IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, OKWENGU & AZANGALALA, JJ.A

CIVIL APPEAL NO. 162 OF 2006

BETWEEN

KENYA REVENUE AUTHORITY....……….……...……..APPELLANT

AND

DOSHI IRON MONGERS…………....................…...1ST RESPONDENT

ASHOK DOSHI……………………….......………..2ND RESPONDENT

(An appeal from partial judgment of the High Court of Kenya at Nairobi (Osiemo, J) dated 24th February 2006

in

H.C. Misc. Application No. 1206 of 2004)

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JUDGMENT OF THE COURT

Kenya Revenue Authority (KRA) (the appellant), which was the 4th respondent in the High court, is a statutory body corporate established under **Section 3 of the Kenya Revenue Authority Act, (Cap 469 of the Laws of Kenya),** whose core function is to assess, collect and account for all revenues, on behalf of the Government of Kenya.

Doshi Iron Mongers (the1st respondent) on the other hand, is described in the pleadings as a company registered and trading in the Republic of Kenya, dealing in general merchandise. It used to import its merchandise from various countries in the world.

Ashok Doshi (the 2nd respondent), is described as a director of the 1st respondent. According to the respondents, they had carried out the said business for about two decades by the time the petition before the High Court, from which this appeal emanates, was filed.

The respondents' grievance was that in the period between 1996 and 2004, the appellant together with other state agencies who were parties in the petition before the High Court, formed the habit of raiding the respondents' warehouses in Mombasa and Nairobi for no rhyme or reason, purporting to search for counterfeit, substandard and uncustomed goods. From what we can decipher from the record, these raids

were targeting 'BIC' biro pens, battery cells, and other items at the behest of companies such as Haco Industries who were the assigned users of the trade mark. According to the respondents, these raids were driven by malice, they were capricious and unlawful, and were being used by their business competitors to harass them and possibly drive them out of their legitimate business.

In the course of such raids, the appellant would impound and/or seize several of the respondents' products particularly biro pens , locks, torches and batteries, electrical switches, lighters, matches etc, all which the respondents used to import as per their customers' specifications.

On two occasions following such raids, the respondents were hauled to court and charged with various offences of "*offering to supply goods for sale to which a false trade description is applied contrary to the **Trade Descriptions Act, Cap 505 of the Laws of Kenya***". In ordinary English parlance, the respondents were being accused of dealing with "counterfeit goods".

One such case was Nairobi Criminal Case No. 3453 if 1997, in which the respondents were accused of dealing in counterfeit "BIC" biro point pens. Although several witnesses testified for the prosecution among them a director of BIC SOUETTE, FRANCE, who were said to be the makers of "*true*" Bic biro point pens, the court dismissed the charges and acquitted the respondents under Section 210 of the Criminal Procedure Code, after finding them with a no case to answer. The court found that the director of the company that held the trade mark could not in fact pick out any marks to show which biros were said to be 'genuine' and which ones were counterfeit.

According to the respondents, despite that finding by the court, the appellant and others persisted in their unwarranted harassment by continuing to conduct other raids ostensibly for counterfeit goods.

Other criminal charges followed subsequently, but the complainants in those charges

"HACO INDUSTRIES" were unable to prove that the products were counterfeit goods, and the criminal process did not therefore yield the results anticipated by the appellant.

The raids nonetheless continued, culminating in the one which was carried out on 16th February, 2004, at Mombasa, which is what prompted the respondents to move the High Court by way of originating summons (O/S) under **Section 84** of the retired constitution of Kenya, for enforcement of fundamental rights and freedoms. The Originating summons, being O/S **No. 1206 of 2004** cited the Weights and Measures Department, Kenya Industrial Property Institute; Kenya Bureau of Standards, Appellant, and the Attorney General as 1st to 5th respondents respectively.

In the O/S, the respondents sought a total of 26 declarations/orders as against the five respondents, as hereunder:-

> *"1. A declaration that the respondents jointly and severally do not have power to enforce Intellectual Property Rights that do not repose in them.*
>
> *2. A declaration that Intellectual Property Rights are rights in personum and not rights in rem.*
>
> *3. A declaration that the enforcement of Intellectual Property Rights and the redress of any infringement thereof including but not limited to counterfeiting can only be done by the holder of such Intellectual Property Rights.*
>
> *4. A declaration that any act undertaken by the respondents jointly and/or severally in seizing, detaining and/or destroying any product on the basis that such product is "counterfeit" is ultra vires, bad in law and/or illegal.*
>
> *5. A declaration that the raids carried out by the respondents either jointly and/or severally upon the applicant's premises on the dates under listed, in search of purported "counterfeit" products was mala fide, null and void for having been done outside the law, arbitrarily, capriciously and in*

contravention of the applicants' rights under Section 77 and 82 of the Constitution to observance of the due process of law and not to be subjected to capricious, discriminatory and arbitrary exercise of power.

(i) Raid on the 16th February 2004

(ii) Raid on the 30th August 2003

(iii) Raid on the 28th August 2003

(iv) Raid on the 4th November 1996

(v) Raid on the 23rd August 2002

6. A declaration that the seizure and detention of the applicants' goods made by the respondents either jointly and/or severally on the dates set out herein before at No. 5 on the premises that such goods were/are "counterfeits" were both unlawful and based on a misapprehension of the enabling statutes of the respondents.

