REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CONSTITUTIONAL PETITION NO. 7 OF 2015

IN THE MATTER OF THE CONSTITUTIONAL PETITION BROUGHT PURSUANT TO ARTICLES 22, 23 AND 258 OF THE

CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOM OF THE PETITIONER AS ENSHRINED AND PROTECTED UNDER ARTICLES 29, 40, 47, 50 (1) AND 75 OF THE CONSTITUTION OF KENYA

BETWEEN

WITMORE INVESTMENT LIMITED…...….PETITIONER/APPLICANT

-VERSUS-

COUNTY GOVERNMENT OF KIRINYAGA……..…1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL….…2ND RESPONDENT

INSPECTOR GENERAL, THE

KENYA NATIONAL POLICE SERVICE………..…3RD RESPONDENT

NJOGU BARUA……………………….......………4TH RESPONDENT

RULING

1. Witmore Investment Ltd. the Petitioner/Applicant herein has moved this Hon. Court through a Notice of Motion dated 31st December, 2015 for the following orders namely:-

> ***(i) That this hon. court be pleased to hear prayer 2 herebelow ex-parte in the first instance due to its urgency***
>
> ***(ii) That this hon. court be pleased to issue an interim conservatory order extending the life and/or term of the Alcoholic Drinks License No. 000192 issued by the 1st respondent to the applicant on 31st December, 2014 in respect of premises situated at KABARE/MUKARARA/501 to manufacture Opague Beer known as Brown oak pending the hearing and determination of***

prayers 3, 4 and 5 of this application.

(iii) That the hon. court be pleased to issue an order of Mandamus to compel the 1st respondent to issue the applicant with an alcoholic drinks license for 2016 in respect of premises situated at KABARE/MUKARARA/501 to manufacture Opague Beer known as Brown Oak.

(iv) That this hon. court be pleased to issue such further and/or better relief as it may deem fit and just.

(v) That the costs be provided for.

2. The Applicant has in seeking the above reliefs invoked the provisions of **Article 23** of the **Constitution** and **Rules 3 (2), 5 (a) (b) (c)** and **(d), 4(1), 23(1)** and **24 (1)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.** The Applicant brought its application on the following grounds namely:-

(a) That the 1st respondent issued an Alcoholic Drinks License No. 000192 to the applicant in respect of premises situated at Kabare/Mukarara/501 to manufacture Opague Beer known as Brown Oak.

(b) That the applicant on the basis of the licence invested heavily on buildings, machinery and human resources worth millions of shillings besides servicing a loan with a financial institution worth approximately Kshs.50,000,000/=.

(c) That the 1st respondent had indicated on 22nd December, 2014 that the licence then in force would be in force until fresh licences were issued.

(d) That despite application for renewal of licence, the 1st respondent has failed to communicate with the applicant or renewed the licence for 2016.

(e) That the applicant had legitimate expectations of renewal of its license having complied with all the conditions set by the 1st respondent herein and that failure to renew the licence was aimed at defeating the orders that were earlier issued by this court.

3. The Applicant through its director JULIUS COMBA NYAGA has sworn an affidavit sworn on 31st December, 2015 in support of the above grounds. In his affidavit Mr. Comba has exhibited a manufacturing licence for the brewing of opague beer issued by the 1st respondent. The licence indicated that the expiry date was 31st December, 2014 and the licence was in respect to the Applicant's premises situated at **KABARE/MUKARARA/501.**

4. The Applicant has deposed that he lodged his application for renewal of the licence on 10th November, 2015 by submitting the requisite form and an application fee of Kshs.1000/- but despite a letter from their advocate seeking for information regarding the renewal of licence, the 1st respondent has been silent. The Applicant has contended that the Applicant's action unless checked would halt its business and prejudice him as he has loans amounting to Kshs.50 Million to be repaid. The Applicant sees this as a violation of his constitutional rights to property and fair administrative action which has subjected its director to psychological and emotional torture.

5. The Applicant has submitted through his advocate Messrs Magee wa Magee Advocates that having fulfilled all the requisite conditions for renewal of licence and having been issued with a public notice that the 2014 licence would remain valid for the year 2015, until new licences were issued, it was their legitimate expectation that the licences issued in 2014 would remain valid and it is on that basis that Applicant is now asking for the extension of that validity. The Applicant has cited the decision in **Keroche Breweries Ltd. -Vs - Cabinet Secretary Ministry of Interior and Coordination of National**

<u>Government and other [2015] eKLR</u> to buttress his contention that predictability and certainty in Government's dealings with the public is a basic requirement and fundamental principle of law. It is submitted that failure by the 1st respondent to renew its licence violated its legitimate expectation which in its contention is unlawful.

