



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO. 59 OF 2013

**IN THE MATTER OF SECTION 15, 16, 25 (A) (B) (D) (I), 26 (I) AND 3 OF
THE ANTI-COUNTERFEIT ACT, 2008 ARTICLES 22(1), 23 AND 165(3)
OF THE CONSTITUTION OF KENYA 2010.**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLE 27, 36 (2) AND
47 OF THE CONSTITUTION OF KENYA, 2010.**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
ARTICLES 10(1) (B), 10(1)(C), 10(2)(B) AND 21(1) OF
THE CONSTITUTION OF KENYA, 2010.**

BETWEEN

PANYAHULULU COMPANY LIMITED.....PETITIONER

AND

ANTI-COUNTERFEIT AGENCY.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

AND

SOCIETE BIC.....INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. The petitioner is a limited liability company incorporated under the Companies Act, Cap 85 of the Laws of Uganda and it carries on trade in the Republic of Uganda.

2. The 1st respondent is a state corporation established under the provisions of the Anti-counterfeit Act, (Act No. 13 of 2008) and charged with the responsibility to combat counterfeiting, trade and other dealings in counterfeit goods, devices and promotes training programmes to combat counterfeiting and co-ordinate with national, regional or international organizations involved in combating counterfeiting.

3. The 2nd respondent is a constitutional office established under the provisions of Article 157 of the constitution which is mandated to conduct criminal proceedings.

THE PETITION

4. The petitioner averred that they were the registered owners of containers PCIU 8740106 and PCIU 8222787, which contained Beifa Ball point pens in transit to Uganda through the Port of Mombasa. The 1st respondent had on the 14/7/2011 seized the petitioner's goods but were later released. They are also the registered trademark owner of the mark "Beifa" which is the trademark on the pens which were in the container. The trademark had been registered on 22nd April, 2003 in class 16 under No. 25659 and the same had been renewed for 10 more years commencing 22nd April, 2010 by the Registrar of Trademarks Uganda.

5. On or about the 16/9/2013, the 1st respondent through its agents seized their containers on suspicion that the trademark "Beifa" infringed on the trademark which belonged to the interested party Societe Bic, after completed investigations which was done without interrogating, enact in breach of the petitioner's guaranteed constitutional right including the right to be heard.

6. The Petitioner claimed to have suffered unreasonable delay and unnecessary demurrage charges in trying to have the seized containers released. Also there had been loss of business as a result of the seizure at a cost of USD 2,000 per day. There had been no supply of documents and information to the petitioner or its advocates as per the requirements set out in the Anti-counterfeit Act.

7. The petitioner's advocates were informed by an-email dated 14/10/2013 to ask the petitioner to appear before the Mombasa Law Courts to take plea on a charge of importing into Kenya Counterfeit goods contrary to section 32 of the Anti-Counterfeit Act. . The main competitor was Societe Bic. The two have been involved in litigation over the use of the three dimensional trademark and the Registrar of Trademark on 24th February 2011 denied exclusivity of the use of the three-dimensional trademark.

8. It was their contention that their right to equality and freedom from discrimination had been breached as provided under Article 27 as follows:-

(i) The 1st respondent acted contrary to section 25(1) (1) of the Anti-counterfeit Act, 2008 by failing to give them an inventory of the goods seized and a certificate in respect of the same.

(ii) The 1st respondent had acted contrary to section 25(1)(b) of the Anti-counterfeit Act , 2008 by failing to furnish them with a copy of the inventory, under section 25(1) (d) the 1st respondent failed to issue a written notice to them of the action taken under section 23(1) of the Anti-counterfeit Act 2008 and of the counterfeit depot where the seized goods were being kept.

(iii) Acting contrary to section 26(1) of the Anti-counterfeit Act 2008 by failing to provide the petitioner with copies of any statement taken down or other documentary evidence.

9. There was breach of their right to fair administrative action as provided under Article 47 of the Constitution by the 1st and 2nd respondent's jointly, severally or acting in concert. They had not observed the known rules of natural justice by failing to grant a reasonable opportunity of presenting their case in regards to the seized goods and that they ought to have been heard before the commencement of the criminal proceedings.

10. Further the petitioner averred that the respondents acted in a manner that was in contravention of Article 2(4) 3(1) and Article 10(1)(c) of the Constitution.

11. In addition to the above, there was breach of the petitioner's right to correction or deletion of untrue or misleading information that affects the person as provided in Article 35(2) of the Constitution. The seized goods were not counterfeit goods under the Kenyan law as they were disclosed as "Bic Pens" and a trademark "Beifa" had been registered in Uganda.

12. The petitioner prayed for the following specific orders:

(a) This honourable court do make a declaration that the seizure of the container numbers PCIU 8740106 and PCIU 822287 and the subsequent investigation and the non-compliance by the respondents with the provisions of the Anti-counterfeit Act 2008 was illegal and unconstitutional and contravened the petitioners right to equality and freedom from discrimination Article 27 of the Constitution.

(b) This honourable court do make a declaration that the seizure of the container numbers PCIU 8740106 and PCIU 822287 and subsequent investigation and the denial of the petitioner a chance to correct information held by the inspectors on behalf of the respondent's thereto was illegal and unconstitutional and contravened the petitioner's right to equity and freedom from discrimination under Article 35(2) of the Constitution.

(c) This honourable court do make a declaration that the respondents illegal and procedurally flawed actions since their seizure of the two containers and investigations on the goods therein and the prosecution of the petitioner for the criminal offence of transiting

in counterfeit goods and or any other act raise legitimate concerns of bias and prejudice in contravention of the petitioners right to equality and freedom from discrimination as enshrined in Article 47 of the Constitution.

(d) This honourable court do make a declaration that the respondents illegal and procedurally flawed actions have directly resulted in unnecessary delay and unreasonable expenses to the petitioner in contravention of the petitioner's right to fair administrative action under Article 47(1) of the Constitution.

(e) This honourable court do make a declaration that the respondent's illegal and procedurally flawed actions since their seizure of the two containers and investigations on the goods therein and the prosecution of the petitioner for the criminal offence of transiting in counterfeit goods and or any other act raise legitimate concerns of bias and prejudice in contravention of the petitioner's right to equality and freedom from discrimination as enshrined in Article 27 of the Constitution of Kenya.

(f) This honourable court do direct that the seized containers numbers PCIU 8740106 and PCIU 822287 be immediately returned to the petitioner by virtue of section 25(3) of the Anti-counterfeit Act (cap 130A)

(g) This honourable court do make a declaration to the extent that the investigations into the alleged counterfeit goods seized on the two container numbers PCIU 8740106 and 822287 was:

I. In breach of the petitioner's legitimate expectations.

II. Disregarded material and pertinent facts relating to the goods on transit to Uganda

III. Unfair

IV. Unprocedural

V. Unreasonable and irrational

VI. In breach of the Wednesbury Principles

(h) This honourable court do grant compensation for the illegal and unconstitutional seizure of the two containers together with compounded interest of court rates thereon from the date of the said illegal and unconstitutional seizure thereof until payment in full.

(i) These honourable court do grant compensation for losses as a result of the illegal, forceful and unconstitutional seizure of the two containers in the sum of USD 2000 per day since seizure together with compound interest thereon from the date of the said illegal and unconstitutional seizure thereof until payment in full.

(j) This honourable court do grant compensation for the aforesaid breaches of the petitioners constitutional rights together with compounded interest thereon from the date of judgment until payment in full.

(k) This honourable court do issue a judicial review order of certiorari and quash the administrative decision by the respondent's to criminally prosecute the petitioner for transiting in counterfeit goods as contained in Mombasa Criminal case No. 2418 of 2013.

(l) This honourable court do issue a judicial review order of prohibition restraining the 1st respondent acting by itself, its employee and or agents or through such person as may act on its authority from prosecuting in any court in Kenya the petitioner in any goods market by the trademark "Beifa" registered in class number 16 under number 25659 on transits to Uganda.

(m) At this honourable court do order that the costs of this petition by borne by the Respondents in any event.

(n) As such other orders as this honourable court shall deem fit.

Affidavit in support of the petition

13. An affidavit was sworn by Liu Huaizhi on 1//8/2013 and filed on 11/10/2013 as the general manager of the petitioner who was the registered owner of goods contained in containers PCIU 8740106 and 8222787 containing "Beifa" Ballpoints pens on transit through Kenya to Uganda. The same contents contained in the petition were reiterated.

14. He also averred that the seizure of the goods by the 1st respondent was protested by their advocate through a letter dated 19/9/2013 whereby the 1st respondent responded by stating that investigations were complete, a copy of the said letter was annexed together with the following documents:

(a) A certified copy of importation documents dated 21/9/2013

(b) A certified copy of the certificate of Renewal of Registration dated 22.4.2010.

(c) A copy of the letter addressed to the 1st respondent and other supporting documents. The letter was dated 16.9.2013 which indicated the seizure of goods on suspicion that the goods had infringed on the design owned by Societe Bic.

(d) A copy of a letter dated 19/9/2013 to the 1st respondent complaining of the seizure of goods.

(e) A correspondence of letters between the interested party and the 1st respondent whereby the complainant had complained of the trademark and the 1st Interested Party advised them to file a complaint in Uganda which was the final destination of the goods.

(f) A copy of the email communication and a summons for court attendance.

(g) A copy of the Ruling whereby the Registrar of Trademark on 24th February, 2011 had denied Societe Bic exclusive use of such three dimensional trademark.

RESPONSES

1st respondent's replying affidavit

15. Casper Oluoch who is an inspector with the 1st respondent swore its affidavit and averred that the petition was an abuse of the court process since it was an attempt by the petitioner to obtain evidence relating to the criminal proceedings contrary to Article 50. Also the petitioner was invoking inapplicable provisions of the Anti-counterfeit Act and that they observed all the provisions of the Constitution especially their rights and freedoms.

16. The petitioner had engaged Trans Freight's Limited as its agent. A copy of the single administrative document, Entry No. 2013 MSA 4334893 lodged by them on behalf of the petitioner was annexed. An employee of Trans Freight Logistics was present on 16/9/2013 when the containers were opened and inspected and he had acknowledged the seizure and inventory by appending his signature.

17. The petitioner was able to get copies of the inventory and photographs of the actual seizure given to them by Transfreight Logistics who were it's agents and had sent Mr. Musembi its employee. A notice of seizure was supplied on the same day of inspection 16/9/2013 and the same documents were emailed to the General Manager Mr Gopal of Transfreight Logistics Limited.

18. Several attempts were made to contact the petitioner or its directors but its agent was unwilling to provide any direct contact and there was no response to their email dated 21/9/2013. An email was sent to them on 11/9/2013 by an agent Andrew Kaswarra of Three Way Shipping Limited who had attached a Beifa Trademark registered in Uganda indication that the petitioner was aware of the investigations.

19. In addition, he averred that the 1st respondent was not under any legal duty or obligation to avail the Petitioner any statements or documentary evidence within Section 26(1) of the Anti-counterfeit Act and such can only be supplied to the complainant, and under Article 50 the same can be supplied once a person has taken plea.

20. Further the petition was meant to undermine the original jurisdiction and processes of the subordinate court and to delay the expeditious disposal of the pending criminal proceedings and the High Court lacked the original jurisdiction to determine whether there was any counterfeiting or abuse of the intellectual property rights of Societe Bic.

21. The issues raised by the petitioner indicate the necessity of the trial before a subordinate court, and the petitioner has not shown any willingness to submit to the jurisdiction of the subordinate court. Also their advocates on record were entitled to be served with any process including a summons, and urged this court to dismiss the petition.

Interested party's replying affidavit.

22. Mr. Peter Karimi, the Area Business Development Manager Eastern Africa of Societe Bic swore an affidavit on 31.01.2014 and it was filed on 3.2.14 in response to the contents of the Petitioner's Notice of Motion application dated 18/10/2013, the Petition and the affidavit sworn by Liu Huaizhi and confirmed that the petitioner had been charged in Mombasa criminal case number 2418 of 2013.

23. The Interested Party was the registered owner of a three dimensional trademark No. KE/T/115/043574 in class 16 protecting the shape of BIC ® Ball pen. The same had been renewed on 25.7.08 for a period of 10years. They were therefore entitled to make a complaint to the 1st respondent pursuant to Section 33(1) of the Anti-counterfeit Act. The mark itself is intellectual property which is protected by Article 40(5) of the Constitution. On or about September 2013 they made complaints to the 1st respondent in regard to the suspected infringement of its three dimensional trademark No. KE/T/1995/043574. On 16.09/13 the 1st respondent informed them that an inspection had been conducted at the Port of Mombasa which confirmed an infringement to the three dimensional trademark. Thus the 1st respondent was entitled to take all the actions provided in Section 23(1) of the Anti-Counterfeit Act.

24. The photographs of the PX Beifa pens imported by the petitioner shows an identical pen to the three dimensional trademark registration No.43574 since it had a hexagonal shape of the plastic barrel, a transparency of the plastic barrel, a shape and colour of the oblong / bullet shape plastic cap and the shape and colour of the plastic end plug which there was main containers.

25. The petitioner's allegations were untrue since a notice of seizure and the investigations of the seized goods were issued to its agent which notice indicated the suspected counterfeit goods were seized at the port of Mombasa in accordance with Section 23(1) and 25(1)(d) of the Anti-counterfeit Act, and its not mandatory to issue documents to the accused but to the complaints as provided under section 26(1).

26. The Petitioner has failed to demonstrate how the trial court shall be unable to protect its right to fair hearing under Article 50 of the constitution. The criminal proceedings was a judicial process and not an administrative action and therefore issues raised under Article 47 are not relevant. Whenever Section 33(4) does not preclude an inspector from taking own initiative in relation to an act or conduct believed or suspected to be an act of dealing in counterfeit goods. Also Section 32(f) states that it is an offense to import transit through or export from Kenya any counterfeit good said thus the petitioner's beifa pens had similar mark to their registered three dimensional trademark under Section 2(a) even though it was done outside Kenya.

27. His advocate on record informed him that a mere allegation that their rights had been breached was not enough; it was upon them to state the nature of the violation. The constitutional rights are not absolute but are subject to the public interest and enjoyment of those rights by other persons. It was therefore the duty of the state to bar those who infringe on other peoples intellectual property. And that the petitioner is only trying to circumvent the due process of the law in a trial for offences they have committed.

28. The allegation that the Registrar of trademarks on Uganda on 24/2/2011 had denied the exclusive use of its three dimensional trademark was false. Indeed the registrar had upheld the registration of the interested party's three-dimensional trademark and had declined to expunge the same from the Registrar.

29. He urged the court to find the application and the petition an abuse of the court process and to dismiss the same.

SUBMISSIONS

Parties highlighted orally in court on 18/11/14 and also filed written submission.

Petitioner's submissions.

30. They urged the court to rely on the Petition dated 18/10/13, the affidavit in support of the Petition and the list of authorities. They urged that they did not sign any inventory of the goods seized and neither did their agents sign. Their agent was Pacific International lines (PTE). They have been in business of shopping Beifa Ball point pens to Kenya and transiting them to Uganda through the port of Mombasa. In 2011 the 1st respondent had sized its goods but the same was released and the complainant was asked to lodge the complaint in Uganda.

31. It was their submission that they were the registered owners of containers no. PCIU 8740106 and 8222787 and it was the registered owner of the mark Beifa which had been registered on 22.04.2003 in class 16 under no.25659.

32. It was their duty to plead with precision the alleged breach and spell out the nature of the breach as was held in **Anarita Karimi Njeru v. Attorney General (1979) KLR**. The respondents being public officers did not abide by the national values and principles of Article 10 when they seized, investigated and decided to prosecute the Petitioner. They respondents were further on breach of Article 21, 27, 35(2) and 47 of the constitution. They were not accorded a chance to be heard. They were never granted equal protection and benefit of the law and procedure and further that the respondents failed to observe the rules of natural justice.

33. The respondents failed to observe the **audi alteram rule** of natural justice which caused unnecessary delays and unreasonable expenses. In **Pashito Holdings & Anor v. Ndungu & 2ors** the Court of Appeal held:

“the rule of audi alteram partem, which means “hear the other side” is a rule of natural justice. It is an indispensable requirement of justice that the party who has to make a decision shall hear both sides giving each an opportunity of hearing what is urged against him.”

34. Further that the goods seized were not counterfeit goods and they did not confuse to the interested party's goods and that if at all there was any dispute then the same should be a trademark dispute.