7. A declaration that any seizure of goods under the basis of such goods being "counterfeits" can only be effected by the Intellectual Rights holder in such rights upon application to the High Court and upon such court granting Anton Piller Orders.

8. A declaration that the respondents have no Intellectual Property Rights in the goods listed herein below capable of protection under any law.

(a) S. S master knapsacks

(b) Thermo cool flasks

(c) Vogue flasks

(d) Cutlery sets

(e) 3-ton hydraulic jacks

(f) Tiger head torches

(g) Bath mixers

(h) Pillar cock

(i) Sharpeners

(j) Clips

(k) Umbrella

(l) Cello ball-point pens

(m) Gate valves

(n) Tricycle padlocks

(o) Fortec cisterns

(p) Beverage sets

(q) BAT lanterns and globes

(r) Ramton products

(s) Mini vacuums

(t) Dietz lanterns

(u) Onion mortice locks

(v) Thermos flasks

(w) Bic ball point pens

(x) Or any other product in which the respondents have not reserved intellectual Rights by registration.

9. A declaration that Intellectual Property Rights under the Trade Marks Act, the Industrial Property Act 2001, Patents Act, can only accrue to an individual, and even so upon registration of such rights under the relevant Act.

10. A decision that the actions of the respondents in carrying out raids, searches, entries, seizure and detention of the applicants' goods under the ambit of the Anti-counterfeits Secretariat" based at the 1st Floor, Times Tower, Haile Selassie Avenue, was/is illegal, contrary to the provisions of the respondents parent Acts.

11. A declaration that the "Anti-counterfeits secretariat" is an illegal entity unknown to any law, and unconstitutional.

12. A declaration that the state and particularly the respondents cannot enforce counterfeit law and/or Intellectual Property Rights.

13. A declaration that the forceful entry and search of the applicants' premises at Kwa Jomvu Changamwe Mombasa by the officers of the respondent was arbitrary and irregular, and contravention of the applicants rights under Section 76 of the Constitution.

14. A declaration that the first, second, third and fourth respondents have discriminated against the applicants within the meaning of Section 82 of the Constitution.

15. A declaration that the first, second, third and fourth respondents under the illegal "Anti-counterfeits secretariat" have conspired to destroy the applicants' business.

16. A declaration that the institution and prosecution of Chief Magistrate's Court Nairobi, Criminal Case No. 3453 of 1996 against the applicants was oppressive, vexatious and contrary to public policy and a contravention of the applicants' rights under Section 77 of the Constitution.

17. A declaration that the seizure and detention of the applicants' goods by the respondents' officers on the

a) 16th February 2004

b) 28th August 2003

c) 30th August 2003

d) 23rd August 2002 and

e) 4th November 1996, amounts to compulsory taking/acquisition by the state through the respondents of the applicants' goods and premises within the meaning of section 75 of the Constitution.

18. A declaration that the seizure and detention of the applicants' goods by the respondents under the "Anti-counterfeits Secretariat" amounts to trespasses to land and chattels and a contravention of section 75 of the Constitution.

19. A declaration that the institution and prosecution of the Chief Magistrate Court, Criminal Case No. 2158 of 2002, Mombasa against the applicants and another was oppressive, vexatious and contrary to public policy and exposed the applicants to double jeopardy and violated the applicants' constitutional rights.

20. A permanent injunction to restrain the first, second, third and fourth respondents from interfering with the applicants conduct of business.

21. An order that the respondents do remove their seizure notices and release from detention the applicants' goods.

22. A permanent injunction to restrain the first, second, third and fourth respondents from contravening the applicants' rights under sections 75, 76, 77 and 82 of the Constitution.

23. An order that the respondents either jointly and/or severally do pay to the applicants special damages in the sum of Kshs. 178,000,000 being the value of the goods illegally seized and detained by the respondents.

24. An order that the respondents do pay to the applicants' general damages.

25. An order that the respondents do pay to the applicants' exemplary damages.

26. An order that the respondents do pay the costs of this suit.

The O/S was supported by an equally lengthy affidavit of the 2nd respondent sworn on 9th December 2004 with several annexures.

In reply to the O/S and supporting affidavit, Christopher Kiratu, one of the officers of the appellant who was in the team that raided the respondents' premises, swore an affidavit dated 20th January 2005. In the affidavit, Mr. Kiratu described himself as the co-ordinator of the "*anti-counterfeit and substandard products secretariat*". He deponed that the said secretariat comprises of officers from the respondents in the O/S and its purpose was to "co-ordinate the fight against counterfeit products, prohibited and restricted goods, and to ensure compliance of the relevant requirements in accordance with the respective Acts of the respondents".

He nonetheless denied having been a party to the raids conducted on the respondents' property on 4th November 1996, 16th February 2004 and 23rd August 2002. He however admitted having participated in the raids conducted on the respondents' property on 28th and 30th August 2003 citing complaints from *"taxpayers and right holders"* to the effect that the respondents could have been evading payment of duty on its goods. He admitted that his team detained several goods and he issued the Form 89 pending investigations into the payment of duty for the said goods. He deposed that after investigations, some of

the goods that were found to have been compliant after investigations were released to the respondents but the goods covered by Form 89 No. 106511 were not released after the respondents failed to show that duty had been paid on them.

