



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLENOUS CIVIL APPLICATION NO.171 OF 2016

AND

IN THE MATTER OF SOY AFRICA LIMITED

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF
CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF THE FOODS AND DRUGS AND SUBSTANCES ACT CAP 254 LAWS OF
KENYA**

AND

IN THE MATTER OF ALCOHOL DRINKS CONTROL ACT NO.4 LAWS OF KENYA

AND

**IN THE MATTER OF THE CHIEF MAGISTRATES CRIMINAL CASE NO.513 OF 2015 AT
THARAKA**

AND

IN THE MATTER OF THE DOCTRINE OF ULTRA VIRES

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

SOY AFRICA LIMITED.....APPLICANT

VERSUS

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

CHIEF MAGISTRATE’S COURT AT THARAKA.....3RD RESPONDENT

MINISTRY OF HEALTH..... 4TH RESPONDENT

NATIONAL AUTHORITY FOR THE CAMPAIGN AGAINST

ALCOHOL AND DRUG ABUSE [NACADA].....5TH RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 27th May 2016, the *ex parte* applicants herein, **Soy Africa Limited**, seeks the following orders:

1. **Certiorari to remove into the High Court and quash the decision of the 1st Respondent and/or 2nd Respondent to commence criminal proceedings, prosecute and/or cause to be charged for the purpose of prosecution Martin Mwangi Wachira, Julius Ngoju Thumaini and Muriithi Kinyamu in Chief Magistrate’s Court Case No. 513 of 2015, Tharaka.**
2. **Prohibition directed at the 2nd and 3rd Respondents from carrying out and/or proceeding with Martin Mwangi Wachira, Julius Ngoju Thumaini and Muriithi Kinyamu’s in Chief Magistrate’s Court Case No. 513 of 2015, Tharaka and/or any other proceedings arising from or connected to the above mentioned case.**
3. **Prohibition to prohibit the 1st and 5th Respondents, their security agents, police, divisional administration, servants and/or from interfering with the sale, distribution, supply and/or consumption of Ndume beer powder and Ndume beer beverage within the Republic of Kenya.**
4. **Mandamus compelling the 5th Respondent to clear Ndume beer powder as a non-harmful substance and fit for human consumption and issue them with relevant compliance certificates.**
5. **Mandamus compelling the Magistrae in Chief Magistrate’s Court Case No. 513 of 2015 Tharaka to order the release of 129 bags of Ndume beer powder currently in police/court custody.**

Applicants’ Case

2. According to the applicant, on the 22nd day of September 2015 at around 0200hours at Gatunga trading centre, Gatunga location in Tharaka North sub-county within Tharaka Nithi County the 1st Respondent’s police agents did cause to have arrested **Martin Mwangi Wachira, Julius Ngoju Thumaini and Muriithi Kinyamu** on allegations of distributing 129 bags of cereal beer powder namely: Ndume beverage in 10KG package which do not conform with the requirements of the ***Alcoholic Drinks Control Act No. 4 of 2010*** using motor vehicle KBY 282N Mitsubishi FH (section 27(a) (a) and Section 27 (4); Being in possession of alcohol contrary to (section 27(1)(a) an section 27(4)), Distribution alcohol contrary to section 32 (1)(c), section 32(2) (b) and section 32(8) and dealing with alcohol without a licence contrary to section 7(1)(b).

3. It was further averred that the 2nd Respondent did cause to be produced in court to commence criminal proceedings as against **Martin Mwangi Wachira, Julius Ngoju Thumaini and Muriithi Kinyamu** Chief Magistrate’s Court Case no.513 of 2015 Tharaka which are still ongoing and the accused have all taken the entered a plea of not guilty and have been released on bond of Ksh.50,000.00. In addition, the 1st and 2nd Respondents jointly and/or severally have since caused the seizure and detention of 129 bags

of Ndume beer powder belonging to Applicant.