35. They relied on **Grace Kazungu & anor v. NSSF civil case No. 703 of 2010** where it was held that the fundamental principle of natural justice is that a person affected by a decision will receive notice that his or her case is being considered. And in **Geothermal Development Co. Ltd v. A.G. & Onrs, Nai Petition No. 352 of 2012 and in Multiple Hauliers E.A Ltd v. The A.G. & 11 ors** the court emphasized the need for administrative action to be carried out procedurally.

36. They urged that the respondents failed to abide by and adhere to the procedures set out in the Anti-Counterfeit Act of 2008. Article 47 was to instill discipline to administrative action so that the values and principles of the constitution were infused in matters of public administration. In **Gitau Kiereni v. Capital Markets Authority & Anor. Majanja J, quoted hard Diplock in O'reilly v. Mackman (1983) 2AC 237** when he stated.

“The right of a man to be given “a fair opportunity of hearing what is alleged against him and of presenting his own case in so fundamental to any civilized legal system that it is to be presumed that parliament intended that a failure to observe it should render will and void any decision reached in breach of this requirement.”

37. On the breach of Article 21, Petitioner urged the court to rely on **K.C.B. & 2 Ors v. commissioner of Police & Anor** where the court held it could ordinarily not interfere in the running of their offices and exercise of their discretion within the limits provided by the law but the offices were subject to the constitution and the court could interfere where the facts disclosed a violation of the rights and fundamental freedom as guaranteed under the constitution.

38. Further on breach and contravention of Article 35(2) it was urged there were processes which could have taken place for the goods to be

declared counterfeit. In *Dry Associates v. Capital Markets Authority* it was held that: “Article 35(2) was not intended to interfere with normal regulatory and adjudicatory processes. The right to correction or deletion of untrue or misleading statements is also achieved through the normal forensic process established by law. In my view the investigation conducted fairly and in accordance with standards established by the construction will achieve the effects of Article 35(2)”

39. The petitioner urged that Article 10 had been breached and referred to *John Githinji Wangonde & 7 ors v. Coffee Board of Kenya & Anor, COFEK v. A.G. & or ex-parte & Ors Nai JR Misc Applic No. 185 of 2011 (unrptd)* where the courts emphasized that Article 10 sets out the values that provide the society with a vision which are not merely statements or directors of state policy but are an integral part of the application of the provisions of the constitution and have to be given legal effect.

40. Further the petitioner urged that the 1st respondent failed to furnish the petitioner with one copy of the inventory of the goods seized within five working days after seizure contrary to section 25(1)(b) and the institution of the criminal proceedings in Mombasa.

41. They urged the court to award a sum of Ksh. 2,000,000 as general damages for breach of Article 47 and this court had jurisdiction under Article 22 and 23 to grant the orders sought.

The 1st respondent's submission.

42. They urged that they received information early September 2013 that the Petitioner would import two containers through Port of Mombasa. They proceeded to place a terminal hold as a prerequisite to formal seizure of the goods on arrival and the petitioner's agent transfreight logistics limited was informed and they attended the opening and verification of the containers on 16/9/2013.

43. The petitioner was given an opportunity to be heard through their agents but they denied the opportunity and relied on available, credible and water tight evidence. A charge was preferred since they acted legally. Kenya ratified the agreement on trade related Aspects of intellectual property rights (Trips), the treaty is on the establishment of the East Africa community and the EAC Common Market Protocol and thus it has an obligation to protect intellectual property rights from abuse and in combating counterfeiting trade as provided under section 5(b) of the Anti-counterfeit Act.

44. In addition to the above section 32(f) of the Anti-counterfeit Act Criminalizes transiting through Kenya any counterfeit goods unless one shows the goods are for domestic and private use to give them an exemption from seizure or if the goods fall under Article 60 of the Agreement on trade related Aspects of intellectual property rights (TRIPS Agreement) where the goods are in small quantities and are of non-commercial nature.

45. Further Uganda and Kenya are members of World Trade Organization and signatories to the trips Agreement. They are also members of the East African Common Market and the East African Customs Union and they undertook to put measures to prevent infringement, misuse and abuse of intellectual property rights.

46. The issue between the petitioner and the interested party is the use of the three dimensional form and not the 'Beifa' trademark. There is no issue regarding the trademark 'Beifa'. The court was referred to section 2 of the Trade Marks Act which defines a mark as follows:-

“A distinguishing guise, slogan, device, brand, heading, label, ticket, name, signature, word, letter or numeral or any combination thereof whether rendered in two dimensional or three dimensional form”.

47. They urged that though the petitioner's trademark was territorial in nature, it was not the true position. Trademarks were extra-territorial as far as protection but the aspect of enforcement was territorial based on state sovereignty. Section 2 of the Anti-counterfeit Act gives the power to protect intellectual property rights irrespective of the country of registration as long as it was consistent with Kenya's international trade obligation.

48. The counsel urged that Article 47 of the constitution was strictly adhered to since they were given an opportunity to be heard. They responded by stating that the '*Audi alteram partem*' applied to decisions with civil consequences and not criminal consequences as faced by the petitioner as was held in *Wood v. Wood & others (1974)* LR 9 Ex. 190.

49. The petitioner would have had an opportunity in court to be heard. They were not under a legal or any other obligation to seek to hear the petitioner before deciding on whether there was a prima facie case as was held by Herd Reid in *Wiseman v. Borneman [1971] A.C 297* at 308. This court would not be used by the petitioner to get all evidence. The right to fair hearing does not fall within Article 47 but Article 50. In *Beatrice Ngonyo Kamau & 2 others V. Commissioner of Police and 2 others. Petition No. 251 of 2012 (unrptd)* it was held that reasonable grounds could not prove a charge against an accused person at the start of a trial but it merely showed a prima facie case and this would be before a trial court. Further the petitioner was being untruthful by urging that they would have provided the information during investigations.

50. Further the quality and sufficiency of the evidence should not be interfered with but left to the trial court and the petitioner failed to address or state the illegality of their actions. As was held in *Uwe Maixner and anor v. The A.G court of Appeal Civil Appeal No. 131/05 at page 5.*

51. They urged that the petitioner was under an obligation to state the precise provision of the right and act was breached and the act itself which they have failed. This was held in various cases including *Matiba v. The Honourable Attorney General Nairobi High Court Misc Application No. 666 of 1990, Annarita Karimu Njeru v. R (No. 1) (1979) KLR 184, Ben Kipeno and 6 others. A. G & anor. Petition No. 15 of 2007*). Therefore the petition falls short of the requirements for the award of the orders sought.

52. Article 27 provides for equality and freedom from discrimination and it's for that reason that the petitioner's agent was supplied with a copy of the inventory of seized goods (form ACA 2) which was used by them in the affidavit and notice too was issued. At the material time Transfreight logistics limited were the authorised agent and in law an agent can commit a principal as was held in **Okero v. Republic [1981] 459**. On the other hand sec 26(1) of the Anti-Counterfeit Act provides that copies of any statements or documentary evidence procured by an inspector in the cause of exercising his powers may be made available to a complainant upon an application in a prescribed manner. In this case the petitioner was the accused.

53. The petitioner stated that Article 35 had been breached, however it was their submission that the criminal process, the opportunity to correct or delete any misleading or uncovered information was accorded to an accused person during trial as was held by Majanja J in **Thuiitha Mwangi & 20 others v. the EACC and 3 others Nai H.C Petition No. 369 of 2013** where it was held as follows:-

“The provisions of Article 50 deal with the rights of the accused at a trial therefore recourse cannot be had to article 35 of the Constitution that protects freedom of information once the person is charged with the criminal offence. Furthermore the right under article 50 is one that is properly enforced by the trial court should need arise during proceedings”.

The petitioner could only access any evidence after plea taking and the issue on whether goods were counterfeit or not was to be proved at the trial court.

54. In addition it was improper for the petitioner to mislead the court by disclosing its shipping agent and not it's clearing and forwarding agent for customs purposes as provided under section 146 of the East Africa Customs Management Act.

55. The counsel averred that the petitioner is not entitled to any form of compensation. Section 16 (2) of the Anti-counterfeit Act states the circumstances that can make them liable to pay compensation if an officer acted negligently and in bad faith. There was no proof by the Petitioner on the loss of USD 2000 per day.

56. Further counsel urged that the ruling in Uganda was not binding to this court since any party aggrieved by a trademark in Kenya has a right to protection from abuse on intellectual property. The urged the court to dismiss the petition with costs.

Interested party's submissions

57. The petition was strongly opposed by the interested party. They urged that the seized goods violated the interested parties three-dimensional trademark since once a person has been registered as the proprietor of a trademark as per section 7 of the Trademarks Act. Then an exclusive right to the use of that trademark is given. Therefore the inspector who is appointed under section 22 is empowered to seize or detain or where applicable remove for detention all goods in question and under section 23 he is empowered to institute criminal proceedings against any person who is suspected of engaging in counterfeit under section 30.

58. The petitioner in their submissions are introducing a new issue that the inventory of goods seized was not signed, an issue not raised in their affidavits. They were supplied with an inventory which was signed by their agent and even used the documents as annexures. The petitioner was distorting facts with a view to mislead the court to issue orders. In **Saflo Limited v. Llyod Masika Limited [2010] eKLR**, non-disclosure of material facts tears into the credibility of the plaintiff's case.

59. The counsel further urged that the 1st respondent did not contravene sections 25(1)(d) or 26(1) of the Anti-counterfeit Act since a notice of seizure was issued as per their own annexure and only the complainant is entitled to be issued with documents. In regard to Article 47, the 1st respondent is not required to interrogate, question or record a statement from a suspect during investigation if so then, it would be violating their right to silence and right against self-incrimination. During trial the right to fair hearing shall be accorded as was held in **Augustine Francis V. A.G. Republic of Trinidad & Tobago H.C.A No. 52025 of 2004**. The petitioner was given full details of the charges in Mombasa criminal case No. 2418 of 2013.

60. The Petitioner's allegation that the goods in transit could not be seized or detained by the 1st respondent were untrue since section 32(f) of the Act states that it is an offence to import, transit through or export from Kenya any counterfeit goods. In its letter dated 14/7/2011 the 1st respondent had informed the petitioner the seizure was not wrongful though it had preferred no criminal charges.

61. Counsel urged the court to exercise caution since there existed a trial case as held in **Kenya Toner and Supplied Limited v. Director of weight and measures and 2 others, Nairobi Constitution Petition No. 51 of 2002 (unreported)** and in **Thuiitha Mwangi & 2 others V. EACC & 3 others [2013] eKLR**. The petitioner had to plead with precision and clearly state the nature of breach as was held in **Ben Kipeno & 6 others v. The A.G and another [2007] eKLR**. Constitutional rights were not absolute but subject to the public interest and enjoyment of the rights of other persons including intellectual property. The state usually protects the rights and freedoms of people.

62. Further they urged the court not to stop the prosecution of the petitioner in Mombasa Criminal case No. 2418 of 2013. This is because other manufacturers and traders dealing in genuine goods will lose their protection and so with the consumers right to buy genuine goods.

63. In addition to the above counsel urged the court that any right to apply to court for redress when any right of fundamental freedom is contravened should not be misused as a substitute for the normal proceedings. In Augustine Francis (supra)

it was held as follows: -

“Applicants must recognize that constitutional remedies are to be sparingly used and only availed to assert genuine constitutional rights. The court will not countenance the “dressing up” of a common law action under the guise of constitutional

redress; if true nature of the right allegedly contravened is common law right (a parallel remedy exists) but also fits the definition of a right protected by the constitution, the applicant must demonstrate some exceptional feature of his case that would make resort to the constitutional procedure more appropriate”.

The issues here ought to be raised by the petitioner in the trial court. This instant petition is an abuse of the trial court. In **Meixner & another v. AG [2005] eKLR 189** the court of Appeal held that,

“It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case the appellants would have caused the judicial review court to embark upon the examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence that is hardly the function of the judicial review court. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of the trial court.”

They urged this court to vacate the conservatory orders issued on 22/10/2013 staying the Criminal proceedings and to dismiss this case with costs.

ISSUES FOR DETERMINATION

64. The court has referred to the petition, the affidavits in support and the submissions. Both oral and written. The following specific issues arise for determination.

- a. Whether the 1st respondent had jurisdiction to seize the containers.
- b. Whether the petitioner’s rights have been violated and, consequently, whether the petitioner is entitled to compensation.

DETERMINATION

65. The petitioner herein filed this petition on 22/10/2013 seeking for various orders. The 1st respondent is a state organ tasked with the responsibility of combating counterfeiting, trade and other dealing in counterfeit. The purpose of the Anti-counterfeit Act No. 3 of 2008 is to prohibit trade in counterfeit goods. It was not demonstrated that the Act of Parliament was unconstitutional. Section 2 of the Act defines counterfeiting to mean -

*(a) The manufacture, production, packaging, re-packaging, labelling, or making, whether in Kenya **or elsewhere of any goods whereby these protected goods are imitated in such a manner and such a degree that these other goods are identical or substantially similar copies of the protected goods.***

(b) “Counterfeit goods” are defined as goods that are the result of counterfeiting, and includes any means used for purposes of counterfeiting.

66. From the definition above it is clear that counterfeiting includes those goods whether in Kenya or elsewhere. The petitioner’s case was that the goods subject of the Petition were on transit and were for sale in Uganda and they were not for local use. This was opposed by the 1st respondent and the interested party. The containers No. PC 14 8740106 and 8222787 contained Beifa Ball points whereby the design was alleged to be infringing on the trademark and design registered by the Interested Party.

67. The 1st respondent through its agent Casper Oluoch carried out a search on the containers and seized them. I would agree with the 1st respondent and the Interested Party that section 23 of the Act gives powers to the Agency inspectors to enter and inspect any place, premises or vehicle in which goods are reasonably suspected of being counterfeit are found, manufactured, produced or made. Further section 23(c) empowers the inspector to seize, detain or remove for detention all the goods in question found at the premises. This case “beifa ball points were in the containers.

68. The court finds that the 1st respondent acted within the law to inspect the containers and later seize them, as provided under section 32(f) of the Anti-counterfeit Act as follows:

*“It shall be an offence for any person to import into, **transit through**, tranship within or export from Kenya, except for private and domestic up of the importer or exporter as the case may be, **any counterfeit goods”.***

The law is clear, and if the 1st respondent had carried out its investigations and preferred to charge the petitioner, even though the goods were on transit it had the power and jurisdiction to seize detain and inspect. Even though the petitioner had been warned earlier in 2011 when the 1st respondent had seized containers containing the ‘Beifa’ ball paints, it is a cardinal principle of law that there can be no waiver, acquiescence or estoppel against the law.

69. The petitioner further alleged that the 1st respondent had breached fundamental rights and freedoms as enshrined in the Constitution.

(a) Breach of right governed by the Anti-counterfeit Act.

The petitioner stated the 1st respondent breached or was in violation of section 25(1)(a) and (b) and (d) and section 26 (1) of the Act.

The petitioner annexed an affidavit in support of the petition which was sworn on 8th October, 2013 and filed on 22/10/2013 was sworn by Liu Huaizhi, the General Manager. In its affidavit there were several annexures including notice of seizure dated 16.9.2013 from the Anti-Counterfeit Agency which was signed by Caspar Oluoch.

(b) A copy of an inventory of seized goods dated 16.6.2013; it had a signature of the inspector and the agents name and signature.

70. The petitioner however submitted that the 1st respondent acted contrary to section 25(1)(a) by failing to give them any inventory of the goods seized so that they could check on their correctness. The deponent was so clear in his affidavit at paragraph 4 that he had been shown a copy of letter dated 16/9/2013. The court has referred to the letter being a notice of seizure under section 25 (1)(d) that contained images and copies of inventories of seized goods. The court is in agreement with the 1st respondent and the interested party that the petitioner is alleging breach of section 25(i) yet indeed they were supplied with the copies and even used them as annexures in their pleadings. On the inventory of seized goods dated 16th September 2013, the name of the agent of the owner of the seized goods is given as “TransFreight Logistics on behalf of Panyahululu Co. Ltd.” The agent’s representative is shown as one Musembi who signed the Inventory. I find that the petitioner’s complain that it had not been given the relevant documents to be without merit, for where did it obtain the copies of documents attached to its petition as LH3 in the affidavit of Liu Huaizhi, the general manager of the petitioner.

71. In addition to the above, section 26(1) of the Act provides that:

“copies of any statement taken down or other documentary evidence procured by an inspector in the course of exercising his powers under this Act may be made available to a complainant upon an application in the prescribed manner”.

The petitioner alleged the violation of the above section yet the petitioner was not the complainant but rather it was the interested party. The 1st respondent, however as discussed above, had issued the petitioner with documents and they cannot allege not to be provided with documents.

Violation of rights and freedom in the Constitution

Whether there was violation of Article 47.

72. The court has a duty to determine whether the actions by the 1st respondent were inconsistent with the provisions of the Bill of Rights or the fundamental values and principles in the Constitution, as contended by the petitioner.

73. The petitioner filed this petition on a cause of action for violation of their constitutional rights. In **Anarita Karimi Njeru v. AG [1979] KLR 54** the court held that the petitioner must demonstrate the provisions of the Constitution violated, and the manner of the violation. The petitioner did not demonstrate in what manner the constitutional provisions had been violated in relation to it.

74. The petitioner alleged the 1st respondent was in violation of Article 47. The right to fair administrative action in Kenya is enshrined as a fundamental right under Article 47 of the constitution provides as follows:-

“47(1) every person has a right to administrative action that is expeditious. Efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, that person has the right to be given a written reasons for the action

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-

(a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) Promote efficient administration.

75. The 1st respondent had summoned the petitioner to appear before court to take a plea against the charge but the petitioner failed to attend. In fact, all the documents that the 1st respondent used in the seizure were given to the petitioner. The petitioner cannot allege not to have been given audience to interrogate when a criminal case was already in court and they had been summoned but failed to attend.

Whether Article 2(4) and 3(1) was violated.

76. The petitioner further alleged a violation of Article 2(4) and 3(1). Article 2 (4) states as,

“Any law, including customary law, that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid”.

Article 3 of these Constitution states that-

3(1) Every person has an obligation to respect, uphold and defend this constitution.

Consistently with the Rule of Law which is a principle under the values and principles of governance under Article 10 of the Constitution, the 1st respondent is under an obligation to defend traders and manufacturers from counterfeit goods in accordance with the Anti-counterfeit Act. The petitioner has not demonstrated how the respondents' actions were in breach of the Constitution. As held above, the 1st respondent was guided by the Anti-Counterfeit Act and it was within the law to seize the petitioner's containers.

Whether Article 10(1)(b)(c), 10(2)(b) was violated.

77. The petitioner cited the 1st respondent was in breach of Article 10 which sets out the national values and principles of governance based on the assertion that the petitioner was not afforded an opportunity to be heard. In this case he was to be interrogated by the 1st respondent before making the decision to charge him in Mombasa Criminal Case No. 2418 of 2013. The 1st respondent's Inspector Casper Oluoch in his affidavit deposed that the petitioner was asked to avail himself, the same was communicated to his advocates but instead they failed to appear. I would respectfully agree with Majanja J. in Nairobi Petition No. 255 of 2011 **John Githinji Wang'o v. Coffee Board of Kenya and another [2012] eKLR** that-

“Whether there is a breach of Article 10(2) must be determined in light of other provisions of the constitution and the law which impose obligations on state organs, state officers, public officers or all persons who ally and interpret the constitution, enacts, apply or interpret any law or make or implement public policy decisions.”

I do not find that in the circumstances of this case, the petitioner was denied an opportunity to be heard.

Whether Article 21(1) and 27 have been violated

78. The petitioner alleged that the 1st respondent violated Articles 21(1) and 27 of the Constitution. Article 21(1) provides for a fundamental duty of the State and every state organ to observe, respect, protect, promote and fulfil the right to fundamental freedoms in the bill of rights. The 1st respondent is a public office, whose officers have a duty to observe the law. The 1st respondent's officer was to act on his own motion or through a complaint and in this case the interested party whose allegation that the three dimensional mark was being infringed on by the petitioner. It was on that complaint that the two containers were inspected and seized.

79. The court agrees with the interested party that constitutional rights are not absolute but are subject to the enjoyment of the rights of other persons. It was the duty of the 1st respondent to protect the interested party's trademark. In **Kenya Commercial Bank and 2 Others v. Commissioner of Police & Another**, the criminal proceedings had not commenced and in **Investments and Mortgages Bank Ltd (I & M) v. The Commissioner of Police and the Director of Criminal Investigations Department & 4 others [2013] eKLR**, there had been various suits which had been determined and the fresh investigation was declared to be an infringement of the petitioners right.

80. The petitioner also alleged an infringement to Article 27 of the constitution on equality and freedom from discrimination. The petitioner only stated as follows:-

“The 1st respondent appointed officers in acting against the provisions of the Anti-counterfeit Act, 2008, have also acted in contravention of the provisions of Article 27 by not granting the petitioner equal protection and equal benefit and treatment of the law”.

The petitioner alleged they were not given an inventory of the goods seized in order to check its correctness, failed to furnish the petitioner with a copy of the inventory of the goods seized within five (5) working days failed, to issue a written notice and failed to provide copies of statement taken down. The Petitioner had from its annexed documents been represented by Transfreight Logistics Limited who were its clearing and forwarding agents, and it cannot, consequently, be heard to say that it was not duly informed.

Whether Article 35(2) was violated

81. The petitioner alleged that the 1st respondent had acted in a manner that violated their rights. Article 35(2) states as follows:

35. Access to information

2. Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

The 1st respondent is mandated with a duty to enforce the law in the Anti-counterfeit Act, Section 33(4) whereof gives an inspector the power to take any appropriate step on his own initiative in relation to any act of dealing in counterfeit goods. In this case criminal proceedings were preferred in Mombasa and the petitioner was informed about the same but failed to turn up for the trial.

82. The provisions of Article 35 right to correction of untrue or misleading information must be read in the context of the case in which criminal charges are preferred, and in the trial whereof the accused is guaranteed a fair trial under Article 50 (2), A harmonious construction of Article 35 (2) in the context of a trial is not to permit a rebuttal of any allegations outside the ambit and before the trial commences but to provide within the context of the trial consistently with the unlimitable right to fair trial an opportunity to challenge evidence presented by the prosecution and to adduce evidence in rebuttal under Article 50 (2) (j) and (k) of the Constitution.

83. There is already proceedings before the Mombasa Criminal Court, Criminal case No. 2418 of 2013 where the petitioner will be accorded a fair trial in accordance with Article 50(2) of the Constitution, which provides for a fair trial to an accused person. The petitioner was informed of the charge, which was sent to him via email and through its advocates. The Halsbury Laws of England, 5th Edition 2010 Vol. 61

of para 639 states as follows;

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adopted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute”.

84. The petitioner had sought for judicial review order of prohibition restraining the 1st respondent acting by itself, its employees from prosecuting them in any court and an order for certiorari to quash the administrative decision to criminally prosecute them. The petitioner is aware that the orders can only be granted through filing a judicial review application since they would be opposing a decision made by a public authority. The court is not the trial court and it is consequently not allowed to examine the evidence with a view of forming its own view about the merits of the case. Judicial Review proceedings examine the process of decision making and not the merits of the decision itself.

Conclusion

85. There cannot be a valid extra judicial consideration of evidence to be used by the prosecution in an impending trial so as to determine whether or not there is sufficient evidence to justify the prosecution, or such similar purpose. What would be the nature of such an extra-trial process? Who would be the finder of fact in such a process? What would a disagreement between the person sought to be charged and the Prosecutor as to the sufficiency of evidence relied on by the prosecution mean? Would it mean that the prosecution would be halted before commencement of the trial? Does criminal prosecution depend on the concurrence of the accused of existence of justifiable facts to support the prosecution? What would be the meaning of the independence of the Prosecutor under Article, 157 of the Constitution subject only to considerations of public interest, interests of administration of justice and avoidance of abuse of legal process under Article 157 (11)? The answers to these questions must be found in the position that a suspect is entitled to be informed of the charges alleged against him and an opportunity to answer to those charges and should prosecution for criminal offence be preferred despite the answer given by the suspect, he must as an accused be given an opportunity to prepare and present his defence to the charge before a competent court in accordance with Article 50 (1) of the Constitution.

86. To permit an interference with the prosecution before the charge is presented to court is to unconstitutionally interfere with the 2nd respondent's constitutional mandate holder of the State powers of prosecution contrary to Article 157 (6) of the Constitution, unless it can be shown that the prosecution is unconstitutional in terms of Article 157 (11) for being against public interest, due administration of justice and or an abuse of the legal process.

87. Prosecution and trial are judicial exercise to be undertaken after a charge against the accused is presented to the court and the accused has pleaded guilty to the charge necessitating a trial. The right to evidence to be relied upon by the prosecution is expressed to facilitate the preparation of the defence. Should the court consider that adequate time and facilities have not been availed to the accused, the trial may be adjourned to a later date for that purpose.

88. Supply of evidence in the possession of the prosecution cannot, in my respectful view, be used as a precondition to the prosecution. Evidence is properly adduced in the context of a trial as the judicial function of determining the validity of the charge lies with the court and not the particular accused or, indeed, the Prosecution. The prosecution need only be in possession of evidence upon which a court may base a conviction. That is evidence to support a finding of reasonable suspicion of having committed an offence. It need not reach certainty of conviction, as even the criminal standard of proof is only to the level of beyond reasonable doubt. The determination as to the cogency of the evidence and consequently conviction thereon is a matter for the trial court.

89. Accordingly, a suspect or an accused cannot insist on being supplied before trial with the evidence to be relied on by the prosecution at his trial commences with the plea taking in the trial court. Granting such a request may indeed lead to interference by such accused with the evidence or witnesses of the Prosecution.

90. Above all the adjudicating authority on the question whether there has been committed an offence of transiting in counterfeit goods is the criminal trial court and not the constitutional or judicial review court.

91. I do not find that the petitioner's rights and freedoms to equality and equal protection and benefit of the law, access to information, fair administrative action was infringed by the 1st respondent in any way as it acted scrupulously within the provisions of the Anti-counterfeit Act in dealing with the property subject of this Petition. I also do not find that the Respondents are in breach of any principles of the constitution under Article 10 and any duty to observe respect protect promote and fulfil rights and fundamental freedoms of the petitioner.

92. Needless to say, the issue as to the violation of the Interested Parties trade mark and consequently the commission or otherwise of the criminal offence of transiting counterfeit goods is not before this court and it is the proper subject of the trial pending before the criminal court at Mombasa.

Orders

93. Accordingly, for the reasons set out above, the Court makes the following orders:

1. The Petition herein is dismissed.
2. The interim order issued staying the criminal proceedings in Mombasa Criminal Case No. 2418 of 2013 is hereby vacated.

3. The Petitioner shall pay to the 1st Respondent and Interested Party the costs of the Petition.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 11TH DAY OF OCTOBER 2018

E.K. OGOLA

JUDGE

Appearances:

M/S Muthaura, Mugambi, Ayugi & Njonjo Advocates for the Petitioner.

M/S J. O. Adera, Advocate for the 1st Respondent.

M/S Kaplan & Stratton, Advocates for the Interested Party.