



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 225 OF 2020

COUNTY GOVERNEMENT OF NAIROBI.....1ST PETITIONER

NAIROBI CITY COUNTY,

ALCOHOLIC DRINKS CONTROL & LICENSING BOARD.....2ND PETITIONER

VERSUS

NATIONAL AUTHORITY FOR THE CAMPAIGN AGAINST

ALCOHOL AND DRUG ABUSE.....RESPONDENT

JUDGMENT

1. The petitioners filed a petition dated 23rd July 2020 under Articles 1, 2(1), 3(1), 4, 6 and the Fourth Schedule of the Constitution, Alcoholic Drinks Control Act No.4 of 2010, the National Authority for the Campaign Against Alcohol and Drug Abuse Act, No.14 of 2012 and the Alcoholic Drinks (Licensing) Regulations, 2010.

2. The petition seeks the following orders: -

i. An injunction order be issued restraining the respondent, its servants, agents, assignees or anyone acting under its authority from levying license fees for alcoholic drinks imports and exports and issuing licenses to importers and exporters of alcoholic drinks;

ii. Conservatory orders be issued staying the decision by the respondent's notice dated 7th July 2020 that appeared in myGov.Newsletter, from levying license fees for alcoholic drinks imports and exports and issuing licenses to importers and exporters of alcoholic drinks;

iii. A declaration be issued that the respondent acted in breach and violation of Articles of the Constitution;

iv. An order of certiorari be issued to remove and quash the decision of the respondent dated 7th July 2020 and any other decision that seeks levying license fees for alcoholic drinks imports and exports and issuance of licenses to importers and exporters of alcoholic drinks by the respondent;

v. A declaration be issued that Section 4, 7 and 8 of the Alcoholic Drinks Act No.4 of 2010 is ambiguous, irrelevant and unconstitutional as it contravenes Articles 6(2), Article 174 and the Fourth Schedule Part 2 Paragraph 4(c) of the Constitution;

vi. A declaration that NACADA has no jurisdiction or mandate to levy any license fees on alcoholic drinks in whichever shape or form and neither can NACADA issue licenses to importers and exporters of alcoholic drinks;

vii. A declaration be issued that the Nairobi County Government has the mandate to levy fees and issue licenses to importers and exporters of alcoholic drinks in the County as provided for under the law;

viii. Any such further orders as are appropriate for the effective administration of justice;

ix. Any other relief that this honourable Court deems fit and proper to grant; and

x. Costs of this petition be provided for.

3. The crux of this petition, as supported by the averments in the petitioners sworn affidavit of similar date, is that the respondent on 7th July 2020 placed a public notice on MyGov.newsletter at page 10 to the effect that importers and exporters of alcoholic drinks would pay a license fee to it, following the lapse of 14 days from issuance of the Notice.

4. The petitioners claim that the respondent has intruded into their mandate by its actions which are violating the Constitution under the Fourth Schedule, Part 2 Paragraph 4(c) which places liquor licensing under the County Government. They explain that this mandate is also captured under the Alcoholic Drinks Control Act No.4 of 2010, the National Authority for the Campaign Against Alcohol and Drug Abuse Act, No.14 of 2012 and the Alcoholic Drinks (Licensing) Regulations, 2010.

5. They aver that the functions of the respondent under Section 5(d) (l) of the National Authority for the Campaign against Alcohol and Drug Abuse Act do not include a licensing function. That had this been intended during the making of the statute, the same could have been explicitly expressed in the Act.

6. It is their argument consequently that the licensing function is clearly the mandate of the County Government as seen from a reading of the Nairobi City County Alcoholic Drinks Control and Licensing Act No.3 of 2014.

7. The respondent vide a replying affidavit sworn by Daniel Konyango on 22nd February 2021, avers that prior to the promulgation of the Constitution, the National Government was mandated with all matters pertaining to control of alcoholic drinks. This function later on became a devolved function of the County Government under the Fourth Schedule Part 2, Paragraph 4(c) which specifically provides for liquor licensing.

