

**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATES' COURT AT NYERI**

**CMCC NO. 390 OF 2016**

**ADAN NURA ABASS.....PLAINTIFF**

***VERSUS***

**ANTI-COUNTERFEIT AGENCY.....1<sup>ST</sup> DEFENDANT**

**FCA US LLC.....2<sup>ND</sup> DEFENDANT**

**RULING**

The 1<sup>st</sup> Defendant filed a notice of motion dated the 16<sup>th</sup> November, 2016, seeking the following orders;

1. That the Plaint herein dated 13<sup>th</sup> October, 2016, together with the consequent Amended Plaint herein dated 10<sup>th</sup> July, 2017 be struck out.
2. Costs be paid to the 1<sup>st</sup> defendant.

The application is premised on grounds set thereunder, and a supporting affidavit sworn by the 1<sup>st</sup> Defendant's chief inspector on the 16<sup>th</sup> November, 2017.

The Plaintiff/Respondent filed grounds of opposition to the application hereof dated the 23<sup>rd</sup> November, 2017. Learned counsel for the parties agreed to ventilate the application through written submissions which were duly filed.

I have carefully considered the application, the grounds of opposition and the respective written submissions. Learned counsel for the Applicant/1<sup>st</sup> defendant set out in their submissions three main grounds on which the application is founded. These are;

- 1. Jurisdiction*
- 2. Doctrine of Ex turpi Causa Non Oritur Action*
- 3. The application being an abuse of the court process, frivolous, scandalous and meant to embarrass and prejudice the 1<sup>st</sup> Defendant.*

On the first ground, the learned counsel for the Applicant/1<sup>st</sup> Defendant submits that this court lacks the jurisdiction to entertain this suit firstly that there are statutory remedies available to the Plaintiff and not the common law equitable remedies sought in the instant suit, which is expressly precluded and ousted by statute. Secondly, that the subject

matter of this suit, trade mark infringement, is the exclusive preserve of the High Court. Thirdly, that determination as to whether the goods are counterfeit or not, is the exclusive preserve of the High Court. Fourthly, that this court lacks jurisdiction to order release of the seized suspected counterfeit goods in the absence of a determination that they are not counterfeit, and fifthly, that this court lacks jurisdiction to grant prerogative or judicial review orders. Learned counsel for the Applicant/1<sup>st</sup> Defendant has submitted in depth on each of the five limbs on the issue of jurisdiction. I need not rehash what has been submitted.

Learned counsel for the Respondent/Plaintiff has submitted that the Plaintiff's claim does not fall under the Trade Marks Act, but rather under the statutory causes of action created under sections 15 and 16 of the Anti-Counterfeit Act, and that the claim discloses a reasonable cause of action.

On the issue of jurisdiction and with regard to a claim based on common law or equitable remedies where there is express provisions, the Respondent/Plaintiff's learned counsel has submitted that the claim is founded on the statutory causes of action created under Sections 15 and 16 of the Anti-Counterfeit Act, No 13 of 2008.

**Section 15** of the said Act states;

***“ The provisions of section 14 shall not relieve the authority of the liability to pay compensation or damages to any person for any injury to him, his property or any of his interests caused by the exercise of any power conferred by this Act, or by any other written law or by failure , whether wholly or partially, of any works.”***

**Section 16(1)** thereof states;

***“ Any person who suffers damage or loss caused by wrongful seizure, removal or detention of goods alleged to be counterfeit goods pursuant to a complaint laid with the Executive Director in accordance with the provisions of this Act, shall be entitled to claim compensation for the damage or loss suffered by him against the complainant.....’***

The question as to whether the claim by the Respondent/Plaintiff is one under the common law or under statute is fully answered by the afore stated provisions and I am satisfied that the claim for damages is properly before court. The Applicant also alleged that the Plaintiff’s claim is founded on a trade mark infringement or industrial infringement which is a preserve of the High Court and not this court. I have carefully perused the Plaint dated the 13<sup>th</sup> October, 2016, and the subsequent amended Plaint dated the 10<sup>th</sup> July, 2017. I did not find anywhere therein where the issue of trade mark

infringement is pleaded. It is trite that a party is bound by his/her pleadings. The court cannot re-frame pleadings for parties or impute what is not expressly pleaded. If the Applicant/ 1<sup>st</sup> Defendant believed that the cause of action is based on trade mark infringement, then they ought to have filed a counterclaim on the same. I have not seen any counterclaim raising the issue of trade mark infringement in the statement of defence dated the 3<sup>rd</sup> March, 2017. That allegation is therefore unfounded.

