



REPUBLIC OF KENYA  
IN THE HIGH COURT OF  
AT NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION  
PETITION NO. E172 OF 2021

**MOUNT KENYA BREWERIES LIMITED...APPLICANT/PETITIONER**

**-VERSUS-**

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

**RULING**

1. The application before this Court has been brought by the Petitioner, Mount Kenya Breweries Limited, by way of a notice of motion dated 11<sup>th</sup> May, 2021 and is grounded on Articles 23(3)(c) & 165(3) of the Constitution; Rules 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; and all other enabling provisions of the law. Through the application orders are sought as follows:

**a. Spent.**

**b. Pending *inter-partes* hearing of this application the Court be pleased to issue a temporary conservatory order restraining the Respondent from continuing to lock, seal the outer doors or in any way deny or limit the access to the Petitioner's manufacturing premises.**

**c. Pending *inter-partes* hearing and determination of the substantive Petition, the Court be pleased to issue a temporary conservatory order restraining the Respondent from continuing to lock, seal the outer doors or in any way deny or limit the access to the Petitioner's manufacturing premises.**

**d. Pending *inter-partes* hearing and determination of this application, the Court be pleased to order the Respondent to reinstate the Petitioner's excise license and to facilitate the resumption of normal business operations at the Petitioner's factory by resuming the issuance of excise stamps for production and unsealing the manufacturing premises.**

**e. Pending hearing and determination of the substantive Petition, the Court be pleased to order the Respondent to reinstate the Petitioner's excise license and to facilitate the resumption of normal business operations at the Petitioner's factory by resuming the issuance of excise stamps for production and unsealing the manufacturing premises.**

**f. Pending *inter-partes* hearing and determination of this application this Honourable Court be pleased to order the release of Motor Vehicle registration number KCC 433H seized at the Petitioner's manufacturing premises.**

**g. The costs of this application be awarded to the Petitioner.**

2. The application is premised on the grounds as set out on its face, and a supporting affidavit and supplementary affidavit sworn respectively on 11<sup>th</sup> May, 2021 and 3<sup>rd</sup> June, 2021 by Solomon Wahome, a director of the Applicant. It is also indicated that the application is supported by the petition, the affidavit in support thereof and the annexures thereto.

3. From the pleadings, it emerges that the Applicant is licensed to engage in the manufacture, packaging and distribution of alcoholic beverages. It is also regulated and licensed by the Respondent, Kenya Revenue Authority, as a manufacturer and dealer of excisable goods.

4. The Applicant's case is that it is a registered taxpayer that pays its taxes diligently and has on several occasions been lauded by the Respondent for timely and accurate returns. Further, that it has indeed been issued with a tax compliance certificate for every year of business.

