



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**PETITION NUMBER 3 OF 2011**

**IN THE MATTER OF CHAPTER FOUR OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA**

**AND**

**IN THE MATTER OF RULES 11, 12 AND 13 OF THE CONSTITUTION OF KENYA  
(SUPERVISORY JURISDICTION & PROTECTION OF FUNDAMENTAL RIGHTS AND  
FREEDOM OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES,  
2006**

**AND**

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

**AND**

**IN THE MATTERS OF THE ALCOHOLIC DRINKS CONTROL ACT (ACT NO. 4 OF 2010) &  
THE ALCOHOLIC DRINKS CONTROL (LICENSING) REGULATION, 2010**

**BETWEEN**

**MURANG'A BAR OPERATORS ASSOCIATION SELF HELP GROUP .....  
PETITIONER**

**VERSUS**

**THE MINISTER FOR STATE FOR PROVINCIAL**

**ADMINISTRATION AND INTERNAL SECURITY ..... 1<sup>ST</sup>  
RESPONDENT**

**NATIONAL CAMPAIGN AGAINST DRUG**

ABUSE AUTHORITY (NACADA) ..... 2<sup>ND</sup>  
RESPONDENT

THE ATTORNEY GENERAL ..... 3<sup>RD</sup>  
RESPONDENT

ENGINEER EPHRAIM MWANGI MAINA

AND CENTRAL KENYA PARLIAMENTARY GROUP.....1<sup>ST</sup> INTERESTED  
PARTY

NJOKI MITUGU, CHAIRLADY OF

SERVERS OF HEALTH AND ENVIRONMENT.....2<sup>ND</sup> INTERESTED  
PARTY

DR. FRANCIS KIRANGA, CHAIRMAN

NAKURU COUNTY CONSULTATIVE FORUM.....3<sup>RD</sup> INTERESTED  
PARTY

#### RULING

The petitioner's application by way of chamber summons dated 14<sup>th</sup> January, 2011 was brought pursuant to the provisions of **Article 22(1), (2), Article 23(3) (b) & (c)** of the Constitution, **rules 20 and 21 of the Constitution of Kenya (Supervisory jurisdiction and protection of fundamental rights and freedoms of the individual) High Court Practice and Procedure Rules, 2006**. The petitioner sought the prayer that:

**"Pending the hearing and determination of the petition herein this court be pleased to issue a conservatory order of prohibition restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents whether jointly or severally and whether by themselves or their agents, from unlawfully harassing, coercing, arbitrary arresting, intimidating and/or in any other manner whatsoever interfering or disrupting the business operations of the applicants, their employees, servants and/or agents in the course of operating, selling, disposing and/or dealing with licensed alcoholic drinks."**

The application was brought on grounds, *inter alia*, that:

- **the petitioner's members were being harassed by officers of the 1<sup>st</sup> and 2<sup>nd</sup> respondents contrary to the spirit of the Constitution.**
  
- **the transitional period providing for nine months compliance period had not lapsed.**
  
- **the Alcoholic Drinks Control Act, 2010, is being challenged.**
  
- **implementation of the Alcoholic Drinks Control Act, 2010, has contravened their fundamental right to protection of property under Article 40 of the Bill of Rights.**

- **their fundamental right to own property under Article 40 has been contravened.**

The application was supported by an affidavit sworn by one Simon Macharia Kairu, an executive member of Murang'a Bar Operators Association Self Help Group which is a registered association. He deposed that he had been duly authorized by all members of the association to swear the affidavit on their behalf. The deponent is also a proprietor of an establishment known as "Highway View Resort" at Murang'a town where he has employed nine workers. He has operated the said business for a period of about 3 years.

In paragraph 6 of his affidavit the deponent stated:

**"That recently, the new alcoholic law came to pass which law has affected the members in major ways including:**

- (a) that the licencing body has been transformed;**
- (b) that the licence fees has been increased tremendously;**
- (c) that the conditions for applying for licence have become more stringent;**
- (d) that the relevant implementation agency has been developed."**

He further stated that **Section 70** of the Alcoholic Drinks Control Act, 2010, hereinafter referred to as **"the Act"** provides that the compliance period shall be nine months from the date of commencement. The same states as hereunder:

**"Notwithstanding any other provision of this Act to the contrary, a person who, immediately before the commencement of this Act-**