6. The Applicant has further contended that its 2014 licence is still in force by virtue of Section 16(4) of the Kirinyaga County Alcoholic Drinks Control Act because its renewal application is still pending and the 1st Respondent has not rendered its decision on the said application or communicated to the applicant regarding the renewal of its licence. The Applicant has therefore urged this Hon. Court to allow this application in line with the cited provision of the law. It is further argued that Section 18 of the cited Act gives the Applicant the right to seek remedy in this Court where renewal of a licence has been declined.

7. The Applicant has faulted the 1st Respondent's public notice dated 1st September, 2015 revoking the public notice dated 22nd December, 2014 which extended the licence issued to the applicant earlier pending renewal arguing that the same has been tailor-made to defeat this application and that the same is an after-thought as 1st Respondent did not include it initially as an answer to the petition when they filed their response. It is contended that the said notice is unlawful as it has the effect of cancelling all licences without differentiating whether the same were genuine or false and cited the sentiments expressed by the court in the Keroche case (supra) in support of his contention.

8. In response to the 1st Respondent's contention that the liquor licences issues in 2014 expired, the Applicant has submitted that the public notices exhibited by the 1st Respondent related to operating of bars and not manufacture of beer which was the trade that the Applicant had been licensed to operate. It has further been argued that the Applicant's licence was issued on 31st December, 2014 and for all intents and purposes it was not meant to be a one day license and hence the logic for extending its validity to cover the year 2015. The Applicant denied the contention by the Respondent that it had not complied with the legal requirements and that the 1st Respondent did not demonstrate that the Applicant's application to renew its licence to manufacture beer failed the legal test and that the refusal is a violation of the provisions of *Article 47 (2)* of the **Constitution of Kenya**.

9. The Applicant has argued it is not seeking final orders in its application but is merely seeking to preserve its business and conserve status quo pending the determination of the petition herein. It has further submitted that *Article 23* of the Constitution establishes a judicial review order as a relief and that relief when it relates to violation of a constitutional right cannot be subject to any statute and hence the provisions of *Order 53* of the **Civil Procedure Rules** and the **Law Reform Act** do not apply. It urged this Court to expand the scope of intervention in so far as stopping the administrative actions taken by the 1st Respondent and cited the decision in **<u>JOHN KIPNGENO KOECH & 2 OTHERS -VS- NAKURU COUNTY ASSEMBLY & 5 OTHERS [2013] eKLR</u>** to buttress this point.

10. The 1st Respondent has opposed this application through a replying affidavit sworn by KENNETH GITHINJI its legal officer sworn on 13th January, 2016. The 1st Respondent has attacked this application on the basis that the same is misplaced, misconceived and improperly before court arguing that the same is an abuse of court process. It has further faulted the Applicant for citing interim orders issued by this Court as the reason for not obtaining 2015 and 2016 licenses contending that the Applicant cannot operate without a license which it contends can only issue upon compliance with regulatory and legal requirements. The 1st Respondent has deposed that the Applicant cannot ask the Court to play the role of licensing as that role is donated to itself under the **4th Schedule** of the **Constitution.** In this regard it has cited an authority in the case of **<u>Kagumo Sub County Alcoholic Drinks Committee -Vs- Kibao Savings and Credit Co-operative (C.A. Nyeri No. 63/15).</u>**

11. The 1st Respondent has further contended that failure to issue a trading or liquor manufacture license cannot be litigated under the petition since it is a separate cause and that the order of mandamus as a relief can only be sought through a Judicial Review. It was contended that this application will derail the disposal of the petition itself and that orders of mandamus cannot be effectively and procedurally

canvassed in this petition as an interim application.

12. The 1st Respondent submitted that the petition pending is seeking declaratory orders for illegal invasion and general damage and that the alleged violations have no nexus with the denial of licence. In its view the Applicant's application amounts to a new pleading given that the pleadings had been closed by the directions given by this Court on the mode of disposal of the petition itself. It was contended that the application had opened a new fresh case which is prejudicial to the 1st Respondent because it had already filed its affidavits in response to the petition. The 1st Respondent's learned counsel Wanjiru Wambugu Advocate cited a court of appeal decision in the case of **Independent Electoral and Boundaries Commission & Anor. -Vs- Stephen Mutinda Mule & 3 Others [2014] eKLR** to support her contention that a party in litigation should not be allowed to raise a different or fresh case without an amendment to the pleadings.

