



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

Petition 51 of 2012

**KENYA TONER AND SUPPLIERS
LIMITED.....APPLICANT**

AND

**DIRECTOR OF WEIGHTS AND MEASURES.....1ST
RESPONDENT**

**MINISTER OF TRADE & INDUSTRY.....2ND
RESPONDENT**

**ATTORNEY GENERAL.....3RD
RESPONDENT**

AND

**HEWLETT-PACKARD COMPANY.....1ST
INTERESTED PARTY**

**HEWLETT-PACKARD DEVELOPMENT COMPANY L.P.....2ND
INTERESTED PARTY**

JUDGMENT

Introduction

1. In this petition, the petitioner challenges the authority of the Weights and Measures Department to conduct search and seizure of goods on its premises. It alleges that this a violation of its fundamental rights and freedoms protected under **Articles 31(b), 40 and 47** of the Constitution.

The Petitioner’s Case

2. The petitioner is a limited liability company carrying on the business of importing and selling

computers, printers and related accessories. On 16th December 2011 while acting on a complaint from a company known as International Corporate Research Kenya Limited (“ICR”), the Weights and Measures Department (“the W&MD”) applied for warrants to enter, search and seize products bearing the names and trademarks of Hewlett Packard Development Company (“HPDC”).

3. The petitioner claims that without any due regard for the law, inspectors from W&MD entered its premises, seized and carried away products without filling in and leaving an inventory of the products at the premises. The petitioner claims that it tried, on numerous occasions, to find out where goods were stored but the W&MD inspectors failed to respond to requests.

4. The petitioner contends that the W&MD, while conducting the search and seizure, did so without regard to the procedure prescribed in **section 25** of the **Anti Counterfeit Act, 2008** when seizing counterfeit goods.

5. The petitioner also avers that the search and seizure was done in bad faith and actuated by malice as there was no legally qualified or authoritative complaint lodged on behalf of HPDC and that the confiscated goods were genuine and manufactured by HPDC.

6. The petition dated 17th February 2012 is supported by the affidavit of Robert Muthama Kiamba sworn on 17th February 2012 and a further affidavit sworn by Richard Musau Mwanja on 23rd April 2012.

7. The petitioner seeks the following reliefs in the petition;

a) *A declaration that the petitioner’s right to own property and deal with it without arbitrarily being deprived of the same is guaranteed by Article 31 and 40 of the Constitution and the respondent’s action contravenes the petitioner’s fundamental rights under the Constitution.*

b) *A declaration that the intended prosecution of the petitioner by the 1st respondent on the basis of a complaint by International Corporate Research Kenya Limited is in violation of Articles 28, 29, 31 and 40 of the Constitution.*

c) *An injunction restraining the respondents whether by themselves, employees, agents or any other organs howsoever from presenting the petitioner or any of their offices and or caring to retain their products or destroying the same in the basis of complaint by International Corporate Research Kenya Limited.*

d) *An order compelling the 1st respondent to return the seized goods and pay damages to the petitioner.*

e) *The Honourable Court does issue such other orders and further directions as it may deem fit to meet ends of justice.*

f) *The costs of this petition be awarded to the petitioner.*

Respondents’ Case

8. The respondents opposed the petition based on the replying affidavit sworn on 9th March 2012 by Joseph Stom Musonye, the Assistant Director at the W & MD within the Ministry of Trade.

9. Mr Musonye is an inspector of Weights and Measures appointed under **section 54** of the **Weights and Measures Act (Chapter 513 of the Laws of Kenya)** by Gazette Notice Number 10559 of 10th August 2011. He is also an inspector appointed under the **Trade Descriptions Act (Chapter 505 of the Laws of Kenya)** by Gazette Notice No. 1645 of 4th June 1979.

10. The respondents contend that the petition is misconceived as the search and seizure was done under the **Trade Descriptions Act** and not the **Ant-Counterfeit Act, 2008** and that the W & MD acted under

section 21 of the *Trade Descriptions Act* and that it is intended to charge the petitioner and Richard MwaniaMusau with offences under the *Trade Descriptions Act*.

Interested Parties' Case

11. The interested parties, Hewlett Packard Company ("HPC") and Hewlett Packard Development Company LP ("HPDC") have opposed these proceedings by way of affidavit.

12. The first affidavit is that of Paul T Porrini sworn on 16th March 2012. He is a manager of HPDC. He confirms that HPDC is the registered owner in Kenya of the trade marks known as "HP". The HP mark is printed on or affixed to all packaging materials and labels for genuine laser jet printers, toner cartridges and ink containers for printers manufactured by HP and user instructions for such goods.

13. The second is an affidavit of Megan Van Den Bergh, the HPC regional security manager, Southern and Eastern Africa Global Security Group, sworn on 22nd March 2012. He depones that his duties involve inspection of any goods bearing the HPDC trade mark seized by government authorities to confirm whether they are counterfeit. His authority to act on behalf of HPDC is confirmed by Mr Porrini.

