



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 36 OF 2017

IN THE MATTER OF SECTION 25(3) ANTI-COUNTERFEIT ACT

AND

IN THE MATTER OF THE TRADE MARKS ACT CAP 506 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF JUDICIAL REVIEW IN THE NATURE OF MANDAMUS, CERTIORARI AND PROHIBITION

BETWEEN

REPUBLICAPPLICANT

VERSUS

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

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

AND

MASHWA BREWERIES LIMITEDINTERESTED PARTY

EX-PARTE:- FRM (EA) PACKERS LIMITED

FRANCIS MATHENGE KIGO

RULING

1. On 3rd February 2017 this court granted to the applicants FRM(EA) Packers Limited and Francis Mathenge Kigo, leave to institute Judicial Review proceedings seeking the following Judicial Review orders:-

- a) Certiorari to bring to the High Court for purposes of being quashed, the decision of the first respondent made on 1st February, 2017 to seize Alcoholic Beverages from the first applicant and to prohibit any further production and sale of its Santa King Ice product.

b) Prohibition restraining the 1st respondent from entering into premises of FRM EA Packers Limited searching, impounding or seizing any alcoholic beverages and Santa King Ice beverage

c) Prohibition restraining the respondents from entering, into the premises of FRM East Africa Packers Limited, its suppliers, distributors or agents and searching, impounding or seizing Santa King Ice and other alcoholic products manufactured by the first applicant .

d) Prohibition restraining the 2nd respondents from receiving, entering, proceeding with or in any manner dealing with the complaint on the production, sale and distribution by the applicant of alcoholic beverages known as Santa King Ice or any other alcoholic beverage currently in production within its licences premises at Mlolongo.

e) Mandamus to compel the 1st respondent to return the applicant's goods collected from the premises of FRM (EA) Packers Limited and more specifically set out in the inventory of seized goods No. 000424 dated 1st February 2017 and pay such damages as the court shall deem just in the circumstances of this case.

2. On the prayer that leave so granted do operate as stay of enforcement and or execution of the decision of the 1st respondent, the court directed that the application with regard to that prayer for stay be served upon the respondents and the interested party for interpartes hearing on 13th February 2017 in accordance with the provisions of Order 53 Rule 1 (4) of the Civil Procedure Rules.

3. It is therefore that prayer for leave to operate as stay of the 1st respondent's decision which is subject of this ruling.

4. The facts of this case as contained in the statutory statement as verified by the affidavit of Mr Francis Mathenge Kigo the 2nd applicant Director of the 1st applicant company are that the 1st applicant is a licensed company, licensed by all relevant licensing authorities to manufacture alcoholic drinks and that it manufactures an alcoholic drink with a brand name **SANTA KING ICE** following a Deed of Transfer of brand name dated 5th August 2015 between Merchant Pinewood Ltd, the transferor and FRM EA Packers Limited, 1ST the applicant transferee, which brand name is allegedly passed by the Kenya Bureau of Standards (KEBS) for use of the standardized mark under the Standards Act Cap 496 Laws of Kenya.

5. That the applicant also uses a bottle which is a normal bottle used in the industry for all alcoholic drinks and it pays about 30 million shillings in a month as taxes to Kenya Revenue Authority who have even pitched tent at the applicant's offices/premises to monitor tax compliance.

6. That the name **SANTA KING ICE** is the applicants' own innovation for the last five years and is found in any other bar or supermarket as a low income drink, and that it is an original brand name and production.

7. That on 1st February 2012, the applicants were shocked when officers from Anti Counterfeit Agency the 1st respondent, and without notice went to the premises and claimed that there was counterfeiting and seized the product and left inventory of seized goods.

8. According to the applicants, the product is not a counterfeit since the colour, taste, composition are different. Further, that the Anti Counterfeit Agency is being used by business competitors to stifle competition from a genuine tax payer since no chemical tests had been carried out to show that the product is a counterfeit and neither has the interested party competitor shown any better right since it is not mandatory to register a Trademark and that in any event, the marks/labels are not strikingly similar as shown by the samples annexed to the affidavit.

9. The applicants contended that in view of the foregoing, there was statutory and constitutional

violation of their constitutional rights to protection under the law; to Fair Administrative Action as not even visual or other scientific data is provided to show any counterfeit and that neither is there any inquiry as to whether there was counterfeiting hence the applicants had been denied fair trial.

10. It was submitted that the applicant employs many Kenyans and that despite seeking for particulars of the alleged complaint of counterfeiting, the 1st respondent had refused to divulge any information.

11. The applicants therefore sought for stay of the impugned actions of the 1st respondent which are said to be unfair, unreasonable and irrational.

12. The 1st respondent opposed the prayer for stay and filed grounds of opposition on 13th February 2017 which were submitted on by Mr Adera counsel for the 1st respondent. It was contended that the prayer for stay is speculative as it presumes a decision to prosecute the applicants had been made yet there is no decision made to prosecute or not to prosecute the applicants.

13. Further, that Section 28 of the Anti Counterfeit Act limits the period within which the decision to prosecute is to be made.

14. Secondly, that there was also speculation that the goods have been determined to be counterfeits which is not true. That in the absence of a decision or order as stipulated in Order 53 Rule 7 of the Civil Procedure Rules and Section 4,5, and 6 of the Fair administrative Action Act, no Judicial Review order can be sought and obtained and therefore the stay sought is groundless.

15. It was also contended that the applicants lack the requisite locus standi to bring this application and to enjoy any stay orders as the application is premised on **SANTA KING ICE** brand name which is a Trademark under Section 2 of the Trademarks Act.

16. That Section 7 of the Trademarks Act confers on the registrant the exclusive right to use the brand name or trademark. That to exclude others from the use of a name, one must be registered yet the 1st applicant herein is not registered under the Trademarks Act hence it cannot seek the court's protection.

17. That the applicant only attempted to apply for registration of a trademark on 2nd February 2017 after its goods were seized on 1st February 2017. That in Kenya, protection of a trademark is based on registration and not long use.

18. It was contended that that the applicants seek stay of criminal investigations which this court cannot grant and that the 1st respondent administers the Anti Counterfeit Act which is a criminal piece of legislation hence it will be contrary to public policy and public interest if the 1st respondent was to be gagged from investigating criminal conduct, as Article 50(1) of the Constitution requires that any dispute be subjected to a public trial.

19. The 1st respondent urged the court to let the complaint lodged by the interested party be investigated and a decision taken and that there is no law for an inquiry to be made before seizure of goods

20. It was further contended that the applicants had come to court with unclean hands in the sense that; it is not possible to forewarn suspected criminals with a notice; that there is no legal requirement for giving of complaint documents to the applicants herein since Article 49 of the Constitution does not entitle them evidence to be used against them and that such evidence can only be availed after a plea has been taken as stipulated in Article 50 of the Constitution;

21. According to Mr Adera, the process of 1st February 2017 was to gather evidence. It was further submitted that the applicants rely on immaterial issues which this court should ignore namely:- the statutory mandate of Kenya Revenue Authority and Kenya Bureau of Standards and the County

Government of Machakos; that KEBS has nothing to do with counterfeiting; and that Kenya Revenue Authority is only concerned with collection of Government Revenue of Machakos County Government.

22. Further, that having permits does not preclude the applicant from criminal investigations by the 1st respondent. It was submitted that therefore the Standards Act and the Income Tax Acts are irrelevant to this case.

23. That the several Articles of the Constitution listed in paragraph 29 of the verifying affidavit are immaterial for purposes of stay and that even if they were, that would go to the merit of the proceedings.

24. Mr Adera also contended that principles for stay had not been demonstrated to the court as no irreparable damage was demonstrated and that under Section 16 of the Anti Counterfeit Act, rights of the applicants to compensation for damages are guaranteed hence stay is precluded.

25. Counsel for the 1st respondent urged the court to dismiss the prayer for stay.

26. The interested party Mashwa Breweries Limited also filed grounds of opposition on 13th February 2017 opposing the prayer for stay which grounds were submitted on by Mr Kenyatta, his counsel contending that:- Section 9(2) of the Fair Administrative Action Act Mandates a party to exhaust alternative remedies before resorting to Judicial Review. Further, that the remedy available to the applicants is compensation if seizure of its goods was illegal hence prayer 4(a) of the application is excluded.

27. In addition, that paragraph 19 of the applicant's affidavit confirms seizure of the goods which are in custody of the 1st respondent hence there is nothing to stay and that the same applies to prayer 4(c) on search of premises.

28. That stay must be anticipatory, not to stay that which has already taken place.

29. On prayer 4(b) of fear of being arrested, it was contended that as the applicants did not obstruct the 1st respondents officers from seizing the goods, no arrest could have been done hence staying arrest in premature.

30. Mr Kinyatta also submitted that the main motion had not been filed hence prima facie issues were spent at leave stage but that no single ground of stay had been demonstrated by the applicant.

