



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CONSTITUTIONAL PETITION NO. 5 OF 2015

AND

IN THE MATTER OF CONTRAVENTION OF THE RIGHTS UNDER ARTICLES 27,28, 92,35,47,55 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF NAKURU COUNTY ALCOHOLIC DRINKS CONTROL ACT, 2015

AND

IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL

SUPPLEMENTARY/LICENCING/REGULATIONS 2015

ANDREW OMWENGA WANJIKU.....PETITIONERS

T/A TRIANGLE BAR & OTHERS

VERSUS

NAKURU COUNTY COMMISSIONER & 3 OTHERS.....RESPONDENTS

RULING

1. The Petitioner’s application filed on 16th September, 2016 proceeded exparte on 23/2/16 as the Respondent, despite service did not attend court or file any affidavit or grounds of opposition to the application. A Memorandum of appearance however had been filed by the Hon. Attorney General the 3rd Respondent on 7/9/15 on behalf of all the Respondents.
2. Mr. Gichuki for the Petitioners argued only prayers 1, 2 and 3 of the application, erroneously entitled as a Chamber Summons rather than a Notice of Motion. Prayer 1 & 2 are clearly spent by virtue of the order of Ndungu J, on 16/9/15. Other prayers were not argued and were apparently abandoned.
3. Prayer 3 of the application seeks an order:

“THAT pending the hearing and determination of this matter this, Honourable court be pleased to issue a conservatory order stopping the Respondents by themselves, their agents and or servants from interfering with petitioners business, or closing, confiscating, damaging the Beers or wines and spirits in the applicants establishments

known as TRIANGLE BAR AND FILLING STATION BAR, MERCY'S PUB AND SHABAHA BAR, LEGACY PUB, SUE TABBY PUB, MWIRERI BAR, TOP UP PUB, QUEENS BAR AND NALEP WINES & SPIRIT and allow them to continue their operations as licensed Retail/Traders to preserve the investments and products therein" (sic).

4. The grounds in support of the application are repeated and fleshed onto in the affidavit sworn by one **Andrew Omwenga Wanjiku** on his own behalf and on behalf of his co-Petitioners. The affidavit also adopts the Petitioner's affidavit and annexures filed alongside their Petition on 31/8/15.

The said affidavit was also sworn by the same deponent on behalf of all the Petitioners.

5. Briefly, the gist of the Petitioners' affidavit is that in the material period, they were all operating bar businesses as alcohol retailers on the strength of single business permits issued to them by the County Government of Nakuru. That they were appointed and authorized to sell alcoholic products from various breweries including Kenya Breweries, London Distillers and Keroche Breweries.

They claim that the County Government had allowed them to continue operations pending the renewal or issuance of proper alcohol retail licences after the County Government enacted the necessary legislation.

6. The Petition was prompted by the alleged confiscation of the so-called 'second generation' alcoholic drinks from the petitioners' establishments. They alleged that the Respondents' agents prohibited them from re-opening their businesses on threat of arrest. The actions, they claim, have impacted adversely upon their source of livelihood and they risk losing their remaining legal stocks, in addition to incurring financial loss through continued payment of rents for the business premises.
7. The Respondents' actions are also allegedly discriminative as the Petitioners' competitors in similar circumstances have been allowed to continue operating.

They assert that the blanket condemnation of the so-called 'second generation' alcoholic drinks resulting from the attendant illegal Presidential directive for the destruction of the same, and the revocation of the Petitioners' licences constitutes a violation of their right to fair administrative action under the Constitution.

8. The depositions in the affidavit in support of the Petition are repeated in averments of the Petition itself. Although the Respondents did not file any material in opposition to the Petitioners' application, this court must satisfy itself that a prima facie case has been established by the Petitioners to warrant the grant of the orders sought
9. **Musinga J.** (as he then was) stated in the case of **Centre for Rights, Education and Awareness & 7 Others -vs- the Attorney General. Petition No. 16 of 2011:**

"At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation".

