



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**JUDICIAL REVIEW NO. 108 OF 2011**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW REMEDY OF  
CERTIORARI**

**AMBUKIA WINERIES LIMITED.....APPLICANT**

**VERSUS**

**RONGAI DISTRICT ALCOHOLIC DRINKS REGULATION COMMITTEE.....  
RESPONDENT**

**JUDGMENT**

1. By the Notice of Motion dated 19<sup>th</sup> October, 2011, the Applicant sought the following orders:  
**THAT**
  - a. **this honourable court be pleased to grant an order of *certiorari* to bring before it for purposes of being quashed the decision of the Rongai District Alcoholic Drinks Regulation Committee made in the meeting held on 15<sup>th</sup> September, 2011 to ban to manufacture and sale of the Applicant's alcoholic drinks and withdraw the Applicant's liquor licence; and**
  - b. **the costs of this application be provided for.**
2. The application is supported by the statutory statement of facts dated 29<sup>th</sup> September, 2011, the Verifying Affidavit sworn on 29<sup>th</sup> September, 2011 and a supporting affidavit sworn on 19<sup>th</sup> October, 2011. It was filed pursuant to the leave granted by this court on 30<sup>th</sup> September 2011.
3. The Applicant is a limited liability company established under the Companies Act Cap 486 Laws of Kenya and carries out the business of manufacturing wines. The Respondent is a District Alcoholic Drinks Regulation Committee established under Section 8 of the Alcoholic Drinks Control Act. It has the mandate to issue licences in accordance with that Act within Rongai District.
4. On 15<sup>th</sup> September, 2011, the Respondent made a resolution to ban sale of illicit brews and 2<sup>nd</sup> generation drinks within Rongai District. By a notice dated 15<sup>th</sup> September, 2011, all the bar owners, operators and manufactures of these drinks within Rongai District were notified of this resolution and further warned that if they contravened it, they would would be prosecuted in court and their licences withdrawn.
5. The Applicant, who was a manufacturer of Opaque and Githuki Beers, which were cited in the letter as among the brews banned, was aggrieved by this resolution. It alleged that this decision was made in breach of the rules of natural justice and in total disregard of procedure. The Applicant was not heard by the Respondent before it made the decision to shut down the

- Applicant's business operations. The Applicant argued that its operations were lawful at the time as it had been granted licences by the relevant bodies having complied with all the regulations. The Respondent had no valid reasons to withdraw its licence to manufacture these two drinks.
6. The Respondent filed the Grounds of Opposition dated 16<sup>th</sup> July 2014 in opposition to the application. It argued that the application is fatally and incurably defective, it is bad in law and an abuse of the court process and that it lacks merit.
  7. In addition the Respondent filed a Replying Affidavit sworn by the Deputy County Commissioner of Rongai District, David Kipngetich Kosgei, on 7<sup>th</sup> October, 2014. The Respondent explained that the Applicant was denied a liquor licence not pursuant to the resolution made on 15<sup>th</sup> September 2011 but because it was found to be in gross violation of the Food, Drugs and Chemical Substances Act Cap 254 and the Alcoholic Drinks Act, 2010.
  8. When the Applicant's production plant was inspected on 20<sup>th</sup> July 2011, as is routinely done before a liquor licence can granted, the inspecting officer found raw materials which were not labeled and expired materials. These were seized by the Inspecting Officer who filed the Seizure Form "B". In addition, the Applicant's Production Manager could not tell the procedure of manufacture of brews, the store used by the Applicant was damp and had an unpleasant smell and the alcoholic content of the drinks was not indicated on the label. It is for these reasons that the Applicant was denied a liquor licence.
  9. The Counsel for the parties argued the application on 15<sup>th</sup> May, 2015. Counsel for the Applicant relied on the written submissions filed on 27<sup>th</sup> August, 2014. He argued that by banning the sale and manufacture of the drinks in its resolution made on 15<sup>th</sup> September 2011, the Respondent was in fact, delegating what was legal. It made this resolution and did not involve the Applicants or other brewers. This was notwithstanding that the Applicant had at the time in possession of all the necessary licences to carry out its business.
  10. Counsel submitted that all the averments in the Replying Affidavit were mere afterthoughts and were not backed by any evidence. The resolution of the Respondent was based on the situation in the country at the time that there were so many deaths throughout the country as a result of illicit brews. That the decision generalized all brewers and was not sufficient to warrant the banning of the Applicant's products or revocation of its licence. The Applicant should have been given an opportunity to show that its drinks were safe.
  11. The Respondent's Counsel relied on the written submissions filed on 24<sup>th</sup> October, 2014. It was his submission that the Respondent had discretion to issue and cancel licences issued to manufacturers of liquor. It exercised its power to cancel the Applicant's licence pursuant to Sections 13 and 14 of the Alcoholic Drinks Act after it visited its premises and found that the Applicant had contravened the law in the manner set out in the Replying Affidavit.

#### **ISSUES FOR DETERMINATION:**

12. The Respondent did not make any submissions to support the grounds in the Grounds of Opposition. Accordingly the issues raised in this for determination in this application are:
  - i) whether the Respondent's decision made on 15<sup>th</sup> September 2011 was within the mandate and;
  - ii) whether the Respondent's decision to cancel the Applicant's licence should be quashed.

#### **ANALYSIS**

13. The Applicant alleges that its right to natural justice and in particular, the right to be heard was infringed by the Respondent when it passed a resolution to ban certain drinks without consulting it. However although none of the parties raised this issue, I find that the more pertinent question is whether the Respondent had jurisdiction to ban the sale and manufacture of the drinks in its resolution dated 15<sup>th</sup> September 2011.
14. The Respondent is a creature of statute established under **Section 8(1)** of the **Alcoholic Drinks Act No. 4 of 2008**. Its mandate is to **issue licences in accordance with the Act and to perform**

**such other functions as may be allocated to it by the Minister.** By its resolution, the Respondent purported to ban certain drinks it referred to as “**2<sup>nd</sup> generation drinks and illicit brews**” within Rongai District. In effect, it determined that the constituents of these drinks were harmful, on the basis of the deaths that occurred throughout the country to persons who had consumed these drinks, and thus proceeded to ban those drinks from being sold or manufactured.

15. Under **Section 4** of the Act, the function to determine harmful or dangerous constituents of alcoholic drinks, is vested upon the Relevant Agency which is defined at Section 2 as the National Campaign Against Drug Abuse Authority. This section provides that the agency’s functions include:

(a) .....

(b) .....

(c) .....

**(d) advise the Minister generally on the exercise of his powers and the performance of his functions under this Act, and in particular to—**

**(i) recommend to the Minister the permissible levels of the constituents of alcoholic drinks required to be prescribed under section 68(2)(a);**

**(ii) advise the Minister on the harmful constituents and ingredients of alcoholic drinks required to be prohibited under section 68(2)(b);**

16. **Section 68 (1) and (2)** of the Act provides that the Minister at the time responsible for matters pertaining to Provincial Administration, may on the advice of the relevant agency, make regulations for the better carrying out of the objects of the Act, and in particular, may make regulations to;

**(a) prescribe anything required by this Act to be prescribed or prohibit anything required by this Act to be prohibited;**

**(b) prescribe the recommended levels of alcohol in alcoholic drinks which levels shall not exceed the levels set by the World Health Organisation;**

**(c) prescribe substances as harmful constituents of an alcoholic drink;**

**(d) .....**

**(e) prohibit the addition or use of any harmful constituent or ingredient in the production of alcoholic drinks;**

17. The Respondent therefore exceeded its mandate when it made a finding that certain drinks were hazardous and the proceeded to ban the sale and manufacture of those drinks and impose sanctions to persons who violated this directive. Its mandate under the Act is to ensure that an applicant was in compliance with the existing regulations and then proceed to issue it with the licence. In addition, determination of whether a substance or constituent element of an alcoholic drink was hazardous was not a function which the Minister could confer upon the Respondent and this had specifically been allocated to another body, NACADA, by the Act.

18. For this reason, I find that the resolution made on 15<sup>th</sup> September, 2011, in so far as it prohibited sale and manufacture of 2<sup>nd</sup> generation drinks and illicit brews was made in excess of the Respondent’s jurisdiction. As a statutory body, the Respondent must act within the powers conferred to it by the statute. Any decision made in excess of this jurisdiction is ultra vires and void.

19. The second limb of the Applicant's prayer was for an order to quash the decision of the

Respondent to withdraw its licence. However, this sprayer was vague. The Applicant was not clear whether it only sought Re-instatement of the licence to manufacture Githuki and Opaque beers. This was relevant in light of the Respondent's allegation that it had refused to grant a licence for one of the Applicant's bars after it inspected the Applicant's premises on 20th July, 2011, it found that the Applicant was in breach of various regulations under the **Alcoholic Drinks Act** and **Food, Drugs and Chemical Substances Act Cap 254**.

20. This allegation was not satisfactorily controverted by the Petitioner. I therefore find that in the circumstances, the prayer to quash the decision to withdraw the Applicant's licence cannot be granted.

### **FINDINGS**

21. Accordingly, I find that the Respondent's resolution made on 15<sup>th</sup> September 2011 is null and void for want of jurisdiction. The Applicant's mandate under the Alcoholic Drinks Act, No. 4 of 2010, does not include power to make a determination that certain contents of drinks are hazardous, nor ban the use of these contents or to impose sanctions for breach of regulations. Its mandate was to issue licences to persons who had complied with existing regulations.

### **DETERMINATION**

22. For this reason, the application is partially successful and the first limb of the prayers is granted. The Respondent's resolution made on 15th September, 2011 is hereby removed into this court and quashed as it was made ultra vires.

23. The prayer in the 2nd limb to quash the Respondent's decision to withdraw the license is disallowed.

24. The Applicant shall have the costs of this application.

Orders accordingly.

**Dated, signed and Delivered at Nakuru this 26th day of August, 2015.**

**A. MSHILA**

**JUDGE**