REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 295 OF 2015

(CONSOLIDATED WITH PETITION 309 OF 2015, PETITION 314 OF 2015, JR NO. 231 OF 2015, JR NO. 242 OF 2015, JR NO. 246 OF 2015 AND JR NO. 247 OF 2015)

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 ARTICLES 10; 19 (2); 20 (1). (2), (3) & (4); 21(1); 27 (1); 40; 47 (1) & (2); AND 165 (3) (b) and (d) (ii)

AND

IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL ACT, 2010

AND

IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL (SUPPLEMENTARY) (LICENSING) REGULATIONS, 2015

AND

IN THE MATTER OF THE STATUTORY INSTRUMENTS ACT, 2013

AND

IN THE MATTER OF THE STANDARDS ACT

AND

IN THE MATTER OF THE STANDARDIZATION MARKS (PERMITS AND FEES) REGULATIONS

AND

IN THE MATTER OF SUSPENSION OF PERMITS AND LICENSES ISSUED TO KEROCHE BREWERIES LIMITED BY LETTER DATED 3RD JULY 2015 BY KENYA BUREAU OF STANDARDS

BETWEEN

KEROCHE BREWERIES LIMITED.....1ST PETITIONER

CROWN BEVERGES LTD.....2ND PETITIONER

MOUNT KENYA BREWERIES LIMITED.....3RD PETITIONER

KAPARI LIMITED.....4TH PETITIONER

MICHAEL NGUGI WANJIRU.....5TH PETITIONER

BISCEPTS LIMITED.....6TH PETITIONER

DANIEL NJERU KWENGA.....7TH PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

THE NATIOAL POLICE SERVICE.....3RD RESPONDENT

THE KENYA BUREAU OF STANDARDS….....4TH RESPONDENT

NATIONAL AUTHORITY FOR THE CAMPAIGN AGAINST

ALCOHOL AND DRUGS ABUSE (NACADA)….....5TH RESPONDENT

KENYA REVENUE AUTHORITY.....6TH RESPONDENT

COUNTY COMMISSIONERS OF

KIAMBU AND NAKURU.....7TH RESPONDENT

HON. KIMANI ICHUNGWA.....8TH RESPONDENT

HON JOHN KIHAGI.....9TH RESPONDENT

COUNTY GOVERNMENT OF NAIROBI.....10TH RESPONDENT

HON DAVID GIKARIA.....11TH RESPONDENT

JUDGEMENT

Introduction

1. This Judgement is the subject of several Petitions and Judicial Review Applications whose particulars appear in the title herein and which were consolidated for the limited purposes of determining certain common issues which I will enumerate shortly. The order consolidating this Petition No. 295 of 2015 (which is the lead file) together with JR No. 242 of 2015, JR No. 231 of 2015, Petition 314 of 2015, JR No. 246 of 2015, JR No. 247 of 2015 and Petition 309 of 2015 was made on 31st July, 2015.

2. The Petitioners are either manufacturers or distributors/retailers of various alcoholic drink beverages in various parts of the Republic of Kenya. For convenience they shall all be referred to as "the Petitioners".

3. The 1st Respondent is Hon. Attorney General of the Republic of Kenya sued in his capacity as the Principal Legal Adviser to the Government of Kenya.

4. The 2nd Respondent is the Cabinet Secretary (hereinafter referred to as "the CS") in Charge of the Ministry Interior and Co-Ordination of National Government (hereinafter referred to as "the Ministry") and is cited in these proceedings as the person responsible for gazetting the ***Alcoholic Drinks Control (Supplementary) (Licensing) Regulations, 2015*** ("the Regulations") whose net effect is to suspend the operations, production and manufacture of several of the Petitioner's alcoholic beverages and products without specifying the products that are to be suspended.

5. The 3rd Respondent is the Inspector General of Police, in-charge of the National Police Service constitutionally mandated to exercise command over the National Police Service (hereinafter referred to as "the Police") and obligated to maintain law and order and ensure the protection of life and property and is responsible for implementing the impugned decision of the 1st

Respondent using his law enforcement officers.

6. The 4th Respondent, **Kenya Bureau of Standards**, (KEBS) is a statutory body established under the provisions of the ***Standards Act***, Cap 496, Laws of Kenya and charged with the responsibility to, among others, promote standardization in industry and commerce and provide facilities for the examination and testing of commodities and the manner in which they may be manufactured, produced, processed or treated. Its functions include setting standards in the manufacture and trade of consumable commodities within the republic and enforcing compliance to the said standards. It is cited as Respondent in these proceedings for suspending the Petitioners' permit to produce alcoholic beverages.

7. The 5th Respondent, the **National Campaign Against Drug Abuse Authority** (NACADA) is a statutory authority established under the provisions of the ***Alcohol Control Act, 2010*** and is mandated with the regulations and control of manufacture and trade in Alcohol within the Republic.

8. The 6th Respondent, **Kenya Revenue Authority,** is a statutory body established under the provision of the ***Kenya Revenue Authority Act*** (Cap 469 of the Laws of Kenya) as the sole agent of the Government for the assessment and collection of all government revenue.

9. The 7th Respondents are the Commissioner in Charge of Kiambu and Nakuru Counties, devolved county governments established in accordance with the Constitution and ***County Government Act***.

10. The 8th, 9th, and 11th Respondents are Members of Parliament representing their various constituencies with the Republic of Kenya, and are cited as Respondents in these proceedings for intimidating and harassing the Petitioners and attempting to deprive the Petitioners of their property using hired hooligans whom they brought into the Petitioners' premises.

11. The 10th Respondent, Nairobi County Government, is a devolved county Government established under the Constitution and the ***County Government Act***.

Petitioners' Case

12. According to the Petitioners, on the 1st of July 2015, H.E. the President of the Republic of Kenya ordered a crackdown on the production and sale of illicit liquor within the country. It was contended by the Petitioners that following the said Presidential directive, the CS drafted and enacted the ***Alcoholic Drinks Control (Supplementary) (Licensing) Regulations, 2015*** (hereinafter referred to as "the Regulations") dated 2nd July 2015 which raised serious and fundamental issues of administrative law. Further, the procedure adopted by the CS in enacting the Regulations and directing that they should take effect immediately was procedurally *ultra vires* as it was contrary to sections 5 and 11 of the ***Statutory Instruments Act*** with regard to public participation and consultation with persons likely to be affected by legislation and Article 10 of the Constitution of Kenya. The said directive was further faulted on the ground that by it the CS donated unto himself powers that he did not possess at their stage of enactment as such power can only accrue once the Regulations have procedurally enacted under ***Statutory Instruments Act*** and Article 10 of the Constitution. To the Petitioners, the Regulations had not been debated or approved or passed by the relevant committee of the National Assembly pursuant to the provisions of section 11 of the ***Statutory Instruments Act.***

13. In addition, the CS was accused of abusing his powers in directing that the Regulations take effect immediately and requiring a special license without taking into account the licenses still in force. The Regulations did not take into account the licenses already issued to the Petitioners contrary to the principle of continuity of business pursuant to the licenses validity under section 14 of the ***Alcoholic Drinks Control Act*** and pursuant thereto, the 1st Respondent issued the Regulations whose implementation was immediate. The said Regulations provided a blanket ban of certain ready to drink alcoholic drinks and beverages also referred to as second or third generation alcoholic drinks without defining what constitutes second or third generation drinks and/or the criteria for identifying the same.

14. It was the Petitioners' case that despite being a stakeholder in the alcoholic drinks industry, it was not consulted before the implementation of the Regulations, contrary to the provisions of the ***Statutory Instruments Act*** ("the SIA"), and in particular section 5(1) thereof which places an obligation on public entities to involve stakeholders likely to be affected by the implementation of proposed regulations in the consultative process before the enactment and implementation of the Regulations. It was therefore contended that by virtue of this failure, there was substantial non-compliance with the provisions of the SIA and accordingly the Regulations are ripe for striking down.

15. The Petitioners added that on or about 3rd July, 2015, the 3rd Respondent, addressed a letter to all manufacturers of portable spirits, ordering for the immediate suspension of all manufacturers' permits, including the Petitioner's, to manufacture portable spirits and alcoholic beverages. This directive effectively mandated the Petitioners to immediately stop production of and trade in spirits.

16. It was averred that the 2nd Respondent, with the assistance of law enforcement officers under his authority, indiscriminately implemented the Regulations by impounding and destroying all forms of liquor including several of the Petitioners' brands, largely owing to the absence of clarity on the meaning of second and third generation alcoholic drinks and beverages. Further the said officers unlawfully, illegally and unconstitutionally confiscated and or destroyed the Petitioners' alcoholic drinks and beverages without due regard to their right to protection of property as guaranteed under Article 40 of the Constitution. The Petitioners averred that none of the Respondents were possessed of any equipment or test mechanism to establish whether indeed the Petitioners' were producing or selling illicit and or lethal brews as alleged, an allegation which the Petitioners denied.

To them, the Respondents' actions were unlawful and illegal and amounted to a threat to the Petitioner's right to enjoyment of their property guaranteed under Article 40 of the Constitution.

17. It was disclosed that Members of Parliament supported by the Officers of the National Police Service under the command of the 2nd Respondent and the Officers of the Provincial Administration under the command of the 3rd Respondent subsequently mounted a nationwide campaign aimed at ridding the Republic of the so called "Second Generation" liquors and other forms of illicit brews. It was averred amid the ongoing agitation and lawless implementation of the Presidential directive, the Police and the Ministry's Officers and other Senior County Security Officers unlawfully and without any lawful cause or authority led a contingent of armed security officers who forcefully entered into the Petitioners' premises and proceeded to impound, seize, detain, and destroy the Petitioners' products. The Officers further demanded that the premises be closed and warned that they would arrest anyone found within the premises if opened and as a result the Petitioners' factory premises have remained closed and all operations suspended thereby occasioning the Petitioner financial losses.

18. It was averred that the Respondents' actions of 3rd July, 2015, suspending with immediate effect without notice, the Petitioners' permits and licences pending alleged investigation by some inter-agency government department amounted to unfair administrative action in contravention of Article 47 of the Constitution. Furthermore, KEBS's actions amount to a breach of the Petitioner's legitimate expectations that the permits and licences which were validly granted after full inspection would not be withdrawn without giving reasons and hearing the Petitioner before withdrawing the same. To the Petitioners, the Regulations and directive were also in breach of rules of natural justice, being the right to be heard of the Petitioners and accused the Respondents of having acted unreasonably, unfairly and in breach of Articles 40 and 47 of the Constitution in enforcing the Regulations as they failed to take into account the licensing and certification of the Petitioners' products given by the various government agencies including the KEBS, approval by the Kenya Revenue Authority, the clear provisions of the ***East Africa Community SQMT Act*** and the authority by the Ministry of Health to import the licensed products, as a result of which some of the Petitioners' products were deemed second and third generation alcoholic drinks. This posed a threat and uncertainty of the licenses and certifications already issued to the Applicant.

19. It was contended that the arbitrary actions of the 1st and 3rd Respondent to publish the Regulations and suspend the licenses and permits to manufacture potable spirits respectively has led to catastrophic losses to the Petitioner, their distributors and retailers. Since the word *'potable'* has not been defined by the 3rd Respondent, any attempt to define it outside the law in order to dis-apply it to a party is unfair and unequal treatment of the Petitioner in contravention of Article 27 of the Constitution.