14. Mr Bergh confirms that he carried out an inspection of the goods seized by the W&M inspectors which bore identical or closely similar marks to HPDC registered trademarks and he concluded that the goods seized were counterfeit goods. He thereafter prepared a report to that effect.

Proceedings and Determination of Issues

15. When this matter came up for directions on 13th March 2012, I directed that parties to file and exchange written submissions before the hearing date on 24th February 2012. I also extended interim orders pending the hearing and determination of the petition.

16. On the hearing date, counsel for the petitioner, Mr Nyamu, requested another counsel, Mr Mutuku, to seek an adjournment as he otherwise engaged in prosecuting an important matter at the Machakos High Court.

17. I rejected the application for the adjournment and informed counsel that I would give reasons in the judgment and I now give my reasons.

18. When this matter came up I concluded that the nature of the matter required an expedited hearing and it is for this reason I gave conservatory orders without hearing the parties. I thereafter directed the parties to file their depositions and exchange written submissions. The respondents and interested parties complied with my directive and filed their submissions but the petitioner had not complied with my order on the hearing date. I also took the view it would not be in the interests of justice to adjourn the matter any further. Finally, I was of the firm view that an advocate holding brief has instructions and full authority in the eyes of the court to prosecute the matter. (See ***K.S.K. Cargo Limited v Kenya Airways Ltd Nairobi Civil Appeal No. 83 of 2001 (Unreported)***)

19. I heard the parties' oral submissions and considered the written submissions dated 23rd April 2012 by the respondent and those dated 24th April 2012 by the interested parties. I shall allude to these arguments in by consideration.

20. This is a petition filed under **Article 22** of the Constitution seeking to enforce fundamental rights and freedoms and to determine matters which are necessary for determination of the alleged violation. Thus, there are several allegation and counter allegation regarding the directorship and shareholding ICR. These issues are not necessary for the determination of the enforcement proceedings and I shall therefore avoid commenting on them.

21. I am also alive to the fact that there is a likelihood of criminal proceedings being preferred and I will

therefore exercise great circumspection in making definitive finding of facts in order not to prejudice the fair trial in another forum.

22. The petitioner has cited a breach of **Article 28, 29, 31 and 40** of the Constitution in the relief set out in the petition. In proceedings for enforcement of fundamental rights and freedoms, it is the duty of the petitioner to plead with precision the alleged breach and spell out the nature of the breach in relation to him. (See *Anarita Karimi Njeru v Attorney General [1979] KLR 54* and *Matiba v Attorney General [1990] KLR 666*). I shall consider these rights in light of the facts and arguments.

Right to Human Dignity

23. The right to human dignity is protected under **Article 28** of the Constitution which provides, “*Every person has the inherent dignity and the right to have that dignity respected and protected.*”

24. **Article 28** refers to human dignity which in simple terms is the inherent worth of a human being. It is doubtful that this article was intended for corporate or inanimate persons. Under **Article 260** person is defined as including a company association or other body of person whether incorporated or unincorporated. Whether a corporate being is entitled to a specific right under the Bill of Rights flows from the nature of this right. The petitioner has not shown how its right to human dignity, if any, has been infringed by the respondents. I therefore hold that there is no breach of **Article 28** by the respondents.

Freedom and Security of the Person

25. **Article 29** provides as follows;

29. *Every person has the right to freedom and security of the person, which includes the right not to be—*

- (a) deprived of freedom arbitrarily or without just cause;*
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;*
- (c) subjected to any form of violence from either public or private sources;*
- (d) subjected to torture in any manner, whether physical or psychological;*
- (e) subjected to corporal punishment; or*
- (f) treated or punished in a cruel, inhuman or degrading manner.*

26. This right under **Article 29** includes several elements which may, by definition, exclude its application to corporate or inanimate persons. For example, a company cannot be detained without trial, subjected to violence or torture or corporal punishment. The petitioner has not demonstrated how any of its rights under **Article 29** have been violated. I therefore hold that there is no violation of **Article 29**.

Right to Privacy

27. The right to privacy is provided for under **Article 31** which states;

31. *Every person has the right to privacy, which includes the right not to have –*

- (a) their person, home or property searched;*
- (b) their possessions seized;*

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communication infringed.

28. The right to privacy is not absolute. It is subject to the general limitations to fundamental rights and freedoms set out in **Article 24(1)** as follows;

24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right and fundamental freedom;

(b) The importance of the purpose of the limitation;

(c) The nature and extent of the limitation;

(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve that purpose.

29. **Article 24(3)** imposes on the State or a person seeking to justify a particular limitation to demonstrate that the requirements of **Article 24** have been met.

30. Both counsel for the respondents, Ms Mumassaba and counsel for the interested parties, Mr Muthui emphasised that the petitioner is a trading company and it is subject to laws that govern of its business conduct. They contended that the petitioner is subject to the **Trade Descriptions Act** which is an Act enacted to “**prohibit misdescription of goods, services, accommodation and facilities provided in the course of trade; to prohibit false or misleading indications as to the price of goods; to confer powers to require to be marked on or to accompany the goods to be included in advertisement; and for purposes incidental to and connected therewith**”.