It is noted however, that according to the respondents, none of the seized goods had been released to them as at the time of filing the O/S (para 20 of the supporting affidavit). The appellant, through Mr. Kiratu defended the Anti-counterfeit and Substandard Products Secretariat but did not specify under which law it was anchored.

The replying affidavit was silent on the subsequent raids conducted on the respondents' premises on 16th February 2004. None of the officers said to have conducted the said raids swore any affidavits to controvert the respondents' deponements pertaining to this raid, which according to the respondents totally paralysed their operations, prompting them to come to Court seeking protection, by way of the originating summons. The matter proceeded for hearing before Osiemo, J as directed by the then Chief Justice.

Parties filed their skeletal submissions but on the hearing date, a date that had been taken by consent of the parties, there was no appearance on behalf of the appellant. The court therefore proceeded with the highlighting of the submissions in the absence of the appellant.

The gist of the respondents' submissions before the trial court was as follows: - Firstly, that the raids on their properties and seizure of their goods under the pretext that they were counterfeit was unlawful. Part of the basis for this submission was that the Custom and Excise Act does not empower the appellants to deal with counterfeit goods, or enforce trademarks.

Secondly, that the appellant lacks proprietary rights in the products seized; and further, that they needed court orders (Anton Piller orders) to allow them to enter, search and seize.

The other germane issue they raised was that it is only the registered holder of a trademark who can lodge a complaint to the effect that his/her trademark has been infringed. We shall revert to this issue later in this judgment.

Although, we can discern from the proceedings that the 3rd respondent in the High Court (Kenya Bureau of Standards) filed grounds of opposition in which it denied any knowledge of the existence of an Anti-Counterfeit Secretariat, the said grounds of opposition were not included in the record of appeal and so we are unable to make reference to the same. It was also learned counsel for the respondents' submission that the Weights and Measures Act, (Cap 513 Laws of Kenya) only gives the Weights and Measures Department (1st respondent in High Court) powers to deal with matters of weights and measures, and has nothing to do with counterfeits.

The Intellectual Property Act of 2001 which creates the 2nd respondent in trial court, on the other hand, it was submitted, empowers the 2nd respondent to register intellectual property rights, and maintain records, but does not empower the 2nd respondent to enter premises , inspect, search and seize goods under the pretext that they are counterfeit goods.

With regards to the appellant herein (KRA), learned counsel submitted that the Customs and Excise Act does not give it power to deal with counterfeits. It was the respondents' submission that the Parent Act does not enable them to deal with counterfeit goods, and only empowers them to seize goods listed under Schedule 8 of the Customs Act.

This is contrary to averments in paragraph 23 of Mr. Kiratu's replying affidavit where he depones as follows:-

> *"The 4th respondent is empowered by the Customs and Excise Act to arrest, search premises, require production of documents, information and these were all applicable to the applicants in*

> *order to ascertain whether the goods that were detained were duty paid or **violated any other statute in Kenya**."*

The impression this averment seems to create, which is also reiterated in learned counsel's submissions in this appeal, is that **Section 5 of the Customs and Excise Act** gives an officer under the Act powers, rights and privileges akin to those given to a police officer in execution of his duties under **Cap 84 of the Laws if Kenya**. This would therefore, mean that they can enforce any law, including detection of crime, apprehension of offenders etc.

We pause here and ask; is this position in law? Can a proper officer as contemplated under the Customs Act arrest anybody for offences under the penal code; traffic Act, or any other law outside the ambit of the tax enforcement regime?

We shall revert to that submission later on.

Having considered the petition, the rival affidavits and submissions of counsel, the learned Judge rendered the judgment, now sought to be impugned, on 24th February 2006. In the said judgment the learned Judge granted the following orders and declarations:-

> *"1. THAT it is hereby declared that the respondent jointly and severally do not have power to enforce Intellectual property Rights that do not repose in them.*
>
> *2. THAT it is hereby declared that Intellectual Property Rights are rights in personum and not rights in rem.*
>
> *3. THAT it is hereby declared that the enforcement of Intellectual Property Rights and the redress of any infringement thereof including but not limited to counterfeiting can only be done by the holder of such Intellectual Property Rights.*
>
> *4. THAT it is hereby declared that the act undertaken by the respondents jointly and/or severally in seizing, detaining and/or destroying any product on the basis that such product is counterfeit is ultra vires, bad and/or illegal.*
>
> *5. THAT a declaration be and is hereby made that the raids carried out by the respondents either jointly and/or severally upon the applicants premises on the dates under listed in search of purported counterfeit products was mala fide, null and void for having been done outside the law arbitrarily, capriciously and in contravention of the applicants rights under Section 77 and 82 of the Constitution to observance of the due process of law and not discriminatory and arbitrary exercise of power.(sic)*
>
> > *(a) Raid on the 16th February 2004*
> >
> > *(b) Raid on the 30th August 2003*
> >
> > *(c) Raid on the 28th August 2003*
> >
> > *(d) Raid on the 4th November 1996*
> >
> > *(e) Raid on the 23rd August 2002*
>
> *6. THAT a declaration be and is hereby made that the seizures and detention of the applicants goods made by the respondents either jointly and/or severally on the date set out hereinbefore at No. 5 on the premises that such goods were/are counterfeits were both unlawful and based on a misapprehension of the enabling statutes of the respondents.*

7. THAT it is hereby declared that any seizure of goods under the basis of such goods being counterfeits can only be affected by the Intellectual Rights holder in such rights upon application to the High Court and upon such Court granting Anton Piller Orders.

8. THAT it is hereby declared that the respondents have no Intellectual Property Rights in goods listed herein below capable of protection under any law:-

(a) S. S. Master Knapsacks

(b) Thermo Cool Flasks

(c) Vogue Flasks

(d) Cutlery Sets

(e) 3-Ton Hydraulic Jacks

(f) Tiger Head Torches

(g) Bath Mixers

(h) Pillar Cock

(i) Sharpeners

(j) Clips

(k) Umbrella

(l) Cello Ball-Point Pens

(m) Gate Valves

(n) Tricycle Padlocks

(o) Fortec Cisterns

(p) Beverage Sets

(q) BAT Lanterns and Globes

(r) Ramton Products

(s) Mini Vacuums

(t) Dietz Lanterns

(u) Onion Mortice Locks

(v) Thermos Flasks

(w) Bic Ball Point Pens

(x) Or any other product in which the respondents have not reserved Intellectual Rights by registration.

9. THAT it is hereby declared that the action of the respondents in carrying out raids, searches, entries, seizures and detention of the applicants goods under the ambit of Anti-counterfeit Secretariat "based at the 1st Floor, Times Tower, Haile Selassie Avenue" was/is illegal contrary to the provisions of the respondent Parent Act.

10. THAT it is hereby declared that the "Anti-counterfeit Secretariat" is an illegal entity unknown to any law and unconstitutional.

11. THAT it is hereby declared that the state and particularly the respondents cannot enforce counterfeit law and/or Intellectual Property Rights.

12. THAT it is hereby declared that the forceful entry and search of the applicants premises at Kwa Jomvu Changamwe Mombasa by the officers of the respondent was arbitrary and irregular and a contravention of the applicants right under Section 76 of the Constitution.

13. THAT a declaration be and is hereby made that the institution and prosecution of Chief Magistrate Court Nairobi, Criminal Case No. 3453 of 1996 against the Applicants was oppressive, vexatious and contrary to public policy and in contravention of the applicants rights under Section 77 of the Constitution.

14. THAT it is hereby declared that applicant's goods by the respondents

- *(a) 16th February 2004*
- *(b) 28th August 2003*
- *(c) 30th August 2003*
- *(d) 23rd August 2002 and*
- *(e) 4th November 1996, amounts to compulsory taking/acquisition by the state through the respondents of the applicants' goods and premises within the meaning of Section 75 of the Constitution.*

15. THAT it is hereby declared that the seizure and detention of the applicants' goods by the respondents' under the Anti-counterfeit Secretariat amounts to trespasses to land, chattels, and a contravention of Section 75 of the Constitution.

16. THAT it is hereby declared that the institution and prosecution of the Chief Magistrate Court Criminal Case No. 2158 of 2002 Mombasa against the applicants and another was oppressive, vexatious and contrary to public policy and exposed the applicants to double jeopardy and violated the applicants constitutional rights.

17. THAT the declarations prayed for under paragraphs 9, 14 and 15 are hereby annulled.

18. THAT the injunctions prayed for under prayer 20 and 22 are not granted.

19. THAT prayers 23 and 25are not granted.

20. THAT prayer 21 is hereby granted and the respondents are ordered to release any goods belonging to the applicants seized or detained by them as at the date of this order forthwith.

21. THAT general damages as follows are hereby granted to the applicants:-

1st Applicant – Kshs. 2,000,000

2nd Applicant – Kshs. 1,500,000

22. *THAT the 1st respondent is not a proper party to the suit and is hereby struck out.*

23. THAT no liability or damages are awarded against the 2nd and 3rd respondents.

24. THAT the 4th respondent be and is hereby ordered to pay to the applicants the sums awarded hereinabove within 30 days hereof.

25. THAT the costs of this suit be borne by the 4th respondent in any event."

The appellant was aggrieved by a small fraction of those orders, and consequently filed a notice of appeal, pursuant to **Rule 75 of the Rules** of this Court against such part of the decision that decided that:-

> *"(1) The applicants be awarded general damages in the amount of Kshs. 3.5 million;*
>
> *(2) The 4th respondent's action and use of the Customs Form F. 89 are ultra vires the Customs and Excise Act;*
>
> *(3) The customs and Excise Act does not make provision or give power to a proper officer to seize goods pending their investigations while issuing the Customs Form F 89;*
>
> *(4) The Kenya Revenue Authority (KRA) code of conduct is invalid null and void and contrary to Regulations under* ***Section 21(c) of the KRA Act Cap 469."***

In its memorandum of appeal however, the appellant proffered a total of thirteen (13) grounds of appeal. This elicited strong protest from the respondents, who submitted that the appellant was estopped from challenging those parts of the decision that were not covered in the four areas identified in the notice of appeal.

It was the respondents' submission that this Court would not have jurisdiction to deal with any aspect of the judgment that is not covered in the notice of appeal. In response thereto, the appellants submitted that their thirteen (13) grounds of appeal are subsumed in the four broad areas indicated in the notice of appeal.

We shall need to deal with that issue first because, any issue pertaining to jurisdiction must be determined before the court delves into the other issues. This is so because, as stated in the *locus classicus* case of the **Owners of Motor Vessel Lilian 'S' vs Caltex Oil Kenya Ltd [1989] KLR 1,**

> *"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited……*
>
> *Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."*

The same court went on to elucidate the importance of a court seized of a matter having the jurisdiction to entertain it and stated:-

> *"A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

This Court has cited with approval the above decision in many matters where the issue of jurisdiction or lack of it has been raised. The issue before us now is not whether we have jurisdiction to entertain this appeal. The issue is whether we have the requisite jurisdiction to consider and make determination on issues that the appellant has not raised in its notice of appeal.

General jurisdiction of this Court to hear and determine appeals is obviously anchored on **Article 163(3) of the Constitution**. That is not in dispute here and we shall not delve into it. The procedure for invoking this jurisdiction is provided in **Rule 75 of this Court's Rules** which provides as follows:-

> *"Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court."*

Rule 75(3) provides the requirements of a notice of appeal. It reads in part:-

> **"**Every *notice of appeal shall state whether it is intended to appeal against* ***a part only of the decision, shall specify the part complained of****, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice." (Emphasis supplied).*

This provision is not restrictive at all and allows a party to appeal against an entire judgment/decree. A party aggrieved by an entire judgment of the court must nonetheless state so.

Likewise, a party who is aggrieved only by a part of a judgment is at liberty to pinpoint that part of the judgment that aggrieves him/her. When a party specifies the part of the judgment it wishes to appeal against, and files a notice of appeal to that effect, then it cannot thereafter be allowed to ambush the other parties by including aspects of the judgment which were hitherto deemed to have caused no grievance to the party.

This is because principles of justice and fairness demand that no party should ambush the other at the hearing. When a party chooses to appeal only against a part of the judgment and sticks with that notice of appeal to the end, it cannot introduce other matters for determination either through the memorandum of appeal, or in its submissions in court. If a party is unsure of what it needs to appeal against, it is safer to appeal against the entire judgment, but thereafter condense the grounds of appeal, or drop some of them later as may become necessary.

In this case, there was no leave sought to amend the notice of appeal. The appellant is therefore bound by its own notice of appeal. An argument was made to the effect that the memorandum of appeal did not deviate from the notice of appeal. We have studied the contents of the memorandum of appeal, and noted that there are some issues which fall outside the ambit or purview of the notice of appeal. We have identified grounds 4, 5, 7,8,10, 11 and 13 as the grounds falling within the ambit of the Notice of Appeal.

The Notice of Appeal delineates the scope of the appeal of which the other side has notice .We shall therefore only consider those grounds in the memorandum of appeal that fall within the purview of the notice of appeal. We have no jurisdiction to consider those issues that fall outside the notice of appeal before us. It can be argued that as a court of first appeal we have jurisdiction to re-evaluate the evidence adduced before the trial court and arrive at our own decision, independent of the findings of the trial court. That is definitely so, but even such re-evaluation, must be within the confines of the notice of appeal. That is why, for instance, we cannot revisit the issue of the special damages of Ksh.178, 000,000 claimed by the respondents, which claim was disallowed, in the absence of a cross appeal.

This appeal must therefore be considered within the confines of the appellant's notice of appeal as filed.

We have, above encapsulated the evidence adduce before the High Court and the issues arising therefrom as expected of us by **Rule 29(1)(a) of the Rules of the Court**; and as we have loyally repeated many times in decisions of this Court for instance in **Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955) 22 EACA 270**; <u>Selle vs</u> <u>Associated Motor Boat</u> **Co. (1968)E A123** and many others.

We now turn to the rival submissions of counsel herein *viz a vis* the four broad grounds contained in the notice of appeal and particularized in some of the grounds in the memorandum of appeal, which we have referred to earlier.

On the first issue of the award of general damages, we start by analysing the evidence on the same and the reasons given by the learned Judge for awarding that amount as general damages. We shall then apply the principles already set out in our jurisprudence to determine whether there is justification for us to interfere with the said award.

Before awarding the respondents herein the disputed general damages, the learned Judge analysed in great and meticulous detail why he was satisfied that an award for general damages was merited.

Foremost was the learned Judge's finding that the outfit christened the "Anti-counterfeit Secretariat" was not underpinned on any law, and was therefore illegal, and unconstitutional. Further to this, the learned Judge, for reasons very well covered in his judgment found that only a rights holder can identify an infringement of a trademark and thus enforce the same.

We note that these two declarations by the learned Judge have not been appealed against. For reasons we have given earlier pertaining to our jurisdiction in this appeal, we cannot interfere with those declarations. It is nonetheless necessary for us to revisit the learned Judge's findings on these issues as they form the backdrop against which the general damages were awarded.

The learned Judge was faced with uncontroverted evidence to the effect that the respondents' premises had been raided severally by the impugned "anti-counterfeit secretariat". As noted earlier in our analysis of the evidence, several criminal cases had been preferred against the respondents, but they had been acquitted on all of them.

In one of them, the makers of ball point pens which had been impounded, and were the subject matter of the charges, were unable to identify them, yet, the respondents were put through the rigors of a criminal trial. They were acquitted after the state failed to establish a prima facie case against them, and this was principally because nobody could identify the seized goods as counterfeit. The complainants in those cases and the respondents herein seemed to harbor the misconception that the only genuine Bic biro pens were the ones manufactured by Haco industries, which was assigned the "Bic" trademark in Kenya. They did not consider the existence of a possibility that the same pens could be sourced from other trademark assignees from other countries. That would explain why even the trademark holders could not tell the difference between what was said to be genuine and what had been impounded from the respondent's warehouses.