20. It was disclosed that the actions of the Police and several Members of Parliament drawn from their respective areas occasioned untold and monumental property losses in terms of lost business as a result of the suspension and stoppage of production, loss of brand reputation, loss of consumer, retailer and distributor confidence and direct losses as a result of the destruction of their alcoholic drinks and beverages by the Respondents.

21. According to the Petitioners, their staff and agents made numerous attempts to record their complaints at various police stations but the police refused to record their complaints stating that they were enforcing a presidential directive which therefore entitled them not to receive complaints arising therefrom.

22. To the Petitioners, whereas the law is sufficient in providing enforcement mechanism in dealing with issues of issuance of government directives and enforcement of the same, it does not contemplate nor does it condone the lawlessness and "mob justice" enforcement of government directives.

23. The Petitioners asserted that they were legitimate investors who adhered to all the Licensing requirements imposed on them by the Respondents and therefore had a legitimate expectation to the protection of the law. However, they suffered and continued to suffer loss due to the destruction and seizure of their assets and products and the closure of their premises by the Respondents.

24. In the Respondents' view the following constitutional provisions were violated by the Respondents in the said process:

1. Article 27 (1) of the Constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. The actions by the Respondents to unilaterally issue unlawful orders then proceed to enforce the same in a lawless and violent way goes against the very fabric of a society governed by the rule of law and totally denied the Petitioners the benefit and protection of the law.

2. Article 29(c) which provides that every person has the right to freedom and security of the person, which includes the right not to be subjected to any form of violence from either public or private sources. The mobilization and incitement to violence of riotous mobs of members of the public by state and government officials and the continued use of the threat of force and arbitrary arrest of the Petitioners' staff at its premises violated this right.

3. Article 31(a) and (b) which provides that every person has the right to privacy, which includes the right not to have their person, home or property searched and their possessions seized. The arbitrary and unlawful entry into the Petitioner's premises and the illegal search and seizure of the Petitioner's goods and properties violated the Petitioners' rights under Article 31.

4. Article 40 of the Constitution which affords the Petitioners rights to own property which the Respondents acting as agents of the state callously breached by impounding and destroying the Petitioners' property thus arbitrarily depriving the Petitioners of the use of the destroyed and impounded property.

5. Article 47 of the Constitution which guarantees to every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Petitioners were never given a chance to be heard before their premises were forcefully entered into and their properties destroyed. The actions by the State to revoke licenses unilaterally and declare a crackdown on a lawful and legitimate enterprises that are the Petitioners' economic mainstay after the Petitioners has complied with all the licensing requirements imposed by law was unfair. Further, there was no due procedure followed when arriving at the declarations.

6. Article 48 which guarantees that every person shall have access to justice. The use by the State of the Police and the Ministry's Officers, Officers who exist to maintain law and order and ensure that persons aggrieved by actions of other can access justice subverted the achievement of this constitutional guarantee.

7. Article 50 of the Constitution which provides for the right to a fair trial where a person suspected to have committed a crime is subjected to a clearly defined procedure that ensures fairness and justice. The State completely disregarded the provisions of this Article and engaged in a reckless witch-hunt based on suspicions which resulted in a situation where State agents were roaming localities accompanied by unruly mobs destroying property and reigning havoc on legitimate enterprises.

25. To the extent that the Fourth Schedule to the Regulations provided a general ban on importation and distribution of second and third generation alcoholic drinks which required special licenses without defining what constituted the same, it was averred that they were thus unreasonable since the absence of criteria to define posed a threat to the Petitioners' licensed products. As a result, the Regulations were being implemented indiscriminately as a result of which the Petitioners licensed products were being deemed to be second and third generation and thus illegal which led to the confiscation and destruction of its property and the arrest of its employees who were later released without any charges being preferred. A general ban on certain ready to drink alcoholic drinks and beverages was also criticised for not specifying the products or the brands that they sought to regulate or which would be affected by the Regulations.

26. The Police were accused of failing to perform their duties of providing security and ensuring the protection of property and prevention of unlawful destruction of property hence abdicated duty under Article 10, 21 and 244 of the Constitution and the ***National Police Service Act***.

27. The Petitioners therefore sought the following orders:

a. **A declaration that the violent crackdown, invasion, looting and intentional destruction of the Petitioner's legitimate products sold in the pursuance of its lawful business and marketed in its lawfully run distributorships by its lawful agents is a gross violation of the Petitioner's rights to property, privacy, fair administrative action and the right not to be subjected to violence.**

b. **A declaration that the deliberate failure and refusal by the 2nd and 3rd Respondents to receive and act on the reports of violence on and destruction of the Petitioners property and staff amounts to gross malfeasance by the state and its officers and is an abdication of the state's responsibility to uphold the rule of law.**

c. **An Order of *Certiorari* calling into this Court the *Alcoholic Drinks Control (Supplementary) (Licensing) Regulations, 2015* for the purposes of quashing the same forthwith. In the alternative, an order of prohibition to stay the coming into force the Alcoholic Drinks Control (Supplementary) (Licensing) Regulations 2015 pending compliance with the Statutory Instruments Act.**

d. **An Order of *certiorari* calling into this Hon. Court the letter dated 3rd July, 2015 issued by the Kenya Bureau of Standards suspending the permits and licenses granted to the Petitioners for production and distribution of potable spirits for the purposes of quashing the same forthwith.**

e. **An Order of *mandamus* be issued to the Respondents to immediately unlock and remove all seals, padlocks and any other gadgets placed at the Petitioners' premises for purposes of impounding the Petitioner's property; or in the ALTERNATIVE**

f. **An Order be issued authorising the Petitioner to remove forthwith all seals, padlocks and any other gadgets placed in the Petitioner's premises by the Respondents for purposes of seizing and or impounding the Petitioner's products.**

g. **An Order of *Prohibition* or injunction permanently restraining the Respondents from closing, vandalising, confiscating, impounding, seizing and or destroying by burning or in any other manner whatsoever, the Petitioners' licensed brands of alcoholic drinks, beverages, spirits and all alcoholic products belonging to the Petitioner or in any way interfering with the Petitioners' lawful operations of their business pursuant to the Alcoholic Drinks Control (Supplementary) (Licensing) Regulations 2015 or otherwise.**

h. **An order of prohibition to prohibit and restrain the Respondents from arresting, detaining or charging in court or prosecuting any of the Applicants employees, servants, agents and/or distributors dealing with the Applicant's licensed alcoholic products, drinks and property whatsoever pursuant to the Alcoholic Drinks Control (Supplementary) (Licensing) Regulations 2015 or otherwise.**

i. **An order of compensation for material loss and damage in the amounts that shall be established and**

assessed to have been suffered by the Petitioners or their lawful agents as a direct and indirect consequence of the Respondents' actions.

j. **The Respondents to bear the costs of this Petition in any event.**

k. **Costs.**

l. **Such further Orders as this honourable court may deem just and expedient.**

28. It was submitted by the Petitioners that the genesis of the mayhem and wanton destruction of property was the blanket Presidential directive to destroy illicit liquor without giving any guidelines or policy directives on how the exercise would be carried out. This directive, according to the Petitioners was captured in the video a copy of which was exhibited in these proceedings. That directive was not in writing and simply given by word of mouth to members of Parliament and other government officials contrary to Article 135 of the Constitution which requires that:

A decision of the President in the performance of any function of the President under this Constitution shall be in writing and shall bear the seal and signature of the President.

29. It was submitted that is manifestly clear that there was no written decision of the President that gave any roadmap to public officers to carry out the war on illicit brews; rather H.E. the President embarked on the yester years' era of 'roadside declarations' whose end result was an inflammation of passions among members of public all around the country who were incited by their respective Members of Parliament to carry out indiscriminate destruction of alcoholic brews and products without determining which drinks were illicit and lethal to human consumption and which drinks were safe.

30. It was submitted that under Article 132(3)(b) of the Constitution, the president is under a duty to direct and co-ordinate the functions of ministries and government departments hence the president's directive falls within Article 132(3)(b) of the Constitution as he was directing different ministries and government departments to crackdown on illicit drinks and alcoholic beverages. Whereas it was thus required to be in writing, signed and under seal, the directive did not meet the threshold under Article 135 of the Constitution and it failed the test of legality and constitutionality hence was unlawful, unconstitutional and *void ab initio*. It was therefore submitted that any process or function or duty carried out pursuant to the directive is unlawful and void in line with the principle of *ex nihilo nihil fit* (out of nothing comes nothing).

31. The Petitioners then proceeded to reiterate what followed as stated hereinabove and reproduced section 5(1) of the ***Statutory Instruments Act, 2013.***

32. It was submitted that the CS ran afoul of the provisions of the SIA by failing to consult the Petitioners as relevant stakeholders in the alcoholic drinks and brews manufacturing industry and that by virtue of this failure, there was substantial non-compliance with the provisions of the SIA which rendered the Regulations are invalid, void and of no legal effect for failing to adhere to one of the statutory preconditions for their existence.

33. It was submitted further that the Regulations have not been gazetted pursuant to section 27 of the ***Interpretation and General Provisions Act***. Without evidence gazettement, it was submitted that the Regulations remain illegal and in-operational. Based on **R vs. Institute of Certified Public Secretaries of Kenya Ex Parte Munida Njeru Geteria [2010] eKLR** this Court was urged to quash the said Regulations.

34. It was submitted that KEBS's actions and conduct to suspend the Petitioners' license was unconstitutional and illegal and offended the provisions of Article 47 of the Constitution and the provisions of the ***Fair Administrative Action Act, 2015*** ("the FAA") which has elaborate provisions on the procedure to be followed by public agencies prior to taking administrative action that is likely to adversely affect the rights and fundamental freedoms of any person. In particular, the Petitioners relied on section 4 of the FAA and submitted that before taking the actions complained of the Respondents were constitutionally and legally bound to notify the Petitioners of their intention to adversely affect their manufacturing and licensing rights. The Respondents were further obligated to give reasons for the proposed adverse action and allow the Petitioners an opportunity to be heard and to make representations on the proposed action.

35. While appreciating that KEBS has a statutory mandate under the ***Standards Act*** to ensure standardisation in industry and commerce within Kenya and for the purposes of carrying out its mandates under section 4 thereof, it was submitted that there is no power thereunder which allows KEBS to arbitrarily, capriciously and discriminately suspend the Petitioners' licenses without following due process in contravention of the rules of natural justice. It was the Petitioners' submission that the tenets of due process demand that fair administrative action prerequisite be adhered to before any adverse administrative action is taken against any person. In support of this position the Petitioners relied on **Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary. Joseph Kimiri – Treasurer) & 8 others v Cabinet Secretary for Transport and Infrastructure & 5 Others [2014] eKLR.**

36. It was submitted that despite KEBS denying in its replying affidavit that it suspended the Petitioners' license as a result of the Regulations, the nexus between the suspension and the alleged inter-agency analysis and investigations that were supposedly being conducted was clearly discernible from the replying affidavit. It was the Petitioners. Case that it was shameful and despicable that government agencies established under statute would abdicate their statutory roles and act on suspicion, conjecture and hypothesis to shut down, destroy and paralyse legitimate businesses contributing billions of shillings to the Kenyan economy in taxes.

37. It was submitted that the actions of the Respondents violated the Petitioners' legitimate expectations that they would continue enjoying the benefits of their licences and relied on **Keroche Industries Limited vs. Kenya Revenue Authority & 5 others [2014] eKLR.**

38. Since KEBS has a statutory duty under the ***Standards Act*** to conduct regular checks and tests, which tests are regularly conducted, to ensure they comply with the standards of being fit for human consumption and other criteria and technical specifications as determined by it, it was submitted that there was no basis whatsoever for KEBS to suspend the Petitioners' licenses without first affording them with a notification as to the change in circumstances that may have occurred to warrant a change in position to effect a suspension of their licenses. To the Petitioners, the said actions amounted to a gross violation of their legitimated expectations that the licenses would not be withdrawn without first affording them an opportunity to be heard. This submission was hinged on the decision of **Musinga, J** (as he then was) in the case of **Kuria Greens Limited vs. Registrar of Titles & Another [2014] eKLR** as follows:-

> **"The impugned decision by the 1st respondent not only violated the petitioner's aforesaid constitutional rights but was also unreasonable and contrary to its legitimate expectation. Referring to a party's legitimate expectation, Lord Simon Brown in R vs DEVON COUNTY COUNCIL ex parte P. BAKER, [1995] 1 ALL ER, stated:**
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> **"….it is the interest rather than the benefit that is the substance of the expectation. In other words, the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognizes that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision".**
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> **Similarly, in COUNCIL OF CIVIL SERVICE vs MINISTER FOR CIVIL SERVICE [1984] 3 ALL ER 935 at page 949, Lord Diplock stated that for a legitimate expectation to be thwarted, the impugned decision:**
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> **"…must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn".**
>
> **It is therefore clear that a benefit, (but in this case a right) cannot be withdrawn until the reason for its withdrawal has been given and the person concerned has been given an opportunity to comment on the reason."**

39. It was submitted that the Respondents' actions of depriving the Petitioners access to their premises and threats to cart away the Petitioners' properties reeked of high-handedness, malice and impunity of the highest levels. Accordingly, the Respondents infringed on the Petitioners' constitutional right to property as guaranteed under Article 40 of the Constitution. Since none of the Respondents were possessed of any equipment or test mechanism to establish whether indeed the Petitioners' were producing or distributing illicit and or lethal brews as alleged, the Respondents' actions were unconstitutional, unlawful, illegal and violative of the Petitioners' right to enjoyment of their property guaranteed under Article 40 of the Constitution. Furthermore, the Respondents' actions to shut down the Petitioners' production lines by entering into the premises without warrant or authority and without reason, notice or any sort of warning was an unconstitutional infringement of the 1st Petitioners' right to property and occasioned monumental monetary losses.

40. It was submitted that this Court has the constitutional power to give an order for general damages where the exigencies of the case so merit. Clearly, the 1st Petitioner's right to property was violated with several violations of trespass, locking down of the 1st Petitioner's go-down and shutting down of its production lines. For these violations of the Respondents, this Court is invited to grant an order of damages for trespass and illegal interference with and detention of property. In support of this contention reliance was sought on **Evelyn College of Design Ltd vs. Director of Children's Department & another [2014] eKLR**

41. According to the Petitioners, Article 31 of the Constitution recognizes and guarantees the right to privacy which includes the right not to have ones person, home or property seized and their possessions seized. Indeed, the Respondents' actions were violative of the 1st Petitioner's right to privacy and the right to property and relied on **Standard Newspapers Limited & Another vs. Attorney General and others [2014] eKLR.**

42. It was submitted that to declassify one manufacturer at the expense of all others to languish in suspension is indeed discriminatory and offends the provisions of Article 27 of the Constitution.

43. It was therefore submitted that the actions of the Respondent were unconstitutional and outside the confines of the law.

1st, 2nd, 5th, 6th, and 7th Respondents' Case

44. According to the 1st, 2nd, 5th, 6th, and 7th Respondents, the Inter-Agency Taskforce and Control of Potable Spirit and

Combat of illicit Brews (hereinafter referred to as "the Taskforce") was appointed vide Gazette Notice No 5069 dated 10th July 2015 to streamline issues arising in the alcohol industry. According to them, KEBS is conferred with discretion by its constitutive statute (the ***Standards Act***) at Section 10A to suspend licences where it has a reasonable belief that they are non-compliant with standards and/or requirements of any written law. They contended that the prevailing rampant manufacture, distribution, sale and consumption of illicit brew and the resultant deaths arising from such activities warranted the Respondents to make a decisive action within the ambit of the regulatory and statutory framework to crack down on illegal alcoholic drinks. They added that in the year 2010 Parliament enacted the ***Alcoholic Drinks Control Act 2010*** as a measure to regulate the alcohol industry and to curb illicit alcohol and alcoholism which devastating the Country's productive population hence the events of the year 2015 relating to alcohol control by the government are merely continuation of the war against illicit alcohol albeit with a fresh determination to put to an end the menace of deaths and incapacitation brought about by lethal brews in Kenya. It was their case that over time there have been numerous incidents of citizens consuming alcohol and either dying or developing severe health complications including blindness after such consumption and in some of the instances where such loss of life or health occurred the manufacturers or sellers or distributors of the illicit brews could not traced. In some instances there were even reports in the media of hawking of alcohol.

45. The said Respondents contended that in the light of this revelation the mere closing of known outlets or manufacturing businesses or revocation of their licences was viewed as ineffective and only a drastic action would be effective in the fight against illicit alcohol and lethal brews and gave the example of the year 2014 when more than 80 people were reported dead and more than 170 others reported hospitalized in a span of only 72 hours across 5 different counties as a result of consuming illicit alcohol which to them was a stark reminder of November 2001 when over 140 people died after consuming lethal brew and June 2005 when 49 people died and 174 others were hospitalized also after consuming illegal brew. It was their view that the death of so many persons in such a wide geographical area demonstrated the ease with which the alcohol was being distributed and the potential grave danger of lack of new strategies to fight the vice. It was therefore averred that due to its seriousness regarding the protection of citizens' lives and health, action taken by the government in the fight against alcohol included the sacking of many ranking government officials. However, despite all the sustained efforts exerted by the government in the fight against illicit alcohol, which efforts were in the public domain, criticism was continually levelled against the government to the effect that the government has not done enough to end the lethal, illicit alcohol menace. Later there arose a highly publicized clamour in the media calling for the government to end the killer brew menace and tough action including institution of charges of manslaughter against brewers and lethal alcohol products. In addition, the reported lack of success in previous crackdowns on the menace of illicit alcohol brought to the fore the fact that only sustained joint effort by all agencies concerned in the war against illicit alcohol may succeed in protecting citizens from the menace.

46. The said Respondents disclosed that in the year 2015 after a string of these incidents it became clear that there was need to streamline the alcohol manufacturing sector with a view to:

1. establishing what each manufacturer produces;

2. establishing the quality of such product;

3. ensuring that the products of each manufacturer are made of the appropriate raw materials

4. ensuring that the products are made in an environment that is conducive for making of products classified for human production;

5. ensuring that the appropriate licences have been obtained by the producers;

6. establishing the action to be taken against the manufactures offending the condition of their licences or other laws.

47. According to the said Respondents, the prevalence of addictive alcoholic drinks in the market had negatively affected the economic, educational and social spheres in the country in that the affected drinking youth economic productivity as well as social and familial responsibilities were considerably diminished. At the same time the production and distribution and sale of illicit and substandard alcohol in the country also exposed underage youth to alcohol abuse and addiction at a tender age, often even before they had completed their academic studies, thus creating a perpetual cycle of illiteracy, ignorance, poverty, and crime among other social ills. At the same time crime escalated as a result of the kind of alcohol abuse due outlined as the drinkers who had abandoned productive economic activities sought to finance their drinking lifestyles and the prohibitive cost of rehabilitation of alcohol addicts also became a drain to the national economy.

48. It was therefore contended that it is the above mentioned adverse effects in the alcohol production, distribution and sale industry that caused the government to intervene in the alcohol sector in the public interest. Accordingly, on 2nd July 2015 His Excellency, the President of the Republic of Kenya directed that a nationwide campaign against illicit brews be undertaken in order to control alcohol abuse menace. Consequently, the CS established and gazetted an Inter-Agency Taskforce on Control of Potable Spirit and Combat of Illicit Brews vide Gazette Notice No 5069 dated 10th July 2015. In their view, since many sources of deleterious alcoholic products were not known, as a matter of necessity the crackdown on the industry had to affect the manufacturers, distributors and sellers of alcoholic products without exception. To them, it also emerged that some of the manufacturing enterprises were run by criminals and engaging the income therefrom for further criminal activities. It was their view that The deaths and injury to health the spiralling crime, loss of economic productivity and social and familial breakdown occasioned by illegal, unlicensed and substandard alcoholic drinks necessitated the actions taken by the various government agencies in containing the menace in line with the states obligation of safe guarding consumer rights under Article 46 of the Constitution.

49. The said Respondents however denied the allegation that the 1st Respondent had operationalized the alcoholic drinks

control regulations and explained that the regulations purportedly gazetted by the Cabinet Secretary cannot be unconstitutional since they are made pursuant to the powers conferred to the Cabinet Secretary under Section 68 of the ***Alcoholics Drinks Act*** which has not been declared unconstitutional as read together with Sections 9(3), (4) and 10(1) of the ***National Government Coordination Act*** and in any event cannot be unconstitutional since the document presented to court is only a draft which has yet to be gazetted to acquire the force of law. It was therefore their view that the regulations were prematurely challenged since they have not subjected to the requisite requirements of public participation and parliamentary approval and thus the question of their conformity with the ***Statutory Instruments Act*** cannot arise at this stage.

50. It was however contended that the ***Alcoholics Drinks Control Ac***t allows the Cabinet Secretary to appoint authorized officers for purposes of enforcement of the Act and the menace of the manufacture, distribution, sale and consumption of illicit and substandard alcoholic beverages warrants the Members of Parliament to be involved since they are crucial stakeholders as representatives of the people and in line with the provisions of Articles 94(2), 95(1) and 95(5)B. Besides, the involvement of personnel from all the concerned regulatory and the security agencies was necessary in order to inculcate trust from the public and among themselves in the wake of adverse perceptions of the earlier disjointed efforts at curbing illicit alcohol and lethal brews. Further, the inclusion of the governors in the alcoholic drinks regulation is proper and with the law since under the 4th schedule to the constitution, county governments are constitutionally mandated and empowered to licence alcoholic drinks.

51. It was their case that the President was acting within his constitutional powers, responsibilities and duty under Article 132(3)B of the constitution and in line with Section 8(1) of the ***National Government Co-ordination Act*** to request government Department and Agencies to exercise their statutory duties to crack down illegal liquor which was becoming a health hazard and cause of many deaths and that does not need to be a directive to be put in writing under seal and signature of the President. To them, under the law the Cabinet Secretary in charge of Interior is responsible for the implementation of the ***Alcoholic Drinks Control Act*** and the ***National Campaign for the Control of Drugs and Alcohol (NACADA) Act*** and in performance of his functions he is directly responsible and answerable to the President. They added that government agencies deal with enforcement of compliance of the law and regulations within the powers conferred on them in their respective statutes and denied that the government agencies involved hooligans in the aforesaid crackdown of illicit liquor as alleged by the petitioners. It was averred that the members of the public had engaged earlier in the pouring of illicit liquor prior to the alleged acts and the government has maintained law and order and clarified that the crackdown is on illicit liquor should be devoid of any unlawfulness and destruction of private property and the petitioners had not demonstrated that it has reported to authorities on the alleged destruction of property and there was inaction.

52. The said Respondents denied that the crackdown on illicit liquor was selective or meant to favour or frustrate any manufacturers but meant to achieve, secure and safeguard the rights of consumers and prevent harmful substances from the market which is a periodic exercise that is in any event provided for in the regulatory and statutory framework in the alcoholic industry. They averred that the ***Alcoholic Drinks Control Act*** recognize law enforcement agencies as authorised officers under the act and they have powers under section 51 of the Act for purposes of ensuring compliance with the Act and may at any time enter any premises where they have any reasonable belief that there is noncompliance with the act by any person. Further, the allegation that the Inter Agency Task Force is an unspecified entity is an allegation based on misinterpretation of the law since the same is provided for at section 25 of the ***National Campaign Against Control of Drug Abuse and Alcohol Act*** and comprise of government lead agencies involved in the reduction of alcohol and drug abuse.

53. It was asserted that the notices and the letters of suspension issued to the petitioner was a general one that had been issued to all manufacturers without discrimination and the allegation that the Respondents were unfair to the petitioner to promote unfair compensation against certain Rand or to the advantage of other brands is unfounded and thus untrue. They however disclosed that they were aware that the 1st petitioner's alcohol production facilities were inspected against various regulatory requirements and were found to be lacking well maintained floor, adequate ventilation (% of openings) and indication of the physical location of the factory and telephone contact of products label. In any event the inspection of premises by the aforesaid multiagency task force and the resultant recommendation will clearly demonstrate lack of bias since the petitioner herein was found to have complied with most of the regulatory and statutory requirements and recommended to continue operations subjects to compliance within 60 days of the shortcoming enumerated above and tax compliance. To the Respondent, since the 1st petitioner herein has been in operation from 29th July 2015, the cessation of production was only for a while.

54. In their submissions the said Respondent reiterated the foregoing and stressed that the President was acting within his constitutional powers, responsibilities and duty under Article 132(3)B of the constitution and in line with Section 8(1) of the ***National Government Co-ordination Act*** to request government Department and Agencies to exercise their statutory duties to crack down illegal liquor which was becoming a health hazard and cause of many deaths and that does not need to be a directive to be put in writing under seal and signature of the President. It was submitted that one of the functions of the President under Article 132(3)(b) is to direct and co-ordinate the functions of Government ministries and departments while Article 132(c) requires that a decision by the President to assign implementation of any Act of Parliament by a Cabinet Secretary be done through a gazette notice. The Constitution further provides that the President may perform any other executive function conferred by the Constitution or any other national legislation.

55. It was also submitted that section 8(1) of the ***National Government Co-ordination Act*** assist the executive in carrying out its work by providing that the President is responsible for the co-ordination of functions of the Ministries, State and Government Departments.

56. Based on **Kenya Guards Allied Workers Union vs. Security Guards Services & 38 Others Misc. 1159 of 2004**, it was submitted that the crackdown on illicit liquor was in line with public interest. According to the Respondents on the authority of **Republic vs. Chief Justice of Kenya & 6 Others exp Moijo Mataiya Ole Keiwua Misc. Appl. No. 1298 of 2004**, the Courts have no power to review the exercise of powers by the President provided the President is acting within the scope of his powers and within the confines of the Constitution.

57. It was submitted that the President's action was well founded within the Constitution and the ***National Government Co-ordination Act.*** It was submitted that when the President acts and requests certain specific roles which have been donated to certain agencies in their respective statutory and regulatory mandate, no order is required. Similarly the agencies also operate within their own statutory framework that does not necessarily require the intervention of the President. Based on **Mumo Matemo vs. Trusted Society f Human Rights Alliance & 5 Other [2013] eKLR**, the Court was urged not to interfere with the decisions of the President and the Respondents.

58. It was submitted that the ***Standards Act*** allow KEBS to suspend a licence where it has reasonable belief that there is a violation of the Act or any other law. It was submitted that based on what is sated herein above the actions of the Respondents were justified and in the public interest and reliance was placed on the decision of **Ngaa, J** in **John Kinyua Muyaka & 11 Others vs. County Government of Kiambu & 3 Others [2014] eKLR**.

59. While not denying that the letter dated 3rd July, 2015 was issued by KEBS, it was submitted that t same was not discriminatory or meant to cripple any manufacturer to economic advantage of any other manufacturer since the suspension was general in nature issued to all alcoholic drinks manufacturers without bias or favour. In support of this position he Respondents relied on **East Africa Breweries Ltd vs. Attorney General & 2 Others [2013] eKLR**.

60. On the constitutionality of the Regulations, it was submitted that the issue is premature and based on conjecture and the Respondents relied on **Timothy Njoya vs. Attorney General & Another [2014] eKLR** in support of this contention.

4th Respondent's Case

61. According to the 4th Respondent, KEBS, both the motion and the petition as filed and presented before the honourable court are frivolous, vexatious and misleading and are, in essence, an abuse of the process of court for, among others, failing to establish any breach, on the part of KEBS, of the constitution provisions as alleged by the petitioner.

62. It was contended that KEBS is a statutory, government of Kenya, agency and body corporate established under section 3 of the ***Standards Act***, Cap 496 of the Laws of Kenya with the mandate under the provisions of Section 4 thereof to, among others promote standardisation in industry and commerce; make arrangements or provide facilities for the examination and testing of commodities and any material or substance from or with which and the manner in which they may be manufactured, produced, processed or treated; provide for cooperation with the Government or the representative of any industry or with any local authority or other public body or any other person with a view to securing the adoption and practical application of the standards; and provide for the testing at the request of the appropriate Cabinet Secretary and on behalf of the Government, of locally manufactured and imported commodities with a view to determining whether such commodities comply with the provisions of the Act.

63. It was therefore averred that KEBS neither issued its letter dated 3rd July 2015 arbitrarily nor was it issued pursuant to the purported presidential directive or the ***Alcoholic Drinks Control (Supplementary) (Licensing) Regulations,*** **2015**. Rather, it was issued pursuant to KEBS' above functions and authority as donated to it by sections 10A, 13 and 14 of the ***Standards Act***, as well as the provisions of Regulations 11 of the ***Standardisation Marks (permits and fees) Regulations.***

64. To KEBS, it may as well act *sua sponte*, whether on suspicion of contravention of standards or not and proceed *suo motu*, to inspect, suspend permits or in any other way enforce the appropriate standards, in this regard without any formal or informal prompting or, as alleged by the petitioner, without any directive from any quarters and such action shall still have the force, legitimacy and validity under the Constitution and the ***Standards Act***. In this regard, the 3rd Respondent, acting through its inspectors, has powers under section 14(1) of the ***Standards Act*** to, among others enter upon any premises at which there is or is suspected to be a commodity in relation to which any standard specification or standardisation mark exists; inspect and take samples of any commodity or any material or substance used, or likely to be used, or capable of being used in the manufacture, production, processing or treatment thereof, and cause any container within which there is or there is suspected to be any quantity of any such commodity, material or substance, to be opened; inspect any process or other operation which is or appears likely to be carried out in those premises in connection with the manufacture, production, processing or treatment of any commodity in relation to which a standard specification or a standardisation mark exists; require from any person the production of any book, notice, record, list or other document which is in the possession or custody or under the control of that person or of any other person on his behalf; examine and copy any or any part of any book, notice, record, list or other document which appears to the 3rd Respondent to have relevance to the 3rd Respondent's inspection or inquiry, and require any person to give an explanation of any entry therein, and take possession of any such book, notice, record, list or other document as KEBS believes may afford evidence of an offence under the Act; require information relevant to the 3rd Respondent's inquiry from any person whom the 3rd Respondent has reasonable ground to believe is or has been employed at any such premises or to have in his possession or custody or under his control any article referred to under the Act; seize and detail, for purposes of testing, any goods in respect of which the 3rd Respondent has reasonable cause to believe that an offence has been committed; and seize and detain any good or documents which the 3rd Respondent has reasonable cause to believe may be required as evidence in any proceedings for any offence under the Act.

65. It was contended that the petitions fatally fail to appreciate KEBS' statutory mandate to act as it has done in this case. In particular the petitions have failed to distinguish between the source of information, on the one hand, upon which the 3rd Respondent may act having reasonable cause to believe that an offence has been; or is being; or may be committed and the authority under the applicable law, in this case the ***Standards Act***, on the other hand, that empowers that 3rd Respondent to take whatever action it may deem necessary within the statutory powers bestowed upon it. It was therefore averred that even assuming that KEBS acted on the purported Presidential directive, which is not the case herein, that assumption would be immaterial to the extent that KEBS could still have treated the directive as any other source of information (just like any other

complaint from regular consumer, government agency, NGO, concerned citizen or even a private agency and which the 3rd Respondent may, notwithstanding the requester, act upon in line with and in exercise of its powers under the statute).

66. In KEBS' view, the statement in the first paragraph of its letter dated 3rd July 2015, was merely a general statement and/or remark meant to lay the background about the effects of illicit liquor which have, in any event, been in the limelight, courtesy of the press and print media. Moreover, the grant of a permit or a licence by KEBS does not give the grantee thereof in this instance *carte blanche* to operate in absolute autonomy and does not therefore negate KEBS' powers under the ***Standards Act*** of entry, inspection, or even cancellation of the permit within a day after such grant for purposes of enforcing Standards.

67. It was averred that contrary to the petitioners' allegations, KEBS' actions, which affected not only the Petitioners but were also directed at many other manufacturers of the specified brands of portable spirits, do not violate the Petitioners'; or indeed the various manufacturers' Constitutional right to ownership of property as enshrined under Article 40 of the Constitution and the same are in consonance with consumer rights within the meaning of Article 46 of the constitution. To KEBS, its action complained of is lawful, both constitutionally and statutorily underpinned, reasonable in all respects and cannot be said to be an attempt to deprive the Petitioners of their constitutional or other right to own property of any description, since such right is neither absolute nor superior to the interests of the general public. Consequently, to allege otherwise would be to interpret the constitution in the most abstract and narrow approach. In addition, public interests and protection of Kenyans as consumers dictate against the granting of the prayers sought by the Petitioner since, the prayer/reliefs sought are not the most efficacious in the circumstances herein and, if granted, would gravely expose Kenyans and cause enormous adverse social, economic and health effects to the general public. In its view, the inconvenience and/or loss, if at all, that may be suffered by the Petitioners would be by far a lesser evil than would be the loss if the public was to be exposed to the dangers of consuming illicit and/or lethal portable spirits should it turn out after the ongoing inter-Agency investigations and analysis, that the subject portable spirits were in fact illicit, harmful and/or lethal.

68. KEBS denied that it had used and/or was using gangs, goons and/or mobs to enforce its mandate, but averred that it had used, was using and at all material shall use the legally appointed and authorized officers under sections 13 and 14 of the ***Standards Act***. It its view, by the prayers and orders the Petitioners seek against KEBS, the motion and petition is evidently and invitation by the Petitioners to this court to repeal and/or amend the ***Standard Act*** to suit the Petitioners' own aspirations as to what powers KEBS should have. Accordingly, the court was invited to find that to allow the Petition against KEBS would be to amend the provisions under the ***Standards Act***, a function reserved for the legislature. According to it, its Statutory powers, and therefore its lawful actions as herein, are necessary prudent, justified and well-founded for they are ordained to subject all products and especially those meant for human consumption (such as the Petitioner's Alcoholic beverages) to the strictest regulatory framework for the protection of the fundamental, absolute and unlimited constitutional right to life as well as the equally imperative consumer rights aforesaid.

69. KEBS therefore implored the Court to take into consideration the inherent merits of its well-intended action bearing in mind the public interest, consumer values as protected under the constitution, as well as the proportionate magnitudes and priority levels attributable to the subject matter herein namely protection on consumer rights and to accordingly dismiss the motion and the petition with costs to it.

70. It was submitted on behalf of KEBS while reiterating the foregoing that the Standards Act does not require that evidence of non-compliance with any condition specified in the licence/permit be produced to KEBS before it can suspend the licence and permit hence there was no need to prove that the Petitioners were producing poisonous liquor. Suffice it, it was submitted that reference was made to "increased reported deaths". Accordingly it was reasonable to suspend production of potable spirits by all manufacturers including the Petitioners. This, it was submitted was in accordance with the provisions of Article 21 of the Constitution which binds KEBS to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights including the protection of consumer rights.

71. Once KEBS cited the provisions under which it was suspending the licences and permits, it was submitted that it mattered not what else might have been said in the said letter since the only concern of the Court should be whether or not KEBS in fact acted within the purview of section 10A of the ***Standards Act***.

72. KEBS contended that the Petitions were fatally defective for want of compliance with the mandatory provisions of section 11of the Standards Act. To KEBS, the Petitioners ought to have appealed to the Tribunal within 14 days of the decision complained of. While that provision does not oust the jurisdiction of the Court, it was submitted that where thee is a procedure for redress of a particular grievance, the same ought to be followed. In support of this position KEBS relied on **Speaker of the National Assembly vs. Njenga Karume [2008] eKLR**.

73. It was submitted that the appeal mechanism aforesaid is the most applicable and appropriate herein given the nature of the subject matter; that is the management and control/regulation of standards, permits and licences. KEBS cited **Republic vs. Business Premises Rent Tribunal & 3 Others exp Christine Wangari Gachege JR Appl. No. 136 of 2013** as supporting this position and submitted that since the prayers sought herein are not efficacious in the circumstances, these petitions are an abuse of the process of the Court.

74. With respect to costs, KEBS submitted that taking into account the public interests involved there should be no order as to costs.

Determinations

75. I have considered the foregoing. The first issue for determination is the effect if any of section 11 of the ***Standards Act*** to these proceedings. The said provision provides:

Any person who is aggrieved by a decision of the Bureau or the Council may within fourteen days of the notification of the act complained of being received by him, appeal in writing to the Tribunal.

76. It is clear that the appellate route is only applicable where what is being challenged is the decision of the Bureau or the Council. In this case, the Petitioners' grievances are not restricted to the actions of the ***Bureau or the Council***. The Petitioners challenge the decisions of the Cabinet Secretary and the President as well. I am well aware of the principle established by the Court of Appeal of Trinidad and Tobago in the case of **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004** that where there is a means of redress that is inadequate, the Court should not exercise restraint. In that case the Court held:

"The opinion in Jaroo has recently been considered and clarified by the Board in A.G vs Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their lordship's words:

"Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court's process. Atypical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power...Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights"."

77. I entirely agree and confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. Therefore confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. In other words the Court ought to consider whether the alternative remedy is less convenient, beneficial and effectual. It must be appreciated that judicial review has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. See **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43.**

78. The right to access this Court should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms except in the circumstances noted in **Belfonte (supra).** The Petitioners instituted these proceedings claiming breach of their rights and fundamental freedoms. The mandate and jurisdiction to determine that question lies in this Court under Articles 22, 23(3) and 165(3)(d) of the Constitution. The Tribunal, in my view, does not have the jurisdiction to determine alleged violations of the Constitution -See **Wananchi Group (Kenya) Ltd vs. The Communications Commission of Kenya Petition No.98 of 2012**. **Majanja J** in **Isaac Ngugi vs. Nairobi Hospital and Another Petition No. 461 of 2012** found on the same lines when he expressed himself as follows:

"For instance, the Court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in questions. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the Constitutional guarantee even though there exists private law regulating a matter within the scope of the Application of the Constitutional right or fundamental freedoms. In such cases, the Court may proceed to apply the provisions of the Constitution directly." (Emphasis added).

79. I associate myself with the decision of **Nyamu, J** (as he then was) in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** where he held:

"On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from

dictatorships. The courts should never, ever, abandon their role in maintaining the balance...From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism."

80. In my view, it would not be fair, convenient or conducive to the proper administration of justice to require a Petitioner to split its case into two or more causes and file them before different Tribunals when the matter can be dealt with by one Tribunal. In my view the Petitioner in such circumstances ought to commence the case before the Tribunal with the jurisdiction to hear and determine all the questions in controversy and grant all the reliefs sought. That Tribunal, in the circumstances of these Petitions is the High Court.

81. Accordingly I find no merit in the objection that the issues raised in these Petitions ought to have been dealt with pursuant to section 11 of the ***Standards Act***.

82. I must state from the outset that in consolidating these matters this Court expressly stated that it would only limit itself for the purposes of the consolidated causes to the following issues and leave the remaining issues, if any to be determined in the individual files unless otherwise ordered later:

1. **The legality and constitutionality of the Presidential directive.**

2. **The legality of the letter dated 3rd July, 2015.**

3. **The legality and constitutionality of the Alcoholic Drinks Control (Supplementary) Regulations, 2015.**

83. In **Federation of Kenya Women Lawyers (Fida-K) & Others vs. Attorney General & Others Nairobi HCCP No. 102 of 2011 [2011] eKLR**, a three Judge bench of this Court **Mwera, Warsame & Mwilu, JJ** expressed itself on 25th November, 2011, *inter alia* as follows:

"Only last year and in our early maritime history we constructed a great ship and called it our new Constitution. In its structure we put in the finest timbers that could be found. We constructed it according to the best plans, needs, comfort and architectural brains available. We tried to address various and vast needs of our society as much as possible. We sent it to the people who ratified it. It was crowned with tremendous success in a referendum conducted on 4th August 2010. We achieved a wonderful and defining victory against the "REDS". We vanquished them. The aspirations and hope of all Kenyans was borne on 27th August 2010. We achieved a rebirth of our Nation. We have come to revere it and even have an affection for it. We accomplished a long tedious, torturous and painful chapter in our history. We all had extraordinary dreams. It is a document meant to fight all kinds of injustices. It is the most sophisticated weapon in our maritime history. As Kenyans we got and achieved a clean bill of constitutional health. However, the honeymoon is over, it is time to do battle with it. This case is a battle between competing interests over the provisions of the Constitution...We appreciate that men and women need support in their fight to claim and protect their liberties and their natural refuge and their protectors are the courts. The main impediment to the implementation and protection of Individual Rights is the prevailing social attitude. As they say, you can legislate equality all you want, but you cannot make people think it and live it particularly if they had been conditioned through inherited traditions and their own life experiences to the concept of inequality...Whilst recognizing that even the most progressive Constitution cannot alone solve all the ills of society, the constitution that aspires to be legitimate, progressive, authoritative and to be accepted as a fundamental law must also address, inter alia, the fundamental rights of the people and ensure elimination of all forms of discrimination especially against women and disabled persons."

84. Long before the promulgation of the current constitution on 27th August, 2010, **Madan, J** in the case of **Githunguri vs. Republic KLR [1986] 1** expressed himself as follows:

"We believe we are speaking correctly and not for the sake of being self laudatory when we say the Republic of Kenya is praised and admired by other people and other systems for the independent manner in which justice is dispensed by the courts of this country. We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the constitution if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law you destroy justice thereby also destroying the society."

85. What informed the decision to retire the former Constitution was the appreciation that the said Constitution had with time been diluted by incessant amendments that it was nolonger capable of meeting the aspirations of the people. As was often said the effect of the said amendments were that what used to be the kitchen had been turned into a bedroom while the bedroom had been turned into a bathroom. In other words it was nolonger possible to determine what the original document looked like as a result of several substantial ill-conceived and poorly thought of "renovations" to the Constitution. Kenyans therefore decided that no serious purpose would be achieved by repairing the document. A time had come for Kenyans to start on a clean slate. Therefore apart from Transitional provisions which were meant to ensure there was a smooth exodus from the old system to the new dawn, Kenyans decided to have a clean break from the old way of conducting business. Most of the provisions in the Constitution were informed by the experience that Kenyans had endured and their determination not to go back there. One such experience was the fact that Parliament through the said renovations had since ceased being answerable to the people and did whatever pleased it without any qualms.

86. Kenyans therefore decided to protect certain provisions of the Constitution unto themselves and barred Parliament from intermeddling in the same. Kenyans made it clear that sovereignty belonged to them and that they had only ceded some of their powers to their agents or delegates, the Legislature, the Executive and the Judiciary. However they expressly provided that such delegated power must be expressed in accordance with the will of the people as decreed in the Constitution, the ultimate expression of their will.

87. Accordingly, it is important to take note of the following Articles of the Constitution:

> ***(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.***
>
> ***2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.***
>
> ***(2) No person may claim or exercise State authority except as authorised under this Constitution.***
>
> ***(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.***
>
> ***3. (1) Every person has an obligation to respect, uphold and defend this Constitution.***
>
> ***4. (2) The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.***

88. The said national values and principles of governance which are expressly stated to bind all State organs, State officers, public officers and all persons whenever any of them applies and interprets the Constitution, enacts, applies or interprets any law and makes or implements public policy decisions include, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, good governance, integrity, transparency and accountability.

89. Under Article 73(1)(a) of the Constitution it is provided that authority assigned to a State officer is a public trust to be exercised in a manner that is consistent with the purposes and objects of the Constitution, demonstrates respect for the people, brings honour to the nation and dignity to the office, promotes public confidence in the integrity of the office and vests in the State officer the responsibility to serve the people, rather than the power to rule them.

90. Being a public trust, the authority assigned to a State officer is therefore one that is to be accounted for by the officer concerned to the people. Kenyans appreciated that as a result of the accumulation of power in the executive in the retired Constitution, accountability had long been thrown to the dogs and the State officers were rulers rather than servants of the people. Therefore in order to ensure that the executive was accountable to the people the Constitution went further and expressly provided the manner in which the executive power was to be exercised by the Chief Executive of the country, the President. That Kenyans desired a radical shift from the previous legal and Constitutional framework was appreciated by **Mutunga, CJ & P** in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR** where he expressed himself as follows:

> **"In Paragraph 8 of my dissenting Advisory Opinion *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion of the Supreme Court* (Reference No 2 of 2012), I endorsed the approach to the interpretation set out in the Constitution itself, and in the provisions of the *Supreme Court Act.* There is no doubt that the Constitution is a radical document, that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism, and 50 years of independence. In their wisdom, the Kenyan people decreed that past to reflect a *status quo* that was unacceptable and unsustainable, through: provisions on the democratization and decentralization of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya which they delegate to institutions that must serve them, and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights, giving the whole gamut of human rights the power to radically mitigate the *status quo* and signal the creation of a human-rights State in Kenya; mitigating the *status quo* in land that has been the country's Achilles heel in its economic and democratic development. These instances, among others, reflect the will and deep commitment of Kenyans, reflected in fundamental and radical changes, through the implementation of the Constitution. It is also the will of the Kenyan people that they rely on the Judiciary to protect and develop the Constitution. Article 159 of the Constitution deals with the principles governing the exercise of judicial power, identifying the source of that power in the people of Kenya. The constitutional provisions on the Judiciary (its independence, its integrity, its intellectual leadership and the distinction of its judges and its resources) make this abundantly clear. Therefore, the early years of the decisions of the Courts, and in particular those of the Supreme Court, will be seminal and critical for the future development and impact of the Constitution. Although I had categorized the jurisprudence envisaged by the Constitution as robust (rich), patriotic, indigenous and progressive (all these attributes derived from the Constitution itself, and from Section 3 of the Supreme Court Act), perceptions of this decolonizing jurisprudence can be summed up as Social Justice Jurisprudence, or Jurisprudence of Social Justice. Such jurisprudence in all our Courts, and in particular at the Supreme Court, as the apex court in the Republic of Kenya, will ensure that the fundamental and core pillars of our progressive Constitution shall be permanent, irreversible, irrevocable and indestructible**

– as should also be our democracy."

91. Therefore in Article 135 of the Constitution, Kenyans expressed their will by providing that:

A decision of the President in the performance of any function of the President under this Constitution shall be in writing and shall bear the seal and signature of the President.

92. One however must remember that the person holding the office of the Presidency is first and foremost a human being with his or her own human rights which inhere in him or her as a human being and which are not donated by the State but which are simply recognised by the State. Accordingly, as a human being the President for example has the freedom of expression which allows him or her to express himself or herself in respect of any matter in which he or she deems he or she needs to share with fellow human beings, of course within the parameters permitted under the law. However the freedom of expression by a President in the exercise of his or her rights and fundamental freedoms must be distinguished from the exercise of power under Article 135 of the Constitution as read with Article 132(3)(b) of the Constitution. Under the latter, the President is expressly mandated to direct and co-ordinate the functions of ministries and government departments. That is clearly a function which the President exercises under the Constitution. It is therefore a function which clearly falls within the provisions of Article 135 of the Constitution. Whereas when the President is simply exercising his or her freedom of expression, whatever he says is not binding on any person, it may have persuasive effect. In that event he or she is not bound to put his or her expression in writing as required under Article 135. However where the President intends that his or her decision in the exercise of his or her powers under the Constitution be acted on he or she is expected by the Constitution, from which he or she derives his or her executive powers, to comply with Article 135 and ensure that the decision is in writing and bears the seal of his or her office and signature.

93. As was held in **Commissioner of Income Tax vs. Menon [1985] KLR 104; [1976-1985] EA 67,** it is one of the canons of statutory construction that a court may look into the historical setting of an Act, to ascertain the problem with which the Act in question has been designed to deal. Similarly, in **Njoya & 6 Others vs. Attorney General & Others (No. 2) [2004] 1 KLR 261; [2004] 1 EA 194; [2008] 2 KLR**, a majority of the Court held that quite unlike an Act of Parliament, which is subordinate, the Constitution should be given a broad, liberal and purposive interpretation to give effect to its fundamental values and principles. That purposive approach was explained by the Supreme Court **In the Matter of the Principle of Gender Representation in the National Assembly and The Senate Advisory Opinion Application No. 2 of 2012,** where it was held that a purposive approach would take into account the agonized history attending Kenya's constitutional reform.

94. In **Murungaru vs. Kenya Anti-Corruption Commission & Another Nairobi HCMCA No. 54 of 2006 [2006] 2 KLR 733**, it was held that our Constitution must be interpreted within the context and social, and economic development keeping in mind the basic philosophy behind the particular provisions of the Constitution. Article 135 of the Constitution, in my view is steeped in historical context. To me, the said Article was found necessary to be inserted expressly in the Constitution due to the past experience where the head of State would make serious decisions with serious ramifications in rather carefree manner for example in political rallies and on "meet the people" political tours in what became commonly known as "roadside declarations". It was not unheard of for appointments and dismissal of State Officers to be done in such incongruous fora. When questions arose as to the import and impact of the declarations some of which were clearly vague and were left to the interpretation of the people who believed they were directed at, it was always impossible to know with certainty whether the utterances were in the exercise of freedom of speech or were to be interpreted as made in the exercise of Constitutional and statutory authority. The results was simply chaos.

95. It must be appreciated that directives under the Constitution in the exercise of executive powers of the President are serious matters that ought to be given only after serious circumspection and after full appreciation of the full effects of the likely consequences of their application. The requirement for writing affords the President time to reflect on and if possible seek legal opinion on the likely effects of the decision thus avoiding situations where the actions are subjected to litigation or to ugly scenes in the implementation of the directive. That cooling period also affords the President time to ensure that the directive is carried out in an orderly manner so as to achieve its purpose in accordance with the national values and principles of governance. In other words in the exercise of the powers conferred on the President under Article 132 of the Constitution, the decision or action must not be based on emotions but must well thought of and must be precise and exercised in accordance with respect for the rule of the law and must be targeted at the purpose for which they are meant to achieve.

96. I must hasten to add that where the President simply states what is already the law, there is no requirement for him to comply with the provisions of Article 135 of the Constitution since he would only be giving a reminder on the implementation of a function which he or she had already exercised.

97. It is contended that on the 1st of July 2015, H.E. the President of the Republic of Kenya ordered a crackdown on the production and sale of illicit liquor within the country. That this directive was given has not been disputed. The only issue is what its import and impact was. If this directive was in the exercise of the functions under Article 135 of the Constitution, I would have had no hesitation is declaring it unlawful since it was clearly not in writing and could therefore not be under seal and was incapable of being signed. I have listened to the video which was exhibited in these proceedings and it is clear that the President while addressing himself to what he termed "*pombe haramu*" in fact directed the closure of all "dens" notwithstanding whether or not they were licensed. As conceded by the Petitioners themselves, the proliferation of illicit liquor in this country has reached an alarming proportion. The effect thereof on the young people of this country is clearly devastating. If left unattended to, the effect will clearly reach a level where it would have to be a declared a national disaster. The manufacture and distribution of such illicit liquors which have led to serious adverse affects on the health and lives of Kenyans must be stemmed and any Kenyan of good will must support the efforts by the Government to stamp such ignominious business. The Petitioners themselves expressly averred that they fully support and have always been in support, of all efforts by the Government to regulate and stamp out the production and sale of illicit liquor which is perpetrated by unlicensed persons and counterfeiters much to the detriment of the interests of legitimate brewers and the consumers at large.

98. However the fight must be orderly and must respect the human rights and their fundamental freedoms and must be conducted in accordance with the law and the Constitution. In other words the appreciation of the need to rid the country of the illicit alcohol does not give the Government a free hand to breach the law and the Constitution. In carrying out its mandate of protecting Kenyans, the Government must respect the rights of the same Kenyans it is obliged to protect.

99. Whereas compliance with the dictates of the rule of law may sometimes be frustrating and at times obstructive and inconveniencing to those in authority, that is a sacrifice we must make since as appreciated in the preamble to the Constitution, we recognise the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. As was held by the Court of Appeal in **Judicial Commission of Inquiry Into The Goldenberg Affair & 3 Others vs. Job Kilach Civil Application No. Nai. 77 of 2003 [2003] KLR 249**, democracy is normally a messy, and often times, a very frustrating, way of governance and in this respect, dictatorships are more efficient. However as the same Court appreciated in **Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another Civil Application No. Nai. 43 of 2006 [2006] 1 KLR 77:**

> **"We recognize and we are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the Courts, sometimes even to the annoyance of the public and the only institution charged with the duty to interpret the provisions is the High Court and where permissible, with an appeal to the Court of Appeal. Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court's decisions since occasionally those who have been mighty and powerful are the ones who would run and seek the protection of the Courts when circumstances have changed…The courts must continue to give justice to all and sundry irrespective of their status or former status."**

100. In this case the President's directive while directed at illicit brews, ordered the Members of Parliament to spearhead the crackdown on the same. Whereas no one harbours any doubt that the President's directive was clearly appropriate, had the President addressed himself to those who are statutorily mandated to implement the law relating to illicit liquor, no one would have been questioning his directive as in those circumstances he would not have been directing those organs to carry out a function which hitherto did not exist but would be waking them up to carry out their mandate. That the law imposes a duty on the Cabinet Secretary, the Police, KEBS and NACADA to take steps to rid the country of illicit liquor cannot be doubted. In fact the Petitioners appreciated that KEBS has a statutory mandate under the ***Standards Act*** to ensure standardisation in industry and commerce within Kenya and for the purposes of carrying out its mandates under section 4. To that extent the President would not have been deemed to be undertaking a fresh mandate under any law but simply directing those concerned to ensure that the law was implemented.

101. However, the President's audience and those to whom the directive was addressed and whom he directed to report to him, the Members of the National Assembly and the Senate, were not those legally mandated to carry out what he was directing them to undertake. In my view, the President was giving them fresh mandate. Members of Parliament's role is clearly provided for in the Constitution and in line with the principle of separation of powers, the President, in a Presidential System like ours should not direct Parliament in the manner in which it conducts its matters unless the Constitution expressly empowers the President to do so. In the premises to the extent that the directives of 1st July, 2015 were directed to Members of Parliament, as opposed to the executive, who were further directed to report back to the President, the said directives violated the doctrine of separation of powers as well as Article 132(3)(b) of the Constitution as read with Article 135 thereof.

102. This was clearly appreciated in **Doctors for Life International vs. Speaker of the National Assembly and Others** (CCT 12/05) [2006] ZACC 11 where it was held:

> **"The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle "has important consequences for the way in which and the institutions by which power can be exercised."**

103. The executive, and any arm of the Government must be conscious of the vital limits on its authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the executive should not interfere in the processes of other branches of government or purport to direct the other branches on how to conduct themselves unless to do so is mandated by the Constitution.

104. As appreciated in **Republic vs. Chief Justice of Kenya & 6 Others exp Moijo Mataiya Ole Keiwua Misc. Appl. No. 1298 of 2004**, the President's actions can be challenged if unconstitutional. This was the position even before the promulgation of the current Constitution, a position given effect to by **Nyamu, J** (as he then was) in **Mureithi & 2 Others (For Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443,** in which the learned Judge expressed himself as follows:

> **"Where there is no proof that the Presidents followed the constitutional provisions and the law in having trust land set apart, or that the setting apart was for the purposes other than for public purpose, the alienation is challengeable under the Constitution. Thus, both the President and the county councils had no power to alienate land for private use or ownership e.g. forests falling under the trust land as defined in the Constitution, wetlands, islands, public purpose land set aside for hospitals, and cemeteries etc."**

105. The position is similar to the position adopted by the South African Constitutional Court Case of **Doctors for Life International vs. Speaker of the National Assembly and Others** (CCT 12/05) [2006] ZACC 11 where the Court expressed itself as follows:

> **"…under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament "must act in accordance with, and within the limits of, the Constitution", and the supremacy of the Constitution requires that "the obligations imposed by it must be fulfilled." Courts are required by the Constitution "to ensure that all branches of government act within the law" and fulfil their constitutional obligations. This Court "has been given the responsibility of being the ultimate guardian of the Constitution and its values." Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that "the obligations imposed by [the Constitution] must be fulfilled." It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution."**

106. It follows that where it is alleged that the executive has violated or in threatening to violate the Constitution, this Court must step in, investigate the allegations and if found to be merited to remedy the violation or threatened violation.

107. In my holding, by directing the Members of Parliament to enforce a statutory mandate of other organs without complying with Article 135 of the Constitution, it is my view that the President violated the provisions of the said Article.

108. That brings me to the second issue and that is the legality or lawfulness of the letter dated 3rd July, 2015.

109. This letter was written by KEBS and in order to appreciate its full meaning and tenure, I reproduce the substance of the same as follows:

> ***SUSPENSION OF PERMITS TO MANUFACTURE POTABLE SPIRITS***
>
> ***"Following reported deaths in some parts of the country, the National Government and the County Governments have ordered the immediate suspension of al licences for manufacturers of Potable Spirts until an inter-agency Government Departments carries out a nationwide Inspection of Premises and analysis of alcoholic products to ensure that they meet quality Kenya Standards.***
>
> ***Consequently and in line with Section 10A of the Standards Act (Cap 496) and Regulation 11 of the Standards Act (Cap 496) and Regulation 11 of the Standardization Marks (Permits and Fees) Regulations, KEBS is hereby suspending your permit to produce Potable Spirits immediately until the Inter-agency investigation is complete. You are required to immediately stop production until the suspension is lifted.***
>
> ***We would like to assure you the suspension of the Permit shall be reviewed as soon as the report of the inter-agency Government Departments is conducted and you comply with all the conditions under which the permits are issued."***

110. Whereas KEBS cited the statutory provisions, it is clear that the decision to suspend the licences came from the National and the County Governments and the KEBS was simply implementing the same. This view is supported by the fact that the suspension was to await the report of the Inter-agency Government Departments rather than the evaluation by KEBS itself. In my view, it is not convincing to purport that the letter was written in the course of KEBS normal exercise of its statutory mandate. It is clear the action was provoked by decisions by other parties.

112. The decision had the effect of cancelling all licences without differentiating whether the same were genuine or fake and whether they were still valid or expired and whether any specific manufacturer had breached the terms of the licence. The said decision definitely had the effect of adversely affecting the economic interests of those in the liquor industry.

112. Article 47 of the same Constitution provides:

> ***(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.***

113. Pursuant to Article 47(3) Parliament has enacted the ***Fair Administrative Action Act***. Section 4(1), (2) and (3) thereof provides:

> ***4. (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;

(0 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.

114. Under section 2 of the said Act "administrative action" is expressed to include:

(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.

115. That the cancellation of the licences possessed by the Petitioners affected their legal rights or interests cannot be doubted. Accordingly KEBS' decision was clearly an administrative action as contemplated under the said Act. KEBS was therefore under a Constitutional and Statutory duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness necessarily required that persons who were likely to be affected by its decision such as the Petitioners be afforded an opportunity of being heard before the decision adverse to their interest was taken. Further, it was a Constitutional and Statutory requirement that they be given written reasons for the action. It has not been contended that the Petitioners were ever afforded an opportunity to be heard before the decision contained in the letter dated 3rd July, 2015 was made.

116. Even without the provisions of the said Act, the requirement for an opportunity of being heard was appreciated by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where it expressed itself as hereunder:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To "consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion...."Consider" implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void *ab initio.*"

117. In my view a proper consideration of a matter requires that the Tribunal considers all aspects of the case and all aspects of the case cannot be said to have been considered when the person against whom the complaint is preferred has not been called upon to give his or her version of the issues in question.

118. Therefore in withdrawing the approval, KEBS was constitutionally obligated to follow the due process of the law. It was not supposed to act arbitrarily without affording the persons to be affected thereby an opportunity of being heard.

119. As I held in **Republic vs. City Council of Nairobi ex parte North Lake Limited High Court Miscellaneous Application**

> **"a person likely to be affected by an administrative action, in my view, is not necessarily a party to the subject of the transaction…It is settled law that a benefit cannot be withdrawn until the reason for withdrawal has been given and the person concerned has been given an opportunity to comment on the reason."**

120. Having determined that no opportunity was afforded to the Petitioners to be heard before the interests and rights which had accrued to them were arbitrarily withdrawn, the only question that remains is whether the said decision ought to stand. According to KEBS the decision was made under section 10A of the ***Standards Act*** as read with the Regulations to the said Act. Section 10A provides:

> ***(1) The Bureau may where it is satisfied that the holder of a permit—***
>
> ***(a) has not complied with any condition specified therein; or***
>
> ***(b) has not manufactured any commodity to which the permit relates to the relevant Kenya Standard of approved specification, as the case may be; or***
>
> ***(c) has ceased to manufacture the commodity to which the permit relates, cancel, or suspend the operation of, a permit; and suspension under this subsection may be for such period, not exceeding one year, as the Bureau deems fit.***

121. Even without interrogating the said provisions it is clear that a reading of Article 47 of the Constitution together with the decision in ***Onyango Oloo Case*** (supra) implies that the rules of natural justice apply since the above provisions do not purport to take away that right. However the provisions require that for the powers under section 10A to be exercised KEBS must be "satisfied" of the circumstances enumerated in subsections (a), (b) and (c) of the said section exist. How then is KEBS supposed to be "satisfied" of the same? In my view, for KEBS to be said to have been satisfied, it must have consider all the relevant factors. The word "consider" was defined in ***Onyango Oloo Case*** (supra) as follows:

> **"To consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided."**

122. What then does the Court do when the authority leaves the parties affected by its decision guessing about what maters informed its decision by not disclosing the said reasons? In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090,** the Court expressed itself as follows:

> **"The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law…The facts, which induced the Minister to find that the holding was mismanaged and that the applicants were unable to develop it, were disclosed neither to the applicants nor later to the court. In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons...Orders made must comply with the Act, and if they do not so comply in important aspects, they will be null and void…The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority…An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not direct himself in fact or law…It is clear that both sections 187(1) and (4) require the Minister to be "satisfied". It gives him a discretion; and it is his discretion to act upon the facts before him, and not for the court to sit on appeal so as to impose its judgement on the facts upon the Minister. There is no doubt that the Minister acted in good faith. But the Minister had to have certain facts before him."**

123. From the above decision it comes out clearly that even though KEBS has the discretion to cancel licences where it is satisfied that the relevant provisions apply, that satisfaction must appear on the face of the record and where there are no material on the basis of which it can be said to have been satisfied, the Court would be entitled to find that it had no basis for being "satisfied" since its satisfaction must be based on certain existing facts. It is now trite that there are circumstances under which the Court can interfere with the exercise of discretion. In **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323** the Court held:

> **"...this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable."**

124. From the foregoing it is clear that KEBS in the exercise of its discretion breached the duty to act fairly. The rule of law required it to act fairly. This was the position adopted in the English case of **Reg vs. Secretary of State for the Home Department ex-parte Doody [1994] 1 AC 531** where it was held that:

> **"The rule of law in its wider sense has procedural and substantive effect...Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural."**

125. Accordingly, KEBS abused its discretion and power. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240:**

> **"The rule of law is the cog upon which all the provisions of the Constitution turn...My finding on this is that where there is evidence of abuse of power as indicated in one or two of the cases cited above the court is entitled to proceed as if the source of that power did not exist in respect of the special circumstances where the abuse was perpetrated. Parliament did not confer and cannot reasonably be said to have conferred power in any of the taxing Acts so that the same powers are abused by the decision making bodies. In such situations even in the face of express provision of an empowering statute appropriate judicial orders must issue to stop the abuse of power. A court of law should never sanction abuse of power, whether arising from statute or discretion. Equally important is the uncertainty resulting from a change of tariff. As held above this is a violation of the rule of law. This violation has the same legal effect as abuse of power and attracts the same verdict – *see Benett* case (*supra*). Nothing is to be done in the name of justice which stems from abuse of power. It must be settled law by now, that a decision affecting the rights of an individual which stems from abuse of power cannot be lawful because it is outside the jurisdiction of the decision making authority guilty of abusing power. Abuse of power taints the entire impugned decision. A decision tainted with abuse of power is not severable. The other reason why the impugned decision cannot be severed from any other lawful actions in the same decision is because of the great overlap which has occurred in this case stretching from illegality, irrationality impropriety of procedure to abuse of power. Once tainted always tainted in the eyes of the law."**

126. Whereas KEBS has power under the ***Standards Act*** to cancel licences, that power must be exercised in accordance with the Constitution and the provisions of the Act donating the power. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** it was held that one of the grounds for quashing a decision is procedural impropriety which the Court described as:

> **"...a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

127. In my view KEBS committed all the actions constituting procedural impropriety. It failed to observe the rules of natural justice; it did not act with procedural fairness towards the Petitioners; and it did not observe the procedural rules laid down in the statute under which it purported to be exercising its jurisdiction.

128. In **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,** the Court held:

> **"If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a 'determination' within the meaning of empowering legislation was accordingly a nullity…Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law…It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."**

129. In my view a proper consideration of a matter requires that the Tribunal considers all aspects of the case and all aspects of the case cannot be said to have been considered when the person against whom the complaint is preferred has not been called upon to give his or her version of the issues in question. As was held by **Emukule, J** in **Republic vs. Kombo & 3 Others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 [2008] 3 KLR (EP) 478**:

> **"The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong (such as taking a man's land), or which infringes a man's liberty (as by refusing him planning permission), must be able to justify its action as authorised by law – and nearly in every case this will mean authorised directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard."**

130. In my view, an administrative action cannot be said to be procedurally fair when the process of arriving at it is shrouded in mystery. Further an administrative action cannot be said to be procedurally fair where a decision is arrived at based on an opinion formed as a result of the consideration of the version of only one side since by a consideration of one side one cannot be said to have felt certain about the truth of the matter in dispute. Where one's right or fundamental freedom is likely to be affected by an administrative action, that person has a right to be given written reason for the action. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court of Canada in **Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held:

> "**The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."**

131. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable. It was in appreciation of this that judicial review was recognised in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** as the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.

132. To decide to cancel all valid licences without considering whether or not the licensees have in their individual capacities broken the law amounts to arbitrariness. It amounts to collective punishment and in my view collective or communal punishment has no place in the current constitutional dispensation. Further, to hold therefore that a member of the executive is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary, it has been held, is the first victim. Accordingly the Courts are empowered to and are under a duty to investigate allegations of abuse of power and improper exercise of discretion.

133. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

134. According to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority or power.

135. This position was appreciated in the South African case of **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99,** with respect to the provisions of the Constitution of that Country which bears similarities to our own Constitution. In that case, the Constitutional Court of South Africa (**Chaskalson, P**) expressed itself as follows:

> **"Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution…Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was "the main crucible" for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to**

claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control."

136. It was further contended that the said decision violated the Petitioners' legitimate expectations that their permits and licences which were validly granted after full inspection would not be withdrawn without giving reasons and hearing the Petitioner before withdrawing the same. This is the position adopted by **De Smith, Woolf & Jowell,** in ***"Judicial Review of Administrative Action"*** 6th Edn. Sweet & Maxwell page 609 where it is stated:

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

137. In **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** it was held:

"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine."

138. Similarly in **R vs. Devon County Council ex parte P Baker [1955] 1 All ER** it was held:

"...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision."

139. In my view there is a legitimate expectation that public authorities will comply with the Constitution and the law. In our context it is expected that public authorities will adhere to the constitutional values and principles including those enumerated in Article 10. I am therefore in agreement with the Petitioners that the decision to cancel their valid licences and permits without the due process being followed violated their legitimate expectations and was therefore unlawful.

140. It is therefore my view and I so hold that KEBS decision to cancel all the licences as expressed in the letter dated 3rd July, 2015 was clearly tainted with illegality and procedural impropriety.

141. The third issue for determination was the Constitutionality and legality of the ***Alcoholic Drinks Control (Supplementary) Regulations, 2015***. These Regulations were, according to the Cabinet Secretary, Ministry of Interior and Co-Ordination of National Government, triggered by the Presidential directive. If that was the position then the Cabinet Secretary must have deemed the Presidential directive of 1st July, 2015 to have been given pursuant to the provisions of Article 132(3)(b) in the exercise of the powers of the President in co-ordinating the functions of ministries and government department. For that exercise to had any legal validity it had to comply with Article 135 of the Constitution. Therefore in so far as the Regulations were purportedly enacted in accordance with an invalid directive, the said Regulations were similarly invalid.

142. It was further contended that the said Regulations did not comply with section 5(1) of the ***Statutory Instruments Act, 2013.*** The said provision provides:

(1) Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—

(a) have a direct, or a substantial indirect effect on business; or

(b) restrict competition;

the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.

143. This provision is a clear reflection of the provisions of Article 10(2)(a) of the Constitution which provides that one of the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever they inter alia enacts, applies or interprets any law and makes or implements public policy decisions is participation of the people.

144. Section 2 of the ***Statutory Instruments Act*** provides:

"statutory instrument" means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.

145. It is therefore clear that by that definition, the ***Alcoholic Drinks Control (Supplementary) Regulations, 2015*** is a statutory instrument hence subject to the provisions of section 5(1) of the ***Statutory Instruments Act*** as read with Article 10(2)(a). It cannot be doubted that the said Regulations had both direct and a substantial indirect effect on businesses of the Petitioners. In fact according to the Petitioners, as a result of their implementation, the Petitioners incurred enormous losses. Therefore the Regulations fell squarely with the contemplation of section 5(1) of the ***Statutory Instruments Act.*** In this case there is no evidence that the ***Alcoholic Drinks Control (Supplementary) Regulations, 2015*** were subjected to the process of public participation as mandated under Article 10. Further, the said Regulations were expressed to take effect immediately. Such direction clearly violated both the constitutional and statutory edicts.

27. According to the Petitioners the same Regulations were never laid before Parliament as required under section 11 of the ***Statutory Instruments Act***. The said provision states:

(1). Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament.

(2) An explanatory memorandum in the manner prescribed in the Schedule shall be attached to any statutory instrument laid or tabled under subsection (1).

(3) The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.

(4) If a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.

146. As was held in **Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary. Joseph Kimiri – Treasurer) & 8 others v Cabinet Secretary for Transport and Infrastructure & 5 Others [2014] eKLR:**

"Whether or not the relevant Cabinet Secretary did transmit the Regulations was, in my view, peculiarly within the knowledge of the said Cabinet Secretary and therefore it behoved him to place before the Court material supporting the fact that he had fulfilled the legal obligation placed on him. Without such evidence, it would be unreasonable to expect the applicants to prove the negative that the Cabinet Secretary did not so comply apart from making an allegation to that effect."

147. In that case the Court held that if the Regulations were not laid before Parliament within seven (7) sitting days after the publication, the same would on the 8th day have become void although the voidance of the Regulations would not nullify the acts which were done thereunder before the said 8th day.

148. Without evidence that the Regulations were laid before Parliament, it is my view and I so hold that the same became void and are therefore a nullity

149. Fundamental rights and freedom which are expressly laid out in our constitution such as the right to a hearing must never be given casual observance or breached with impunity by the Government or its servants. If we show disrespect to the supreme law of the land and fail to correct blatant violation of important provisions of the Supreme Law we will be encouraging such violation and breeds impunity. **Warsame, J** (as he then was) in **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010** did not mince his words when he rendered himself as follows:

"The new Constitution has enshrined the Bill of Rights of all citizens and to say one group can not enjoy the right enshrined under bill of rights is to perpetuate a fundamental breach of the constitution and to legalise impunity at very young age of our constitution. That kind of behaviour, act or omission is likely to have far and serious ramification on the citizens of this country and the rulers. It also raises basic issue of whether a President who has just sworn and agreed to be guided by the provisions of the Constitution can allow his

agents to breach it with remarkable arrogance or ignorance. All these, are issues which require sober and attentive judicial mind in order to address the rights and obligations of all parties involved... *Prima facie* the allegations contained in this application is a serious indictment on the institution of the President and whether he is protecting, preserving and safeguarding the interests, rights and obligations of all citizens as contained in the new constitution. This application is a clear indication that the security arms of this country have not tried to understand and appreciate the provision of this new Bill of Rights. It also shows yester years impunity are still thriving in our executive arm of the government."

150. That decision was handed down almost one month after the promulgation of the current Constitution on 30th September, 2010. One would have thought that five years later, the executive arm of the Government would have internalised the provisions of the new Constitution. Far from it, this case shows that some members of the executive are still living in the dark days of the retired Constitution. The courts, it has been held, would be no rubber stamp of the executive and whereas if Parliament gives great powers to the Minister, the courts must allow them to him, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority; he must act in good faith; extraneous considerations ought not to influence him; and he must not misdirect himself in fact or law. Kenyans expect that all those to whom they have delegated their sovereign power must exercise the same in accordance with the prescription in the Constitution. To those in authority the message pursuant to the social contract is this: exercise the powers in accordance with the dosage prescribed by Kenyans or find yourselves on the wrong side of the law. As this Court held in **Kenya Country Bus Owners' Association & 8 Others vs. Cabinet Secretary for Transport and Infrastructure & Others JR No. 2 of 2014:**

"The principle of accountability mandates that State and public officers be prepared to face the consequences of their actions when such actions are manifestly taken with impunity and *mala fides*. It is only when such officers are personally made to take the responsibility for their actions that the rule of law shall be upheld. The Courts in my view have a duty and a responsibility to ensure that the public does not suffer at the expense of actions or inactions of officers deliberately designed to bring judicial process into disrepute and turn Courts of law into circuses. To blatantly and brazenly disregard legal processes or to turn them into a mockery in the execution of executive authority is in my view an affront to the rule of law, an assault on the Constitution and constitutionalism and a recipe for chaos and anarchy… Whereas public and State Officers have a duty to protect the public they have no right and authority to do so unlawfully. The protection of the public must be done in accordance with the law as laid down in the Constitution and the existing legislation….In exercising its judicial authority, this Court is enjoined by Article 159(2)(e) of the Constitution to be guided by *inter alia* the need to protect and promote the purpose and principles of the Constitution and one such principle is good governance. Good governance in my view dictates that the public ought not to unduly shoulder the burdens of persons whose actions are themselves contrary to their expectations…"

151. Courts must therefore adopt such measures as will deter those who deliberately seek to render our nascent Constitution toothless and bring the rule of law into disrepute. That is a debt that the judiciary owes to the people of this Country and when called upon by the people on whose behalf it exercises sovereign authority, it is obliged under Article 1(3)(c) 0f the Constitution to pay it. As was held by **Lord Griffiths** in **Bennett vs. Horse Ferry Road Magistrate's Court and Anor [1993] 3 All ER at page 150**:

"...the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law...The great growth of administrative law during the latter half of this century has occurred because of the recognition by the Judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended...and if it comes to the attention of the court, that, there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it..."

152. That decision was relied upon by **Nyamu, J** (as he then was) in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** when he expressed himself as follows:

"**I hold that where there is proof of abuse of power and a violation or threat to the rule of law, the court must wholly stop what the perpetrator of those ills intended to do. I apply the principle in the *Benett case* above. The reason for this is that only the might and majesty of law can prevent or act as a deterrence against the temptation to abuse power and also, send the right signals, that public administration must adhere to the rule of law.**"

153. I wish to reiterate that the war against manufacture and sale illicit brews must be fought with the vigour that the vice deserves in order to stamp the menace. In a country like ours which the rule of law thrives and has not been declared a failed State, all actions of the Government must be in accordance with the rule of law. The problem, in my view, with the proliferation of illicit brews must stem from the laxity whether by design or otherwise of the licensing agencies and those who are entrusted with the task of monitoring whether the brewers comply with the law. That is where as it is said the rubber meets the road. By concentrating on the end product, the State, with due respect is holding the wrong end of the stick.

154. When all is said and done, however, that war must fought in accordance with the dictates of the rule of law and must bow to the dictates of the Constitution with respect upholding of the rights and fundamental freedoms as enacted by Kenyans in the referendum conducted on 4th August 2010 and crowned by the promulgation of 27th August, 2010. Policies which affect liberty, economy, property and life if not properly implemented have the potential to lead to catastrophic results as has happened in the past not only in this country but also elsewhere in this continent. Where respect for the rule of law is not adhered to chaos and mayhem reign supreme. Justice must continue to be our shield and defender. The Courts must never shy away from doing

justice because if they did not do so justice has the capacity to proclaim itself from the mountaintops and to open up the Heavens for it to rain down on us. Courts as the temples of justice and the last frontier of the rule of law must ensure that impunity does not reign supreme in our motherland. This must be so because justice is not a cloistered virtue and where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and heaven and earth embrace. See **Mureithi & 2 Others (For Mbari ya Murathimi Clan) vs. Attorney General & 5 Others** (supra).

155. The words of the Court in **Jacqueline Resley vs. City Council of Nairobi [2006] eKLR** bear repetition. In that case the Court expressed itself as hereunder.

> **"The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed…If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place."**

156. An argument that the impugned decisions were made in public interest cannot, in the light of blatant violation of the constitutional and statutory provisions, hold. As was held in **Republic vs. County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya [2014] eKLR**:

> **"There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision."**

157. Before I depart from this judgement I wish to express my gratitude to counsel who appeared in these proceedings for their submissions which I found very useful and which I have considered. If I have not expressly referred to each and every authority cited it is not out of disrespect or lack of appreciation for their industry.

Conclusion

158. Having considered the issues which the Court directed to be determined in these proceedings I hereby make the following orders:

1. **In so far as the Presidential directive was made pursuant to Article 132(3)(b) of the Constitution the same were unconstitutional as it did not comply with the provisions of Article 135 of the Constitution. Accordingly the same, pursuant to Article 2(4) of the Constitution, is void and has no legal effect.**

2. **The decision made by Kenya Bureau of Standards cancelling all the petitioners' permits and licences transmitted vide the letter dated 3rd July, 2015 is illegal and unconstitutional and is hereby quashed.**

3. **The *Alcoholic Drinks Control (Supplementary) Regulations, 2015 are* unlawfully are hence null and void and are consequently quashed.**

4. **For avoidance of doubt any actions taken pursuant to the said actions are similarly unlawful and have no legal effect.**

5. **The issue of costs will be dealt with in the respective individual files.**

159. Orders accordingly.

Dated at Nairobi this 15th day of January, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muite, SC for the 1st Petitioner

Mr Murithi for the 2nd Petitioner

Mr Omuganda for the 3rd Petitioner

Miss Kuria for the 6th Petitioner

Mr Ashitiva for the 4th Respondent

Cc Kazungu