



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 524 OF 2016**

**In the matter of Articles 22, 23, 40, 47, 50 (2) (n), (l),  
165 and 258 of the Constitution of Kenya, 2010**

**and**

**In the matter of contravention of Fundamental Rights and Freedoms  
under Articles 40, 47, and 50 (2) (n), (l) of the constitution of Kenya**

**and**

**In the matter of the Counterfeit Act, CAP 130 A Laws of Kenya**

**and**

**In the matter of section 10 of the Standards Act, Chapter 496, Laws of Kenya**

**BETWEEN**

**Platinum Distillers Limited.....Petitioner**

**versus**

**The Hon. Attorney General.....1<sup>st</sup>Respondent**

**The Cabinet Secretary for Interior and**

**Coordination of National Government.....2<sup>nd</sup>Respondent**

**The Inspector General National Police Service.....3<sup>rd</sup>Respondent**

**The Anti-Counterfeit Agency.....4<sup>th</sup>Respondent**

**East African Breweries Limited.....5<sup>th</sup>Respondent**

**JUDGEMENT**

**The petitioners case**

Briefly, the petitioner avers it manufactures, packs and distributes alcoholic drinks. Among its products is beer packaged in 50 litre keg barrels which is the subject of this petition. The petitioner states that the said barrel is uniquely branded and engraved with the petitioners name and Logo and it is clearly distinguishable.

On or about the 5<sup>th</sup> day of December 2016, about 30 officers from the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents went to the petitioners premises situated along the eastern by-pass alleging that the petitioner was using Keg barrels that were counterfeit to package and sell its 5.5 Beer Brand and carried 20 pieces of empty 50 litre Keg Barrels and 2 pieces of the top ring all of which were engraved with the petitioners name and logo.

The petitioner also received information on 7<sup>th</sup> December 2016 from its agents, dealers and distributors in Meru that they were being harassed by the police and C.I.D officers on grounds that the petitioner was using counterfeit keg barrels and some distributors were allegedly threatened with arrest on allegations of using the counterfeit keg barrels. The petitioner also avers that the actions complained of have lead to gross loss of business. The petitioner also states that the patents in question have not been patented by another company and that it beer is licensed by the Kenya Bureau of Standards.

As a result of the matters pleaded above, the petitioner avers that its rights under articles 27 (1), 29 (c), 31, 40, 47, 50, 73 & 75 have been violated, hence the prayer for the reliefs enumerated in the petition.

### **The fifth Respondents Response**

On behalf of the 5<sup>th</sup> Respondent is the affidavit of **Karen Mate-Gitonga** filed on 23<sup>rd</sup> January 2017 in which she avers *inter alia* that the 5<sup>th</sup> Respondent operates its beer business through its subsidiary Kenya Breweries Ltd and that for the last 20 years it has packaged some of its beer products in either 30 litre or 50 litre stainless steel barrels called kegs. The barrel is used to store, transport and serve beer. Distributors are required to return the barrel for re-use.

She further avers that to the best of her knowledge there is no manufacturer or assembly of stainless steel barrels in Kenya. They are currently manufactured and assembled outside Kenya. The fifth Respondent has contracted a specialized keg manufacturer in Spain to manufacture its customized stainless steel Euro-Keg Barrels. The said manufacturer purchases keg spears from U.S.A and then assembles them in Spain. Its barrels meet KBS requirements and are engraved with several security features listed in paragraph 12 of the affidavit.

She avers that in October 2016, the 5<sup>th</sup> Respondents distributors and retailers spotted and reported the presence of some obviously tampered keg barrels marked with the words "Platinum Distillers Ltd"/logo which were evidently stolen KBL barrels but had been fraudulently converted by cutting off the upper ring of the barrel containing the words "East African Breweries" and replaced with another with the words 'Platinum Distillers Ltd' which had been manually welded onto the keg barrel leaving an uneven arm. Also, all the security and standard features of KBL had been filed off. Thus, there was evidence of tampering.

The matter was reported to the Criminal Investigation Department and the Anti-Counterfeit Agency for investigations. On 5<sup>th</sup> December 2016, Anti-Counterfeit and CID officers searched the petitioners factory at Ruai impounded 12 empty EABL barrels, twenty fraudulently converted EABL barrels with upper rings marked 'Platinum Distillers Ltd' and with all other markings filed off and two upper keg rings with the words "Platinum Distillers Ltd." Photographs of the said items were annexed to the affidavit.

On 7<sup>th</sup> December 2016 the police impounded three more fraudulently converted E.A.B.L. barrels at Nkubu, a distributor of the petitioners 5.5 Keg beer. There was no evidence that the petitioner had in the recent past imported or bought keg barrels and keg spears, except that the petitioner states it imported 1700 pieces of stainless steel keg upper rings a confirmation that it is involved in the business of fraudulent conversion of the barrels.

It is also averred that there exists different sizes, shapes and features of keg barrels contrary to the petitioners averments and that the petition does not disclose breach of constitutional rights and that these proceedings are aimed at impeding lawful investigations. Also the petitioner failed to disclose the source of its barrels

## **Fourth Respondents Response**

**Hassan Maningo**, an inspector with the fourth Respondent averred that the first Respondent received information of *inter alia* acts of counterfeiting of products of the 5<sup>th</sup> Respondent. Accompanied by officers of the third respondent they inspected the premises of the petitioner on 5<sup>th</sup> December 2016 and established that the petitioner was converting and changing the 5<sup>th</sup> Respondents keg barrels into its own. He seized all the offending items and prepared the inventory annexed to his affidavit. He submitted samples to the 5<sup>th</sup> Respondents manufacturer for testing as evidenced by the annexure to the affidavit. After analysing, they were forwarded back to him by the manufacture confirming that the petitioner was converting the barrels into its own use. Annexed to the affidavit is a report from the manufacturer confirming the foregoing.

He also avers that though the petitioner is licensed to manufacture its own alcoholic products, it opted to engage in the activities complained of. He denied the alleged acts of harassment and reiterated that the search and seizure were done lawfully, hence the prosecution is lawful.

## **First, Second and Third Respondents Grounds of opposition**

In their grounds of opposition filed on 21<sup>st</sup> March 2017, the First, Second and Third stated that the arrest, charging and seizure were done lawfully and that the petition aims at curtailing the powers of the first to fourth respondents. They also state that the orders sought are aimed at interfering with the criminal justice system and that there are no triable issues disclosed in this case nor does the petition disclose violation of fundamental rights.

## **Submissions by the Petitioner's advocates**

Counsel submitted that the law enforcement agencies should carry out their duties in conformity with the law, that their actions violated the petitioners rights under articles 27, 29 (c) 40, 47 and 50 of the constitution.

## **Submissions by the First, Second and Third Respondents' advocates**

Counsel submitted that rights under article 40 (6) of the constitution do not extend to illegally acquired properties, that the right to property is not absolute [1] nor does the right to enjoyment of property extend to prejudice or limit rights of others and that the search and seizure was done in accordance with the law.

## **Submissions by the fourth Respondents advocates**

Counsel for the fourth Respondent submitted on length on the legality of the seizure and cited the relevant provisions of the Anti-Counterfeit Act[2] which also grants the fourth Respondent investigative powers. Counsel urged the court not to usurp the constitutional mandate of investigative bodies, and that all the police need to do is to establish reasonable suspicion before preferring charges. Counsel also submitted that the petition does not meet constitutional threshold.

## **Submissions by the fifth Respondent's advocates**

Counsel submitted that the petitioner failed to particularize the provisions of the constitution it alleges were violated and that the arguments raised can be raised in the lower court.

Counsel also cited absence of credible challenge to the legality of the actions complained of which are provided under sections 23 and 57 of the Act.[3] Counsel denied the alleged violation of constitutional rights.

## **Issues raised**

The key issue for determination is whether the petitioner demonstrated a case to warrant this court to grant the reliefs sought in the petition. In other words, was the search in question, seizure of properties, arrest and prosecution done without any legal basis or was it an abuse of legal process?.

The basic principle is that it is for the prosecution, not the court, to decide whether a prosecution should be commenced and, if commenced, whether it should continue. In *Environment Agency v Stanford*,<sup>[4]</sup> Lord Bingham LCJ said:-

*"The jurisdiction to stay, as has been repeatedly explained, is one to be exercised with the greatest caution ... The question of whether or not to prosecute is for the prosecutor....."*

The DPP is required to act independently in the discharge of his duties. Article 157 (10) of the Constitution of Kenya 2010 provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority. This position is also replicated under Section 6 of the Office of the Director of Public Prosecutions Act.<sup>[5]</sup>

The above provisions require the DPP to not only act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction or instructions or instigation of any other person. The decision to institute or not institute court proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. I find nothing in the petitioners case to suggest, even in the slightest manner that the DPP did not act independently in arriving at the decision to prosecute.

Section 24 of the *National Police Service Act*<sup>[6]</sup> sets out functions of the Kenya Police Service. In my view, the petitioner has not demonstrated that the investigations and prosecution in question constitute an abuse of process or police powers, nor has the petitioner proved malice or bad faith.

**The police have a duty to investigate any complaint once a complaint is made.<sup>[7]</sup> Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.**

However, the courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of the petitioners fundamental rights.

Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case. <sup>[8]</sup> Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. I am afraid, from the material before me, there is nothing to show that the search, arrest, impounding of the exhibits and prosecution is unfair, wrong, baseless or an abuse of police powers or judicial process. The concept of a fair trial involves fairness to the prosecution and to the public as well as to the accused.<sup>[9]</sup>

It is on record that barrels bearing printed EABL logo were found in the premises of the petitioner. It is also in evidence that other barrels which had been tempered with were found in the petitioners premises. The barrels seized at the petitioner distributors/retailers were also tempered with. Also, it is on record that the barrels that triggered the arrest were recovered from the distributors/retailers of the petitioner. All this evidence stands un rebutted. It is on the basis of this evidence the prosecution was mounted. In all fairness, I find nothing in the petitioners case to suggest, even in the slightest that the prosecution was mounted without legal basis.

The barrels recovered from the petitioner were taken to the fifth Respondents' manufacturers' in Spain who analyzed and gave a report which clearly identified them as the ones belonging to the fifth Respondent. This evidence was not rebutted. The petitioner did not explain how he acquired the barrels nor did he satisfy the court how seizing such items pursuant to the clear provisions of the law infringe on his constitutional rights.

The inherent jurisdiction of the court to stop a prosecution to prevent an abuse of process is to be exercised only in exceptional circumstances.<sup>[10]</sup> The essential focus of the doctrine is on preventing unfairness at trial through which the accused is prejudiced in the presentation of his or her case or where there is a clear breach of fundamental rights to a fair trial. Courts should first consider whether or not there is anything in the arrest or trial to prevent 'a fair trial' and if there is none, then the court ought to allow the prosecution to continue.

In my view, the high court should prohibit or quash prosecutions in cases where it would be **impossible to give the accused a fair trial; or where it would amount to a misuse/manipulation of process** because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.<sup>[11]</sup> These categories are not mutually exclusive and the facts of a particular case ought to determine whether to allow the orders sought or not.<sup>[12]</sup> The power to stay or stop a prosecution should only be exercised if exceptional circumstances exist which would result in prejudice to the accused which cannot be remedied in other ways.

A criminal prosecution can also be stopped if it was commenced in the absence of proper factual foundation. There is nothing to suggest that there was no proper factual foundation in undertaking the prosecution in question.<sup>[13]</sup> As explained above, there was reasonable basis to institute the investigations and the prosecution. The decision whether or not to prosecute is very important. It can be very upsetting for a person to be prosecuted even if later found not guilty. However, a decision not to prosecute can cause great stress and upset to a victim of crime. I find nothing in the material before me (even mere reasonable suspicion) to suggest that the DPP acted in violation of article **157 (10)** of the Constitution and Section **6** of the Office of the Director of Public Prosecutions Act<sup>[14]</sup> cited above.

The Constitution contains, in material respects, a fundamental commitment to human rights. Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), stated that:-<sup>[15]</sup>

*"..... The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law required a criminal trial to be initiated or conducted..."<sup>[16]</sup>*

The right to a fair trial is guaranteed by Article 50 of the Constitution. The prosecution of an accused person must be conducted with due regard to traditional considerations of candour, fairness, and justice. There is no evidence before me to demonstrate even in the slightest manner that the provisions of article 50 of the constitution or any of the cited articles have been threatened or violated or will be violated.

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article **14** of the International Covenant on Civil and Political Rights (ICCPR).<sup>[17]</sup> The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under article **25 (c)** of our constitution, it is among the fundamental rights and freedoms that may not be limited.

The cardinal principle in criminal justice is that an accused person is presumed innocent until proven guilty. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner.

Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes

the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized.[18] There is no material before me to show that the criminal trial will be unfair or that the decision to charge was arrived at unfairly.

### **Whether the petition raises any constitutional issues**

It is convenient to state that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.[19] When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful...the question is whether the argument forces us to consider constitutional rights or values.[20]

The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others*[21] in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak*[22] notes that:-

*“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of .....the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”* [23]

Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. [24] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organise an analysis of the nature of constitutional matters arising from the cases before the Court. I find no constitutional issues raised in the present petition nor has any violation of rights been proved as alleged.

### **Determination**

In all honesty, I find nothing in the material before me to show that the petitioners right to a fair trial has been hampered or threatened in the criminal trial in question nor is there is tangible evidence to demonstrate that the police or any of the respondents acted maliciously or outside their powers or that the prosecution in question was commenced without proper or reasonable foundation. It is my view that the petitioner has not demonstrated even in the slightest manner that his rights to a fair trial have been or will be infringed if the prosecution proceeds nor has it been shown that the said trial is an abuse of court process or it will inherently violate his rights to a fair trial as enshrined in the constitution.

The petitioners also pray for compensation and damages. In all honesty, I find no basis for awarding damages nor has evidence been adduced to demonstrate any basis for awarding the damages sought.

I find that this petition has no merits. Consequently, I dismiss this petition with costs to the Respondents. For avoidance of doubt, I direct that the Respondents are at liberty to proceed with the intended arrest and prosecution of the Petitioner and or its directors or officers in connection with the incidents/circumstances that gave rise to this petition, namely, the alleged violation of provisions of the Anti-Counterfeit Act.

Orders accordingly

Signed, Dated, Delivered at Nairobi this **21<sup>st</sup>** day of **June** 2017

**John M. Mativo**

**Judge**

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[1] See Article 24 of the constitution

[2] Act No 13 of 2008

[3] Ibid

[4] {1998} C.O.D. 373, DC

[5] Act No. 2 of 2013

[6] **No 11 A of 2011**

[7] See **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another {2012} eKLR**

[8] *Hui Chi-Ming v R* [1992] 1 A.C. 34, PC

[9] *DPP v Meakin* [2006] EWHC 1067.

[10] See Attorney General's Reference (No 1 of 1990) [1992] Q.B. 630, CA; Attorney General's Reference (No 2 of 2001) [2004] 2 A.C. 72, HL.

[11] See *Bennett v Horseferry Road Magistrates' Court and Another* [1993] 3 All E.R. 138, 151, HL; see also *R v Methy Tydfil Magistrates' Court and Day ex parte DPP* [1989] Crim. L. R. 148.

[12] *R v Birmingham and Others* [1992] Crim. L.R. 117

[13] Republic vs Attorney General ex-parte Arap Ngeny HCC APP NO. 406 of 2001

[14] Supra

[15] *Shabalala & 5 others vs A.G of Transvaal & Another* CCT/23/94

[17] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].

[18] *Natasha Singh v. CBI*{2013} 5 SCC 741

[19]<http://www.yourdictionary.com/constitutional-question>

[20] Justice Langa in *Minister of Safety & Security v Luiters*, {2007} 28 ILJ 133 (CC)

[21] {2002} 23 ILJ 81 (CC)

[\[22\]](#) {2001} (1) SA 912 (CC)

[\[23\]](#) 2001 (1) SA 912 (CC)

[\[24\]](#) Supra note 5 at paragraph 23