



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Miscellaneous Application 321 of 2009

JAMES MUCHEMI T/A JAMPUR GENERAL AGENCIES.....APPLICANT

Versus

THE HON. THE ATTORNEY GENERAL & 3 OTHERS.....RESPONDENTS

RULING

This is an application filed by James Muchemi who trades as Jampur General Agencies. He seeks the leave of this court to commence Judicial Review proceedings against the Hon. The Attorney General, Commercial Manager Kenya Ports Authority and Commissioner General, Kenya Revenue Authority. He seeks leave to apply for an order of certiorari to remove into the High Court and quash the entire decision of the KEBS, Managing Director, made on 27th May 2009 rejecting the applicant's assorted hair products and directing the Applicant to re-ship the goods to the country of origin; leave to be granted to the Applicant James Muchemi to apply for an order of prohibition to prohibit the Respondents from destroying the Applicant's goods, i.e. assorted hair products reflected in the packing list exhibited with the verifying affidavit, that leave be granted to apply for an order of mandamus compelling the Respondents to release the consignment in the container DFSU 2096983 to the Applicant and that the leave sought do operate as stay.

The chamber summons is based on a statutory statement dated 3rd October 2009 and a verifying affidavit of the Applicant sworn on the same date. When the Counsel for the Applicant Mr. Kaikai moved the court on 4th June 2009 ex parte in accordance with Order 53 Civil Procedure Rules, the court directed that the matter be heard interparties. The 1st Respondent did not file any papers but urged that the allegations made are all directed at the 2nd Respondent who is before the court. He urged the court not to grant leave as respects the 1st Respondent.

Kevin Mugambi, a quantity Inspector employed by the 2nd Respondent swore an affidavit dated 22nd June 2006 in opposition. The 2nd Respondent also filed skeleton arguments.

Briefly, the Applicants case is that he has a business by name Jampur General Agencies, dealing in supply of Hair Care Products from USA, South Africa and UK. He applied for and was issued with an import standardization mark in March 2009 by the Kenya Bureau of Standards (KEBS). He has been trading within the bounds of specifications relevant to Kenya Standards. In March 2009 samples of the products he trades in were taken to KEBS for laboratory analysis and results released on 4th May 2009 which complied with relevant specifications. Since the goods were from same source, he did not need a certificate of compliance but verification from the authorities.

In 2007, a certificate of compliance was issued in respect of the Distributors of the products he gets supplies from JM 3.

On 29th February 2009 he brought a consignment of assorted items from Labchem Ltd in London as per Customs Authority Form dated 22nd May 2009. He exhibited as JM4 the packing list and Customs entry Form No. 1732910. His goods were inspected and verified on 25th – 26th May 2009 and they were directed to be released as per Report of Mr. Mugambi 'JM 5' when his agents, Soresit Impex went to get the release stamp, they were informed that a further verification was required of the goods in container DFSU 2096983 confirm if there was any infringement. He wrote to the 3rd Respondent carry out a 2nd verification (JM 1) and they accepted subject to charges (JK 7). To his surprise the KEBS wrote to him on 27th May 2009 rejecting the assorted hair products for failing to comply with relevant Kenya Standards. (JM 8) According to the Applicant, the decision rejecting the goods was illegal and excessive. That Haco Industries have been following him as causing competition against them. That Haco Chris Kirubi had confronted his wife on 26th May 2009 informing him that only Haco Industries had the sole monopoly in all motions hair products and that if the Applicant did not stop, he would face dire consequences. On 21st October 2006 Mr. Kirubi had written to him claiming to be the authorized distributor of motions hair products and he should stop (JM 12). The Applicant attributes these developments to Mr. Chris Kirubi and KEBS and that matter is not an issue of the quality of the goods but its about business rivalry and that is why he seeks protection of this court. That on 29th May 2009 and 1st June 2001 the Managing Director of KEBS told the media that he had failed to supply certificate of compliance but that KEBS is under an obligation to verify the flawlessness in the quality of the products with or without certificate of compliance. That Kirubi also informed the media that the Applicant had smuggled the goods into the country (JM 13) copies of the daily newspaper. That the involvement of Haco Industries in this matter is malicious and mischievous and is all about malice other than infringement of standards. That KEBS has generally condemned the consignment without singling out which product do not meet the standards.

Ms Muhia submitted that the issue at hand relates to a consignment brought into the country on 22nd May 2009 and June as per the packing list and import and export form. She contended that the Applicant has misrepresented facts to the court as he has used documents for goods brought in February 2009. She submitted the KEBS is mandated to carry out directly or through agents, analysis of consignment at entry points and after its analysis a certificate of conformity is issued. That in this case Beauty Enterprises (JM 3) who inspected the goods are not their agents and could not verify the Applicant's goods. That he consignment brought in by Form JM4 on 22nd May 2009 did not come to the country with a certificate of conformity and when inspected it was found to have failed to comply with KEBS tests. ICS 1707 which relates to labeling as the consignment had no expiry date and that the Applicant has not exhibited any certificate from the 2nd Respondent as proof that the consignment was cleared. It was denied that the decision was a collusion between the 2nd Defendant and Haco Industries.

In the further affidavit of James Muchemi filed on 1st July 2009 he denied that he was given a chance to pay the 15% costs of Insurance Freight (CIF) and that the consignment was never intercepted and he was never told that that products did not bear the dates of manufacture and expiry, otherwise he would have produced the documents which he has.

At this stage of the proceedings, all that the Applicant needs to demonstrate is that he has an arguable case with good chances of success.

What is sought to be quashed is the decision of the KEBS dated 27th May 2009 communicated to the Applicant vide the letter dated 27th May 2009. The letter indicates that the inspection was carried out on 26th May 2009. The Applicant also exhibited as JM 5 an inspection report dated 26th February 2009 in which an inspection and verification of the consignment was done. The question is whether the verification carried out on 26th February 2009 and which was approved relates to the same consignment as the one in issue. The Respondents contend that they are two different consignments and that is why

they alleged that the Applicant is misrepresenting facts to court. That would have to be determined later in this matter.

The Applicant relied on a certificate of compliance (JM 3) dated 24th October 2007 issued by Beauty Enterprises. The Respondents deny that the said Beauty Enterprises is known to them or that Beauty Enterprises is one of their agents who carries out verifications. Again this is an issue in contention that would need to be thrashed out at a later stage.

One of the grounds upon which the Applicants relies on is that the decision is based on some rivalry of between the Applicant and Haco Industries who supply similar goods. I have seen the communication on record JM 12 and JM 13 from daily newspapers. That raise an issue that is worth consideration at a later stage on whether the decision is reasonable or based on irrelevant considerations other than fairness.

For the above reasons I find that there is an arguable case disclosed and leave is granted to the Applicant in terms of prayer 2, 3 & 4 of the chamber summons. If leave does not operate as stay, then the substratum of this application will disappear. I therefore grant an order that leave operates as stay meaning that the goods should not be interfered with or released till the motion is heard and determined. The notice of motion be filed and served within 14 days of todays date in default the above orders should lapse automatically.

Once the notice of motion is filed and served, the same be brought up for mention with a view to the court giving directions.

Costs will abide the notice of motion.

Dated and delivered this 20th day of July 2009.

R.P.V. WENDOH

JUDGE

Present

Mr. Kaikai for the Applicant

Mr. Kipkogei for the 1st Respondent

Mr. Twahil holding brief for Ms Ngugi for the 4th Respodnent

Muturi: Court Clerk