



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO E291 OF 2021

ALGARE DISTILLERS LIMITEDAPPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

APPLICATION

1. M/s Algarve Distillers Limited, Applicant/Petitioner through a Notice of Motion dated 23rd July 2021 seek the following orders:-

a) Spent.

b) Spent.

c) That pending inter pares hearing and determination of the substantive Petition, this Honourable Court be pleased to issue a temporary conservatory order restraining the Respondent from continuing to lock, seal the Applicant's manufacturing facility and/or equipment or to in any way deny or limit access to the Petitioner's manufacturing premises.

d) That pending inter pares hearing of this application, this Honourable Court be pleased to issue an order compelling the Respondent to immediately release to the Applicant excise stamps the issuance of which has already been approved by the Respondent and for which payment has been received.

e) That this Honourable Court be pleased to grant the Applicant a status quo order, allowing the Applicant to continue its operations pending the hearing and determination of this application inter parties.

f) That this honourable Court be pleased to issue any other order that it may deem fit for ends of justice to be met.

g) Costs of this Application be provided for.

2. The Application is premised on several grounds on the face of the application and is further supported by an affidavit by Peter Ndiritu sworn on 23rd July 2021 and further affidavit sworn by Peter Ndiritu on 4th August 2021.

RESPONDENT'S RESPONSE

3. The Respondent is opposed to the application and is doing so filed Replying Affidavit sworn by Isaac Gachoka on 2nd August 2021.

PETITIONER'S CASE

4. The Applicant/Petitioner in the application seeks orders thereto on a number of grounds. The Applicant is in business of manufacturer of alcoholic beverages which are excisable goods within the meaning of ***Part I of the 1st Schedule of Excise Duty Act***, since 2019, which business the Applicant contend to have conducted in full compliance with the law and regulations, mandating manufacturers of excisable goods to affix excise stamps on all their manufactured products, which Applicant aver to have continuously complied with after procuring excise stamps from the Respondent.

5. It is Petitioner's/Applicant's case that the Respondent after having approved and received payments for excise stamps has unlawfully and unreasonably, withheld the same from the Applicant, without assigning any reasons, effectively shutting down the Applicant's operations. It is further stated that on 22nd, July 2021 the Respondent's officers accessed the Applicant's factory and proceeded to place a seal on the Applicant's production line, and immediately shut down the Applicant's operations.

6. The Respondent upon being challenged by the Applicant to provide reason for the drastic action, the Respondent's officials then served the Applicant with a letter of even date, purporting that certain goods being the Applicant's Piston brand and which had affixed upon them duplicated or counterfeited excise stamps were seized from un-named third parties. That during the access or visit of the Applicant's factory the Applicant contended that no goods with duplicated or counterfeited excise stamps were found at the Applicant's premises. The Respondent's action is urged to have incapacitated the Petitioner/Applicant's business.

7. The Applicant further urge that it was not served with 21 days notice as required under the **Excise Duty Act**. That the Respondent's interfere with Applicant's operation is urged to be highly detrimental to the livelihood of Applicant's employees and thus exposing the Petitioner/Applicant to labour disputes.

8. The Respondent on the other hand, it is stated has failed to conduct conclusive investigations relating to the alleged counterfeited stamps or provide the Applicant with an avenue to make a case for themselves before deciding to take adverse action against the Applicant. It is stated the Respondent's interruption of the Applicant's business is arbitrary and without justifiable cause, and such conduct creates unproductivity, financial loss and is contrary to Petitioner's legitimate expectation, that administrative action by government shall be fair and predictable. It is Petitioner's averment that the Respondent's action are affront to Applicant's constitutional rights as outlined in the Petition filed herein.

9. Further it is Petitioner's/Applicant's case that unless this Court intervene urgently, the Applicant will surely suffer substantial loss before they are afforded a fair hearing which is highly detrimental to the business of the Applicant.

RESPONDENT'S CASE

10. The Respondent rely on Replying Affidavit sworn by Isaac Gachoka, sworn on 2nd August 2021. He contends that from the data available with the Respondent, Excise Tax has been performing poorly despite high compliance level in the market. He states so as to establish the reason for the poor performance, the Respondent's enforcement team embarked on carrying out audit of the excise stamps affixed on excisable products in the market. The costing analysis of a 20 bottle carton of 250 ml each affixed with genuine excise stamps indicated that the minimum retail price cannot be below Kshs.2,800. The Respondent urged that it was able to establish that the reasons behind the low retail price of the various alcoholic beverages bearing 'genuine' excise stamps was Duplicate excise stamps.

11. The Respondent so as to protect revenue that is much needed by the government and to curb proliferation of revenue by duplication of stamps, the Respondent states that it is imperative that the investigations into the conduct of the Applicant be completed and stamps paid for be retained as the manufacturing plant has been closed pending conclusion of investigations.

12. The Respondent further urge that the nature of Excisable goods are such that they are fast moving goods susceptible to abuse by unscrupulous tax payers who are always looking for ways to evade paying taxes through use of counterfeit and duplicate stamps or outright tax evasion. Further it is Respondent's case that it is sole issuer of revenue stamps and cannot be considered **functus officio** in the execution of its mandate. The Respondent further states that same samples of Piston Vodka 250ml manufactured by Applicant were drawn from the market.

13. It is stated by the Respondent that to establish the source of these stamps and the anomalies identified the following immediate actions, were taken and this necessitated the temporarily suspension of further production of the goods;

a) To establish why the products of Alfarve Distillers Limited have more than one similar Human Readable Code (HRC) in an excise stamps affixed on their products.

b) To establish whether it is possible to have two similar stamps which are both genuine

c) To establish the source of these anomalies with the stamps

d) To establish if there is any revenue loss on these anomalies and if any how much is lost.

14. The Respondent contended that its officers carried out routine checks on the Applicant's premises and established that the Applicant was engaging in tax evasion schemes to the extent that they had duplicate and/or counterfeit Excise Stamps. It is further urged the purpose for existence and maintenance of this Excise stamps is fortified in law vide Legal Notice No. 53 of 2017, which the Respondent is mandated to enforce. Further it is stated that non adherence to the provisions of Legal Notice No. 53 of 2017 is prima facie evidence of tax evasion thus informing the investigative process that was commenced by the Respondent that informed placing of a Custom Seal on the production line. The Respondent contend that the orders and prayers that are being sought by the Applicant if granted have the potential of interfering with the Respondent's statutory mandate and for which consequences are of an irrecoverable nature. It is further contended the orders sought in the application are final in nature and if ranted at this interim stage, they will render the Petition superfluous.

15. The Respondent further assert that it is within its jurisdiction in the investigation and prosecution of criminal matters/actions. Equally, the Respondent is a statutory body established under **Section 3 of the Kenya Revenue Act Chapter 469 Laws of Kenya** and whose mandate is reflected in **Section 5(2)** of the same Act which is an agency of the Government of Kenya for the collection and receipt of revenue.

16. The Respondent in addition averred that it is empowered vide **Section 22(3)** as read together with **Section 23(1)(a) & (b) of the Anti-counterfeit Act** to (a) enter upon and inspect anyplace, premises or vehicle at, on or in which goods that are reasonably suspected of being counterfeit goods are to be found. (b) take the steps that may be reasonably necessary to terminate the manufacturing, production or making of counterfeit goods.

17. The Respondent asserted that its decision to seal the production line of the Applicant's factory is well informed, within the law and is not in violation of any of the Applicant's rights under any law and as such, the Applicant should not be granted the order sought in the Application.

APPLICANT'S / PETITIONER'S FURTHER AFFIDAVIT

18. The Applicant/Petitioner through a further affidavit by Peter Ndiritu sworn on 4th August 2021 briefly deponed in response to Respondent's Replying Affidavit and has raised a number of issues and states that the Replying Affidavit contains allegations to which no evidence has been presented before this Court. That whereas the Respondent alleges to have drawn several samples of Piston Vodka 250ml "**from the market**", It is deponed that no particulars of the said products have been furnished to the Applicant, despite the same having been allegedly seized close to two weeks after the routine checks by the Respondent. Further it is deponed that no inventory of such products has been annexed to its affidavit and no nexus between those products and the Applicant has been demonstrated.

19. The Applicant/Petitioner further has deponed that in spite of the Respondent admitting that it is both in the process of undertaking investigations and has shut down the Applicant's operations, no discernible reason has been put forth as to how the shutting down of the Applicant's operations aids in the said investigations and no legal grounds for arbitrarily shutting the said operations have been put forth.

20. The Applicant in further response to paragraphs 8, 9 and 10, the Applicant reiterates the contents of paragraph 19 of the Applicant's Supporting Affidavit, wherein the Applicant annexed letters inviting the Respondent to investigate the issue of rampant counterfeiting of its popular Piston Brand. The Applicant further annexed copies of charge sheets indicating the criminal prosecution of several perpetrators of counterfeiting activities. These annexures it is contended demonstrate that the Applicant has been a victim of counterfeiting and has identified this as among the reason for the presence of counterfeit products bearing its brand in the market. These and other issues it is urged would have undoubtedly formed part of the Applicant's responses had the Respondent bothered to follow the process laid down in law.

21. In response to paragraph 17 and 18 of the Replying Affidavit, the Applicant categorically state that the Respondent's officers never conducted any search on the Applicant's premises but rather sprung upon the Applicant on the 22nd July 2021, arbitrarily placed a custom seal on its production line and proceeded to serve upon it the letter dated 22nd July 2021. It is further deponed that no inspection of the Applicant's premises was undertaken on 22nd July 2021 and no duplicate stamps were discovered as alleged by the Respondent. The Respondent, it averred clearly has no qualms about misleading this Honourable Court with a view to urging the continued violation of the Applicant's Constitutional rights.

22. It is deponed further that no duplicate and / or counterfeit Excise stamps were found in the Applicant's premises nor were any products seized from the Applicant's warehouse as alleged by the Respondent.

23. The Applicant further urge that nothing could have been easier than for the Respondent to annex the alleged duplicate and / or counterfeit stamps allegedly found in the Applicant's possession to their Replying Affidavit. The failure to so annex the alleged confiscated duplicate and /or counterfeit stamps, despite reasonable opportunity being afforded to them, lends credence to the Applicant's averments that the Respondent's action of unlawfully sealing off the Applicant's premises was arbitrary and malicious and skews the balance of convenience in favour of the Applicant.

24. The Applicant on issue of non-disclosure allegations state that the Applicant has disclosed all facts material to this matter including the service upon them of the only piece of correspondence from the Respondent which is their letter dated 22nd July 2021. The Applicant's further states that it is the Respondent who has been less than candid in their response. Indeed, the Applicant avers that it is the Respondent who continues to withhold critical information that would avail the Applicant of an opportunity to challenge its unlawful actions, or which would be prejudicial to the Respondent's case.

25. The Applicant challenges the Respondent's action and states that Respondent has allegedly collected sample from third parties, who remain unidentified, and as such found reason to both commence investigations and to place a customs seal on the Applicant's production line. The placing of the seal has admittedly shut down the Applicant's factory. This is a clear admission by the Respondent that they have failed to follow the mandatory provisions of **Section 20** as read with **Section 23 of the Excise Duty Act** which mandates the Respondent to issue a 21 days' notice before taking punitive administrative action such as the suspension of a license. The Respondent in effect is admitting to the prejudice caused to the Applicant by prematurely taking the said punitive action at the commencement of the investigation, rather than as a result of it.

26. The Applicant further contend that the Respondent's actions are contra statute and contra the Constitutional presumption of innocence afforded to the Applicant, which action the Applicant aver to be a violation of **Article 47 of the Constitution**.

27. The Applicant further in response deponed that it is not true that the grant of the orders sought would prejudice the Respondent in any way. Indeed, it is averred that the grant of the orders does not in any way hinder the Respondent from continuing to undertake its investigations nor does it prejudice its supervisory jurisdiction as set out in the Excise Duty Act. On the other hand, it is stated that failure to grant the orders sought immediately exposes the Applicant to the risk of total collapse of its business which has remained shut down from 22nd July 2021, by operating outside the provisions of **Excise Duty Act**, and by further failing to release excise stamps duly approved and paid for by the Applicant, the Respondent has effectively shut down the Applicant's operations in perpetuity. It is urged by the Applicant that only by grant of the orders sought shall this Honourable Court assert the supremacy of the Constitution and the Respondent's duty to abide by the laws governing its actions.

28. The Applicant/Petitioner in further response depones, that the attempt by the Respondent to justify its illegal actions by referring to the ground for limitation of the Applicant's fundamental rights should be summarily rejected by this Honourable Court. It is further urged that this Court cannot sacrifice mandatory statutory procedure to facilitate the capricious exercise of administrative power by a body imbued with such sweeping powers as the Respondent. The Applicant states that the blatant usurpation of mandatory statutory requirements by the Respondent must not therefore be sanctioned by this Honourable Court. It is indeed trite that no unfair process can produce a fair result.

