Patiala Distillers Limited v Deputy County Commissioner Mathira East & another (Judicial Review Application E003 of 2024) [2025] KEHC 1320 (KLR) (25 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1320 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

JUDICIAL REVIEW APPLICATION E003 OF 2024

DKN MAGARE, J

FEBRUARY 25, 2025

IN THE MATTER OF AN APPLICATION FOR A JUDICIAL BREVIEW ORDER OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 8 & 9 OF THE FAIR ADMINISTRATIVE ACTION ACT

BETWEEN

PATIALA DISTILLERS LIMITED ..... EXPARTE APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONER MATHIRA EAST .... 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE ..... 2ND RESPONDENT

JUDGMENT

1. By the application dated 13.4.2024, the Applicant sought the following reliefs:

    i. An order of certiorari be issued to remove to the High Court for purposes of quashing the decision of the 1st Respondent to seize or ban the possession, consumption or sell of the Applicant's Diamond Ice and Flying Horse alcoholic drinks brands in Mathira East Sub-county or in any place within the Republic of Kenya.

    ii. An order restraining the Respondents from unlawfully seizing, banning, taking or otherwise removing the Applicant's Diamond Ice and Flying Horse alcoholic drinks brands from the market shelves in Mathira East Sub-county or in any place within the Republic of Kenya.

iii. An order of pecuniary compensation for the loss of 1450 cartons of Applicant's Diamond Ice and Flying Horse seized by the Respondents on 20.2.2024.

iv. An order of pecuniary compensation for the Respondent to compensate the Applicant for reputation loss occasioned by public destruction of the Applicant's products.

v. Costs.

2. The application was supported by the Statement of Facts and the affidavit of Mary Waigwe both dated 27.4.2024. It was deposed as follows:

a. The Applicant is licensed to manufacture and package its products within the Republic of Kenya.

b. The Applicant manufactures Diamond Ice, Flying Horse, Best, Blue Ice, Chase, and Genius Gin and distributes Konyagi Gin and Faxe.

c. The Applicant's brand is registered under the Trademarks Act, and products comply with KEBS.

d. On 20.2.2024, the Respondent seized 1450 cartons of Diamond Ice and 996 cartons of Best Classic Gin, and 12 bottles of blue ice, all manufactured and delivered to the Applicant's distributor in Mathira East, and declared via the media the items as prohibited.

e. On 26.2.2024, the Respondents then orchestrated a public destruction of the said 1450 cartons.

f. There was no offence known on law committed, and so the actions were irrational, unlawful, and criminal.

3. The Respondents filed a Notice of Preliminary Objection dated 15.8.2024 as follows:

a. The suit is incompetent and fatally bad in law.

b. The suit is premature as the complaint ought to be first submitted to IPOA.

c. The Applicant also filed a similar suit in Nyeri HCCC No. E004 of 2024 against the principle of sub judice.

d. The issues are criminal in nature to be determined by a criminal court.

e. The matter will condemn the Respondents unheard.

4. The Respondents also filed Grounds of Opposition dated 4.10.2024, which repeated in substance the Notice of Preliminary Objection terms.

Submissions

5. The Applicant filed submissions dated 31.10.2024. It was submitted that the Applicant had demonstrated that the acts of the Respondent were tainted with illegality. The Applicant relied on Pastoli v Kabale District & Others (2008) eKLR

6. The ex-parte Applicant's further submission are that the grounds of opposition were mere averments that should be dismissed. She cited Kennedy Otieno Odiyo & 12 Others v KenGen (2010) eKLR which I have considered.

7. They submitted that the prayers for pecuniary compensation were merited. Further, that the pendency of Nyeri HCC E004 of 2024 declared this suit sub judice.

8. On the part of the Respondents, no submissions were filed.

Analysis

9. The issue that presents to me for determination is whether the Applicant has satisfied the criteria for issuance of a Judicial review order of certiorari as entitled to the reliefs sought in the Application. The Applicant maintained that the acts of the Respondent of suspending and banning the distribution and sale of its alcoholic brands were tainted with illegality and were irrational.

10. The court has to establish the validity of the administrative process conducted by the Respondents. I say so because it is largely not disputed as a matter of fact that the Applicant's goods were seized. The right to fair administrative action is enshrined under Article 47 of the 2010 Constitution as doth;

    (1) Every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

    (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

    (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall —provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.

11. The grounds of opposition and preliminary objection filed on behalf of the Respondent did not answer to the factual disposition. The Preliminary Objection was not a preliminary objection as it raised no pure point of law, and I hold it as such. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made this pertinent observation as hereunder : -

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop".

12. According to the Respondents per their grounds of opposition, the Applicant should have first reported to the IPOA before coming to court. I do not agree with the Respondents. This court has original jurisdiction to intervene and issue Judicial Review Orders under Article 47 of *the Constitution* and the *Fair Administrative Action Act*.

