



REPUBLIC OF KENYA

High Court at Eldoret

Petition 9 of 2012

IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF DENIAL, VIOLATION, INFRINGEMENT AND THREATS OF THE
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 40, 43, 55 AND 57 OF
THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CONTRAVENTION AND/OR ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 27 AND 40 OF THE
CONSTITUTION**

AND

THE ALCOHOLIC DRINKS CONTROL ACT (NO. 4 OF 2010)

AND

ALCOHOLIC DRINKS CONTROL (LICENSING) REGULATIONS 2010

BETWEEN

NASILU SELF HELP GROUP PETITIONER

VERSUS

THE NATIONAL CAMPAIGN AGAINST

DRUG ABUSE AUTHORITY (NACADA) 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

The Petition is dated 23rd June, 2011 filed by Nasilu Self-Help Group. The prayers sought are as follows:-

- (a) That a declaration do issue that regulation 15 and the Third Schedule thereto of the Alcohol Drinks

Control (Licencing Regulation, 2011 in so far as it prescribes licence fees of Ksh. 50,000/= for a 12 months general retail alcoholic drinks licence of Ksh. 30,000/= for 6 months to the Petitioner's members as a condition to trade amounts to a violation, denial and infringement of the Petitioner's members rights under articles 27, 40, 43, 55 and 57 of the Constitution of Kenya, 2010 as the same do not amount to reasonable and justifiable limitation of Fundamental Rights and Freedoms in an open and democratic society, equality and are invalid.

(b) That a declaration that section 8 of the Alcoholic Drinks Control Act, 2010 in so far as it gives the Minister of State for Provincial Administration and Internal Security powers to appoint District Alcoholic Drinks Regulation Committees without involvement and consultation of the Petitioners infringement, violation, denial and a threat to the Petitioner's members constitutional rights under articles 43, 55 (b) and 57 (a) of the Constitution of Kenya, 2010 and the said section is invalid pursuant to article 23 (d) of the Constitution of Kenya, 2010.

(c) That such other order(s) as the Honourable Court shall deem fit to grant.

(d) That the costs of the petition be sourced by the respondents.

The background to the Petition is that Nasilu Self-Help Group registered under the Ministry of Gender, Children and Social Development under registration number **ELD/EAST/SS/REG/2165** consists of 48 youths and older members of the society. It carries on retail trade businesses under the **ALCOHOLIC DRINKS CONTROL (LICENCING) REGULATIONS**. The members claim that their constitutional rights have been violated.

As for the youth members they state their constitutional rights under Article 55 (b) and (c) have been violated; that is the right to opportunities to participate in the economic spheres of life and access to employment. They argue that these rights have been violated by the operations of **REGULATION 15** of the **THIRD SCHEDULE** of the **ALCOHOLIC DRINKS CONTROL (LICENCING) REGULATIONS**, (hereinafter the Regulations) **2010**, which sets the licencing fees and general retail alcoholic trade at Ksh. 50,000/- for 12 months and Ksh. 30,000/= for 6 months or less.

On behalf of the older members, it is argued that they have been denied their right under Article 57 (a) and (b) of the Constitution, which is the right to pursue their personal development on account of the operation of the regulations.

It is further the contention of the Petitioner's members that their rights under Article 40 (1) and (2) (a) of the Constitution, which is right to own property and such right not to be limited or restricted on the basis of discrimination, has been denied, infringed, violated and so threatened by the licence fees contained in the Third Schedule of the Regulations.

The Petitioner's members further contend that as youths and older members of the society, their rights under Article 55 (b) and 55 (a) of the Constitution have been infringed and violated by constituting the District Regulation Committee pursuant to Section 8 of the Alcoholic Drinks Control Act, Act No. 4 of 2010 (hereinafter the Act) for Eldoret East District vide Gazette Notice No. 5127 of 2011 without involvement and consultation of the Petitioner's members who are stakeholders in the sector.

