REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 325 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF *CERTIORARI, PROHIBITION* & *MANDAMUS*

AND

IN THE MATTER OF THE ANTI-COUNTERFEIT ACT NO. 13 OF 2008

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT, 2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

ANTI-COUNTERFEIT AGENCY.....RESPONDENT

AND

CAROLINE MANGALA T/A

HAIR WORKS SALOON.....*EX PARTE* APPLICANT

JUDGMENT

The parties

1. The applicant is a business lady carrying on business for gain in Nairobi in the name style of Hair Works Saloon at the Mezzanine Floor, Reinsurance Plaza, Nairobi, in the Republic of Kenya.

2. The Respondent, the Anti-Counterfeit Authority is a body corporate with perpetual succession and a common seal established under section 3 of the Anti-Counterfeit Act[1] (herein after referred to as the act). In its corporate name, it is capable of— (a) suing and being sued; (b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property; (c) borrowing and lending money; (d) charging fees for services rendered by it; (e) entering into contracts; and (f) doing or performing all such other things or acts necessary for the proper performance of its functions under the act, which may lawfully be done by a body corporate.

Factual Matrix

3. The relevant background which triggered these proceedings is that on the 2nd August 2018 the Respondent's officers raided the applicant's shop at the mezzanine floor, Reinsurance Plaza on suspicion that she was dealing, trading and selling counterfeit beauty products by the brand Makari De Suisse. The officers seized the products and prepared an inventory pursuant to regulation 8(1) of the Anti-Counterfeit Regulations, 2010.

Legal foundation of the application

4. The applicant states that in flagrant disregard of section 25(1) (d) of the act, the said officers failed to disclose to her the address of the counterfeit goods depot. The applicant maintains that the seizure was unfair, illegal and was tainted by gross *mala-fides* because:-

a) That on the 13th April 2018, the applicant on her own volition submitted samples of the same products to the Kenya Bureau of Standards (herein after referred to as the KEBS) under to ascertain whether they were counterfeit or not.

b) That KEBS is the statutory body, which pursuant to section 4(1) (c) and (i) of the Standards Act, Cap 496, is inter-alia mandated to:-

i. to make arrangements or provide facilities for the examination and testing of commodities and any material or substance from or with which and the manner in which they may be manufactured, produced, processed or treated;

ii. to provide for the testing at the request of the Minister, and on behalf of the Government, of locally manufactured and imported commodities with a view to determining whether such commodities comply with the provisions of the act or any other law dealing with standards of quality or description.

c. That on or about the 18th April 2018, the KEBS conducted the requisite laboratory tests on the said samples and on or about the 28th April 2018, it issued a laboratory test report, the pertinent part of which read thus:

"The samples complied with the requirements of the standards as indicated in the test certificates attached..."

5. The applicant states that the consequent of the aforesaid testing is that the seized products which are similar to the said samples meet the standards set by the KEBS, hence, they are not counterfeit as alleged by the Respondent. As a consequence, the applicant states that the seizure complained of was tainted with gross *mala-fides* and was devoid of any justification.

6. The applicant further states that in light of the laboratory tests conducted by the KEBS, the said seizure was unreasonable, based on non-existent considerations or ulterior motive or purpose calculated to prejudice the applicant's business because:-

*i. The complaint dated **23rd July 2013** was lodged by a company called JO Global Venture Limited who alleged to be agents of M/s Victoria Albi Incorporated and alleged owners of the Trade Mark Makari De Suisse.*

ii. The crux of the complaint is an alleged trademark infringement allegedly owned by Victoria Albi Incorporated.

iii. Under section 5 of the Trade Marks Act, a party cannot seek redress for a trademark that has not been registered.

iv. In the instant case, it is without doubt that neither the alleged firm of Victoria Albi Incorporated nor their agents, M/s JO Global Venture Kenya Limited have registered the mark Makari De Suisse in Kenya under the provisions of the Trade Marks Act.

*v. Though an application was lodged on the **7th August 2018**, the said application **is still pending examination** at the Registrar of trade marks.*

*vi. It follows that at the time the complaint was lodged on the 23rd **July 2018** and the goods seized on the **23rd August 2018**, the complainant did not have a duly registered trade mark in existence capable of laying a basis to lodge a complaint for infringement.*

vii. The mere fact that the Respondent being the statutory body to which the complaint was lodged, failed to ascertain/make inquiries as to whether the complainant had any intellectual property right protected under the Trade Marks Act but elected to proceed and seize the applicant's goods, confirms not only the sheer and utter negligence of the Respondent but the mala fides manner in which the Respondent conducted itself.

Reliefs sought

7. The applicant prays for the following orders:-

*a. An order of **CERTIORARI** to remove into this Honourable court and quash in their entirety all the seizure notices/inventory of seized goods issued against the applicant on the 2nd August 2018 seizing all the Applicant's Makari de Suisee products.*

*b. An order of **PROHIBITION** directed towards the Respondent, restricting/prohibiting the Respondent, its agents, officers and any person acting under that office from seizing any Makari de Suisse products from the applicant's shop at Hair Works Saloon on the mezzanine floor of the Reinsurance Plaza on the basis that they are allegedly counterfeit.*

*c. An order of **MANDAMUS** ordering and compelling the Respondent to return all the products seized on the 2nd August 2018 and pay the Applicant compensatory and punitive damages for the Respondent's mala- fide exercise of its statutory duty.*

d. Any such order or relief as the honourable court may deem just, fit and appropriate in the circumstances of this matter.

Respondent's Replying Affidavit

8. **Abdifatah Adan**, an inspector with the Respondent swore the Replying Affidavit dated 2nd October 2018 in opposition to the application. He averred that the Respondent has a statutory mandate to, *inter alia*, prohibit trade or any other dealings in counterfeit goods. He deposed that the Respondent exercises the said mandate either upon formal complaint or on its own initiative based on information or intelligence.

