



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 763 of 2003

DAIRYCOM (K) LIMITED..... PLAINTIFF

VERSUS

KENYA DAIRY BOARD..... 1st DEFENDANT

KENYA BUREAU OF STANDARDS..... 2nd DEFENDANT

RULING

The Plaintiff, Dairycom (K) Limited filed the present application under certificate of urgency on 28th November, 2003 under the provisions of Order 39, Rules 1, 2 and 9 of the Civil Procedure Rules and Sections 4, 17, 19 and 70 of the Dairy Industry Act, Chapter 336 Laws of Kenya. The Defendants are the Kenya Dairy Board and the Kenya Bureau of Standards.

The Plaintiff seeks the following orders in this application:-

- *That the court grant a mandatory injunction against the 1st Defendant/Respondent to lift the seizure of the Plaintiff/Applicant's container MAE0567919 pending the hearing interpartes and determination of this application.*
- *That this honorable court be pleased to declare the seizure of the Plaintiff/Applicants container MAE05679191 as ultra vires the power granted to the Defendant under the Dairy Industry Act, Cap 336 Laws of Kenya.*
- *That the 1st and 2nd Defendants be restrained from making and publishing any and/or further defamatory statements of and concerning the Plaintiff pending the hearing and determination of this suit.*

The application is supported by 3 affidavits of Mr. Andrew Omboto sworn on 28th November, 2003, the Managing Director of the Plaintiff Company. The Plaintiff's case is that during the normal course of business it purchased and imported a consignment of sweet salted butter from Northern Ireland for domestic resale. The Plaintiff claims that on 21st November, 2003 the 1st Defendant's officials seized the said consignment which was contained in a container marked MAE 05679191. The Plaintiff contends that the said seizure was unlawful and illegal and that it was for undisclosed reasons. That the butter in issue had been certified as having met international and local standards. That the 20 metric tons of sweet salted butter is a highly perishable Dairy product and the cost of its refrigeration is exorbitant and further containment would destroy the entire consignment.

The Plaintiff initially came to this court on 28th November, 2003 under certificate of urgency. This court

granted interim orders on an ex parte basis. Upon service of the orders on the Defendants the Kenya Dairy Board and the Kenya Bureau of Standards, the parties recorded further orders by consent on the following terms:-

1. A fresh sample of the butter from the Container in issue be given to the government chemist and the Department of Food, Science and Technology, University of Nairobi for testing on the following parameters:-

(i) Saponification Value

(ii) Ph. Value

(iii) Acidity of extracted fat

2. The matter be mentioned on 6th January, 2004 for presentation of the Report to the court.

3. Status quo to be maintained.

After the said Reports were presented in court and parties exchanged their respective affidavits, grounds of opposition etc, the matter came before me on 19th February, 2004 when I heard it. The application was opposed by both Defendants.

After listening to the submissions of all the counsels and reading the pleadings, and all affidavits and looking at annexures, it becomes clear that there are preliminary issues or points of law which this court ought to consider and determine. These relate to the applicability of the Dairy Industry Act, Chapter 336 Laws of Kenya and the Dairy Import Registrations and the Dairy Industry Inspector's Regulations made hereunder. Do these laws apply to the butter which is the subject of this suit, does the 1st Defendant have the legal authority or powers to impound or seize the butter as it did in this case, is the 1st Defendant vested with statutory powers to regulate the import of butter and if so to what extent? Was the seizure of the butter herein legal?

It is necessary for the court to look at the objectives of the Dairy Industry Act the establishment of the Kenya Dairy Board, and its functions and power.

The Board is established by Section 4 of the Act and its functions are set out in Section 17. The preamble of the Act reads:-

"An Act of Parliament to provide for the improvement and control of the Dairy industry and its products".

This gives a general picture of the objective of the Act.

Section 17 of the Act provides as follows:-

"PART III- FUNCTIONS, POWERS AND DUTIES OF THE BOARD

17. (1) *The functions of the Board shall be -*

(a) *to organize, regulate and develop the efficient production, marketing, distribution and supply of Dairy produce, having regard to the various types of dairy produce required by different classes of consumers;*

(b) *to improve the quality of dairy produce;*

(c) *to secure reasonable and stable prices to producers of dairy produce.*

(d) to promote market research to Dairy produce;

(e) to permit the greatest possible degree of private enterprise in the production, processing and sale of dairy produce, consistent with the efficiency of the producer and the interests of other producers and of consumers; and

(f) generally to ensure, either by itself or in association with any Government department or local authority; the adoption of measures and practices designed to promote greater efficiency in the dairy industry;

(2) In the exercise of its powers and in the performance of its functions under this Act, the Board shall act in accordance with general or special directions that may be given to it by the Minister.

Under Section 19 of the Act the Minister may, on the advice of the Board make regulations generally for the better carrying out of the purposes and provisions of the Act with regard to Dairy produce. And in the definitions Section (Section 3) - "Dairy Produce" is defined as "milk, cream, butter, ghee, cheese and any other product or by-product of milk". It is clear that the 1st Defendant has been mandated to regulate virtually all matters pertaining to Dairy produce which includes butter.

As the court considers this application, it is important that it bears in mind that the substantive relief in the suit and on which all the injunctive orders are based or pegged is:-

"4. A declaration that the Dairy Industry Act, Cap 336 Laws of Kenya does not provide for any requirement for Import Licence or Import permit in regard to the importation of Dairy produce".

The Defendant on its defence says that it admits seizing the Plaintiff's container but with good reasons. That the consignment of butter was imported without valid authority to import, that the licence used to import the butter had expired and the Plaintiff flouted procedures laid down of the 1st Defendant concerning importation by Dairy Products into Kenya. That the butter was imported from a country which is under disease quarantine by virtue of Legal Notice No. 326 of 1996. The Defendant says that it has refused to lift the seizure of the Plaintiff's container since the Plaintiff despite requests to be supplied with all evidence, documents and information regarding importation of the said container, has failed to do so and has resorted to supplying incorrect, misleading and inaccurate information.

It would appear to the court that the dispute herein and the basis of the seizure at this stage is in fact with regard to importation and procedures. Strictly, it is not about the unfitness of the butter for human consumption or otherwise. Definitely this will be and could be an issue in these proceedings but at the first instance, it is the seizure which is due to questions about importation. The 1st Defendant in the replying affidavit of Mr. David Mwaura Maina sworn on 13th February, 2004 says as much. He says that the seizure of the butter was not on the basis of failure to meet the requirements of the safety but on the basis that the Plaintiff failed to supply relevant information on the same and/or supplied incorrect information and further failed to comply with laid down procedures on the importation of Dairy products.

Despite the foregoing both the Plaintiff and Defendant have delved into the question of quality, fitness, and suitability of the butter with each side producing reports and/or findings to support their respective cases. The Defendant claims that tests locally show that the butter failed the tests and has been condemned as unfit.

The seizure of the butter herein took place on 21st November, 2003 by the 1st Defendant's inspectors. The seizure order, inter alia, reads as follows:-

"The following Dairy produce has been seized by KDB Inspectors on behalf of the Kenya Dairy Board in accordance with the powers given under the Dairy Industry (Inspectors) Regulations 1964 (Legal Notice No. 215 dated 2nd June, 1964).

From (Name) Evans Kimemia Vehicle - Address c/o Diarycom (K) Ltd Container No. P.O. Box 10608, Nairobi AEU567919(1) (If bicycle list frame number) Type and quantity of Dairy produce seized FRESHLY SALTED BUTTER

Containers seized Container No. MAEU 567919(1) How disposed of Transami Container Yard

Did the 1st Defendant's inspectors have the legal power to seize the said produce under Legal Notice No. 215 dated 27th June, 1964? I have read the said Notice and confirmed that it is the one that enacted the Dairy Industry (Inspectors) regulations. The said regulations inter alia, provide :-

"3. If an inspector has reasonable grounds for suspecting that evidence of an offence under the Act or any regulations or orders made hereunder is to be found on or in any lands, premises, place, vehicle, bicycle, pack, animal or vessel or in the possession of any person, he may-

(vi) seize, remove and detain any Dairy produce which gives reasonable cause to suppose will afford evidence of an offence under the Act or any regulations or orders made thereunder, and for the same reasons seize, remove and detain or take charge of any vehicle, bicycle, pack animal, plant, machinery, vessel, container, or receptacle, and any book account or document.....".

I uphold that the said provision gives the 1st Defendant's inspection the power or authority to seize the Plaintiff's butter consignment. However, the inspectors must have reasonable cause to exercise this power and I think that they must give reasons for the seizure. There must be sufficient justification. This could be the reasons why Regulation 7 of the said Regulations requires that:-

"7. Every seizure under these regulations shall be reported without unnecessary delay to a magistrate who shall also be furnished with a copy of any written statement provided for under regulation 6".

In this case the seizure took place on 21.11.03 giving rise to this dispute. The Plaintiff moved to court on 28th November, 2003 for the ex parte injunction. The parties did not give the court a clear sequence of events from the time of seizure to the filing of the suit. It is therefore not possible to say that the Inspectors failed to comply with Regulation 7. Once the suit was filed in the high court, such a reference to a magistrate could have been pre-empted.