13. It has been further submitted that the order of mandamus being sought would amount to a final determination of the cause which cannot be described as an interim relief because in the 1st Respondent's view the nature of the relief would outlive the petition itself when the life span of an interim order is dependent on the pendency of a suit or petition. The 1st Respondent further wondered aloud about the fate of the order if it was to be allowed now after the determination of the petition particularly if it was to be determined this year.

14. It has been submitted that this Court cannot be a licensing body as it has no mandate, criteria, mechanisms and opportunities to confirm requirements and formalities necessary before issuance of an alcoholic operations license. The 1st Respondent has cited the provisions of Section 11 (1) and (2) of the Kirinyaga County Alcoholic Drinks Control Act and an unreported High Court decision in the case of **PATRICK KARIUNGI -VS- THE COMMISSIONER OF POLICE AND THE ATTORNEY GENERAL** (High Court Nairobi JR Misc. No. 193 of 2012) in support of this contention. The 1st Respondent has submitted that the Applicant has not satisfied the requirements for the issuance of 2016 licence as per the law and that compelling the 1st Respondent to issue a licence before all the requirements are satisfied would amount to compelling it to commit an illegal act and that the best the Respondent can be compelled to do is to consider the application. The High Court case of **PATRICK KARIUNGI -VS- COMMISSIONER OF POLICE (Nbi H.C. J.R. MISC. APP. No. 193 of 2012)** has been cited in support of this contention.

15. The 1st Respondent has also contended that failure to renew a licence is not in itself a constitutional issue. In its view the Applicant cannot plead legitimate expedition because licensing is not automatic but an annual practice that is conditional. It has faulted the Applicant for invoking the Constitution because in its view where there is another remedy in civil law, a party should pursue that alternative remedy. In regard to this contention, it has relied on the High Court decision in the case of **Maggie Mwauki Mtalaki -Vs- H.F.C.K. [2015] eKLR.**

16. The 1st Respondent has further contended that the Applicant has not demonstrated a *prima facie* case against it with a probability of success to warrant being granted the remedies sought pointing out that the photographs annexed to the further affidavit by the Applicant do not disclose the involvement of the 1st Respondent or any of its employees.

17. The 1st Respondent has also questioned the rationale of the Applicant coming to court if at all the county legislation on alcohol (Section 16 (4) Kirinyaga County Alcoholic Drinks Control Act) allowed it to operate using the 2014 licence. It has faulted the Applicant for not applying for 2015 licence to operate and holding on a 2014 licence to for operations this year 2016.

18. I have considered this application and submissions by both the Applicant's counsel and the 1st Respondent's Counsel which I found commendable and a job well done. The application and the response made him raise quite a number of issues for determination but in my view the following issues are the main issues necessary to dispose of this application:

(a) Whether the orders/reliefs sought are final or interlocutory in nature.

(b) Whether the application raises a new cause separate from petition.

(c) Whether the applicant is entitled to the remedies sought.

19. Looking at the reliefs sought in the application before me, prayer (a) is already spent. Prayer (e) is basically on costs which ordinarily follows the eventuality or the outcome of the application. Prayer (d) is asking this Court to make any orders it deems fit in the circumstances. That leaves prayer (b) and (c) being the only substantive orders being sought in this application. Prayer (b) as indicated above is seeking for an extension of validity or the life of licence No. 000192 issued to the applicant on 31st December, 2014 pending determination of prayer (c) and in prayer (c) the Applicant is seeking for an order of mandamus to compel the 1st Respondent to issue it with 2016 licence to manufacture Opague Beer known as Brown Oak. That is how the application before me has been framed.

20. The 1st Respondent has submitted the above orders in their nature are substantive and final because it reasons that a lifespan of an interim order is only dependent on the pendency of a suit or a petition which this Court finds sound. The Applicant's response that the orders are not final as I will not determine the petition is also true but for a different reason which will become clearer when I consider the 2nd issue in this application as listed above. However, what is pertinently clear is that the order being sought by the Applicant go beyond the determination of the petition herein. This is obvious from the manner in which the application has been framed and the resultant effect if the application is allowed. In my view the 1st Respondent's rhetorical question posed in regard to the lifespan of the prayers sought is legitimate and valid. The term interlocutory according to BLACK'S LAW DICTIONARY 9th Edition means "an interim or temporary order, not constituting a final resolution of the whole controversy." An interim or interlocutory order is normally issued on a basis of an interlocutory application which is defined under the same Black's Law Dictionary as "a motion for equitable or legal relief sought before a final decision." So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the Applicant wanted to move this Court for a final resolution of the issues in controversy raised in the application, it should have moved this Court properly in the manner provided by law.

