



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 83 OF 2019

PLATINUM DISTILLERS LIMITED.....APPLICANT/PETITIONER

-VERSUS-

KENYA REVENUE AUTHORITY.....RESPONDENT/RESPONDENT

RULING

[The Petitioner's Chamber Summons Application Dated 4th March, 2019]

1. By a Chamber Summons application dated 4th March, 2019 supported by the affidavit of John Waweru Ndegwa of even date, the Applicant, Platinum Distillers Ltd, seeks conservatory orders against the Respondent, Kenya Revenue Authority, who allegedly while acting on mistaken belief on 23rd February, 2019 raided the Applicant's offices without lawful cause, seized documents, locked the premises and placed customs seals on the outer doors of the Applicant's premises effectively denying them access to the premises.

2. The Applicant therefore specifically seeks the following orders:

a) Spent

b) THAT pending inter partes hearing of this application, the Court be pleased to issue a temporary conservatory order restraining the Respondent from continuing to lock, seal the outer doors or in any way deny or limit access to the Petitioner's manufacturing premises.

c) THAT pending inter partes hearing and determination of the substantive petition the Court be pleased to issue a temporary conservatory order restraining the Respondent, its servants or agents from continuing to lock, seal the outer doors or in any way deny or limit access to the Petitioner's manufacturing premises.

d) THAT pending inter partes hearing of this application, the Court be pleased to issue an order of injunction directing the Respondent, its servants or agents to return all the documents taken from the Petitioner's offices and manufacturing premises.

e) THAT the cost of this application be borne by the Respondent.

3. In response, the Respondent filed a replying affidavit sworn on 7th March, 2019 by its Assistant Manager in the Investigations and Enforcement Department Timothy Mumanyi. The first objection is that John Waweru Ndegwa the deponent of the affidavit in support of the application was neither a director, a manager nor a person authorized by the Applicant to swear the supporting affidavit and therefore lacked *locus standi*. He further deposed that the Applicant is a licensed importer and manufacturer of excisable goods being alcoholic beverages but does not possess a license for the year 2019.

4. It is the Respondent's case that on the night of 23rd February, 2019 upon receiving some information, two trucks suspected to be ferrying uncustomed ethanol were tracked to the Applicant's premises in Ruai Sub-County, Nairobi. The consignment had been declared as propylene glycol and had been imported by Multiplan Packaging Limited who is neither a licensed importer of ethanol or a manufacturer or distributor of excisable goods. Upon subjecting the suspected consignment to laboratory examinations, and following further analysis by the Government Chemist Department, the consignment was confirmed to be ethanol and not propylene glycol as declared.

5. It is averred for the Respondent that further investigations revealed that the Applicant and Multiplan Packaging Company are related companies sharing common directorship and both share the same premises leased out to them by one Michael King'ara and Mary Wanjiru Kinyua. Also that Michael King'ara doubles up as a director in both companies. Further, that it also came to the Respondent's attention that Multiplan Packaging Limited was importing other excisable goods to wit alcoholic beverages vodka flavours and from that information, it was inferred that the importation of the uncustomed ethanol and other excisable goods was for the benefit of the Applicant herein.

6. It is further averred on behalf of the Respondent that as the Applicant was beneficially interested in the uncustomed ethanol, the premises belonging to both the Applicant and Multiplan Packaging Limited were locked up and placed under customs seals as further investigations were being undertaken. Further, that the trucks ferrying the uncustomed ethanol were sealed and escorted to the DCI headquarters whereupon notices of goods deposited at a customs warehouse were issued in respect of the trucks.

7. I have carefully considered the grounds upon which the application for conservatory orders is based, the parties' rival affidavits and submissions and it is my view that the issue the court is called upon to decide at this point is whether the Applicant has met the conditions for the grant of conservatory orders.

8. The guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution are settled. The law, as I understand it, is that in considering an application for conservatory orders, the court is not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a *prima facie* case to warrant grant of conservatory orders. The court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant.

9. The tenor, import and scope of a conservatory order was highlighted by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** as follows:

“[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

10. At this stage, the Applicant is only required to establish a *prima facie* case with a likelihood of success and the prejudice to be suffered if orders are not granted. Musinga, J (as he then was) clearly explained this in the case of the **Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General, Nairobi High Court Petition No. 16 of 2011; [2011] eKLR** when he stated that:

“It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner’s application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

11. As it has been held in various decisions, a *prima facie* case is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, an applicant has to show that he or she has a case which discloses arguable issues and in a case alleging violation of rights, arguable constitutional issues.

12. In this case, it is contended that the decision or action taken by the Respondent flies in the face of the constitutional provisions in particular Articles 31, 40 and 47 of the Constitution. Without saying more, it is clear that this petition discloses *prima facie* arguable issues for trial. In other words, it cannot be said that the petition is wholly frivolous or unarguable.

13. Having passed the first hurdle the second issue is whether the Applicant has satisfied the provisions of Article 23(3)(c) of the Constitution. As was held in **Centre for Rights Education and Awareness (CREAW) & 7 others** (supra) a party seeking a conservatory order only requires to demonstrate that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. However, this must be weighed against the public interest.

14. The Applicant deposed in their supporting affidavit that the closure of their manufacturing premises has deleterious consequences on its business since it has employed over 50 permanent workers and is servicing huge business loans and therefore require to be in constant production to meet its regular business obligations. It is also the Applicant’s case that in any event, the Respondent has already seized and carried away the suspected product and there is no justification for continuing to seize or keep the business premises closed. The Applicant asserts that after all, the product was not recovered from their premises nor was it the consignee.

15. It is important to note that the orders the Applicant seeks, if granted at this stage, will substantively determine the petition. The orders are in the nature of a mandatory injunction. Discussing the circumstances under which mandatory injunctions can be issued, the Court of Appeal in the case of **Kenya Breweries Ltd & another v Washington O. Okeyo [2002] eKLR; Nairobi Civil Appeal No. 332 of 2000** cited with approval Vol. 24, 4th Edition of Halsbury’s Laws of England where it is written at paragraph 948 that:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application”.

16. The Respondent’s case is that it is investigating a case of suspected tax evasion and smuggling of uncustomed goods. The investigations were triggered by information which led to the impounding of two trucks ferrying uncustomed ethanol. Without saying much, the evidence

placed before the court by the parties links the said ethanol to the Applicant.

17. Although the Applicant intends to challenge the constitutionality of Section 157 of the East African Community Customs Management Act, 2004 (EACCMA) which the Respondent applied in sealing the Applicant's premises, the fact is that the said provision remains good law at this stage of the proceedings. It empowers the Respondent to act as it did and an assurance has been given under oath by the Respondent, that the premises can only be sealed for a maximum of thirty days.

18. It is my view that allowing the Applicant to access the premises at this stage may jeopardise the investigations by the Respondents. Payment of taxes, where the same is due, is a constitutional and statutory obligation which no citizen can escape. The Respondent is mandated to ensure that taxes are collected and accounted for.

19. I agree that the Applicant will indeed suffer business loss during the period when its premises will remain closed. However, the public interest that requires payment of taxes comes into play in this case. The Respondent has shown that there is reasonable suspicion that the Applicant is a tax evader. The Respondent should be given space to address that issue.

20. My finding is that the instant application is without merit. I must however point out that the premises should be released back to the Applicant on or before 23rd March, 2019 when thirty days will lapse from the date of seizure. Of course the treatment of seized consignment and the recovered documents will be guided by the action the Respondent intends to take in respect of the alleged violation of the tax laws. Otherwise the Chamber Summons dated 4th March, 2019 fails in its entirety and the same is dismissed. The costs in respect of this application shall abide the outcome of the petition.

Dated, Signed and Delivered at Nairobi this 14th day of March, 2019.

W. KORIR,

JUDGE