4. The applicant however averred that the Respondents in their actions fail to appreciate that Ndume Cereal Beer Powder does not fall under the definition of **Alcoholic Drinks Control Act** No.4 of 2010. It was disclosed that the is a limited Liability Company duly incorporated in the Republic of Kenya pursuant to the provisions of the **Companies Act** Chapter 486 of the Laws of Kenya with Certificate no.59321 of 1994 and that Ndume trade was an acquisition of **Unilever Co. Ltd** from **Best Foods of South Africa**. Later the applicant brought the trademark from Unilever co. Ltd and that the Applicant has manufactured Ndume Cereal Beer Powder for 22 years under classification of Opaque cereal beer powder which is made of extrusion process which kills 99% bacteria load making the product almost sterile and safe.

5. Further, the Applicant pays V.A.T. to K.R.A. through V.A.T. no. P055097333, and is therefore not an illicit product/brew. Apart from that Ndume cereal powder is standardized and certified by Kenya Bureau of Standards (KEBS) and Ndume has also obtained certificate of analysis from Government Chemist and University of Nairobi Laboratory all showing that the satisfy requirements. It has also been cleared to be safe for human consumption by the Ministry of Health.

6. It was averred that vide a letter dated 17th August 2015 the applicant did write to the 5th Respondent requesting for documentation clearing Ndume and confirming it is not harmful substance and in response to the said letter NACADA, the 5th respondent herein did reply to the effect that the Applicant's produce does not fall under their mandate but that of Ministry of Health, Directorate of Public Health. It was averred that various county and provincial administrations have previously granted permission for the sell and distribution of Ndume beer powder e.g. Gilgil Sub County and Eastern Province and that Ndume does not fall nor appear under the manufacturing firms ordered to cease manufacturing of alcoholic drinks by an Inter-Agency Traskforce on Control of Potable Spirit and Combat of Illicit Brews vide Gazette Notice No. 5069 dated 10th July 2015.

7. According to the applicant, the 1st and 2nd decisions are made for an illegal improper motive and/or extraneous purpose.

Respondent's Case

8. The Respondents opposed the application.

9. It was averred that the referred criminal case no. 513 of 2015 at Tharaka law courts the accused persons were charged with distributing alcohol contrary to section 27(1)(a) as read with section 27(4) of the **Alcoholic Drinks Control Act** No.4 of 2010; being in possession of alcohol contrary to section 27(1)(a) as read with section 27(4) of the alcoholic drinks control Act No. 4 of 2010; distributing alcohol contrary to section 32(1)(c) as read with section 32(2) (b) and punishable under Section 32(8) of the **Alcoholic Drinks Control Act** No. 4 of 2010; and dealing with alcohol without a license contrary to section 7(1)(b) as read with section 62 of the **Alcoholic Drinks Control Act** No. 4 of 2010.

10. According to the Respondents, the Applicant is protesting criminal case no.513 of 2015 which is before Tharaka Chief Magistrate's Court yet it is not one of the accused persons in the said criminal case before the trial court. It is wrong for the applicant to seek to stop a case where it is not a party.

11. It was averred that it is the mandate of the CID and in the public interest that the CID receive all complaints and/or information from the public, carry out investigations and upon reasonable grounds a prosecution may be instituted. It was revealed that in the above referred criminal case, on the 22nd day of September, 2015 at around 2.00a.m., the OCS Gatunga police station received information that there was a suspicious lorry which was offloading some goods within Gatunga centre. He then proceeded to the scene of crime and found the said lorry with three occupant (the Accused persons). He asked them whether they had a license for the goods and they told him that they did not have except documents from Kenya Bureau of Standards (KEBS). It was revealed that on examination of the documents of KRA &

KEBS they produced it was established that the beverage contained synthetic ethyl alcohol. Accordingly, the three occupants were arrested with their items and taken to Gatunga police station where they were booked while the lorry and 129 bags of cereal beer powder of 10kgs package were retained as exhibits. Upon completion of the investigations it was found that there was sufficient evidence to charge the suspects.

12. Consequently, two exhibit memos were prepared; one to government chemist with one bag of the 10kg of Ndume flour for analysis and another to scene for crime together with CD containing photographs and after analysis at the government chemist's department a report of government analyst was prepared and the findings indicated that the flour was found to contain ethyl alcohol at the concentration of 5% v/v. equivalent to 4% w/v. Further, the same is confirmed by the certificate of analysis by the Ministry of health that the said powder contained 5.2v/v of ethanol content.

