REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 4 OF 2011

KIZITO MARK NGAYWA
…….PETITIONER

VERSUS

THE MINISTER OF STATE FOR INTERNAL SECURITY
AND PROVINCIAL ADMINISTRATION……..1ST RESPONDENT
ATTORNEY GENERAL
…….2ND RESPONDENT

R U L I N G

The applicant, Kizito Mark Ngaywa filed this Petition on 25.01.2011 under the provision of Constitution in which he alleged contraventions of his fundamental right and freedom under Articles 27,28,29,32,33,35,36,46 and 47.

In the Petition he seeks the following orders:-

(a) A declaration that the provisions of Section 7(3)(i) and 68(2) (d) of the Alcoholic Drinks Control Act, 2010 and Rule 16 and the Fourth Schedule of the Alcoholic Drinks Control (Licensing) Regulations 2010 are inconsistent with the Constitution of Kenya thus are null and void.

(b) General Punitive and Exemplary damages against the Respondents for the violations of the fundamental rights and freedoms of the individual in application of the Alcoholic Drinks Control Act.

The Petitioner named the following as Respondents:-

1. The Minister of State for Internal Security and Provincial Administration and

2. The Attorney General Simultaneous with the filing of the Petitioner, the said Petitioner filed an Application and Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom of the Individual) High Court Practice and Procedure Rules 2006 seeking the following conservancy Orders:-

"1. The application be certified to be very urgent and service in the first instance be dispensed with.

2.The Respondents by themselves, agents, public or private, proxies or assigns be and are hereby restrained from in any way enforcing and/or implementing Regulation 16 and he particulars in the Fourth Schedule of the Alcoholic Drinks Control (Licensing) Regulations 2010 until the hearing and determination of the Petition herein.

3. Costs be in the cause.

The application sets out the following grounds that:-

1. *The Alcoholics control Act 2010 is not being interpreted and applied in such a way as to accord with the Constitution as demanded by Section 7 of the Transitional Clause of the Constitution of Kenya 2010.*

2. *The said law has regulatory provisions that contradicts the letter and spirit of the Constitution to the extent to countermand the freedom of choice enjoyed by the individual.*

3. *The said law enacts discriminatory provisions and seeks to afford a privilege to access and consume alcoholic drinks to Members of Parliament the rich and powerful who belong to exclusive membership clubs and members of the disciplined forces while at the same time subjecting many people to potential arrest and criminal trial for exercising the freedom of choice.*

4. *The impugned law particularly does not promote the public interest rather undermine "the since" (sic) of human dignity and freedom of the individual.*

5. *The continued application of the Section set out in the Petition is demeaning to the Petitioner and the people of Kenya generally.*

The application is also supported by an affidavit sworn by the Petitioner on 25.01.2011.

The Petitioner's advocate appeared in court under certificate of urgency on 25.1.2011. Counsel summarized what the petition was all about and sought exparte orders in the nature of a conservatory order i.e. an interim order suspending the enforcement of Regulation 16 and the particulars in the fourth schedule of the Alcoholic Drink Control (Licensing) Regulations 2010. The court did not make any orders in this regard but certified the application as urgent and fixed it for hearing for 2.02.2011.

On 2.02.2011, Mr. Ndubi appeared for the Applicant/Petitioner, Mr. Njoroge for the Respondents and Mr. Kimondo for the National Campaign Against Drug Abuse Authority (NACADA) which applied to be joined as an Interested Party.

Counsel recorded a consent making NACADA an Interested party in this Petition. Mr. Njoroge then applied for adjournment to enable him file his client's/Respondent's Replying Affidavit. He asked for 14 days. Mr. Ndubi did not object but applied that the court grant conservatory orders pending the inter partes hearing of the application. He submitted that it was crucial that the interim conservatory orders are granted at this stage to protect the fundamental rights and individual freedoms of the Applicant and other Kenyans. That it was in the interest of justice and the balance of convenience filled in favour of his client. He said that the Respondents will not be prejudiced by the said orders being granted.

Mr. Ndubi urged the court to grant early dates and for the petition to be heard on priority basis.

The application for immediate grant of interim conservatory orders pending the inter partes hearing of the application was opposed by the Respondents and NACADA. Mr. Njoroge said that the matter await the fair and full hearing of the application. He said that he had not had sufficient time to obtain instructions from the Respondents. He said that the Act has yet to be declared un-Constitutional and it was premature to suspend the Regulations.

I have considered the application for adjournment and that for temporary suspension of the regulations and the submissions by Counsel. When considering the matter, I recalled my decision in

PETITION NO. 669 OF 2009, MOMBASA BISHOP JOSEPH KIMANI & OTHERS –V- ATTORNEY GENERAL, COMMITTEE OF EXPERTS AND ANOTHER which I delivered on 6-10-2010. In the said case I was guided by the decisions of the Constitutional Court in Tanzania in **NDYANABO –V- ATTORNEY GENERAL (2001) 2 EA 485** in which the said court presided over by the Hon. Chief Justice Samatta Stated as follows:-

"……..

Thirdly; until the contrary is proved, a legislation is presumed to be Constitutional. It is a sound privilege of Constitutional construction that if possible, a legislation should receive such a construction as will make it operative and not inoperative.

Fourthly, since, as stated, a short while ago, there is a presumption of Constitutionality of legislation, the onus is upon those who challenge the Constitutionality of the legislation, they have to rebut the presumption. Fifthly where those supporting a restriction on a fundamental right rely on a claw back or exclusion clause in doing so, the onus is on them, they have to justify the restriction."

I am still persuaded by the above-mentioned principles of Constitutional interpretation. In the **BISHOP JOSEPH KIMANI** case, the court observed as follows:-

"It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stay actually show that the operation of the legislative provision are a danger to life and limb at that very moment."

……

It is my view that the principle of presumption of Constitutionality of Legislation in imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law."

I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation of statutes, statutory provisions or even Regulations should be wholly avoided except where the national interest demand and the situation is certain.

I do find and hold that at this stage the presumption of Constitutionality of the Alcoholic Drinks Control Act and the Regulations still subsists and has not been rebutted. It can only be rebutted after full and fair hearing of the Petition and upon the court declaring that the said Act and regulations or parts thereof are unconstitutional. I am still of the view that "there is no place for conservatory or interim order in Petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void." It is even more premature at this stage where the application has not been heard or is not being heard to seek such conservatory orders. The Applications must be heard first.

In view of the foregoing, I decline to grant the orders sought at this stage. Since I have made my position or opinion on such applications known, I am of the view that I should disqualify myself from hearing the application inter partes or step aside for that matter and it be heard by another judge with a fresh mine on the issue. This will only be fair unless the Applicant thinks that he is up to the uphill task of persuading me to change my mind.

I do hereby grant leave to the Respondents and Interested Party to file Replying Affidavits within 14 days. The Petitioner is granted leave to file a further affidavit within 7 days of service, if necessary. Costs in the application.

Dated and delivered at Mombasa this 3rd day of February 2011.

M. K. IBRAHIM

J U D G E

Coram:
Ibrahim, J
Court clerk – Kazungu
Mr. Ndubi for the Petitioner/Applicant
Mr. Kamau h/b for Mr. Njoroge for the Respondents.
No appearance for NACADA
Ruling delivered in their presence.

Ibrahim, J