



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 122 OF 2018

PREMIER MOTORS LIMITEDPETITIONER

VERSUS

THE ANTI-COUNTERFEIT AGENCYRESPONDENT

JUDGMENT

1. The undisputed facts gleaned from the pleadings and submissions of the parties disclose that the Petitioner, Premier Motors Ltd, imports motor vehicle spares from various parts of the world for local sale in its two shops in Nairobi. Among the products it stocks is RVT silicon whose brand name is Teson manufactured by a United Arabs Emirates Company known as Al Khair Auto Spare Parts Co. L. L. C.

2. On 20th December, 2017 at around 11.00a.m., officers from the Respondent, the Anti-Counterfeit Agency, visited the Petitioner's two shops to carry out inspection for counterfeit goods. In the course of the exercise, they seized 867 pieces of Teson on the ground that the product was counterfeit. The seized consignment remains in the custody of the Respondent to date.

3. It is the Petitioner's case that at the time of inspection and seizure the documents authenticating the manufacture and purchase of the product were shown to the officers of the Respondent but they nevertheless went ahead and seized and detained the goods.

4. The Petitioner's case is that the Respondent's actions breached its right to acquire and own property as protected by Article 40 of the Constitution. Further, that the Respondent's actions caused it loss of business.

5. It is the Petitioner's averment that the actions of the Respondent violated its right to fair administrative action as guaranteed by Article 47 of the Constitution in that it was not afforded an opportunity to be heard before the seizure of the product. It is the Petitioner's case that the Respondent's action was not based on reasonable suspicion and was thus beyond its jurisdiction and *ultra vires* the law.

6. The third and final provision of the Constitution which the Petitioner claims was violated by the Respondent is Article 50. It is the Petitioner's assertion that the Respondent being a quasi-judicial body had a duty to avail it a fair hearing which it did not do thereby violating Article 50 of the Constitution.

7. The Petitioner therefore pray for orders as follows:-

“1. A Declaration that the action by the Respondent of inspection without any probable cause and seizure of Eight Hundred and Sixty–Seven Teson Products belonging to the Petitioner was a violation of the Petitioner's rights under Articles 40, 47 and 50 of the Constitution of Kenya.

2. An order that the Respondent do immediately release and restitute the Petitioner's property particularly the seized TESON Products which were unlawfully impounded on the 20th December 2017 and which is being detained by the Respondent.

3. General Damages for Breach of Constitutional Rights.

4. Compensation for loss of business.

5. Any other Order this Court shall deem mete and just.

6. The costs of tis Petition be awarded to the Petitioners.”

8. The Respondent opposed the petition through a replying affidavit sworn by Chief Inspector Martha Luther on 18th October, 2018.

9. A summary of the Respondent's reply is that on 21st November, 2017 a company by the name Abro Industries Inc through the firm of Iseme Kamau & Maema Advocates filed a complaint alleging infringement of its intellectual property by the Petitioner. As there was proof that the complainant was eligible to lay a complaint under Section 33 of the Anti-Counterfeit Act in that it had met all the statutory requirements, the deponent on 20th December, 2018 accompanied by three administration police officers proceeded to the Petitioner's premises to conduct investigations. A search disclosed 885 pieces of suspected counterfeit markers which were seized and an inventory of the seized goods prepared. The same was signed by the Petitioner's store manager.
10. It is the Respondent's averment that as investigations were ongoing, it received a demand notice from the Petitioner's advocates indicating that the seized goods bearing the Teson mark were manufactured by Al Khair Spare Parts Co. LLC located in Dubai and that the Teson trade mark was registered both in Kenya and UAE in the name of Al Khair Spare Parts Co. LLC. The letter further disclosed that Al Khair Spare Parts Co. LLC exports its Teson branded products into Kenya through Universal Intertrade FZCO which in turn distributes the products to the Petitioner for sale.
11. It is the Respondent's case that in light of the information disclosed by the Petitioner, it reconsidered the matter and commenced negotiations with a view to settling the matter through alternative dispute resolution. It is the Respondent's averment that an agreement was reached on 22nd January, 2018 in which it was to release the Petitioner's goods and that would mark the full and final settlement of the matter between the parties. The Petitioner, however, did not collect the seized goods after the settlement.
12. It is the Respondent's averment that its actions were done in good faith and based on statutory provisions and there was therefore no breach of the Petitioner's constitutional rights.
13. Submitting in support of the Petitioner's case, counsel stated that the Petitioner's right to acquire and own property pursuant to Article 40 of the Constitution was violated by the Respondent when it seized its goods. It is the Petitioner's case that search and seizure of goods should be instigated by a complaint which was lacking in this case. Counsel submitted that it is only upon complaint by the owner of intellectual property that an inspector is authorized to enter and search premises.
14. Further, that Section 33(1) & (2) of the Anti Counterfeit Act, 2008 ("the Act") provides the manner of laying a complaint. It is the Petitioner's case that although Section 34(1) of the Act entitles the owner of intellectual property to apply for seizure and detention of counterfeit goods, the failure of the Respondent in this case to exhibit such a complaint meant that the inspector's action in entering into the premises was unwarranted and illegal.
15. The Petitioner cited the decision in **Standard Newspapers Limited & another v Attorney General & 4 others [2013] eKLR** in support of the proposition that courts do not condone illegal seizure of properties without due process of the law.
16. The Petitioner also submitted that its right to privacy as guaranteed by Article 31 of the Constitution was infringed by the Respondent. The decision in the case of **Samura Engineering Limited & other v Kenya Revenue Authority, Nairobi Petition No 54 of 2011** is cited in support of the proposition that any search of property must be conducted in terms of legislation, which complies with the provisions of Article 24 of the Constitution as such searches, infringe on the right to privacy.
17. It was also submitted for the Petitioner that even if the seizure was legal, the goods ought to have been returned within three months from the date of seizure as provided by Section 28(1) of the Act. It is the Petitioner's case that although the goods were seized on 20th December, 2017, they had not been returned by 4th April, 2018 when the petition was filed hence contravening the said Section 28(1). Further, that nobody has been charged in connection with the said seizure.
18. Turning to the alleged infringement of Article 40 of the Constitution, the Petitioner submitted that its business had been disrupted by the actions of the Respondent and it had suffered losses as a consequence.
19. On the claim that Article 47 of the Constitution had not been complied with by the Respondent, the Petitioner asserted that its goods had been seized without an opportunity to be heard being availed to it. Further, that the Respondent had deliberately failed to accept the evidence in support of the manufacture and importation of the product hence disregarding the due process. The decision in the case of **Dry Associates Ltd v Capital Markets Authority & another, Petition No 328 of 2011** is cited as emphasizing the importance of compliance with Article 47 of the Constitution.
20. As for the remedies it seeks in the petition, the Petitioner submitted that it has a right to get the relief of declaration of violation of rights, an injunction compelling the Respondent to release its goods, an order for compensation and any other order the court deems fit.
21. The Petitioner pointed to Section 16(2)(a) & (b) of the Act as providing for compensation by way of damages to an aggrieved party where it is proved that the inspector was grossly negligent or acted in bad faith. According to the Petitioner the inspectors on duty on the material day acted both in gross negligence and with bad faith. This, the Petitioner submitted, is confirmed by the fact that its goods have not been returned to date.
22. The Petitioner submitted that Section 25(3) of the Act entitles it to move this court for a determination that its seized goods are not counterfeit goods and for an order that the goods be returned to it.
23. Citing the decision in **Standard Newspapers Ltd (supra)**, the Petitioner submitted that monetary compensation must be reasonable and fair taking into account the circumstances of each case. The Petitioner still relying on the said case urged this court to award it Kshs.5 million as compensation.
24. In opposition to the petition, it was submitted for the Respondent that the actions of its inspector were lawful. It was asserted that Section

22 empowers the Anti-Counterfeit Agency Board to appoint inspectors for purposes of enforcement of the Act. Further, that the powers of an inspector as provided by Section 23 of the Act includes inspection, seizure, removal and detention of goods reasonably suspected to be counterfeit. It is the Respondent's case that the inspection and seizure of the Petitioner's goods was conducted by a designated inspector during day time and was thus done in compliance with the law.

25. Submitting that there was reasonable basis for suspecting that the premises had counterfeit goods, counsel for the Respondent stated that there are two circumstances which can form the basis for suspicion. Suspicion can arise from a formal complaint under Section 33 or the opinion of the Executive Director under Section 33(5) of the Act. The Respondent's case is that the action against the Petitioner arose from a formal complainant from Abro Industry Inc the registered proprietor of "999" liquid gasket marker.

26. The Respondent's case is that the complainant had demonstrated that it was the registered proprietor of a protected mark and identified the Petitioner as the suspected perpetrator. It is the Respondent's submission that the complainant had also laid a complaint, provided the mark, sworn an affidavit in support of the complaint, provided an indemnity and paid the complaint fee as required. It is the Respondent's case that it was incumbent upon it to act on the complaint.

27. It is submitted for the Respondent that acting on the basis of the complaint, its officers visited the Petitioner's premises on 20th December, 2017 conducted a search and seized goods suspected to be counterfeit. Further, that its officers prepared an inventory which disclosed the reason for the seizure and that the inventory of the seized goods was signed by the Petitioner's representative.

28. It was therefore the Respondent's submission that considering the process followed, it is evident that the Respondent acted within the scope of its statutory powers and discharged its duties in good faith.

29. It is the Respondent's submission that its actions did not breach Article 40(1) of the Constitution as alleged by the Petitioner since the seizure of the goods was based on the reasonable suspicion that the property was counterfeit and was based on a statutory complaint against the Petitioner. The Respondent therefore asserted that its actions were not arbitrary but informed by the law.

30. According to the Respondent, its actions were actually in furtherance of a constitutional requirement and in particular Article 40(5) which requires the State to support, promote and protect the intellectual property of the people of Kenya.

31. Asserting that the Petitioner's right to fair administrative action and fair hearing pursuant to Articles 47(1) and 50 of the Constitution were not breached, counsel submitted that a hearing was indeed conducted out of which an agreement was reached to release the seized goods to the Petitioner. It is the Respondent's position therefore that the Petitioner's rights as protected by Articles 47 and 50 were not violated. It is the Respondent's case that the Petitioner has not approached this court with clean hands. According to the Respondent the Petitioner failed to disclose to this court the agreement dated 22nd January, 2018 between the parties in which the seized goods were to be released to the Petitioner and that the agreement constituted a complete, full and final settlement between the parties.

32. It is the Respondent's assertion that the Petitioner's failure to disclose the existence of the agreement indicated lack of good faith on its part. Further, that the Petitioner has not challenged the settlement agreement nor has it claimed a breach of its terms. The Respondent urged this court to find that that said agreement constituted a complete, full and final settlement between the parties and any breach thereof ought to have resulted in the institution of a civil suit and not a constitutional petition, as is the case herein. The Respondent therefore urged the court to dismiss the petition and award it costs.

33. The Respondent's actions are not disputed. The question is whether these actions breached the Petitioner's constitutional rights. The Petitioner claims that they did but the Respondent thinks otherwise.

34. The Respondent whose legal name is the Anti-Counterfeit Authority is a creature of Section 3(1) of the Anti-Counterfeit Act, 2008. Its functions are outlined at Section 5 as follows:-

"5. Functions of the Authority The functions of the Authority shall be to—

- (a) enlighten and inform the public on matters relating to counterfeiting;**
- (b) combat counterfeiting, trade and other dealings in counterfeit goods in Kenya in accordance with this Act;**
- (c) devise and promote training programmes on combating counterfeiting;**
- (d) co-ordinate with national, regional or international organizations involved in combating counterfeiting;**
- (da) advise the government through the Cabinet Secretary on policies and measures concerning the necessary support, promotion and protection of intellectual property rights as well as the extent of counterfeiting;**
- (db) to carry out inquiries, studies and research into matters relating to counterfeiting and the protection of intellectual property rights.**
- (e) carry out any other functions prescribed for it under any of the provisions of this Act or under any other written law; and**
- (f) perform any other duty that may directly or indirectly contribute to the attainment of the foregoing."**

35. The powers of inspectors who are appointed under Section 22 of the Act are very wide as enacted at Section 23 as follows:-

“23. Powers of inspectors (1) An inspector may at any reasonable time—

(a) enter upon and inspect any place, premises or vehicle at, on or in which goods that are reasonably suspected of being counterfeit goods are to be found, or on reasonable grounds are suspected to be manufactured, produced or made, and search such place, premises or vehicle and any person found in such place, premises or vehicle, for such goods and for any other evidence of the alleged or suspected act of dealing in counterfeit goods, and for purposes of entering, inspecting and searching such a vehicle, an inspector may stop the vehicle, wherever found, including on any public road or at any other public place;

(b) take the steps that may be reasonably necessary to terminate the manufacturing, production or making of counterfeit goods, or any other act of dealing in counterfeit goods being performed, at, on or in such place, premises or vehicle, and to prevent the recurrence of any such act in future: Provided that those steps shall not include the destruction or alienation of the relevant goods unless authorized by an order issued by a court of competent jurisdiction;

(c) seize detain, and, where applicable, remove for detention, all the goods in question found at, on or in such place, premises or vehicle;

(d) seize detain, and, where applicable, remove for detention, any tools which may be used in the manufacturing, production, making or packaging of those goods or applying a trade mark or that exclusive mark on such goods;

(e) if he reasonably suspects that a person at, on or in such place, premises or vehicle may furnish any information with reference to any act of dealing in counterfeit goods—

(i) question that person and take down a statement from him;

(ii) demand and procure from that person any book, document, article, item or object which in any way may be relevant to nature, quantity, location, source or destination of the goods in question, or the identity and address of anyone involved or appears to be involved as a supplier, manufacturer, producer, maker, distributor, wholesaler, retailer, importer, exporter or clearing and forwarding agent of, or other dealer in, the goods in question; and

(f) Seal or seal off any place, premises or vehicle at, on or in which—

(i) the goods in question are found, or are manufactured, produced or made, either wholly or in part;

(ii) any trade mark, any exclusive mark or any work which is the subject matter of copyright, is applied to those goods;

(iii) the packaging for those goods is prepared; or (iv) the packaging of those goods is undertaken.

(2) Nothing in this section shall be construed as requiring a person to answer any question or give any information if to do so might incriminate him.

(3) An inspector may arrest, without a warrant, any person whom he suspects upon reasonable grounds of having committed any offence under this Act and may search and detain such a person: Provided that no person shall be arrested under this section unless he obstructs or hinders the inspector or refuses to give his name and address to the inspector or to produce to him satisfactory evidence of his identity, or gives a name and address which the inspector has reason to believe to be false or it appears to the inspector that such a person may not be found or made answerable to justice without unreasonable delay, trouble or expense.

(4) An inspector shall have the power to investigate any offence related or connected to counterfeiting notwithstanding that such an offence is not expressed as such under the provisions of this Act.

(5) An inspector shall have the same powers as are exercised by a customs officer with regard to importation of counterfeit goods under the East African Community Customs Management Act, 2005.

(6) If a magistrate, on sworn information in writing—

(a) is satisfied that there is reasonable ground to believe either—

(i) that any goods, books or documents which an inspector has power under this section to inspect are on any premises and that their inspection is likely to disclose evidence of commission of an offence under this Act; or No. 13 of 2008 Anti-Counterfeit [Rev. 2018] 16

(ii) that any offence under this Act has been, is being, or is about to be committed on any premises; and

(b) is also satisfied either—

(i) that admission to the premises has been or is likely to be refused and that notice of intention to apply for a warrant under this section has been given to the occupier; or

(ii) that an application for admission, or the giving of such a notice, would defeat the object of the entry, or that the premises are unoccupied, or that the occupier is temporarily absent and it might defeat the object of the entry to await his return, the magistrate may by warrant under his hand, which shall continue in force for a period of one month, authorize an inspector to enter the premises, if need be by force.

(7) An inspector entering any premises by virtue of this section may take with him such other persons and such equipment as may appear to him to be necessary; and on leaving any premises which he has so entered by virtue of a warrant he shall, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured against trespassers as he found them.”

36. An inspector who has seized any suspected counterfeit goods in accordance with Section 23 is expected to proceed as provided by Section 25 in the following manner:-

“ 25. Duty of inspector upon seizure of goods

(1) An inspector who has seized any suspected counterfeit goods in accordance with section 23 shall—

(a) forthwith seal, clearly identify and categorize the goods and prepare, in quadruplicate, an inventory of such goods in the prescribed form and cause the person from whom the goods are seized to check the inventory for correctness, and, if correct, cause that person to make a [Rev. 2018] Anti-Counterfeit No. 13 of 2008 17 certificate under his signature on each copy of the inventory and if the seized goods are removed under paragraph (c), the inspector shall endorse that fact under his signature on every copy of the inventory, in which case the inventory shall also serve as a receipt;

(b) furnish one copy of the inventory to the person from whom the goods are seized and another to the complainant, if any, within five working days after the seizure;

(c) as soon as possible, remove the goods, if transportable, to a counterfeit goods depot for safe storage, or, if not capable of being removed or transported, declare the goods to have been seized in situ, and seal off or seal and lock up the goods or place them under guard at the place where they were found, and thereupon that place shall be deemed to be a counterfeit goods depot; and

(d) by written notice, inform the following persons of the action taken by the inspector under section 23 (1) and of the address of the counterfeit goods depot where the seized goods are kept—

(i) the person from whom those goods are seized; and

(ii) either the complainant, where the inspector exercised his powers pursuant to a complaint laid in accordance with section 33(1); or

(iii) the person who, in relation to those goods, qualifies under section 33(1) to be a complainant, but who had not yet so laid a complaint at the time when the inspector exercised those powers on his own initiative in accordance with section 33(4).

(2) An inspector may require a complainant to disclose any additional information, which may be relevant to the action that has been taken.

(3) Any person aggrieved by a seizure of goods under section 23 may, at any time, apply to a court of competent jurisdiction for a determination that the seized goods are not counterfeit goods and for an order that they be returned to him.

(4) The court may grant or refuse the relief applied for under subsection (3) and make such order as it deems fit in the circumstances, including an order as to the payment of damages and costs.”

37. Section 33 of the Act provides the manner in which a complaint may be laid by the holder of an intellectual property right as follows:-

“33. Laying a complaint

(1) Any holder of an intellectual property right, his successor in title, licensee or agent may, in respect of any protected goods, where he has reasonable cause to suspect that an offence under section 32 has been or is being committed, or is likely to be committed, by any person, lay a complaint with the Executive Director.

(2) The complainant shall furnish, to the satisfaction of the Executive Director, such information and particulars, as may be prescribed, to the effect that the goods with reference to which that offence has allegedly been, or is being, or is likely to be,

committed, prima facie are counterfeit goods.

(3) Where the Executive Director is reasonably satisfied— (a) that the complainant is a person entitled to lay a complaint under subsection (1); and

(b) that—

(i) the goods claimed to be protected goods, prima facie are protected goods; and

(ii) the intellectual property right, the subject matter of which is alleged to have been applied to the offending goods, prima facie subsists; and

(c) that the suspicion on which the complaint is based appears to be reasonable in the circumstances, the Executive Director shall cause appropriate steps to be taken in accordance with section 23(1).

(4) The preceding provisions of this section shall not preclude an inspector from taking any appropriate steps on his own initiative including receiving and acting on consumer complaints in relation to any act or conduct believed or suspected to be an act of dealing in counterfeit goods, provided the provisions of this Act are complied with.

(5) Nothing in this section shall preclude the Executive Director from causing appropriate steps to be taken in accordance with section 23(1) in the event of an infringement of an intellectual property right for which no complaint has been lodged by the holder thereof in accordance with subsection (1) of this section.

(6) Notwithstanding the provision of subsections (1) and (2) of this section, a consumer or purchaser of goods may, where he has reasonable cause to suspect that an offence under this Act has been committed, is being committed or is likely to be committed by any person, lay a complaint with the Executive Director who shall cause appropriate steps to be taken in accordance with the provisions of this Act.”

38. The Respondent’s averment is that its actions were premised on a legitimate complaint laid by the owner of an intellectual property and which complaint had complied with Section 33(3) of the Act. It is the Respondent’s case that when the Petitioner produced evidence to confirm that the seized goods were not counterfeit the goods were released to the Petitioner upon the Petitioner discharging the Respondent of any liability.

39. The Petitioner has not demonstrated that the Respondent’s inspector acted maliciously or unreasonably. All the actions were carried out in accordance with the provisions of the Act. I agree with the Petitioner that a citizen is entitled to privacy but this right can be limited in certain circumstances. The need to balance the rights of an individual against those of the community was clearly expressed by the Constitutional Court of South Africa in the case of the **Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others In Re: Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others (CCT 1/00 [2000] ZACC 12**, as cited by Mumbi Ngugi, J in **Standard Newspapers Limited & another v Attorney General & 4 others [2013] eKLR**, as follows:-

“ [54] ...There is no doubt that search and seizure provisions, in the context of a preparatory investigation, serve an important purpose in the fight against crime. That the state has a pressing interest which involves the security and freedom of the community as a whole is beyond question. It is an objective which is sufficiently important to justify the limitation of the right to privacy of an individual in certain circumstances. The right is not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process. On the other hand, state officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property; there would otherwise be little content left to the right to privacy. A balance must therefore be struck between the interests of the individual and that of the state, a task that lies at the heart of the inquiry into the limitation of rights.”

40. There is also the settlement agreement dated 22nd January, 2018 between the Petitioner and the Respondent in which it was agreed that the goods would be forthwith released to the Petitioner and the agreement would constitute a complete, full and final settlement between the parties. The Petitioner did not mention anything about the agreement in the petition. That agreement in itself shows the professional manner in which the Respondent acted on the complaint that had been made against the Petitioner by Abro Industries Ltd. Once the Respondent established that the goods were not counterfeit, it immediately entered into an agreement with the Petitioner’s counsel settling the matter. There is no evidence that the Respondent failed to comply with the agreement.

41. In **Kenya Bureau of Standards v Powerex Lubricants Limited [2018] eKLR; Civil Appeal No. 143 of 2016 (Nairobi)**, the Court of Appeal defined the term “reasonable” as follows:-

“22. From the above provision, there is no doubt that the appellant’s officers had the legal mandate to enter the respondent’s premises and carry out investigations as to whether there was any likely contravention of the Standards Act. When it comes to seizure and detention of the goods as was the case here, there must exist “reasonable cause to believe that an offence has been committed.” The inspectors cannot just descend on the premises and cart away products without any tangible reason, or without disclosing any and seek to hide behind Section 14 of the Standards Act. They must act without malice, caprice, unreasonableness and within four corners of the law. What then does “reasonable cause to believe” mean? The word “reasonable” is difficult to define particularly in the abstract. This is so because it tends to call for subjective interpretation. In ordinary English parlance, it would mean fair, proper, moderate, not harsh, even justifiable to an extent, not petty, trivial or frivolous, open minded etc. It must always be interpreted within the context of the circumstances it is

applied or used. According to the Black's Law Dictionary, "reasonable cause" is the same as "probable cause" and amounts to "more than bare suspicion, but less than evidence that would justify a conviction." Defining "reason" Ramanatha Aiyar in "The Major Law Lexcon (4th edition 2010) states:

"Reason is "the very life of law, for when the reason of a law once ceases, the law itself generally ceases because reason is the foundation of all Laws."

The reasonable belief must therefore be founded in the law. It denotes good faith, rationality and cannot be based on mere pretence or surmise."

42. A review of the Respondent's actions will clearly disclose that it acted reasonably and in good faith. It complied with the Act in all the steps it took. The Petitioner was informed why its goods were seized and there was a genuine complaint that the goods could be counterfeit.

43. Looking at the evidence placed before this court, I find that the Petitioner has not established that the Respondent violated its rights. The petition is therefore found to be without merit and the same is dismissed with no orders as to costs.

Dated, Signed and Delivered at Nairobi this 3rd day of October, 2019.

W. Korir,

Judge of the High Court