The Petition is supported by the affidavit of Joseph Kosgei the Chairperson of the Petitioner. The deposition in the affidavit has emphasized that the licence fees imposed under the regulations are not within justifiable limits. That they are exorbitant and unreasonably high to allow the Petitioner members to continue carrying out their trade. That such high licence fees will definitely shut out he Petitioner's members from the trade hence infringe on their right of interest to property and as enshrined in Article 40 of the Constitution. That some of the petitioner's members being youth, will be denied access to employment and opportunities to participate in economic spheres of life.

It is deponed that the resultant effect of operationalizing the regulations is to render majority of the youth and older members of the society unemployed. That the failure to consult the Petitioner's members is

unconstitutional as it has curtailed them to participate in the affairs of the society and governance. That in the course of the implementation of the regulations, the Petitioner's members are undergoing undue harassment by the Respondent's agents.

In opposing the application, the 1st Respondent has filed a Replying Affidavit, sworn by Florina Mwikali Mutua, its legal officer on 9th August, 2011. The summary in the depositions contained in the affidavit is that the petitioner has no basis in law in seeking that the Act applies selectively to cater for the youth and older persons. That Petitioner has not demonstrated that its members are not able to pay the prescribed fees on grounds that they are unreasonably high. That the Petitioner's members alleged economic inconvenience caused by the new licence fees cannot be measured against allowing them to retail alcoholic drinks without licence as is prescribed in the Act. That their quest too would have social effects of conducting unlicensed alcohol retail businesses. That there is no evidence that the introduced licence fees will result in unemployment by way of redundancy and loss of opportunities as suggested by the Petitioners.

It is further deposed that the introduction of the licence fee is intended to raise funds for the establishment of the Alcoholic Drinks Control Fund to meet the capital and recurrent expenditure for promoting national cessation and rehabilitation programmes amongst other necessary functions as provided in Section 5 of the Act. That the functions and purposes of the said Alcoholic Drinks Control Fund are public oriented and they should at all times be promoted and enhanced in priority to the alleged goal of achieving sectarian and individual economic conveniences as fueled by the Petitioners which way of life and hitherto created a drastic and unregulated sale of alcoholic drinks thus causing deaths and health complications to the consumers. That the Petitioner's members are not subjected to double tax liability by being charged exorbitant fees which exceeds fees payable by other professional traders. That on the whole no constitutional rights of the Petitioner's members have been infringed or violated.

The 2nd Respondent has opposed the application vide Grounds of Opposition dated 23rd July, 2012. The grounds lists are as follows:-

1. The Petitioner's prayers offends the rights of other citizens enshrined in Article 55 (d) and Article 11 (1) of the Constitution and if allowed it will lead to the establishment of excessive bars and drinking dens thus exposing the youth to exploitation and destroying civilization of the society.
2. The Petitioner's prayers offends Article 43 (1) of the constitution and if granted they will lower the standard of health to many unsuspecting Kenyans and take away the mandate of the 1st Respondent.
3. That the Petitioner's rights to Articles 43, 55 (b) and 57 (a) have not been violated as such rights are subject to the rights of others to human dignity and public morality reasonable and suitable in an open and democratic society.
4. That one cannot be a judge in his own cause and hence section 8 of the Alcoholic "Drinks Control Act, 2010 is not invalid simply because it does not give the Petitioners right to regulate themselves.
5. That liquor business is a menace and the restrictions imposed by the legislature in regulation is and the Third Schedule thereto of the Alcoholic Drinks Control Licensing Regulation, 2011 are reasonable and justifiable in an open and democratic society to prevent a large number of husbands, sons, fathers as well as women from being ruined by the presence of bars in every corner of in the republic.
6. That the petition is misconceived and should be dismissed with costs.

Parties were asked to file written submissions and this has been done. The parties have relied on pleadings they have filed. Suffice it say however is that I have carefully considered the said filed

submissions. Three major issues have arisen for consideration in this Petition:-

First, whether Regulation 15 of the Third Schedule of the Regulations, in so far as it prescribes the new licence fees, has occasioned unreasonable limitation of the fundamental rights and freedoms of the Constitution of the Petitioner's members.

