



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 103 OF 2017

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 20, 21 (1), 22, 23 (1) (3), 24, 27, 28, 29(A), 31(A) (B) 39 & 40 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF NAIROBI CHIEF MAGISTRATES COURT CRIMINAL CASE NO. 308 OF 2017, (REPUBLIC VS BARLOWORLD LIMITED AND GEORGE NGUGI WAMBUI)

AND

IN THE MATTER OF SECTION 25 (3), 28, 32 AND 33 OF THE ANTI-COUNTERFEIT ACT, 2008

AND

IN THE MATTER OF SECTION 17 OF THE PATENTS REGISTRATION ACT CAP 508

BETWEEN

BARLOWORLD LIMITED.....PETITIONER

VERSUS

ANTI-COUNTERFEIT AGENCY.....1STRESPONDENT

MATCH MASTERS LIMITED.....2NDRESPONDENT

JUDGEMENT

The petitioners case

Briefly, the petitioner imported a consignment of Brand Safety Matches from India valued at Ksh. 6,000,000/=. The petitioner had obtained all the requisite approvals both in India and in Kenya to sell the said products locally.

However, on 19th November 2016, the first Respondent forcefully entered its premises at Kijabe street, in Nairobi and illegally seized the said consignment claiming they were counterfeits. The petitioner avers that it was not accorded a hearing nor were any reasons given for the seizure and that criminal case number CMCC NO. 308 of 2017 (R vs Barloworld Limited & George Ngugi Wambui) arising from the said seizure was instituted without a legitimate complaint.

As a consequence, the petitioner avers that the said acts contravened articles 21 (1), 22, 23 (1) (3), 24, 27, 28, 29 (a) (b) 39 & 40 of the constitution, hence the reliefs sought in the petition.

The first Respondents' Response

Casper Oluoch, a chief inspector with the first Respondent swore the Replying affidavit filed on 3rd May 2017. He reiterates the first Respondents' legal mandate to take action on counterfeit matters based on either formal complaint or *suo motto*.^[1] He averred that the issue at hand relates to determination of intellectual property rights and such rights have nothing to do with quality standards of goods.

He states that on 18th November 2016 in the company of a one **Grace Kamunge**, an Inspector at the first Respondent, they proceeded to the petitioners premises at Kijabe Street and pursuant to section **23 (1) (f)** of the Anti-Counterfeit Act^[2] declared the site a counterfeit goods depot *in situ* and secured the place and on 19th November 2017 when the goods were moved to secure place at Kyangobe. He also issued seizure notices and inventory. He notified the second Respondent of the seizure who in turn filed a formal complaint. To him, the acts complained of are lawful, therefore, the prosecution is lawful.

Submissions by the Petitioner's advocates

Counsel for the petitioner cited absence of evidence to support infringement of any trade mark or patent and that the second Respondent who is the alleged holder of the trade mark failed to participate in these proceedings despite being served. Counsel also cited degrading treatment, discrimination and infringement of property rights. In his supplementary submissions, counsel submitted that the law does not grant the first Respondent power to act arbitrarily and that the acts complained of violate article 40 of the constitution

Submissions by the First Respondents' advocates

Counsel for the first Respondent submitted that the petition is fatally defective in that it did not set out with a degree of reasonable precision the provisions of the constitution alleged to have been violated,^[3] that the petition is not supported by evidence and that the discretion of the first Respondent to investigate should be interfered with. Counsel also cited public interest as a justification for the action complained of. Counsel also insisted that the petitioner has no right to be supplied with documents in support of the seizure before the seizure.

Effect absence of the second Respondent from these proceedings

At the outset, I must point out that failure by the second Respondent who is alleged to be the complainant in the criminal case and on whose complaint the prosecution was mounted has left a serious gap in the first Respondents case. The second Respondent is the party whose patent or intellectual property right are alleged to have been violated. He is the one whose goods are alleged to have been counterfeited. Thus, its presence in these proceedings was absolutely necessary for the just determination of this case. He was served on 4 April 2017 as evidenced by the affidavit of service filed on 7th April 2017 but did not appear or file a Response. I cannot comprehend how the first Respondent hoped to convince the court on the issues at hand in absence of the alleged complainants evidence.

The first Respondent made no effort to secure an affidavit from the second Respondent at least to support the allegations in support of the alleged charges and persuade the court that the prosecution is founded on sound factual basis. Worse still, the first Respondent did not avail a search to demonstrate the alleged

owner of the alleged trade mark or to establish whose goods were counterfeited. There is no evidence of the genuine goods to judge whether the petitioners were truly counterfeits. This raises a fundamental question, that is whether or not the prosecution is founded on sound legal basis, and whether the seizure and prosecution is well grounded on law and facts for the court to allow the prosecution to proceed.

Was the seizure and prosecution founded on any legal/factual basis?

The basic principle is that it is for the prosecution, not the court, to decide whether a prosecution should be commenced and, if commenced, whether it should continue. In *Environment Agency v Stanford*,^[4] Lord Bingham LCJ said:-

"The jurisdiction to stay, as has been repeatedly explained, is one to be exercised with the greatest caution ... The question of whether or not to prosecute is for the prosecutor....."

Whereas the provisions cited by the first Respondent clearly state the mandate of the Anti-Counterfeit Agency, and that they **have a duty to investigate any complaint once a complaint is made or act *suo motto* and whereas they would be failing in their legal mandate to detect and prevent crimes under the act, the courts have an overriding duty to promote justice and prevent injustice.** From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of the petitioners fundamental rights.

Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case.^[5] Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. I am afraid, from the material before me, there is nothing to show that the actions by the first Respondent were based on sound legal basis.

