



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 35 OF 2014**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE HON. V. J. YATOR ..... RESPONDENT**

**AND**

**1. DIRECTOR OF PUBLIC  
PROSECUTIONS**

**2. MUMIAS SUGAR COMPANY LIMITED .....INTERESTED  
PARTIES**

**EX PARTE ABDI SAMAD IBRAHIM HUSSEIN..... APPLICANTS**

**JUDGMENT**

**INTRODUCTION**

The ex parte applicant was charged in the Chief Magistrate's Court Criminal Case No. 64 of 2008 with two counts, respectively, for being in possession of uncustomed goods contrary to section 200 (d) (iii) of the East African Community Customs Management Act and for being in possession of counterfeit goods contrary to section of 32(a) of Anti-counterfeit Act No. 13 of 2003, as follows:

**“CHARGE SHEET DATED 7.2.2014**

**ABDI SAMAD IBRAHIM HUSSEIN**

***BEING IN POSSESSION OF UNCUSTOMED GOODS CONTRARY TO SECTION 200 (D) (III) OF THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT 2004.***

**PARTICULARS OF OFFENCE**

**ABDI SAMAD IBRAHIM HUSSEIN**

***On the 1st day of February 2014 at Bondeni area in Mombasa township within Mombasa County was found being in possession of uncustomed goods namely 278 bags of sugar valued at Kshs.1,112,000/= (On Million One Hundred and Twelve Thousand).***

## COUNT TWO

### ABDI SAMAD IBRAHIM HUSSEIN

*BEING IN POSSESSION OF COUNTERFEIT GOODS CONTRARY TO SECTION 32 (a) AS READ WITH SECTION 35 (1) (A) OF THE ANTI COUNTERFEIT ACT 13/2008.*

### PARTICULARS OF OFFENCE ABDI SAMAD IBRAHIM HUSSEIN

*On the 1st day of February 2014 at Bondeni area in Mombasa township within Mombasa County was found being in possession of 278 bags of sugar of counterfeit goods purported to be Mumias sugar valued at Kshs.1,112,000/= (One Million One Hundred and Twelve Thousand)."*

In her judgment dated 1<sup>st</sup> July 2014, the learned magistrate acquitted the ex parte applicant of the possession of counterfeit goods and held that:

*"I conclude that from the physiological appearance of the bags, the bags used to pack the sugar were counterfeit. The question then arises **was the accused person responsible for counterfeiting?** During the seizure by the officers from Kenya Sugar Board, some copies of documents were handed over to the officers who forwarded the same to Mumias Sugar company for verification, the same were not controverted as not being genuine, no document examiner was called to controvert the same as being fake, the prosecution ignored to establish the relationship between the Bondeni go down and Muliki Traders in Ola, PW1 and PW3 stated that when they visited Bondeni go down, they did not witness any repackaging being done, the visit was abrupt and if the accused was involved in repackaging or manufacturing then the officers would have found him. No officer was called from Mumias Sugar Go down was called to deny that the sugar was not obtained from their Go down. I take judicial notice that in the recent past there have been complaints of Mumias Sugar Company dealing with cheap imports in fact PW4 confirmed to court that the Chief Executive Officer one Mr. Kibatia had been sent on compulsory leave with regard to illegal sugar importation. It can only be inferred that Mumias Sugar sells counterfeit sugar to its customers or the sugar seized is one of the repackaged cheap imports. To that extent I find that the prosecution has failed to prove that the accused person was responsible for counterfeiting by any means of the actions stated in the definition of counterfeiting as defined in section 2 of the Anti-counterfeit Act.*

***For the above reasons cited, I find that the prosecution has failed to prove beyond reasonable doubt that the accused person was responsible for counterfeiting of the sugar seized and acquit the accused under section 215 CPC of the offence of being in possession of counterfeit goods contrary to section 32 (a) as read with section 35 (1) (a) of the Anti-counterfeit Act No. 13 of 2008."***

Following the delivery of the Judgment on 1<sup>st</sup> July 2014, the trial court made the following order, which gave rise to the judicial proceedings before the Court:

***"Owing to the observation made by the court pursuant to section 28(3) of the Anti-counterfeit Act NO. 13/2008, the 278 bags are hereby forfeited to the government for destruction after expiry of 14 days. Right of Appeal 14 days."***

In her Judgment, while considering the issue whether sugar board agents are gazetted inspectors as per the provisions of section 22 of the Anti-counterfeit Act, No. 13 of 2008, the learned magistrate had found that

***"However, whether officers were gazetted or not, it does not prevent the court from making observation as to goods which appear counterfeit as per section 28 (3) of the Anti-counterfeit Act No. 13 of 2008."***

## **THE APPLICATION**

By Notice of Motion dated 10<sup>th</sup> July 2014 upon leave of court granted on 9<sup>th</sup> July 2014, the ex parte applicant sought relief set out in the Statement as follows:

- a. ***An order of certiorari to issue to remove to this Honourable court for purposes of quashing forthwith the Order of forfeiture of 278 bags of sugar to the Government and destruction of the said bags of sugar after expiry of fourteen (14) days form 1st of July, 2014 and other subsequent Orders in CMC Criminal Case No. PCR 64 OF 2014.***
- b. **Costs.**

The Grounds upon which the relief was sought were set out in the Statement as follows:

### **“GROUNDS UPON WHICH THE RELIEFS ARE SOUGHT**

- *The applicant was an accused in Criminal Case NO. 64 of 2014 but was acquitted of the two (2) counts of being in possession of un-customed goods and counterfeit goods;*
- *That pursuant to his acquittal the court ought to have returned the exhibits to him having found that he had genuinely purchased them from Mumias Sugar Company Limited;*
- *There was no evidence produced that the actual sugar in the 278 bags was counterfeit to warrant its forfeiture and destruction;*
- *The court having found the process of sampling to have been unfair then the sugar could not be forfeited and/or destroyed;*
- *That the court having found the receipts which the applicant had for the 278 bags of sugar came from Mumias Sugar Company Limited then it could not issue orders for forfeiture and destruction as that is contrary to the evidence on record.*
- *That the Orders by a Magistrate in Criminal case No. 64 of 2014 are a nullity in law and are not based on any evidence.*
- *That the applicant having been acquitted the only remedy he has is not to appeal but to file judicial review as the Orders issued for forfeiture and destruction are in violation of the law.*
- *Further proceedings in the subordinate court are likely to cause serious financial loss to a tune of over Kenya shillings one million two hundred thousand [Kshs.1,200,000/=] only being the value of the sugar to be destroyed and which sugar was lawfully bought from Mumias Sugar Company Limited who have offered themselves to-destroy it which is contrary to the law.*
- *The court acted without jurisdiction in granting orders for forfeiture and destruction which were contrary to the court's finding that the applicant was not guilty.*
- *That the Order granting Mumias Sugar Company Limited authority to destroy the sugar is contrary to the constitution.*
- *It is just to grant the Orders.”*

## **RESPONSES**

The Respondent did not file any response to the application. The 1<sup>st</sup> Interested Party filed Grounds of Opposition dated 26<sup>th</sup> August 2014 and for the 2<sup>nd</sup> Interested Party a Replying affidavit was filed by its Legal Officer Amuhaya Barasa on 12<sup>th</sup> August 2014.

## **SUBMISSIONS**

Counsel for the parties M/S Mogaka Omwenga & Mabeya Adocates for the ex parte applicants, Mr. Jami Yamina Principal Prosecution Counsel for the 1<sup>st</sup> Interested Party and M/S M. Ananda & Co. Advocates for the 2<sup>nd</sup> Interested Party [No submissions were filed for the Respondent] filed written submissions and judgment was reserved.

In brief, the applicant’s case was that the trial court had no jurisdiction to grant the orders of forfeiture and destruction of the goods having found the applicant not guilty of possession of counterfeit goods and

having found only the sacks, as opposed to the sugar itself, to be counterfeit. Counsel summarized the applicant's contentions as follows:

*“14. **Your Honour**, the basis of the Exparte Applicant requesting for the Oder for Certiorari to quashing the Honourable respondent's Orders are as follows:*

- *The Exparte Applicant was acquitted of the two [2] counts he had been charged of;*
- *The goods forfeited were lawfully purchased from the Go-down of the 2nd Interested Party;*
- *If any offence of counterfeiting was committed then it was done by the 2nd Interested Party;*
- *The Sugar in the bags was not found to have been counterfeit save for the “**bags**” which were found to have been **counterfeited by the 2nd Interested Party**;*
- *The Orders for forfeiture and destruction of 278 bags of sugar were a nullity and were not based on any evidence at all;*
- *The Honourable Respondent acted contrary to the evidence produced and hence contrary to the law by giving of the Order;*
- *The complainant ought to have been charged with the offence of counterfeiting but not the Exparte Applicant;*
- *The Respondent acted contrary to the Constitution in giving the 2nd Interested Party leave to facilitate the destruction of the sugar which they had sold to the Exparte Applicant and hence contrary to the Provisions of the Constitution.”*

For the 1<sup>st</sup> Interested Party, it was urged that the trial court had jurisdiction under section 28(3) of the Anti-counterfeit Act to make the order for forfeiture and destruction of goods.

The 2<sup>nd</sup> Interested party contended that the applicant ought to have appealed from the decision of the trial court which exercised a discretion, setting aside of which depends on clear principles set out in **Mbogo v. Shah** (1968) EA 93; and “it has not been shown that such exercise was done illegally or the court abused its discretion but the court exercised its discretion properly and there is no miscarriage of justice.”

### **ISSUE FOR DETERMINATION**

These judicial review proceedings are not an appeal from the decision of the learned trial magistrate. The only valid issue before the court would be whether the learned magistrate has jurisdiction and discretion to direct the forfeiture and destruction of the goods the subject of these proceedings.

### **DETERMINATION**

Although I subscribe to the view that non-exhaustion of alternative remedies is no bar to judicial review, where an application requires a reconsideration of the matter on the merits, judicial review would be ill-suited as it only deal with the process of decision making rather than the merit of the decision itself. Where the decision itself is sought to be challenged, the proper procedure should be appeal on the merits. I have, respectfully, noted the decisions of Odunga, J. in **Jacinta Wanjiru Raphael v. William Nangulu-DCIO, Makadara & 2 Ors.**, [2014] eKLR and **AG v. Inspector General of Police & ANor. ex p. Raphael Mungai Goko Nginya** [2014] eKLR to the same result but differently reasoned that the judicial review process is a remedy of last resort.

As held in the Court of Appeal decision in **Commissioner of Lands v. Kunste Hotel Ltd.** (1995-98) EA 1, judicial review proceedings are not concerned with the merit of the challenged decision but with the decision making process. This position has been followed in subsequent decisions including recent **Makupa Transit Shade Ltd & Anor. v Kenya Ports Authority** [2015] eKLR of 12<sup>th</sup> March 2015, where the court (Okwengu, Makhandia and Sichale, JJA.) on an application by the applicant for mandamus directing the respondent to grant it a lease on a property said:

*“Finally, though the Public Procurement and Disposal Act was in force in year 2008, they are indirectly inviting the court to consider the merits of the refusal yet judicial review only concerns itself with the process of reaching a decision and not its merits. It should also be*

noted, that judicial review cannot be used to assert private law, the very issues the appellants are attempting to do by trying to force a crystallization of the 2002 negotiations into a formal lease agreement. In **Commissioner of Lands v. Kunste Hotel Limited** (1997) eKLR this court held that:

***“But it must be remembered that judicial review is concerned not with private rights or merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he is subjected.”***

*Finally, we would observe that judicial review jurisdiction is a special jurisdiction that is neither criminal nor civil. It operates within narrow confines of the Law Reform Act and Order 53 of the Civil Procedure Rules. As it is narrow it should never be mixed or combined with other jurisdictions.”*

With respect, the ex parte applicant herein is not only seeking to pursue through judicial review his private law interest in the ownership of the alleged counterfeit sugar but in addition also seeks to have the court consider the merit of the decision to forfeit the sugar and set it aside. That in my view is the province of an appeal court not judicial review court. I do not agree with the submission by counsel for the applicant that having been acquitted of the charges, the ex parte applicant is unable in law to appeal the decision to forfeit the goods made by the trial court upon the judgment. In the grounds upon which the relief is sought, the ex parte applicant urges that –

*“vii. That the applicant having been acquitted the only remedy he has is not to appeal but to file judicial review as the Orders issued for forfeiture and destruction are in violation of the law.”*

Section 28 of the Anti-counterfeit Act No. 13 of 2008 is in the following terms:

**“28. RELEASE OF SEIZED GOODS**

- 1. Where any goods are seized and detained under section 23, they shall be returned, less any portion thereof which has been reasonably utilized for the purpose of any test or analysis, to the person from whom they were seized within a period of three months after the date of seizure unless, within such period, some person is charged with an offence under this Act and it is alleged that such offence was committed in relation to or in connection with such goods.*
- 2. Where a prosecution for an offence under this Act is commenced within the period mentioned in subsection (1), and any person is evicted of that offence, the court which made the conviction may order that any goods seized and detained in relation to or in connection with which such offence was committed shall be forfeited to the Government for destruction at the expense of the person so convicted.*
- 3. **The court before which a person is charged with an offence under this Act shall, whether such person is convicted of the offence or not, order that any goods in his possession which appear to the court to be counterfeit goods or to be tools used or intended to be used for making counterfeit goods, be destroyed or otherwise dealt with as the court may deem appropriate.***
- 4. Where a person charged with an offence under this Act absconds and does not appear in court or where counterfeit goods are seized but are not claimed an inspector may apply to have the counterfeit goods forfeited to the State for destruction.” [underlining mine]*

Under section 350 of the Criminal Procedure Code an appellant may appeal from any order of the trial court:

***“350. (1) An appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every petition shall (unless the High Court otherwise directs) be accompanied by a copy of the judgment or order appealed against.”***

Section 354 (3) of the Criminal Procedure Code empowers the court on appeal from a criminal case to make the several orders set out in the section as follows:

*“354. (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -*

*(a) in an appeal from a conviction -*

*(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or*

*(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or*

*(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;*

*(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;*

*(c) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as the High Court may think fit;*

***(d) in an appeal from any other order, alter or reverse the order,***

***and in any case may make any amendment or any consequential or incidental order that may appear just and proper.***

The principles upon which an appellate court will interfere with the exercise of discretion by a trial court are well settled following the statement of Newbold, P. in the case of ***Mbogo v. Shah*** (1968) KLR 93, that –

***“A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and has as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.”***

Even if this Court were sitting on appeal it would not have interfered with the exercise of discretion by the trial Court. It appears to me however, that the power granted by section 28 (3) of the Anti-counterfeit Act is more than a discretion; it rather a duty to order destruction of the goods, if the circumstances set out in the section exist. The trial court herein was therefore under a duty, rather than discretion, to order that the goods that appeared to the court to be counterfeit goods to be destroyed or otherwise dealt with as the court deems appropriate. Under section 28 (3) of the Act, the power to order destruction of goods crystallizes upon a determination by the court that the goods in possession of an accused person “*appear to the court to be counterfeit goods or to be tools used or intended to be used for making counterfeit goods*”.

The court was further asked to find that there was no evidence to support the exercise of the power to destroy the goods under section 28 (3) of the Act and that the trial court’s decision was therefore a

nullity. This is truly the central plank of the ex parte applicant's case summed up in the submissions as follows:

*“Lastly Your Honour, it is our submission that this matter the orders sought ought to be granted because the respondent issued orders for forfeiture and destruction of the 278 bags of sugar without having found that the ex parte applicant was an offender and more importantly without any finding that the sugar was counterfeit and hence the courts order for forfeiture and destruction were granted illegally and hence procedural impropriety by failure by the respondent giving an order were an illegality and in very irrational manner and in hence there was irrationality on the part of the respondent and finally there was procedural impropriety by failure by the respondent giving an order was affecting the ex parte applicant unfairly in that he bought the sugar from the complainant [2<sup>nd</sup> Interested Party] was granted permission to destroy the sugar, where as the ex parte applicant was being affected the order and that 2<sup>nd</sup> Interested Party was not being penalized at all and it is the one who had sold the sugar to the ex parte applicant.” (sic)*

While the above submission makes a spirited pitch for the grounds for the grant of judicial review orders on the grounds of illegality, irrationality and procedural impropriety, it is quite clear from the application that it contends that there is no evidence to support the order for forfeiture. Hence reference to ***Mwasi v. Republic*** [1989] KLR 544 where Bosire and Githinji, JJ held that:

*“Forfeiture is a penalty. However, it can only be treated as a penalty where the **evidence** clearly shows that the property forfeited belongs to the accused.”*

For this court to make such a determination as to the sufficiency of evidence to justify the forfeiture and destruction order, or otherwise, it would have to go into the merits of the case and examine the evidence presented before the trial court. Indeed, it would appear, in facilitating the court for this task, the applicant attached to his application a record of the handwritten proceedings, the typed judgment and the handwritten order for forfeiture and destruction of the goods. As discussed earlier such the task of evaluation of evidence on the merits cannot be asked of a Judicial Review court.

Without prejudicing the court that may eventually hear the appeal on the matter, I am not prepared to hold on the examination of the documents before me that the facts before the court did not warrant the decision reached by the court in holding that *“I conclude that from the physiological appearance of the bags, the bags used to pack the sugar were counterfeit”* and that there was no evidence for the corollary that the goods were counterfeit. Or that the decision was plainly wrong.

If the ex parte applicant's argument that if there was counterfeiting it was done by the 2<sup>nd</sup> respondent is correct, the sugar remains counterfeit only the guilty party is different, the 2<sup>nd</sup> Interested party rather than the ex parte applicant. The trial court would still have power under section 28 (3) of the Counterfeit Act. For the question whether, in terms of the section, the court is satisfied, or, as the ex parte applicant would have it, there was evidence, that the sugar - as distinguished from the bags in which it was packed ***“appear to the court to be counterfeit goods”*** is a matter of evidence for determination by the trial court and the High Court exercising its appellate rather than judicial review jurisdiction.

## **ORDERS**

Accordingly for the reasons set out above, the Notice of Motion dated 10<sup>th</sup> July 2014 is declined with costs.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF MARCH 2015.**

**M. MUYA**

**JUDGE**

In the presence of: -

Mr. Omwenga for the Applicant

Mr. Jami for the Respondent and the 1<sup>st</sup> Interested Party

Mr. Ananda for the 2<sup>nd</sup> Interested Party

Mr. Musundi - Court Assistant