



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION NO. 14 OF 2014

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF UNFAIR ADMINISTRATIVE ACTION CONTRARY TO ARTICLES 27, 40, 47, 46, 50, 1,2,3,4,5 AND 6 OF
THE CONSTITUTION OF KENYA**

**AND IN THE MATTER OF ARBITRARY UNFAIR AND UNLAWFUL CLOSURE OF LICENCED BUSINESS PREMISES
SELLING ALCOHOLIC DRINKS**

AND

IN THE MATTER OF SECTION 7-11 OF THE ALCOHOLIC DRINKS CONTROL ACT NO. 4 OF 2010

AND

IN THE MATTER OF THE PUBLIC HEALTH ACT

AND IN THE MATTER OF THE COUNTY GOVERNMENT ACT

AND

**IN THE MATTER OF UNLAWFUL AND ARBITRARY CLOSURE OF BUSINESS PREMISES OPERATING AS BARS, WINES
AND SPIRITS**

BETWEEN

CENTER FOR HUMAN RIGHTS AND DEMOCRACY.....PETITIONER

VERSUS

NANDI COUNTY DIRECTOR FOR HEALTH SERVICES.....1ST RESPONDENT

NANDI COUNTY SECRETARY.....2ND RESPONDENT

NANDI COUNTY EXECUTIVE HEALTH.....3RD RESPONDENT

NANDI COUNTY EXECUTIVE TRADE.....4TH RESPONDENT

NANDI COUNTY COMMISSIONER.....5TH RESPONDENT

NANDI COUNTY COMMANDER OF POLICE.....6TH RESPONDENT

NANDI COUNTY ADMINISTRATION POLICE OFFICER..7TH RESPONDENT

NANDI COUNTY GOVERNMENT..... 8TH RESPONDENT

ATTORNEY GENERAL.....9TH RESPONDENT

AND

AFRICA SPIRITS LTD.....1ST INTERESTED PARTY

NANDI WINES & SPIRITS

SELLERS ASSOCIATION.....2ND INTERESTED PARTY

JUDGEMENT

The petitioner moved this court vide a petition dated 30th July 2014 seeking that this court grant the following orders;

- i. A declaration that the closure notices issued by the county director for Health services, Nandi County amounts to an unfair administrative action contrary to Article 47 of the Constitution of Kenya.
- ii. A declaration that the closure notices issued by the County Director for Health Services, Nandi county amounts to positive discrimination contrary to Article 43 of the Constitution of Kenya.
- iii. A declaration that the closure notices issued by the County Director for Health, Nandi County, infringed on the right to own property contrary to Article 40 of the Constitution of Kenya.
- iv. A declaration that the closure as ordered contravenes the provisions of the Public Health Act, Section 110-115 which substantively seeks to control, prevent and guard against the introduction of infectious diseases from outside.
- v. An order of judicial review removing into court the closure notices issued by the respondents and quashing them forthwith.
- vi. A declaration that the arbitrary and discriminatory nature the Nandi County Government went about ordering the closure of the interested parties business premises is discriminatory and contravenes the provisions of Article 43 of Constitution of Kenya.
- vii. A declaration that the provisions of the Arbitrary Closure Order relating to the closure of licensed premises is inconsistent and ultra vires to the provisions of the National Alcoholic Drinks Control and hence be declared null and void.
- viii. Damages for unlawful and unilateral arbitrarily closure of businesses.
- ix. Costs of the petition.
- x. Any other order the court may deem fit to grant.

The interested parties claim that they are licensed dealers in wines and spirits in Nandi County. They claim that the Nandi County Director for Health Services, on the 10th and 11th days of July 2014 issued a notice requiring the interested parties to close business on the grounds that their structures didn't meet the minimum required health standards, that their premises lacked adequate sanitary facilities and that their personnel were operating without valid medical certificates.

The interested parties claim that they do not face any charges of selling adulterated liquor to the detriment of the public. They claim that they took loans to stock their business and their closure is hurting their livelihood as they can't service the loans. They further claim that the closure was unreasonable and that they were never given an opportunity to be heard.

The interested parties claim that their constitutional right to own property under Article 40 of the constitution has been infringed upon. They claim that the respondent's decision was tainted with illegality, irrationality and impropriety.

The 1st, 2nd, 3rd, 4th and 8th respondents, through their written submissions dated 11th November 2014 opposed the petition on the following grounds;

1. That the petitioner failed to prove that their fundamental right to fair administrative action under Article 47 was breached by the decision of the 1st respondent.
2. That the said decision was necessitated by the death of 14 people in Nandi County who died after consuming adulterated alcoholic drinks.
3. That they gave written reasons to the interested parties in the notice served to them, reasons which they did not object to prior to instituting this suit.
4. That Section 3 of the Alcoholic Drinks Control Act mandates them to protect the health of individuals from excessive

consumption of alcoholic drinks.

5. That the rights in question are not absolute as Article 24 of the constitution provides for such limitation for as long as such limitation is justifiable and reasonable.

6. That the interested parties' right to own property or economic and social rights were not deprived and if at all they were limited, the said rights could not be subordinated to the right to life of the greater populace.

The respondents claim that the closure notice was constitutional and lawful and that the decision was made in public interest. They prayed that the petition be dismissed with costs to the Respondents.

This court, as a point of departure must first determine the lawfulness, or otherwise, of the notices issued by the 1st respondent. Section 31 of The Food, Drugs and Chemical Substances Act CAP 254, Laws of Kenya states,

'The Director of Medical Services in relation to any matter appearing to him to affect the general interests of the consumer, and the Director of Agriculture in relation to any matter appearing to him to affect the general interests of agriculture in Kenya, and any other person authorized in writing by the Minister so to do, may direct a public officer to procure for analysis samples of any food, drug, device, cosmetic or chemical substance, and thereupon that officer shall have all the powers of an authorized officer under this Act and this Act shall apply as if the officer were an authorized officer.'

Further, Section 117 of the Public Health Act CAP 242, Laws of Kenya states,

'It shall be the duty of every health authority to take all lawful, necessary and reasonably practicable measures for preventing or causing to be prevented or remedied all conditions liable to be injurious or dangerous to health arising from the erection or occupation of unhealthy dwellings or premises, or the erection of dwellings or premises on unhealthy sites or on sites of insufficient extent, or from overcrowding, or from the construction, condition or manner of use of any factory or trade premises, and to take proceedings against any person causing or responsible for the continuance of any such condition.'

Section 120 (1) of the said Act provides that if the person on whom a notice to remove a nuisance has been served as aforesaid fails to comply with any of the requirements thereof within the time specified, the medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate, and such magistrate shall thereupon issue a summons requiring the person on whom the notice was served to appear before his court.

The respondents claimed that the closure of the premises was a result of a court order arising from Kapsabet PMCC Misc. Case No. 76 of 2014. The veracity and validity of the said order was not challenged by the applicants.

I therefore find that the 1st respondent acted within the precincts of law in issuing the order. I am satisfied that the issuance of the notices was procedurally correct.

I am equally not convinced that the petitioner deserves the judicial review orders as no sufficient case is established warranting granting the same.

I do dismiss the petition with costs to the Respondents as the application is in want of merit.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 4th day of July, 2019

In the absence of:

Mr. Angu for the petitioner

Mr. Yego for 1st, 2nd, 3rd, 4th, and 8th Respondents and Mr. Tigoi for 5th, 6th, 7th, and 9th Respondents

Ms Sarah – Court assistant