The third limb on jurisdiction was that section 25(3) of the Anti-Counterfeit Act provides that determination whether the seized goods are counterfeit or not, is exclusive preserve of the High Court. Looking at section 25(3) of the said Act, the section states that such an application shall be made before a court of competent jurisdiction. Nowhere in that provision is the jurisdiction preserved exclusively for the High Court. That submission is misconceived. A similar finding holds for the fourth limb on jurisdiction with regard to determination as to whether the goods seized are counterfeit or not. Section 25(3) clearly states that the court of competent jurisdiction shall determine whether the seized goods are counterfeit or not and order they be returned to the owner.

The last limb on jurisdiction as argued by learned counsel for the Applicant/1<sup>st</sup> Defendant is that the order for release prayed in the plaint is basically a prerogative or judicial order of mandamus that this court has no jurisdiction to grant. Section 25(3) of the Anti-Counterfeit Act No. 13 of 2008 heavily relied by the learned counsel for the Applicant clearly states that a court of competent jurisdiction can order release of seized goods. That provisions does not state that this can only be done by the High Court. Looking at the provisions of sections 15, 16 and 25 of the said Act, the release of the goods a statutory function of the Anti-Counterfeit Authority which would require an order of mandamus to compel it to do. This court finds the submissions a misapprehension of the law.

I have considered the other two grounds upon which the application is based. The learned counsel for the Applicant submitted that the suit offends the doctrine of Ex Turpi Causa Oritur Action. Although counterfeiting is a criminal offence, a party cannot be condemned unless convicted by a court of law on that offence. The Applicant/1<sup>st</sup> Defendant cannot determine that the goods are counterfeit and convict the person from whom the goods have been seized. It behoved the 1<sup>st</sup> Defendant to institute criminal charges against the Respondent/Plaintiff or a determination. Only after such a

conviction is reached can the doctrine apply. It is appalling that almost seven years down the line since the Applicant seized the goods, they have never preferred any charges against the Respondent. The Applicant/1<sup>st</sup> Defendant cannot hide behind the doctrine to deny the Respondent/Plaintiff his right to pursue the claim. I find no merit in the submissions.

The other ground raised by the Applicant is the failure by the Respondent/Plaintiff to set out the particulars of defamation as required by Order 2 Rule 7 of the Civil Procedure Rules. That ground has been conceded by learned counsel for the respondent/Plaintiff in their submissions. That claim for damages for slander is hereby struck out.

Finally, on the issue of the suit being embarrassing and prejudicial to the first Defendant/Applicant, which goes to the merit of the claim, I find that the same cannot be a basis of striking out a pleading. As held in the case of **Blue Sky Epz limited -vs- Natalia Polyakova & Another [2007] eKLR**; *“The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issues.”*

In the case of **Madison Insurance Company Ltd V. Augustine Kamanda Gitau(2020)e-KLR**, the Court held;

*“The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless of fanciful and or is brought is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be a forum for such ventures.....”*

From the foregoing analysis of the submissions herein above, I find that the application by the 1<sup>st</sup> Defendant/Applicant is without merit. It is hereby dismissed. On the issue of costs of the application, I note that the Respondent/Plaintiff conceded to one issue raised by the Applicant/1<sup>st</sup> Defendant, each party has therefore succeeded in part, each shall bear own costs.

***Dated and delivered virtually at Nyeri this...26<sup>th</sup> day of  
.....July.....2023.***



*AK*  
**A. G/Kibiru(Mr.)**

**Chief Magistrate**

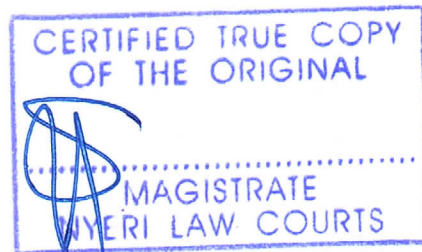
**In the presence of:**

*Kingon*  
..... **for Plaintiff**

*M. Nyawira h/b for Advers*  
..... **for Defendant**

*Sachline*  
..... **Court Assistant**

*AK*  
*26/7/23.*



*CA Ms for directions* *23*  
*26/7/23.*

*AK*  
*26/7/23*