



IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO. 137 OF 2011

KISUMU BAR OWNERS ASSOCIATION SELF HELP.....PETITIONERS

VERSUS

DISTRICT COMMISSIONER.....1ST RESPONDENT

DISTRICT ALCOHOLIC DRINKS REGULATION

COMMITTEES.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

AND

NATIONAL AUTHORITY FOR CAMPAIGN AGAINST ALCOHOL

AND DRUG (NACADA).....INTERESTED PARTY

J U D G M E N T

1). The petitioner herein seeks the following reliefs:

- a. A declaration that the directive of the District Commissioner who is the chair person of District Alcoholic Drinks Regulation Committee to hike the licensing fee and to close Wines and Spirits retail shops unconstitutional and a contravention of the petitioners Economic and Social Rights are therefore null and void.
- b. An order of prohibition to restrain the District Commissioner, his servants, employees from interfering with the petitioner's business.
- c. That such orders as this honourable court shall deem fit.
- d. Costs of the petition.

2). Earlier on when this matter was argued this court granted temporary orders in favour of the application. There was no representation on the part of the respondents. The interested party however later applied to be enjoined which application was allowed.

The Petitioner's Case

3). The affidavits of Fredrick Obonyo and Felix Ochieng explains who the petitioners are and their claim against the respondent. The petitioners have referred themselves as self help group registered under the Ministry of Gender, Children and Social Development.

They have complained that the District Commissioner who is the chair person of the District Alcoholic Drinks Committee acted *ultra vires* by issuing verbal orders which required all retail shops selling spirits to be closed and their licences revoked. They have further accused the respondents of increasing the licensing charges from Kshs. 2,400/= to Kshs. 50,000/= and limiting the hours which the petitioners are supposed to operate to six hours only. They said that this order was to be effected in a week's time which was going to cause untold suffering to the applicants.

4). From their pleadings the applicants did not attach any annexure to show any directives from the 1st respondent. The applicant further argued that the action of 1st respondent breached their constitutional rights as well as running contrary to the international protocols namely The International Covenant of Economic, Social and Political Rights which this country is a signatory to.

Interested Party's Case

5). As earlier indicated the respondent did not mount any defence. However the interested party did file a response to the petition. It raised several factual and legal issues in opposing the said petition. The interested party *inter alia* argued that the respondent were in order when they raised the licence fees as this was within its mandate as provided by the Alcoholic Drinks Control Act 2010 and Alcoholic Drinks (Licensing) Regulations 2010. The interested party further argued that the suit was basically defective as there was no proper petitioner. It argued that since the petitioner was registered as an association, it ought to have sued via its officials.

6). The parties agreed to dispose this matter by way of written submissions which I have had the advantage of perusing the same together with the attached authorities. The issues of determination are as follows:

1. **Whether the petitioner have legal standi or the petitioner is non entity.**
2. **Whether the respondents contravened the relevant provisions of the constitution.**
3. **Whether the directive by the 1st respondent contravened the process of the Alcoholic Drinks Act 2010 and the Regulations thereunder.**
4. **Who is entitled to costs.**

7). In answering the first issue there is no doubt that the petitioner is registered as a self help group under the Ministry of Gender, Children and Development vide certificate No. S/H No. 16389/011 on 17-6-2011. What is its legal standing *viz a viz* the suit herein? Ordinarily its only a limited company or a partnership that could bring a petition or file a suit in the manner filed by the petitioner herein. The petitioner is not an association under the Societies Act.

I find that the suit ought to have been filed by the officials of the self help group. I respectfully do not find the basis in law where a self help group is a legal or juristic person capable of suing on its own. It ought to sue vide its elected officials.

8). As was held in **HCC No. 33 of 2004 Geoffrey Ndirangu & Others -VS- Chairman Mariakani Jua Kali Association & Others**, an association such as this has no legal capacity to sue or be sued in its own name. No constitution of the group was availed to this court to demonstrate its status. On this score alone this petition ought to fail.

9). There are however equally other relevant issues raised by the petitioners which are relevant herein so as to settle this matter once and for all. Did the respondent contravene the Alcoholic Drinks Control Act 2010 and the Regulations thereunder? I do not think so. All that the District Commissioner did if at all he did, was to state what the Act said. Although the petitioner have not demonstrated by way of documentary evidence that they applied for the licence and the fees was increased or the working hours were reduced, Rule 15 of the Alcoholic Drinks Control (Licensing) Regulation 2010 shows how the fees are charged. I do not respectfully think that the 1st respondent unilaterally increased the fees. In any event the petitioners are not challenging the Act but the action of the 1st respondent. Rule 15 and 16 of the above regulations specify the fees chargeable and operational hours. Further, there is no evidence that the

petitioners were ever denied the licences or at all. If this was so then there is an appeal process which such a party ought to pursue.

10). Are the prayers sought really available to the petitioner? A close look at the body of the petition clearly demonstrates that the issues complained of ought to fall under the regime of judicial review. If indeed the 1st and 2nd respondents were acting in their official capacity and acted *ultra vires* as claimed by the petitioner then they ought to be challenged in their administrative status and not to clothe it via a constitutional petition. The petitioner has cited Article 27 (1) and (4) of the constitution, ostensibly that they have been discriminated against. I respectfully do not find any form of discrimination. If at all the respondent were enforcing the law then it was incumbent upon the petitioners to obey. As stated above they have not challenged the Act in their petition.

11). The petitioner's property or rights have not been violated in any way. There is no evidence that the respondent discriminated them against any other person. Neither has any constitutional law been breached. It must be understood that rights always come with responsibility. The responsibility here of the petitioner is to apply for the licences as required by the Act. Nothing as found above has been shown to this court that they applied for licences and were denied.

12). In conclusion, therefore I do not think this petition ought to stand. The petitioner does not have any *locus standi*. It has brought this suit wrongly. More importantly the "Acts" complained of fall within the judicial review province and not by way of a constitutional petition. It is imperative that parties ought not to clothe every complain with the provisions of the constitution especially where other relevant avenues are available.

Consequently, this petition is hereby dismissed. As costs follow the event, the petitioner shall meet the costs of this suit payable to the interested party only. The earlier orders of injunction are hereby discharged.

Dated, signed and delivered at Kisumu this 23rd day of July, 2014.

**H.K.
JUDGE**

CHEMITEI