8. He depones that the National Government under Article 186(3) of the Constitution retains all functions regarding alcoholic drinks control that have not been devolved to the County Governments.

9. He however depones that during the devolution process it was not clear which aspects of liquor control were devolved to the County Governments and which were to be retained with the National Government. It is indicated that this created a lacuna in the law with regard to the functions of liquor control. This was demonstrated by failure of regulatory action in the licensing of manufacturing, import and export of alcoholic drinks.

10. He further depones that this issue interfered with its exercise of its mandate of collaborating with other agencies to facilitate and promote monitoring and surveillance of national and international trends in production, manufacture, sale, consumption, trading and promotion of alcohol and drugs, which are prone to abuse. The respondent as a result sought guidance on the matter vide a letter dated 14th May 2019 to the Inter-Governmental Relations Technical Committee (IGTRTC) that took over from the Transition Authority. Through its letter dated 30th April 2020, the Committee advised that the regulation of imports and exports of alcoholic drinks are under the National Government as it is part of international trade.

11. Furthermore, the respondent in an effort to address the legal gaps, is said to have held a meeting on 28th May 2020 with the relevant stakeholders. It was decided in this meeting that the respondent would undertake the licensing of imports and exports of alcoholic drinks. The public was thereafter informed of this resolution vide the public notice published on 7th July 2020.

12. It is averred that the Nairobi City County opposed this move by issuing a notice in late September 2020 contrary to the respondent's notice. In addition, the Nairobi City County sought to have its notice implemented as against the respondent's notice dated 7th July 2020. It is also deponed that Nairobi City County's actions are intent on creating confusion in the market and public with regard to licensing of importation and exportation of alcoholic drinks.

The Petitioners' Submissions

13. The petitioners filed written submissions and a list of authorities dated 28th September 2020 and further supplementary submissions and a list of authorities dated 22nd March 2021. Both were filed by Kithi & Company Advocates.

14. Counsel submits that the question to be answered is whether the Fourth Schedule Part 1 Paragraph 1 of the Constitution mandates the National Government to oversee licensing of import and export of alcoholic drinks and if so how is the Fourth Schedule Part 2 Paragraph 4 (c) to be interpreted.

15. It is counsel's submission that issuance of the Public Notice dated 7th July 2020 adopted a narrow interpretation of the Constitution. This he argues is against a holistic interpretation of the Constitution as an integrated whole as guided by the Supreme Court in the case of **In the Matter of the Kenya National Human Rights Commission Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR** and case of **Tinyefunza vs Attorney General(1997) UG CC 3** which were cited in support. Counsel essentially argues that one cannot interpret any part of the Fourth Schedule without reading it alongside Articles 1(3),6(2),174 and 186 of the Constitution.

16. It is argued that the issues in this matter are not new and have been canvassed by the High Court in the case of **Okiya Omtatah Okioti v County Government of Kiambu(2018)eKLR**. The Court while observing that the licensing function was devolved to the County Government noted that the petitioner's narrow approach to the relevant provisions of the Fourth Schedule was not tenable as it ignored the relevant context of the matter.

17. Counsel submits that the sections of the law relied on by the respondent in issuing the Public Notice dated 7th July 2020 do not give it the mandate to license. This they submit is implicitly granted to the District Alcoholic Drinks Regulation Committee now the County Alcoholic Drinks Control and Licensing Boards under the Alcoholic Drinks Act No.4 of 2010. Further that the distinct roles as between them and the respondent can be discerned from the preambles of the said Act and the National Authority for the Campaign Against Alcohol and Drug Abuse Act, No.14 of 2012. It is their case ultimately that licensing is a core function of the County Government.

18. Learned Counsel further submits further that even where the two statutes are in conflict, the County legislation would prevail as the liquor licensing function is an exclusive mandate of the County Government as observed in the case of **Meru Bar, Wines & Spirits Owners Self Help Group v County Government of Meru [2014] eKLR** which they cited to buttress this point.