10. It is evident from the pleadings and affidavits of the Petitioners that at the time of filing this Petition, and indeed, at the time of filing the instant application, with the exception of 5th Petitioner they had no licences authorizing them to operate as retailers of alcoholic products.
11. They stake their position upon the Single Business Permits issued by the County Government of Nakuru copies of which are attached to their application. It would appear that these business

permits were issued to 1st-4th and the 6th to 8th Respondents to authorize them to engage in the business activity described invariably in the documents as “**small bar/traditional beer sellers**”. Yet the Petitioners assert at Paragraph 4 & 5 of their supporting affidavit that they were authorized to sell conventional brands of alcohol produced by *inter alia* Kenya Breweries and Keroche Breweries.

12. The copies of court orders annexed to the affidavits and marked as **MF1-AOW3**, *inter alia* were in respect of licensed brands of alcoholic drinks and beverages produced by the applicants therein, namely Keroche Breweries Ltd and African Spirits Limited. The orders have no nexus with the Petitioners herein.
13. I think the explanation for the foregoing licence anomaly is contained in Paragraph 6 & 8 of the supporting affidavit. Paragraph 6 states:

“That the County Government of Nakuru had not passed the necessary Alcoholic Drink Control Act until early August and the County Government had not formed the relevant District County Committee which were to liaise with the Central Government Liquor Control Agency NACADA to reach a decision of the issuance of the Alcoholic Drink.

Retail License for 2015-2016 year- Annexed is a letter from the County Government addressed to the County Commissioner for and on behalf of the Central Government and the security organs to desist from harassing the Traders until the licences are issued – MF1- “AOW 4”.

14. What I deduce from the above paragraphs, and indeed the entirety of the affidavit and annexures is that a good number of the Petitioners had previously been licensed under the Alcoholic Drinks Control Act which licenses, with the exception of the 5th Petitioner had expired by late 2014 or early 2015. And that subsequently the Nakuru County Government was required to pass the necessary legislation for the regulation of alcoholic drinks.
15. That this enactment was delayed, and that 7 of Petitioners applied for the single business permits which were granted to them by the County Government purportedly to facilitate the continued operation of their businesses. Thus the Petitioners had no retail licences authorizing them to sell alcohol as retailers at the time of the impugned Presidential directive in July 2015, allegedly leading to the destruction of the ‘second generation’ alcoholic drinks and other related activities.
16. On 7th November, 2014 the County Government of Nakuru through its County Secretary and Head of Public Service **J. M. Motari**, had indeed written a letter (annexture **AOW 5**) to the County Commissioner Nakuru to convey the County Assembly’s intention to enact the relevant legislation and to commence issuance of alcohol licences in January 2015. In the meantime, the author pleaded that: **“Security officers to not harass and/or arrest the traders since we shall have a small window as we wind upon this.”**
17. The Petitioners confirm that any of the illicit so-called second generation alcohol in their premises was removed and confiscated following the Presidential directive and that they only hold stocks of licensed alcoholic beverages and therefore they should be allowed to continue operating.
18. The Petitioners are not to blame for their predicament or for the state of affairs in the County Government, but a County’s Single Business Permit/Licence cannot act as a replacement in place of a proper licence to conduct retail businesses in alcohol. It is not denied that the Petitioners may have invested funds in their respective establishments and that they risk incurring financial losses by way of lost stock and other expenses. However it is doubtful that the law is on the Petitioners’ side.
19. A conservatory order can only issue where there is a real danger that an applicant will suffer prejudice due to violation or threatened violation of a Constitutional right or freedom.
20. In my own view, the admissions of the Petitioners regarding their lack of alcohol licences and the prior possession of the so-called ‘second generation’ alcoholic beverages puts to doubt the allegation of prejudice made in the Motion. With regard to the right to be protected against discrimination, what I heard the Petitioners say is that they have been singled out and stopped from operating while other retailers in similar circumstances continue with their business.

Secondly, that they were denied their right to fair administrative action before their licences were revoked and the illicit alcohol confiscated.

21. There is no proof of discrimination in the first place. But even if there were, I do not think that Article 27 (on discrimination), Article 29 (on freedom and security of the person) article 35 (on information or even article 47 (on fair administrative action) can, prima facie be invoked in this instance.
22. Security agents and police have the duty and mandate to enforce the law, in this case the Alcoholic Drinks Control Act which is still in place, and requires that businesses/people dealing with alcohol be licensed accordingly. Actions taken lawfully by authorized persons in the enforcement of the Act, as appears to be the case here, cannot ordinarily give rise to a valid claim of violation of threat or violation of the alleged rights of those on the wrong side of the law.
23. **Musinga J.** (as he then was) clearly qualified the nature of prejudice against which a conservatory order would be issued: It should flow from a violation or threat of violation of a constitutional right. It is upon an applicant to demonstrate such prejudice as a consequence of a violation or threat of a violation of a right. Not every alleged prejudice therefore will warrant the issuance of a conservatory order.
24. What the Petitioners in effect are asking of the court, in my view is to give legal sanction to the letter marked as annexure **AOW5**, and to stop the police from carrying out their lawful duties merely because the County Government has failed to timeously enact the necessary law and to issue the alcoholic drinks licences to the Petitioners. I think that the Presidential directive has been brought into the picture as a red herring, as the police do not need any directive to enforce the law.
25. All that happened as a consequence of the Presidential directive was a more vigorous law enforcement exercise regarding alcoholic beverages, and which eventually caught up with the Petitioners.
26. As a court of law, this court cannot lend its authority in order to give legal sanction to the Petitioners or any other business persons to carry on unlicensed business in alcoholic beverages, whether the beverages be described as licensed brands produced by conventional brewers or as second generation alcoholic beverages.
27. Thus the fact that Keroche Breweries Ltd has been allowed continue to operate with regard to licensed brands or beverages offers no refuge to the Petitioners or any other unlicensed retailer in alcoholic beverages.
28. Similarly, the Petitioner in the authority relied on by the Petitioners, namely: **Witmore Investment Ltd -vs- County Government of Kirinyaga & 3 others (2014)e KLR** was a licensed manufacturer as at 2014 and the premises were licensed. The court in the case applied the principles for the granting of injunctive orders as stated in **Giella -vs- Cassman Brown & Co. (1973) E.A. 318** and the case of **Mrao -vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** on the definition of a prima face case. The authority is therefore distinguishable from the present case and at any rate, the decision can only be of persuasive authority to this court.
29. Bereft of a demonstrable prima facie sound legal and factual basis, the Petitioners' application has the semblance of a *plea ad misericordiae*- plea for mercy. The Supreme Court of Kenya in **Gatirau Peter Munya -vs- Dickson Mwenda Githinji & 2 Others SCK Petition No. 2 of 2013** observed that the question of public interest may often come to play in the consideration of whether or not to grant a conservatory order.
30. The court stated *inter alia* that:

“Conservancy orders bear a more decided public – law connotation: for these orders are orders to facilitate ordered functioning or public agencies, as well as to uphold the adjudicating authority of the court in the public interest..... conservancy orders, consequently should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and proportionate magnitudes and priority levels attributed to the relevant case.”

31. Applying the foregoing principle to the instant application, I am not persuaded on the inherent merit of the matter, particularly with reference to the constitutional rights and values invoked by the Petitioners. Secondly, I am not persuaded that in granting the orders sought, this court would be seen to uphold its authority in the public interest, as already intimated in this ruling. I find no merit in the application and therefore dismiss it in its entirety.

Delivered and Signed at **Naivasha** this **21st** day of **April, 2016**.

Mr. Gichuki for the Applicant

N/A for the Respondents

Court Clerk: Mr. Barasa.

C. MEOLI

JUDGE