13. The Court appreciates that whereas it is true that where dispute resolution mechanism exists outside courts, the same should be exhausted before the jurisdiction of the courts is invoked. This requirement is also to promote the application of Article 159 of *the constitution*, the said doctrine is not absolute. In Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, the Court of Appeal stated that:

> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The ex parte Applicants argue

that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

14. There exists exceptions to the doctrine of exhaustion. In R vs Independent Electoral and Boundaries Commission (I E B C) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

> What emerges from our jurisprudence in these cases are at least two principles: while exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others.)

15. Therefore, this court will, in exceptional circumstances, consider and determine whether the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed. This places the burden upon parties to present material to the court to consider the suitability of the appellate mechanism. It must also consider available mechanism in each case and determine whether it is suitable to determine the issues raised.

16. Moreover, the jurisdiction of this Court to consider disputes on administrative action as a right also emanates where many parties may lack adequate audience before a forum created by a statute, or the quality of the audience before the forum is in doubt, must not be ousted from the seat of this Court. Therefore, statutory provisions ousting the Court's jurisdiction are not cast in stone and must be construed restrictively on a case-to-case basis. This was extensively elaborated by Mativo J in Night Rose Cosmetics [1972] Ltd v Nairobi County Government & 2 others [2018] eKLR as doth:

> In the instant case, the Petitioners allege a violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

17. I do not see how IPOA would have assisted the Applicant in this case. This court thus has the requisite jurisdiction. The jurisdiction of this court is circumscribed under Article 165(3) of *the Constitution* of Kenya, which posits as follows: -

> (3) Subject to clause (5), the High Court shall have-
>
> (a) unlimited original jurisdiction in criminal and civil matters;
>
> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

18. This court is called upon to subject the Respondents' acts to judicial review test. The principles for Judicial Review reliefs were set out in a landmark case of Republic Vs *Kenya National Examination Council Ex parte Gathenji and others Civil Appeal No.266 of 1996*, where the Court of Appeal stated inter alia:

> 'An order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision-making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal.''

19. In Judicial Review application, the court is concerned more with the decision-making process, than with the merits of the decision itself. It does not mean that, where constitutional issues are raised, the court cannot deal with merit of the decision. The supreme court [MK Koome, CJ, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ] in the case of Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) posited as follows:

> 84. More recently in Praxedes Saisi & 7 others v Director of Public Prosecutions & 2 others) (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) Praxedes Saisi case this court stated that: 'It is our considered opinion that the framers of *the Constitution* when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority.'
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> 85. It is clear from the above decisions that when a party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se.

20. In Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others SC Petition No 14 Consolidated with 14A, 14B, & 14C of 2014 [2014] eKLR this court in resolving the controversy stated as follows:

> '355. However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that *the Constitution* of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to

approach the court and have their grievance resolved on the basis of articles 22 and 23 of *the Constitution*.

21. The issue in this matter is whether the Respondent had the jurisdiction to make the orders they did. Secondly, whether the Applicant was heard before the said decision was made. The Applicant is a person likely to be affected by the decision. Can the Respondent waive the process of hearing the ex parte applicant?

22. Before the new constitution, the position was diametrically opposite as set out in the Municipal Council of Mombasa v Republic & Umoja Consultants Ltd (2002) eKLR, the Court of Appeal held that: -

> Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.'

23. The tragedy of cataclysmic proportions appears to be the impunity with which the respondent acted and did not find it helpful to place before the court factual matrices that would validate their actions. The courts are not soothsayers and prophets to discern why an action was carried out. Grounds of opposition are not enough. In the case of Kennedy Otieno Odiyo & 12 Others vs Kenya Electricity Generating Company Limited [2010] eKLR the court held that:

> THE respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition address only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant.

24. As the matters stand, there is no factual basis from the Respondent explaining their actions. The ex-parte Applicant filed a Government Analyst Report dated 26.6.2023. It demonstrated that the alcohol sampled, produced, and sold by the Applicant was compliant with what is described as EAS 109:2013. This fact was not controverted by any contrary evidence. The Respondent did not comment on the compliance of the brands they seized. The purpose for which the Applicant's goods were seized cannot be considered lawful and administratively fair on all fronts. When an action is not explained, it is arbitrary.

25. In the case of Richard Owuor & 2 others (suing on behalf of Busia Sugarcane Importers Association) v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Cooperatives & 7 others [2021] eKLR, the court addressed the question of what constitutes arbitrariness as doth:

> 29. This Court recently discussed the doctrine of arbitrariness in Nairobi High Court Constitutional Petition No. E283 of 2020 Law Society of Kenya vs. The Attorney General & Others (unreported). This is what I stated: -
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> > 116. The Court of Appeal in Malindi Civil Appeal 56 of 2014 Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR made reference to the Black's Law Dictionary 8th Edition that defined arbitrariness in the following manner: -

In it connotes a decision or an action that is based on individual discretion, informed by prejudice or preference, rather than reason or facts.

117. The High Court in Civil Suit No. 3 of 2006 Kasimu Sharifu Mohamed vs. Timbi Limited [2011] eKLR referred to Oxford Advanced Learner's Dictionary A. S. Horby Sixth Edition Edited by Sally Wehmeiner which defines the term 'arbitrary in the following way: -the term arbitrary in the ordinary English language means an action or decision not seeming to be based on a reason, system and sometimes, seeming unfair.

