



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 61 OF 2013

IN THE MATTER OF CHAPTER 4 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

IN THE MATTER OF RULES 11, 12 AND 13 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUALS) HIGH COURT PRACTICE RULES

AND

IN THE MATTER OF ALCOHOLIC DRINKS CONTROL ACT, 2010 AND THE ALCOHOLIC DRINKS CONTROL (LICENCING) REGULATIONS ISSUED UNDER LEGAL NOTICE NO. 206 OF 2010

RUTH M. MAINGI & 29 OTHERS PETITIONERS

versus

THE MINISTER OF STATE FOR ADMINISTRATION AND INTERNAL SECURITY & 2 OTHERS RESPONDENTS

And

NATIONAL CAMPAIGN AGAINST DRUG ABUSE

AUTHORITY (NACADA) INTERESTED PARTY

RULING

1. The applicants herein, **bar owners** within Machakos County filed a Notice of Motion dated 14th November 2013 pursuant to the provisions of **Rules 23** and **24** of the **Constitution of Kenya** (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and **Article 23** and **165(3)(b)** of the Constitution of Kenya, seeking orders that:-

- ***An interim order do issue restraining the 3rd respondent either by itself or its agents, servants or employees from invading the petitioners' business premises, arresting them or harassing them in purported enforcement of Rule 15 and the third schedule of Alcoholic Drinks Control (licensing) Regulations, 2010 pending the hearing and determination of the application.***

- **An order do issue that the petitioners continue to pay license fees as previously applicable, that is Kshs.4800 for their businesses, pending hearing and determination of the main petition.**

2. The application is premised on the grounds that; the making of the regulations in questions by the Minister pursuant to **Section 68 of the Alcoholic Drinks Control Act, 2010 (The Act)** constitutes an administrative act which ought to comply with **Article 47 of the Constitution of Kenya (Constitution)**; under **Rule 15** and the third schedule for the Alcoholic Drinks Control (licencing) Regulations, 2010. The Minister raised fees to over 500%, that is, from Kshs.4800 to Kshs.50,000 without basis; the petitioners have already been served with a Notice by the 3rd respondent requiring them to pay the new license fees as per the said regulations; the petitioners believe that the 3rd respondent will continue invading their business premises and using police to harass and arrest them in a bid to compelling them to comply with the said regulations.

3. **Ruth Maingi**, the 1st petitioner swore an affidavit in support of the application on her own behalf and that of her co-petitioners. She deponed that on 12th September 2013 the 3rd respondent's chairperson issued them with a notice requiring them to pay licence fees for their bars in accordance with the alcoholic Drinks control (licencing) Regulations, 2010; the 1st respondent made regulations under rule 15 of the said regulations without seeking or obtaining their views on the same yet these laws meant to govern their businesses which is in contravention of their rights under Article 47 of the Constitution; raising the fee from Kshs.4800 to Kshs.50,000 which is 500% increase was without basis; the 3rd respondent has been using the police to harass them with a view of forcing them to pay the license fees that has been making them suffer monetary loses.

4. The 1st and 2nd respondents filed grounds of opposition stating that; the application is totally incompetent, bad in law and does not lie, the alcoholic Drinks control Act came into operation on 22nd November, 2010; the prayer sought for injunction does not meet the threshold of a prima facie case as set out in **GIELLA VS CASSMAN BROWN'S** Case; the prayer for conservatory prohibitory order ought not to issue as the petitioners have not demonstrated how their rights/or those of their members have been violated; The petitioner members are before court with tainted hands as they have no *locus* to institute these proceedings having failed to comply with **section 9(1)** of the **Alcoholic Drinks Control Act, 2010**, read together with **Rule 4(2)** of the Alcoholic Drinks Control (Licensing/Regulations 2010); and that the petitioners rights envisaged under the bill of rights are subject to the limitations as contemplated under the constitution taking into account the object and purpose of the Alcoholic Drinks Control Act, 2010 and no material has been placed before the court to support the petitioners allegations of unlawful harassment and interference with their business operations by the respondent.

5. The 3rd respondent responded through an affidavit deponed by the Secretary to the County Government, **Francis Mwaka** who averred that the 3rd respondent is established under **Section 8(1)** of the **Alcoholic Drinks Control Act, Act No. 4 of 2010** and is mandated to issue licenses to persons intending to sell, dispose of or deal with alcohol in any manner within Machakos District. Under Section 143(3) of the Act, every grant, renewal or transfer of a licence is subject to the payment of the prescribed licence fees and therefore the operation of the petitioners' businesses is subject to the fulfilment of that condition.

Under the third schedule of the Alcoholic Drinks Control (Licensing) Regulations 2010, the petitioners are liable to pay a license fees of Kshs.50,000 per year as they operate premises within Machakos County.

7. That its issuance of the notice requiring petitioners to pay license fees is within its mandate as it is the body that is charged with ensuring that the petitioners comply with the terms of the license including payment of fees. It did not have powers to determine the fees payable for the license fees and neither is it involved in determination of the license fees payable as the power lies with the 1st respondent.

8. Further, he stated that the Alcoholic Drinks Control (licensing) Regulations have been in existence since 2010 and the petitioners did not object to imposition of the fees until 12th September 2013 when the

3rd respondent by way of notice sought to enforce the payment of the fees and as such the petition is brought to evade obedience with the law and not enforce their fundamental rights as enshrined in the constitution. It has power under section 8(2) of the Act to visit the petitioners' business premises to ensure that they adhere to the terms of the license. They have not used any of its agents, servants or employee to procure the assistance of the police and chiefs to harass the petitioners. And, that non-payment of these prescribed license fees amounted to an offence under the Act and as such the police were entitled to arrest those who are found to be operating without payment of the prescribed license fees.

9. The Interested Party on the other hand responded to the application through its legal officer, **Jane Githinji** who deponed that its key mandate is to assist and support the government in developing and implementing policies, law and action plan on control of alcohol abuse; **Section 68 of the alcoholic Drinks Control Act, 2010** empowers the minister to make regulations generally for the better carrying out of objects of the Act and further the said regulations may prescribe any fee payable.

Pursuant to the section, the minister made and passed regulations pertaining to fees payable in respect of all alcoholic drinks and gazetted the same. (Legal Notice No. 206 of 2010).

10. That the Act provides for comprehensive control of manufacture, sale, consumption, distribution and promotion of alcoholic drink in Kenya. The regulation provides for comprehensive licensing procedure to enable District Alcoholic Regulation Committees to effectively manage the licensing process. The fees prescribed was suggested by the industry therefore the petitioners' averment that it was raised by 1000% was baseless as it was prescribed in view of the current inflation rates. Besides, the third schedule provide for thirteen different types of licenses and the petitioners' were a liberty to choose the license that best suited their purpose and financial sustainability.

11. Further, that the Act passed through the requisite steps in parliament wherein the petitioners were represented by their members of parliament and through various consultative forums prior to its enactment.

12. That the petitioners' assertions that Rule 15 and the 3rd schedule only take into consideration the location of the premises was a necessary evil to ensure the protection of vulnerable persons. The Article 53(d) of the constitution provides for protection of every child against abuse, neglect, harmful cultural practices which was the basis of enforcement of the 300 metres rule therefore the rule 15 and 3rd schedule as to the location of premises was a necessary evil to ensure protection of vulnerable persons; and that the petitioners rights are subject to some limitations as contemplated by the constitution taking into account the object and purpose of the Act.

13. The application was canvassed by way of written submissions.

14. It was submitted on behalf of the applicants that the relief sought was conservatory in nature and there was no denial by the respondents that previously the petitioners were paying Kshs.4,800. Gazetting of regulation 15 is an administrative action amenable to the provisions of Article 47 of the Constitution. No replying affidavit was filed to indicate that the petitioners were consulted / involved before the regulation was effected. The increase in the fee has an adverse effect therefore the applicants have a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

15. In their submissions, the 1st and 2nd respondents stated that the petitioners were not entitled to the relief of the conservatory orders sought. It was pointed out that with the new restructuring of Ministries; the 1st respondent does not exist. What exists is the Ministry of Interior and Coordination of National Government State Department of Interior. That the orders the applicants are seeking to be stayed are in operation in the whole country therefore staying the same will be benefiting a few minority persons. Further that there is no demonstration of a prima facie case with a likelihood of succeeding as no documentary evidence of alleged harassment was tendered.

17. It was also argued that no substantial loss will be occasioned but the applicants will suffer any loss it

will be quantifiable which can be compensated by an award of damages. The government is charged with the responsibility of ensuring that consumption of alcohol does not interfere with national values and well being of the people hence the making of the Act and Regulations.

18. The 3rd respondent submitted that it had not infringed any of the applicants' rights and the alleged infringement complained of was not particularized as required by law.

19. The Interested Party's submissions were in respect of the main petition.

20. The applicants herein are seeking a conservatory order. In the case of **MUSLIM FOR HUMAN RIGHTS (MUHURI) & 2 OTHERS VS THE ATTORNEY GENERAL & 2 OTHERS (2011)eKLR** it was stated that:-

“..... a party seeking a conservatory order only required to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants conservatory order, there is a real danger that the applicant will suffer prejudice as a result of the violation or threatened violation of the constitution.”

21. The **Alcoholic Drinks Control Act, No. 4 of 2010** was enacted into law and came into force on 22nd November 2010. According to **Section 3** of the **Act** amongst other provisions, the object of the Act is to control the production, sale, and use of alcoholic drinks in order to protect the health of individuals in light of the dangers of excessive consumption of alcoholic drinks and to protect the health of persons under the age of eighteen years by preventing their access to alcoholic drinks.

22. **Section 7** of the **Act** provides for licensing of the manufacture, production, sale, disposal or dealing with alcoholic drinks. **Section 8** of the **Act** provides for the formation of District Alcoholic Drinks Regulation Committees in each district. Its function is to issue licenses in accordance with the Act and to perform such other functions as may, from time to time be allocated to it by the minister.

Section 68 of the Act mandates the minister to make regulations for carrying out the objects of the Act. Those regulations may prescribe the fees payable under the Act.

23. The applicants herein are questioning the constitutionality of section 68 as regards the prescription of fees payable by bar operators. Their contention is as regards the fees they claim to be unconstitutional for firstly being inordinately high and for having not been consulted. The issue of public consultation in the legislative process being key to the constitution. In determining whether administrative actions by the respondents complied with the constitutional provisions of public participation the court will be guided by Article 10 of the constitution regarding public participation of all stakeholders.

24. With regard to the determination of the fees payable this is a reserve of the 1st respondent as it is clearly stipulated by the regulation. This would behove upon the 3rd respondent to fulfil its administrative obligation of ensuring compliance.

25. From the foregoing it is apparent that the applicants have not demonstrated existence of a prima facie case with likelihood of succeeding.

26. Secondly, the loss envisaged to be suffered is monetary in nature. It is a loss that is quantifiable and can be compensated by an award of damages in case the petition is successful.

27. For reasons given, I decline to grant the relief sought. The application is dismissed with no orders as to costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 26th day of AUGUST, 2015.

L.N. MUTENDE

JUDGE