5. It is the Applicant's averment that on the 9<sup>th</sup> April, 2021, the Respondent's representatives without any notice or prior information entered its premises and conducted a search after which they claimed to have discovered approximately 16,600 bottles of its product purportedly affixed with unverified excise stamps together with a reel of purported non-genuine excise stamps. According to the Applicant, the Respondent's agents also found a motor vehicle registration number KCC 433H parked at the premises which they used to transport the goods to an undisclosed place.
6. The Applicant avers that the exercise was conducted unilaterally and forcibly with the aid of more than 20 other persons who were armed and who claimed to be members of the National Police Service. It is deposed that the Respondent's representatives unlocked and unsealed the factory and moved freely within the premises without involving the proprietors or members of staff. Further, that the Respondent seized property within the premises and subsequently suspended the Applicant's excise licence thus crippling the business operations. It is also averred that prior to the raid and search of the premises, the Respondent had always been in constructive control of the manufacturing process at the Respondent's factory.
7. The Applicant states that the Respondent's actions are an affront to its constitutional right under Articles 31 and 47; sections 4, 5 and 6 of the Fair Administrative Action Act, 2015; sections 20(2) and 23 of the Excise Duty Act, 2015; and Section 44(4) of the Tax Procedures Act, 2015. It is averred that as a consequence of the Respondent's actions, its shareholders and hundreds of staff members had lost their source of livelihood without reasonable justification. Further, that the Applicant had lost significant business income and is now unable to fulfill its vast financial obligations totaling over Kshs. 350 million to its financiers and creditors including ICDC, Unitas Society Sacco Ltd and Equity Bank and is also unable to meet other recurrent expenditure. The Applicant deposes that its directors are likely to be adversely listed by credit reference bureaus which would result in dire consequences individually and collectively for the shareholders, directors and other stakeholders.
8. The Applicant states that after the unlawful and unprocedural actions taken against it, the Respondent had called upon it to discuss new tax assessments totaling to a colossal sum of money and had threatened to prefer charges against its directors and other officers unless specific figures were agreed upon pertaining to its tax obligations to the Respondent.
9. The Respondent opposed the application through a replying affidavit sworn on 24<sup>th</sup> May, 2021 by Joan Mwangi, an officer appointed under Section 13 of the Kenya Revenue Authority Act, Cap 469.
10. The Respondent's case is that the Applicant is a licensed alcohol manufacturer located in Nanyuki and that under the Excise Duty Act, 2015 alcohol is an excisable good and the Applicant is therefore a licensed manufacturer of excisable goods under the Excise Duty Act, 2015.
11. It is the Respondent's case that Legal Notice No. 69 of 2011 requires all manufacturers of excisable goods to install a custody mass transfer flow meter of the type approved by the Respondent as the meter is one of the major control measures it employs to protect revenue. It is averred that with a view to establishing compliance with the said legal requirement, the Respondent on 15<sup>th</sup> March, 2021 wrote to the Applicant asking for evidence of compliance and the Applicant never provided the requested information.
12. The Respondent avers that the Applicant was therefore identified as one of the manufacturers that had not installed mass transfer flow meters. However, the Respondent in the spirit of trust and facilitation agreed to facilitate all the factories that did not have the meters and Excise Goods Management System (EGMS) by sealing and unsealing of the production lines as requested by the manufacturers. This was meant to give time to the manufacturers to source and install EGMS and meters since all alcohol manufacturing companies that have not installed both EGMS and the meters were put under excise control by dint of Section 24 of the Excise Duty Act, 2015.
13. The Respondent's case is that since the Applicant had not complied with Legal Notice No. 69 of 2011 and was under the control of the Respondent, the Applicant was not supposed to carry out any production in the absence of the Respondent's Factory Control Officer who would seal and unseal the production lines on the Applicant's request.
14. The Respondent avers that upon receipt of intelligence that the Applicant was engaging in production in the absence of its Factory Control Officer, it commissioned some of its agents to visit the Applicant's premises with the objective of confirming if the Applicant was operating in the absence of the Factory Control Officer. The agents were also to establish if the custom seal was intact or tampered with, to check and confirm the source of materials including excise stamps and ethanol, and to confirm the authenticity of excise stamps. It is deposed that under Section 7 of the Tax Procedures Act, 2015, the Respondent's officers in the performance of their duties have all the powers, rights, privileges and protections of a police officer.
15. The Respondent avers that its team, accompanied by administrative police officers, unexpectedly visited the Applicant's premises on the 9<sup>th</sup> April, 2021 at around 17.30 hours whereupon they procedurally introduced themselves to the Applicant's security personnel. They stated the purpose of the visit and they were ushered in without any confrontation or force.
16. The Respondent states during the visit that it was discovered: that the Applicant's factory was in production during the time of the visit and the custom seal was on; that the Respondent was not informed of this production which is contrary to Section 24 of the Excise Duty Act, 2015; that the Applicant was found to have produced a total of 16,600 bottles of alcohol which had been affixed with counterfeit excise stamps contrary to the law; and, that a roll of excise stamps of about 15,000 pieces in the stamp application machine was counterfeit.
17. According to the Respondent, the Applicant was issued with a notice of offence which was signed and received by its production manager and all the 16,600 bottles of 250ml of sparkler vodka bearing counterfeit excise stamps were seized pursuant to Section 44 of the Tax Procedures Act, 2015 and the relevant provisions of the Excise Duty Act, 2015. Further, that an inventory of the documents recovered from the factory was also signed and received by the Applicant's production manager. A truck registration number KCC 432H that was loaded with the counterfeited products was also impounded and used to transport the counterfeited goods to a warehouse at Wilson Airport where they were deposited.

18. The Respondent avers that it is empowered under Section 23(4) of the Excise Duty Act, 2015 to suspend an excise licence immediately and without notice where the licensee has engaged in tax fraud; has been found in possession of, or using, counterfeit stamps on excise goods; or has been found in possession of goods bearing counterfeit stamps or has violated any regulations relating to health and safety standards of packaging goods. It is averred that notwithstanding the stated law, the Applicant was on 12<sup>th</sup> April, 2021 asked to show cause within seven days why the excise licence should not be suspended.
19. The Respondent's case is that on 14<sup>th</sup> April, 2021 the Applicant's two directors accompanied by their appointed tax agent Mr. Wachira of WADA Tax Solutions visited the Respondent's offices where after discussions the directors were informed of the intention to suspend the Applicant's excise licence and given seven days to respond to the notice dated 12<sup>th</sup> April, 2021 that was emailed to them on the same day. According to the Respondent, on 13<sup>th</sup> April, 2021 the Applicant appointed WADA Tax Solutions Limited as its agent and on 19<sup>th</sup> April, 2021 the agent responded to the notice of intention to suspend the excise licence.
20. The Respondent states that it was not satisfied with the Applicant's response and on 26<sup>th</sup> April, 2021 pursuant to a notice issued under Section 23(4) of the Excise Duty Act it suspended the Applicant's excise licence.
21. It is the Respondent's averment that on 4<sup>th</sup> May, 2021 another director of the Applicant visited the Respondent's offices and after discussions with the Respondent's representatives he was notified that the Applicant had been put under a tax compliance check by the Respondent and it would soon be notified of the findings of the said tax compliance check. The director was further informed that the case had been forwarded to the Respondent's investigation and enforcement department for fraud investigation and prosecution.
22. The Respondent deposes that the impromptu visit to the Applicant's manufacturing premises was done procedurally and any seizure of goods, records, equipment and vehicles was guided by the requirements of the law. Further, that the suspension of the excise licence was done procedurally and in accordance with the law. The Court is therefore urged to dismiss the application.
23. The Applicant in rebutting the Respondent's case through the supplementary affidavit produced receipts and photographs evidencing acquisition and installation of the custody mass transfer flow meter. According to the Applicant, the Respondent's control over its production was not on account of its failure to install a custody mass transfer flow meter.
24. It is the Applicant's position that the Respondent's actions under Section 44(1) of the Tax Procedures Act are unlawful because the said provision was declared unconstitutional by the High Court in **Robert K. Ayisi v Kenya Revenue Authority & another [2018] eKLR** on 16<sup>th</sup> May, 2018. Further, that the seven days' ultimatum issued by the Respondent was in clear violation of Section 23(1) of the Excise Duty Act, 2015 which requires a licensee to be given a period of 21 days to show cause why the licence should not be suspended. In conclusion the Applicant vehemently denies admitting tax fraud or engaging in it.
25. The Applicant filed submissions dated 3<sup>rd</sup> June, 2021 wherein it states that at this stage the Court is not required to make a definitive finding on the facts or the law but instead to evaluate the material placed before it and decipher whether it has made a *prima facie* case and whether the denial of the orders will prejudice it. Reliance is placed on the decision in **Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR** for the holding that in considering an application for conservatory orders the Court is not required to delve into a detailed analysis of facts and law as what is only required is for the party seeking the conservatory order 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.
26. The Applicant cites and relies on the Supreme Court decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** as establishing the principles that guide the grant of conservatory orders.
27. The Applicant submits that it has established a *prima facie* case and relies on the Court of Appeal decision in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** for the statement that a *prima facie* case is one which discloses that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal.
28. It is the Applicant's case that it has established a *prima facie* case as it has demonstrated that despite installing a mass transfer flow meter as required by the law, the Respondent was still in constructive control of its manufacturing premises as its officer was responsible for sealing and unsealing its production lines. The Applicant argues that the Respondent was not justified to conduct the search and seizure of its property unilaterally and arbitrarily because it violated its rights under Articles 31 and 40 of the Constitution.
29. It is additionally the Applicant's submission that the Respondent's powers of search and seizure as provided by the Tax Procedures Act were extinguished after the High Court declared the provisions of search and seizure under sections 44(1) & (2), and 60(1) & (3) of the Tax Procedures Act unconstitutional in the case of **Robert K. Ayisi v Kenya Revenue Authority & another [2018] eKLR**.
30. It is additionally the Applicant's submission that the suspension of its licence contravenes the provisions of Article 47 of the Constitution which provides the right to fair administrative action which includes the right to be heard. Further, that Respondent failed to comply with Section 23 of the Excise Duty Act which requires the Respondent to issue a 21days' notice to the licensee prior to suspending, revoking or cancelling a licence under the Act.
31. On the need to show the prejudice it will suffer if orders are not granted, the Applicant submits that the actions of the Respondent have had a deleterious effect on its business and occasioned it substantial prejudice. The Applicant states that at the moment it is unable to generate revenue because its manufacturing premises have been locked and its excise licence suspended. According to the Applicant, its directors and hundreds of staff have consequently lost their livelihood in the wake of the Covid-19 pandemic which has already caused serious economic strain on individuals and corporations. Further, that the Applicant is now unable to discharge its obligations to various financial institutions.

32. The Applicant contends that it has previously met all its tax obligations and is ready and willing to subject itself to the Respondent's tax investigations and enforcement procedures as long as they are in tandem with the provisions of the law. Further, that the Respondent will also benefit if the Applicant's manufacturing premises are re-opened and normal operations resumed because income will be generated and the necessary taxes remitted to the Respondent.

33. In response, the Respondent filed submissions dated the 15<sup>th</sup> June, 2021 and identified the only issue for the determination of this Court as to whether the conservatory orders sought by the Applicant should be granted. Reliance is placed on the holding in **Centre for Human Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011]** that 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. Also cited in support of this position is the decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** where it was held that conservatory orders are 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.

34. The Respondent submits that based on the cited decisions, a party seeking conservatory orders must establish a *prima facie* case, demonstrate the prejudice to be suffered if the orders are not granted, and show that it is in the public interest to grant conservatory orders. Further, that as held in **Kenya Association of Manufacturers and 2 others v Cabinet Secretary–Ministry of Environment and Natural Resources & 3 others [2017] eKLR**, conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.

35. It is the Respondent's submission that the Applicant has not made out a *prima facie* case to warrant the grant of the orders sought. According to the Respondent it is empowered under Section 23(4) of the Excise Duty Act, 2015 to suspend an excise licence immediately and without notice where the licensee has engaged in tax fraud; is found in possession of, or using, counterfeit stamps on excisable goods; is found in possession of goods bearing counterfeit stamps; or violates any regulations relating to health and safety, standards or packaging of goods.

36. It is the Respondent's submission that it is not in dispute that the Applicant was not only found in possession of counterfeit stamps but was also found in possession of goods bearing counterfeit stamps. Further, that despite the law empowering the Respondent to immediately suspend the Applicant's licence as it was found with counterfeit stamps and goods bearing counterfeit stamps, it was lenient on the Applicant and had instead issued it with a notice through the letter dated 12<sup>th</sup> April, 2021 to show cause within seven days why the licence should not be suspended. Based on the stated facts, the Court is therefore urged to find that the Applicant has not established a *prima facie* because the Respondent was procedurally performing its statutory functions.

37. The Respondent submits that even if the Court were to find that a *prima facie* case has been established, the Applicant has not shown the prejudice to be suffered if its application for orders will be declined as it will only be suffering the repercussions of being found on the wrong side of the law. Also, that any loss to be suffered by the Applicant can be financially quantified and compensated by way of damages.

38. The Respondent contends that it is not in the public interest to issue conservatory orders in this case since the Applicant was found on the wrong side of the law and was unfairly benefiting from manufacturing excisable goods without paying excise duty. According to the Respondent, the actions of the Applicant gave it unfair advantage over other manufacturers of similar products who pay their taxes. Further, that the Applicant's actions also denied the Respondent and by extension the Kenyan public revenue which is needed to fuel the economy.

39. The Court is urged to follow its decision in **Okiya Omtatah Okoiti v Kenya University Teaching, Referral & Research Hospital & 2 Others (Interested Parties) [2019] eKLR** on the importance of the need to take into account the public interest when determining an application for conservatory orders. It is the Respondent's case that the public interest in the instant case frowns upon tax evaders such as the Applicant hence the Court should find that the threshold for grant of conservatory orders has not been met and the application should be dismissed with costs.

40. The law that guides the grant of conservatory orders is now well established. In determining an application for grant of conservatory orders the Court is not required to go into the details of the evidence and the law as those issues fall into the province of the Court that will hear and determine the petition. All that the Court needs to do is to satisfy itself that a *prima facie* case has been disclosed and failure to grant orders will jeopardize the rights of the applicant irredeemably. This statement finds support in the holding in **Centre For Rights Education and Awareness (CREAW) & 7 others V Attorney General [2011] eKLR** that:

**“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 stage, 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.”**

41. Even where a strong case has been established and it has been demonstrated that failure to grant orders will be prejudicial to the applicant, the Court is also required to bring into view the public interest. The Court must interrogate the impact of any orders on the public and where issuance of orders is likely to be extensively injurious to the public, the Court should decline the application for conservatory orders since there is the option of the remedy of damages if the applicant will eventually be successful.

42. The place of the public interest when considering an application for conservatory was repeatedly stressed by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** 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.*”

43. In considering an application of this nature, the first task is to determine whether there is a *prima facie* case before the Court with a likelihood of success. The meaning of a *prima facie* case in civil disputes was stated by in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** as follows:

**“So what is prima facie case? I would say that in civil cases it is a case in 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...**

**But as I earlier endeavoured to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”**

44. In order to determine whether the Applicant has an arguable case with a probability of success at the trial I will need to briefly rehash its arguments. In the first place, the Applicant asserts that the Respondent’s action of suspending its licence without notice contravened Section 23 of the Excise Duty Act, 2015 and Section 44 of the Tax Procedures Act, 2015. The Respondent retorts that the same Section 23 of the Excise Duty Act, 2015 allows it to immediately suspend a licence without notice. It is therefore important to reproduce Section 23 of the Excise Duty Act, 2015 in its entirety so that it can speak for itself. It states:

### **23. Commissioner to notify licensee prior to suspension of license**

**(1) Where the Commissioner seeks to suspend a licence under this Act, the Commissioner shall give the licensee twenty-one days’ notice prior to the suspension, giving grounds on which the suspension shall be done.**

**(2) A notice issued under this section may require the licensee to remedy any circumstances which may be required to be remedied.**

**(3) Where a licensee fails to comply with the requirements indicated in the notice issued under this section, the Commissioner may proceed to suspend the licence under section 20.**

**(4) Despite any other provision of this Act, the Commissioner may suspend a licence, without notice, where the licensee—**

**(a) has engaged in tax fraud;**

**(b) has been found in possession of, or using, counterfeit stamps on excisable goods;**

**(c) has been found in possession of goods bearing counterfeit stamps; or**

**(d) has violated any regulations relating to health and safety, standards or packaging of goods.**

45. The Respondent is indeed correct that Section 23(4) of the Excise Duty Act, 2015 which was introduced through an amendment in 2018 allows it to suspend a licence without notice where the licensee has engaged in tax fraud; has been found in possession of, or using, counterfeit stamps on excisable goods; has been found in possession of goods bearing counterfeit stamps; or has violated any regulations relating to health and safety, standards or packaging of goods.

46. The Respondent’s case is that its actions were triggered by the fact that the Applicant was found using counterfeit stamps on excisable goods and was also in possession of goods bearing counterfeit stamps. According to the Respondent, notwithstanding that the law authorized it to suspend the Applicant’s licence without notice, it had given the Applicant notice to show cause why the licence should not be suspended and only suspended the licence after the Applicant failed to convince it that the licence should not be suspended. From the facts and the law, it therefore appears that the Respondent did not violate the law in suspending the Applicant’s licence. I will come back to another aspect of this issue later in this ruling.

47. Another ground upon which the Applicant impugns the raid on its factory is that the Respondent based its actions on the search and seizure powers provided in sections 44(1) & (2) and 60(1) & (3) of the Tax Procedures Act, 2015 yet those provisions were already declared unconstitutional in **Robert K. Ayisi v Kenya Revenue Authority & another [2018] eKLR**. The Respondent did not make any reply to this argument. I note that the High Court did indeed in the said case find sections 44(1) and (2), 60(1) and (3) and 59(4) of the Tax Procedures Act, 2015 not to be in compliance with the Constitution and declared them unconstitutional, invalid, null and void. However, that decision was stayed by the Court of Appeal in **Kenya Revenue Authority v Robert Anyisi; Nairobi City County Government (Interested Party) [2020] eKLR; Civil Application No. 170 of 2018** when the Court held that:

**“16. Having disposed the issue that the appeal is arguable and we have the requisite jurisdiction to order stay, we have to address the nugatory aspect. Counsel for the applicant argued that if the impugned orders remain in force, the applicant’s**

mandate in tax collection will be greatly hampered. That the applicant will fail to collect colossal sums of money that is budgeted for the coming financial years; that it cannot undertake any audit or investigate cases of tax evasion but merely rely on self-assessment of tax due. That finally refusal to grant a stay would cause hardship that may reflect in the overall national economy and in the event that the appeal succeeds, the loss will be irreversible. We are convinced that these arguments have some merit. From our own analysis of the matter, and as demonstrated above, this is a unique case that has a public interest bearing on the mandate of the applicant as a tax collection agency on behalf of the people of Kenya. Also, in the interest of justice it is imperative that the provisions of the law that were nullified by the impugned orders should be subjected to a second opinion of this Court before the laws are amended. We note that even the learned Judge had issued a temporary stay order of the same order pending the filing of the appeal while perhaps being mindful of the same considerations.

**17. In the upshot, the order that best commends to us is to stay the entire judgment and orders of the High Court delivered on 16<sup>th</sup> May, 2018 pending the hearing and determination of the appeal.”**

48. The Applicant’s case that the Respondent acted on statutory provisions that were already declared unconstitutional is therefore without basis. This cannot be a reason for finding that the Applicant has established a *prima facie* case with high chances of success.

49. Can one then say the Applicant has completely failed to show that it has an arguable case with high chances of success? Although the Respondent asserts that it took over control of the manufacturing process as a result of the Applicant’s failure to install the custody mass transfer flow meter, the Applicant has rebutted, through production of documentary evidence, the Respondent’s averment. The basis for the raid on the Applicant’s premises therefore disappears and without establishing a foundation for the exercise of its statutory powers, the Respondent’s actions borders on abuse of power. For this reason alone, I find that the Applicant has established a *prima facie* case since it is highly likely that there was no statutory and legitimate foundation for the raid on its premises in the first place.

50. The next question is whether the Applicant has shown the prejudice it will suffer if the orders sought are not granted. According to the Applicant, it has suffered great prejudice as a result of the Respondent’s suspension of its licence in that its manufacturing operations have been brought to a halt thus putting its financial affairs and the jobs of its employees in peril. If this is not prejudice, what is? It is clear from the undisputed averments of the Applicant that the closure of its business has led to its ruin and even damages may not be sufficient compensation.

51. Where does public interest lie? The Respondent submits that it is in the public interest to uphold its decision as it was discharging its statutory role of collecting taxes. Reference was made to my decision in **Okiya Omtatah Okoiti v Kenyatta University Teaching, Referral & Research Hospital & 2 others; Kenyatta University Council & 2 others (Interested Parties) [2019] eKLR** where in declining an application seeking to stop the opening of a hospital I held that the public interest favoured the opening of the hospital as that would allow Kenyans access medical services from a brand new facility thus reducing the strain on other medical facilities in the country. Unfortunately for the Respondent the circumstances of that case are so different from those prevailing in the present case to the extent that the cited case cannot be used as the yardstick for denying conservatory orders in the instant case. Conservatory orders are granted where doing so would uphold the public interest and denied where granting them would be harmful to the public interest. The Court is therefore required to do a delicate balancing act in the circumstances of each case.

52. In the instant case the Respondent is actually not protecting the interests of the public which is to ensure that taxes are collected. When the Respondent proceeds to kill businesses in the guise of collecting taxes, it becomes an undertaker and will itself eventually die since its survival depends on the existence of income generating businesses from which it can collect taxes. In ensuring that legitimate businesses do not operate, the Respondent acts against its core mandate which is to collect taxes since it cannot collect taxes from businesses that are not operational. On the other hand, the Applicant is correct that its continued operation is beneficial to the public because it will pay taxes on whatever revenue it generates. It will also offer jobs for its employees and service the loans it has taken from financial institutions.

53. From the foregoing analysis, it follows that the Applicant has made a case for grant of conservatory orders. Orders shall therefore issue as follows:

(a) Pending *inter partes* hearing and determination of the petition, a conservatory order is issued restraining the Respondent from continuing to lock, seal the outer doors or in any way deny or limit the access to the Applicant’s manufacturing premises. For the purpose of executing its mandate, the Respondent’s officers or agents are, however, at liberty to gain access and exit from the Applicant’s manufacturing premises at any given time.

(b) Pending the hearing and determination of the petition, the Respondent is ordered to reinstate the Applicant’s excise licence and to facilitate the resumption of normal business operations at the Applicant’s factory by resuming the issuance of excise stamps for production and unsealing the manufacturing premises.

(c) Pending the hearing and determination of the petition the Respondent is ordered to release to the Applicant the motor vehicle registration number KCC 433H seized from its manufacturing premises. For avoidance of any doubt, this order does not extend to the products allegedly bearing counterfeited excise stamps seized from the manufacturing premises.

(d) The costs of the application shall abide the outcome of the petition.

54. The above orders do not in any way stop the Respondent from pursuing any outstanding and future tax liabilities from the Applicant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KABARNET THIS 29<sup>TH</sup> DAY OF OCTOBER, 2021**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**