118. The Supreme Court of China in Sharma Transport vs. Government of A. Palso (2002) 2 SCC 188 had the occasion to interrogate the meaning and import of the term 'arbitrarily'. The Court observed as follows: -

> The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

119. The term 'arbitrariness' had earlier on been defined by the Court (Supreme Court of China) in Shrilekha Vidyarthi vs. State of U.P (1991) 1 SCC 212 when it comprehensively observed as follows;

> The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you'. This is what men in power must remember, always.

26. The cadre of judicial review under our constitutional dispensation is higher than administrative law. It is now hinged on Article 47 of *the Constitution* as a right to fair administrative action. The said Article provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal: and

(b) promote efficient administration.

27. The right of the ex parte applicant to property and to carry out their business was likely to be affected. The products were destroyed without hearing. There were no reasons given before the action was taken. Subsequently, the products were destroyed without having the ex-parte applicant taken through a judicial process on any alleged malfeasance. A party adversely affected by administrative action, has the right to be given written reasons for the action. Under this pretext, the state's administrative bodies only act within their mandate and not more, and for whatever is done outside the mandate, judicial review is the corrective measure. In Daniel Ingida Aluvaala and another vs Council of Legal Education & Another,[Pet No. 254 of 2017] I observed that:-

> " Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decisions to be allowed to stand, it must be demonstrated that the decision is grounded on law.

28. *The constitution* has thus embedded into our legal system a transformative development of administrative justice, which not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies but also entrenches the right to fair administrative action in the Bill of Rights. In Judicial Service Commission vs. Mbalu Mutava & Another {2015} eKLR the Court of Appeal held that:

> " Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

29. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1 at paragraphs 135-136 as follows with regard to similar provisions on just administrative action in Section 33 of the South African Constitution:-

> " Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades..."

30. As a derivative of Article 47 of *the Constitution*, Section 7(2) of the *Fair Administrative Action Act*, 2015 provides for grounds of Judicial Review, which include bias, procedural impropriety, ulterior motive, failure to consider relevant matters, abuse of discretion, unreasonableness, violation of legitimate expectation or abuse of power.

31. The indefinite, sudden, and unreasonable conduct of the Respondents in seizing the Applicant's goods thus was an attempt to place the life of the Applicant as a company upon the rack, instigated by the Respondents who could choose only what is the Respondents' desire; to achieve motives other than justice by keeping the Applicant out of trade ad infinitum. This court will intervene where it is demonstrated that the administrative acts of the Respondents have caused the Applicant and other citizens at large to live or operate their businesses at the mercy of state authorities.

32. On the assertion by the Respondents that this matter be sub judice, I do not agree that this Judicial Review is to be stayed at the instance of the suit in HCCC No. E004 of 2024. This application raised Judicial Review reliefs, which need not be lumped together with purely civil claims. The rule against sub judice within Section 6 of the *Civil Procedure Act* is thus inapplicable.

33. The Applicant also prayed for damages. However, no material was placed before the court to discern such damages. The nature of the pecuniary damages pleaded by the Applicant were special damages and loss, which ought to have been not only specifically pleaded but also strictly proved. On special damages, the rule is strict and somewhat mathematical. The court has to discern the pleaded damages and proceed to find proof. It is not based on estimates. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177, stated that:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

34. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court's task thus entails whether the trial court failed to award special damages that were pleaded and proved. In Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J held that:

> " In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...

35. The loss occasioned by the destroyed goods was therefore not pleaded. Although the Applicant also pleaded damage due to loss of reputation, the same would conventionally accrue where defamation is proved. This not being a civil suit, I do not see any need to venture into such a case, not being before the court. Where there is another remedy, then the judicial review is not appropriate. Being in the nature of civil damages, the Applicant should pursue the same in a civil claim. Given that there is such a suit, the claim for damages is sub judice and is accordingly struck out. The question of damages, shall not be addressed in this judicial review matter.

36. On costs, an award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. They are discretionally. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

37. Given the mixed results, each party shall bear their own costs.

Determination

38. The upshot is that I make the following orders: -

a. The ex parte Applicant's Notice of Motion dated 13.3.2024 is merited and is allowed in part.

b. An Order of certiorari is hereby issued to remove to the High Court for purposes of quashing the decision of the 1st Respondent to seize or ban the possession, consumption or sell of the Applicant's Diamond Ice and Flying Horse alcoholic drinks brands in Mathira East Sub-County or in any place within the Republic of Kenya.

c. An Order is hereby issued restraining the Respondents from unlawfully seizing, banning, taking or otherwise removing the Applicant's Diamond Ice and Flying Horse alcoholic drinks brands from the market shelves in Mathira East Sub-County or in any place within the Republic of Kenya.

d. The prayers for pecuniary compensation and damages are struck out.

e. Each party shall bear their costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 25TH DAY OF FEBRUARY, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Kabugu for the ex parte Applicant

Mr. Lenin Kibe for Mumbi Kiarie for the Respondent

Court Assistant – Michael