31. That the court cannot stay investigations and that there will be no prejudice to be suffered since only goods were seized and no arrests were made.

32. In a rejoinder, Mr Gichuki Kingara counsel for the applicants for the applicants submitted that the Trademarks Act does not give the 1st respondent any power to seize the goods as the Trademarks Act has its own procedure for resolving disputes under that Act relating to trademarks.

33. That the 1st respondents should not take the law in their own hands by closing the brewer and or seizing its products without adhering to the Constitution and the law.

34. Further, that Anti-Counterfeit Act does not enforce the Trademarks Act. Mr Kingara submitted that the application by the 1st applicant to register a trademark on 2nd February 2012 does not mean that his client had violated any law as there is no law that mandated registration of Trademarks. In his view, there was an attempt by the 1st respondent to enforce the Trademarks Act through counterfeit procedures.

35. Further, that the 1st respondent and the interested party had not denied all the facts deposed by the applicant by way of replying affidavits.

36. It was submitted that there was abuse of legal process necessitating these proceedings.
37. Mr Kingara further submitted that there was no speculation because decisions had been made to seize his client's goods on account that they were counterfeits. He maintained that in a democratic society, one cannot stifle competition as that would be unconstitutional. Counsel further maintained that his clients had been prejudged as being criminals before being accorded an opportunity to be heard.
38. Further, that the constitution protects rights of all persons –company and its directors.
39. According to Mr King'ara, there are instances where the court can stay investigations where it is satisfied that there was no fairness in the whole process.
40. Further, that this is not just a criminal complaint but that it has a civil component.
41. It was also submitted that the right to information is guaranteed by Article 35 of the Constitution and that the applicant's letter dated 1st February 2017 requesting for information on the complaint was in order and that it cited Regulation 13 and Section 33 of the Act.
42. On the issue of immateriality, Mr King'ara submitted that no government body acts in isolation in that alcohol is regulated by Kenya Revenue Authority and KEBS to ensure compliance and that no law permits the 1st respondent to licence the applicant or to interfere with licensed business. Counsel submitted that manufacture of alcohol is a controlled industry hence the court should protect his clients.
43. Further, that the cited constitutional and statutory provisions at paragraph 29 are material because they guarantee rights which have been violated.
44. On entitlement to compensation, it was submitted that one cannot sit back as his rights are being violated and be told to suffer because he will be compensated in damages yet the Constitution offers safeguards.
45. On Mr Kenyatta's submission on Section 9(2) of the Fair Administrative Action Act, it was submitted that the law does not envisage infringement of rights then tell the party to seek compensation.
46. It was further submitted that the applicant was seeking stay of further continuation of the infringement of the applicant's rights hence the application was not overtaken by events.
47. Mr Adera sought to counter some legal issues raised as new matters in Mr King'ara's submissions. He maintained that Regulation 13 and Section 33 of the Act and Article 35 of the Constitution do not confer rights.
48. That the Section 33 only provides for the manner of lodging complaints and persons entitled to lay such complaints, not access to information rights by a suspect. Further, that Regulation 13 merely lists the documents that should form part of the complaint lodged with the Anti Counterfeit Agency.
49. It was contended that Article 35 of the Constitution on the right to information is implemented by Access to Information Act but that it is not automatic that information has to be given as requested and an appeal is to be made to the Commission on Administrative Justice (CAJ).
50. It was also submitted that Section 28 of the Act places in the court power to decide whether goods are counterfeits while the 1st respondent merely investigates complaints.
51. In the midst of the respective parties' advocates submissions, there were several interruptions from either side on the extent of the submissions and this led Mr King'ara counsel for the applicants to seek to address the court on his doubts as to whether Mr Adera was a qualified advocate to practice in

court since he is an inhouse lawyer with the first respondent which is a public entity/ state Corporation.

52. The court after hearing the concerns directed that it will rule on the matter in the proceeding when delivering this ruling and therefore reserved the decision on that issue to form part of this ruling.

53. Mr Adera maintained that he was a qualified advocate for 15 years, had a practicing certificate for 2016 and that he had applied for his current practicing certificate which is pending with the Law Society of Kenya. Further, that it had not been demonstrated that he was bared to act as such advocate for his client.

Determination

1. I have considered the application, the grounds, affidavit in support, annexures and the grounds of opposition filed by the 1st respondent and the interested party.

2. I have also considered the parties' advocates oral submissions in support of their client's respective positions.

3. Order 53 Rule 1(4) of the Civil Procedure Rules stipulate:

The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.

4. Prayer No. 4 of the chamber summons seeks for stay of enforcement or execution of the 1st respondent's decision to restrain it from:

a) *Entering, remaining on or otherwise seizing impounding collecting or in any way dealing with the applicants goods manufactured under its brand name SANTA KING ICE.*

b) *Staying the prosecution of the Directors of the 1st applicant, its employees or any other persons in connection with the goods manufactured by the 1st applicant under its brand name SANTA KING ICE.*

c) *Staying the decision of the 1st respondent to search the premises of the applicant pursuant to the complaints of the interested party.*

5. Whether or not to grant stay in Judicial Review proceedings is an exercise of judicial discretion by the court, based on the circumstances of each case.

6. Stay is not a matter of course. The party seeking for a stay must demonstrate to the satisfaction of the court that unless stay is granted, then the applicant shall, at the end of the day, if successful in his main motion, be rendered a mere pious explorer in the judicial process.

7. In the case of **Taib A. Taib vs Minister for Local Government & Others Mombasa HC Miscellaneous Application 158 of 2006** Maraga J (as he then was) now Chief Justice and President of the Supreme Court of Kenya stated:

“.....it is only where the imminent outcome of the decision challenged is likely to render the success of the Judicial Review nugatory or an academic exercise that the court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding. It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though

that is not the determinant factor.”

8. In **R.H. V Ashworth Hospital Authority [2003] WLR 127 at 138** Lord Dyson LJ stated, inter alia that:

“.....The purpose of a stay in a Judicial Review proceedings is clear. It is to suspend the proceedings that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the Judicial Review process and make it more effective. It will ensure that so far as possible, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success.....”

The administrative court routinely grants stay to prevent the implementation of a decision that has been made but not yet carried out into effect or fully carried into effect.”

9. From the above decisions, it is clear that it is not in every case that there is a prima facie arguable case that the court will grant stay in Judicial Review proceedings.

10. Even where leave is granted to apply for Judicial Review orders, the law is clear that in considering whether the said leave ought to operate as a stay of proceedings the court has to be careful in what it states lest it touch on the merits of the main application for Judicial Review and that where the application raises important points deserving determination by way of Judicial Review it cannot be said to be frivolous. This is the principle espoused in **Jared Benson Kangwana V Attorney General Nairobi HCC 446/95**.

11. The applicant must show that the probability of a determination being made in the challenged proceedings are high and such probability cannot be said to have been achieved on a mere conjecture and speculation.

12. Odunga J in **Kenafic Industries Ltd & another V Anti Counterfeiting Agency & 3 Others[2015] eKLR** stated that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought although that is not the determinant factor.

13. In the instant case, the stay sought is to restrain the 1st respondent, its agents or servants from entering, remaining on or otherwise seizing impounding, collecting or in any way dealing with the applicant's goods manufactured under its brand SANTA KING ICE; staying prosecution of the Directors of the 1st applicant or other persons in connection with the brand name SANTA KING ICE and restraining the 1st respondent from searching the premises of the applicant pursuant to the complaint of the interested party.

14. According to the 1st interested party, the 1st respondent is engaged in preliminary investigations to establish whether any offence has been committed and that so far, no decision has been made on whether or not to prosecute the applicants hence this court should exercise restraint in interfering with activities of the respondent as such interference will be contrary to public policy. Further, that the prayers 4 (a) and (c) are overtaken by events as what is sought to be stayed has already taken place.

15. On the part of the 1st respondent, it is contended that the application for stay is speculative and presumes that a decision to prosecute has been made when there is no such decision made to prosecute the applicants.

16. On the question of whether or not there is a decision capable of being challenged the court notes that annexure FKM 4 is an Inventory of Seized Goods Form ACA 2 issued by Corporal M. Oluoch, an Anti Counterfeit Agency Inspector with remarks “ seizure conducted pursuant to complaint from Mashwa Breweries; Goods transported to Anti Counterfeit Agency Depot Kyangombe on 1st February 2017.

17. The goods seized are described as **SANTA KING ICE** ready to drink alcohol beverages A/C 15% v/v/ 500ml; quantity 10 crates A 25 pieces = 250 pieces; seized from FRM EA Packers Ltd Kutch Road, Mlolongo at 1.00 pm.

18. Section 23 of the Anti counterfeit Act Cap 130 A Laws of Kenya sets out the steps that are to be undertaken by the Agency where there is reasonable ground to believe that a person has committed a counterfeiting offence. The section stipulates:

“23 (1) An inspector may at any reasonable time-

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

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

c) Seize, detain, where applicable, remove for detention all goods in question found.

d) Seize, detain and where applicable remove for detention any tools that may be used in the manufacture, production, making, packaging goods or applying a trademark that exclusive mark on such goods.

19. The 1st applicant claims that he has been licenced to operate the brewery for the last 5 years and that even Kenya Revenue Authority has set up an office within its premises to monitor tax compliance as the applicants are among the highest tax payers in the country, paying to the tune of 30 million per month.

20. Further, that the applicant employs 300 people and 700 others who are likely to lose employment if stay is not granted.

21. The applicants claim that their right to fair administrative action which is protected under Article 47 of the Constitution as operationalised by the Fair Administrative Action No. 4 of 2015 was violated. It is also claimed that the respondents are trying to enforce the Trademarks Act yet they have no mandate to do so.

22. On the other hand, the 1st respondent and the interested party claim that the application is an abuse of the court process as the applicant seeks to prohibit the exercise of statutory mandate and that the respondents have a duty to enforce the law, which is criminal law.

23. In addition, the 1st respondent and the interested party claim that as the applicant is not registered under the Trademarks Act, it cannot claim ownership of the brand name SANTA KING ICE. The interested party did not however, claim to be the registered holder of SANTA KING ICE as its trademark.

24. It is further claimed that the applicants have a remedy under the Anti counterfeit Act to claim for damages and therefore they are in a wrong forum as they can claim damages for unlawful seizure of their goods.

25. As earlier stated, this court at this stage must not delve into the merits of the substantive motion

although the parties' advocates argued deep into the merits thereof.

26. In **Econet Wireless Limited Vs Econet Wireless Nigeria Ltd and Another** [FHD/KD/CS/39/208] it was held that the decision to grant a stay involves:-

“ a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the court.....a situation of complete hopelessness or render nugatory any order of the court or paralyze in one way or the other, the exercise by the litigant of his constitutional right, or generally provide a situation in which whatever happen to the case, and in particular, even if the applicant succeeds, there would be no return to the status quo.”

It therefore follows that parties who have invited the court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the court would be of no use.

27. As was held in the Nigerian Court of Appeal in **United Cement Company of Nigeria V Dangote Industries Ltd & Minister of Solid Mineral Development** [CA/A/165/2005]:

“ a court ought to ensure that “appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete hopelessness or render nugatory any judgment or order.”

28. In the instant case, the applicants maintain that they are manufacturers of their own products and that they are not passing off and that the seizure, detention or bringing to a halt the operations of the company is arbitrary and unlawful and unfair, and in breach of the rules of natural justice.

29. Further, that the seizure and detention of the goods will disable the applicant's trade and that the 1st respondent is being used by the interested party competitor to stifle their operations.

30. What emerges from the arguments of all the parties is whether the inspector had other powers which he could have exercised before seizing the products on the basis of a complaint which had not been investigated prior to the seizure of the product. Section 23 (1)(a) of the Anti counterfeit Act clearly sets out those **steps** that the inspector may take and commences with:

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

b)[emphasis added]

31. There is no mandatory requirement that the inspector's first port of call is to seize the goods. He could therefore first **enter, inspect and search the premises** to establish whether there is reasonable ground to believe that the goods manufactured therein are counterfeits before seizing them. In the instant case, the first action was that of seizure before inspection.

32. Section 33 of the Anti counterfeit Act provides the manner in which a complaint is lodged by a holder of an intellectual property right and processed by the 1st respondent before the steps in section 23 are taken which section contemplates compliance with each of the steps outlined therein systematically.

33. Since there is no contention on the part of the 1st respondent and the interested party that what was seized was simply a sample of the goods/products for inspection upon which the applicants would be

informed if the products were counterfeits, and with the applicant insisting that having been lawfully licensed to manufacture the products, they had a legitimate expectation that those licenses issued to them would enable them manufacture products for the full year as long as they fulfilled the conditions which led to the grant of the licences, it is, in my humble view that in the circumstances, it is appropriate to stay any further action of seizure or detention of the applicants' goods or products, while allowing any lawful investigations to be carried out on the already seized goods to establish whether there is any breach of the law by the applicants.

34. Although the 1st respondent's counsel contends that a criminal cannot be given an opportunity to be heard while the investigator is gathering evidence as that would defeat the purpose of the entire exercise; and that in any case, the Act provides for a remedy in damages for unlawful seizure of goods, thereby suggesting that when carrying out an investigative role, the rules of natural justice would not be applicable or that they would be suspended, the Fair Administrative action Act No 4 of 2015 which implements the Constitution, Article 47, does not contemplate a situation where the right to a fair administrative action is allowed to be violated merely because there is remedy in damages for unlawful seizure.

35. And if there must be limitation of any right under Article 24 of the Constitution then such limitation must be by Statute and must be reasonable.

36. All persons and Citizens of this country, at that, have a legitimate expectation that the rule of law which is a national value and principle of governance espoused in Article 10 of the Constitution shall be promoted at all times in the execution of public duty or in the taking of an administrative action.

37. Therefore, where there is a serious allegation of breach of rules of natural justice and the alleged violator takes such a casual approach to the allegation, this court exists to protect such rights and interests of those whose rights and interests are violated. In such cases, it is appropriate to stay the alleged violation in order for the applicants not to be rendered pious explorers in the judicial process.

38. In **Re Bivac International SA (Bureau Veritas) [2005]2 EA 43 EA HCK** it was stated that inter alia.

“.....Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megany J in the case of John V Rees[1970]ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.”

39. The interested party also contended that Section 9(2) of the Fair Administrative Action Act is applicable in view of the remedy for damages. In my humble view, that is a matter which the court will consider in depth during the hearing of the main motion since there is no challenge at this stage, raised against the leave that was granted ex parte by this court.

40. To discuss those provisions exhaustively will be to water down the leave which was granted by this court, yet there is no application to vacate leave granted and especially where it has not been shown to the court, that the order for leave was issued per incuriam thereby necessitating the setting aside.

41. There was also serious contention that the Anti Counterfeit Act is a criminal legislation, and therefore this court cannot stop enforcement of the Act. However, in view of the submissions by the applicant's counsel that the enforcement of the Act is not wholly criminal and that where there is apparent abuse of power this court has jurisdiction to intervene, it is my view that again, that is a matter to be canvassed in the main motion as to whether the provisions of the Act are reasonably capable of having criminal and non criminal jurisdiction and whether any decision reached by the enforcement agency can be challenged by way of Judicial Review.

42. It is for the above reasons that I find that the applicants herein have made out a case for stay at this

stage. However, as was held in the **Taib A Taib (supra)** case, a stay order framed in such a way as to compel the respondents to reinstate the applicant (mandatory) before hearing the respondent cannot be granted.

43. Stay is only appropriate to restrain a public body or administrator from acting and to prohibit further decision making process if it has not yet been completed, being taken by a public body; and the implementation of the decision of such body if it has been taken. This is what Order 53 Rule 1(4) of the Civil Procedure Rules stipulate.

44. Accordingly, I would grant stay of the impugned decision of the 1st respondent Anti Counterfeit Agency in the following terms, not necessarily in the terms as framed in the application:

a. That leave so granted do operate as stay of enforcement and or execution of the 1st respondent to and especially:

i. Restrain the 1st respondent Anti Counterfeit Agency by itself, its servants, agents or otherwise at all from further entering, remaining on or otherwise further seizing, impounding, collecting or in any other way dealing with the applicant's goods manufactured under its brand name SANTA KING ICE pending hearing and determination of these judicial review proceedings.

ii. Staying the decision of the 1st respondent and restraining the 1st respondent from further searching the premises of the applicant pursuant to the complaints of the interested party pending hearing and determination of these judicial review proceedings.

b. As the decision to prosecute the Directors of the 1st applicant, its employees or any other person in connection with the goods manufactured by the applicant under its brand name SANTA KING ICE can only be taken by the Director of Public Prosecutions and as no such decision has been taken or made to so prosecute the applicant's Directors or any other person in connection with the impugned goods, I decline to grant stay in terms of prayer No. 4 of the chamber summons.

c. Regarding the issue of Mr Adera's capacity as an advocate to represent the Anti Counterfeit Agency as he is an in house lawyer, no material was placed before the court for consideration on merits on whether or not Mr Adera has such capacity under the law. I therefore decline to make any finding on that issue.

d. This matter shall be mentioned on 28th February 2017 to confirm the filing of the substantive motion and for directions on the hearing.

45. Costs shall be in the cause.

46. Those are the orders of the court.

Dated, signed, and delivered at Nairobi this 16th day of February, 2017.

R.E. ABURILI

JUDGE

In the presence of:

Mr King'ara and Miss Kimere for the applicants

Mr Adera for the 1st respondent

Mr Kenyatta for the interested party

CA: George