- (a) was, in accordance with any law, a manufacturer, importer, exporter, distributor or retailer of alcoholic drink shall be deemed to be a manufacturer, importer, exporter, distributor or retailer of any alcoholic drink under this Act.**
- (b) was a manufacturer, importer, exporter, distributor or retailer of any alcoholic drink or the owner or manager of any premises contemplated under this Act, shall, within nine months of such commencement, comply with the requirements of this Act."**

Mr. Kairu further stated that on 17<sup>th</sup> December, 2010 immediately after the Act and the regulations made thereunder came into force there had been constant disruption of business in that the police have been arresting, harassing and intimidating the petitioner's members and/or their employees while enforcing the new operating powers. As a result the members of the petitioner had lost business income of approximately Kshs.10 million, Mr. Kairu alleged. He added that their customers were shying away from their premises for fear of arrest. The constitutional rights of the members of the petitioner as guaranteed under **Article 40** of the Constitution had therefore been infringed. The deponent stated in paragraph 14 of his affidavit that:

**“That the arbitrary arrest and intimidation are callous, high handed, imperious as the respondents have not formally communicated with the petitioner and/or challenged the petitioner with any criminal charge in court and therefore the respondent's allegations if any have not been subjected to the due process of the law.”**

He therefore urged the court to grant the orders as sought.

In the petition, the petitioner sought several declarations in respect of various sections of the said Act and the regulations made thereunder as read together with various Articles of the Constitution.

When the application came up for hearing before the Duty Judge on 14<sup>th</sup> January, 2011, the court granted an interim order of injunction in terms of the application pending inter partes hearing of the same.

The application was opposed by the respondents and the interested parties. The Attorney General, representing the 1<sup>st</sup> and 3<sup>rd</sup> respondents through Miss Wanjiku Mbiyu, Senior Deputy Chief Litigation Counsel, filed grounds of opposition and stated as hereunder:

**“1. The application is totally incompetent, bad in law**

**and does not lie, the Alcoholic Drinks Control Act,**

**2010, came into operation on 22<sup>nd</sup> November, 2010.**

**2. The prayer sought for injunction does not meet the**

**threshold of a prima facie case as set out in Giella v. Cassman Brown case.**

**3. The prayer for a conservatory prohibitory order**

**ought not to issue as the petitioner has not demonstrated how its rights/or those of its members have been violated by the respondents.**

**4. The petitioner and its members are before the honourable court with tainted hands.**

**5. The petitioners and its members have no locus standi to institute these proceedings as they have 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 (Licencing/Regulations 2010).**

**6.**

**The petitioner's 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 No. 4 of 2010.**

**7. There is no material placed before the honourable court to support the petitioner's allegations of unlawful harassment, coercion, arbitrary, intimidation and interference with the petitioner's business operations by the respondents."**

The 2<sup>nd</sup> respondent did not file any affidavit or grounds of opposition. Mr. Kimondo for the 2<sup>nd</sup> respondent supported the grounds of opposition as aforesaid. Mr. Njenga Mwangi appeared for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties. The 1<sup>st</sup> interested party is the Member of Parliament for Mathira Constituency in Nyeri County and Chairman of the Central Kenya Parliamentary Group, a caucus of legislators from Central Kenya. In his affidavit in opposition to the application herein, Mr. Maina stated, *inter alia*, that the problem of alcohol and drug abuse in Kenya has reached unprecedented levels causing havoc in villages, urban centres and cities and that abuse of alcohol had led to many deaths, broken homes and destruction of young productive lives. He went on to state that the Alcoholic Drinks Control Act and the Alcoholic Drinks Control (Licencing) Regulations, 2010, endeavour to control the production and consumption of alcoholic drinks for the protection of the general public and especially the youth. That was the objective of enacting the aforesaid laws, he added.

The 2<sup>nd</sup> interested party is the Secretary of Servers of Health and Environment, a registered non-governmental organization whose objectives are *inter alia*, providing rehabilitative services for alcoholic and drug addicts and environmental protection. She also echoed the depositions made by the 1<sup>st</sup> interested party.

In his submissions, Mr. Mbutia for the petitioner sought to rely on the provisions of **Article 40** of the Constitution which deals with protection of right to property. In particular, he submitted that it was unconstitutional for Parliament to enact a law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in or right over any property of any description or limit or in any way restrict the enjoyment of any right under the Article on the basis of any of the grounds specified or contemplated in **Article 27(4)**. **Article 27(4)** provides as hereunder:

**"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."**

In his view, the provisions of the Act and the regulations made thereunder contravened the aforesaid provisions of the Constitution.

