



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 50 OF 2015

1.HASSAN ELMI.....1ST PLAINTIFF

2.STEPHEN NGATIA KAGUNDA.....2ND PLAINTIFF

3.STEPHEN MAINA.....3RD PLAINTIFF

4.STEPHEN KARANJA WAHINDI.....4TH PLAINTIFF

5.ESTHERWAMBUGU.....5TH PLAINTIFF

VERSUS

ANTI-COUNTERFEIT AGENCY.....DEFENDANT

RULING

1. The Plaintiffs who are the Applicants hereof are businessmen within Nakuru County and the registered owners of motor vehicles Registration Numbers **KBK 085V, KAZ 501Z, KAE 564J, KAS 215Y and KBQ 563W**.

On the 27th June 2015 the Defendant through its agents confiscated the Applicants motor vehicles above mentioned while on transit together with goods they were carrying being full and empty gas cylinders. The said vehicles and goods are in the custody of the respondent. The Applicants have since been charged in the Chief Magistrate's Court at Nakuru with the offence of being in possession of counterfeit goods.

2. By their application dated 1st July 2015 and brought under the provisions of Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules and Sections 23, 27 and 28 of the Anti-Counterfeit Act, the Applicants seek the following orders:

(1) That this application be certified urgent and be heard exparte

(2) That pending the hearing and determination of this application interparties, this Honourable Court be pleased do issue an order of Mandatory injunction directing the Defendant to release Motor Vehicles Registration Numbers **KBK 085V, KAZ 501Z, KAE 564J, KAS 215Y, KBQ 563W**, goods and empty Gas Cylinders to the Applicants forthwith and without any condition.

(3) That pending the hearing and determination of this suit this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendant by himself, his agents, his servants from confiscating and/or in any way from interfering with the Plaintiffs' motor vehicle Registration Numbers **KBK 085V, KAZ 501Z, KAE 564J, KAS 215Y, KBQ 563W**, goods full and empty Gas

Cylinders.

(4) That the OCS Nakuru Central Police to ensure compliance of this order.

3. The application is based on the grounds as appear on the face of the application and the supporting affidavit of Hassan Elmi, the first Applicant - with authority of the other applicants sworn on the 1st July 2015.

The Applicants state that they are the registered owners of the vehicles and have attached copies of the logbooks to confirm ownership. They state that the vehicles and the Gas cylinders they were ferrying are not, and cannot be counterfeit goods and that by their forfeiture they have been exposed to hardship and economic loss as they are the only source of income that their continued detention will cause them to suffer more loss and damage.

4. The application is opposed by grounds of opposition filed on the 9th July 2015, that the application is fatally and incurably defective, it is bad in law and abuse of court process, applicants have failed to lay a basis for their claim, is based on distortion of facts, misrepresentation, irrelevant and lacks merit.

5. In his submissions, Mr. Moger Advocate for the Applicants argued that under **Section 23 of the Anti-Counterfeit Act**, the inspector is empowered to enter into premises and vehicles and to search for counterfeit goods and confiscate them. He urged that motor vehicles and gas cylinders cannot be held to be counterfeit goods, that it is only the process of filling and sealing the gas cylinders that could be, by definition of a counterfeit as provided in **Section 2**, termed as counterfeit. He further argued that the penalty provided for being in possession of counterfeit goods is a fine, not less than three times value of the goods, - that the detention of the vehicles and goods have economically crippled the applicants who are protected by the constitution in pursuit of their economic rights.

It is his submission that it is only the “seals” of the gas cylinders that could be termed as counterfeit if so proven. He prays that the vehicles and the gas cylinders be released to the applicants on terms as the court may deem fit.

6. Mr. Kirui Learned state counsel for the Respondent opposes release of the vehicles and the gas cylinders on grounds that the purposes of the Anti-counterfeit Act is to protect the market from counterfeit goods. He argued that the vehicles were carrying the suspected counterfeit goods, hence by definition in Section 2, the vehicles form part of machinery and equipment used, and that the said items are in safe custody awaiting a court order to either release them or destroy them.

7. This court has considered the application, the supporting affidavit and annexures thereto, and submissions by counsel.

The purpose of The **Anti-Counterfeit Act No.13 of 2008** is to prohibit trade in counterfeit goods. 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 those protected goods are imitated in such a manner and such a degree that those 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. “**tools**” are defined to include machinery and equipment.

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 to be found, manufactured, produced or made and search the same. **Section 23 (c)** empowers the inspectors to seize, detain or remove for detention all the goods in question found at the premises or vehicle.

8. The applicants have come to court for a determination that the seized vehicles and goods are not counterfeit and for an order that they be returned to them. The applicants have submitted that motor vehicles are not counterfeit. Going by the definitions under **Section 2 of the Act**, I am persuaded that a vehicle can only be used to ferry goods that may be suspected to be counterfeits. In my view, **Section 23(c)** empowers the inspectors to remove suspected goods for detention from either a vehicle or premises. There is no where in the entire act that a detention of a vehicle is envisaged or allowed. If that were the intention, it would have been expressly spelt out. To that extent, I find no reason for the continued detention of the five motor vehicles. The said motor vehicles were ferrying various makes of gas cylinders, filled with liquified gas and others empty.

Going back to the definitions under **Section 2 of the Act**, would gas cylinders and liquified gas be counterfeited so as to fit in the definition of “**counterfeit goods?**”

9. The Respondent in its submission stated that the goods ferried were suspected to be counterfeits and that since the appellants have been charged, it would be jumping the gun to conclude that they were not counterfeits, and that they should not be released to the Applicants and the market.

This court will not purport to determine whether or not the gas cylinders with or without the gas are not counterfeits. That decision is the preserve of the trial court. - upon evidence being tendered.

The purpose of the Anti-counterfeit Agency and Act is to protect counterfeit goods from the market and prohibit trade in such goods.

It is this court's view that it would be unsafe to order release of the gas cylinders at this interlocutory stage to the Applicants and the public at large, in view of obvious dangers that may occasion users should they indeed be counterfeits which decision as I have stated lies with the trial court after hearing of the suit.

For the reasons stated, the application dated 1st July 2015 is allowed in part in the following terms:

1. That pending the hearing and determination of the suit the Respondent is ordered to forthwith and unconditionally release to the Applicants Motor Vehicles Registration Numbers:

KBK 085V

KAZ 501Z

KAE 564J

KAS 215Y

KBQ 563W

2. That the OCS Nakuru Central police Station to ensure compliance of this order.

It is so ordered.

Dated, signed and delivered in open court this 15th day of July 2015

JANET MULWA

JUDGE