19. In a nutshell Counsel contends that an authority ought not to vary its scope of statutory powers and duties but act within the four corners of the statute as opined in the case of **Republic v Kenya Revenue Authority Ex Parte Aberdare Freight Services LTD & 2 Others [2004] 2 KLR 530**. Further dependence was placed on the case of **Re Hardial Singh and Others [1979] KLR18; [1976-80] 1KLR 1090**.

20. The respondent filed written submissions dated 7th February 2021 through Marende and Nyaundi Advocates who identify the issues for determination as follows:

- i. Whether the respondent breached and violated Articles of the Constitution by levying and collecting license fees;*
- ii. Whether Section 4, 7 and 8 of the Alcoholic Drinks Control Act contravene Article 6(2), Article 174 and Fourth Schedule Part 2 Paragraph 4(c) of the Constitution; and*
- iii. Whether an order of certiorari to quash the notice dated 7th July 2020 would suffice.*

21. Counsel on the first issue submits that while implementing its new obligation it ensured its actions would not breach the Constitution. They did this by taking into account the interdependent nature of the two levels of government and conducting consultative meetings with the stakeholders including a representative of the Council of Governors. It is its argument thus that the petitioners have failed to demonstrate how its act of issuing import and export licenses is unconstitutional.

22. On the second issue he submits that while it agrees that the Constitution should be interpreted in a holistic manner, it notes that Part 2 of the Fourth Schedule provides for liquor licensing by the County Government while Part 1 of the Fourth Schedule states that international trade is a function of the National Government. Taking this into consideration it is stated that it is the petitioners who have adopted a narrow interpretation of the Fourth Schedule. This is since the Interpretation and General Provisions Act under Section 3 defines export as to take out of Kenya by air, land or water and import as to bring into Kenya by air, land or water.

23. Counsel argues that Section 7(1) (a) and (b) of the Alcoholic Drinks Control Act were devolved to the County Government while Section 7(1) (c) and (d) of the Act remained with the National Government since it deals with international trade. Moreover it is submitted that where there is a conflict between national legislation and county legislation under Article 191 of the Constitution national legislation prevails.

24. He submits that the Court in the case of **Okiya Omtatah Okoiti v County Government of Kiambu [2018] eKLR** only rendered judgement on the issue of manufacture, production, sale and consumption not imports and exports. He adds that a case is only an authority for what it actually decides and has been proven as stated in the case of **State Of Orissa vs Sudhansu Sekhar Misra and Ors 1968 AIR 647** which it cited in support. Further reliance was placed on the case of **Firestone South Africa (Pty) Ltd v Genticuro AG Petition No.208 of 2019**.

25. Counsel submits that the Constitution should be interpreted in a way that promotes its purposes, values and principles to effectuate the greater purpose of the instrument as observed in the cases of **Institute of Social Accountability & Another v National Assembly & 4 others [2015] eKLR** and **Smith Dakoys v North Carolina, 192 US 268 [1940]**. Additional support was placed on the cases of **In Re Matter of Kenya National Commission on Human Rights [2014] eKLR** and **In ex parte Speaker of Kwa Zulu-Natal Provincial Legislature: In Re Certification of the Constitution of the Province of KwaZulu-Natal 1996(4)SA 1098 (cc) 11BCLR 1419 (cc)**.

26. Counsel on the last issue submits that to be granted an order of certiorari the petitioner needs to prove that the respondent acted in excess of its power. Further that this order can only be issued where a decision is without jurisdiction or in excess of jurisdiction as held in the case of **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR**. It is their argument that their action was lawful and not in excess of its powers.

27. It is their submission in light of their arguments that the petitioners have no mandate to license imports and exports as per the Fourth Schedule. It is on this premise they argue that the petition lacks merit and as a result should be dismissed.

Analysis and Determination

28. I have considered the petition, affidavits, submissions and authorities plus the law. I find the issues for determination to be:

- i. Whether the respondent violated the Constitutional provisions under the Fourth Schedule by levying and collecting license fees from imports and exports of alcoholic drinks; and*
- ii. Whether Section 4, 7 and 8 of the Alcoholic Drinks Control Act contravene Article 6(2), Article 174 and Fourth Schedule Part 2 Paragraph 4(c) of the Constitution;*

Whether the respondent violated the Constitutional provisions under the Fourth Schedule by levying and collecting license fees from imports and exports of alcoholic drinks

29. The petitioners through this petition call on this Court to interpret the provisions of the Fourth Schedule Part 2 Paragraph 4(c) of the Constitution with regards to the functions devolved to the County Government. The respondent on the other hand is of the view that the petitioners interpretation of the Schedule has created a problem as Part 1 Paragraph 1 of the Fourth Schedule to the Constitution clearly indicates that international trade is a function of the National Government. In essence both parties seek this Court's interpretation of the cited Schedule in the Constitution.

30. The question raised by the parties falls squarely in this Court's jurisdiction to interpret the Constitution. This is established under Article 165 of the Constitution. Sub-Article 3(d) which provides as follows:

(3) Subject to clause (5), the High court shall have -

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191;

31. The Supreme Court defined the Constitution's interpretation in the case of **Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others [2014] eKLR** as follows:

“[142] For our purposes, interpretation of the Constitution involves revealing or clarifying the legal content, or meaning of constitutional provisions, for purposes of resolving the dispute at hand (call it the hermeneutic aspect). The basic reference-point in constitutional interpretation is the text. Application of the Constitution is a more dynamic notion. It comes into play when the provision of the Constitution remains in some vital respects (even after the jural process of content-ascertainment) indeterminate, or ambiguous, or vague, or contradictory. In other instances, a constitutional text may be quite clear on paper, but when applied to a dispute, it leads to absurd consequences. In such a situation constitutional application ceases to be a simple exercise in interpretative syllogism. It takes on the character of “creative interpretation” [see Jeffrey Goldsworthy, German Law Journal, Vol.14 No.08, pp. 1279-1295 (August 2013)], or what some American theorists have called “constitutional construction” (see Randy E. Barnett, Interpretation and Construction, 34 Harv. J.L and Pub. Policy65 (2010)).”

32. The Supreme Court went ahead to highlight the principles to be adhered to while interpreting the Constitution in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR**. The Court pronounced itself as follows:

“[137] This, in our perception, is an interpretive conundrum, that is best resolved by the application of principle. This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit. In the Matter of the Kenya National Human Rights Commission, Sup. Ct. Advisory Opinion Reference No. 1 of 2012; [2014] eKLR, this Court [paragraph 26] had thus remarked:

“...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result” [emphasis supplied].

[138] In Speaker of the Senate & Another v. Attorney-General & 4 Others, Sup. Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR, [paragraph 156], this Court further explicated the relevant principle:

“The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitutions borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may

not properly [capture] express the minds of the framers, and the minds and hands of the framers may also fail to properly mind the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.”

33. Likewise, the Court of Appeal in the case of Centre Human Rights and Awareness v John Harun Mwau & 6 Others [2012] eKLR observed as follows:

“the Constitution should be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms and permits the development of the law and contributes to good governance...that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion....that the Constitution must be interpreted broadly, liberally and purposively so as to avoid the austerity of tabulated legalism...that the entire Constitution has to be read as an integral whole and no one particular provisions destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (harmonization principle).”

34. In the same way the Court of Appeal in the case of Ethics & Anti-Corruption Commission v National Cereals & Produce Board & another [2014] eKLR emphasized as follows:

“Article 10 of the Constitution reminds us that whenever we interpret or apply the Constitution we are bound by the national values and principles set out in the Constitution, among them good governance, integrity, transparency and accountability. In addition Article 259 of the Constitution demands of us, whenever we interpret the Constitution, to adopt the approach that among other things, promotes its purposes, values and principles and contributes to good governance.”

35. In a nutshell, when interpreting the Constitution as invoked by the petitioners, the collective jurisprudence beseeches this Court to interpret its Articles holistically, so as to promote its purposes, values and principles with an aim of advancing the rule of law, human rights, fundamental freedoms and permit the development of the law in a manner that contributes to good governance.

36. The disputed provisions of the Constitution are found in the Fourth Schedule of the Constitution. This Schedule has to be read in tandem with Articles 185(2), 186(1) and 187(2) of the Constitution. This Schedule provides for the distribution of functions between the National Government and the County Governments. Part one of the Schedule highlights the National Government’s role while Part 2 outlines the County Governments roles. The relevant parts to this matter read as follows:

Part 1(1)

Foreign affairs, foreign policy and international trade.

Part 2 (4) (c)

Cultural activities, public entertainment and public amenities, including--

(a)

(b)

(c) liquor licensing;

37. In answering this question consequently this Court must consider the principles of interpretation in light of the circumstances of this case as observed in the cited law and the authorities. An interrogation of the Constitution’s text at this juncture is necessary to shed light on the question posed by the parties.

38. The starting point would be Article 186 of the Constitution which requires one to read the Fourth Schedule alongside it. This Article provides as follows:

Respective functions and powers of national and county governments

(1) Except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule.

(2) A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.

(3) A function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government.

(4) For greater certainty, Parliament may legislate for the Republic on any matter.

39. If anything the above provision echoes one of the key themes that the Constitution intended to uphold which is devolution. A look back at the Constitution reveals the heart behind this proper distribution of State functions and powers between the two levels, of Government. At

the very onset, Article 6(2) of the Constitution describes the kind of relationship the two levels of Government must nurture. This Article provides as follows:

The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.

40. This distinct yet cooperative relationship is later on resounded under Article 189 of the Constitution as follows:

Cooperation between national and county governments

(1) *Government at either level shall--*

a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;

b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and

c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.

(2) *Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.*

(3) *In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.*

(4) *National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.*

41. What I gather from the above provisions is that the primary purpose of the devolved system was to ensure that the functions given to each level were distinct but nonetheless involve cooperation with the other level.

42. The matter before this court involves the function of liquor licensing for import and export of alcoholic drinks. A reading of the relevant Fourth schedule provisions reveals that this function is not expressly defined and neither is it defined under Article 260 of the Constitution. Similarly, the Alcoholic Drinks Control Act No. 4 of 2010 under Section 7 that provides for licensing of alcoholic drinks states as follows:

Control of alcoholic drinks

(1) *No person shall—*

i. manufacture or otherwise produce;

ii. sell, dispose of, or deal with;

iii. import or cause to be imported; or

iv. export or cause to be exported, any alcoholic drink except under and in accordance with a licence issued under this Act.

43. The above Section does not also specifically assign the role of licensing of importation and exportation of alcoholic drinks to either level of government. The petitioners in their interpretation submit that the function is wholly within the jurisdiction of the County Governments, terming the respondent's actions in issuing the Public Notice dated 7th July 2020 a violation of the Constitution. The respondent on the other hand describes the petitioners approach as being narrow while emphatically stating that it is not clear which aspects of liquor control were devolved to the County Governments and which were to be retained with the National Government in essence creating a lacuna in law.

44. I am inclined to differ with each party as a holistic interpretation of the Constitution tells a different story. While it is certain that the National Government deals with international trade it is also clear that the County Government is charged with the function of issuance of liquor licenses. My understanding of the law is that the lack of specific regulation in the licensing of imported and exported alcoholic drinks as between the two levels, does not create a lacuna as posited by the respondent but on the contrary a function that cuts across the two levels. In anticipation of such a scenario Article 186(2) of the Constitution offers the following solution 'A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.'

45. This element was aptly captured in the case **Okiya Omtatah Okoiti v County Government of Kiambu** (*supra*) which both parties have relied on in this way:

"17. Article 186(1) reiterates the foregoing by stating that:

“(1) Except as otherwise provided by this Constitution, the functions and powers of the national government and the country governments, respectively, are as set out in the Fourth Schedule”

18. Sub articles 2 and 3 of the above Article further provide that a function or power conferred on both the county and national government is deemed to fall within the concurrent jurisdiction of each level of government, and that any function or power not assigned by the Constitution or national legislation to a county is a function or power of the national government.

19. The Constitution therefore does not anticipate a vacuum in the assignment or performance of functions between the national and county governments. However, it anticipates a conflict between national and county legislation where functions are shared. Article 191 of the Constitution therefore makes provision for the resolution of conflicts arising between national and county legislation with regard to matters that fall within the concurrent jurisdiction of the county and national government.”

46. Faced with such a situation the two levels are required to work in a cooperative and collaborative manner. To do so Article 189 of the Constitution guides as follows ‘Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.’ In addition to this where a conflict arises as noted in the **Okiya Omtatah case** (*supra*), the two levels of government are to invoke the provisions of Article 191 of the Constitution to resolve the dispute.

47. Turning over to the second part of this question, it is noted that the dispute before this Court is as between the County Government of Nairobi and the Respondent who is defined under the Alcoholic Drinks Control Act No. 4 of 2010 under Section 2 as “relevant agency” means the National Campaign Against Drug Abuse Authority or its successor in law as the public body or department responsible for matters relating to alcoholic drinks. The functions of the respondent as set out under Section 4 of the Act are:

a) keep statistics on the level of alcoholic drinks consumption and related deaths and carry out research, documentation and dissemination of all relevant information on alcoholic drinks;

b) promote national treatment and rehabilitation programmes;

c) advise the Minister on the national policy to be adopted with regard to the production, manufacture, sale, and consumption of alcoholic drinks;

d) advise the Minister generally on the exercise of his powers and the performance of his functions under this Act, and in particular to—

(i) recommend to the Minister the permissible levels of the constituents of alcoholic drinks required to be prescribed under section 68(2)(a);

(ii) advise the Minister on the harmful constituents and ingredients of alcoholic drinks required to be prohibited under section 68(2)(b);

(iii) advise the Minister on the test methods to be used in determining alcoholic drinks in order to test conformity with the requirements of this Act and any regulations made thereunder;

(iv) advise the Minister on the information that manufacturers shall provide, including information on product composition, ingredients, hazardous properties and brand elements required to be provided under section 68(2)(c);

(v) advise the Minister on the packaging, sale and distribution of alcoholic drinks;

(e) recommend to the Minister and to participate in the formulation of the regulations to be made under section 68;

(f) carry out such other roles necessary for the implementation of the objects and purpose of this Act and perform such other functions as may, from time to time, be assigned by the Minister.

48. Likewise, the National Authority For The Campaign Against Alcohol And Drug Abuse No. 14 of 2012 under Section 5 details the respondent’s functions as follows:

a) carry out public education on alcohol and drug abuse directly and in collaboration with other public or private bodies and institutions;

b) coordinate and facilitate public participation in the control of alcohol and drug abuse;

c) coordinate and facilitate inter-agency collaboration and liaison among lead agencies responsible for alcohol and drug-demand reduction;

d) in collaboration with other lead agencies, facilitate and promote the monitoring and surveillance of national and international emerging trends and patterns in the production, manufacture, sale, consumption, trafficking and promotion of alcohol and drugs prone to abuse;

e) in collaboration with other lead agencies, provide and facilitate the development and operation of rehabilitation facilities, programmes and standards for persons suffering from substance use disorders;

f) subject to any other written law, license and regulate operations of rehabilitation facilities for persons suffering from substance use disorders;

g) coordinate and facilitate, in collaboration with other lead agencies and non-State actors, the formulation of national policies, laws and plans of action on control of alcohol and drug abuse and facilitate their implementation, enforcement, continuous review, monitoring and evaluation;

h) develop and maintain proactive co-operation with regional and international institutions in areas relevant to achieving the Authority's objectives;

i) in collaboration with other public and private agencies, facilitate, conduct, promote and coordinate research and dissemination of findings on data on alcohol and drug abuse and serve as the repository of such data;

j) in collaboration with other lead agencies, prepare, publish and submit an alcohol and drug abuse control status report bi-annually to both Houses of Parliament through the Cabinet Secretary;

k) assist and support County governments in developing and implementing policies, laws and plans of action on control of drug abuse; and

l) carry out such other roles necessary for the implementation of the objects and purpose of this Act and perform such other functions as may, from time to time, be assigned by the Cabinet Secretary.