Second, whether Section 8 of the Alcoholic Drinks Control Act (the Act) in so far as it gives the Minister powers to appoint District Alcoholic Regulation Committees without the involvement of the Petitioner's members amount to an infringement or violation of their rights.

Third, and most importantly and a summary of this Petition, whether the Petitioner's members ought to have been consulted before both the Act and the Regulations were effected.

The Petitioner's claimed violations or infringement or threat to their Constitutional Rights under Articles 27, 40, 43, 55 (b) and 57 (a).

Article 27 provides for Equality and freedom from discrimination; Article 40 Protection of right to property and Article 43 Economic and social rights. Article 55 (b) falls in Part 3 of Chapter four (4) (Bill of rights) which spells out specific applications of the Bills of Rights to particular groups of person. Article 55 is on the right of the youth while Article 57 under the same part is on rights of older members of the society.

More emphasis is given to the last two Articles 55 and 57 which provide as follows:-

Article 55. "The state shall take measures, including affirmative action programmes, to ensure that the youth -

- (a) access relevant education and training;**
- (b) have opportunities to associate, be represented and participate in political, social, economic and other spheres of life;**
- (c) access employment; and**
- (d) are protected from harmful cultural practices and exploitation."**

Article 57. "The State shall take measures to ensure the rights of older persons -

- (a) to fully participate in the affairs of society;**
- (b) to pursue their personal development;**
- (c) to live in dignity and respect and be free from abuse; and**
- (d) to receive reasonable care and assistance from their family and State."**

My attention is drawn to the following provisions:-

Article 27 (1) – Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age disability, religion, conscience, belief, culture, dress, language or birth.

Article 40 (2) Parliament shall not enact a law that permits the state or any person -

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4) (refer to it above).

Parliament, in enacting any legislation touching on rights to property must bear in mind the above provisions. The provisions must be interpreted vis-a-vis the objects (purpose) of the Act. Section 3 of the Act provides as follows:-

“3. The object and purpose of this Act is to provide for the control of the production, sale, and use of alcoholic drinks, in order to-

(a) protect the health of the individual in the light of the dangers of excessive consumption of alcoholic drinks;

(b) protect the consumers of alcoholic drinks from misleading or deceptive inducements and inform them of the risks of excessive consumption of alcoholic drinks;

(c) protect the health of persons under the age of eighteen years by preventing their access to alcoholic drinks;

(d) inform and educate the public on the harmful health, economic and social consequences of the consumption of alcoholic drinks;

(e) adopt and implement effective measures to eliminate illicit trade in alcohol including smuggling, illicit manufacturing and counterfeiting;

(f) promote and provide for treatment and rehabilitation programmes for those addicted or dependent on alcoholic drinks; and

(g) promote research and dissemination of information on the effects of alcoholic drink consumption, in particular the health risks that may arise therefrom.”

I am minded that prior to the enactment of this Act, it was in the public domain that many deaths countrywide had been occasioned by excessive consumption of alcohol. Most of this alcohol was sold in an unregulated manner. It was therefore important to regulate the manner in which alcohol was sold, and of course the quality of the same. The Act was therefore debated and passed by the legislators with good intentions. Moreso, the legislators being the representatives of the people at the grassroots, it is assumed they made sufficient consultations with them. But again, whether or not the Act has achieved the intended objects is quantifiable. Of interest to this court is whether the Act and the regulations have violated the rights of the Petitioner's members as enshrined in Article 55 and 57 of the Constitution.

The Petitioners feel offended by Section 8 of the Act which reads:-

“8 (1) There shall be, for every district, a committee to be known as the District Alcoholic Drinks Regulation Committee which shall-

(a) issue licences in accordance with this Act; and

(b) perform such other functions as may, from time to time be allocated to it by the Minister.

(2) The District Committee may, in the discharge of its functions under this Act, make

inspection or other visits to premises at such times as it may deem appropriate.

(3) The District Committee shall consist of-

(a) the District Commissioner of the district who shall be the chairperson;

(b) the District Medical Officer of Health;

(c) Officer Commanding Police Division;

(d) one person nominated by every local authority in the district;

(e) three residents of the district, appointed by the Minister at least two of whom shall be women;

(f) one person designated by the relevant agency who shall be the secretary to the District Committee.

(4) The authorized officers in charge of the district appointed pursuant to section 50 shall attend the meetings of the District Committee in an ex-officio capacity.

(5) The conduct of business and affairs of the District Committee shall be in such manner as may be prescribed.

(6) The relevant agency shall provide secretariat services for the District Committee.”

The District Committee established under this section is charged with the duty of issuing licences to persons conducting business under the Act. The Committee, among other things, inspects the premises where the business is set up or intended to be set up before a licence is renewed or issued respectively. A critical person in this committee is the Public Health Officer, whose role is to ensure that health standards are maintained in the business premises.

In light of this, the net effect of abolishing this section, would among other things, firstly, be to open a floodgate of premises that are a health hazard to the public and consumers of the service.

Secondly, the Petitioner has not proposed who in the absence of the Committee would issue the licence(s) or inspect the premises. Is it then the proposition of the Petitioner to have businesses dealing with food (and drinks) in an uncontrolled health environment? Or to run businesses without licences?

Article 42 of the Constitution envisages the right to every person to a clean and healthy environment. This can only be achieved if all business premises are inspected so as to ensure they meet the required health standard. Court would set a bad precedent if it shouldered away this noble task from the Committee. It would also be a bad precedent to assume that a certain class of person do not pay for licences or be exempt from crucial safeguards against health.

True to say, the fees may be exorbitant. In fact the percentage of the increment from Ksh. 2,400/= to Ksh. 50,000/- at once cannot be justified. This is because, if the government aims at creating employment to both the youth and older members of the society, a conducive environment for any business is not negotiable. Conducive environment is not just for the well-to-do (wealthy) but also for starters and less economically able persons. Such an environment cannot be created and sustained where licence fees are increased without due regard to size of the business that gives the ability to meet any fees charged from the business.

That is why wide consultations are called for. But who do the Petitioner's members represent, if legislation is abolished to suit a small class of interest? These laws including Regulation 15 of the regulations were enacted by our legislators and were meant to apply uniformly throughout the Republic of

Kenya. The case law **PETITION NO. 110 OF 2010 – ALICE OPEC AND OTHERS -VS- THE MINISTER FOR STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY** – set a good example. All are equal before the law. The court stated that the Petitioner must be treated as an equal to other entities in the alcohol industry including the very consumer.

In the same breathe, in as much as I recognize that the fees may be exorbitant, the Petitioner's members cannot be treated in a preferential manner by the law. If the law must change, my view is that it will change through the same systems it was enacted.

The Petitioner is a representation of a small group of people in the Republic. Whereas the fees may be too high to enable them run their businesses, this may not apply elsewhere. In view of this, wide consultations must be done throughout the Republic. This can only be achieved through lobbying the legislators who brought the law into force to have the same abolished or amended. Better still, we currently have the County Governments under our Constitution. The economic strengths of each county may differ. The Counties are the best forms through which those consultations should be channeled to cater for specific interest of a class of people. This will give the Petitioner an upper hand to lobby for the best licence fees payable in line with the affordability of its members.

In the **PETITION NO. 3 OF 2011 MURANGA BAR OPERATORS ASSOCIATION SELF HELP GROUP -VS- MINISTER FOR STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY AND OTHERS** a slightly different scenario obtained although the complaint too related to the manner in which the Act was being executed. The Petitioners were complaining of being harassed by officers of the 1st and 2nd Respondents, in being forced to close their bars before the time allocated for their closure. In this case, the alleged harassed is occasioned by the quest to pay the licence fees by the traders. I have already set grounds why the licence fees cannot be done away with to suit a small representative group. I need not say more.

