



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPLICATION NO. 3 OF 2014

IN THE MATTER OF THE CUSTOMS AND EXCISE ACT CAP 472 LAWS OF KENYA

AND

IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL ACT NO. 4 OF 2010

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS ARTICLE 50(2)(N) OF THE CONSTITUTION OF KENYA**

SAMUEL GATHURU T/A

IMENTI WINES AND SPIRIT.....1ST APPLICANT

FESTUS KINOTI MURITHI T/A

SUMMER TIME.....2ND APPLICANT

SOLOMON MURITHI MANYARA T/A

SMALL WORLD.....3RD APPLICANT

CATHERINE MUSYA.....4TH APPLICANT

JACINTA KIBUTHATA

MATRIX WINES & SPIRITS.....5TH APPLICANT

JENARO MUTIRIA KIRIMA t/A

JUBILEE WHOLESALERS.....6TH APPLICANT

VERSUS

REPUBLIC OF KENYA.....1ST RESPONDENT

JUDGEMENT

1. The petition has been brought by the 6 applicants against the Republic of Kenya and the County Government of Meru. On the face of the Petition is a statement containing the basis of the Petition. It states as follows:

1. **That the petitioners were arrested on 12.2.2014 by County Government officers on allegation of distributing alcoholic drinks without a wholesalers license and selling alcoholic drinks with substandard containers contrary to section 31(1) a(3) of Act 4 of 2010.**
2. **The petitioners were not arraigned in court.**
3. **That the petitioners are wholesalers of alcoholic drinks within Meru County and are Licenced to do the said trade.**
4. **That the section under which the petitioners have been charged has since been amended and therefore the offence does not exist.**

2. The Petitioners now seek one declaration which is

(a) That the intended charges against the petitioners be declared a nullity.

(b) Costs be provided for.

3. This Petition is supported by an affidavit which is sworn by the 3rd Applicant on behalf of all the Petitioners. In brief the supporting affidavit deposes that the Petitioners are licensed wholesalers and distributors of wines and spirits within Meru County. Their respective licenses are annexed. They depose further that Police Officers and officials of the County government have on several occasions arrested their products and threatened them with prosecution if they did not stop distribution in plastic containers. They claim that the law forbidding the use of plastic containers was amended by parliament through section 31 of the Alcoholic Drinks Control Act No. 4 of 2010. Their plea is that the Respondent should be stopped from arresting them charging them or interfering with their businesses.

4. There is a Replying Affidavit sworn by Mr. Jason Makori dated 25th February 2014. The gist of that affidavit is to the effect that the Applicants are misleading the court in order to obtain blanket orders in pursuit of personal business interest by seeking to stop the respondents from discharging their duties. It is also deposed that the Notice of Motion Application is premature bad in law and an abuse of the court process, frivolous, unfounded, and misdirected.

5. The Application was urged by Ms Nalima on behalf of the Applicants. The learned advocate for the Petitioners relied on supporting affidavit and urged that the section under which the Petitioners were to be charged has since been amended. Ms Nelima urged that the police were constantly harassing her clients by continuously going to their premises and ferrying away their goods.

6. Mr. Moses Mungai for the state argued the petition on behalf of the Respondents. The learned prosecution counsel relied on the replying affidavit sworn by Mr. Jason Makori. In his submissions Mr. Mungai urged that the respondent admit that there has been an amendment to the law and that the respondent had intended to charge the petitioners only on one occasion and not repeatedly as the petitioners have claimed but that the respondent have since changed their minds. Mr. Mungai urged that the orders sought should not be granted as they are blanket orders. Mr. Mungai did not have an objection to the exhibits of goods ceased from the Petitioners being restored.

7. The Application has been brought under Article 50(2) of the constitution. The entire Article 50 deals with fair hearing. (2) gives every accused person a right to a fair trial and the manner in which that fair trial should be conducted is set under (2) (a) – (q). On the face of the application the petitioners have

invoked Article 50 (2) (n) of the Constitution which provides as follows:

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not-

(i) an offence in Kenya; or

(ii) a crime under international law

8. I have considered the petition and it is very clear to me that what the petitioners are seeking is a declaration that an intended prosecution against them by the respondents be declared a nullity basically on the grounds that the law under which the respondent intended to charge them has since been amended.

9. I find the petition incompetent for the simple reason that the court is being asked to make certain assumptions.

i. One assumption is that there is an intention to charge the petitioners.

ii. An assumption that the intended charges would be against the petitioners.

iii. An assumption that the charges the respondents will prefer against the petitioners will have ceased to exist due to an amendment to Act No. 4 of 2010.

iv. An assumption that at the future time that the Respondents will decide to prefer charges against the petitioners, the petitioners' licences will still be valid.

10. The Petition has been challenged for being pre mature, bad law, frivolous unfounded and misdirected. I do not agree with any of those terms except that the Petition is bad in law for being incompetent.

11. The reason why the Application is incompetent first technical reason that the Petitioners are applying to stop an action that has not taken place. The most important reason why the application is incompetent is because it is a blanket declaration has been sought against the government which affects functions of the government. A court cannot stop a government from carrying out its duties especially where those duties have not been specified. The government of the Republic of Kenya and the County Government of Meru both have very specific duties and responsibilities under the Constitution of Kenya and other laws of the 1st Respondent a court cannot interfere with the execution of such duties and responsibilities on an application of this nature especially where the duties and responsibilities have not been declared or specifically mentioned.

12. The Petitioners will not suffer any prejudice if the prayers sought herein are not granted because once they are charged if at all for offences which do not exist under the law they will have the right within the case where they are charged to apply to have the charges struck out for being bad in law. I find the application is incapable of being granted and I therefore dismiss it. Each party should bear their own costs of this case.

DATED SIGNED AND DELIVERED THIS 22nd DAY OF MAY 2014

J. LESIIT

JUDGE.

