



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR. MISCELLANEOUS APPLICATION NO. 122 OF 2014

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION
AND MANDAMUS**

-AND-

IN THE MATTER OF THE KIAMBU COUNTY FINANCE ACT OF 2013

AND

**IN THE MATTER OF THE KIAMBU COUNTY ALCOHOLIC DRINKS CONTROL ACT OF
2013**

AND

**IN THE MATTER OF THE KIAMBU COUNTY ALCOHOLIC DRINKS CONTROL
(LICENCING) REGULATIONS 2013**

AND

IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

BETWEEN

DR SAMUEL THINGURI WARUATHE

BEATRICE WAIRIMU KAMAMIA

RICHARD NJOGU NDUNGE

(BEING OFFICIALS OF THE KENYA NATIONAL

CHAMBER OF COMMERCE & INDUSTRY

KIAMBU COUNTY).....APPLICANTS

-AND-

KIAMBU COUNTY GOVERNMENT.....1ST RESPONDENT

KIAMBU COUNTY EXECUTIVE MEMBER

IN CHARGE OF EDUCATION, CULTURE

AND SOCIAL SERVICES.....2ND RESPONDENT

-AND-

KIAMBU LIQUOR WELFARE GROUP.....INTERESTED PARTY

JUDGEMENT

1. By a Notice of Motion dated 4th April, 2014, the *ex parte* applicant herein, **Dr Samuel Thinguri Warwathe, Beatrice Wairimu Kamamia and Richard Njogu Ndunge** who bring this application in their capacities as officials of Kenya Chamber of Commerce & Industry, Kiambu County, (hereinafter referred to as the Chamber) seek the following orders:

1. **That an order of certiorari does issue to remove from (sic) this Honourable Court and quash the decision of the Kiambu County Finance Act, 2013 and in particular, 2nd Schedule part – I-IX thereof.**
2. **That an order of certiorari does (sic) to remove from (sic) this Honourable Court and quash the decision of the Kiambu County Alcoholic Drinks Control (Licensing) Regulations, 2013 and in particular, the 3rd Schedule thereto.**
3. **That an order of certiorari does issue to (SIC) the Kiambu County Alcoholic Drinks Control Act, 2013 and in particular the provisions of sections 14(2)(b), 15(1)(b), 26(4) and 27 thereof.**
4. **THAT an order of prohibition does issue to prohibit the Respondents, their agents, employees, servants, police officers or whosoever from enforcing the impugned Kiambu County Finance Act, 2013, Kiambu County Alcoholic Drinks Control Act, 2013 and Kiambu County Alcoholic Drinks Control (Licensing) Regulations, 2013.**
5. **THAT an order of mandamus to compel the Respondents to enact a proper Kiambu County Finance Act, 2013 (sic) Kiambu County Alcoholic Drinks Control Act and Kiambu County Alcoholic Drinks Control (Licensing) Regulations, 2013 (sic) in accordance with Constitutional provisions, the Statutory Instruments Act and with he participation of the members of the public, interested parties and stakeholders.**

2. **The costs of this Application be provided for.**

Applicant's Case

2. The Motion is supported by affidavits sworn by **Samuel Thinguri Warwathe** on 28th March, 2014 and 19th December, 2014.
3. According to the deponent, the Applicants are officials of the Chamber which is a public company limited by guarantee but most importantly a public institution, which undoubtedly is the apex body for trade and industry as well as the umbrella organization of businessmen and industrialists within the Country. Its role according to the deponent is to promote commerce and Industry within the County as well as to safeguard the interests and welfare of the business community therein.
4. It was disclosed by the deponent that the Respondents herein had enacted and were accordingly enforcing the ***Kiambu County Alcoholic Drinks Control Act, 2013***, (hereinafter referred to as the Act), ***The Kiambu County Alcoholic Drinks Control (Licensing) Regulations, 2013*** (hereinafter referred to as the Regulations) and ***Kiambu County Finance Act, 2013***, which came into operation on or about December 2013 . According to the deponent, the said pieces of legislation and schedules thereto and in particular the second schedule to the ***Finance Act*** and the third schedule to the Regulations that deal with permits and licence fees made drastic provisions affecting the business community within Kiambu County and had introduced multiple licences for business operating within the County such as business licences for various sectors, public health permits, single business permits and other permits as well as specialized licences such as those provided

under the *Alcoholic Drinks Control Regulations, 2013* and *Music and Copyright Societies Act*. Apart from that, the said legislations made tremendous increase in the said licences fees some of them by over 300% and even imposed additional permits.

5. It was deposed that the Applicants and the numerous members from the business community who the applicants represented including but not limited to the Interested Parties were highly aggrieved by the said legislations, which in the applicants' view smacked of impropriety, illegality, injustice, irrationality, irrelevance, Wednesbury unreasonableness, undue harshness, fanciness, oppression, uneconomical and arbitrariness. To exacerbate the situation, it was averred that the Respondents were applying the said laws retrogressively by demanding that the licence fees for the year 2013 be settled under the new rates provided for in the said legislations and moreover that the pre-existing businesses, which were now not eligible for licences be closed down.
6. It was therefore contended that the said laws and the implementation thereof was against the well-established legal principles of legislation and are otherwise unconstitutional as they offend the provisions of Articles 209 and 210 of the Constitution.
7. It was also contended that the said laws had been enacted without adequate public participation and/or consultation or at all in blatant disregard to the peremptory requirements of Article 196 of Constitution and Section 87 and 115 of the *County Governments Act* which sets out the principles of public participation in County policy making planning and legislation.
8. It was the applicants' apprehension that they would not be able to pay the new charges imposed by the Respondents within the short time stipulated or at all which in turn would be driven out of business hence occasioning them irreparable losses. The deponent averred that the Kiambu County business community were ready, able and willing to cooperate with the Respondents in a bid to come up with feasible fees and charges arrived at consultatively and rationally with the aim of achieving the twin objects of fostering enterprises whilst raising funds for county expenditure and development.
9. It was however deposed that the police, servants and agents of the Respondents had been conducting crackdowns and harassing and arresting members of the business community within the county in the guise of implementing the said laws. To the deponent, the said charges and fees encapsulated in the said laws were inexplicably and comparatively higher than those in other Counties and as such, they believed that the same were likely to impact unfairly on them and the business community within Kiambu County and/or ultimately affect industry competitiveness and sustainability.
10. To the applicants' surprise, the Kiambu County Assembly had rejected the *Finance Bill 2013* only to pass the same without amendments after only eighteen days.
11. It was added that the impugned Act and in particular Sections 14(1)(b), 15(1)(b) 2(b)(c), 26(4) and 27 are starkly unconstitutional, discriminatory, illegal, irrational, vindictive, oppressive, unduly restrictive and unwarranted in the following ways:-

(a) Section 14 (2) (b) proscribes the issuance of licences to persons who operate within a fuel station or fast food restaurant without giving a clear rationale for the same and without considering that there are already business persons with establishments within such premises who stand to suffer irreparably as a consequence of the said blanket prohibition.

b. Similarly, the said Act does not provide for transitional provisions and as such its effect is to arbitrarily send home persons who are already in business for no apparent reason.

c. Importantly, Section 15 (1) (b) and 2(b) is discriminatory in purporting to deny licences to persons previously convicted to more than 6 months imprisonment as it amounts to double jeopardy and is not underpinned by any clear rationale.

d. In the same breath persons who have been convicted have an equal right to engage in business and to have an equal opportunity to earn a decent livelihood without the stigma and prejudice as is being meted out by the said provision.

e. In any event such persons have an equal right to the protection of the law and to the equal application of the law and there is no just cause for the selective application of the law in this case.

f. Section 26(4) is unconstitutional as it purports to impose criminal sanctions without considering the well-established principles of criminal responsibility as enshrined in the constitution and the **Penal Code** Cap 63 of the Laws of Kenya .

g. Section 25 is unconstitutional, unlawful and is against the principles of administration of justice as it purports to stifle traders' cause of action against creditors in matters of alcoholic drinks without any clear rationale.

h. Notably the traders have every right to pursue their claims against creditors under the well-established systems of legal redress and the court system has powers under the constitution to determine such disputes.

i. As such, to deny the traders the right to pursue their claims against such creditors is highly prejudicial and unjust as well as an unnecessary ouster of the jurisdiction of the court system.

j. The operating hours as stipulated in Section 16 of the **Kiambu County Alcoholic Drinks Control Act** and the 1st Schedule thereto are unduly restrictive and not informed by the realities on the ground including consumer needs, general overheads such as the cost of labour and premises on full time basis yet operating for very minimal hours.

12.To the applicants, the Regulations are oppressive, unconstitutional, arbitrary, irrational, fanciful and unreasonable for the following reasons:-

a. Provisions of Rule 6(5) of the Regulations inexplicably and irrationally prohibit the issuance of alcoholic licences in areas where the premises or building is deemed to be residential irrespective of the fact that the building is located on a commercial area.

b.The licence fees provided for under the 3rd Schedule of the said Regulations, which increase the said fees from about Kshs 4,800/- to between Kshs 30,000/- and Kshs. 50,000/= is hefty, unfair, abrupt, punitive, unbearable, excessive and oppressive and as such they predispose the traders to massive losses.

13.The deponent contended that the impugned pieces of legislation were riddled with massive illegalities and irregularities to wit *inter alia* the Act does not incorporate the amendments made to the **Kiambu County Alcoholic Drinks Control Bill, 2013** by the Committee of the whole house. Similarly, the Respondents acted *ultra vires* and in blatant disregard of the **Statutory Instruments Act** Cap No. 23 of 2013 while enacting the Regulations 2013 for the following reasons:-

a. The Respondents failed to make appropriate consultation with the Applicants and other members who are likely to be affected by the said Regulations before making them in the particular they failed to notify the Applicants and the business communities at large either directly or by advertisement, of the intention to formulate the said Regulation and invite them to make their contributions or afford them a reasonable opportunity to do so as stipulated in peremptory terms under Section 5 of the Statutory Instruments Act.

b. The Respondents have failed to prepare a regulatory impact statement about the said regulations prior to their making as provided in Section 6 of the Statutory Instruments Act and in accordance with Section of the same Act or at all.

c. Similarly, the Respondents have failed to make a notification of the regulatory impact statement about the said regulations as stipulated under Section 8 of the Statutory Instruments Act or at all.

d. Moreover, the Respondents have failed to table or lay the said Regulations before the Kiambu County Assembly for scrutiny as provided for under part IV of the Statutory Instruments Act and as such, the said Regulations are of no legal effect from the date when they should have been tabled before the County Assembly.

14.It was the applicants' belief that the Respondents conduct in enacting and enforcing the said

legislations and regulations smacked of impropriety, malice, unconstitutionality, unreasonableness, irrationality, illegality and is indeed rash, capricious and in flagrant disregard to the rules of natural justice and as such, the said legislation deserve to be quashed and their implementation prohibited as sought herein. Similarly, the Respondents utterly frustrated their legitimate expectations that they would enact the said legislations and regulations fairly, procedurally, rationally, and with inclusiveness as well as stakeholders' participation and consultation since the Respondents had a public and statutory duty to enact the said legislations strictly in accordance with the constitution and well established legal principles.

15. The applicants asserted that there were no other mechanisms for enforcing compliance by the Respondents with the said legal and constitutional principles save for the orders of mandamus sought herein.

Interested Party's Case.

16. The interested party's case was put forward by an affidavit sworn by **Richard Mungai Kagiri**, one of its members on 15th September, 2014.

17. According to him, the interested party is a said Self Help Group duly registered with the Ministry of Gender, Children and Social Development and it brings together members owning and operating bars and lodges within the Kiambu town and its environs with current membership of about 1300 members and their employees.

18. It was his deposition that the Kiambu County Government pursuant to the Act and the Regulations thereunder issued a notice on the 16th May, 2014 requiring bar owners to make applications for liquor licences within fourteen days. Pursuant thereto, the members of the interested party made the requisite applications on the 27th and 28th May, 2014 but the 1st Respondent blatantly refused to receive the applications and consequently failed to inspect the premises of the members of the interested party.

19. He contended that the interested party then sent all its members application forms by standard courier services and the same were delivered to the 1st Respondent who never visited the interested party members premises for inspection or informed them of the reason thereto. To him despite the interested party's attempt to engage the 1st Respondent on the issue, the 1st respondent never responded. Instead of undertaking the said inspection, the 1st Respondent pursuant to the Notice published in the *Daily Nation* of Friday 1st August 2014 threatened to shut down interested party businesses.

20. He averred that the Kiambu County Government pursuant to the Act 2013 and the Regulations thereunder issued a notice on the 16th May, 2014 requiring bar owners to make applications for liquor licences within fourteen days issued a notice on the 1st August, 2014 to the effect that no premises shall be allowed to operate without a valid liquor licence beyond 8th August, 2014. However, the members of the interested party have not yet received liquor licences or written reasons for rejection of applications for liquor licences as required by law. He disclosed that there was another suit pending at the High Court in Murang'a being Petition Number 3 of 2014 as between the interested party and the 1st Respondent which was yet to be finalised hence if the orders sought are not granted the whole suit will be rendered nugatory and the applicant would suffer substantial loss. Further, the applicants would suffer great injustice and irreparable harm by the said increase of fees bearing in mind the rising standards of living.

Respondents' Case

21. On behalf of the Respondents, a replying affidavit was filed sworn by **Domnic Gicheru**, the County Chief Officer Public Service and Administration of the Kiambu County Government on 15th December, 2014.

22. According to him, the issues pertaining to the ***Kiambu County Finance Act 2013*** were adjudicated upon by this court in Petition No. 532 of 2013 consolidated with Petition Nos. 12 of 2014, 35, 36 of 2014, 42 of 2014, & 72 of 2014 and Judicial Review Miscellaneous Application No. 61 of 2014: ***Robert N. Gakuru & Others v Governor Kiambu County & 3 others***, wherein the

- Act was declared null and void. All the issues arising therefrom are therefore res-judicata, vexatious, malicious and an abuse of the court process.
23. Based on legal advice received from counsel, he was of the view that the other issues raised by the Applicants as pertains the ***Kiambu County Alcoholic Drinks Control Act*** and the ***Kiambu County Alcoholic Drinks Control (Licencing) Regulations 2013*** were heard and determined by the High court at Murang'a Petition No. 3 of 2014, **John Kinyua Munyaka & Others vs. County Government of Kiambu & Others** (herein after Petition No. 3 of 2014) in which the 1st Interested Party were the petitioner's and therefore the present application is not only an abuse of the court process, vexatious, malicious but also reeks of *mala fides* on the part of the Applicants.
 24. It was the Respondent's position that pursuant to Article 185 (1) and (2) as read together with the Fourth Schedule Part 2 Section 4 (c) of the Constitution 2010, the 1st Respondent through the Kiambu County Assembly has the powers to legislate and regulate the licensing of sale of liquor in the County and pursuant to those powers it enacted the ***Kiambu County Alcoholic Drinks Control Act, 2013***. He disclosed that pursuant to section 67 of the Act the Executive Committee Member Education, Culture and Social Services, being the Executive Member responsible for alcohol control, on the 22nd December 2013 published the Regulations. The said Act and indeed the Regulations were enacted following the loss of lives and eyesight or vision because of the sale and consumption of illicit brew which necessitated the regulation of consumption of alcohol in public interest.
 25. He added that the object and the purpose of the Act is explicitly stated under Section 3 of the Act which include *inter alia* pursuant to the requirements under Part II of the Fourth Schedule to the Constitution and reduce and mitigate the negative health, social and economic impact on communities resulting from production, sale and consumption of alcoholic drinks.
 26. To the deponent, the Act thereto and the Regulations were enacted after all the due process in respect of the respective pieces of legislation were followed including the public participation in which members of the applicants' were invited and participated in. He expounded that consultations with stakeholders including the Applicants and the general public were conducted through meetings held on the 25th July, 2013, 19th August, 2013 and 26th August 2013 in which issues concerning the legislation on control of alcoholic drinks were discussed. In fact the name of the representative of the interested party who has sworn the affidavit on their behalf appears at number 76 in the list of participants.
 27. In his view, it is not illegal or *ultra vires* for the 1st Respondents to introduce the said license and it is clear from the pleadings by the Applicant they have not challenged the legality of the said licenses. To him, the licenses and license fees prescribed under 3rd Schedule of the Regulations are reasonable, rational and do not violate both procedural and substantive fairness as alleged by the Applicants. He therefore deposed that the impugned legislation were enacted lawfully and for purposes spelt out under Section 3 of the Act and that the Regulations thereto were necessary and were enacted pursuant to Section 67 of the Act.
 28. It averred by the deponent that Petition no. 3 of 2014 **Hon. Justice Ngaah** held retrospectively application of the law is not *ipso facto* unconstitutional who went ahead and found that the impugned legislation were not unconstitutional and that the retrospective application of the impugned law was based on Section 68 of the Act. With respect to the imposition of deadline and penalty, it was his view that the same are necessary for good order, planning and saving costs for the 1st Respondent's activities since the Applicant cannot expect that all laws are implemented at their convenience and without order, otherwise the County Government activities would be uncoordinated and would spell anarchy in the County, in any event the Applicant and other members of the public were involved.
 29. It was further deposed that the 1st Respondent was and had at all times been willing to listen to the grievances of the Applicants in connection to the impugned legislations and their implementation and to this end the 1st Respondent had even initiated meetings with the Applicants and other stakeholders in the County to resolve their grievances. To him, the decision of **Justice Ngaah** on the issues raised held that the same were not unconstitutional and were proper and were informed by rationality.
 30. The Respondents' position was that the provisions of Rule 6(5) of the regulations prohibiting the issuance of Alcoholic licenses in areas where the premises or building is deemed to be residential

- irrespective of whether the building is located on a commercial area is not constitutional, oppressive, arbitrary, irrational, fanciful and unreasonable and that this was confirmed in Petition 3 of 2014 found as much. To them, the Licence fees prescribed under the 3rd Schedule of the Regulations are reasonable and not punitive, hefty, unfair, abrupt, unbearable, excessive and oppressive because the same was done with the full participation of stakeholders including the applicants and the interested party. In addition the same issues were also adjudicated on in Petition no. 3 of 2014.
31. The Respondents contended that it was false to allege that the Respondents failed to table the Regulations before the Kiambu County Assembly for scrutiny. Pursuant to Section 11 of the **Statutory Instruments Act**, the Regulations were transmitted to Speaker of the Kiambu County Assembly vide a letter dated 12th November 2013 and duly approved by the County Assembly Committee on Implementation and Delegated Legislation on 17th February, 2014.
32. It was therefore their case the impugned legislation were enacted through the due process of the law, in a constitutional manner that is not discriminatory, irrational and illegal as held in Petition no. 3 of 2014. In addition even though the Applicants have challenged the impugned legislations on grounds of Wednesbury unreasonableness, irrationality and impropriety but failed to demonstrate it in their affidavit.

Determinations

33. I have considered the application, the affidavits, both in support of and in opposition to the application as well as the rivalling submissions.
34. By this Court's decision in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR**, the Court nullified the ***Kiambu Finance Act, 2013***. Accordingly, the issues raised in respect of the said Act, no longer fall for determination and I will not address them in this judgement.
35. Having considered the foregoing, it is my view that the following issues fall for determination in this application:
1. ***Where the impugned legislation had retrospective effect and whether it is as a result unconstitutional.***
 2. ***Whether the fees imposed were exorbitant.***
 3. ***Whether the impugned legislation was discriminatory.***
 4. ***Whether the Prohibition against selling alcohol at petrol stations and residential areas was legal.***
 5. ***Whether there was non-compliance with Statutory Instruments Act.***
 6. ***Whether there was public participation in the enactment of the impugned Act***
36. It is not in dispute that the impugned Act was the subject of Petition No. 3 of 2014 in which judgement was delivered on 10th October, 2014.
37. I must appreciate that the said decision being a decision of a Court of concomitant jurisdiction, its outcome is not binding on this Court. However the said decision is persuasive and if it reflects the true legal position there would be no basis for this Court to form a different opinion.
38. On the contention that the specification of areas in which alcoholic establishments could be established was a denial of the right to property, the Court held that the provision simply specifies, by exclusion, where liquor business outlets should be; in other words, the petitioners can operate anywhere else apart from those places specified in the Act as premises where a fuel station is located or a fast food restaurant. According to the Judge, the rationale behind this provision is to restrict easy accessibility to alcohol by motorists who drive to fuel stations to fuel their vehicles or by people such as children who may find themselves in a fast food restaurant. Such restrictions are meant to protect the lives of those motorists and other road users as well as the lives of vulnerable children. In the Court's view, though the right to acquire and own property is guaranteed under article 40 of the Constitution, this right is one of the rights that can be limited under article 24(1) of the same Constitution if it is justifiable in an open and democratic society and with particular regard to the larger public interest. The Judge found that the purpose for the limitation was noble and also stated that fuel stations do not just spring up anywhere and overnight.

39. On the issue of the retrospective operation, the Court was of the view that a legislation that is retrospective in nature is not ipso facto unconstitutional as long as it is apparent either by express words or by necessary implication that that was the intention of the legislature. Such an intention is found in section 68 of the ***Kiambu County Alcoholic Drinks Act, 2013***. In view of section 68 of the Act, there is no basis upon which the Act can be assailed on the ground of being retrospective in its application. It is also doubtful whether the retrospective effect of the Act and more particularly section 14(2) (b) thereof was going to have any impact on the petitioners' existing licenses since by the nature of their trade, they apply for these licenses every year and there was no single license that was exhibited to demonstrate that it was issued for the year 2014.
40. On the discrimination based on past records of the applicant for licence, the Court did not see any hint of artificiality or arbitrariness in the requirement that those in business or aspiring to be in business must be people of certain disposition; again this requirement is not unique to alcohol business alone, nowadays employers both in private and public sector would want to know whether their potential employee has been convicted of any offence before. If one misses out on an opportunity because of his past criminal record it is not the employer or potential employer to blame and an elimination based on this ground cannot be said to be discrimination as understood in article 27(4) of the Constitution. His view was that as far as the impugned provision is concerned, the Kiambu County Assembly, in its wisdom, has thought it necessary that persons with criminal records of particular offences should not trade in alcoholic drinks. In the Judge's view, it is a policy decision that the court is ill-equipped to interrogate.
41. However, even if there was discrimination, that ipso facto would not justify this Court in nullifying the impugned legislation. In **John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others [2011] eKLR**, it was held that:

“we need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case will therefore require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one contest may not necessarily be unfair in different context. At the heart of this case, therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyse a claim of discrimination has both a subjective and an objective component...In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context...It is only by examining the larger context that a court can determine whether differential treatment results in equality.”

42. In **Nyarangi & 3 Others vs. Attorney General [2008] KLR 688**, it was held:

“The *Blacks Law Dictionary* defines discrimination as follows: “The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” *Wikipedia, the free encyclopedia* defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. *The Bill of Rights Handbook, Fourth Edition 2001*, defines discrimination as follows:- “A particular form of differentiation on illegitimate ground.”... The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex

or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of *Griggs vs. Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications was found “to disqualify Negroes at a substantially higher rate than white applicants”.

43. The Judge also noted that section 15(b) of the Act, as are the rest of the provisions that the petitioners have impugned, is a replica of section 13(1) of the *Alcoholic Drinks Act*, 2010 which is the national legislation for the regulation of the production, sale and consumption of alcoholic drinks. Even if the impugned section 15(2) (b) of the Act was nullified, the petitioner would still be caught out by the same law at the national level. The Judge did not find the impugned piece of legislation discriminatory neither in terms of article 27(4) of the Constitution nor contrary to article 43 of the Constitution that guarantees social and economic rights or any provision of the International Convention on Economic and Social Rights.
44. The petitioners also assailed section 26(4) of the Act on the ground that it purports to create offences and penalties for such offences, a task which, in their view, is reserved for the National Government as stipulated in Part 1(7) (b) and (c) of the Fourth Schedule to the Constitution. There is no doubt the Act was enacted by the County Assembly of Kiambu County Government in exercise of its legislative authority with which it is vested under Article 185(1) of the Constitution. Some of the functions for which the County may legislate for effective performance and exercise of powers of the County Government are control of public nuisances and liquor licensing. In the Judge’s view, a “violent, quarrelsome or a riotous conduct” in a liquor outlet would be a public nuisance that a County Government is vested with power to control under section 3 of Part 2 in the Fourth Schedule to the Constitution. The Judge did not envisage how such control can be exercised other than through a legislative instrument that is backed by proportionate sanctions in the event of non-compliance. In this context, the County Government has not just been loaded with functions but it has also been endowed with the necessary mechanisms to ensure that those functions are effectively delivered; such mechanisms are the power to legislate laws with sanctions to ensure compliance.
45. The petitioners also impugned section 16 of the Act as read with the First Schedule to the Act; they claimed that this provision and the schedule violate article 40 of the Constitution and International Labour laws on hours of operation. The Judge was unable to see how the section

and the schedules infringed the petitioners’ constitutional rights since the rights are more to do with the consumers than retailers who in this case are the petitioners. However, the regulation of drinking hours cannot be construed to interfere with consumer rights. If anything, article 46 is clear that a consumer’s right to health and safety is paramount; this right would certainly be compromised if the consumers were exposed to unbridled consumption of alcohol. The timing of when alcohol can be retailed does not deprive the petitioners of their right to property.

46. The petitioner also claimed that the licence charges had been exorbitantly hiked without public participation being factored in the process. Here I must say that public participation ought not to be equated with mere consultation. Whereas “consultation” is defined by *Black’s Law Dictionary* 9th Edn. at page 358 as “the act of asking the advice or opinion of someone”, “participation” on the other hand is defined at page 1229 thereof as “the act of taking part in something, such as partnership...” Therefore public participation is not a mere cosmetic venture or a public relations exercise. In my view, whereas it is not to be expected that the legislature would be beholden to the public in a manner which enslaves it to the public, to contend that public views ought not to count at all in making a decision whether or not a draft bill ought to be enacted would be to negate the spirit of public participation as enshrined in the Constitution. In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public. In other words the end product ought to be owned by the public. This position was appreciated in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA**

416 (CC) as hereunder:

“If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy.”

47. As I held in *Gakuru* (supra):

“In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public *barazas* national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that.”

48. As was held in *Doctors for Life International vs. Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC):

“The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them”. According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in *New Clicks*, “[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.” The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.”

49. My view is reinforced by the decision in *Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2)* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC), where Ngcobo, J held *inter alia* as follows:

“Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and

fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy. Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves. The representative and participative elements of our democracy should not be seen as being in tension with each other.....What our constitutional scheme requires is “the achievement of a balanced relationship between representative and participatory elements in our democracy.” The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process.....To uphold the government’s submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process. The government’s argument that the provisions of section 118(1)(a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected.....Before leaving this topic, it is necessary to stress two points. First, the preamble of the Constitution sets as a goal the establishment of “a society based on democratic values [and] social justice” and declares that the Constitution lays down “the foundations for a democratic and open society in which government is based on the will of the people.” The founding values of our constitutional democracy include human dignity and “a multi-party system of democratic government to ensure accountability, responsiveness and openness.” And it is apparent from the provisions of the Constitution that the democratic government that is contemplated is partly representative and partly participatory, accountable, transparent and makes provision for public participation in the making of laws by legislative bodies. Consistent with our constitutional commitment to human dignity and self respect, section 118(1)(a) contemplates that members of the public will often be given an opportunity to participate in the making of laws that affect them. As has been observed, a “commitment to a right to . . . public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect.”

50. However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.
51. Therefore the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question. As was appreciated by **Lenaola, J** in **Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013**, public participation is not the same as saying that public views must prevail. This position reflects the view held in *Doctors for Life Case* (supra) to the effect that:

“Where Parliament has held public hearings but not admitted a person to make oral submissions on the ground that it does not consider it necessary to hear oral submissions

from that person, this Court will be slow to interfere with Parliament's judgment as to whom it wishes to hear and whom not. Once again, that person would have to show that it was clearly unreasonable for Parliament not to have given them an opportunity to be heard. Parliament's judgment on this issue will be given considerable respect. Moreover, it will often be the case that where the public has been given the opportunity to lodge written submissions, Parliament will have acted reasonably in respect of its duty to facilitate public involvement, whatever may happen subsequently at public hearings. However, for citizens to carry out their responsibilities, it is necessary that the legislative organs of state perform their constitutional obligations to facilitate public involvement. The basic elements of public involvement include the dissemination of information concerning legislation under consideration, invitation to participate in the process and consultation on the legislation. These three elements are crucial to the exercise of the right to participate in the law-making process. Without the knowledge of the fact that there is a bill under consideration, what its objective is and when submissions may be made, interested persons who wish to contribute to the lawmaking process may not be able to participate and make such contributions."

52. The Judge in Petition No. 3 of 2014 held that if the petitioners had the opportunity to participate in the meetings that came up with the Act and the regulations, meaning that their views must have been considered, it is beyond the court to determine how much should be levied as rates payable by the petitioners or any other person seeking a license to retail liquor.
53. On compliance with section 11 of the *Statutory Instruments Act*, it was contended by the Respondents that that allegation was incorrect and that to the contrary, the Regulations were transmitted to Speaker of the Kiambu County Assembly vide a letter dated 12th November 2013 and duly approved by the County Assembly Committee on Implementation and Delegated Legislation on 17th February, 2014. No serious challenge was taken to this averment
54. Having considered the decision in Petition No. 3 of 2014 in which the issues raised herein were substantially dealt with, I have no reason to deviate from the findings of the learned Judge. I am persuaded by the decision arrived at by the Judge and just as the Judge in the said petition, it is my view that this application lacks merit.
55. Unlike constitutional petition or civil proceedings in which the Court is entitled to interrogate the merits of the challenged decision, in purely judicial review proceedings like in the instant case, the Court is only concerned with the decision making process and is not entitled to determine whether or not the impugned decision is merited.

Order

56. In the premises this application fails and is dismissed but as the issues raised herein were meant to benefit of the residents of Kiambu County in general there will be no order as to costs.

Dated at Nairobi this 17th day of April, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Munawa for Mr Kago and Mr Juma for the Applicant and interested party respectively.

Mrs Nganga for Mr Kiarie for the Respondent.

Cc Richard.