As indicated earlier, the 1st Defendant inter alia, claims that the butter was imported without valid authority to import, the Plaintiff's licence to import had expired and that it flouted procedures laid down by the 1st Defendant concerning importation of dairy products in Kenya. I have carefully read the Dairy Industry (Imports) Regulations. The said regulations deal with the dairy produce prescribed thereunder - see Regulation 2. The Dairy produce prescribed under regulation 2 are:-

"Sweetness skimmed condensed milk Dried full cream milk powder Condensed full cream milk sweetened Evaporated milk Cheese, including processed cheese".

There is no mention of butter or any type of butter. As a result the 1st Defendant cannot purport to rely on the Dairy Industry (Import) regulations as a basis for the seizure. They certainly have no powers or authority to seize butter. They did not show the court any Legal Notices after 1966 introducing other Dairy produce as prescribed under the said regulations.

The courts would usually not interfere with statutory bodies in the performance of their functions and it is not the role of the court to direct them as to how they should run their affairs. However, such statutory bodies must be run in accordance with the provisions in the Act or statute that established them and any subsidiary legislation. If the bodies breach the provisions of the said statute or purport to do acts that are not permitted under the said acts and not authorised by any law, then the court must intervene.

In its Notice of seizure, the 1st Defendant's inspectors did not say why the butter was impounded. The reasons came out in their defence. Now that this matter is before the court, the court will rely on the

pleadings. I am persuaded that the 1st Defendant had no legal powers to impound or seize the butter herein under the Import Regulations. Butter is not a prescribed Dairy produce under Regulation 2 of the said regulations.

Apart from the aforesaid the 1st Defendant in its defence says that the butter was imported from a country which is under disease quarantine by virtue of Legal Notice No. 326 of 1996. I have seen the aforesaid Legal Notice which reads as follows:-

"The Animal Diseases Act (Cap. 364)

IN EXERCISE of the powers conferred by Section 8 of the Animal Diseases Act, the Director of Veterinary Services prohibits the importation from European countries of live bovine, semen, embryos, carcasses, meat, bone meal and their products

Dated the 2nd December, 1996

R.S. Kimanzi

Director of Veterinary Services"

The 1st Defendant claims that in seizing the consignment of butter, the 1st Defendant was acting in the public interest and within the mandate and powers given to it by the Provisions of the Dairy Industry (Inspectors) Regulations. The 1st Defendant says that the consignment of butter was later analysed by the Kenya Bureau of Standards and results indicated that the salted butter did not comply with the requirements of Kenya Standard Specification for butter. I saw a copy of the certificate of analysis. The 1st Defendant also claims that the importation documents produced by the Plaintiff indicated that the consignment was imported from Australia which information was false, inaccurate and intended to mislead the 1st Defendant. That it is its duty to protect the Kenyan public from consuming uncertified dairy product.

I have seen the purported letter of no objection issued by the Ministry of Agriculture and Rural Development. The country of origin is shown to be Australia and not Northern Ireland.

I have also seen the conflicting certificates of analysis of the butter and of great significance the letter dated 28th November, 2003 by the Kenya Bureau of Standards ordering the Plaintiff to re-ship the salted butter back to the country of origin within (30) days from said letter.

When considering the application I must be guided by the three principles set out and established in the case of *GIELLA —vs- CASSMAN BROWN LIMITED (1973) EA*. 358. First the Applicant must make out a *prima facie* case with a probability of success at the trial. Secondly, that normally an injunction will not be granted unless it can be shown that the Applicant is likely to suffer irreparable injury which cannot be adequately be compensated in damages and thirdly, that if the court is in doubt it shall decide on a balance of convenience.

If I go by the plaint, I would say that the Plaintiff has shown a *prima facie* case with a probability of success in respect of its main substantive relief, namely a declaration that the Dairy Industry Act, Cap. 336 Laws of Kenya does not provide for any requirement for import licence or import permit in regard to the importation of dairy produce. If at all the seizure was in enforcement of the Dairy Industry (Imports) regulations, the said seizure would be illegal as butter is not a prescribed product under the said Regulations.

If this was the only issue then this court would be inclined to grant the injunctions sought herein. But the Defendant has given other reasons for effecting the seizure and which this court is obliged to look at. The 1st Defendant claims that the butter was imported from a country which is under disease quarantine by virtue of Legal Notice No. 326 of 1996 which I have fully set out above. I have read Section 8 of the

Animal Diseases Act and found that the said provisions deals with animals and their products but applying all rules of interpretation I do not think milk and milk products or in this case Dairy produce are covered by the said Act and in particular Section 8. The section reads:-

"8(1) The Director may, by notice in the Gazette, prohibit for such time as he thinks necessary or regulate the importation or the exportation of all animals or any specified kinds of animals, or of carcasses, meat, hides, skins, hair, wool, litter, dung, semen, live viruses capable of setting up infections in animals, sera, vaccines and other biological or chemical products intended to be used for the control of animal disease or fodder from any specified country, port or territory".