Moreso, court must be alive to the national values and principles of governance of **PARTRIOTISM** as provided by Article 10 (2) (a) of the Constitution. If I were to allow the prayers sought, I would totally cripple a source of revenue collection by the government. I would not be providing an alternative source from which this revenue would be gotten. The licence fees are consolidated into the Fund created under S. 5 of the Act.

Section 5 (1) provides:-

“There is established a fund to be known as the Alcoholic Drinks Control Fund.

- 2. The Fund shall consist of such licence and other fees as may be payable under this Act.**
- 4. The Fund shall be used for meeting the capital and recurrent expenditure relating to -**
 - (a) research, documentation and dissemination of information on alcoholic drinks;**
 - (b) promoting national cessation and rehabilitation programs; and**
 - (c) assisting in the operations of the District Committees and civil society programmes in accordance with subsection (5);**
 - (d) any other matter incidental to the matters stated in paragraphs (a), (b) and (c).**

On this ground too I would not be inclined to give the orders sought.

In the **MURANG'A BAR OPERATORS ASSOCIATION SELF HELP GROUP PETITION**, the court referred to **OLUM & ANOTHER -VS- ATTORNEY GENERAL (2002) 2 EA 508** in which the court held that in order to determine the constitutionality of a statute, it had to consider the purpose and effect of the impugned statute or section thereof. If the purpose was not to infringe a right guaranteed by

the Constitution, the court had to go further and examine the effect of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the Constitution, the statute or section in question would be declared unconstitutional.

I have already set out the objects of the Act and the Regulation (regulation 15). The effect of their implementation goes a long way into creating a healthy society and steady economy. To do away with them without a wider consultation in the manner their implementation was done would be fatal to our society and government at large. This is implied on understanding that the legislators consulted their constituents before enacting the subject law.

Under Article 24 of the Constitution, the Bill of Rights can only be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity and equality and freedom. The relevant factors to be considered include the **importance of the purpose of the limitation and the nature and extent of the limitation.**

These are factors I have considered above. I agree that exorbitant licence fees may limit the youth and the elderly to engage in business. But they are only a small composition of persons running similar business in the Republic. Therefore to effect their quest would amount to applying the law selectively without wider consultations of other interest groups.

I also distinguish the findings of the court in **NYERI MISCELLANEOUS APPLICATION NO. 40 OF 2009 – REPUBLIC -VS- THE COUNTY COUNCIL OF MURANG'A (EX PARTE) AND MAKUYU TRANSPORTERS SELF-HELP GROUP AND 27 OTHERS** with the instant case. In the former the council implemented the charging of the revised fees without the approval of the Minister for Local Government as was required by the law. In our case, no law has been flouted in the enactment of the regulation(s) and I have no basis on this account to abolish or declare the regulation or the Section (8) of the Act unconstitutional.

The Petitioner also relies on the case of **MUSLIMS FOR HUMAN RIGHTS (MUHURI) & 2 OTHERS -VS- THE ATTORNEY GENERAL (2011) e KLR.** No final orders were given in this ruling. Court only gave conservatory orders restraining the Respondents from publishing the name of Mr. Justice Alnashir Visram as the Chief Justice of the Republic of Kenya, because his appointment was in contravention with laid down provision of the Constitution. That position does not obtain in the instant case.

CONCLUSION

In the end I decline to grant the prayers sought as doing so would amount to giving preferential treatment to the Petitioner's members before the law. Further, granting their prayers would amount to an impression that any law can be abolished only on consideration of a small interest group. The consultations they demand are available through the channels the laws in question were enacted and more particularly, currently, through the County Governments that will now specialized with a smaller locality. Moreso, I decline to grant the orders on account of the likely sudden negative economic impact such orders would have on our country.

The Petition is accordingly dismissed. This being a public interest litigation, each party shall bear its own costs.

DATED and DELIVERED at ELDORET this 28th day of March, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Kiplimo holding brief for Kigamwa for the Petitioner

Mr. Chege Advocate for the 1st Respondent

Mr. Ndumbi for the 2nd Respondent