9. Mr. Adan deposed that on 1st August 2018 the Respondent received a formal complaint in terms of Section 33(1) of the Act as read together with Regulation 13 of the Anti-Counterfeit Regulations, 2010. He averred that he together with a one Samuel Kanyua, proceeded to the *ex-parte* applicant's premises, inspected the same and seized suspected counterfeit goods with serial **numbers "000988", "000989", "000990", "000991" "000992", "000993" & "000994"** as per copies of the Inventory of Seized Goods, Form ACA 2 annexed to his affidavit. He averred that he carried out the inspection and seizure pursuant to the provisions of Section 23 of the Act.

10. Mr. Adan further deposed that it is not true that the seizure was unfair, illegal, unjustified or tainted with gross *mala fides*, and, that the applicant declined to sign the inventory.

11. He deposed that the Respondent's mandate is strictly confined to abuse of intellectual property rights which in this case is a trade mark and does not extend to matters to do with standards. He averred that the mere fact that the allegation that the seized goods had passed laboratory tests conducted by the KEBS is not only irrelevant but an unreasonable consideration when dealing counterfeiting because the test of counterfeiting is set out in section 2 of the Act and does not include any matter to do with standards.

12. He stated that the fact that the applicant has based her application solely on some alleged laboratory tests by KEBS is sufficient ground to dismiss the application for being outside the ambit of the exercise of this court's judicial review powers and jurisdiction. He further stated that the assertion that a product that has passed the laboratory tests of KEBS is not counterfeit is made out of absolute ignorance as to what constitutes counterfeit goods under the law and the statutory mandate of the Respondent.

13. He also averred that the allegation of ulterior motive is devoid of factual basis or foundation and should be dismissed with the contempt it deserves and that the applicant has failed to demonstrate any illegality, irrationality and procedural impropriety, the core principles for the award of any prerogative order.

14. He further averred that the act limits investigation period and that this application is pre-mature in that the applicant has not made an application for a declaration that the goods are not counterfeit which is a pre-condition to any order of release.

15. Mr. Adan also averred that counterfeiting is a criminal offence and the Respondent, once investigations are complete, will prefer appropriate criminal charges against the applicant and consequently the ideal situation would be for this Honourable Court to allow the ongoing investigations to run their ordinary and normal course without any orders of this court.

16. He also averred that the order of prohibition is speculative and cannot be granted by this Honourable Court on the face of the clear mandate of the Respondent and the powers and duties vested in its inspectors under Sections 23 & 25 of the act. He averred that there is no basis for *Mandamus* to award damages since the Respondent's actions have not been found to fall within the ambit of section 16(2) of the act, nor can compensation lie in this case since there is no evidence or basis for the same.

***Ex parte* applicant's supplementary Affidavit**

17. **Caroline Mangala,** the applicant swore the supplementary affidavit dated 31st October 2018 essentially disputing the contents of the Respondent's Replying Affidavit and reiterating her earlier affidavit. In addition, she averred that the Respondent has a duty to act in good faith and asserted that the seizure was tainted by gross *mala-fides* and based on unreasonable or nonexistent reasons.

18. She averred that the complaint was lodged by JO Global Venture Limited alleging to be agents of M/s Victoria Albi Incorporated and that the crux of the complaint is alleged trademark infringement allegedly owned by Victoria Albi Incorporated.

19. She argued that under section 5 of the Trade Marks Act[2]a party cannot seek redress for an unregistered trademark, and, that, none of the said parties had registered the Trade Mark in Kenya. She averred that by proceeding without ascertaining whether the Trade Mark was registered, the Respondent acted *Mala fides.*

20. She averred that the Respondent's statutory mandate to protect intellectual property only crystallizes when a complainant has a right capable of being protected and not before. She added that the standard and the quality of goods is well within the mandate of the KEBS under section 4(1) (i) of the Standards Act.[3]

Failure to join the complainant in this case

21. The applicant filed an application dated 11th March 2019 seeking to join J.O. Globa Ventures, the complainant in the complaint before the Respondent. However, it never prosecuted the said application nor was it withdrawn.

22. It is not clear why the said application was not prosecuted, yet, the seizure was triggered by the complainant's complaint, who, to me was a necessary party in this case. The principle that comes out from decided cases is that a person or a body becomes a necessary party if he is entitled in law to defend the orders sought. The term "entitled to defend" confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, for there would be violation of natural justice. The principle of *audi alteram partem* has its own sanctity. That apart, a person or an authority must have a legal right or right in law to defend or assail.

Issues for determination

23. Upon considering the diametrically opposed positions taken by the parties, I find that the following issues fall for determination:-

a. Whether the impugned decision is tainted with illegality.

b. Whether the decision was tainted by bad faith

c. Whether the Respondent's officers failed to consider relevant considerations and took into account irrelevant considerations.

d. Whether the applicant has established any grounds to warrant the judicial review orders.

a. Whether the impugned decision was tainted with illegality.

24. The applicant's counsel argued that under section 5 of the act, the general objective of the Respondent is to combat counterfeiting and protection of Intellectual Property Rights, and, in this case, rights is protected under the Trade Marks Act.[4] Counsel argued that the complaint lodged in this case related to alleged infringement of the complainant's Trade Mark. He cited section 5 of the Trade Marks Act[5] and argued that the complainant lacked the requisite *locus standi* to lodge the alleged complaint since it did not have a registered Trade Mark. On this ground counsel argued that the complaint and subsequent seizure were illegal and void. To fortify his argument, counsel relied on *Macfoy v United Africa Co Limited*[6] for the holding that if an act is void, then it is in law a nullity.

25. The Respondent's counsel referred to the definition of counterfeiting in the act which includes manufacturing, production, packaging, repackaging, labelling, or making any goods that are imitations of protected goods without the authority of the owner of the intellectual property right. Counsel further referred to the mandate of the KEBS which includes providing, testing of locally manufactured and imported commodities with a view to determining whether such commodities comply with the provisions of the act or any other law dealing with standards of quality or description and argued that the mandate of KEBS is to ensure that goods sold locally meet the requisite standards while the Respondent ensures that goods sold locally do not infringe on the intellectual property rights of manufacturers. Counsel emphasized that the distinction must be appreciated because there are times when goods will be substandard but not counterfeit, or counterfeit but not substandard or both counterfeit and substandard.

26. The Respondent's counsel further submitted that clearance of goods regarding compliance to the relevant standards by KEBS does not invoke a presumption that the goods are not counterfeit. He submitted that the test as to whether goods are counterfeit lies in section 2 of the act. For this proposition counsel relied on *PAO & 2 Others v Attorney General*[7] and urged the court to disregard the contention that the goods had been tested by KEBS.

27. Public bodies, no matter how well intentioned, may, only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned seizure to be allowed to stand, it must be demonstrated that it is grounded on law. As such, the Respondents' actions must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle, which, is inextricably linked to the rule of law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* where the court held as follows:-

> *"the doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . . Public power . . . can be validly exercised only if it is clearly sourced in law"*[8]

28. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The courts when exercising this power of construction are enforcing the rule of law, by requiring public bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[9]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

29. Thus, when the legality of a decision, act or omission is challenged, a court ought first to determine whether, through the application of all legitimate interpretive aids,[10] the impugned decision, act or omission is capable of being read in a manner that complies with the mandate conferred by the enabling statute. The Constitution requires a purposive approach to statutory interpretation.[11]The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[12] The often quoted dissenting judgment of **Schreiner JA** eloquently articulates the importance of context in statutory interpretation:-

> *"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."*[13]

30. The Supreme court of India in *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others*[14] observed that:-

> *"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the*

textual interpretation match the contextual."

31. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. As it stands, this exposition is generally accepted, but it must be said that context is everything in law, and obviously one needs to examine the particular statute and all the facts that gave rise to it. All public power must be sourced in law.

32. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[15]A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.[16] In *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others*[17] Stopforth Olivier JA provided useful guidelines for the factors to be considered when conducting a purposive interpretation of a statutory provision:-

> *"In giving effect to this approach, one should, at least, (i) look at the preamble of the Act or at the other express indications in the Act as to the object that has to be achieved; (ii) study the various sections wherein the purpose may be found; (iii) look at what led to the enactment (not to show the meaning, but also to show the mischief the enactment was intended to deal with); (iv) draw logical inferences from the context of the enactment."*

33. The Respondent's 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.*

34. The powers of inspectors appointed under Section 22 of the act are provided under section 23 of the Act. My reading of the applicant's case is that she is not challenging the powers of the Inspectors. The substance of the complaint as I understand is that the illegality arose because the complainant had not registered the Trade Mark under the law, hence she had no right to enforce Intellectual Property. In other words the complaint was illegal *ab inito.*

35. In addition, the duty of an inspector upon seizing any goods suspected to be counterfeit goods in accordance with Section 23 is provided for under section 25 of the act which reads as follows:-

> *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.

36. Section 33 of the act provides the manner in which a complaint may be laid by the holder of an intellectual property right. Again, the only challenge here is that the complainant had not registered his Trade Mark, implying that he had no right in the first place to lay the complaint. This argument, as I understand it, is hinged on the contention that an unregistered Trade Mark is unprotected, hence no complaint could arise. Simply put, the applicant's argument is anchored on the fact the complainant had not registered the Trade Mark and to confirm her position, she exhibited a search showing that the complainant's application for Registration was pending. The applicant's argument is in my view legally frail as explained below.

37. *First,* the applicant's argument ignores what is described as a common law trade mark. (*See Capital Estate and General Agencies (Pty) Ltd & others v Holiday Inns Inc & others.)**[18]*** As Nicholas AJA observed in *Schultz v Butt*:-[19]

'The fact that in a particular case there is no protection by way of patent, copyright or registered design, does not license a trader to carry on his business in unfair competition with his rivals'.

38. In common law, **passing off** is a common law tort which can be used to enforce unregistered trade mark rights. The tort of passing off protects the goodwill of a trader from misrepresentation. The law of **passing off** prevents one trader from misrepresenting goods or services as being the goods and services of another, and also prevents a trader from holding out his or her goods or services as having some association or connection with another when it is not true.

39. The wrong known as **passing off** consists in a representation by one person that his business (or merchandise, as the case may be) is that of another, or that it is associated with that of another, and, in order to determine whether a representation amounts to a **passing off**, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another.[20] **Passing-off** is defined as follows:-

*"The wrong known as passing off consists in a representation by one person that his business (or merchandise, as the case may be) is that of another, or that it is associated with that of another and, in order to determine whether a representation amounts to passing off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another."**[21]***

40. As Corbett CJ put it in *Williams t/a Jenifer Williams & Associates & another v Life Line Southern Transvaal*:-[22]

*"In its classic form it usually consists in **A** representing, either expressly or impliedly (but almost invariably by the latter means), that the goods or services marketed by him emanate in the course of business from **B** or that there is an association between such goods or services and the business conducted by **B.** Such conduct is treated by our law as being wrongful because it results, or is calculated to result, in the improper filching of another's trade and/or in an improper infringement of his goodwill and/or in causing injury to another's reputation. Such a representation may be made impliedly by **A** adopting a trade name or a get-up or mark for his goods which so resembles **B's** name or get-up or that **A's** goods or services emanate from B or that there is the association between them referred to above. Thus, in order to succeed in a passing off action based upon an implied representation it is generally incumbent upon the plaintiff to establish, inter alia: firstly, that the name, get-up or mark used by him has become distinctive of his goods or services, in the sense that the public associate the name, get-up or mark with the goods or services marketed by him (this is often referred to as the acquisition of reputation); and, secondly, that the name, get-up or mark used by the defendant is such or is so used as to cause the public to be confused or deceived in the manner described above."*

41. A cause of action for passing off is a form of intellectual property enforcement against the unauthorised use of a get-up (the whole external appearance or look-and-feel of a product, including any marks or other indicia used) which is considered to be similar to that of another party's product, including any registered or unregistered trademarks. **Passing off** is a common law cause of action, whereas statutory law such the Trade Marks Act provides for enforcement of registered trademarks through infringement proceedings.

42. **Passing off** and the law of registered Trade Marks deal with overlapping factual situations, but deal with them in different ways. **Passing off** does not confer monopoly rights to any names, marks, get-up or other indicia. It does not recognize them as property in its own right. Instead, the law of **passing off** is designed to prevent misrepresentation in the course of trade to the public, for example, that there is some sort of association between the businesses of two traders.

43. There are three elements, often referred to as the Classic Trinity, in the tort of **passing off** which must be fulfilled. In *Reckitt & Colman Ltd v Borden Inc*,[23] – also known as the *Jif Lemon case* – is a leading decision of the House of Lords on the tort of **passing off**. The court reaffirmed the three part test (reputation and goodwill, misrepresentation, and damage) in order to establish a claim of **passing off**. Lord Oliver, at page 880, reaffirmed the classic test for passing off:-

> *"**First,** he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying "get-up" (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. **Second,** he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. ... **Third,** he must demonstrate that he suffers or ... that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff."*

44. The above jurisprudence extinguishes the applicant's argument suggesting that the fact that the Trade Mark was unregistered is sufficient to render the complainant's complaint incompetent for lack of *locus standi.*

45. The second ground upon the applicant's argument collapses is that a reading of the Anti-Counterfeit Act clearly shows the scope and purpose of the enactment. The preamble to the act reads that it is an Act of Parliament to prohibit trade in counterfeit goods, to establish the Anti-Counterfeit Authority, and for connected purposes. The Act defines counterfeiting as follows:-

> *"counterfeiting" means taking the following actions without the authority of the owner of intellectual property right subsisting in Kenya or outside Kenya in respect of protected goods—*
>
> *(a) the manufacture, production, packaging, re-packaging, labelling or making, whether in Kenya, of any goods whereby those protected goods are imitated in such manner and to such a degree that those other goods are identical or substantially similar copies of the protected goods;*
>
> *(b) the manufacture, production or making, whether in Kenya, the subject matter of that intellectual property, or a colourable imitation thereof so that the other goods are calculated to be confused with or to be taken as being the protected goods of the said owner or any goods manufactured, produced or made under his licence;*
>
> *(c) the manufacturing, producing or making of copies, in Kenya, in violation of an author's rights or related rights;*
>
> *(d) in relation to medicine, the deliberate and fraudulent mislabelling of medicine with respect to identity or source, whether or not such products have correct ingredients, wrong ingredients, have sufficient active ingredients or have fake packaging:*
>
> *Provided that nothing in this paragraph shall derogate from the existing provisions under the Industrial Property Act, 2001 (No. 3 of 2001);*

46. From the above definitions, the aspect of "manufacturing and producing" relates to patent. The packing, re-packing and using marks that may confuse the public as to the identity of the product amounts to a trade mark infringement and the definition relating to violation of an author's rights refers to copyright infringement. Thus is can be said that in Kenya the counterfeiting means infringement of intellectual property rights. It follows that the distinction created by the applicant by hanging on the alleged non-registration of the Trade Mark cannot stand. This is because, as the foregoing analysis of the definition shows, counterfeiting is wide enough to cover infringement of intellectual property rights.

47. From the foregoing, it is clear that the applicant only got stuck in one statute, namely, the Trade Mark Act and forgot that in identifying the anti- counterfeit laws in Kenya, it is vital to consider the intellectual property doctrines. This is for the simple reason that counterfeiting is considered as infringement of intellectual property in Kenya, thus the laws that protect the intellectual property rights can be considered as anti-counterfeit laws. As Prof. Ben Sihanya correctly puts it, the intellectual property doctrines which are relevant to combating counterfeit trade include: patent, trade secrets, trade mark and copyright.[24]This can also be demonstrated from my above argument on the conceptual framework where I defined counterfeiting to include the infringement of patent, trade mark and copy rights. It thus follows that the substantive laws that protect these intellectual property rights are part of the anti-counterfeiting laws.

48. It is my finding that a valid complaint was laid before the Respondent. The above analysis and findings completely extinguishes the core ground upon which this application stands. On this ground alone, this application must fail.

b. Whether the decision was tainted by bad faith

49. The applicant's counsel cited section 7(2) (h) of the Fair Administrative Action act,[25]the definition of bad faith in Black's Law Dictionary and *SCA v Minister of Immigration*[26] which defined bad faith as lack of honest or genuine attempt to undertake the task and involves personal attack on the honesty of the decision maker in support of his contention that the seizure was actuated by bad faith.

50. The applicant's counsel also relied on *Republic v University of Nairobi ex parte Lazaru Wakoli Kunani & 2 Others* for the holding that an administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law. He also submitted that statute power can only be exercised validly if is exercised reasonably. Counsel argued that failure to ascertain whether the complainant's Trade Mark was registered constituted lack of honesty, hence the subsequent seizure was tainted with *mala fides*.

51. Citing the definition of negligence in the Black's Law Dictionary,[27] counsel argued that failure to inquire whether the trade mark had been registered was not only negligence, but was meant to achieve an ulterior purpose, hence, the decision was tainted with *mala fides*.

52. The Respondent's counsels argument as I understood it was that the Respondent's inspectors acted within their powers.

53. The starting point is that under section 7 of the Fair Administrative Action Act,[28] a decision or administrative action may be judicially reviewed if, among other things, if the decision was taken in bad faith or arbitrarily or capriciously, or the decision is not rational or is otherwise unconstitutional or unlawful. Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest. These motives, which have the effect of distorting or unfairly biasing the decision-maker's approach to the subject of the decision, automatically cause the decision to be taken for an improper purpose and thus take it outside the permissible parameters of the power.

54. A power is exercised *fraudulently* if its repository intends for an improper purpose, for example dishonestly, to achieve an object other than that which he claims to be seeking. The intention may be to promote another public interest or private interests. A power is exercised *maliciously* if its repository is motivated by personal animosity towards those who are directly affected by its exercise.

55. Bad faith has been defined rarely, but an Australian case defined it as ''a lack of honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker."[29] Even though "Bad faith" has not been given a precise definition, it has been frequently associated with actions involving malice, fraud, collusion, illegal conduct, and dishonesty, abuse of power, discrimination, unreasonable conduct, ill-motivated conduct or procedural unfairness. Justice Southin in *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee**[30]*** articulated the concept of bad faith as follows:-

> "*The words bad faith have been used in municipal and administrative case law to cover a wide range of conduct in the exercise of legislatively delegated authority. Bad faith has been held to include dishonesty, fraud, bias, and conflict of interest, and discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that is illegal, and renders the consequential act void. And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact."(Emphasis added)*

56. A decision maker must not seek to achieve a purpose other than the purpose for which the power to make the decision has been granted by Parliament. Bad faith can be inferred where there is a deliberate breach of due process or where the decision maker appears to have been influenced by irrelevant considerations.

57. The greatest defence to allegations of this nature is that the act must have been performed in good faith. The act complained of must have been done in the performance or intended performance of a duty or authority under the enabling act or by-law passed under it. The words "good faith" must be read in the context of the act. When one speaks of good faith in the performance of a duty or statutory authority, one must look to the nature of the duty or statutory authority to determine what is reasonable and what is not. This contextual approach can lead to very subjective judgments. If there is clear evidence of an intention to act illegally or outside the scope of authority, dishonestly or with malice, in other words, a blatantly dishonest exercise of power, then a party cannot rely on the good faith defence. However, to lose the immunity of "good faith" involves more than negligence or an error in judgment. If there is an honest attempt to give effect to the law, the good faith defence should prevail.

58. The Supreme Court of Canada in *Chaput v. Romain**[31]*** described the "honest belief" distinction as follows:-

> "*What is required in order to bring the defendant within the terms of such a statute as this is a bona fide belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did."*

59. The contrast is with an act of such a nature that it is wholly unauthorized and where there exists no colour for supposing that it could have been an authorized one. In such a case there can be no question of good faith or honest motive. The words "good faith" must be read in the context in which they are found. Acting in good faith presumes exercising a judgment which is either made in good faith or in bad faith. If it is made in good faith, the statutory immunity applies. If it is made in bad faith, the statutory immunity does not apply.

60. The circumstances of this case is that the seizure was triggered by a complaint. The law permits the inspectors to act upon receiving a complaint or upon reasonable suspicion. This is provided for in section 23 of the Act. **Rudd, J** in *Kagane –vs- Attorney General*,[32] set the test for reasonable and probable cause. Citing *Hicks vs. Faulkner*,[33] *Herniman vs. Smith*[34] and *Glinski vs. McIver**[35]*** the learned judge stated thus:-

> "*Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he*

instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judges by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution...Inasmuch as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based."

61. In *Simba vs. Wambari*[36] the court defined what constitutes a reasonable and probable cause in the following words:-

> *"The plaintiff must prove that the setting of the law in motion by the inspector was without reasonable and probable cause….if the inspector believed what the witnesses told him then he was justified in acting as he did…"*

62. In *Hicks v Faulkne*[37] Hawkins J defined reasonable and probable cause as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead to any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."[38] It was stated that the test contains a subjective as well as an objective element. There must be both actual belief on the part of the prosecutor and the belief must be reasonable in the circumstances.

63. The test for determining the existence of a reasonable suspicion is an objective one, that is, the grounds of suspicion must be those which would induce a reasonable person to have the suspicion.[39] It is, therefore, not whether an officer believes that he has reason to suspect, "but whether on an objective approach, he in fact has reasonable grounds for his suspicion."[40] That is, "a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest."[41] What is required is that the police officer must take account of all the information available to him/her at the time and base the decision to arrest on such information.[42] What constitutes reasonable grounds for suspicion had to be judged against what was known or reasonably capable of being known at the relevant time.[43]A belief or suspicion was capable of being reasonable even though founded on a mistake of law. The officer in question need not be convinced that the information in his/her possession was sufficient to commit for trial or convict, or to establish a *prima facte* case[44]for conviction, before making the arrest.[45]

64. I now apply the tests for bad faith discussed above. I am not persuaded that the allegation of bias cited in this case can pass the above tests. The applicant has not demonstrated that the motive of the decision is tainted by bad faith or malice. The material before me does not suggest bad faith or a reasonable possibility of ill motive or bad faith in seizing the goods. Bad faith is a serious allegation which attracts a heavy burden of proof[46]which is lacking in this case. This ground of assault fails.

c. Whether the Respondent's officers failed to consider relevant considerations and took into account irrelevant considerations.

65. The applicant's advocates cited section 7(2) (f) of the Fair Administrative Action Act[47] and argued that a public body, must, when taking a decision, take into account all relevant considerations. To buttress his argument, counsel cited *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[48] for the holding that if in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then, in exercising the discretion, it must have regard to those matters. He submitted that a public body must not take into account irrelevant considerations.

66. In addition, counsel relied on *Secretary of State for Education and Science v Tame side MBC*[49] in which Lord Diplock held that a public body is not only required to direct itself properly as to the nature and scope of its decision making function, but it is also required to take reasonable steps to acquaint itself with the relevant information to enable it properly to perform the duty. Counsel argued that even though the complaint was premised on a Trade Mark infringement, it was not accompanied by a certificate of trade mark issued under the act. He argued that the failure to inquire whether the said certificate existed amounted to failing to consider relevant considerations. Counsel argued that such omission renders the decision unlawful.[50]

67. Lastly, the applicant's counsel argued that there is a correlation between counterfeiting and standardization of goods and argued that the respondent's mandate is inextricably connected with the standardization of products, hence, the reports conducts by KEBS cannot be wished away. On the requirements of section 26(5) of the act, counsel argued that there is no evidence before this court to show that the complainant holds the Trade Mark.

68. The Respondent's counsels argument was that the applicant has largely based its case on the allegation that the complaint laid with the Respondent was not based on any subsisting trade mark registration. He referred to section 26(5) of the act which provides:

> *"(5) Where the subsistence of intellectual property right in respect of suspected counterfeit goods or the title or interest in intellectual property right is in issue, the complainant shall be presumed to be the owner of the copyright or the related right or, as the case maybe, the exclusive licensee of any such right, until the contrary is proved."*

69. It was his submission that drawing from the foregoing provisions, the complainant is presumed as the owner of the trade mark and any other arguments in rebuttal of the aforesaid presumption can only be trial related and merit based which calls for a full hearing and proof before the trial court and not judicial review.

70. The question that comes to mind is whether the tests by KEBS are relevant considerations in this case. With tremendous respect, the applicant's counsel totally misconstrued counterfeiting and intellectual property law and what constitutes a lawful seizure under the act. Counsel equally misunderstood what constitutes relevant and irrelevant considerations. I will first address the law on relevant and irrelevant considerations before considering the argument propounded by the applicant's counsel.

71. If, in the exercise of its discretion, an authority takes into account considerations, which the courts consider not to be proper, then in the eyes of the law it has not exercised its discretion legally. On the other hand, considerations that are relevant to a public authority's decision are of two kinds. These are mandatory relevant considerations (that is, considerations that the statute empowering the authority expressly or impliedly identified as those that must be taken into account), and discretionary relevant considerations (those which the authority may take into account if it regards them as appropriate). If a decision-maker has determined that a particular consideration is relevant to its decision, it is entitled to attribute to it whatever weight it thinks fit, and the courts will not interfere unless it has acted in a *Wednesbury*-unreasonable manner. This is consistent with the principle that the courts are generally only concerned with the legality of decisions and not their merits.

72.. The law on relevant and irrelevant considerations was explained in *R. v. Somerset County Council, ex parte Fewings*[51] in which Lord Justice of Appeal Simon Brown identified three categories of considerations that decision-makers need to be aware of:-[52]

> *a) those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had;*
>
> *b) those clearly identified by the statute as considerations which must not be had; and*
>
> *c) those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so.*

73. Lord Justice Brown elaborated that for the third category, there is "a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process," subject to *Wednesbury* unreasonableness.

74. The Singapore case of *City Developments Ltd. v. Chief Assessor*[53] illustrates a similar point. The Court of Appeal stated, "Where a wide range of considerations needs to be taken into account or a power is conferred on an authority exercisable on the authority's 'satisfaction', the courts are reluctant to intervene in the absence of bad faith or capriciousness." It also said, "What is or is not a relevant consideration will depend on the statutory context."[54]

75. The duty of the court is to determine whether it has been established that in reaching its decision, an administrative body directed itself properly in law; and, had in consequence taken into consideration the matters which upon the true construction of the act it ought to have considered and excluded from its consideration matters that were irrelevant to what he had to consider. When determining if a decision-maker has failed to take into account mandatory relevant considerations, the courts tend to inquire into the manner in which the decision-maker balances the considerations.

76. However, once the decision-maker has taken into account the relevant considerations, the courts are reluctant to scrutinize the manner in which the decision-maker balances the considerations. This can be gleaned from the case of *R. v. Boundary Commission for England, ex parte Foot,*[55] where the Court of Appeal of England and Wales was unwilling to overrule certain recommendations of the Commission as it had rightfully taken all the correct considerations laid down in the relevant statute. The court emphasized that the weighing of those relevant considerations was a matter for the Commission, not the courts.[56]

77. The above statement of law was endorsed in *Tesco Stores Ltd. v. Secretary of State for the Environment,*[57] a planning law case. Lord Hoffmann discussed the "distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority."[58] His Lordship stated:-

> *"Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at."*

78. Turning to the substance of the issue under consideration, the applicant's counsel argued that since the goods were tested by KEBS and certified as being genuine, that was a sufficient ground for the Respondent's officers to decline the complaint. The said argument ignores the wide definition of what constitutes counterfeiting and counterfeit goods in the act. It also ignored the wide definition assigned to Intellectual Property under the act which includes— (a) any right protected under the Copyright Act;[59] (b) any plant breeders' right granted under the Seeds and Plant Varieties Act;[60] (c) any right protected under the Trade Marks Act;[61] and (d) any right protected under the Industrial Property Act.[62] Simply put, even genuine products can be counterfeit depending on how they hit the market

79. A reading of the act shows that it affords protection to intellectual property owners who have registered trademarks, unregistered well-known trademarks, copyright works (provided that the subsistence of copyright in the work is proven); and prohibited marks under the Trade

Marks Act.[63] It is also important to bear in mind what constitutes dealing in counterfeit goods which includes possession of infringing goods in the course of business; or manufacturing, making or producing infringing goods for non-private or domestic use; or selling, hiring or exchanging infringing goods; or exhibiting infringing goods for the purposes of trade; or distributing infringing goods for the purposes of trade, or any other activity or action that may prejudice the rights of an intellectual property owner; or importing infringing goods.

80. It follows that so long as there was reasonable belief that the seized goods fell within the statutory definition counterfeit goods, the seizure was properly founded on the enabling provisions of the act. The alleged certificate by KEBS does not and cannot remove the goods from the ambit of the above definitions. The final nail to the applicant's argument lies in the fact that even genuine goods can be counterfeit as earlier explained and counterfeit goods ca be genuine.

d. Whether the applicant has established any grounds to warrant the judicial review orders

81. In his supplementary submissions, the applicant's counsel cited *Republic v Public Procurement Administrative Review Board ex parte Synerchemie*[64] for the proposition that no statute can be enacted with the sole intention of doing an injustice to parties and that Article 47 elevates fair administrative action from a common law action to a constitutional right under the Bill of Rights. He placed further reliance on *Republic v Speaker of the Senate & Another ex parte Afrison export Import Limited & Another*[65]in support of the proposition that judicial review is now entrenched in the constitution and that it is no longer a common law prerogative.

82. The applicant's counsel also cited *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others*[66] for the holding that merit review is permitted to a limited extent and that under the Constitution expanded the traditional judicial review jurisdiction. Lastly, the applicant's counsel relied on sections 11(1) (j) of the Fair Administrative Action Act[67] and 16 of the Anti-Counterfeit Act[68] and argued that the applicant is entitled to damages.

83. The Respondent's counsel referred to the scope of judicial review jurisdiction and argued that to succeed a litigant must prove illegality, irrationality or procedural impropriety. He relied on a passage from *Republic v Public Procurement Administrative Review Board & 3 Others ex parte Saracem Media Limited*,[69] *Isaack Osman Sheikh v Independent Electoral & Boundaries Commission & 2 Others*[70] and *Republic v Public Procurement Administrative Review Board ex parte Higawa Enterprises Limited*.[71]

84. In addition, the Respondent's counsel argued that the existence or otherwise of an Intellectual Property Right is a merit issue as provided under section 26(5) of the act and that it is the trial court that is best suited to determine such an issue.[72] Counsel argued that the applicant has already been charged in criminal case no. 2074 of 2018 and is inviting this court to delve in evidence relating to the said case.[73] On the release of the goods counsel cited section 25(3) of the act and argued that such an order can only be granted pursuant to an application to a competent court under the said section.