49. The petitioners are aggrieved that the respondent's public Notice was done in excess of its mandate as stipulated in the two preceding statutes. It is their assertion that the functions of the respondent under the National Authority for the Campaign against Alcohol and Drug Abuse Act do not include a licensing function which if it were so would have been explicitly expressed in the Act.

50. While I do not agree that the licensing function of imported and exported alcoholic drinks is a sole preserve of the County Government, I am inclined to agree with the petitioners that the respondent in issuing the public notice dated 7th July 2020 acted outside its function as envisaged under Section 4 of Alcoholic Drinks Control Act No. 4 of 2010 and Section 5 of the National Authority For The Campaign Against Alcohol And Drug Abuse No. 14 of 2012. I say so because an examination of its functions reveals that it does not include liquor licensing.

51. The Alcoholic Drinks Control Act No. 4 of 2010 makes known that the respondent under Section 4(c) is to advise the Minister on the national policy to be adopted with regard to the production, manufacture, sale, and consumption of alcoholic drinks and under Section 4(d) advise the Minister generally on the exercise of his powers and the performance of his functions under this Act.

52. It is reasonable to deduce that the respondent in this matter took over the role of the National Government in its concurrent function with the County Government instead of bringing the matter to the Minister's (Cabinet Secretary) attention as advised by the Act for his action. Be that as it may, the function of international trade is a function of the National Government and not the respondent. Even in this scenario the respondent was expected to bring the issue to the attention of the Cabinet Secretary for action, and not assume the role.

53. It is my humble view in light of the circumstances of this case that the respondent did indeed violate the provisions of the Fourth Schedule Part 1(1) and Part 2 (4c) of the Constitution by levying and collecting license fees from imports and exports of alcoholic drinks. The respondent had no legislative authority to issue the license on behalf of the National Government thus violating the principles of the devolved government and the principles, purposes and values of the Constitution. In light of this I find Article 2(4) of the Constitution applicable '*any act or omission in contravention of this Constitution is invalid*'.

Whether Sections 4, 7 and 8 of the Alcoholic Drinks Control Act contravene Article 6(2), Article 174 and Fourth Schedule Part 2 Paragraph 4(c) of the Constitution

54. Answering this question involves interpreting the impugned Sections alleged to be unconstitutional. It is accordingly vital to bear in mind the relevant guiding principles in interpretation of both the Constitution and an Act of Parliament. It is imperative that the spirit of the Constitution presides and permeates the process of judicial interpretation. It is accordingly set in law and principle that the Constitution must be interpreted broadly, liberally and purposely as discussed extensively in the previous issue.

55. It is appreciated that in the interpretation of an Act of Parliament a number of principles have been established that guide courts in making the declaration of the constitutionality or lack thereof of a Statute.

56. The first principle in determining the constitutionality of a statute or a provision is the general presumption that Acts of Parliament are enacted in conformity with the Constitution. This position was affirmed by the Court of Appeal of Tanzania in the case of **Ndyanabo v Attorney General [2001] EA 495** which was a restatement of the law in the English case of **Pearlberg vs. Varty [1972] 1 WLR 534**. In the former, the Court held that:

“Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative”

57. Furthermore, the Court in the case of Isaac Robert Murambi v Attorney General & 3 others [2017] eKLR highlighted a number of principles that are to be considered as follows:

The onus of proving that a law is unconstitutional lies with the person saying so as held in U.S. v Butler 297 U.S. 1 [1936]. In the said case the Court stated that:

“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”

A statute should be construed according to the intention expressed in the statute itself as confirmed the Court of Appeal case County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR when it stated that:

“The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context...”