Counsel further referred to the provisions of **Section 12(1) (c)** of the Act which requires that the premises in respect of which alcohol is sold should be located at least three hundred metres from any nursery, primary, secondary or any other learning institution for persons under the age of 18 years. If that rule is implemented it will lead to mass closure of many bars in urban centres since many of them are located within three hundred metres from learning institutions, counsel stated.

Counsel further lamented that the operating hours had been reduced with no rationale at all. The reduced operating hours had caused drastic reduction of income to the petitioner's members while at the same time the licence fees had been increased considerably.

With regard to the transitional provisions as stipulated under **Section 70** of the Act, Mr. Mbutia submitted that the law required his clients to comply with the same within a period of nine months from

the commencement date of the Act which was 22<sup>nd</sup> November, 2010. That notwithstanding, the 1<sup>st</sup> and 2<sup>nd</sup> respondents' officers had embarked on harassing the petitioner's members for operating without licences. He said that the licencing committees which are established under **Section 8** of the Act had not been constituted. It was not therefore possible for the petitioner's members to obtain licences for the year 2011 after expiry of licences for the year 2010.

**Section 8(1)** of the Act states that:

**“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.”**

**Sub section (3)** thereof provides for the composition of the licencing committee which consists of the District Commissioner as the Chairperson, the District Medical Officer of Health, Officer Commanding Police Division, one person nominated by every local authority in the District, three residents of the District, appointed by the Minister at least two of whom shall be women and one person designated by the relevant agency as the Secretary to the committee.

Mr. Mbutia urged the court to confirm the interim orders that had been granted until the petition is heard and determined.

In opposing the application, Miss Mbiyu submitted that the Act had already come into operation and the petitioner's members are required to comply with all the requirements of the same including obtaining current licences. She said that the District Alcoholic Drinks Regulation Committees had already been established and therefore the applicants had no excuse for failing to apply for fresh licences.

As regards the provisions of **Section 70(b)** of the Act, counsel submitted that the law requires the applicants to comply with the requirements of the Act within nine months from the date of its commencement and not at the end of the said period. That did not however mean that they were exempt from obtaining licences over the transitional period.

Miss Mbiyu further submitted that the applicants had not demonstrated a *prima facie* case with a likelihood of success and could not therefore be granted the injunctive orders as prayed. She pointed out that there was no documentary evidence of the alleged harassment since no copy of police occurrence book abstract had been annexed to the applicant's affidavit as would show that any of the petitioner's members had indeed been arrested. But even if such arrests had been carried out the police were lawfully enforcing the law, counsel added.

Regarding the alleged breach of the applicants' constitutional rights as provided for under **Articles 27 and 40** of the Constitution, Miss Mbiyu submitted that such rights are not absolute but are subject to the greater public interest. She pointed out that the objects of the Act as stated under **Section 3** thereof include protection of the health of the individual in light of the dangers of excessive consumption of alcoholic drinks, protection of consumers of alcoholic drinks from misleading or deceptive inducements, protection of health of persons under the age of 18 years, etc. The intention of Parliament in enacting the said law ought to be upheld, counsel submitted.

Mr. Kimondo for the 2<sup>nd</sup> respondent supported the submissions by Miss Mbiyu and added that it had

not been shown that the 2<sup>nd</sup> respondent had interfered with the petitioner's operations at all. He further stated that even if during the hearing of the petition the applicants will be able to demonstrate that they had suffered any loss of business, such loss is quantifiable and can be compensated by an award of damages.

Mr. Njenga Mwangi also supported the submissions by Miss Mbiyu. He further submitted that the applicants had not come to court with clean hands in that they were operating their businesses without current liquor licences. They had failed to demonstrate that the District Alcoholic Drinks Regulation Committees are not in place. He further stated that the government is charged with the responsibility of ensuring that the consumption of alcohol does not interfere with the national values and well being of its people and that is why the Legislature enacted the Alcoholic Drinks Control Act, 2010, and the regulations made thereunder. **Article 46** of the Constitution which provides for consumer rights states, *inter alia*, that consumers have the right to goods and services of reasonable quality; to the information necessary for them to gain full benefit from the goods and services; to the protection of their health, safety and economic interest and to compensation for loss or injury arising from defects in goods or services.

Regarding the operating hours, counsel submitted that the Fourth Schedule to the Alcoholic Drinks Control (Licencing) Regulations, 2010, provides for eleven categories of licences which have different licence hours, conditions and exceptions. An applicant may choose to apply for a licence with more operational hours. The applicants could not therefore complain that they are only allowed to open their businesses from 5.00 p.m. to 11.00 p.m. during the weekdays. In view of the foregoing, counsel urged the court to discharge the interim orders that had been granted and dismiss the petitioner's application.

In determining this application, the Court has to consider whether the applicant has an arguable case. The gravamen of the application is the alleged infringement of the applicant's Constitutional rights as a result of the enforcement of the Alcoholic Drinks Control Act, 2010, and the regulations made thereunder. The petitioner cited, *inter alia*, the rights of its members under **Articles 24, 27(4) and 40** of the Constitution as the main ones that had been infringed by the said Act and regulations. The petitioner also cited several sections of the Act which are alleged to be in conflict with the aforesaid Articles of the Constitution. It is therefore necessary to consider, albeit briefly, the salient provisions of the said Articles of the Constitution and juxtapose them against the various sections of the Act complained of. In so doing, this court is alive to the principles of Constitutional interpretation set out in **OLUM & ANOTHER v. ATTORNEY-GENERAL [2002] 2 EA 508**. 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. The court went on to refer to the principle of harmonization which requires that all provisions of the Constitution concerning an issue should be considered together.

So what is the purpose of the Alcoholic Drinks Control Act? **Section 3** of the Act states 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 the 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 drink consumption, in particular the health risks that may arise therefrom.”

Commenting on the object of an Act vis-à-vis the constitutionality of the same, the Canadian Supreme Court in THE QUEEN v. BIG M. DRUG MART LIMITED stated:

**“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity.”**

It is in the public domain that prior to enactment of the Alcoholic Drinks Control Act the country, on a number of occasions, witnessed very sad incidents where hundreds of people lost their lives due to consumption of adulterated alcoholic substances. Many others were left permanently blind and/or seriously incapacitated and thus rendered economically unproductive. It was even widely reported in the media that due to uncontrolled consumption of alcoholic drinks and particularly the illicit brews, population figures in some parts of the country had stagnated over the years or even gone down. That was so because of the high numbers of men who had abdicated their marital responsibilities due to over indulgence in consumption of alcohol and the adverse effects thereof. To check the worrying trend as aforesaid, Parliament in its wisdom enacted and passed the Alcoholic Drinks Control Act, 2010. The Act and the regulations made thereunder, in my view, provide a well thought out legal framework for regulation of production, sale and consumption of alcoholic drinks. I do not agree with the petitioner that the Act criminalizes consumption of alcoholic drinks *per se*. Like any other law, there must be sanctions for any breach of its provisions.

Turning to the constitutionality of the Act, it was alleged that some of the provisions thereof violate some provisions of the Bill of Rights in the Constitution. **Article 20(4)** of the Constitution requires that in interpretation of the Bill of Rights a court is obliged to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom as well as the spirit, purport and

objects of the Bill of Rights. And again, the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings, see **Article 19(2)** of the Constitution.

**Article 43(1)(a)** of the Constitution provides that:

**“Every person has the right –**

**(a) to the highest attainable standard of health,**

**which includes the right to health care services, including reproductive health care.”**

That provision of the Supreme law should be read together with **Article 21(2)** which states that:

**“The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.”**

Parliament, having taken cognizance of the fact that unregulated consumption of alcoholic drinks and particularly illicit trade in alcohol was inhibiting the highest attainable standard of health and reproductive health of many Kenyans and particularly the youth, was under an obligation to legislate an appropriate law to address the problem. If Parliament, being aware of the said challenge, had failed to take the appropriate legislative measure as it did, the State would have been in breach of **Article 21(2)** as read with **Article 43(a)**.

The State has Constitutional obligation to take legislative and policy measures to ensure that there is progressive realization of each and every right guaranteed under **Article 43** of the Constitution and that includes the right to health care, accessible and adequate housing, reasonable standard of sanitation, freedom from hunger, adequate food of acceptable quality, clean and safe water, social security and education.

The State is also constitutionally mandated to address the needs of vulnerable groups within society and that includes women, children and the youth. **Section 12(c)** of the Act states that the premises in respect of which an application for a liquor licence is made ought to be at least three hundred metres from any nursery, primary, secondary or other learning institutions for persons under the age of eighteen years. Such a person is a child as per the definition of “child” under **Article 260** of the Constitution.

As regards the licence hours for General Retail Alcoholic Drink Licence, these are from Monday to Friday during the hours of 5.00 p.m. to 11.00 p.m. and during weekends and public holidays during the hours of 2.00 p.m. to 11.00 p.m. I believe the hours were set as above so as to ensure that a proper balance is struck between working hours and leisure hours so that those workers who partake in alcohol do not engage in its consumption during working hours. I believe overall, the economic gain to be made or realized in limiting the operational hours is much more than the loss in income incurred by the petitioner and its members and the country as a whole. Sustainable development is one of our national values and principles of governance but cannot be attained if the most productive lot of the country’s labour force spend long hours in alcohol consumption. To that extent I do not think that the reduction of the licence hours is unconstitutional at all.

I now turn to **Article 27(4)** of the Constitution. The petitioners alleged that the Act encourages discrimination as against consumers of alcohol. No material was placed before the court in support of that allegation. By providing the regulatory framework for production, sale and consumption of alcoholic drinks, Parliament cannot be accused of having discriminated against consumers of alcohol. I think in all the countries of the world there is some control of production, sale and consumption of alcohol. There is no gainsaying that without such control the economic gains of the alcohol industry would by far be surpassed by the economic losses and other unquantifiable losses.

As regards the provisions of **Article 40** of the **Constitution** which guarantees protection of right to property, I did not find any merit in the petitioner's argument that the impugned Act or any section thereof is an infringement to their right to acquire and own property. Any applicant whose establishment complies with the licensing regulations will continue to be licenced as there before. As earlier stated, the control mechanisms set out in the Act are necessary.

Turning to the provisions of **Section 70(b)** of the Act, I must confess that its interpretation is rather difficult in light of the noble intentions of the Act. By stating that a person who was a manufacturer, importer, exporter, distributor or retailer of any alcoholic drink or the owner or manager of any premises contemplated under the Act, "**shall, within nine months of such commencement, comply with the requirements of this Act,**" did Parliament intend that there would be no regulatory law and policy in the manufacture, sale and consumption of alcoholic drinks over that transitional period of nine months? I do not think so. **Section 69** of the Act repealed the **Chang'aa Prohibition Act** and the **Liquor Licensing Act** and so the only regulatory law is the Alcoholic Drinks Control Act. The petitioner's argument is that the Act provides compliance period of nine months and within that time their members ought to be left alone to sell alcoholic drinks without any hindrance or control whatsoever, as long as they will have complied with the provisions of the Act before the end of the stipulated period. That kind of interpretation is unacceptable. If that was the case there would be untold chaos. There is no evidence that the District Licencing Committees have not been established. It was not shown that any of the petitioner's members had applied for a liquor licence for this year and their application could not be processed because the District Committee had not been constituted. The provisions of **Section 7** of the Act which requires every person to obtain an appropriate licence for sale of any alcoholic drink has not been suspended. Like nature, the law abhors a vacuum. It could not have been the intention of Parliament that in the intervening period between the repeal of the Liquor Licencing Act and the commencement date of the Alcoholic Drinks Control Act, 2010, there would be no regulatory framework of sale and consumption of alcoholic drinks. I therefore reject the petitioner's contention that the officials of the 1<sup>st</sup> and 2<sup>nd</sup> respondents should let their members operate their businesses without any interference at all even in the absence of liquor licences as required under the Act. It is in the interest of the members of the petitioner to ensure that within the period of nine months from the effective date of the Act they comply with all the necessary requirements of the law.

In view of the foregoing, I am not satisfied that the applicants have established a *prima facie* case with a likelihood of success. Consequently, I decline to grant the orders as sought in the chamber summons dated 14<sup>th</sup> January, 2011. The interim orders that were granted on 14<sup>th</sup> January, 2011 are hereby discharged. This being a public interest litigation, I direct that each party bears its own legal costs.

**DATED, SIGNED and DELIVERED at NAIROBI THIS 24<sup>TH</sup> DAY OF JANUARY, 2011.**

**D. MUSINGA JUDGE In the presence of:**

Nazi – court clerk

Mr. Mwanza for Mr. Mbutia for the petitioner

Miss Mbiyu for the 1<sup>st</sup> and 3<sup>rd</sup> respondents

Mr. Kimondo for the 2<sup>nd</sup> respondent

Mr. Njenga Mwangi for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties