



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF AT NAIROB**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. E275 OF 2021**

**IN THE MATTER OF ARTICLES 22 AND 165 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10, 19, 20, 21, 22, 23, 24, 25, 27, 31, 40, 47 AND 50, OF  
THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE TAX PROCEDURES ACT**

**AND**

**IN COME TAX ACT**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

**BETWEEN**

**PARTIAL DISTILLERS (K) LIMITED.....PETITIONER**

**VERSUS**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**RULING**

**THE APPLICATION**

1. The Applicant/Petitioner through an application dated 14<sup>th</sup> July 2021 supported by supporting affidavit sworn by James Muchoki Muthoni on the even date seeks the following orders:-

*a) Spent.*

*b) Spent.*

*c) Spent.*

*d) Pending interpartes hearing and determination of the substantive Petition, the court be pleased to issue a temporary conservatory order restraining the Respondent from continuing to place customs seals, locks, or any seals or in any way deny or limit the access to the Petitioner's production equipment or manufacturing premises. The Costs of this application be borne by the Respondent.*

*e) Pending interpartes hearing and determination of the substantive Petition the Court be pleased to issue a temporary*

***conservatory order restraining the Respondent from arbitrary interfering with the Petitioner's lawful production operations by denying it stamps or use of its administrative power to limit or unfairly curtail the Petitioner's ability to operate and produce normally.***

***f) Costs of this application be awarded to the Applicant.***

2. The application is premised on several grounds on the face of the application and supporting affidavit deposed upon by James Muchoki Muthoni on 14<sup>th</sup> July 2021 and further affidavit by Francis Kiambi Kiriiri sworn on 27<sup>th</sup> July 2021.

#### **RESPONDENT'S RESPONSE**

3. The Respondent is opposed to the application and in doing so filed a Replying Affidavit sworn by Isaac Gachoka dated 20<sup>th</sup> July 2021.

#### **PETITIONER'S CASE**

4. The Application is brought under **Article 23(1) and (3) of the Constitution of Kenya** to which the Court has jurisdiction to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, right or fundamental freedom in the Bill of Rights and to which Court may issue appropriate reliefs.

5. The Petitioner's case alluded to violation of its fundamental rights by way of unlawful search and closure of the Petitioner's private manufacturing premises. It is alleged the Petitioner's rights to privacy protected under **Article 31 of the Constitution** was violated, as well as right to property under **Article 40 of the Constitution** as well as right to fair administrative action under **Article 47 of the Constitution** and also violation was occasioned to statute on tax investigation and enforcement.

6. The Petitioner contends that the violations were done and were investigated by the Respondent in acting as a statutory body established under **Kenya Revenue Act**, which as a statutory body is bound by the provisions of **Article 2 of the Constitution**.

7. It is contended by the Petitioner that on 13<sup>th</sup> July 2021 at about 4:00p.m the Respondent officers comprising of a team of nine, visited the Petitioner's manufacturing premises and announced that they had come to close the Petitioner's manufacturing premise on instructions from above. The said team of officers at the material time had no written authorization or warrants to access the premise. The Petitioner agreed to grant them access for purposes of conducting an inspection in the spirit of trust and for them to satisfy themselves that the Petitioner is conducting business above board.

8. It is stated that the officers then proceeded to conduct a search on the premises which did not yield any incriminating material, as they did not find anything of interest or question anything or carry anything from the premise. It is further urged that the team of officers proceeded to inform the Petitioner that despite the positive result they are under strict instructions to take control of the Petitioner's manufacturing premises because the Respondent is carrying out investigations on tax evasion involving an un-named third party.

9. The Petitioner additionally avers that the Respondent's officers then proceeded to place custom seals on the Petitioner's manufacturing equipment and verbally instructed the Petitioner's General Manager not to carry out any business because the Respondent has now taken over the manufacturing premise and all property therein.

#### **RESPONDENT'S CASE**

10. It is stated by the Respondent that on 13<sup>th</sup> July 2021 the Respondent while carrying out its mandate was informed that the Applicant herein, who is in the business of production and sale of alcoholic beverages, was involved in tax evasion schemes and from the said information raided the Applicant premises and established that the Applicant was involved in a tax evasion scheme wherein it used duplicate and fake excise duty stamps. The actions therein were used to circumvent the provisions of the Excise duty stamps and specifically the provisions of the **Excise Duty Act No. 23 of 2015**.

11. The Respondent states that ideally and legally manufacturers of such products run their goods through the Excisable Goods Management System Regulation (EGMS) wherein the same is an online platform for the application and approval of Excise duty stamps. That the system then calculates the excise stamps it issues and based upon the same charges the requisite tax payable that the Respondent then collects as part of its mandate of the enforcement and collection of taxes.

12. It is urged by the Respondent that based on the evidence that was collected and the established fact that the Applicant was engaging in tax evasion activities, the Respondent herein locked the Applicant's premises with its seals and declared the same a crime scene that would then need to be preserved to aid in the investigation of the illegality.

#### **ANALYSIS AND DETERMINATION**

13. Having considered the Petitioner's/Applicant's application and the Respondent's response and considering parties rival submissions, there arise only one issue for consideration being thus:-

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

14. The applicant in the application herein mainly seek an order to restrain the Respondent from continuing to lock or limit the Applicant access to its manufacturing premises on the alleged grounds that the Applicant was involved in a tax evasion scheme wherein it used

duplicate and fake excise duty stamp.

15. The guiding principles upon which this Court can grant conservatory orders are well settled within the framework of **Article 23 of the Constitution** where the Courts are called upon to uphold and enforce the Bill of Rights.

16. I am alive to the fact that the Court is not at such stage called upon to make a definite finding on facts or the law 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.

17. To buttress the above mentioned proposition both parties sought reliance in 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)

18. 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.”***

19. 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)

20. In the instant Petition/Application it is not in dispute that the Applicant is a licensed manufacturer of alcoholic beverages and an ardent tax payer. The Applicant has previously been lauded by the Respondent for timely and accurate returns and has been issued with a tax compliance certificate issued for each year of business.

21. Further in the instant Petition the Respondent without any justification raided or conducted a search on the Petitioner’s manufacturing premises and proceeded to lock up the Petitioner’s premises despite not finding any incriminating material.

22. The Respondent at the time of proceeding to the Petitioner’s premises had no search warrant nor did they inform the Petitioner the reasons for their visit and acted unilaterally and arbitrary and in violation of the rights of the Petitioner under **Articles 31 and 40 of the Constitution**.

23. The closure of the Petitioner’s premises definitely has caused financial loss to the Petitioner who has legitimate expectation that administrative action by the Respondent shall be fair and predictable, in accordance with **Article 47 of the Constitution** and **Fair Administrative Action Act**.

24. I find from the aforesaid, the Applicant has demonstrated that it has arguable case. Or has demonstrated a prima facie case, with likelihood of success against the Respondent and accordingly the first limb required for granting of order sought in the Notice of Motion is satisfied.

25. On the next limb, of what prejudice will be suffered by the Applicant, if the orders are declined, I have to consider the parties pleadings as deponed in the rival affidavits.

26. It is Applicant’s contention that the Respondent’s action of searching the Applicants premises has a deleterious effect on the business of the Applicant and have occasioned substantial prejudice to the Applicant. The Respondent’s action, it is urged, has completely incapacitated the Petitioner who has over 300 casual employees on a daily wage and 170 permanent staff on its monthly payroll. The Petitioner’s employees no longer have a source of livelihood. This also exposes the Petitioner to labour disputes. Further it is urged that the Petitioner is unable to attend to its vast financial obligations which are predicated on the continuous flow of business and business operations.

27. It is further stated that the Respondent’s search at the Petitioner’s premises did not reveal anything, additionally the Respondent has made very general allegations against the Petitioner without any substantial proof. It would be a travesty of justice if the Petitioner’s manufacturing premises would remain closed following unjustified raid upon the premises by the Respondent.

28. From the Petitioner's application and submission, I find that the Petitioner /Applicant has no objection to the Respondent to continue to discharge its legal mandate as the Petitioner continues to operate its legitimate business. I find that the Respondent has not demonstrated on its part any justification whatsoever for Petitioner business to remain closed as the Respondent has failed to substantiate its allegations against the Petitioner. If the orders are declined it is only the Petitioner who will be prejudiced as the Respondent has not shown what prejudice it would suffer if prayers sought are accordingly granted.

29. I find on the said limb the Petitioner/Applicant has demonstrated that declining to grant the orders sought it will continue to suffer substantial prejudice unless the orders in the Notice of Motion of 14<sup>th</sup> July 2021 are granted.

**30. The upshot is that the Application dated 14<sup>th</sup> July 2021 is meritorious. I proceed to grant the following orders:**

***a. That pending hearing and determination of the substantive Petition temporary conservatory order be and is HEREBY issued restraining the Respondent from continuing to place customs seals, locks, or any seals or in any way deny or limit the access to the Petitioner's production equipment or manufacturing premises.***

***b. Further to (a) above and pending hearing and determination of the substantive Petition temporary conservatory order be and is HEREBY issued restraining the Respondent from arbitrary interfering with the Petitioner's lawful production, operations by denying it stamps or use of its administrative power to limit or unfairly curtail the Petitioners ability to operate and produce normally.***

***c. During the subsisting of orders (a) and (b) above the Respondent is at liberty to continue to discharge its legal mandate at the Petitioner's premises as the Petitioner continue to operate its legitimate business, as the Petitioner has no objection to Respondent discharging its legal mandate while Petitioner continue to operate its legitimate business.***

***d. Costs shall abide the outcome of the Petition.***

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF AUGUST, 2021.**

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**J. A. MAKAU**

**JUDGE OF THE HIGH COURT OF KENYA**