31. The preamble to the **Trade Descriptions Act** demonstrates that the Act is intended to protect consumers of goods and services. This is consistent with the provisions of **Article 46** of the Constitution which protect consumer rights and which provides;

46. (1) Consumers have the right—

(a) to goods and services of reasonable quality;

(b) to the information necessary for them to gain full benefit from goods and services;

(c) to the protection of their health, safety, and economic interests; and

(d) to compensation for loss or injury arising from defects in goods or services.

32. As the Constitution must be read as a whole, it is proper that both **Article 31** and **46** be read together and reconciled to the extent that the right to privacy may be limited by enforcement of consumer rights. The Court must endeavour to balance and give effect to both rights as contemplated by the provisions of **Article 24(d)**.

33. The right to privacy must also be balanced with the property rights of intellectual property holders whose rights are also protected by **Article 40(5)** of the Constitution. The statutory mandate granted to the

W & MD to enforce the **Trade Descriptions Act** protects both consumers and intellectual property right holders.

34. The primary grievance by the petitioner is that the raid was conducted at the instance of one Tobias V. D. Pol who introduced himself as operating under ICR. It is contended that the persons purporting to act on behalf of ICR have no right to act on its behalf and indeed have no mandate from the company.

35. It is worth noting that no complaint has been raised concerning the provisions of the **Trade Descriptions Act** concerning search and seizure. The warrant issued in **Chief Magistrate's Court Miscellaneous Criminal Case No. 2090 of 2010** has not been challenged by the petitioner. I therefore hold that the process of search and seizure was regular and does not contravene the statute or Constitution.

36. Furthermore the investigations were undertaken by the W & MD pursuant to its statutory duty thus the issue of whether ICR has a mandate lodge a complaint is irrelevant. The proper consideration is whether, upon a complaint being lodged by any person, there is sufficient material to enable the inspector take the steps to enforce provisions of the Act. There was sufficient evidence to do so and the subordinate court was satisfied to the extent that it issued the search and seizure order. Even if identity of the complainant was material to the offence, that issue should be raised in the trial court which has jurisdiction to consider all arguments in relation to the offence triable before it.

37. The second ground of attack is that there was no inventory. In this respect, the petitioner has relied on the provisions of the **Anti Counterfeit Act, 2008** which has different provisions for enforcement and provides for an inventory in a statutory form. The further affidavit of Richard Mwanja has annexed Seizure Notes which shows an example of seizure notes issued by the W & MD when they conduct a seizure under **section 21** of that Act.

38. However, paragraph 2 of the supporting affidavit of Richard Mwanja, betrays the petitioner's case. He states, "*That sometimes on 16th December, 2011 some people whom I came to realize were inspectors of weights and measures came to one of my shops on Jamia Mall Shop No. G 158 and Premix Building along Gariama Lane on allegations that the company had committed an offence and upon production of a search warrant the said officer carted away assorted goods from my shop. Annexed herewith and marked "RMMA" is a list of the goods taken and a copy of the warrant*". [Emphasis mine]

39. The taking of an inventory is an important and essential safeguard in the protection of the right to privacy where a search and seizure is carried out. Under the **Trade Descriptions Act** and there is no requirement that the inventory be in a specific format. An inventory is a record of goods taken and the list of the goods attached to the affidavit of Richard Mwanja satisfies this requirement. The petitioner has not complained that the inventory is deficient in any manner.

40. I am satisfied that the proceedings under the **Trade Descriptions Act** have been properly invoked. The complaint that the **Anti Counterfeit Act, 2008** has been breached lacks merit. Though the two Acts may overlap, there is no requirement that a person must be charged under both Acts or under one Act or the other. Each agency enforcing the law is vested with discretion to enforce the provisions of its parent statute.

41. I also hold that **Article 40** has not been breached as due process was followed by the 1st respondent. The search and seizure, which was sanctioned by a court of law, was not arbitrary and was intended to protect property rights of the interested parties and the rights of consumers who would be affected adversely by counterfeit goods circulating in the market.

42. I conclude that the limitation imposed on the right to privacy by the **Trade Descriptions Act** is reasonable and justifiable in a democratic society and accords with the provisions of **Article 24** of the Constitution. I therefore hold that there has been no breach of **Article 31** and **40** of the Constitution.

Conclusion and Disposition

43. I have found that there has been no breach of the petitioner's fundamental rights, the petition must be dismissed and it hereby dismissed.

44. The law must now take its course and the orders of stay in force are hereby discharged. For the avoidance of doubt and for the purpose of **section 31** of the *Trade Descriptions Act*, the time taken for these proceedings, which is from the date of filing suit up to the date of this judgment, shall be excluded from the computation of time.

45. As this is an application for enforcement of fundamental rights and freedoms, there shall be no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 4th May 2012.

D.S. MAJANJA
JUDGE

Mr Mutuku holding brief for Mr Nyamu instructed by Nyamu and Nyamu Advocates for the petitioner.

Ms Mumassabba, Litigation Counsel, instructed by the State Law Office for the respondents.

Mr Muthui instructed by Kaplan and Stratton Advocates for the interested parties.