



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 KIRINYAGA COUNTY ALCOHOLIC DRINKS CONTROL ACT 2014

AND

IN THE MATTER OF NATIONAL POLICE SERVICE ACT NUMBER 11A OF 2011

AND

IN THE MATTER OF CHAPTER SIX 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. Before this Court is a Notice of Motion dated 9th July, 2015 brought by **WITMORE INVESTMENT LTD.**, the petitioner/applicant herein who is seeking the following orders:

i. That the Hon. Court be pleased to hear this matter exparte in the first instance due to its urgency.

ii. That this Hon. Court be pleased to issue an interim injunction and/or conservatory order restraining the respondents by themselves, their agents, servants or anybody directed to act on their behalf from intruding into licensed premises of the applicant, from interfering with the applicant's manufacture, distribution and sale of Brown Oak opaque beer pending the hearing and determination of prayers 5, 6 and 7 of this application.

iii. That this hon. Court be pleased to issue an interim injunction and/or conservatory order restraining the respondents by themselves, their agents, servants or anybody directed to act on their behalf from unlawfully harassing anyone distributing, purchasing and/or consuming Brown Oak Opaque beer pending the hearing and determination of prayer 5, 6 and 7 of this application.

iv. That this hon. Court be pleased to order the Officer Commanding Station (O.C.S. Kianyaga Police Station to ensure compliance with the orders herein and in particular to provide security to the petitioner's business premises at KUTUS.

v. That this hon. Court be pleased to issue an injunction and/or conservative order restraining the respondents by themselves, their agents, servants or anybody directed to act on their behalf from intruding into licensed premises of the applicant from interfering with the applicant's manufacture, distribution and sale of Brown oak Opaque beer pending the hearing and determination of the petition.

vi. That this hon. Court be pleased to issue an injunction and/or conservatory order restraining the respondents by themselves, their agents, servants or anybody directed to act on their behalf from unlawfully harassing anyone distributing, purchasing and/or consuming Brown Oak Opaque beer pending the hearing and determination of the petition.

vii. That costs of this application be provided for.

2. The application was supported by the affidavit of Julius Comba Nyaga and the grounds listed on the face of the application. The 1st, 2nd and 3rd prayers of this application were spent on 14th July, 2015 and therefore this ruling relates to prayers 4, 5, 6 and 7 in the application.

3. BACKGROUND

The Petitioner herein has filed a constitutional Petition against the named respondents to wit, County Government of Kirinyaga, The 1st respondent, The Hon. Attorney General the 2nd respondent sued as the principal legal adviser to the Government of Kenya, The Inspector General, Kenya Police the 3rd respondent and Njogu Barua the 4th respondent and Hon member of Parliament for Gichugu Constituency.

The Petitioner in his petition has alleged that it is a duly registered company in Kenya and it is duly licensed to carry out its business which includes manufacture and distribution of an alcoholic beverage under the brand name "Brown Oak Opaque beer"

4. The Petitioner has cited a number of its rights under the Constitution under **Article 3, 10, 20 (1), 27 (1), 29 (c), 29 (d), 40 (1) and 40 (2) (a)** thereof and has alleged that the 1st, 3rd and 4th respondents have through their actions and inactions violated its constitutional rights as enshrined under **Article 29 (d), 40 (1), 47 and 27**. The Petitioner as a result of the alleged violations has sought declaratory orders, General damages and a permanent injunction to restrain the Respondents and their agents from interfering with Petitioner's business of manufacture, distribution and sale of alcoholic drinks.

5. APPLICANT'S CASE

The Petitioner's motion before this court as indicated above was based on the grounds listed on the face

of the application, the affidavit of Julius Comba Nyaga and submissions by Mr. Magee, learned counsel for the applicant. The Applicant has alleged that on 3rd July, 2015 officers from the 1st Respondent accompanied by Police officers under the command of the 3rd Respondent unlawfully and without notice went into the Petitioner's licensed premises accompanied by 4th Respondent, locked up the petitioner's business by affixing a padlock to the door leading to its licensed factory premises.

6. The Applicant has further alleged that at the time of the alleged action, the Petitioner had a stock of Brown Oak Opaque beer worth over Kshs.6,000,000 (Six Million shillings) and that it had bank liabilities amounting to over Kshs.50,000,000 (fifty million shillings) and it is likely to incur huge financial losses as a result of the destruction and closure of its industry.