The Applicant has submitted that the nature of the prayers sought are preservatory to conserve *status quo* pending the determination of the petition. However, the application before me is asking for more. The prayer to extend the validity period of 2014 licence and a mandamus remedy to compel the 1st Respondent to issue alcoholic manufacturing licence for the year 2016 as sought are not dependent on the pendency of the petition herein because the issues raised in this application are distinct and different from the petition itself which brings me into the next issue but before I delve into it I have to say that I agree with the decision cited by the Applicant in the case of **Mwangaza Humanitarian Assistance -Vs- NEMA & 2 Others [2013] eKLR** where Hon. Justice Lenaola observed that in exercising jurisdiction under **Article 23 (1)** of the **Constitution** courts should also be mindful of the procedures and the law invoked and that a judicial review order is such a serious claim that cannot be made at an interlocutory stage as they are final in nature. So while I agree with the Applicant **Article 23** establishes judicial review order as a relief available in a constitutional petition, the remedy in my view is only available when a court is determining a petition brought under *Article 22* and finds basis that a judicial review order is the appropriate relief. On the other hand if a party is desirous of obtaining a prerogative order of mandamus and specific performance at an interlocutory stage, the legal avenue provided is the route prescribed under **Order 53 Rule 1** of the **Civil Procedure Rules** and the **Law Reform Act.** The same cannot be circumvented as that would amount to an abuse of court process. It is true that a statute is subject to a constitution and not vice versa but the context of this application is different because it has sought a judicial remedy at an interlocutory stage claiming denial of a right under the Bill of Rights when the same is yet to be determined. Determination of such a right at this stage in my view would have determined the petition if the violations had been cited in the petition pending before this Court.

21. I agree with the Applicant that the enactment of the 2010 Constitution of Kenya expanded the frontiers of intervention by courts in matters to do with Judicial Review. This is a fact and protection that the citizens of this country decided to provide in order to shield themselves from excesses by the state or state agencies. However, a litigant should properly move the Court by invoking the specific powers of the court and clearly pleading that a specific right has been violated or denied. Furthermore, I have considered the decision cited by the Applicant in the case of **John Kipngeno Koech & 2 others** and I have noted the following observations made by the Court in obiter which I find relevant in this application;

> ***"The order of mandamus is an order directing a public body, authority, person or inferior tribunal exercising public duty to exercise that function or duty if it has not done so. In this case the County Assembly of Nakuru carried out its mandate and its decision is the subject of an order of certiorari already granted. It must be emphasized that the former prerogative order and now judicial order of mandamus is not equivalent of a mandatory injunction or specific performance in contract. The order only lies where the statutory or public duty has not been performed or carried out. My favourite example is the liquor licensing bodies – when they fail to meet and consider applications for liquor licenses the court will direct them to meet and consider the applications but the court will not direct them to grant licenses or make decisions in any one way. There is no legal basis for an order of mandamus………….."***

These observations were made by Hon. J. Anyara Emukule in a judgment he delivered on a petition presented about violation of the petitioner's rights and the court was determining the appropriate remedy for the violation of rights. It is important therefore to note that the decision was made at the determination of the petition itself unlike the situation here where the Applicant is seeking the Court's intervention at an interlocutory stage. In my considered view the remedy can only be available after interrogation or canvassing of the entire petition and the responses made thereon.

22. I also find that the Applicant is uncertain whether it is seeking the order of mandamus as an equitable remedy or a judicial review remedy. The two remedies are similar because both command actions to be performed but they are distinct and different. A party must be specific because of procedural differences and the fact that the two remedies have different spheres. As an equitable remedy, mandamus was used at common law in rare circumstances and the standard of proof is higher than other forms of injunctions. The Court of Appeal in the case of **Shariff Abdi Hassan -Vs- Ndahif Jama Adan [2006] eKLR** quoted with approval the decision in **LOCHABAK INTERNATIONAL FINANCE LTD. -VS- AGRO EXPORT & ANOR [1986] 1 ALL ER 901** in observing that the standard of approach when considering whether or not to grant mandatory injunction is higher than that in respect of prohibitory injunction. The court in setting out the principles applicable in granting mandatory injunction stated as follows:

> ***"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."***

In **Canadian Pacific Railway -Vs- Gand [1949] 2KB,** Cohln L J said at page 249

> ***"I entirely agree ………that the granting of a mandatory injunction on interlocutory relief is very exceptional form of relief to grant, but it can be granted. The reason for this principle is simply because the relief has the effect of meting out justice in a summary manner without the need to wait for full hearing of the entire case".***

So for good reasons courts are often reluctant to grant this type of injunctive reliefs.

