



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 17 OF 2015

PAUL KIHARA NDUBA T/A SHIKANISHA SHOES COLLECTION PETITIONER

VERSUS

HON. ATTORNEY GENERAL 1ST RESPONDENT

THE ANTI-COUNTERFEIT AGENCY 2ND RESPONDENT

JUDGMENT

Before this court is the Petition dated 8th April, 2015 by which the Petitioner **PAUL KIHARA NDUBA t/a SHIKANISHA SHOE COLLECTIONS** seeks the following orders

- a. *“A declaration be issued to declare Section 23 (c) of the Anti-Counterfeit Act No. 13 of 2008 unconstitutional and inconsistent with Section 23 (2) & 25 (c) 31 (a) of the Constitution of Kenya.*
- b. *A declaration be issued that the provisions of Section 23(a) of the Counterfeit Act No. 13 of 2008 is inconsistent with Section 31 (a) of the Constitution of Kenya;*
- c. *A declaration be issued to declare that the Anti-Counterfeit inspectors have no power to confiscate the petitioners goods and fail to prosecute him in court and yet continue holding his goods;*
- d. *A declaration be issued to declare that the 2nd Respondent acted in excess of and in violation of Section 31 (a) and (b) of the Constitution;*
- e. *A conservatory order be issued to injunct the 2nd Respondent from destroying the goods seized from the petitioner;*
- f. *The costs of this application be borne by the Respondent in any event.”*

The Petition was supported by the affidavit of the Petitioner sworn on 8th April, 2015 as well as his further affidavit sworn on 7th May, 2015. **Ms NANCY NJOROGE** Advocate acted for the Petitioner.

The 1st Respondent was represented by the Hon. Attorney General who failed to file any document in response to the Petition. The 2nd Respondent **THE ANTI-COUNTERFEIT AGENCY** was represented by **MR. J. O ODERA** Advocate. The 2nd Respondent filed a Replying Affidavit sworn by **Casper Mark Olouch** on 22nd April, 2015. The deponent is an Inspector with the 2nd Respondent.

BACKGROUND

The Petitioner carries on business as a general trader and runs a shop by the name '**Shikanisha Shoe Collection**' which shop is situated along Kenyatta Avenue in Nakuru Town. On 27th March, 2015 the 2nd Respondent's Inspectors led by one '**Casper Oluoch**' entered into the Petitioner's Shop and proceeded to seize various goods (shoes) worth about Ksh 1.0 million. The Petitioner who was present at the time managed to take photographs of the inspectors as they seized the goods and also signed an inventory detailing the goods taken. The goods seized were itemized in the inventory as follows

- **Puma – 4 pieces**
- **Nike – 25 pieces**
- **Adidas – 75 pieces**
- **Jeep – 19 packaging**
- **10 trousers**
- **5 jackets**
- **Timberland - 119 pieces**

The Petitioner was aggrieved by the actions of the 2nd Respondent which he alleged were illegal for the following reasons

- i. ***He (the petitioner) is only a retailer and is not the manufacturer of the goods in question therefore the 2nd Respondent ought not to have confiscated said goods.***
- ii. ***The 2nd Respondents continues to hold the confiscated goods without charging the Petitioner with any offence in relation thereto***
- iii. ***The 2nd Respondent inspectors ought only to have taken a sample of the alleged counterfeit goods instead of confiscating the whole stock***
- iv. ***There was no lawful and/or justifiable reason for seizure of the goods as there exists no complaint by any person in respect of those goods.***
- v. ***The unjust detention of the Petitioner's goods by the 2nd Respondents is causing him suffering and great losses he is unable to realize any profit from said goods and is therefore unable to pay his suppliers.***
- vi. ***The 2nd Respondent have made continuous threats to destroy the seized goods by burning even though no court order exists for such destruction.***

For those reasons the Petitioner seeks the intervention of this court by way of the orders sought.

On their part the 2nd Respondent admits that their inspectors did raid the Petitioner's shop and did seize the goods in question on 27th March, 2015. The 2nd Respondent maintains that the goods were suspected to be counterfeit and thus the seizure was done lawfully and in accordance with the Anti Counterfeit Act. It is also acknowledged that the 2nd Respondent continues to hold the goods pending conclusion of investigations and argued that the conditions for release of the same under the Act have not arisen. The 2nd Respondents argues that seizure of the said goods was both lawful and justifiable as the same were suspected to be counterfeit and the law prohibits the possession of and/or dealing with such counterfeit goods. The 2nd Respondent states the Petitioner has failed to demonstrate that the goods seized from him were not counterfeit. The 2nd Respondent also contends that he is authorized to seize suspected counterfeit goods notwithstanding the fact that no complaint has been made by the holder of intellectual property.

The 2nd Respondent denies having made any threats to destroy the seized goods and concedes that any destruction can only be done in accordance with the law. The 2nd Respondent maintains that this Petition is devoid of merit and urged the court to dismiss the same with costs.

The Petition was disposed of by way of written submissions. Both parties did duly file written submissions in respect of the matter. Counsel for the Petitioner submitted that there having been no complaint lodged by the holders of intellectual property in the goods found in the petitioner's shop, the seizure of the said goods was unlawful. The Respondents failed to follow due process as provided in the Act thus their actions thereby infringed upon the Petitioner's right to privacy under Article 31 of the Constitution of Kenya. Counsel further submitted that the actions of the 2nd Respondent were activated by malice as demonstrated by the fact that they arrested the Petitioner's wife on 14th May, 2015 without any justifiable cause purely with the intention of harassing the Petitioner and causing him distress.

As stated earlier the 1st Respondent did not file any response to the petition and filed no submissions either. For the 2nd Respondent it was submitted that the inspectors have requisite powers under Section 23(a) and (c) of the Act to enter into a premises and seize suspect goods. Thus such entry and seizure cannot be deemed to amount to an invasion of privacy.

Counsel for the 2nd Respondent also submitted that the holding of the seized goods for purposes of investigations was both necessary and lawful. The 2nd Respondent insisted that they had no intention whatsoever to destroy the seized goods without a lawful court order and the Petitioner had failed to demonstrate any contrary intentions.

Finally it was submitted that the Petitioner had not shown how his rights had been infringed, the petition was incompetent and had failed to meet the threshold of a Constitutional Petition as set out in the case of **ANARITA KARIMI NJERU –VS- REPUBLIC (No.1) [1976-80] IKLR 1272**. As such the Petition ought to be dismissed.

DETERMINATION

I have carefully considered the submissions filed by both counsel. I find that the following issues arise for determination:-

1. Whether this petition is competent
2. Whether the seizure of the Petitioners goods was lawful
3. Whether the Petitioner is entitled to the orders sought in the petition.

I will proceed to analyze the evidence and determine each issue individually.

1. COMPETENCY OF THE PETITION

The 2nd Respondent submitted that the petition as framed was incompetent and ought to be dismissed. They cited the case of **Anarita Karimi Njeru** in which it was held that a petitioner should state with reasonable degree of precision the rights which he claims to have been infringed and the manner in which they are alleged to have been infringed.

The Anti-Counterfeit Agency (the 2nd Respondent) is a body corporate which is established under Section 3(1) of The Anti Counterfeit Act, Cap 130A. The functions of the 2nd Respondent are to be found in Section 5 of the Act and include

“5(b) Combat counterfeiting, trade and other dealings in counterfeit goods in Kenya in accordance with this Act”.

To achieve this end the Agencies inspectors are given powers under Section 23(1) of the Act to do the

following

- a. ***Enter upon any place, premises or vehicle at, on or in which goods that are reasonably suspected to being counterfeit goods are to be bound, 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 searching such a vehicle, an inspector may stop the vehicle, wherever found, including on any public road or at any other public place;***
- b. ***Take the steps that may be reasonably necessary to terminate the manufacturing, production or making of counterfeit goods, or any other act of dealing in counterfeit goods being performed, at, or on 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 and detain, and, where applicable, remove for detention, all the goods in question found at, on or in such place, premises or vehicle;***
- d.
- e.

In the first two prayers of the petition, the court was asked to declare Section 23(1) (a) of the Act unconstitutional for being inconsistent with articles 23(2), 25(c) and 31(a) and (b) of the Constitution of Kenya. However no arguments were advanced either within the body of the petition or in the Petitioner's submissions to support this contention.

A pleading must at the very minimum contain sufficient information to enable the other party know the case it faces to enable it adequately prepare a response to that case. In the case of **MUMO MATEMU –VS- TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013] eKLR**, the court emphasized the need to define with clarity the dispute that is to be determined by the court. A petition must contain with reasonable precision, the constitutional provisions that have been violated as well as the manner of such violation.

The court have in the recent past adopted a more liberal approach regarding pleadings in constitutional cases. Determining the substance of the matter is deemed to take precedence over the need to enforce the law regarding the formality of pleadings and strict adherence to procedural law is no longer required.

Having said that I find that the Petitioner has failed to demonstrate how Section 23(a) and (b) of the Anti counterfeit Act are inconsistent with the Constitution. There exists a rebuttable presumption that all statute law complies with the Constitution. The onus is on the person alleging otherwise (in this case the Petitioner) to rebut this presumption. It was not enough for the Petitioner to merely cite the sections of law and the Constitution. He needed to go further to demonstrate exactly how or in what manner the statute cited contradicted the Constitution. To the extent that this was not demonstrated, I find that there is an absence of necessary particulars to support prayers 1 and 2 of the petition. To that extent this petition is indeed incompetent.

However I am satisfied that the petition did raise substantive questions regarding the legality of the actions of the 2nd Respondent and the question of whether an invasion of the Petitioner's rights to privacy had occurred. These latter issues were in my view properly framed and were duly responded to by the 2nd Respondent. Therefore to this extent the petition is competent and is saved and as such it is not for outright dismissal

2. LEGALITY OF THE SEIZURE

The Petitioner alleged that the 2nd Respondent had no lawful right or basis to enter his business premises and seize goods therein. He contended that this action by the 2nd Respondent amounted to a breach of his right to privacy. Article 31 of the Constitution guarantees to each person the right to privacy which includes the right not to have

- a. Their person, home or property searched**
- b. Their possessions seized**
- c. Information relating to their family or private affairs unnecessarily required or revealed or**
- d. The privacy of their communication infringed.**

The right to privacy like all other rights in the Constitution is not absolute. Article 24(1) of the same Constitution provides that this right like other rights and fundamental freedoms may be limited

“..... by written law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- a. The nature of the right fundamental freedom;**
- b. The importance of the purpose of the limitation;**
- c. The nature and extent of the limitation;**
- d. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
- e. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose”**

Article 40(5) of the Constitution provides that

“(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya”

To realize this particular right over intellectual property Parliament enacted the Anti Counterfeit Act Chapter 130A, Laws of Kenya whose main objective was to prohibit the trade in counterfeit goods. In order to achieve this objective of the Act, Section 23 was enacted. Section 23(1) (a) allows an inspector to enter into and inspect any place, premises or vehicle where goods that are reasonably suspected to be counterfeit are kept. Section 23(1) (c) authorizes the inspector to seize, detain and where applicable remove **all** goods found in that place. Section 27(1) provides that any goods so removed are to be kept in safe custody at a counterfeit goods depot.

Therefore based upon the provisions of Section 23, the inspector was in fact acting pursuant to written law when he entered, and searched the Petitioner’s premises and also in seizing the goods suspected to be counterfeit. The actions of the inspector were perfectly in line with the objective of the Act in protecting intellectual property. As such I find that there was no invasion of privacy.

The petitioner has complained that the inspector’s actions were contrary to the requirements of the Act in two aspects. Firstly the Petitioner claims that it is only upon a complaint by the owner of intellectual property that an inspector is authorized to enter and search a premises. Counsel relied on the provisions of Section 33(1) and (12) which provide for the manner of laying a complaint under the Act as well as Section 34(1) which provides for the right of an intellectual owner to apply to the Commissioner to seize

and detain counterfeit goods. The Petitioner contended therefore that failure to exhibit such complaint meant that the inspector's action in entering into his premises was unwarranted and illegal.

This argument is not entirely correct. Section 34 of the Act provides for the right of a holder of intellectual property, his successor in title licensee or agent to lodge a complaint. Section 34(4) provides that

“(4) The preceding provisions of this Section shall not preclude an inspector from taking any appropriate steps on his own initiative in relation to any act or conduct believed or suspected to be an act of dealing in counterfeit goods provided that the provisions of the Act are complied with” (own emphasis)

Thus Section 34 subsection (4) specifically authorizes an inspector to act ‘**suo moto**’ ie on his own initiative where there has been a suspected breach of intellectual property. The inspector does not need to wait for a complaint in order to act. Clearly the legislature intended to give inspectors the right, of entry and search in any situation where they apprehended that counterfeit goods were being dealt with.

This finding is further buttressed by the provisions of Section 25(1) (d) which vests a duty on an inspector who has seized any suspected counterfeit property pursuant to Section 23 to

“(d) by written notice, inform the following persons of the action taken by the inspector under Section 23(1) and of the address of the counterfeit goods depot where the seized goods are kept

- i.
- ii.
- iii. ***The person who, in relation to those goods, qualifies under Section 33(1) to be a complainant, but who has not yet so laid a complaint at the time when the inspector exercised those powers on his own initiative in accordance with Section 33(4)*** (own emphasis)

The import of this provision is that it is envisaged that in certain situations an inspector may act without there having been any prior complaint. It is envisaged that in certain circumstances the inspector will act on his own initiative. Thus a clear reading of the law is that the actions of the inspector do not necessarily have to be pegged to the existence of a complaint. Therefore there was nothing illegal in the actions of the 2nd Respondent. The inspectors went to the Petitioner's premises in broad daylight and in his presence. They did not act clandestinely. They allowed the petitioner to make a record of the search by way of photographs and an inventory of the seized goods was prepared which inventory the Petitioner admitted to having signed. The inspector has admitted to conducting the search and seizure and the 2nd Respondent has admitted to having the said goods in its possession. The 2nd Respondent was carrying out its lawful functions and cannot be accused of harassment in so doing.

Secondly, the petitioner alleges that the 2nd Respondent's actions were illegal in so far as it continued to detain the Petitioner's goods without preferring any charge against him. The petitioner referred to a newspaper report indicating that he was to be charged. In the first place this report does not make reference to the petitioner specifically as no name is mentioned and secondly the 2nd Respondent is an independent agency and is not subject to press reports in its actions.

Section 28(1) of the Anti Counterfeit Act provides:-

“(1) Where any goods are seized and detained under Section 23 they shall be returned less any

portion therefore which has been reasonably utilized for the purpose of test analysis, to the person from whom they were seized within a period of three months after the date of seizure unless, within such period, some person is charged with an offence under this Act and it is alleged that such offence was committed in relation to or in connection with such goods” (own emphasis).

The 2nd Respondent in reply claimed that their detention of the seized goods was lawful and they were still conducting investigations into the matter to determine who if any person ought to be charged with an offence. The Petitioner’s goods were seized on 27th March, 2015. The petition was filed on 8th April, 2015. By this time the three month period provided for by Section 28(1) had not yet elapsed. Therefore the continued detention of the seized goods by the 2nd Respondent without preferring charges against any person was still lawful and was covered by statute. The detention of the seized goods could only become unlawful if it continued after the expiry of three months with no charges having been preferred against any person (not necessarily Petitioners) in connection with said goods. The Petitioner has not shown that the continued detention was in any way unreasonable nor has he proved that contrary to the claims by 2nd Respondents in fact no investigations were being conducted to the matter.

The only remedy available to the Petitioner as the person who was found in possession of the seized goods is provided by Section 25(3) which provides

“Any person aggrieved by a seizure of goods under Section 23 may at any time apply to a court of competent jurisdiction for a determination that the seized goods are not counterfeit goods and for an order that they be returned to him” (own emphasis)

The Petitioner argued that he was neither the manufacturer nor importer of the goods in question. He pleaded that he only purchased the goods from wholesalers in Nairobi to resell in his Nakuru shop. He gave out the contact addresses of the persons who sold the goods to him and argued that on that basis the 2nd Respondents should pursue those persons and return the goods to him.

This argument is not persuasive at all. The question in issue is whether or not the goods are counterfeit not who manufactured and/or imported them. In order to make a case for return of those goods to himself the Petitioner must show that they are not in fact counterfeit as alleged. The Petitioner has not shown this – he has not fulfilled the condition for return of the goods under Section 25(3) of the Act.

3. ARE THE ORDERS SOUGHT MERITED

I have already found in this judgment that prayers (a) (b) and (c) have not been shown to be merited. The petitioner finally prayed for an injunction to restrain the 2nd Respondents from destroying the seized goods. Section 23(1) (b) by its provision prohibits the destruction of any seized goods unless such action is authorized by a court of competent jurisdiction. Section 28 (3) of the Act allows a court before which a person is charged with an offence under the Act, whether this person is convicted of the offence or not, to order the destruction of the goods in question, or order that they be dealt with in any other manner the court may deem fit. According to Section 27 the seized goods are to be stored in a counterfeit goods depot until such order. (for destruction or otherwise) is made . The Petitioner claimed that the 2nd Respondent’s inspector made calls to him threatening to destroy the goods. The inspector categorically denies having made such calls. No evidence was adduced to substantiate the Petitioner’s claim that such calls were actually made. So far the goods have not been destroyed.

The 2nd Respondents readily agree that due process must be followed if the goods suspected to be counterfeit are to be destroyed. They were ready and willing to abide by the courts orders in this regard.

If at any time the 2nd Respondent would act to destroy the goods without a valid court order, such act would be illegal and remedies for compensation would be available to the Petitioner.

CONCLUSION

Based on the foregoing I find no merit in this present petition. The entry, search and seizure of the Petitioner's goods was lawful and had statutory backing. I find no evidence of a violation of any of the Petitioner's rights. The 2nd Respondent was authorized by law to hold the seized goods for a period of three (3) months pending the charging of any person in court. As such I dismiss this petition in its entirety and I direct that each party meet its own costs in the matter. Given the time it has taken to conclude this petition and taking into account the fact that the 3 month period for detention of seized goods allowed to the 2nd Respondent has now elapsed I direct that the 2nd Respondent finalize their investigations and if applicable lay charges in relation to this matter within the next fourteen (14) days. Failing this the Petitioner will be entitled to move to court for a return of his seized goods if he so wishes.

Dated in Nakuru this 17th day of June, 2016.

Maureen A. Odero

Judge



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