7. The Petitioner through its director, Julius Comba Nyaga deposed in his affidavit sworn on 9th July, 2015, that the company has a permit issued by Kenya Bureau of Standards certifying that the brand it produces (Brown Oak) is of good quality and annexed a copy of the permit exhibited in the said affidavit as "JCN 7" to demonstrate the fact. The company also exhibited photographs of the industry showing that it has invested heavily in the purchase of machineries, infrastructure and personnel as exhibited in the annexure marked "JCN 13".

8. The Applicant has also deposed that the alcoholic drink it manufactures has been analysed by the Government Chemist and was issued with a certificate showing that the product was fit for human consumption. The certificate was exhibited as annexure "JCN 8".

9. It was further alleged on oath that that the Respondents descended on the Petitioner's premises on 4th July, 2015 and unlawfully destroyed alcohol that had been stored therein and annexed photographs of broken bottles marked as annexure "JCN 11". The Applicant alleged that as a result of the Respondents' action, bar owners are now afraid or reluctant to sell Brown Oak and thereby exposing the Petitioner to huge financial losses apart from subjecting its director to psychological and emotional torture.

10. Mr. Magee counsel for the Petitioner submitted that the Petitioner's business is licensed both at the national and county level and relied on a business permit annexed as 'JCN 4' and a licence marked as 'JCN 5' all of which were allegedly issued by the 1st Respondent to the Petitioner to engage in the business of manufacture and distribution of the beer. He also relied on a letter dated 22nd December, 2014 from the 1st Respondent indicating that the licences issued to it for 2014 were to be valid until other licences were to be issued in 2015. He further relied on the licence from NEMA which was annexed as JCN 9' in the affidavit to show that the Petitioner had complied with statutory obligations in setting up the factory to manufacture beer.

11. Mr. Magee further submitted that despite all the licences and permits referred to above plus Tax Compliance Certificate from Kenya Revenue Authority showing that the Petitioner is a registered tax payer and has been filing its returns, which facts he submitted were not disputed or challenged, the Respondents have violated and threatens further violations of the Petitioner's constitutional rights as the actions have crippled its business and it is for that reason he sought for the orders in the application pending the determination of the petition herein.

12. He cited two authorities to persuade this court to grant the reliefs sought. The cases cited are:

- i. **OFFICERS OF THE ASSOCIATION OF SPIRITS MANUFACTURERS –VS- THE A.G. AND 3 OTHERS** in (PETITION NO. 277 OF 2015 AT Nairobi High Court 0 unreported) and
- ii. **JUDICIAL SERVICE COMMISSION –VS- SPEAKER NATIONAL ASSEMBLY &**

ANOR [2013] eKLR

Mr. Magee opined that the *ratio decidendi* of the above authorities is that constitutional rights of individuals must be respected and the rule of law must prevail at all times.

13. THE RESPONDENTS' CASE

To begin with the 1st Respondent, it opposed the application through a replying affidavit sworn by one JOE MURIUKI, the County Secretary to the 1st Respondent and the submissions made by Miss Wanjiru learned Counsel for the 1st Respondent. In his affidavit, Mr. Muriuki deposed that the reliefs sought by the Petitioner are incompetent and misconceived deponing that allowing the same would be a recipe for chaos in the county. According to the 1st Respondent, the petition itself upon which the motion is hinged does not disclose a reasonable cause of action.

14. The 1st Respondent also faulted the petition filed by the Applicant for being vague and unspecific in its complaint against the 1st Respondent. Miss Wanjiru learned counsel for the 1st Respondent submitted that the Petitioner is not licensed to manufacture and distribute beer. She argued that the licence granted to Julius Comba is inapplicable to the Petitioner as the two are different and distinct in law.

15. Miss Wanjiru faulted the Petitioner for not displaying any licence issued by the national government arguing that the licences exhibited at the county level expired in 2014 and that the Petitioner has no valid permit at the moment from the 1st Respondent to manufacture and distribute the beer in 2015. She submitted that the notice dated 22nd December, 2014 exhibited at page 73 of the petition is not sufficient and that without a valid licence, the 1st Respondent cannot be restrained from carrying out its mandate.

16. Miss Wanjiru further contended that the petition is vague and prejudicial to the 1st Respondent in regard to responding to the alleged violation of its rights. She also pointed out an apparent contradiction in the petition as opposed to the application arguing that while the Petitioner alleges that the 1st Respondent “watched with approval” at the destruction of the Petitioner’s property, the application alleges that the 1st Respondent went with the Police to the Petitioner’s premises and put a padlock locking up the premises. The 1st Respondent further faulted the motion and the petition for being too general saying that description of the 1st Respondent is too broad as it begins from the Governor to the sweeper at the county and that the Applicant should have been more specific on who it wanted restrained.

17. The 1st Respondent cited two authorities in support of its opposition:

- i. **Abdalla Rhova Hiribe & others -VS- THE A.G. & KITUO CHA SHERIA (NBI H.C.CIVIL CASE NO. 141/10 – unreported)**
- ii. **MURANGA BAR OPERATORS ASSOCIATION –VS- MINISTER OF STATE FOR PROVINCIAL ADMINISTRATION & OTHERS (MURANGA H.C. PET. NO. 3 OF 2011 – unreported)**

The 1st Respondent argued that they are under an obligation to ensure that consumers’ rights under **Article 46** of the **Constitution** are protected to ensure that goods and services are of reasonable good quality in order to protect the public.

18. The 1st Respondent finally submitted that the rights of the Petitioner are subject to **Article 24** of the Constitution and that full disclosure of the alleged violations of rights have not been made to warrant the orders sought in the application.

19. The 2nd and 3rd respondents though unrepresented at the hearing of the motion before me had filed a replying affidavit through one FRANCIS O’KELLO MAKORI, the learned litigation counsel for the 2nd and 3rd respondents. In their response, which I am inclined to consider, their absence notwithstanding, the 2nd and 3rd respondents opposed the application before Court stating that the same is misconceived and bad in law. According the 2nd and 3rd respondents the Petitioner has not demonstrated in any way how the 2nd and 3rd Respondents have infringed on its rights under **Article 23, 40, 47, 50 (1), 73 and 75** of

the Constitution of Kenya 2010. It was further deposed that the petition as filed disclosed no reasonable cause of action against the 2nd and 3rd respondents and the application cannot stand for lack of merit.

20. The 4th Respondent on his part also opposed the application through grounds of opposition dated 16th July, 2015 and the submissions made by both Hon. Kangata and Mr. Thuku, learned counsels for the 4th Respondents. The 4th Respondent opposed the application stating that the same is vague and unclear in terms of the reliefs sought from this Court. According to him, the Applicant has not made out a *prima facie* case with likelihood of success.

21. The 4th Respondent further faulted the Petitioner from trying to evade legal process of continuous inspection and monitoring of premises dealing in Alcoholic beverages for the wide interests of the public and that it was trying to use the petition to hinder enforcement of the law.

22. The 4th Respondent also opined that the orders sought are without merit, are misconceived and do not demonstrate any infringement of any constitutional right. He decried the petition for being wrongly directed at him in person yet he does not direct the affairs of 1st, 2nd and 3rd Respondents. He also denied that he controls the activities of his residents saying that he is just routing for quality in the alcohol industry.

23. Mr. Kangata faulted the Applicant for lacking a valid licence under Alcohol Control Act Chapter 121A Laws of Kenya issued from the national level of Government and that the licences from County Government exhibited by the Applicant are insufficient and that the petitioner has contravened **Section 7** of the said law by dealing with alcoholic beverages without a valid licence. He also took issue with the factory being put up without approvals from physical planning.

24. Mr. Thuku on his part further opposed the application contending that the petition and the orders sought is unmerited as it does not disclose a *prima facie* case to warrant interlocutory reliefs at this stage. He argued that the reliefs sought are special because they are hinged on a constitutional petition and that by virtue of that the Petitioner had to demonstrate specific constitutional violation to warrant a constitutional petition.

25. He relied on the cited authority of **Maggie Mwauka Mtalaki –vs- HFCK [2015] eKLR** to advance the legal arguments that not all ills should attract constitutional sanctions especially where other statutory remedies are available. He further submitted that granting conservatory orders prayed would be against public interests and on this score he relied on the authority in the case of **HON. JIMALDIN ADAN AHMED & OTHERS –VS- HON. ALI IBRAHIM ROBA & 2 OTHERS [2015] eKLR**.

26. ISSUE FOR DETERMINATION

The motion before this Court has raised a fairly simple issue for determination which is whether the petition establishes a *prima facie* case on violation of constitutional rights of the Petitioner and if so whether it merits a grant of the injunctive reliefs sought.

27. The principles for granting injunctive reliefs were well settled in the celebrated case of **GIELLA – VS- CASSMAN BROWN [1973] EA 358** where it was held that an applicant must first show a *prima facie* case with a probability of success, secondly an interlocutory injunction will not normally issue unless the applicant might otherwise suffer irreparable loss which would not adequately be compensated by an award of damages and third if the Court is in doubt, a decision is made on a balance of convenience.

28. Before I examine facts in this petition and the application to determine whether they demonstrate a *prima facie* case, it is important to first determine what can constitute a *prima facie* case. This question was well answered in the Court of Appeal in the case of **MRAO LTD. –VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR 125** where the court posed;

“so what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal of the latter.”

29. The Applicant in this petition has alleged a number of rights which it says it is entitled under the Constitution. It cited **articles 3, 10, 20(1), 27 (1), 29 (c), 29 (d), 40 (1) and (2), 47 (1), 48, 50 (1), 73 (1) and 75 (1)**. The same is true and this applies to all the articles in the Constitution. They are not in vain and must be protected. The alleged violation of the rights by the Respondents if it is proved is serious and must be remedied. This Court at this stage however, is not concerned with the merits of the allegations as that will be canvassed later at the hearing of the petition itself.

30. The Respondents have questioned the merits of the petition and the application. They have asserted that the Petitioner has no valid licences and cannot have a cause of action in the absence of the same. I have looked at the petition in its entirety and the application and noted that the Petitioner does have some valid licences or permits but some of the licences have also expired.

31. I have noted at page 46 of the petition that the Petitioner has a valid business permit from the 1st Respondent marked as “JCN4” in the application to distribute “second hand generation beer” and the permit expires on 31st December, 2015. The permit does not indicate what “the 2nd hand generation beer” is but I believe that is an issue to be ventilated at a later stage. I also note at page 51 of the petition that the 1st Respondent issued a licence under The Food, Drugs and Chemical Substance Act (Food Hygiene) Regulations to the petitioner on 25th May, 2015 for “Liquor Factory.” The Petitioner also annexed copies of valid permits from County Government of Embu but did not say how the same is related to the reliefs being sought against the respondents herein.

32. On the other hand, as submitted by respondents’ counsels, the licence to manufacture Opaque Beer issued to the Petitioner by the 1st Respondent as exhibited in annexure “JCN 5” in the application expired on 31ST December, 2014 and so to distribution licence issued to Julius Comba Nyaga which as submitted by the 1st Respondent’s counsel I find immaterial in so far as the application is concerned. I agree with the 1st respondent’s assertion that the Petitioner in law is distinct and different from shareholders or its employees and despite the connection of the Petitioner and its directors, the two in law cannot be described as one and the same. That issue however, is immaterial as the permit issued to Julius Comba Nyaga expired and cannot have any legal value or significance in any event.

33. The Petitioner’s learned counsel in response to the lack of valid licences for 2015 pointed out that the 1st Respondent had issued a notice dated 22nd December, 2014 validating the expired licences of 2014 until the issuance of 2015 licences for liquor manufacturing and trade. The averments contained in the supporting affidavit and the annexures thereto have not been controverted or denied by any of the Respondents or the 1st Respondent in particular and therein lies an arguable case that cannot be disregarded. I wish to add however, that at this stage this Court is not being called upon to make any definite finding either of law or fact as that is an issue that will ultimately be determined after hearing the petition itself. The 1st Respondent’s learned counsel submitted that the said notice was not sufficient but the argument does not hold water because 1st Respondent’s replying affidavit does not challenge the authenticity of the said public notice dated 22nd December, 2014. In any event if the 1st Respondent wanted to revoke the said notice nothing could have been easier than to issue another notice cancelling or revoking the said notice which appears on the face of it to be addressed to all and sundry and copied to law enforcement agencies. This Court finds that the said letter negated the assertions made by the Respondents that the Petitioner/applicant’s licences are invalid.

34. The 4th Respondent through Hon. Kangata raised a valid legal point that the petitioner had not complied with **Section 7** of the Alcohol Control Act Cap. 121A Laws of Kenya (No. 4 of 2010). However, a look at the fourth Schedule of the Constitution clearly outlines the functions of both National Government and County Government and Part 2 thereof clearly gives the County Government the

mandate of liquor licensing. I will not make any pronouncement at this stage concerning the provisions in that statute as doing so will have an undesired result of determining the petition prematurely before hearing all the parties and in any even the point raised by the 4th Respondent appears on the face of it to be inconsistent with the averments made by the 1st Respondent under paragraph 10 of the affidavit of Joe Muriuki, the County Secretary. I therefore find it safe at this stage not to delve into detailed analysis of facts and law so that I do not pre-empt the pending petition.

35. In the case of **CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW) & 7 OTHERS NBI CONSTITUTIONAL PETITION NO. 16 OF 2011** Musinga J., (as he then was) made the following observations:

“It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner’s application and not the petition. I will therefore not delve into a detailed analysis of facts and law. At this stage a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution.”

36. The petitioner in this application has stated on oath that the Respondents went to its premises on 2 different occasions on 3rd July, 2015 and on 4th July, 2015 accompanied by rowdy youths and on the first occasion closed the premises by affixing a padlock and on second day (4th July) went back and destroyed alcohol that was in store as demonstrated by the annexures “JCN 13”. The Respondents did not deny or controvert the same. The 1st Respondent only took issue with the allegations contained in the petition that the 1st Respondent “watched with approval the destruction” of the Petitioner’s properties while in the application it is claimed that the 1st Respondent accompanied by the Police went and locked up the premises. I do not find contradiction because the Petitioner has clearly explained that the Respondents unlawfully went into its premises on two different occasions and committed different actions as aforesaid. I will also for the reasons aforesaid not at this stage make any pronouncement whether the act of “watching” destruction taking place constitutes or can constitute a constitutional violation.

37. This court takes the position that this country cherishes the rule of law. The same is enshrined in our national values expressed under **Article 10** of the Constitution. In this regard this Court being a court of law cannot allow anyone despite the noble objectives to sidestep due process of law. If the Petitioner has broken the law by stocking or manufacturing illicit drinks in its premises, it is expected in an orderly society such as ours for the regulatory arm of the government whether county or national to take legal action rather than opt for the illegal one of descending on properties and destroying them. That is a recipe for anarchy and must be discouraged.

38. I am of course cognizant of the public interests in this matter as aptly submitted by Thuku, learned counsel for the 4th Respondent but I agree with Magee, learned counsel for the Petitioner that it is not in public interest to destroy other people’s property and the Respondents have not sworn affidavits to suggest that the destruction of bottles and other properties belonging to the Petitioner was done in public interest. That was hooliganism precipitated by people taking law into their own hands which really if established is not only unlawful but blatant violation of constitutional rights.

39. The authority of this Court to uphold and enforce rights of individuals under **Article 23** is without question meant to protect people or individuals against such arbitrary actions from any quarter. While I am inclined to issue some injunctive orders for the foregoing reasons, I am inclined to agree with the sentiments expressed by the Respondents and supported by the authority in the case of **MAT INTERNATIONAL TERMINAL LTD - VS- MULTIPLE ICD(K) LTD & 3 OTHERS [2012] eKLR** where Justice Tuiyot quoting with approval the case of **ROCKLAND KENYA LTD -VS- MILLER [1994] KLR 63** observed as follows:

“A principle in granting an injunction is that in giving protection to the applicant the court

must give regard to the corresponding need of the defendant to be protected against injury resulting from having been prevented from exercising his own legal right.”

The 1st Respondent has a constitutional and legal mandate to protect the public and consumers of products such as products produced by the Petitioner herein. They cannot be prevented from carrying out that mandate so long as they do so lawfully following due process provided by the law.

40. I will accordingly partly allow the application dated 9th July, 2015 only on the following terms:

1. A temporary injunction is granted restraining the 1st, 3rd and 4th respondents by themselves, their agents, servants or anybody directed to act on their behalf from intruding into licensed premises of the Applicant from interfering with the Applicant's manufacture, distribution and sale of Brown Oak Opaque beer pending the hearing and determination of the petition. The injunction does not however, stop the 1st Respondent or officers working under it from carrying out their statutory mandate like routine inspection to ensure health compliance among other duties like licensing.
2. The petition itself be listed down for directions for purposes of timely directions and disposal for the interest of justice.
3. Costs of this application will be in the course.

Dated and delivered at Kerugoya this 16th day of September, 2015.

R. K. LIMO

JUDGE

16.9.2015

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Magee for Petitioner present

Thuku for 4th Respondent and holding brief for Wanjiru for 1st Respondent.

Munene holding brief for Makori for 2nd and 3rd Respondents.

COURT: Ruling signed and delivered in the open Court in the presence of Magee for Petitioner, Thuku for 4th Respondent and holding brief for Wanjiru (Miss) for 1st Respondent and Munene for Makori for 2nd and 3rd Respondents.

R. LIMO

JUDGE

16.9.2015