23. On the other hand as already aforesaid, the writ of mandamus is a prerogative remedy sought to enforce performance of public or statutory duties by public authorities or government agencies. The remedy is administrative in nature though the scope has now been extended to cover enforcement of rights under the constitution, It is a discretionary remedy and the procedure available in law for a party seeking the remedy is either through Order 53 of the Civil Procedure Rules or through a constitutional petition under Article 22 of the Constitution of Kenya 2010. In whichever way, the Applicant has not satisfied this Court that either of these remedies is appropriate at this stage.

24. (b) Whether the application has raised a new cause of action not pleaded in the petition

The petitioner/applicant herein in its petition has pleaded unlawful invasion of its premises and damage of its property. It has sought declaratory orders on account of violation of its rights and further seeks damages and a permanent injunction to stop the Respondents from their actions. It is on the basis of these prayers that the Applicant successfully lodged an application for an interim injunction dated 9th July, 2015 pending the determination of the petition herein. In the present application, the Applicant has sought conservatory orders to extend the life or the term of the alcoholic licence issued to it on 31st December, 2014 and an order of mandamus to compel the 1st Respondent issue a fresh alcoholic licence for the year 2016. The 1st Respondent has submitted that the application introduces a new cause of action which is not in the petition and is tantamount to an amendment to the petition herein. This contention in my view is not without merit. The application has raised the denial of license and the omission by the 1st Respondent to consider its application for renewal of license as violation of its rights despite compliance. This in my view is a paradigm shift from the nature of constitutional violation of rights raised in the petition. The application presents a new dimension to the petition because the complaint now is not just about the invasion and damage to property but the denial of license to operate as well. To that extent the application is a complete departure from the pleadings before court as the issues raised in the petition has nothing to do with the issues in this application. That is why I observed that the Applicant to some extent is ironically right to say that determination of this application will not determine the petition because the application presents a different cause of action which is improper. An interlocutory application being an offshoot of the main suit or petition must have a correlation. Besides that, a party is bound by the pleadings and where a new issue emerges or was inadvertently left out, the right way is to amend or seek leave to amend if pleadings have been closed as provided by law. But it is irregular and an abuse of court process for a litigant to introduce a new issue to a pending suit without amending the pleadings and putting the other party or parties in the litigation on notice. In that regard this Court is in agreement with the decision cited by the Respondent in the case of **The Independent Electoral & Boundaries Commission & Anor -VS- Stephen Mutinda Mule & Others [2014] eKLR** though the context upon which the decision was made is somewhat different from the present case. The principle is nonetheless the same and is all about informing the other party what your case is all about to accord him or her a chance to respond or defend himself or herself.

25. The Applicant has defended himself on this apparent anomaly by submitting that it is not fair, convenient or conducive to a proper administration of justice to ask him to split its case into two or more causes and file them in separate causes or file a separate judicial review application and cited an authority in the decision in the case of **Keroche Breweries Ltd. and 6 others -Vs- Cabinet Secretary Ministry of Interior and Coordination of National Government and others [2015] eKLR** to support its contention. I have considered the decision quoted and my take is that remarks quoted by the Applicant was made in a different context. The Court was determining the most efficacious remedy to a litigant's grievance particularly where the alternative remedy is less convenient, beneficial and effectual. The Court opined that the Judicial Review action taken by the Applicant could address all grievances wholesomely without the need of pursuing of a different action pursuant to the relevant statute that provided another avenue. The court decided that it was in the interest of fairness and convenience to consolidate all causes and determine them with a finality. To this end, I concur with the decision but one must bear in mind that all the issues or the causes had been properly pleaded and placed before the court through a judicial review, a platform which the said court rightfully found to be most powerful enforcer of constitutionalism and promoters of rule of law to check against abuse of power and arbitrariness. In this application the Applicant after the pleadings had closed, kind of sneaked in a totally new cause of

action through this application in a manner that understandably caught the Respondents and particularly the 1st Respondent unawares.

26. The Applicant is perfectly in order and has a right to have legitimate expectations from the 1st Respondent as a public or statutory and constitutional body charged with delivering services to its subjects. I am in full agreement with the decision in KEROCHE CASE cited by the Applicant that observed that it is a legitimate expectation that public authorities will comply with the constitution and the law. The Applicant has submitted that he complied with all the conditions for the renewal of its licence to manufacture a brand of alcohol known as opague beer. It is not contested that it lodged its application and paid the prescribed fee as demonstrated through exhibit JCN 5 in the affidavit in support of this application. The 1st Respondent for unknown reasons chose to ignore the application when it knew well that the Applicant had its constitutional right to information enshrined under **Article 35** of the **Constitution.** Instead of informing the Applicant about the fate of its application formally as a matter of right and common decency in an open, transparent, democratic country, it chose to address through an affidavit filed in response to this application. The same was wrong and one of the excesses and arbitrariness that the current Constitution was intended to address. Having said that I am however, not satisfied that the Applicant chose the right option to address its legitimate grievances and two wrongs cannot make a right.

27. It was wrong and an omission for the 1st Respondent not to inform the Applicant about the fate of its application whether the information was favourable or adverse and if adverse reasons for its adversity. The grievances about this omission could have been well addressed through Judicial Review because the Constitution did not replace the avenue to challenge unfair administrative actions taken by statutory bodies or quasi judicial bodies through actions under **Order 53** of the **Civil Procedure Rules** and **Law Reform Act**. Of course where the grievances touch on any of the bill of rights under **Article 19** of the Constitution an aggrieved party can as well take a Constitutional action via a constitutional petition to a court of law seized with the jurisdiction. The Applicant chose neither of these avenues and instead filed the present application. There was nothing preventing it from seeking to amend its petition if the actions complained of took place after filing of its petition or after this Court issued temporary orders stopping the Respondents and its agents from further invasions and interference of its business.

(c) Whether the Applicant is entitled to the orders of mandamus and extension of the lifespan of the 2014 alcoholic licence

This Court has been urged to extend the validity of the licenses granted to the Applicant by the 1st Respondent on 31st December, 2014. It is true that the function of issuing trading licenses including those that deal with alcoholic beverages are a function donated by law and the Constitution to the County Governments. I am also persuaded by the 1st Respondent that licensing is an annual cycle and there is basis why the licences issued are annual. It is also true that this Court when issuing the interim orders did not stop the 1st Respondent from discharging its statutory duties or directed it on how to discharge them as there is no challenge on the manner in which the 1st Respondent had exercised its mandate or discharged its functions. The provisions in the statute (read Kirinyaga County Alcoholic Drinks Control Act) requiring those dealing with alcoholic beverages to take out annual licenses have not been challenged because the Applicant has not stated that the law is bad and unconstitutional. It has only challenged the manner in which the statutory duties have been undertaken and as I have found out above that can only be done in accordance with the law and the Constitution whichever is convenient and effective as aforesaid above. I am also in agreement with the decision of Warsame J. (as he then was) in **RE: KISUMU MUSLIM ASSOCIATION (KISUMU H.C. MISC. NO. 280 OF 2003)** where the judge observed that where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. It was further held that the High Court has powers to keep administrative excess on check and supervise public bodies through control and restrain abuse of powers. However, the Court's power in this case has not been invoked properly as illustrated above. Besides this where a statute imposes a duty and leaves the discretion as to the mode of performing that duty in the hands of an official whom the obligation is laid, a mandamus cannot command that the exercise be carried out in a specific way as was held in the case of

KENYA NATIONAL EXAMINATION COUNCIL -VS- REPUBLIC EXPARTE GEOFFREY GATHENJI NJOROGE & OTHERS [1997] eKLR.

In the end whereas I find that the Applicant may be having legitimate grievances against the 1st Respondent, I find that this application is not the right avenue to address them. The prayers sought are therefore declined by this Court but I find it fit and just to direct that the 1st Respondent does fulfill its obligation by formally responding to the Applicant's application of renewal of its licence because it has the right to information concerning its application. The same should be done within 14 days from the date of this ruling. The costs of this application shall be the costs in the main petition which I also direct to be speeded up as it was filed with a certificate of urgency.

Dated and delivered at Kerugoya this 19th day of September, 2016.

R. K. LIMO

JUDGE

19.9.2016

Before Hon. Justice R. K. Limo J.,

Court Assistant Nomi Murage

Magee for Petitioner/applicant present

COURT: Ruling dated, signed and delivered in the open court in the presence of Magee for the applicant and Wanjiru for respondent present.

R. K. LIMO

JUDGE

19.9.2016