I do agree that the Kenya Dairy Board is authorised to work together with other Government agencies or authorities in performing its work. However, section 8 above does not cover butter. As a result, the aforesaid quarantine notice cannot give the 1st Defendant any legal basis to seize the produce herein.

I now come to the issue of the safety standards and fitness of the butter for human consumption. As indicated earlier by consent of all the 3 parties on 18th December, 2003, it was agreed that a fresh sample of the butter from the container in issue be given to the Government chemist and the Department of Food, Science and Technology University of Nairobi for testing on various parameters. Through the affidavit of Cindano Gakuru, the reports of the said institutions was presented to the court.

From the contents of the said reports and affidavit of Mr. Gakuru, the reports and analysis appears to be in favour of the Plaintiff. When faced with the said 2 reports the affidavit of Mr. Gakuru, the 1st Defendant responded as follows:-

3. That the 1st Defendants case is not premised on the suitability of the butter for human consumption. The 1st Defendants case rests on the irregular importation of the said consignment of butter and the breach of the provisions of the Dairy Industry Act, Cap. 376.

4. That I am informed by Mr. Peter Mutua, the Administrative Manager of the 1st Defendant that the seizure of the butter was not on the basis of its failure to meet the requirement for safety but on the basis of the Plaintiff failure to supply relevant information on the same and/or supplied incorrect information and further failed to comply with laid down procedures on the importation of Dairy products..... "

This is stated in a sworn affidavit of Mr. David Mwaura Maina, advocate for the 1st Defendant in reply to Mr. Cindano Gakuru, advocate's affidavit. This court does not approve of advocates making affidavits in respect of contentious issues and which relate to evidence. Counsel should not enter the arena of conflict of the parties.

Be that as it may, for the time being I can state that in view of the foregoing the 1st Defendant is not entitled to question the quality of the butter, its safety and fitness or otherwise, for human consumption.

From the foregoing, I am convinced that the Plaintiff was justified to be aggrieved with the actions of the 1st Defendant. I hold that on a balance of probability, the Plaintiff has made out of *prima facie* case with probability of success as against the 1st Defendant.

What about the 2nd Defendant? I agree with Mr. Omulele that the application does not have any prayer or orders directed to the 2nd Defendant. The seizure was by the 1st Defendant and the second Defendant was not involved whatsoever in the said actions. I do note and this court is aware of the letter dated 28.11.03 directed to the Plaintiff to re-ship the said consignment. Despite the existence of the said order, the 2nd Defendant was a party to the consent order which referred the butter herein for fresh analysis. I would like to leave those matters between the Plaintiff and the second Defendant to deal with probably under the Standards Act. For now, no orders can issue against the 2nd Defendant.

The Plaintiff having succeeded in respect of the 1st limb of *GIELLA -vs- CASSMAN BROWN*, can it succeed on thesecond limb. The butter has a monetary value. If it is re-shipped and perishes or is destroyed, any loss or damage can be compensated in damages. Be that it may, the seizureherein was executed without any legal basis and totally ultravires the Dairy Industry Act. It was illegal. As a result, thequestion of damages cannot arise that this court allows anillegality to continue because it can be compensated indamages. This is against public policy.

At this last stage in this ruling, the court would like tostate that it is not ignorant of the discrepancies in thePlaintiff's importation documents including the allegationthat the country of origin of the butter is Australia. Despitethat, the Act does not confer on the 1st Defendant thepower to seize in the circumstances of this case. Any otherirregularities should be dealt with applying the correct lawand by the appropriate enforcement agencies.

The standard for the grant of mandatory injunctions ishiger than prohibitory ones. The court must act cautiouslyand diligently. However in a proper case a court of law and equity will not hesitate in correcting or reversing a statusquo or situation obtained or created by a violation of thelaw.

I do hereby grant prayer 2 of the summons and order the1st Defendant to release the said container and its contentsto the owner, the Plaintiff forthwith. I also grant prayer 4 asthe said publications arose from the seizure. The costs of theapplication shall be paid by the 1st Defendant to the Plaintiffand the 2nd Defendant.

DATED and DELIVERED at Nairobi this 8th day of March,

2004.

M.K. IBRAHIM

JUDGE