29. Further response is that it is the Respondent who now failed to adhere to the mandatory provision of **Sections 20 and 23 of the Excise Duty Act**. To this extent, it is averred that the Respondent's actions are ultra vires the Act and are therefore beyond its jurisdiction. The Applicant has also urged that it has demonstrated the obvious prejudice that it shall suffer from the continued closure of its factory and the continued denial of excise stamps which may result in its total collapse. To this extent, it is averred that the Applicant is clearly deserving of the orders sought.

30. The Applicant further depones that it has on numerous occasions complained to the Respondent and invited it to investigate the many instances of counterfeiting of its popular piston brand. The Applicant has further annexed at paragraph 19 of its Supporting Affidavit, letters evidencing these complaints. Further, the Applicant has annexed charge sheets indicating the criminal prosecution of third parties who were found to have counterfeited the Applicant's products. To the extent that this information was in the Respondent's knowledge, it is averred that the Respondent surely ought to have followed due process set out in law before it took the drastic step of crippling the Applicant's operations without affording the Applicant any opportunity to be heard.

31. Further the Applicant have averred that the sealing of the Applicant's production line has meant that the Applicant has been out of the market for two weeks so far. This period it is urged can be extended indefinitely by the Respondent who is admittedly not following any process known in law. This extended absence from the market continuous to erode the Applicant's brand and has an obvious deleterious effect on the brand affinity carefully built up over time for its products. The continued absence from the market, even if remedied this time shall obviously result in reduced market share and shall result in the Applicant incurring incalculable opportunity costs.

32. The Applicant is further prejudiced by the revelation at ground 8 of the Respondent's ground of opposition dated 29th July 2021 that the Applicant's license "should remain suspended". To date the Applicant has not been informed through any correspondence or otherwise that their license has been suspended. Indeed, the Respondent's letter dated 22nd July 2021 makes no mention of suspension of the Applicant's excise license. The procedure for suspension of a license is set out in **Section 20** as read with **Section 23 of the Excise Duty Act** and commences with issuance of a notice to this effect by the Respondent. No such notices were issued rendering the alleged suspension unlawful and therefore null and void.

33. The Applicant has further deponed under paragraph 29 of the further affidavit that it is willing to accommodate the Respondent's officials to supervise the production and affixing of excise stamps on its products.

ANALYSIS AND DETERMINATION

34. Having carefully considered the application, Replying Affidavit, further affidavit and counsel rival oral submissions, I find from the aforesaid only one issue arise for consideration thus:-

a) Whether the Applicant/Petitioner is entitled to grant of conservatory orders sought herein.

35. The Applicant herein mainly seek temporary conservatory orders restraining the Respondent from continuing to lock, seal the Applicant's manufacturing facility and the equipment or to in anyway deny or limit access to the Petitioner's manufacturing premises pending hearing and determination of the substantive Petition; and further grant Applicant a status quo order, allowing the Applicant to continue its operations pending determination of the Petition and issue any other order that it may deem fit for the ends of justice to be met.

36. The guiding principles upon which the Court can grant conservatory orders are well settled within the framework of **Article 23 of the Constitution**, which the Courts are called upon to uphold and enforce the Bill of Rights. **Article 23(1) and (3)** provides:-

"23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review."

37. I am alive to the facts that the Court at such stage is not called upon to make a definite finding on facts or the laws but instead is required to evaluate the material placed before it and decide whether the Applicant has made a prima facie case with likelihood of success and further whether declining to grant the orders will prejudice the Applicant.

38. It is further trite that for conservatory order to be granted in a Constitutional Petition, the Applicant is required to demonstrate a prima facie case with probability of success and further that unless the Court grants such orders there is a real danger that the Applicant will be prejudiced by refusal to grant the orders.

