



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BOMET**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 3 OF 2020**

**IN THE MATTER OF ARTICLES 20, 21, 22, 23, 47, 165 AND 175 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF VIOLATION OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION**

**BETWEEN**

**ELLE KENYA LIMITED.....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF BOMET..... RESPONDENT**

**JUDGMENT**

### **The Petition**

1. The Petitioner, Elle Limited, is a limited liability company incorporated under the provisions of the Company's Act, Chapter 486. Laws of Kenya (repealed) and duly licensed under the provisions of the Alcoholic Drinks Control Act, No. 4 of 2010, Laws of Kenya, to carry out the business of Distilling and Manufacturing of Liquor within the Republic of Kenya.

2. The Respondent is the County Government of Bomet, a Constitutional office created under the provisions of Article 176 of the constitution of Kenya to govern the people of Bomet by promoting social and economic development in the county as well as protecting and promoting the interests and rights of all the people of Bomet.

3. The Petitioner filed the present Petition dated 18<sup>th</sup> September 2020 was filed on 30<sup>th</sup> September 2020. It is premised on Articles 20(1), 21(1), 22(1), 23, 47(1) (2), 165 and 175 of the Constitution, and supported by the sworn affidavit of Immaculate Njoki Karuru, the Managing Director of the Petitioner Elle Kenya Ltd and that of Duncan Kiambi Muya, the proprietor of IVOT Wines and Spirits both sworn on 18<sup>th</sup> September 2020.

4. The Particulars are outlined on page 5 of the Petition as follows:-

a) Violation of the right of the Petitioner to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as provided for under Article 47(1) of the Constitution.

b) Violation of the Petitioner's right to be given written reasons for an administrative action that adversely affects a right or fundamental freedom as provided for under Article 47(2) of the Constitution.

c) Direct contravention of the express provision of Sections 4(3) of the Fair Administrative Action Act which provides that where an administrative action is likely to adversely affect the rights and fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- (i) Prior and adequate notice of the nature and reasons for the proposed administrative action;
- (ii) An opportunity to be heard and to make representations in that regard;
- (iii) Notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (iv) A statement of reasons pursuant to section 6;
- (v) Notice of the right to legal representation where applicable;
- (vi) Notice of the right to cross-examine where applicable; or
- (vii) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

d) Deprivation of property being that the Respondent's officials destroyed the Petitioner's property hence violating the right to property as provided for under Article 40 of the Constitution.

5. Consequently, the Petitioner sought the following prayers:-

- i. That the honourable court be pleased to make a DECLARATION that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's officers, servants and/or agents;
- ii. That the honourable court be pleased to make a DECLARATION that the Petitioner is entitled to payment of damages and compensation for the violations of their fundamental rights and freedoms under the aforementioned provisions of the Constitution;
- iii. Damages for loss and prejudice resulting from the actions of the Respondent;
- iv. That the honorable court be pleased to grant such other order and directions it deems fit in the circumstances; and
- v. That the Respondent be ordered to bear the costs of the Petition.

#### **Brief facts**

6. The Petitioner averred that it was duly licensed by Nairobi City County as a manufacturer, distributor and seller of alcoholic drinks, specifically Metropolitan gin for purposes of this present Petition. That their products are processed and produced by a process duly approved by the Kenya Bureau of Standards and were distributed through various outlets in major towns including Bomet, through IVOT Wines and Spirits since 2012.

7. The Petitioner averred that on or about the month of May 2014, it received an order request from their Bomet distributor, IVOT Wines and Spirits (hereafter referred to as IVOT) to supply 1,400 cartons of 205ml and 50 cartons of 250ml Metropolitan gin. They packed the consignment on or about 8<sup>th</sup> May 2014 and dispatched it for delivery by vehicle registration number KBU 617K which left Nairobi at 5 a.m. for Bomet town. The Petitioner further averred that the vehicle arrived its destination at about 11.00 am and proceeded to the distributor's store.

8. The Petitioner stated that during the offloading process, the Respondent's officials together with *askaris* arrived at the scene and immediately clamped the delivery lorry, forcefully confiscated the contents of the consignment, loaded them onto their vehicles and dumped them at Bomet Stadium. That the Respondents' officials then proceeded to destroy the consignment by burning. The Petitioner stated that there was no explanation given to the distributor on the reasons for the said action and that the destruction was reported by print media nationally.

9. The Petitioner also averred that the delivery lorry was later unclamped and that IVOT could now not pay for the consignment thus occasioning them substantial loss and damage.

10. The Respondent filed a Replying Affidavit dated 14<sup>th</sup> April 2021 in which it denied all the averments of the Petitioner and further stated that at no point had the Petitioner furnished proof of directorship or proof of actual costs of damage, that documents attached to the Petition were not certified therefore their authenticity could not be vouched for. The Respondent further stated that they never received a demand notice from the Petitioner. That the Petitioner never lodged any complaint with the police for malicious damage of property, and that it was suspicious for them to lodge the Petition 6 years later.

11. The Petition was canvassed by way of written submissions.

#### **The Petitioners' Submissions**

12. The Petitioner narrowed down the Petition to three main issues being: whether the Petition was competent; whether the seizure and confiscation of the Petitioner's goods was lawful; and whether the Petitioner was entitled to the orders sought in the Petition.

13. The Petitioner submitted that the Petition was competent and raised substantive questions for determination by the Court since they were

able to demonstrate the manner in which their rights had been infringed upon. To support their submission, they relied on the principles in **Anarita Karimi Njeru vs. Republic No. 1 (1976-80) 1 KLR 1272** and **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**.

14. The Petitioner submitted that the Respondent maliciously seized and destroyed their goods without any reasons which was a breach of their fundamental rights under Article 40 of the Constitution. They submitted that it was also an act of grave injustice to them and that the Respondents were in breach of Article 20(1) and 21(1) of the Constitution. The Petitioner further contended that the destruction of their source of their income resulted in a breach of their socio-economic rights and right to fair administrative action that were guaranteed by the Constitution under Articles 43 and 47 respectively.

15. It was the Petitioner's further submission that the Respondent breached their mandate under Article 175 by failing to employ democratic principles and further, that it was their right to be informed and be given an opportunity to respond on why their products were confiscated and destroyed. Lastly, they submitted that as per Article 165(3) and 23, the High Court was competent to determine matters pertaining to the interpretation of the Constitution and violation of the fundamental rights as enshrined in the Bill of Rights under the same Constitution. It was their prayer that gross violation of their rights entitled them to the prayers sought.

16. The Petitioner filed Supplementary Submissions on 19<sup>th</sup> July 2021 to address the new issues raised by the Respondent in their replying affidavit and submissions.

17. Firstly, on the issue of the Petitioner lacking locus, they submitted that the Petitioner, whether a natural person or a body incorporated or not incorporated, had the requisite locus to institute the proceedings under **Articles 22, 258 and 260 of the Constitution**. Thus, the Petition could not be deemed as incurably defective. To this end, they relied on **International Community of Women living with HIV Registered Trustees vs. Co-ordination Board & 2 Others; Teresia Otieno (Interested Party) [2021] eKLR**.

18. The Petitioner submitted that they suffered loss as a result of the arbitrary actions of the Respondent and prayed for general damages which were at the discretion of the court. They contended that they needed to prove that the Petitioner had suffered loss and their rights were infringed as a result of the actions of the Respondent. They added that the Respondent did not deny forcefully seizing their goods and burning them before the members of the public.

19. On admissibility of the documents, the Petitioner asked the court to take judicial notice of the Respondent's actions which were public knowledge and admit the documents for consideration.

#### **The Respondent's Submissions**

20. The Respondent narrowed down the issues to 4 as follows: Whether the Petitioner had locus to lodge the Petition; Whether the Petitioner had proven loss and damages as alleged; Whether the documents adduced were admissible, and; who ought to bear the cost of the Petition.

21. The Respondent submitted that the Petitioner did not adduce any evidence of the existence of the Company and thus the Petition was incurably defective and ought to be dismissed. They claimed that this position was stated by Mr. Richard Terer in his affidavit on behalf of Bomet County Government and the same remained uncontroverted by the Petitioner therefore the same was duly admitted. To this end, they cited **Constitutional Petition No. 27 of 2011, Midland Finance and Securities Limited & Another vs. Kenya Anti-Corruption Commission (2015) eKLR**.

22. The Respondent asked the Court to expunge the supporting Affidavit of Immaculate Njoki Karuru as she did not provide proof of directorship and hence had no authority to swear the same on behalf of the Company.

23. On the issue of loss of property/goods, the Respondent stated that the Petitioner did not furnish the Court with evidence in respect of the same and it was not enough to merely allege that there was loss without demonstrating the actual loss and value. In addition, the Respondent contended that the loss was in the nature of special damages, and therefore ought to have been specifically pleaded and proved.

24. The Respondent submitted that the documents adduced by the Petitioner were in violation of the Evidence Act on admissibility of documents since they were neither original copies nor were they certified and thus could not be relied upon.

25. On costs, the Respondent submitted that the Petitioner should bear the costs of the Petition since it was not a public interest but private matter.

#### **26. Legal justification for the Petition**

The Petitioner set out the legal justification for the Petition along the following provisions:-

##### ***"20. Application of Bill of Rights***

##### ***1) The Bill of Rights applies to all law and binds all State organs and all persons.***

***21. On implementation of rights and fundamental freedoms where sub Article 1 imposes a duty on the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.***

***22. On enforcement of Bill of Rights which gives every person the right to institute court proceedings claiming that a***

*right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.*

**23. Which delineates the authority of courts to uphold and enforce the Bill of Rights where under sub Article (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.*

**43. On economic and social rights**

**47 On Fair Administration Actions,**

**258 On Enforcement of the Constitution, and;**

**260 On Interpretation of the Constitution.**

#### **Issues for determination**

27. Having reviewed the facts of this case, the grounds of the Petition, the prayers and the respective submissions, the following issues are pertinent for determination:-

- (i) Whether the Petitioner has locus standi to institute the proceedings against the County Government of Bomet;
- (ii) Whether the documents adduced as evidence before Court are admissible in law;
- (iii) Whether there was actual loss occasioned to the Petitioner and whether the said loss was proven; and
- (iv) Who bears the costs of the Petition?

#### **Analysis:**

**(i) Whether the petitioner has locus standi to institute the proceedings against the County Government of Bomet.**

28. Black's Law Dictionary, 10<sup>th</sup> Edition at page 1084 defines *locus standi* as, "The right to bring an action or to be heard in a given forum." The court aptly explained the concept of *locus standi* in the case of **Michael Osundwa Sakwa vs. Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR** where it was held as follows:-

*"Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of locus standi."*

29. In **Khelef Khalifa El-Busaidy vs. Commissioner of Lands & 2 Others (2002) eKLR** the court held as follows:-

*"...for an individual to have a locus standi, he must have an interest either vested or contingent in the subject matter before the court, which interest must be a legal one. Such interest must be above that of other members of the public in general."*

30. The main principle is that the court should not restrictively interpret the issue of *locus standi* in a matter in a way that gives the party instituting the same an unfair decision that would technically bar them from seeking redress from the court or an opportunity to resolve their grievances as against the party against whom they seek redress. This means that for a party to institute a Constitutional Petition against another, on the basis of a breach of a constitutional right(s), in determining locus, the court must be guided by the dictates of Article 258 of the Constitution which provides as follows:-

**258. Enforcement of this Constitution**

1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

2) *In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—*

- a) a person acting on behalf of another person who cannot act in their own name;*
- b) a person acting as a member of, or in the interest of, a group or class of persons;*
- c) a person acting in the public interest; or*
- d) an association acting in the interest of one or more of its members.*

31. In **Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010** the court stated the principles locus standi in Constitutional petitions thus:-

*“Over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. ...As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of locus standi. .... This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to locus standi is required to fulfill the Constitutional Court’s mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled.”*

32. Similarly in the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012** the Court of Appeal had this to say on the issue of locus:-

*“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process..... We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1<sup>st</sup> respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution.”*

33. Based on the law and principles set out above, I have come to the conclusion that the Petitioners have a legitimate interest in the Petition brought on their behalf and that of their Business. I will now proceed to discuss the merits of the Petition.

#### **(ii) Whether the documents adduced as evidence before court are admissible in law**

34. The Respondent has argued that the documentary evidence adduced by the Petitioner are neither original nor certified copies and have asked the Court to expunge them.

35. Section 64 of the Evidence Act provides that the contents of documentary evidence may be proved either by primary evidence or secondary evidence. Primary evidence in this case refers to the originals of a document while secondary evidence refers to copies or a reproduction of a document from the original. **The best evidence rule** is that where a party intends to rely on a document as part of its evidence, he or she must furnish the court with the original copies to enable the court to adequately scrutinize the said document. This rule applies except where a party is able to demonstrate the absence of the original documents which would be produced as primary evidence. In such a case, copies will be admitted as secondary evidence.

36. Sections 67 and 68 the Evidence Act, Cap 80 as follows:-

#### **67. Proof of documents by primary evidence**

*Documents must be proved by primary evidence except in the cases hereinafter mentioned.*

#### **68. Proof of documents by secondary evidence**

1) *Secondary evidence may be given of the existence, condition or contents of a document in the following cases—*

*(a) when the original is shown or appears to be in the possession or power of—*

*i) the person against whom the document is sought to be proved; or*

*ii) a person out of reach of, or not subject to, the process of the court; or*

*iii) any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;*

*(b) when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;*

*(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time;*

*(d) when the original is of such a nature as not to be easily movable;*

*(e) when the original is a public document within the meaning of section 79 of this Act;*

*(f) when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;*

*(g) when the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.*

(2)

*(a) In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1), any secondary evidence of the contents of the document is admissible.*

*(b) In the case mentioned in paragraph (b) of subsection (1) of this section, the written admission is admissible.*

*(c) In the cases mentioned in paragraphs (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible.*

*(d) In the case mentioned in paragraph (g) of subsection (1) of this section, evidence may be given as to the general result of the accounts or documents by any person who has examined them, and who is skilled in the examination of such accounts or documents.*

37. The practice has always been that the courts will rarely allow secondary evidence where the original can be produced. Secondary evidence will only be admissible where an original cannot be produced. The rationale for this is that the original document which is primary evidence is considered as superior evidence. The court must thus be satisfied that the conditions under section 68 above are met before admitting secondary evidence. In essence, any documentary evidence that a court admits must be the best that the nature of that case will allow. (See Lord Harwicke in **Omychund vs. Barker** [1744] 25 ER, 15).

38. The Indian Evidence Act 1872 from the Kenyan Act borrows heavily, outlines the guiding principles for admissibility of secondary evidence as follows:-

*i) That the original document could not be produced by the party intending to rely upon the documents in spite of best efforts;*

*ii) That the inability to produce the document must be beyond the party's control; and*

*iii) That the original document was lost or destroyed or was being deliberately withheld by the party in respect of whom that document sought to be used.*

39. In **Rakesh Mohindra vs. Anita Beri and Others** [2016] 16 SCC, 483, the Supreme Court established that the mere admission of secondary evidence where the original could not be produced did not necessarily amount to its proof but instead, its genuineness, correctness and existence could only be proved during the trial whereupon the trial court would have to state its reasons for relying on that piece of secondary evidence.

40. Section 66 of the Evidence Act defines secondary evidence in the following terms:-

**66. Secondary evidence includes—**

*(a) certified copies given under the provisions hereinafter contained;*

*(b) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;*

*(c) copies made from or compared with the original;*

*(d) counterparts of documents as against the parties who did not execute them;*

**(e) oral accounts of the contents of a document given by some person who has himself seen it.**

41. In the present case, the Petitioner attached copies of the following documents in support of its case:-

- (i) Alcoholic Drink License No. 82987 with Serial No. 831 issued on 31 July 2013, valid for 1 year.
- (ii) Kenya Revenue Authority License to manufacture excisable goods No. KRA/1010/12/L/016/12/2014 dated 6 December 2013 valid for 1 year.
- (iii) Kenya Bureau of Standards Permit to use the Standardization mark serial number 27982 dated 15 May 2013 to expire on 9 April 2014.
- (iv) Nairobi City County Single Business Permit No. 2014/1204463 valid for 1 year.
- (v) Tax Compliance Certificate from the Kenya Revenue Authority Serial No. KRA 18/001788/2014 issued on 13 January 2014.
- (vi) Delivery Note No. 05524 dated 7 May 2014.

42. From the pleadings and submissions before the Court, there is no clear reason why the Petitioner never adduced the original documents or certified copies for my scrutiny. Whatever has been adduced is not certified, and I am inclined to agree with the Respondent that they ought to have provided the original documents or at the very least, certified copies. However, as observed above, the best evidence rule in my view will only go to the probative value of the documentary evidence produced by the Petitioner. They are therefore admitted for consideration.

**(iii) Whether there was actual loss occasioned to the Petitioner and whether the said loss was proven.**

43. In its Petition, the Petitioner stated that it had received an order from its distributor in Bomet, IVOT, to supply 1,400 cartons of 205ml and 50 cartons of 250ml Metropolitan gin. He displayed a copy of a delivery note No. 05524 dated 7<sup>th</sup> May 2014 indicating that the consignment was packed into motor vehicle KBU 617K and delivered by driver named Joseph Njoroge Ndung'u. The Supporting Affidavit of Duncan Kiambi Muya indicated that the said lorry arrived at Bomet at 11.00 a.m. and while offloading its contents, the county *askaris* seized the consignment. It was his testimony that he did not pay for the consignment because the delivery was frustrated by the forceful confiscation and subsequent destruction of the liquor merchandise. The Managing Director of the Petitioner, Immaculate Njoki also swore a Supporting Affidavit stating that the distributor could then not pay for the consignment due to the actions of the Respondent.

44. It is the Petitioner's claim that the Respondent's action to forcefully seize and confiscate its goods and later destroy them was illegal and a violation of their fundamental rights which caused her company substantial loss and damage. Specifically, they claimed that their right to an administrative process as enshrined by the Constitution under Article 47 was breached. For clarity the Article provides:-

**47. Fair administrative action**

**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 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.**

**B. The Fair Administrative Action Act No. 4 of 2015**

**4. Administrative action to be taken expeditiously, efficiently, lawfully etc.**

**1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**

**2) Every person has the right to be given written reasons for any administrative action that is taken against him.**

**3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—**

**a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

- b) an opportunity to be heard and to make representations in that regard;*
- c) notice of a right to a review or internal appeal against an administrative decision, where applicable;*
- d) a statement of reasons pursuant to section 6;*
- e) notice of the right to legal representation, where applicable;*
- f) notice of the right to cross-examine or where applicable; or*
- g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.*

*4) The administrator shall accord the person against whom administrative action is taken an opportunity to—*

- a) attend proceedings, in person or in the company of an expert of his choice;*
- b) be heard;*
- c) cross-examine persons who give adverse evidence against him; and*
- d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.*

*5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.*

*6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.*

45. It is clear from the above that where the right of a person is likely to be adversely affected by administrative action, they ought to be given written reasons for the said action. In addition, the administrative action must be efficient, expeditious, lawful, efficient, reasonable and procedurally fair.

46. **Section 2 of the Fair Administrative Action Act, 2015** provides as follows:-

*“Administrative action” includes—*

- i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or*
- ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;*

47. From the above, Administrative Action has been defined as a legal action which is concerned with the conduct of a public administrative body whether a legislative body, a court, a government or regulatory authority or other body that may have the appropriate jurisdiction. Administrative action does not decide a right though it might affect an individual’s existing rights. It is also trite that while exercising administrative powers, the principles of natural justice cannot be ignored.

48. In **Judicial Service Commission vs. Mbalu Mutava & Another Civil Appeal No. 52 of 2014 (2015) eKLR** the Court of Appeal interpreted Article 47 thus:-

*“Article 47(1) marks an important and transformative development of administrative justice, for it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”*

49. County Governments therefore, while being vested with the authority to run the Counties, must exercise such authority by adhering to the Constitutional dictates outlined above. Such power cannot be exercised arbitrarily or unfairly. This includes upholding the right to fair administrative action as provided for under Article 47 of the Constitution and the Fair Administrative Action Act.

50. The Petitioner was however under a duty to demonstrate the manner in which its rights were infringed and provide proof of the same. Section 107 and 108 of the Evidence Act aptly provides this guidance as follows:-

### **107. Burden of proof**

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

### 108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

51. The Petitioner stated that their distributor was in the process of offloading the consignment on the material day from the delivery lorry when the Respondent's officials and county *askaris* appeared and forcefully seized and confiscated their goods. That there was no explanation offered to them on inquiry. The Petitioner further stated that the delivery lorry was only unclamped after the business of discarding their goods was completed.

52. The Petitioner asked the Court to take judicial notice of the actions of the Respondents as this was public knowledge. Throughout this entire case, it is noteworthy that in its Replying Affidavit, the Respondent neither accepted nor expressly denied the allegations by the Petitioner. The Petitioner also only produced the delivery note that proved the delivery of the consignment to Bomet on the said date.

53. This being a Constitutional Petition and following the rules of evidence as outlined above, it was incumbent for the Petitioner to adequately furnish the Court with proof of the actual incident. Merely pleading loss and expecting the Court to declare that there was an infringement without furnishing proof of loss or other relevant evidence regarding the claim is not enough. It would be tantamount to asking the Court to argue the Petition on their behalf. The Petitioner's request for the court to take judicial notice of the destruction of its goods without providing evidence, was rather presumptuous as this was not one of the happenings that the court can take judicial notice in law. A court of law can only make a decision where the legal burden of proof is properly discharged by the party who bears that burden and in this case, it is the Petitioner.

54. In this case, the Petitioner seems to have departed from the principles they so ably deduced from the case of **Anarita Karimi Njeru vs. Republic (No.1)-[1979] KLR 154** which they cited to me and in which the Court stated-

***“...if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”***

55. Similarly, in **Mumo Matemo vs. Trusted Society of Human Rights alliance [2014] eKLR**, the Court of Appeal stated that:-

***“...the principle in Anarita Karimi Njeru underscores the importance of defining the dispute to be decided by the court..... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”***

56. It is probable from the copies of document provided by the Petitioner that they manufactured and sold alcoholic beverages and that IVOT was their Bomet distributor to whom a delivered consignment was in Bomet. However, on the aspect of the unlawful seizure and the subsequent destruction of the consignment by the Respondent's agents, the Court is unable to find any evidence. It was necessary for the Petitioner to furnish some tangible evidence of the seizure and destruction as alleged. Instead, the Petitioner stated that the same was a public event which was reported in print media nationwide without even attaching a copy of any publication to that effect. Further, other than his assertion, the Petitioner has not shown that he reported the incident at any police station or that he directed any written claim to the Respondents. This was expected considering that destruction of property is in itself a criminal act.

57. I observe from the prayers sought by the Petitioner that though the claim is basically on material damage and loss he has opted to seek declaratory orders.

58. I will now address the issue of loss. The fundamental aspect of proving actual loss cannot be overemphasized. The Petitioner asked the Court to find that its fundamental rights were infringed, that they sustained actual loss from the destruction of their goods and that as a result, they were entitled to compensation. In this regard it is impossible for the Court to even assess damages that would be payable to the Petitioner, were this to be its finding. This is because, the Petitioner neither furnished the Court with actual details of what they lost nor did they adduce any evidence to this end. It merely requested the Court to award damages of a general nature, without considering the necessity and importance of adducing evidence of actual loss.

59. From the facts of this case, one would have expected the Petitioner to at the very least outline the cost of manufacturing the liquor, the cost of transporting it to Bomet and the expected sales that would also have been realized by the distributor, alongside the actual evidence of the seizure and destruction to enable the Court have a clear view of the extent of their loss. However, this was not done.

60. I am persuaded by the holding of Lord Kerr's decision in **Romauld James vs. AGT (2010) UKPC** at paragraph 13 where he cited a passage from the judgment of Kangaloo JA in the same case as follows:-

***“In my view, it does not lie in the mouth of the appellant to say that he is not obliged to place evidence of damage suffered before the constitutional court before liability is determined. I say so because it must first be shown that there has been damage suffered***

*as a result of the breach of the constitutional right before the court can exercise its discretion to award damages in the nature of compensatory damages to be assessed. If there is no damage shown, the second stage of the award is not available as a matter of course. It is only if some damage has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice has developed in constitutional matters in this jurisdiction of having a separate hearing for the assessment of the damages, but it cannot be overemphasized that this is after there is evidence of the damage. In the instant case there is no evidence of damage suffered as a result of the breaches for which the appellants can be compensated.”*

61. The Record demonstrates that the action in question occurred in 2014. Throughout the entire case, there has been no explanation furnished by the Petitioner for their reasons in which they opted to institute the Petition 6 years after the said infringement arose. Though Constitutional violations are not usually limited by time, it is expected that a claimant should always be able to demonstrate to the Court the justification for filing their suit for redress years after the violation.

62. It appears to this court that though the action was founded on tort, the Petitioners opted to file a Constitutional Petition to avoid the perils of limitation under Section 4 of The Limitation Act Cap 22.

63. In taking the position above, I am guided by what the Court stated in **Eliud Wefwafwa Luucho & 3 others vs. Attorney General (2017) eKLR** in respect of limitation of time where a Constitutional Petition was involved:-

*“The question of limitation of time in regard to allegations of breach of fundamental rights has in many cases been raised by the State and our courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental right (See **Joan Akinyi Kabasellah and 2 Others vs Attorney General, Petition No. 41 of 2014, Dominic Arony Amolo vs. Attorney General, Nairobi High Court Misc. Civil Case No. 1184 of 2003 (OS) [2010] eKLR, Otieno Mak’Onyango vs. Attorney General and Another, Nairobi HCCC NO 845 of 2003**) with a section of our judiciary holding that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent’s defense (see **Joseph Migere Onoo vs. Attorney General, Petition No. 424 of 2013**) and further the state cannot shut its eyes on its past failings nor can the court ignore the dictates of transitional justice ....”*

64. I must however, having considered the Petition, state that this case need not have been brought as a Constitutional Petition. By bringing a Constitutional Petition instead of filing a civil suit, the Petitioner denied themselves the benefit of pleadings and demonstration of actual loss through calling of witnesses and production of cogent documents. Further afield, I agree with the sentiments of Lord Diplock in **Harriskissoon vs. Attorney General of Trinidad and Tobago [1980] AC 265** that:-

*“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...the constitution is fallacious. The right to apply to the High Court... for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action... the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court...if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”*

65. Indeed, not all actions will amount to a breach of constitutional rights and even when they do, the first recourse should not be to a Constitutional court. In **Benard Murage vs. Fine serve Africa Limited & 3 others [2015] eKLR** the Court succinctly stated this position thus:-

*“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”*

66. In the end, I find that the Petition has not succeeded for want of proof of violation of the Constitutional rights of the Petitioner and for failure to demonstrate and prove actual loss. The Petition lacks merit and is dismissed.

**(iv) Who bears the costs of the Petition?**

67. It is trite that costs follow the event. However, in the circumstances of the present case, I am inclined to order each party to bear its own costs.

68. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 17TH DAY OF DECEMBER, 2021.**

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**R. LAGAT KORIR**

**JUDGE**

**Judgment delivered electronically to the parties as per their consent at the following email addresses:-**

**M/s Muchoki Kang'ata Njenga & Co. Advocates for the Petitioner –**

**M/s Cosmas Koech Advocate for the Respondent –**