As stated above, if the search, arrest, impounding of the goods and prosecution were premised on a complaint by the second Respondent, then one wonders why the complaint was not placed before this court to confirm that truly, the first Respondents actions were founded on a proper factual basis. Such details would at least demonstrate that genuine goods owned or handled by the second Respondent, the nature of infringement and why the impounded goods were counterfeits, any registered trademarks/patents, origin of the genuine goods, or any material to support the allegation that the impounded goods were not counterfeit.

I note from the Replying affidavit at paragraph 11 the deponent talks of notifying "the **prospective** complainant of the seizure "implying that the complainant was being brought into the picture after the seizure by being required to lay a formal complaint."

Details of the genuine goods and why the seized goods were absolutely necessary to establish the factual basis of the prosecution and leave it to the trial court to determine the rest. As matters stand now, it is evident that the seizure, arrest and prosecution were mounted without any proper factual basis, hence the same is unfair, wrong, baseless or an abuse of statutory mandate of the first Respondent and abuse of judicial process.

The law enjoins the DPP to be scrupulously fair to an alleged offender and to ensure fair investigation and fair trial and also to ensure that the citizens constitutional and fundamental rights are not violated. It is the duty of the courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments into these rights.^[6] A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose.^[7] Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.^[8]

The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, tends to undermine the confidence of the community in the criminal justice system.

It is settled law that the Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation.^[9] A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious. The machinery of criminal justice cannot be allowed to become a tool for the police to violate constitutional rights of citizens^[10] The invocation of the criminal law, in unsuitable circumstances or for the wrong ends must be stopped and this court has the mandate to stop such proceedings.

In the instant case, the criminal prosecution is in my view tainted with ulterior motives, namely, to curtail the rights of the petitioner. It would be a travesty to justice, a sad day for justice system should the criminal process be allowed to be used to stifle fundamental rights and freedoms guaranteed under the constitution.

I am aware that the inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.^[11] The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is clear breach of fundamental rights. As observed above.

In *Joram Mwenda Guantai vs. The Chief Magistrate*,^[12] the Court of Appeal held *inter alia* that the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court if he is a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.^[13] The circumstances enumerated above leave this court with no doubt that the first Respondent acted in a truly oppressive manner, in total violation of the constitution and in clear abuse of criminal process.

Where the prosecution is an abuse of the process of court, as is evidently in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court.^[14]

A criminal prosecution can also be stopped if it was commenced in the absence of proper factual foundation. As stated above, there is nothing to suggest that there was proper factual foundation in undertaking the prosecution in question.^[15] There was no reasonable basis to institute the investigations and the prosecution, at least from the evidence before the court.

Whether the prosecution is in public interest.

It has never been the rule in this country that suspected criminal offences must automatically be the subject of prosecution. A significant consideration is whether the prosecution is in the public interest. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue those cases worthy of prosecution. The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. The circumstances surrounding the institution of the criminal case as enumerated above do not suggest the prosecution was undertaken in public interest.

Determination

It is my view that the petitioner has demonstrated that the prosecution in question is unfair, unfounded and premised on ulterior motives. The petitioner has also demonstrated that its constitutional rights have been or will be infringed if the prosecution proceeds. The trial is an abuse of court process. It will inherently violate petitioners rights to a fair trial and Right to property as enshrined in the constitution.

I find that this petition has merits. Consequently, I allow this petition and issue the following orders/declarations:-

- a) **A declaration** be and is hereby issued that the first Respondents' action of seizing the petitioners goods on 18th November 2016 and detaining the same was effected without any factual/legal basis, consequently the same is illegal, null and void for all purposes.
- b) **A declaration** be and is hereby issued that the decision to seize and detain the petitioners aforesaid goods and to mount criminal charges against the petitioner and a one **George Ngugi Wambui** was undertaken without any factual basis and was a flagrant abuse of powers conferred upon the first Respondent by the law and amounted abuse of statutory and judicial process, hence unconstitutional.
- c) **An order of certiorari** be and is hereby issued to bring into this honourble court the proceedings in Nairobi -Milimani Chief Magistrates Criminal Case Number **308** of **2017**-(Republic vs George Ngugi Wambui) for purposes of being quashed.
- d) **An order of stay** be and is hereby issued **permanently staying** the proceedings against the petitioner and the said **George Ngugi Wambui** in Nairobi, Milimani Chief Magistrates Criminal Case Number **308** of **2017** (**Republic vs George Ngugi Wambui.**).
- e) **An order of prohibition** be and is hereby issued prohibiting the Respondents or any person acting for and on their behalf from further prosecuting or proceeding with the Chief Magistrates' Criminal case number **308** of **2017**-Milimani-(**Republic vs. George Ngugi Wambui**).
- f) **That** the first petitioner shall bear the costs of this petition..

Orders accordingly

Signed, Dated, Delivered at Nairobi this **28th** day of **June** 2017

John M. Mativo

Judge

[1] See section 33 of the Anti-Counterfeit Act, No. 13 of 2008

[2] Ibid

[3] Counsel cited several authorities among them Anarita Karimi Njeru vs Republic Misc App No. 4 of 1979, Mumo Matemu vs Truste Society of Human Rights Alliance & 5 Others C.A. No. 290 of 2012

[4] {1998} C.O.D. 373, DC

[5] *Hui Chi-Ming v R* [1992] 1 A.C. 34, PC

[6] Bradley J. in *Edward A. Boyd and George H. Boyd v. Unites States* (1884) 116 U.S. 616

[7] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001

[8] Ibid

[9] Kuria & 3 Others vs. Attorney General{[2002} 2 KLR 69

[10] Ibid

[11] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[12] Nairobi Civil Appeal No. 228 of 2003 {2007} 2 EA 170

[13] Ibid

[14] Ibid

[15] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001