matuu Towns, the 2nd Applicant was charged with the offence of offering for sale substandard goods contrary to **Section 9(2)** and **9(4)** as read with **Section 15** of the **Standards Act, Cap 496** in **Kithimani Magistrate Court No. 371 of 2018**, witnesses who are to testify in the matter are indicated as Kenya Bureau of Standards, DCI and others. It is also contended that officers who were in operation were not appointed and gazetted pursuant to **Section 22** of the **Anti-Counterfeit Act No. 13 of 2008**, which makes the seizure unlawful.

24. **Section 22** of the **Anti-Counterfeit Act (Act)** provides for appointment of Inspectors. The Board of the Anti-Counterfeit Agency is mandated to appoint Inspectors for purposes of enforcing the provisions of the Act whom it issues with certificates of authority to act. **Section 22(3)** of the **Act** provides:

“.... In addition to inspectors appointed under subsection (1) any member of the Board, police officer, Inspectors appointed under the stand Act (Cap 496) are hereby designated as Inspectors for purposes of this Act.”

25. The issue whether or not those who acted were appointed or designated can only be established when the Criminal trial takes place.

26. **Section 23** of the **Act** alluded to in **Paragraph 7** of the affidavit in support of the application provides thus:

“(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.”

Pursuant to the provisions bestowed upon the individuals who went to the premises of the Applicants they acted by seizing, removing goods and ultimately detaining them at a disclosed place. This was done upon reasonable suspicion which is permissible in law. Destruction or alienation of the goods is prohibited. It can only happen if authorized by an order of Court of a competent jurisdiction. Therefore the fact that these goods are exhibits to be produced in a Criminal trial is evidence that they cannot be destroyed unless ordered by a Court of Law. The question whether or not the place the goods are being detained is gazetted will be proved at trial. Whether or not the charge will stand will be subject of evidence to be adduced at trial. It is therefore premature for this Court to dismiss the case as a non-starter.

27. The inspection was carried out following reasonable suspicion and in a manner provided by the law therefore the issue of infringement or discrimination may not arise until the designated inspectors are proved otherwise.

28. It has also been argued pursuant to the provisions of **Article 46** of the **Constitution** that the Applicant's consumer rights gives them the right to benefit to the fullest ability, that their rights to economic interest should be protected. Ordinarily a consumer would be a person to whom particular goods are marketed in the ordinary course of business while a supplier would be a person who is in business of selling goods and includes an agent. The Applicants have pleaded that they are being refused to operate their shop and their licence has been revoked. Considering the quantity of goods seized they can only pass for suppliers. And this being the case, consumers who deal with them have a right to protection of their health, safety and even their economic interest. It is for this reason that the matter before the trial Court should be heard and determined.

29. Regarding release of the motor-vehicles, it has been stated that they are exhibits in the Criminal Case. Releasing them will be interfering with the case before the trial Court. It will therefore be advisable for the application for release of the motor-vehicle to be made before the trial Magistrate.

30. The upshot of the above is that the Applicant have failed to establish that if orders sought are not granted he will suffer prejudice. If it turns out that the Criminal charge is not proved against them they have the option of seeking compensation therefore there is no *prima facie* case established that requires issuance of the conservatory orders.

31. In the result, I decline to grant conservatory orders sought.

32. The costs shall be in the cause.

33. It is so ordered.

Dated, Signed and Delivered at Kitui this 28th day of August, 2018.

L. N. MUTENDE

JUDGE