85. It is common ground that the prayers sought are Judicial Review remedies and the rules governing grant of Judicial Review do apply. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the 'forbidden appellate approach'. Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

86. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the Rule of Law. As with any other form of governmental authority, discretionary exercise of public power is subject to the courts supervision in order to ensure the paramountcy of the law.

87. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. Broadly, in order to succeed, the applicant will need to show either:-

> *a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or*
>
> *b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.*

88. An administrative decision is flawed if it is illegal. A decision is illegal if it: - ***(a)*** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* ***(b)*** *pursues an objective other than that for which the power to make the decision was conferred;* ***(c)*** *is not authorized by any power;* ***(d)*** *contravenes or fails to implement a public duty.*

89. Statutes do not exist in a vacuum.[74] They are located in the context of our contemporary democracy. The rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. The courts should therefore strive to interpret powers in accordance with these principles.

90. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation, which is to combat counterfeiting as defined in the act and for connected purposes.

91. I have already held that the common law right of passing off applies in this case. I have already determined that no illegality, bad faith, unreasonableness or alleged failure to consider relevant considerations has been established. The court cannot stop a lawful process. It can only intervene if is shown to be an abuse of the process, illegal or baseless or if it is prompted by ulterior motives or any such other motives

other than furtherance of the statutory mandate. The applicant has not proved malice or illegal process. The allegations made here do not disclose breach of Rights, nor has any breach been proved at all in the circumstances of this case.

92. The Respondent is vested with powers to undertake the seizure upon reasonable suspicion that an offence has been or is likely to be committed. I have herein above defined reasonable suspicion. No abuse of such powers has been proved. It has not been shown that this power was not exercised as provided under the law. It has not been proved that the Respondent's officers acted outside their powers. The reasons given for the seizure can pass Article **24** analysis test. In my view, reasons and the action taken is justifiable in a modern democratic society.

93. An administrative decision can only be challenged for ***illegality, irrationality*** *and* ***procedural impropriety.*** A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the first Respondent. It's legal because its premised on the four corners of the enabling statute.

94. The grant of the orders of *Certiorari*, *Mandamus* and *Prohibition* is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

95. *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed.' Originally a common law writ, *Mandamus* has been used by courts to review administrative action.[75] *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either**.[76]

96. *Mandamus* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. I am not persuaded that the applicant has demonstrated sound grounds for the court to exercise its discretion in his favour and grant the Judicial Review order of *Mandamus.*

97. The applicant also seeks an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

98. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, or where the applicant could have applied for another remedy. In the instant case, the applicant had an option under the act to apply for a declaration that the goods are not counterfeit goods. She never pursued the said option. Even if this court had been invited to make such a declaration, it cannot properly do so because it would require a merit determination which is outside the function of judicial review jurisdiction.

99. The invitation to this court to compel the Respondent to pay damages cannot be sustained. *First,* no material was presented before this court to support the claim for damages. *Second,* such a determination will require evidence. Judicial review does not deal with contested issues of fact. *Third,* such a determination will be an invitation to this court to venture into merits which is outside the scope of judicial review jurisdiction.

100. The power of the court to review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.[77]

101. In view of my analysis, determination and conclusions arrived at above, it is my finding that the applicant has not established any grounds for the court to grant any of the judicial review orders sought. Accordingly, the applicant's application dated **15th** August 2018 is hereby dismissed with costs to the Respondent.

Right of appeal

Dated, Signed and Delivered at Nairobi this 20th day of November 2019

John M. Mativo

Judge

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[1] Act No. 13 OF 2008.

[2] Cap 506, Laws of Kenya.

[3] Cap 496, Laws of Kenya.

[4] Cap 506, Laws of Kenya.

[5] Ibid.

[6] {1961} 3 ALL ER 1169.

[7] {2012} e KLR.

[8] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* {2006} ZACC 9; 2007 (1) SA 343 (CC).

[9] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[10] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24

[11] Ngcobo J while interpreting a similar provision in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[12] Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville above n 18 at 244.

[13] *University of Cape Town vs Cape Bar Council and Another* 1986 (4) SA 903 (AD). See also *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-3.

[14] {1987} 1 SCC 424.

[15] Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants, Cape Town 2000) at 244-50.

[16] *Dawood and Another v Minister for Home Affairs and Others; Shalabi and Another v Minister for Home Affairs and Others; Thomas and Another v Minister for Home Affairs and Others* {2000} ZACC 8; 2000 (3) SA 936 (CC) ; 2000 (8) BCLR 837 (CC) at para 47.

[17] {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[18]1977 (2) SA 916 (A) at 925H). In order to establish such a mark, an applicant has to show that the mark has acquired such a reputation in relation to the applicant's business that it may be said to have become distinctive thereof. See *Capital Estate and General Agencies (Pty) Ltd v Holiday Inns Inc* 1977 (2) SA 916 (A) at 925H. See also *Policansky Bros Ltd v L & H Policansky* 1935 AD 89 at 97, where Wessels CJ held the following in relation to a claim of passing off: 'It is an action in tort and the tort consists of a representation by the defendant that his business or his goods, or both, are those of the plaintiff. The Roman-Dutch law was well acquainted with the general principle that a person cannot, by imitating the name, marks or devices of another who had acquired a reputation for his goods, filch the former's trade (Ned. Advies Boek, vol. 1, adv. 68, p. 161). This class of tort had not reached, by the end of the eighteenth century, the importance that it has today.'

[19] 1986 (3) SA 667 (A) at 683J-684A.

[20] See *Capital Estate and General Agencies (Pty) Ltd & others v Holiday Inns Inc & others*, 1977 (2) SA 916 (A) at 929E.

[21] *Capital Estate and General Agencies (Pty) Ltd v Holiday Inns Inc*. 1977 (2) SA 916 (A) at 929C.

[22] {1996} ZASCA 46; 1996 (3) SA 408 (A) at 418D-F:

[23] {1990} 1 All E.R. 873.

[24] Moni Wekesa in MoniWekesa and Ben Sihanya (eds) (2009) "An Overview of The Intellectual property Rights (IPRS) Regime In Kenya," Intellectual property Rights in Kenya,Konrad Adenauer Stiftung , Sports Link Limited , Nairobi at http://www.kas.de/wf/doc/kas_18323-1522-2- 30.pdf?110214131726 (accessed on 16/11/2019).

[25] Act No. 4 of 2015.

[26] {2002} FCAFC 397.

[27] 9th Edition.

[28] Act No. 4 of 2015.

[29] *SCA v Minister of Immigration* [2002] F.C.A.F.C. 397 at [19]. Recklessness was held not to involve bad faith (NAFK v Minister of Immigration (2003) 130 F.C. 210, [24]).

[30] {1995} B.C.J. 1763.

[31] {1955} S.C.R. 834.

[32] {1969} EA 643.

[33] {1878} 8 QBD 167 at 171.

[34] {1938} AC 305.

[35] {1962} AC 726.

[36](1987) KLR 601

[37] *Hicks v Faulkner* 1878 8 QBD 167 171, approved and adopted by the House of Lords in *Herniman v Smith* 1938 AC 305 316 per Lord Atkin.

[38] It was held in *Broad v Ham* 1839 5 Bing NC 722 725 that the reasonable cause required is that which would operate on the mind of a discreet person; it must be probable cause which must operate on the mind of the person making the charge, otherwise there would be no probable cause upon which he/she could operate. There can be no probable cause where the state of facts had no effect on the mind of the party charging the other. See also *Rambajan Baboolal v Attorney General of Trinddad and Tobago* 2001 TTHC 17 (Slollmeyer J).

[39] *R v van Heerden* 1958 3 SA 150 (T) 152E. As Jones AJP put it in *Rosseou v Boshoff 1945 CPD 145 147: "*... when one comes to consider whether he had reasonable grounds one must bear in mind that in exercising those powers he must act as an ordinary honest man would act, and not merely act on wild suspicions, but on suspicions which have a reasonable basis"

[40] *Duncan v Minister of Law and Order* 1986 2 SA 805 (A) 814D-E; *Minister of Law and Order v Hurley* 1986 3 SA 568 (A) 579F-G; *Minister of Law and Order v Pavlicevic 1989 3* SA 679 (A) 684G.

[41] *R v Storrey 1990 1 SCR 241 (SCC) 250-251.* The phrase "reasonable and probable cause for a prosecution" according to Robertson and Jastrzebski *Hassbury's Laws of England para 472 is "an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime imputed." See further Abbott v Refuge Assurance Co Ltd 1961 3 All ER 1074; Riches v DPP 1973 2 All ER 935; Fink et al v Sharwangunk Conservancy Inc 790 NYS 2d (10 February 2005); Chatteld v Comerford 1866 4 F & F 1008; Lister v Perryman 1870 LR 4 HL 521; Baptiste v Seepersad and Attorney General of Trinidad and Tobago HC 367 of 2001 (unreported); Kennedy Cecil v Morris Donna and Attorney General of Trinddad and Tobago 2005 TTCA 28 (T&T CA).*

[42] *Chartier v Quebec (Attorney General) 1979 2 SCR 474 (SCC);* R v Gouub 1997 34 OR (3d) *743* (ONCA) 749.

[43] *P*er Gleeson CJ, Gummow, Hayne and Heydon JJ, *Ruddock v Taylor* 2005 222 CLR 612 (HCA) 626 para 40.

[44] *Attorney General v Hewitt 2000 2 NZLR 110 (HC); Police v Anderson 1972 NZLR 233; Duffy v Attorney General 1985 CRNZ 599; Hussien v Chong Fook Kam 1970 AC 942 947-948; Caie v Attorney General 2005 NZAR 703 (HC) para 85; Niao v Attorney General High Court, Rotorua CP 22/96, 11 June 1998.*

[45] *PHE v Ottawa-Carleton (Region) Poicce Service 2003 OJ No 3512 (SCJ) para 54.*

[46] *Daihatsu Australia Pty Ltd v Federal Commission of Australia* (2001) 184 A.L.R. 576 (Finn J. at 587).

[47] Act No. 4 of 2015.

[48] {1948} 1 KB 223.

[49] {1976} 3 ALL ER 665.

[50] Citing Wilkie J in *R (Coghlan) v Chief Constable of Greater Manchester Police* {2005} 2 ALL ER 890 and *R v Secretary of State for Home Department ex parte Venables* {1997} 1 ALL ER 327.

[51] {1995} 1 W.L.R. 1037, Court of Appeal (England and Wales).

[52] Ibid, pp. 1049–1050.

[53] {2008} 4 S.L.R.(R.)

[54] p. 159, para. 17.

[55]{1983} Q.B. 600, C.A. (England and Wales).

[56] Ibid, pp. 635–637.

[57] {1995} 1 W.L.R. 759, H.L. (UK).

[58] Ibid, p. 780.

[59] No. 12 of 2001.

[60] Cap. 326, Laws of Kenya.

[61] Cap. 506, Laws of Kenya.

[62]No. 3 of 2001.

[63] Cap 506, Laws of Kenya.

[64] {2016} e KLR.

[65] {2018} e KLR.

[66] {2016} e KLR.

[67] Act No. 4 of 2015.

[68] Act No. 13 of 2008.

[69] {2018} e KLR.

[70] NBI Civil Appeal No. 180 of 2013.

[71] High Court of Kenya at Mombasa, Judicial review Application Number 59 of 2007.

[72] Citing *Meixner & Another v Attorney General*, CA No. 131 of 2005, Mombasa.

[73] Citing *Republic v Director of Public Prosecutions & Another ex parte Rafique Ebrahim & Another* {2016} e KLR.

[74] *R. vs Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539 at 587 (Lord Steyn: ‘‘Parliament does not legislate in a vacuum. Parliament legislates for a…liberal democracy based upon the traditions of the common law . . . and . . ., unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law’’).

[75]W. G. & C. Byse, Administrative & Review Law, Cases and comments 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[76] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review, 53 GEO. IJ. 19, 25-26 (1964).

[77] See *Gauteng Gambling Board vs Silverstar Development* 2005 (4) SA 67 (SCA) paras 28-29.