Under the Trade Descriptions Act **(Cap 505 of the Laws of Kenya),** the duty to enforce the provisions of that Act reposes on an Inspector of Weights and Measures appointed under Section **27 of the Weights and Measures Act**.

The learned Judge found, and correctly so in our view, that the officers appointed under the Customs and Excise Act have no authority to enforce trade mark or other relted infringements as they did in this case.

Indeed in her submissions filed in court, learned counsel for the appellant seemed to agree with that position when she stated:-

> *"Under IP Laws, there would be the need for a valid complaint by a right holder of IP rights to move to the relevant enforces (sic). BUT, under the Customs and Excise Act, there is no such requirement."*

The appellant placed reliance on **Section 196 of the Customs and exercise Act,** which, it was submitted, was all encompassing, and a carte blanche for customs officers to enforce "any other written law."

Learned counsel for the appellant posited that this provision gives the appellant power to raid and seize,

or enforce any written law. A careful reading of that section would nonetheless seem to suggest otherwise. It specifically deals with goods that are liable to forfeiture, and proceeds to list them. The list does not talk about counterfeit goods. It talks of uncustomed goods; prohibited goods (which are also listed under schedule eight); restricted goods; and those goods that have been packaged in a manner that is meant to deprive the state of its rightful taxes.

The eighth schedule is the one that talks about "all goods the importation of which is prohibited" under the Customs and Excise Act or under any law "for the time being in force in Kenya". The word counterfeit is not defined in the Customs and Excise Act, and indeed officers of the appellant are ill equipped to identify counterfeit goods by sight. That is why in the Criminal cases referred to earlier, even the makers of the Bic biros could not establish that the biros the respondents had been arrested with were counterfeit. Indeed, the record shows that even after detaining some of the goods in this matter for being counterfeit goods, the registrar of trade marks in the letter dated 18th September 2003 confirmed that the said goods were not counterfeits.

In his oral submissions before the Court, Mr. Ontweka, learned counsel for the appellant made the following statement "*the goods were uncustomed because they were infringing on the anti-counterfeit law*". This in our view was an erroneous statement as 'counterfeit' is not synonymous with 'uncustomed', nor is it synonymous to 'contraband'. The learned Judge considered these issues and that was why he faulted the appellant, and found it to have acted capriciously and *mala fide*.

On the submission by learned counsel for the appellant that a proper officer has power to arrest anybody for an offence committed under any written law, we have dealt with this issue before and we need not belabor it. In a nutshell, contrary to that submission by counsel, we do not hold the view that a proper officer under **Cap 472** has the same powers as a police officer under **Cap 84** of the Laws of Kenya, which include as rightly submitted by learned counsel:-

> *"The maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations…"*

Proper officers under the Customs and Excise Act must act within the confines of that Act and deal with offences defined therein, and not assume powers of a police officer under Cap 84 of the Laws of Kenya.

We also wish to point out that the learned Judge cannot be faulted for finding that under the Trade Marks Act, registration of a trade mark is a proprietary right *in personum*. This is explicit from the definition of "Trade Mark" under **Section 2 of the Trade Marks Act (Cap 506)** as read with **Section 40**. **Section 40(3)** provides in part

> *"… the registration of a person as proprietor of a certification trade mark in respect of any goods, shall, if valid, give to that person that exclusive right to the use of the trade mark in relation to those goods, and, without prejudice to the generality of the foregoing words, that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark, or a person authorised by him under the regulations in that behalf using it in accordance therewith, uses a mark identical with it or so nearly resembling it……"*

It is clear from the foregoing that a trade mark attaches to the person and is therefore a proprietary right *in personam*. That being so, it is only the holder of a trademark who would clearly identify any infringement and lodge a complaint against the same.

It was on the basis of the above that the learned Judge concluded, and rightly so, in our view, that the purported enforcement of the trade mark in the absence of a complainant, and by an outfit that was not underpinned on any law, was illegal, and unconstitutional, and thus attracted an award for damages to the aggrieved party. We agree with the following finding/observations by the learned Judge:-

> *"Since the anti-counterfeit secretariat has no legal mandate or statutory foundation, which even if*

it had it would not be enforceable without a valid or genuine claim by the right holder, it follows therefore that the applicants' acts were arbitrarily done, capricious and in violation of the applicant's rights and it is so declared."

In determining whether general damages could be awarded, the learned Judge went further and set out the objectives behind an award of general damages to an aggrieved party. He gave the said objectives as:-

"(1) The vindication of the fundamental right itself so as to promote the values of an open and democratic society based on freedom and equality and respect for human rights;

(2) The deterrence and prevention of future infringements and fundamental rights by legislative and executive organs of state at all levels of Government;

(3) The punishment of those organs of state whose officials have infringed fundamental rights in a particularly egregious fashion."

For a Judge who was operating under the retired Constitution, we must say he was very pragmatic and far sighted!

Having considered the evidence adduced before the trial court in its entirety, we find that some of the detained goods were detained for no rhyme or reason and were clearly not any of those listed under the eighth schedule of **Cap 472**. The appellant had continued to detain the goods even after confirmation from the department of trade to the effect that they had not infringed any trade marks. No apology was offered for this and the goods were not released, and had not been released even as at the time the petition before the High court was going on. There was therefore justification for making the award of general damages.

The next point for our consideration is whether this amount was justified. We observe that the amount is actually not expressly challenged in the appeal. It is trite that an award of general damages is at the discretion of the court. The view of the law as relates to interfering with an award of damages was clearly enunciated by this Court in **Butt vs Khan C.A. No. 40 of 1997 [1981] KLR 349** as follows:-

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on the wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low"

This position has been upheld by this Court to date.

We hold the view that given the circumstances of the case, the amount of Ksh. 2,000,000 and Ksh.1,500,000 to the first and second respondents respectively was neither inordinately high, nor inordinately low to call for our interference.

On whether that amount ought to have been distributed between all the named respondents before the High Court, we note that the learned Judge gave valid reasons for loading the entire burden of costs on the appellant. According to the learned Judge the 1st respondent was non-suited in the first place because it was the minister or the director, or the individual inspectors of Weights and Measures who should have been sued, as opposed to the department.

As far as the 2nd and 3rd respondents were concerned, they were found not to blame as they had only witnessed the 'seizure', and it was Mr. Kiratu, an officer of the appellant, who had signed the seizure documents. Indeed Mr Kiratu in his affidavit conceded that he was the coordinator of the impugned anti-counterfeit secretariat. We find no reason to interfere with that holding either.

Grounds 11 and 13 in the Memorandum of Appeal therefore fail.

This brings us to the issues pertaining to Customs Form F89, and whether the use of the same by the appellant was *ultra vires* the **Customs & Excise Act**, as held by the learned Judge. The form was said to be a customs and excise form and is headed:

> *"Notice of Goods deposited in Customs Warehouse"*

We have gone through the **Customs and Excise Act** and noted that all the forms that are supposed to be used for custom purposes are listed exhaustively in the First schedule. F89 is however not one of those. We are unable to find the provision of law on which the said form is underpinned.

Learned counsel for the appellant did not explain the origin or legitimacy of the said form. All she said was that it is the form that is used for purposes of depositing the goods in the customs warehouse, pending investigations whether the same were uncustomed or counterfeit. She submitted further that "there is no legal requirement for a person witnessing the F89 forms to be authorized under **Cap 472** to execute the same".

In response to this submission, learned counsel for the respondents supported the learned Judge's finding and reiterated that form F89 was not provided for under **Cap 472**, and could not therefore be lawfully used for the purpose for which the officers of the appellant used it. He submitted that the appellant used the form as a seizure document in place of form C53 which is provided for under the Act, and that was an infringement of the law. Counsel invited us to note that the said document in fact, provides that goods detained using the same could only be held for a period of 21 days, and not indefinitely as happened in this case. He also posited that the document could only be signed by a *proper officer* and had no place for signature by strangers as was the case here.

The learned Judge made a finding to the effect that the said document, and any other documents provided for under the **Customs & Excise Act** are official documents which cannot be interfered with or endorsed in any manner by persons other than those authorized under the **Customs & Excise Act**, namely, *proper officers*.

According to the learned Judge, the other persons who endorsed the said forms as witnesses were strangers and ought not to have signed the F89. The learned Judge cited **Section 8 (a) of the Customs & Excise Act** to buttress his finding. The same provides that the commissioner may:

> *"Disclose information to a person in the service of the Government in a revenue or statistical department where the information is needed for the purposes of the official duties of that person solely for revenue or statistical purposes."*

The learned Judge's reasoning was that Mr. Kiratu, though a *proper officer* under **Cap 472**, had no authority under the Act to sign the said documents , nor did he sign them in that capacity. Indeed below his signature, instead of indicating his rank as a *proper officer*, he wrote *"Anti Counterfeit Unit"*. The Act allows only the commissioner and not any other officer to disclose or exchange information. Further, that although the document has no provisions for other parties to append their signatures, or witness, other persons in Mr. Kiratu's team signed as witnesses. The learned Judge found this act contrary to **Sections 5 and 8 of the Customs & Excise Act**.

Having found that the anti-counterfeit unit secretariat was unlawful, then, it would follow that the officers operating under that secretariat had no authority to sign any documents in respect of any goods deposited in customs warehouse, either pending investigations, or upon their seizure.

What we understand the learned Judge to have been saying is that the officers from the 1st, 2nd and 3rd respondents in the High Court were neither proper officers under the Customs & Excise Act; nor did they have any authority to purport to deal with goods deposited in custom warehouses, including appending their signatures to any official documents under **Cap 472, Laws of Kenya**.

As stated earlier, in the written submissions of the appellant, more particularly paragraph 19, learned

counsel stated that there is “no legal requirement for a person witnessing the F89 to be authorized under the **Customs & Excise Act** to execute the same”. The appellant is on this ground relying on the absence of direct provision of the law rather than the existence of positive enabling provisions.

Our question however is whether learned counsel was saying that any civilian or bystander could sign the F89 as confirmation that some goods had been detained in a customs warehouse. Obviously, that would not be the case. Whereas learned counsel cited **Section 12 (2) of the Customs & Excise Act** as allowing “any officer” to examine the goods, that provision must be read together with **Section 12 (2) (b)** which specifies that:

> ***“(b) Except by authority or in accordance with this Act, no person shall interfere in any way with those goods.”***

The Act authorises the commissioner and/or officers appointed and authorised under **Cap 472** and not any other persons. The learned Judge cannot, therefore, be faulted for his finding.

