



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CONSTITUTIONAL PETITION NO. 5 OF 2020

IN THE MATTER OF ARTICLES 2, 3 (1), 10, 19 (1) (2) & 3 20,22,23,27, 47, 159 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER 10, 27 AND 47 OF THE CONSTITUTION

AND

IN THE MATTER OF ALCOHOLIC DRINKS CONTROL ACT 2010 LAWS OF KENYA

BETWEEN

DIRECTOR PETER MUTUNE T/A

WEAVER BIRDS LTD.....1ST PETITIONER/APPLICANT

PATRICK MUTISYA T/A

AMBASSADOR WINES & SPIRIT.....2ND PETITIONER/APPLICANT

NATHAN WAMBUGU T/A

DIMPLE WINES & SPIRITS.....3RD PETITIONER/APPLICANT

MOYALE ARBANUS NZOMO T/A

RAHISI WINES & SPIRITS.....4TH PETITIONER/APPLICANT

MARTIN KIMUYU MUTISYA T/A

JUSMAT WINES & SPIRITS.....5TH PETITIONER/APPLICANT

JOSEPHINE MWIKALI T/A

NECTOR WINES & SPIRITS.....6TH PETITIONER/APPLICANT

LILIAN MWELU MUTUA T/A

MAGIC WINES & SPIRITS.....7TH PETITIONER/APPLICANT

MOSES WAFULA T/A

WALKERS DISTRIBUTORS.....8TH PETITIONER/APPLICANT

HARRISON MUCHIRA T/A

SPLASH WINES & SPIRITS.....9TH PETITIONER/APPLICANT

S.K. NG'ANG'A T/A

MVINYO WINES & SPIRITS.....10TH PETITIONER/APPLICANT

JOSHUA KITHOME T/A INTERIOR

SYNDICATE DISTRIBUTORS.....11TH PETITIONER/APPLICANT

ELIZABETH MWERU T/A

LEGEND WINES & SPIRITS.....12TH PETITIONER/APPLICANT

KENNEY WAITA T/A

UNITY WINES & SPIRITS.....13TH PETITIONER/APPLICANT

N. NJERU T/A

JOJO WINES & SPIRITS.....14TH PETITIONER/APPLICANT

DICKSON MUSYOKA T/A

TWINS WINES & SPIRITS.....15TH PETITIONER/APPLICANT

BENARD KYALO T/A

MIGII WINES & SPIRITS.....16TH PETITIONER/APPLICANT

BENSON MUTINDA T/A

JUPITER WINES & SPIRITS.....17TH PETITIONER/APPLICANT

DOMIANA KAMENE MUTUNGA T/A

MESH WINES & SPIRITS.....18TH PETITIONER/APPLICANT

VERSUS

THE COUNTY COMMISSIONER

MACHAKOS COUNTY.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE COMMANDER OF POLICE MACHAKOS COUNTY..3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGEMENT

1. The petitioners in their petition dated 29.4.2020 sought the following remedies

a) A declaration that the 1st to 3rd respondents' crackdown and orders of closure of the petitioners' business is unlawful, unfair and/ or unjust.

b) An order of permanent injunction prohibiting the 1st to 3rd respondents and any person serving under their authority from conducting the crackdown and/or ordering closure of the petitioners' business premises.

c) A declaration that the petitioners are entitled to protection under the constitution to their right to fair administrative actions.

d) General and exemplary damages be assessed and awarded to the petitioners for gross curtailment of their fundamental rights and the loss of business they have suffered as a result.

e) The Honourable court do issue such orders and give such directions as may be just and expedient.

f) The costs of the petition be borne by the Respondents.

2. The 1st petitioner is indicated as a limited liability company whereas the other petitioners are indicated as adult persons working for gain in Machakos county.

3. 1st Respondent in the petition is the **County Commissioner, Machakos county** a state officer working under the Ministry of Interior and Co-ordination of National Government.

4. The 2nd Respondent **Inspector General of the National Police Service** of the Republic of Kenya is an independent office created under Article 245 of the Constitution of Kenya.

5. The 3rd Respondent is the **County Commander of Police, Machakos County**.

6. The 4th Respondent, **The Honorable Attorney General** is indicated as being sued on behalf of the 1st to 4th Respondents.

7. The events that constitute the background to this petition are as indicated in the petition dated 29.4.2020 and are in effect complaints against the actions of the various state officers. The events as gleaned from the face of the petition are that on 15.4.2020, the respondents mounted a crackdown on alcoholic drinks businesses within Machakos Town and forced the petitioners to close their businesses and cease operations. It was stated that the petitioners businesses are classified as essential businesses under the Covid 19 regulations and that the petitioners have complied with the relevant regulations on social distancing, wearing face masks. It was averred that the actions of the 1st to 3rd respondents are discriminatory and in contravention of the constitution and more specifically articles 27, 28, 29, 40, 47 and 50 of the Constitution.

8. It was averred in the petition that the petitioners right to enjoy their rights and freedoms will be violated if the crackdown on their business activities is allowed to continue.

9. There is no affidavit in support of the petition.

10. There is no indication of any reply to the petition by any of the Respondents.

11. The petition was canvassed vide written submissions filed on 28.5.2020 that I have considered.

12. The issues for determination are whether the petition is competent; whether the court may grant the orders sought.

13. In respect of the 1st issue, a look at the format of the petition and the case of **Anarita Karimi Njeru Versus Republic [1979] eKLR** poses the question "what is the constitutional right that was breached and how it was breached and who breached it?". Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 provides for the form of a petition, and the same offers useful guidance on what the court ought to look out for in resolving the first issue:

14. The said rule provides thus;

"10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

(a) the petitioner's name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

11. Documents to be annexed to affidavit or petition

(1) *The petition filed under these rules may be supported by an affidavit.*

(2) *If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit."*

15. The Constitution and the Practice and Procedure Rules are quite liberal in as far as enforcement of fundamental rights is concerned. For example Rule 10 (3) envisages, the acceptance by a court of law of an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

16. In order to satisfy requirements under (b) and (d) of the above provisions, the court is necessitated to look at the pleadings and the annexures that constitute the facts relied upon. Upon perusal of the petition I find the same has not satisfied the requirements of Rule 10 (2) (a) (c) (e) (f) and Rule 11 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as there is nothing annexed to the petition to demonstrate infringement of the petitioner's rights. Consequently, I find that the petition is incompetent on the ground that the same is not supported by an affidavit verifying the facts sought to be relied upon.

17. If I were for argument's sake to read the mind of the petitioners, I associate myself with the dictum in the case of **Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC)** per Ngcobo, J (as he then was) when he held thus:

"The exercise of public power must ... comply with the Constitution, which is the supreme law and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, it being one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."

18. The National Emergency Response Committee on Coronavirus is noted to have permitted certain categories of businesses to operate within certain parameters. In the same breath the Ministry of Industrialization, Trade and Enterprise Development also presented a list of essential products one of which is alcoholic beverages as an essential product. The petitioners prior to filing suit had attempted to engage the respondents with a view to them being allowed to carry on business on the understanding that they will adhere with the MOH Guidelines on the Covid-19 pandemic. However, it is noted that the petitioners have not presented any such evidence as they haven't filed the requisite affidavit verifying the facts which could then be considered. Further, the petitioners have not presented evidence on the loss suffered as against the larger population restricted due to the said pandemic.

19. Be that as it may, the spread of what is termed COVID 19 caused the World Health Organization (the "WHO") to characterize the named COVID 19 as a global pandemic. In announcing the declaration, the President of the WHO inter alia stated the following with reference to measures taken to reduce the impact of the pandemic:

"We know that these measures are taking a heavy toll on societies and economies, just as they did in China. All countries must strike a fine balance between protecting health, minimizing economic and social disruption and respecting human rights Let me summarize it in four key areas:

- *First, prepare and be ready,*

- *Second, detect, protect and treat,*

- *Third, reduce transmission,*

- *Fourth, innovate and learn ..."*

20. The mere contention that the rights of the petitioners have been infringed would need to be weighed against measures that the petitioners have taken to reduce the impact of the pandemic and in so doing, the respondents acted in a way that infringed upon their rights. Having looked at the petition it is difficult to assess whether the petitioners so acted; what are the actions of the respondents that they feel have infringed upon the petitioner's rights? From the material placed before me, I am not able to say that indeed the respondents acted as is being alleged by the petitioners and that the business activities of the petitioners have been discriminated against from the entire Kenyan population over the restrictions imposed pursuant to the Covid-19 pandemic.

21. In view of the above observations, it is my finding that the petition herein lacks merit and is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 16th day of June, 2020.

D. K. Kemei

Judge