



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERUGOYA
CONSTITUTIONAL PETITION NO. 1 OF 2016

KERUGOYA WAMBO WINES AND SPIRITS LTD.....1ST PETITIONER
WISEBORN INDUSTRIES LTD.....2ND PETITIONER
MUNYIRI SPECIAL HONEY LTD.....3RD PETITIONER
ROSKIN AGENCIES.....4TH PETITIONER

VERSUS

OFFICER IN CHARGE, EMBU G.K PRISON.....1ST RESPONDENT
COMMISSIONER OF PRISONS.....2ND RESPONDENT
CHIEF REGISTRAR OF HIGH COURT.....3RD RESPONDENT
HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. Kerugoya Wambo Wines and Spirits Ltd, Wiseborn Industries Ltd., Munyiri Special Honey Ltd. and Roskin Agencies are the petitioners/applicants herein who have moved this Court vide a Notice of Motion dated 8th February, 2016 brought under Article 23 of the **Constitution** and **Rules 3 (2), 4(1), 5 (A, B, C and (D), 23 (1) and 24 (1) of the Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** for the following orders namely:-

- i. That the application be heard exparte in the first instance.*
- ii. That this hon. Court be pleased to issue an order suspending and/or staying an order made against the applicants/petitioners to cease manufacturing alcoholic drinks with immediate effect through the 1st Respondent's report on inspection of premises manufacturing alcoholic drinks in Kenya dated October, 2015 until the hearing and determination of prayer 3, 4, and 5 herebelow.*
- iii. That this hon. Court be pleased to issue an order suspending and/or staying the order made against the applicants/petitioners to cease manufacturing alcoholic drinks with immediate effect through the 1st Respondent's report on inspection of premises manufacturing alcoholic drinks in Kenya dated October, 2015 until the hearing and determination of the petition herein.*

iv. That this hon. Court be pleased to give such further and/or better reliefs as it may deem fit and just to.

v. That costs be provided for.

2. The grounds upon which the above reliefs were sought are as follows:-

a. That the applicants are engaged in the business of manufacturing opaque beer by the brand names Beehive Honey, Kigwa, Munyiri Special Honey and Kibuga respectively.

b. That all the applicants have the required licence to operate.

c. That the applicants were issued with a court order dated 14th July, 2015 in Nairobi protecting their business of manufacture of opaque beer in Nairobi High Court Petition No. 286 of 2015.

d. That the 1st Respondent which was set up by the 2nd Respondent and which is not a licensing body for the manufacture of opaque beer made a report dated October, 2015 in which it purported to order the petitioner to cease manufacturing of alcoholic drinks with immediate effect.

e. That the order was made without jurisdiction since it was outside the mandate of the 1st respondent in its terms of reference in Gazette Notice No. 5069 dated 10th July, 2015.

f. That the first respondent and the 2nd respondent did not furnish the petitioner or its directors with details, information, data collected and report in respect of their findings which were adverse to it.

g. That the said order unless suspended shall unlawfully and unconstitutionally bring the petitioners'/applicants' businesses to a close and may also occasion non renewable of licenses by Kirinyaga County Government, Kenya Bureau of Standards and other government agencies.

h. That the agencies and/or bodies that licence the business of manufacture of alcoholic drinks are unwilling to license the applicants for the year 2016 as a result of the aforesaid report.

3. In his supporting affidavit, DAVID MUNENE KINYUA swearing on behalf of himself as a partner of the 4th petitioner and on behalf of directors of 1st, 2nd and 3rd petitioners has deposed that all the petitioners are duly incorporated in Kenya to deal with inter alia brewing of alcoholic beverages and that they are licensed to carry out the business and exhibited the various licenses as exhibit "DMK 4" (Business permit, Receipts detailing manufacturing fee of Kshs.250,000/= and alcoholic drinks licenses issued to the 1st petitioner).

4. The 1st petitioner has also exhibited a permit from Kenya Bureau of Standards in respect to his company and a Government Chemists certificate of analysis showing that Kigwa Opaque beer is in compliance with the standards set for alcoholic beverages.

5. The petitioners/applicants through their learned counsel Mr. Magee attacked a report by the 1st respondent dated October, 2015 and exhibited in the affidavit of David Munene Kinyua as DMK II which appeared to have ordered the petitioners and other alcoholic drinks manufacturers to cease manufacturing their alcoholic beverages. It was contended that the 1st respondent lacked the legal capacity and authority to issue such a directive as it was not a licensing body mandated by law to issue such licences. The applicants also contended that under the Constitution such a mandate is granted to a county government pursuant to its functions under Schedule 4 of the Constitution.

6. The applicants further attacked the directive for not giving any reasons why the petitioners should be

stopped from manufacturing of alcoholic drinks saying the directive was unconstitutional, discriminatory and issued without any notice or hearing of the petitioners which in their view was a violation of their rights under **Article 47** of the **Constitution**. Mr. Magee submitted that the petitioners were entitled to a prior notice where an administrative action with adverse effect would be issued. It was further alleged that the first respondent exceeded its jurisdiction as per its terms of reference in Gazette Notice No. 5069 dated 10th July, 2015.

7. I have looked at the functions of the first respondents as per Gazette Notice No. 5069. The functions are listed as follows:

- a. To undertake a full audit of all alcoholic drinks, potable spirits and illicit brews in the Kenyan market and the manufacturers thereof.
- b. Recommend the suspension and recalling of harmful potable spirits and alcoholic drinks in the Kenyan market.
- c. Recommend the suspension and recalling of counterfeit potable spirits and alcoholic drinks in the Kenyan market.
- d. Inspect all the premises manufacturing alcoholic drinks and recommend measures of control including the closure of production premises.
- e. Review the various legal instruments applicable in regulation of alcoholic drinks and advise;
 - i. On gaps in law as regards alcoholic brewing, licence and drinking hours.
 - ii. Regulations of raw materials used in the manufacture/production of alcoholic drinks.
 - iii. Penalties to be meted out for actions and omissions.
 - iv. Appropriate policies.
 - v. Recommend packaging and labeling of alcoholic beverages.

In their above functions the 1st respondent as per the said gazette notice may hold consultative meetings with the approval of the Cabinet Secretary, Internal Security. It may also use official reports and records in their recommendation or carry out research or studies to inform their decisions or recommendations to government agencies and authorities. The action of the 1st respondent in ordering the applicants to cease manufacturing of alcoholic drinks was clearly done without the requisite legal mandate or power. The applicants' concerns about the 1st respondent's action are legitimate though I find that their proper action should have been to file a Judicial Review to challenge the order given by the 1st respondent. This is because the action the complainants have pointed out is an action that was done by an administrative body that has acted in excess of its jurisdiction or legal mandate donated to it by law. The appropriate remedy in my view in such cases is to seek any of the prerogative orders under **Order 53** of the **Civil Procedure Rules**. I have however, considered the entire petition and I am persuaded that the same has some constitutional underpinnings. **Part 2** of the **Fourth Schedule** of the **Constitution** gives the country Governments the mandate to *inter alia* deal with liquor licensing. The power to issue and revoke such licences are clearly the mandate of County Government. The work of the 1st respondent appears to be to recommend various actions including penalties, suspension of licences etc.

8. I have also considered the allegations of infringements of some constitutional rights under **Article 23** and **47** of the Constitution and noted that the respondents have not filed any response despite service. Their action of not responding appears to suggest that they have conceded that they had no mandate to order the respondents to cease manufacturing of alcoholic drinks. I also find that it would be premature at this stage to make a finding on the powers of the Cabinet Secretary Internal Security by invoking the

provisions of the **Alcoholic Drinks Control Act (No. 4 of 2010)** as that would be addressed or canvassed at the hearing of the petition itself.

In the light of the above, I will allow the Notice of Motion dated 8th February, 2016 in terms of prayer 3 and 5 as the same is merited and it is unopposed. It is so ordered.

Dated and delivered at Kerugoya this 18th day of May, 2016.

R. K. LIMO

JUDGE

18.5.2016

Before Hon Justice R. Limo J.,

Court Assistant Willy Mwangi

Magee for applicant present

COURT: Ruling signed, dated and delivered in open court in the presence of Magee for Petitioner/applicant and in the absence of the respondents.

R. K. LIMO

JUDGE

18.5.2016