



**THE REPUBLIC OF KENYA**

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

**PETITION NO 1A OF 2016.**

**IN THE MATTER ARTICLES 2(4), 10,22(1), 23(1) & (3), 47(1) &(2), 50(1), 259(1), 165(3)(B),  
260,232 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF RULES 4, 11, 13 AND 23(1) OF THE PROTECTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 10,47 (1) & (2), 50(1), 132(3) OF THE  
CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ALCOHOLIC DRINKS CONTROL ACT 2010 AND THE ALCOHOLIC  
DRINKS CONTROL (LICENSING) REGULATIONS ISSUED UNDER LEGAL NOTICE NO.  
206 OF 2010**

**BETWEEN**

**PENBOM (K) LIMITED.....PETITIONER**

**AND**

**THE CABINET SECRETARY FOR**

**INTERIOR AND COORDINATION**

**OF NATIONAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

**The Application**

The Petitioner is a company incorporated under the Companies Act Cap 486 of the Laws of Kenya,

whose objects include to brew, distill and manufacture various alcoholic drinks and liquors. The Petitioner alleges that in May 2015 at its place of work, officers alleged to be working on the orders of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents raided its alcohol manufacturing premises, purporting to enforce a presidential directive that all companies manufacturing second generation alcoholic drinks be shut down.

The Petitioner consequently moved this Court by way of a Petition dated 18<sup>th</sup> January 2016, and contemporaneously also filed an application by way of Notice of Motion of the same date, which application is the subject of this ruling. The Petitioner in the said application is seeking orders that pending the hearing of its Petition, the Court issues conservatory order restraining and/or preventing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from marauding the Petitioner and/or interfering with the Petitioner's lawful manufacturing of alcoholic products and their distribution and/or sale, or the business premises and the properties therein.

The application was premised on the grounds that the Petitioner was suffering great losses as a result of the acts of the Respondent which had led to the temporary close of her business, and that if the orders sought are not granted, the Respondents will continue to infringe, threaten and or violate the Petitioner's constitutional rights and the rules of natural justice.

The Petitioner relied on a supporting affidavit sworn on 18<sup>th</sup> January 2016 by Peninah Mueni Mususya one of its directors, wherein she averred that the Petitioner was a licensed business having obtained a single business permit from the County Government of Machakos. Further, that in the year 2015, the Petitioner applied for, and was awarded with a manufacturer drink license by the Matungulu District Alcoholic Drinks Regulation Committee authorizing it to brew drinks above 12,000 litres but below 499,999 litres per annum. It was also stated that the Petitioner was a registered taxpayer and has been paying all the taxes as they became due.

Other licences that were stated to have been awarded to the Petitioner were a license to sell, prepare, pack and display food by the Ministry of Health. In addition that the Petitioner has been using raw materials that have been analysed for the manufacture of her products, and that the alcoholic drinks it manufactured were inspected by the Kenya Bureau of Standards (KEBS) and the Petitioner was permitted to use the KEBS standardization mark.

The Petitioner further averred that it has an environmental audit report conducted and the same was submitted to National Environment Management Authority (NEMA) Machakos. Furthermore, that it had submitted the required documents to the National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA), which wrote to the Petitioner indicating that they had received and verified the documents.

According to the Petitioner, the actions of the Respondents restricting the applicant from operating her business were therefore illegal and unlawful as it had obtained all the necessary licenses which were still in force. The Petitioner attached various documents in support of the averments.

The Respondents did not file any response to, or submissions on the application, despite being served with the said application and hearing notices.

### **The Issues and Determination**

The Court directed that the application by the Petitioner be canvassed by way of written submissions. The Petitioner's learned counsel, Andrew Makundi & Company Advocates, filed submissions dated 11<sup>th</sup> February 2016. I have read and carefully considered the pleadings and submissions made herein by the Petitioner. The issue for determination is whether the Petitioner has shown a *prima facie* case with a likelihood of success, so as to be granted the conservatory orders it seeks in terms of restraining and/or preventing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from interfering with the Petitioner's lawful manufacturing, distribution and sale of its alcoholic products or its business premises and properties.

This Court is granted powers to issue conservatory orders in constitutional petitions under Article 23 (3) (c) of the Constitution, and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. The applicable principles for the grant of a conservatory were detailed by Onguto J. in **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others** [2015] eKLR

In summary, the principles are that the Applicant ought to demonstrate an arguable *prima facie* case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.

The submissions on behalf of the Petitioners in this respect were that the 2<sup>nd</sup> Respondent has through the law enforcing agencies deemed the Petitioner's business illegitimate, and has maintained that the Petitioner should liaise with the Inter-agency Taskforce for Control of Portable Spirit and Combat of Illicit Brews which is based in the office of the 1<sup>st</sup> Respondent. It was submitted that liquor licensing was devolved as provided for under section 4 of part 2 of the 4<sup>th</sup> schedule of the Constitution, and therefore the said agency had no mandate to shut down the Petitioner's business premises especially upon having acquired all the required licenses from the County Government of Machakos.

Reliance was also placed on Article 10(2)(d) of the Constitution, and it was submitted that the objective of attaining economic growth through sustainable development therein will not be achieved since the Petitioner's contribution is being disregarded through closure of her business premises. Further, that the expectations of Article 259(1) on an interpretation of the Constitution to that advances the rule of law and good governance were not taken into account, and the Petitioner has hence suffered a loss.

Lastly, it was submitted that there was breach of Article 47(1) and (2) of the Constitution on the right to fair administrative action, and that the Petitioner was entitled to be furnished with written reasons prior to the implementation of the presidential directive by the 2<sup>nd</sup> Respondent through the police officers who oversaw the implementation of the legislation by the 1<sup>st</sup> Respondent. Reference was made to the decision in **Keroche Breweries Limited v Cabinet Secretary, Ministry of Interior And Co-ordination of National Government & others, High Court Constitutional Petition 295 of 2015** [2015] eKLR on the circumstances when a presidential directive can be held to be unconstitutional

I find that the Petitioner have laid a strong basis for the legality of their business, and have attached evidence of the various licences and authorisations issued to them in this regard. This evidence was not controverted by the Respondents. The prejudice that is being suffered by the Petitioner by the closure of its business is also self-evident, and has been demonstrated. To this extent I find that the Petitioner has shown a *prima facie* case with a likelihood of success.

In addition, it is my view that the grant of conservatory orders herein will enhance the constitutional values cited by the Petitioner and the public interest in promoting adherence to the rule of law. I wholly adopt the holding by Odunga J. in this regard in **Keroche Breweries Limited v Cabinet Secretary, Ministry of Interior And Co-ordination of National Government & others, High Court Constitutional Petition 295 of 2015** [2015] eKLR wherein the learned Judge observed as follows:

**“In purporting to suspend the permits for all manufacturers of portable spirits, its effect is to literally ground such entities notwithstanding the legitimacy or otherwise of their businesses. Such a blanket and overbroad sweeping yet ambiguous directive ought to be frowned upon in any democratic society guided by the rule of law. Collective punishment, in my view is an antithesis to the rule of law and in my view such actions are a recipe to chaos and disorder.”**

I accordingly hereby grant a conservatory order restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by themselves,

their servants, agents or otherwise from interfering with the Petitioner's lawful manufacturing, distribution and/or sale of alcoholic products and/or the Petitioner's business premises and the properties therein pending the hearing and determination of the Petition filed herein.

Orders accordingly.

**Dated, Signed, and Delivered at Machakos this 25<sup>th</sup> day of May 2016**

**P. NYAMWEYA**

**JUDGE**