The other finding on Form F89 challenged by the appellant is the learned Judge’s finding that the **Customs & Excise Act** does not make provision or give power to a proper officer to seize goods pending investigations when issuing the customs Form F89.

It is correct to say that where a proper officer intends to seize goods that are suspected to be uncustomed, or which are found to not have been compliant with the **Customs & Excise Act**, the proper officer should issue the seizure notice which should be in form **C53 (r 267).** This notice provides for a totally different procedure for claiming back the property. Where however, the F89 is used, the goods are not seized. They are supposed to remain in the warehouse, or wherever they are, as the *proper officer* awaits the owner of the goods to avail proof of compliance or actual payment of any taxes due.

Under **Sections 34** and **39 of CAP 472,** where goods are detained in a customs warehouse to await investigations as to whether duty has been paid, or for any other purposes, such detention cannot be for more than twenty one days. According to the learned Judge, the fact that the said goods were detained, ostensibly for purposes of investigations, using the F89, then such detention had no sanction of the law as it exceeded the 21 days provided for under **Cap 472,** hence his finding that the use of the said form was *ultra vires*.

This procedure to detain goods pending investigations, has been properly invoked, in cases where there was suspicion that a motor vehicle’s customs duty had not been fully paid. See **Jacinta Wanjiru Kamau vs District Criminal Investigation Officer Bomet & 2 Others**, See also **Tornado Carriers Limited vs Kenya Revenue Authority & 2 Others, Petition No. 235 [2012],** where some lorries had been held on suspicion of diverting and dumping goods that were not meant to be for home use.

In these two cases however, the law applied was the **East African Community Customs Management Act,** which was nonetheless not in force in the year 2003, when the F89 was used in this case. Moreover, the issues therein were resolve within the time prescribed under the Act.

From the foregoing analysis, it is clear that the learned Judge cannot be faulted for finding that the use of the F89 form was *ultra vires*. The same was not anchored o**n Cap 472,** it was used for the wrong purposes, and further, it was signed by persons who had no authority to sign customs documents.

On the last issue, as to whether the appellant’s code of conduct is invalid, null and void and in contravention of the **KRA Act,** we have the following to say.

A code of conduct is a set of rules outlining the social norms, rules and responsibilities of, or proper practices for, an individual, group of people, institution or organization for the better management or conduct of the persons, or institution in question. It can be referred to as a moral or ethical set of rules of conduct that guide people in their inter personal relationships at the workplace, and also guide them on how to relate to others who they may interact with in the course of their duties. They are a kind of control

tool to ensure that the primary values of an institution, or person e.g integrity, honesty, discipline etc. are met. As at the time the code of conduct in question was made, such codes were not meant to be a prescription of laws and regulations. A code of conduct was merely an internal mechanism to ensure good order, and operation of an institution.

The appellant's Code of Conduct is provided for under **Section 21(c) of the KRA Act (Cap 469)**, which enables the appellant's Board to make regulations prescribing the code of conduct and discipline. Upon perusal of the appellant's Code of Conduct, the learned Judge faulted it, for among other things, not having a date of commencement. In the learned Judge's view, the code of conduct was subsidiary legislation and needed to comply with the **Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya**. The learned Judge therefore found the code of conduct, having not been gazetted as required under **Section 27 (1) of Cap 2**, null & void.

We have looked at the code of conduct, which was among the documents availed to us by the appellant. We confirm that the same meets the definition of a code of conduct we have given earlier on. Indeed in its introduction, it says that:-

> *It is formulated to help the Kenya Revenue Authority Employees to understand the standards of personal and professional behaviour they are supposed to maintain as they perform their duties…"*

In our view, if we consider this issue from the prism of **Cap 2 of the Laws of Kenya**, then the conclusion would be that the contents of the code of conduct are not regulations as envisaged under **Cap 2 of the Laws of Kenya**.

It could have been described as a document containing some internal rules and regulations, setting out how the employer and employees should relate; it also prescribed the rights and responsibilities of the employer and its employees. It did not therefore qualify as subsidiary legislation that required gazettement, and to that extent, it could not have been null and void, as declared by the learned Judge. That was nonetheless, the position pertaining then.

Although this would not affect the finding of the learned Judge on the issue, it would be remiss of us not to mention that there has been a paradigm shift in this area. With the enactment of the Leadership and integrity Act, 2012, Codes of conduct have attained elevated status. They are now referred to as "Leadership and Integrity Codes", and unlike in the pre-2012 era, they are underpinned on the Leadership and Integrity Act, 2012. Part 111 of the said Act prescribes the contents of the code of conduct, and requires that the same be published, and also gazetted within ninety days of the receipt of approval from the Leadership and Integrity Commission.

Once again, we can say that the learned Judge was just being far sighted and pragmatic in his finding as far as the appellant's code of conduct was concerned. In the fullness of time, his finding has been vindicated. Given however the law as it stood then, we cannot say that the appellant's code of conduct was null and void.

On the whole, other than the peripheral issue of the code of conduct, we find that the appellant's appeal lacks merit. In the circumstances, we dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 15th day of July, 2016.

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

………………………

JUDGE OF APPEAL

F. AZANGALALA

……………………....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR