



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.554 OF 2015

BETWEEN

MITI BREWERIES & DISTILLERS Co. LTDPETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

HON. J. M. MANJE.....3RD RESPONDENT

AND

NATIONAL AUTHORITY FOR THE CAMPAIGN

AGAINST ALCOHOL AND DRUG ABUSE (NACADA).....INTERESTED PARTY

RULING

Introduction

1. In its Notice of Motion application dated 10th February 2016, the Petitioner, Miti Breweries & Distillers Co. Ltd seeks to enjoin the Kenya Revenue Authority (KRA) to the Petition as the 4th Respondent.

2. The Application is premised on grounds *inter alia* that KRA, being aware of certain orders made by this Court on 15th December 2015, frustrated the same from taking effect by refusing to grant the Petitioner the requisite license to enable it manufacture its products. That it also refused to issue excise duty stamps to the Petitioner so as to enable it sell its products and further, that it imposed onerous and unlawful terms and conditions on the Petitioner for issuance of the said license.

Petitioner's Case

3. It is the Petitioner's case that it has been holding valid excise licenses issued by KRA to manufacture alcoholic products. It claims further that it has been fully tax compliant and has complied with all the laws governing the manufacture and sale of alcoholic drinks and liquor especially the provisions of the

Customs and Excise Act. Its other contention is that since its factory was closed on 6th July 2015 and despite the orders of 15th December 2015, issued by this Court, KRA has refused to sell and issue excise duty stamps to it to enable it resume business and as a result its business operations have been severely impeded. It further contends that the refusal by KRA to issue it with stamps is therefore contemptuous and an affront to due process.

4. It is also its case that the continued denial by the KRA of the Petitioner's legitimate entitlement to the excise duty stamps contravenes the **Constitution** and deprives it, its employees and their families' economic livelihoods. It therefore argues that KRA is a necessary party to this Petition so as to enable the Court adjudicate upon the Petitioner's complaints as filed.

1st, 2nd Respondent and Interested Parties Case

5. In response to the Application, the 1st and 2nd Respondents and the Interested Party (NACADA), filed a replying affidavit sworn by Dr. William N. Okedi, the latter's Chief Executive Officer. He states that NACADA had on 14th May 2014 received an application for the issuance of a license to manufacture alcoholic drinks from the Petitioner and the license was duly issued. That sometimes in 2015, deaths, injury to health, spiraling crime, loss of economic productivity and family breakdowns occasioned by illegal, unlicensed and substandard alcoholic drinks necessitated various Government agencies to act so as to safeguard consumer rights under **Article 46** of the **Constitution**.

Among the actions taken was a directive by the President of Kenya that a nationwide campaign against illicit brews ought to be conducted as well as the creation of an Inter-Agency Taskforce on Control of Portable Spirits and Combat of Illicit Brews (the TaskForce) vide **Gazette Notice No.5069** of 10th July 2015.

6. He states further that the crackdown on the liquor industry affected manufacturers, distributors and sellers of alcoholic products and as a result, the Petitioner's factory was inspected by the Taskforce between October and November 2015 and the Petitioner was ordered to cease production as the factory was found to be situated near a learning institution of persons under eighteen years and therefore a danger to them. Further, that after analyzing the chemical contents of one of the Petitioner's products, "Hawaii", a portable spirit with gin flavor, the product failed the test as it had excess ethanol and lead content. The Petitioner was thereafter informed of the findings of the Task Force on 21st November 2015 and that it has not to-date complied with the set conditions for issuance of a fresh license to manufacture and distribute alcoholic drinks.

That in the circumstances, KRA has no role in this Petition and there is no reason to grant the present Application.

4th Respondent's case

7. The 4th Respondent, KRA, filed the following grounds of opposition dated 15th February 2016;

(a) the Petitioner's application is incompetent, bad in law and fatally defective.

(b) the Petitioner has no claim and or cause of action against the proposed 4th Respondent.

*(c) the Petitioner has willfully neglected to disclose to this Court that it does not possess a license to manufacture excisable goods as provided under **Section 15 and 16 of the Excise Duty Act, 2015***

(d) the application has been instituted as a means of circumventing the law.

8. In addition to the above grounds of opposition, KRA also filed a replying affidavit sworn by Louis Nyariki, an officer in its Domestic Taxes Department. He states that the Petitioner had been duly

authorized/licensed as a manufacturer of alcoholic drinks in 2015 having acquired the necessary permits and licenses from the licensing authorities. Having also complied with the provisions of the **Excisable Goods Management System Regulations, 2013**, it was issued with six thousand (6,000) excisable stamps by KRA to allow it manufacture and sell its products.

9. He further states that sometime in July, 2015, the Petitioner's premises were allegedly raided and vandalized as a result of which it lost all the 6,000 stamps. By a letter dated 16th December 2015, the Petitioner wrote to the Commissioner of Domestic Taxes seeking to buy another 6,000 excise duty stamps to allow it to re-open its business and by a letter dated 30th December 2015, KRA replied and requested the Petitioner to account for the excise duty stamps previously issued to it as required by law. In addition, KRA requested the Petitioner to apply for an excise license for the year 2016.

10. The Petitioner thereafter lodged an application for renewal of its Excise licence via i-tax on 8th January 2016 and on the same day, KRA issued an acknowledgement letter to the Petitioner outlining the requirements it was to meet before being issued with a fresh excisable license.

11. He states furthermore that the Petitioner has now presented its application for renewal of the excise license and the same is being processed and in addition to presenting the application, he contends that the Petitioner ought to have accounted for the 6,000 excise duty stamps previously issued to it. It is also KRA's position that it is ready and willing to issue the Petitioner with the excise duty stamps as soon as it accounts for the 6,000 excise duty stamps aforesaid and its excise license renewed.

12. Lastly, he states that KRA opposes the joinder to the Petition since it has merely requested the Petitioner to comply with the provisions of the **Excisable Goods Management System 2013 Regulations and the Excise Act No. 23 of 2015** and that the issues being canvassed by the Petitioner in this Petition against the 1st to 3rd Respondents are distinct from the role of the KRA in regard to the Petition since it has not contravened any of the Petitioner's rights as alleged in the Petition.

Determination

13. The only issue for determination is whether KRA should be enjoined in these proceedings. In that regard **Rule 5 (a) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** stipulates that a Petitioner may join two or more respondents in order that the question as to which of the Respondents is liable, and to what extent, may be determined as between the parties.

14. In that context, in its undated Petition filed in Court on 11th December 2015, the Petitioner has not sought any relief against KRA neither does it have any complaints against it. Its only complaint in respect to KRA arises out of the Ruling and Orders of this Court issued on 15th December 2015. In that Ruling, I directed that the Petitioner ought to be allowed to re-open and operate its factory and business, subject to the Respondents being allowed the right to access the factory for inspection and licensing purposes.

15. The Petitioner contends in that regard that KRA is a necessary party in these proceedings on grounds that it has refused to grant the Petitioner the required license to enable it manufacture its products and also that it has refused to issue excise duty stamps to the Petitioner so as to enable it sell its products.

16. In addressing the above issue, it is not in dispute that the Petitioner held a valid license issued by KRA to manufacture excisable goods for the year 2015. According to the KRA therefore, it has not in any way refused to grant the Petitioner the license it needs neither has it refused to grant it excise duty stamps but has asked for certain conditions to be met first and in that regard, I have seen the letter dated 30th December 2016 in which KRA has written to the Petitioner explaining that the latter needs to apply for an excise license as required by law and also that excise stamps will only be issued after the Petitioner has accounted for the 6,000 stamps previously issued as is required under the **Excisable Goods Management System 2013 Regulations**.

17. The above is the only connection between KRA and the Petitioner which is a matter completely outside the purview of the Petition which is all to do with the closure of its factory by the Respondents for flouting the conditions attached to its manufacturing license.

18. It is therefore obvious to me that KRA as the proposed 4th Respondent does not have an identifiable stake and interest in the instant Petition and as was held *inter alia* in **Communications Commission of Kenya & 4 Others vs Royal Media Services Ltd. & 7 Others (2014) e KLR**, a party adversely affected would need to join proceedings filed by another in order to protect its interests and such an action is also important to avoid proliferated litigation over the same subject. In this case, KRA is only sought to be enjoined to proceedings on the question whether it has refused to issue the Petitioner with the requisite license and in his affidavit, Mr. Nyariki, for KRA, has stated that KRA is ready and willing to grant the Petitioner the licence it requires for its business once it complies with the requirements under **Excisable Goods Management System 2013 Regulations**. Those issues are not live in the present Petition and KRA has no interest to protect in it.

19. In the circumstances, I do not find any merit in the Application to enjoin KRA as a party to these proceedings as it does not have any interest in the Petition. Let the Petitioner fulfill the conditions as required under **Excisable Goods Management System 2013 Regulations** for it to be issued with the requisite licence failure to which it can file separate proceedings, if at all, against KRA

20. The Application dated 10th February is therefore dismissed.

21. Let each Party bear its own costs.

22. Orders Accordingly.

DATED, AND SIGNED AT NAIROBI THIS 16TH DAY OF SEPTEMBER, 2016

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2016

EDWARD MURIITHI

JUDGE

In the presence of:

Kazungu – Court clerk

Mr. Karanja for Petitioner

Mr. Nyaga for Respondent

Court

Ruling delivered.

EDWARD MURIITHI

JUDGE