13. To the Respondents, it is manifestly clear from the evidence obtained during investigations by the 1st Respondent that there was a commission of offence by the Accused persons by distributing alcoholic drinks without a license contrary to the provisions of **Alcoholic Drinks Control Act** No.4 of 2010.

14. It was therefore the Respondents' case that the decision to charge and prosecute the Accused persons is based on the sufficiency of the evidence after investigations was done by analysing the evidence. Further the offences with which the Accused persons are charged with are clearly spelt out in the respective statutes and the penalties thereof specified. The Respondents therefore were of the view that it is in the public interest that any criminal act be dealt with accordingly and it is the mandate of the 1st Respondent to investigate and for the 2nd Respondent to prosecute based on the sufficiency of the evidence after investigations has done and analysing the evidence. Therefore the Applicant should not be allowed to interfere with the criminal case which it is not part to. It should not be allowed to shield the Accused persons to continue committing criminal offences by seeking the said orders in this application.

15. The Respondents averred that the purported annexures in application does not support the applicants claim as the supposed to be annexure PKM-2 & 6 are not attached and annexure PKM-7 its effective date is 25-11-2015 which is after the Accused persons had been arrested and charged thus an afterthought. It was contended the Applicant has not demonstrated that the Accused persons are either the directors or shareholders of **Soy Afric Limited**. On the other hand, it is apparent from the foregoing that the Respondents acted within the provisions of the relevant annealing legislation so the orders of sought cannot be sustained.

16. In the Respondents' view, all matters of fact and evidence deposed to in the respective supporting affidavit of the applicant herein are matters of evidence for consideration by the trial court during the full trial and on the basis of which the guilt or otherwise of the applicant shall be determined by the court which is the proper forum for consideration and resolution of all the factual and evidentiary matters. To them, the prosecution of the Accused persons does not in any way violate any of their constitutional and fundamental rights or freedoms as alleged or at all in order to warrant the granting of the orders sought in the application herein.

17. Based on legal advice it was contended that:

a. That under Article 157 (6) of the Constitution of Kenya 2010, the 2nd Respondent exercises the state powers and functions of prosecution which entails the institution, undertaking, taking over continuance and or termination of criminal proceedings amongst other functions and duties;

b. That in addition to thereto, the 2nd Respondent in the discharge of its duties and functions, is required to respect, observe and uphold the following Constitutions inter alia

i. To have regard to public interest of administration of justice and the need to prevent and avoid abuse of legal process under Article 157 (11);

ii. Uphold and defend the Constitution;

iii. The national values and principles of governance enshrined in Article 10 in the application, interpretation of the Constitution as well in making and implementing the laws and public policy decisions;

iv. Respect, observe protect, implement, promote and uphold the rights and freedoms in the Bill of rights enshrined in Article 21 (1);

v. To be accountable to the public for decisions and actions taken and generally observance of the values and principles of public service Article 232(e).

18. It was the Respondents' case that the Applicant had not demonstrated that in making the decision to prefer criminal charges against the Accused persons, the 2nd Respondent has acted without or in excess of the powers conferred upon them by the law or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe the forgoing provisions of the Constitution or any other provision thereof. In their view:

a. The Applicant is seeking to curtail the mandate of the criminal justice system actors as enshrined in within the Constitution of Kenya;

b. The applicant has not adduced sufficient evidence before this Court on the merit of each case to show that prejudice has been occasioned;

c. The accuracy and correctness of the evidence of facts gathered in any investigation can only be assessed and tested by the trial Court which is the best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges;

d. The 2nd Respondent does not require the consent of any person or authority for the commencement of criminal proceedings.

e. The 2nd Respondent does not act under the direction or control of any person or authority and as such Article 249(2) of the Constitution, provides that an independent office is subject only to the Constitution and the law and is not subject the direction or control by any person or authority;

f. The allegation by the applicant is without merit, illegal reason or backing.

19. Accordingly the Court was urged to exercise extreme care and caution not interfere with the Constitutional powers of the 2nd Respondent to institute and undertake criminal proceedings and should only interfere with independent judgment of the 2nd Respondent if it is shown that the exercise of power is contrary to the constitution, is in bad faith or amounts to abuse of process. However, the Applicant has failed to demonstrate that the Respondent have not acted independently or as acted capriciously, in bad faith or has abused the legal process in manner to trigger the High Court's intervention. Further, the Applicant has further failed to demonstrate that the 2nd Respondent lacked jurisdiction or departed from the rules of natural justice in directing that the Accused persons be charged with the criminal offences.

Determination

20. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions and authorities relied upon.

21. The general rule is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review

proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

22. This position was upheld in Meixner & Another vs. Attorney General [2005] 2 KLR 189, where the Court expressed itself as hereunder:

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution...Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. 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 examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

23. In this case the ex parte applicant is clearly not one of the accused persons in the criminal proceedings it intends to terminate. In Miscellaneous Application No. 305 of 2016 – Republic vs. Nairobi City County & Others ex parte Taj Mall Limited this Court expressed itself as hereunder:

“Section 7(1) of the Fair Administrative Action Act, 2015 provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. Therefore a person ought to *prima facie* show his grievance with the question sought to be challenged. In this case what the applicant seeks to challenge are proceedings in Case No. 109 of 2015 filed before the 2nd respondent by the 1st respondent against one Hema Patel Kashyap. There is no indication that the accused in those proceedings is aggrieved by the decision to charge him as he is not the applicant in these proceedings. Mr Mungai, learned counsel for the applicant submitted from the bar that the said accused person went to complain to the applicant herein who decided to challenge the said proceedings. In my view the applicant before me has no business “holding brief” for the said accused person as it were in these judicial review proceedings. The applicant before me, Taj Mall Limited, simply has no interest in a matter in which it is not the accused.

I however wish to disabuse the applicant of the notion that its directors cannot be charged in

matters affecting the corporation. This position is clearly recognised under our *Penal Code* in section 23 which provides as follows:

Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.

24. The applicant has not attempted to justify why these proceedings were brought by it instead of the accused persons themselves.

25. It is however clear that the applicant is challenging the criminal proceedings on the basis that the accused were operating lawfully. In other words their actions were within the law. That in my view is a matter of defence in the trial Court.

26. On their part the respondents contend that the report of the Government Chemist's Department which was confirmed by the Ministry of Health revealed that the flour which was in the possession of the accused persons contained ethyl alcohol at the concentration of 5% v/v. equivalent to 4% w/v and that the said powder contained 5.2v/v of ethanol content. In my view if this was correct and the accused persons were not licensed the Respondents' action to charge the accused person may well have been warranted.

27. Whether the prosecution would be able to prove this is not for this Court to resolve. I however cannot say with certainty that the prosecution's case is farfetched. In my view whereas the accused may well have formidable defenses based on their averments herein, it is for the trial Court to make a finding on which of the two versions is correct. In this case I agree that the issues which the applicant has placed before me are issues which go to the merit of the impugned criminal proceedings and cannot properly be determined in these proceedings.

28. With respect to the prayer for the release of the said powder as the Respondents contend that they intend to produce the same as exhibits, this Court cannot direct that the same be released at this stage. Such a prayer can be properly dealt with by an appropriate application before the trial Court.

29. In the instant case, the Applicant has failed to discharge the burden and the accused must be ready to face their trial as was stated by **Lenaola, J** (as he then was) in the case of **Daniel Ndungu vs. Director of Public Prosecutions & Another (2013) eKLR**:

“In conclusion, the Petitioner ought to face his accusers, prove his innocence or otherwise and submit to the consequences of the Law should he be found culpable”.

30. In the premises I find no merit in this application. As was held in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**:

“In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.”

31. Consequently, the Notice of Motion dated 27th May 2016 fails and is dismissed with costs.

32. Orders accordingly.

Dated at Nairobi this 6th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Khaemba for the DPP

CA Mwangi