39. To buttress the aforesaid proposition, I am guided by the case of *Centre for Rights of Education and Awareness (CREAW) & 7 others vs. Attorney General Nairobi High Court Petition NO. 16 of 2011, (2011) eKLR*, where Justice Musinga, as he then was, stated:-

“It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner’s application and not the Petition. I will not therefore delve into a detailed analysis of facts and law. At this state, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”
(Emphasis added)

40. Further reliance is placed in the decision of the *Supreme Court* where the importance and scope of a conservatory order in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR* was stated as follows:-

“[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

41. I now proceed from the aforesaid to consider whether the Applicant has established a prima facie case. In the Court of Appeal in case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR* the Court proceeded to define a “prima facie case” as follows:-

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.” (Emphasis added)

42. In the instant Application, there is no dispute that the Applicant is in business of manufacture of alcoholic beverages which are excisable goods within the meaning of *Part I of 1st Schedule of Excise Duty Act*, since 2019. That it has at all material times complied with regulations mandating manufacturers of excisable goods to affix excise stamps on all manufactured products and has for this purpose on continuous basis procured excise stamps from the Respondent.

43. It is Applicant’s contention that it has made payments for excise stamps and the Respondent after having approved and received payments for excise stamps ha unlawfully and unreasonably withheld the same. The Applicant contend that the Respondent’s action amount to an infringement of *Article 47 of the Constitution* which provides:-

“47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is Constitution of Kenya, 2010 33 likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration”

44. There is further admission that the Respondent’s officers on 22nd July 2021 visited the Applicant’s facility and proceeded to lock and seal the Applicant’s premises which immediately resulted in shutting down of the Applicant’s operations. The action of the Respondent was provoked by purported certain goods bearing the Applicants Piston brand, which were alleged to have affixed upon them duplicated or counterfeited excise stamps, which were allegedly seized from non-named third parties. It is noted that at the material time no goods were found with duplicated or counterfeited excise stamps at the Applicant’s premises by the Respondent’s officials.

45. The Respondent in their Replying Affidavit did not depone nor allege that duplication and the counterfeited Excise Stamps were found in Applicant’s premises nor were any product seized from the Applicant’s warehouse with duplicate or counterfeit excise stamp.

46. The Respondent have not annexed any of the alleged duplicate and / or counterfeit stamps allegedly found in the Applicant’s premises.

Indeed the Applicant contend none of the alleged duplicate or counterfeit stamp was recovered from their premises and that they have never used duplicate and /or counterfeit Excise Stamps, nor any found within their premises.

47. It is logical if the Respondent's had found such materials they who have exhibited them through their Replying Affidavit. The materials were indeed as stated found with third parties whose connection with the Applicant has not been demonstrated. Further the Respondent failure to annex the alleged duplicate and/or counterfeit stamps allegedly found in the Applicant's premises to their Replying Affidavit, gives credence to the Applicant's averments that the Respondent's action of unlawfully sealing off the Applicants premises was contrary to law and is malicious and without any foundation.

48. From the foregoing it turns out that the Respondent's accessed the Petitioner/Applicant's premises without reasonable and justifiable cause and proceeded to lock up and seal off the Applicant's manufacturing facility and / or equipment or in any way denied and limited access, to the Petitioner's manufacturing premises and equipment.

49. I note from the pleadings and submission and upon consideration of the Application herein, that the Applicant has demonstrated a prima facie case with likelihood of success as regards violation or threat of its fundamental rights as provided under the Bill of Rights. Further the Applicant has demonstrated that if conservatory orders sought are declined it will stand to suffer prejudice. The Respondent on the other end has not demonstrated what prejudice it would suffer if orders are granted.

50. The closure of the premises has definitely caused Applicant to suffer financial loss, notwithstanding the Applicant had legitimate expectation that administrative action by the Respondent were to be fair and practicable.

51. The upshot is that the Application dated 23rd July 2021 is meritorious and I proceed to grant the following orders:-

a) Prayer 1 spent.

b) Prayer 2 spent.

c) Pending hearing and determination of the substantive Petition a temporary conservatory order restraining the Respondent from continuing to lock, and seal the Applicant's Manufacturing facility and or equipment or to in any way deny or, limit access to the Petitioner's manufacturing premises be and is HEREBY issued.

d) An order be and is HEREBY issued compelling the Respondent to immediately release to the Applicant excise stamps the same of which has already been approved by the Respondent and for which payment has been received.

e) While prayers (c) and (d) above continue subsisting the Applicant is directed to accommodate the Respondent's officials to proceed on with the investigations and further if need be supervise the production and affixing of excise stamps on Applicant's products.

f) Costs in the cause.

Dated, Signed and Delivered at Nairobi on this 12th day of August, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA