



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW MISC. NO. 273 OF 2015**

**IN THE MATTER OF SECTION 25(3) ANTI COUNTERFEIT ACT**

**AND**

**IN THE MATTER OF CHIEF MAGISTRATE'S COURT MISC. CRIMINAL APPLICATION  
NO. 1457 OF 2015**

**AND**

**AND IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF  
JUDICIAL REVIEW IN THE NATURE OF MANDAMUS, CERTIORARI AND PROHIBITION**

**KENAFRIC INDUSTRIES LIMITED.....1<sup>ST</sup> APPLICANT**

**MIKUL N. SHAH.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**ANTI-COUNTERFEIT AGENCY .....1<sup>ST</sup> RESPONDENT**

**CHIEF MAGISTRATE'S COURT NAIROBI.....2<sup>ND</sup> RESPONDENT**

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

**PAUL RAMARA.....INTERESTED PARTY**

**RULING**

1. By a Chamber Summons dated 21<sup>st</sup> August, 2015, the applicants herein, **KenafriC Industries Limited** and **Mikul N. Shah** sought the following orders:

1. That this honourable court be pleased to certify this matter urgent and direct that the same be heard Ex parte in the first instance during the current court vacation

2. That this honourable Court be pleased to grant leave to the Applicant to file an application for judicial review seeking the following orders:-

a. An order of Certiorari to bring into the High Court for purposes of being quashed the decision of the Chief Magistrate in Misc. Criminal Application No. 1457 of 2015 Ex parte made on 14/8/2015 and all consequential orders and acts.

b. An order of prohibition restraining the 1<sup>st</sup> Respondent from entering into the premises of Kenafric Industries Limited searching, impounding or seizing exercise books, materials for making exercise books and stationary manufactured by the Applicant under its Trade Marks registered with the Kenya Industrial Property Institute and Registrar of Trade Marks.

c. An order of prohibition restraining the Respondent from entering into the premises of Kenafric Industries Ltd, its suppliers, distributors or agents and searching, impounding or seizing rubber footwear products manufactured under the Applicants Trade Name FUMA and the Applicant Registered Trade Marks and materials for manufacturing the said products.

d. An order of Mandamus directed at and compelling the 1<sup>st</sup> Respondent and the Interested Party and any person who has an issue with the Applicant use of the Trade Name FUMA in its stationary, foodstuff, confectionery and footwear business and the usage of the Applicant's Trade Marks to lodge a formal dispute with the Kenya Industrial Property Institute, industrial Property Tribunal and/or any other body or organization established to resolve Intellectual Property Disputes.

e. An order of Prohibition restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from receiving, entering, proceeding with or in any manner dealing with the complaint on the usage by the Applicant of the Trade Name FUMA on its goods manufactured under the foodstuff, confectionery, stationary and footwear brands and its Registered Trade Marks

f. An order of Certiorari to bring into the High Court for purposes of being quashed the notice requiring the 2<sup>nd</sup> Applicant to appear in Court on 25/8/2015 or any other day.

g. An order of Mandamus to compel the Respondents to return the Applicant's goods collected from the premises of Kenafric Industries Ltd and more specifically set out in the inventory of seized goods No. 0598 dated 14/8/2015 and pay such damages as the Court shall deem just in the circumstances of this case.

h. Such further and other reliefs as this Honourable Court may deem just and expedient to grant.

3. That the leave so granted does operate as stay of implantation, enforcement and/or execution of the decision of the Respondent decision to and specially:-

a. Restrain the 1<sup>st</sup> Respondent by themselves, servants, agents or otherwise at all from entering remaining or otherwise seizing impounding collecting or in any way dealing with Applicant goods manufactured under its Trade Name and Marks.

b. Staying the prosecution of the Directors of the Applicant, its employees or any other persons in connection with the goods manufactured by the Applicant under its Trade Names and Registered Trade Marks.

c. Staying the decision of the 2<sup>nd</sup> Respondent to search the premises of the Applicant pursuant to the Ex parte application of the 2<sup>st</sup> Respondent dated 11/8/2015.

4. That costs of and incidentals to this application be provided for.

2. On 24<sup>th</sup> August, 2015 I granted leave to the applicants to commence judicial review proceedings and as the prayer seeking that the leave so granted operate as a stay was opposed, I directed pursuant to the provisions of Order 53 rule 1(4) of the **Civil Procedure Rules** that the said limb be heard *inter partes*. It is therefore the determination of the same that is the subject of this ruling.

3. According to the applicants on 13<sup>th</sup> August, 2015, at about 5 pm, agents, inspectors and/or employees of the 1<sup>st</sup> Respondent in the company of the interested party descended upon the 1<sup>st</sup> applicant's premises and demanded to check the same for goods in the name of Puma a demand the 2<sup>nd</sup> Respondent declined to comply with due to the fact that it was late and he had not been served with any Court order directing the said search and entry. Consequently, the 2<sup>nd</sup> applicant was arrested, taken to Ruaraka Police Station and charged with the offence of obstruction and bonded to appear in Court on 25<sup>th</sup> August, 2015.

4. The following day the said agents appeared before the 2<sup>nd</sup> Respondent in an *ex parte* application and obtained orders for entry and search of the applicant's premises. Armed therewith, they invaded the industrial premises of the applicant and carted away the applicants' goods which goods the applicants contended were incapable of infringing the trade mark Puma which was the basis upon which the said order was obtained.

5. It was the applicants' position that the said actions were contrary to law and were only aimed at aiding the interested party in his attempt to stifle fair competition and clog the trading and manufacturing process of the applicants. It was contended that the applicants intend to suffer grave harm and prejudice and will be unable to meet its financial obligations and eventually close business in the face of oppressive demands by the Respondents.

6. In his submissions relevant to the issue of stay, **Mr Mogeni** learned counsel for the applicants contended that the applicants were challenging the continuing acts of the Respondents including the decision to require the 2<sup>nd</sup> applicant to appear before the Court in respect of the said charge of obstruction, an action which would mean that the applicants' rights would have been violated without recourse. It was submitted that since the applicant's goods do not infringe the trademark of Puma, the order obtained was being abused and if left to continue and would result in adverse effects on the applicants' manufactured goods.

7. On behalf of the 1<sup>st</sup> Respondent, the prayer for stay was opposed by **Mr Adera**. According to him, the order sought was substantive in nature and not just a stay. It was further submitted that the order sought was speculative in nature as there was no evidence that the Respondents intended to go back to the applicants' premises. Since the application was seeking to restrain the respondents from interfering with the applicants' manufactured goods, it was contended that the order sought had no legal basis. It was contended that the stay as sought in prayer 3(c) had been overtaken by the events and since Courts do not act in vain, the same was incapable of being granted since the warrants were now spent.

8. On the intended prosecution it was submitted that what was sought in the stay was not the same order sought in the substantive application. In learned counsel's view, what was taking place was a process of investigation and not a prosecution and that the bond was related to an obstruction rather than infringement of the trade mark.

9. On behalf of the 2<sup>nd</sup> Respondent **Miss Odhiambo** while associating herself with the submissions of **Mr Adera**, submitted that the applicant had not proved that he stood to suffer irreparable damage if the stay sought was not granted. It was submitted that there was no prosecution in the offing against the applicants and that instead what was imminent was an obstruction charge hence there was no need to grant the stay sought. With respect to prayer (c) it was similarly contended that the same had been overtaken by the events as the search had already been conducted.

10. **Miss Spira**, learned counsel for the 3<sup>rd</sup> Respondent while similarly associating herself with the submissions made by **Mr Adera** reiterated that as the matter was under investigation by the 1<sup>st</sup> Respondent, the Respondents acted within their mandate and ought to be permitted to continue with the same to their logical conclusion.

11. **Mr Okoth** learned counsel for the interested party similarly associated himself with the submissions made by **Mr Adera** and added that the grant of the stay sought would not be in the public interest since the investigations in question ought to be allowed to be completed. Apart from that there are clear

remedies provided under the Act which ought to be resorted to instead of the same issues being determined in these proceedings.

12. In his rejoinder **Mr Mogeni** submitted that the applicants were not seeking an order staying the investigations. In his view since the respondents were still attempting to conduct searches the issues were still alive and had not been overtaken by the events as alleged.

### **Determination**

13. I have considered the application, the affidavits filed herein and the submissions made by the parties and this is the view I form of the issues raised herein.

14. Leave having been granted to commence judicial review proceedings proper, this ruling is limited to the direction whether that leave ought to operate as a stay of the decision in question.

15. Order 53 Rule 1(4) of the **Civil Procedure Rules** provides:

***The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.*** [Emphasis mine].

16. In my view “proceedings in question” refer to the proceedings in respect of which leave is sought. In this case prayer 3(a) substantially seeks the stay of the orders sought to be quashed. It is therefore a competent prayer. Prayer 3(b) on the other hand seeks stay of the prosecution of *inter alia* the applicants’ directors’ actions in connection with the goods manufactured by the applicants. A look at the prayers sought in the application for leave does not however seem to refer to the said prosecution hence no leave is sought in that direction. Perhaps the reason why such an order has not been sought is that no decision to prosecute on the strength of the seized goods has been made and to seek such an order would have been speculative. Prayer 3(c) is said to have been spent. However the applicants believe that what is sought to be stayed is still ongoing. Where, the decision sought to be stayed has been implemented leave ought not to operate as a stay since in that case there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

17. Therefore as in this case, the applicants contend that the actions complained of are capable of being continued with, it is my view that the said prayer is similarly competent.

18. However even where the leave is granted, it was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous.

19. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review proceedings nugatory or an academic exercise that the Court is entitled to stay the said proceedings the strength or otherwise of the applicant’s case notwithstanding.

20. Maraga, J (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

**“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction...In judicial review applications the Court should always ensure that the *ex parte* applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never**

**be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act...A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”**

21. Therefore it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings. It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.

22. In this case prayers 3(a) and (c) seek to restrain the Respondents from undertaking their investigatory powers. It is argued by the applicant that the said action is likely to bring the applicant’s business to a halt. In my view the decision by a Court to halt investigations from being conducted ought to be exercised very cautiously and in very clear cases where the Court is satisfied that the continued investigations are likely render the proceedings before it an academic exercise. In other words the Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. It is upon the *ex parte* applicant to satisfy the Court that the discretion given to the relevant authorities to investigate allegations of commission a criminal offence ought to be interfered with. The word “investigate” is defined in the *Black’s Law Dictionary 9<sup>th</sup> Edition* as: “*To inquire into a matter systematically; to make an official inquiry.*”

23. It is trite that the Court ought not to usurp the Constitutional mandate of the 1<sup>st</sup> Respondent to investigate any matter that, in the 1<sup>st</sup> Respondent’s view raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the 1<sup>st</sup> Respondent since the purpose of a criminal investigations conducted *bona fide* is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid. It must always be noted that judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence to the complaint is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken *bona fides* since that defence is open to the applicant to bring to the attention of the investigators in the course of the conduct of the investigations.

24. However, if the applicants demonstrate that the investigations that the Respondents intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such investigations since investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are given to the Respondents.

25. The duty and mandate given to investigatory authorities was appreciated in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held:

**“The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left**

**to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.**

26. In order for the applicant to succeed it must show that not only were the investigations being undertaken laced with ulterior motives, but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. Although it was alleged that the criminal investigations have been commenced with a view to achieving collateral and extraneous purposes, that is to aid the interested party in his attempt to stifle fair competition and clog the trading and manufacturing process of the applicants, I am not satisfied based on the evidence on the record that this is so. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the ***predominant*** purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

27. In this case, apart from bare allegation that the conduct of the investigations are likely to bring the applicants’ business to a halt, there is no concrete evidence that such an eventuality is probable as opposed to being a mere possibility.

28. At this stage there is no evidence that at the conclusion of the said investigations the applicants will face criminal charges. To say that the applicants risk being charged would be speculative at this stage. Although the issue of the 2<sup>nd</sup> applicant’s bond to appear before the Court in respect of the offence of obstruction was alluded to there is no prayer seeking the stay of the prosecution arising from the said charge. Accordingly this Court cannot grant a stay which is not expressly sought in the body of the application.

29. I have considered the issue raised in this application with respect to the prayer for stay and I am not satisfied that this is a proper case in which the court ought to direct that the leave granted herein ought to operate as a stay of the proceedings in question. Accordingly I decline to make such direction.

30. The costs of the application will be in the cause.

**Dated at Nairobi this 28<sup>th</sup> day of August, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Nyangoro for Mr Mogeni for the Applicant***

***Cc Patricia***