58. Likewise, the case of Council of County Governors v Attorney General & another [2017] eKLR highlighted another critical principle in the interpretation of Statute by declaring as follows:

“A law which violates the constitution is void. In such cases, the Court has to examine as to what factors the court should weigh while determining the constitutionality of a statute. The court should examine the provisions of the statute in light of the provisions of the Constitution. When the constitutionality of a law is challenged on grounds that it infringes the constitution, what the court has to consider is the “direct and inevitable effect” of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach.

Thus, the history behind the enactment in question should be borne in mind. Thus any interpretation of these provisions should bear in mind the history, the desires and aspirations of the Kenyans on whom the Constitution vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament, the national executive and executive structures in the county governments, and the judiciary must exercise this power only in accordance with the Constitution.”

59. The impugned provisions in the Alcoholic Drinks Control Act No. 4 of 2010 are Section 4 which deals with the respondent’s functions, Section 7 which deals with the Control of alcoholic drinks with reference to licensing and Section 8 which establishes the District Committee to issue the licenses alluded to under Section 7 of the Act. The petitioners contend that these Sections are in contravention of the devolution principle as envisaged under Article 6(2), Article 174 and Fourth Schedule Part 2 Paragraph 4(c) of the Constitution.

60. The impugned Sections have been interpreted by the petitioners to mean that the Alcoholic Drinks Control Act No. 4 of 2010 is not worded to clearly indicate that the liquor licensing function is solely the mandate County Government in all aspects. This is a view I do not agree with as the legislation is quite clear in its wording. The drafters of the Alcoholic Drinks Control Act No. 4 of 2010 evidently replicate the functions of the two levels of Government as espoused under the Fourth Schedule of the Constitution.

61. A reading of the Fourth Schedule shows that the function of liquor licensing is an exclusive mandate of the County Government while international trade is a function of the National Government. Just like the Constitution, the impugned Sections do not speak to the interdependent relationship between the function of international trade of imports and liquor licensing in light of the two levels of government.

62. What is certain however is that the Constitution does not leave room for ambiguity in its text in dealing with this issue. It makes it definite that a function that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.

63. In this case the County Government is endowed with Liquor licensing while the National Government is endowed with international trade. The question one asks is whether the County Government would want to deal with licensing what is not in its docket. On the other hand would the National Government deal with imports and exports of liquor (international trade) without being involved in the licensing of the stuff it is exporting/importing?

64. Taking this into consideration, I do not see how the impugned Sections contravene the Constitution. This is because both texts do not expressly specify the function of liquor licensing of alcoholic drinks in light of international trade. In fact the objects and purposes of the impugned Sections only express the devolved functions as captured under the Fourth Schedule. Moreover, with regards to Section 4 it has already been established that liquor licensing is not within the respondent’s mandate.

65. Accordingly, it is my considered view that the drafters of the Alcoholic Drinks Control Act No. 4 of 2010 intended that the two levels of government in their functions collaborate in the control of alcoholic drinks as underscored in the Fourth Schedule of the Constitution. This collaboration would best be particularized by the two levels of government as guided by Articles 186, 189 and 191 of the Constitution as this falls in their legislative domain. It is accordingly my humble conclusion that Sections 4, 7 and 8 of the Alcoholic Drinks Control Act No. 4 of 2010 are constitutional. Let the two levels of Government agree on how to deal with liquor licensing of the imports and exports which is in the domain of international trade.

66. The upshot is that the petition lacks merit and is dismissed. Considering this to have been a matter filed in public interest, I order each party to bear its own costs.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 27TH DAY OF JANUARY, 2022 IN OPEN COURT AT MILIMANI NAIROBI.

HEDWIG ONG'UDI

JUDGE OF THE HIGH COURT