REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CONSTITUTIONAL PETITION NO. 48 OF 2018

IN THE MATTER OF ARTICLES 22(1) & (2) (C), 48, 50(1), AND 258(1) & (2) (C) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENSHRINED IN ARTICLES 1(1); 2(1), (2) & (3); 3(1); 10(2); 73(1) (b); 185(2); AND 259(1) & 3 OF THE CONSTITUTION AND PARAGRAPH 4(C) OF PART 2 OF THE FOURTH SCHEDULE TO THE CONSTITUTION

IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 24, 27, 40, 43, 46 & 47 OF THE CONSTITUTION

IN THE MATTER OF THE ALLEGED VIOLATION OF THE ALCOHOLIC DRINKS CONTROL ACT 2010

IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE KIAMBU COUNTY ALCOHOLIC DRINKS CONTROL ACT, 2018

IN THE MATTER OF THE DOCTRINES OF LEGITIMATE EXPECTATION AND VOID AB INITIO

BETWEEN

OKIIYA OMTATAH OKOITI.....PETITIONER/APPLICANT

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....RESPONDENT

J U D G M E N T

1. This Petition was brought by **Okiya Omtatah Okoiti** (the Petitioner) against the County Government of Kiambu (Respondent) to challenge the Kiambu County Alcoholic Drinks Control Act, 2018. The Petitioner takes issue with the stated purposes of the Act , certain provisions of the Act, and asserts that the process of enactment was carried out in a manner that violates the national values and principles of governance enshrined in several Articles of the Constitution, including Articles 1(1), 2(1) (2) & (3); 3(1); 10(2); 73(1) (b); 185(2); and 259(1) & (3) . He particularly asserts that the law violates the distribution of functions between the national government and county government as per paragraph 4(c) of part 2 of the fourth schedule to the Constitution. Further he claims that certain provisions of the Act flout the provisions of Article 24, and represent violation of rights and fundamental freedoms guaranteed under Articles 27, 40, 43, 46 & 47 of the Constitution.

2. The Petitioner prays for declarations and orders that: -

> **"a. The phrase 'liquor licensing' in Paragraph 4 (c) of Part 2 of the Fourth Schedule to the Constitution refers to the issuing of permits to sellers of alcoholic beverages, and clearly assigns county governments the very limited role of liquor licensing, being the issuing of bar licences and attending to matters incidental thereto and connected therewith.**
>
> **b. Sections 30(3), 36, 63, and 69 of the Kiambu County Alcoholic Drinks Control Act, 2018; and Form B, Form I and Form J of the Fourth Schedule of the Act are unconstitutional and, therefore, invalid, null and void and of no legal effect.**
>
> **c. The Kiambu County Alcoholic Drinks Control Act, 2018 is unconstitutional and, therefore, invalid, null and void and of no legal effect.**

d. By demanding that business premises pay for both single business permits for selling alcohol, and then liquor licences, the County Government of Kiambu is guilty of double taxation.

AN ORDER:

a. QUASHING the Kiambu County Alcoholic Drinks Control Act, 2018.

b. PERMANENTLY PROHIBITING the respondent from demanding that business premises pay for both single business permits for selling alcohol, and the liquor licences."

The Petitioner's Case

3. The Petitioner's stated case is that under paragraph 4 (c) of Part 2 of the Fourth Schedule to the Constitution, the control of alcoholic drinks, including the manufacture and sale thereof lies within the mandate of the national government. That the role of the Respondent herein is restricted to issuance of liquor licences, in particular for bars and related establishments. The Petitioner is aggrieved with the following aspects of the impugned Act. First, the imposition of a licensing tax in addition to ordinary business permits applicable to liquor traders which he views as amounting to double taxation ; secondly, that the Act requires a licensed person to display a list of alcoholic drinks handled by the licensee, on pain of automatic cancellation , by the Director concerned, of the liquor licence; thirdly, that the Act envisages the creation of alcohol free zones and donates so-called rogue powers to officers to enter and search private premises and to seize goods; and lastly that the Act provides for automatic termination of licences issued under the previous law within 30 days of enactment. The Petitioner urged the Court to declare the said Act invalid, null and void.

The Respondent's Case

4. Dr. Martin N. Mbugua, the County Secretary, Kiambu County Government replied to the Petition on behalf of the Respondent. Through a Replying Affidavit filed on 7th June 2018, he deposed that legislation made by the County Assembly is premised on enabling provisions of the Constitution; that the Respondent enacted the Kiambu County Alcoholic Drinks Control Act, 2018 to address, by way of licensing and other measures and in line with the Constitution, the liquor menace witnessed in the County. He deposed that the dual imposition of liquor licence and business permit fees does not amount to double taxation as the purposes are different. That the requirement for the display of a list of the alcoholic drinks handled was intended to regulate rogue traders who violate licences by selling illicit brews; and that cancellation of a licence would be a last -resort consequence of non-compliance therewith. Finally, he deposed that authorised officers would only exercise powers of seizure where it was believed that the provisions of the Act were being contravened. It was contended that the Petitioner has not established the minimum threshold for the grant of the orders sought in the Petition.

5. The Petition was canvassed by way of written submissions and by subsequent oral highlighting.

The Petitioner's Submissions

6. The Petitioner submitted that pursuant to the Fourth Schedule and Article 186(3) of the Constitution, the function of control of alcoholic drinks is assigned to the national government and that of liquor licensing to the County Government. Thus, the Respondent cannot purport to expand its liquor licensing mandate to include the control function and there were no functional gaps justifying the Respondent's involvement in the control of alcoholic drinks. Moreover, ordinary county or other legislation cannot amend the Constitution as the correct procedure is stipulated under Article 255, 256 and 257 of the Constitution. Therefore, the Petitioner submitted that the impugned Act is based on a misinterpretation of the enabling provisions of the Constitution.

7. In regard to public participation, it was the Petitioner's submission that the Kiambu County Alcoholic Drinks Control Act was 'sneaked' into the County. Various provisions of the Constitution were quoted including, Article 201 (a) as to the the principles of public finance which provide for public participation in financial matters; Article 174 which sets out the objects of devolved government; Article 196(1) (b) which provides that a county assembly shall facilitate public participation and involvement in the legislative and other business of the assembly and its committees; Paragraph 4 of Part 2 of the Fourth Schedule to the Constitution which provides for the functions and powers of the county. In addition, the Petitioner called to his aid the provisions of Section 3 (f) and 87 of the County Governments Act (No. 17 of 2012), the former which states that the object and purpose of the Act is to **"provide for public participation in the conduct of the activities of the county assembly as required under Article 196 of the Constitution".**

8. The Petitioner cited various cases in support of his submissions on public participation including, the case of **Robert N. Gakuru & Others vs. County Government of Kiambu County (2014) eKLR.** To the effect that public participation should be real both quantitatively and qualitatively and not merely a formality. He also cited the case of **Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya JR Misc. App. No. 374 of 2012** where it was stated that information should be availed to the members of the public and a forum provided to ventilate their views. Lastly, he relied on in the case of **the Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 15 Others (2015) eKLR** where the appropriate threshold for public participation was stated to accord with the nature of the subject matter, is innovative, enables access to relevant information, is inclusive and does not usurp the role of the office holders of an authority.

9. The Petitioner concluded by positing that a limitation to the right of public participation can only be justified upon satisfaction of the conditions stipulated in Article 24 of the Constitution and that the Respondent herein has not satisfied the said test. Reliance was placed on the case of **Republic vs Independent Electoral and Boundaries Commission (I.E.B.C.) EX PARTE National Super Alliance (NASA) Kenya & 6 others (2017) eKLR.**

The Respondent's Submissions

10. On his part, Mr. Ranja, counsel for the Respondent submitted that contrary to the Petitioner's assertion, the Respondent had produced evidence to show that information was disseminated to members of the public by way of print media and vernacular radio advertisements to encouraged them to send their views on the contested bill. That the argument by the Petitioner that the public participation process was

ineffective was dismissed by the Respondent. Counsel further submitted that the Act is limited to the functions donated to the Respondent under the Fourth schedule of the Constitution. It was submitted that the Petitioner had not furnished the Court with specific details to warrant the declaration sought in respect of Sections 30(3), 36, 63 and 69 of the Act to the effect that they are oppressive, unreasonable and therefore unconstitutional. The Respondent's counsel relied on two authorities on the point, namely, Re **Application by Bahadur (1986) LRC 545 and Meru Bar, Wines & Spirits Owners Self Help Group v County Government of Meru (2014) eKLR.** Asserting a difference between a liquor and a business licence or permit, counsel disputed that the requirement for a person dealing in liquor to obtain both amounts to double taxation.

Analysis and Determinations

11. The court has carefully reviewed the Petition and the rival affidavits filed by the respective parties. In addition, the court has considered the written submissions as well as oral highlighting of them by the parties.

12. It is apparent from the initial pleadings that the Petitioner did not include in his original grounds, the question of public participation. Nonetheless, in the parties' subsequent filings the issue of public participation was raised and canvassed as an issue for determination. In **Galaxy Paints Co. Ltd v Falcon Guards Ltd (2000) E.A. 885** it was held that:

> **"The issues for determination in a suit generally flowed from pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. Unless pleadings were amended, parties were confined to their pleadings. Gandy v Caspair (1956) EACA 139 and Fernandes v People Newspapers Ltd (1972) EA 63".**

13. The above decision was cited with approval by the Court of Appeal in **Housing Finance Company of Kenya v J.N. Wafubwa (2014) e KLR**. The Court however went on to state that:

> **"However, where, as is the case here, the parties have canvassed an issue and left it to the court, the court can pronounce judgment on it though it was not pleaded. This was the holding in the case of Odd Jobs v Mubia (1970) EA 476 where the court held:**
>
> > **"A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the court for decision."**

10.The Respondents through their Replying affidavit filed on 7th June 2018, in defence of the Act were first to raise the issue of public participation. (see paragraphs 30 – 32.) In his further affidavit filed on 16th July 2018 the Petitioner devoted two lengthy paragraphs (34 and 35) to counter these depositions. Thus, the parties' submissions also dwelt on the said matter.

14. There is no dispute that the Kiambu **County Alcoholic Drinks Control Act 2018** was commenced on the date of its gazettement on 9th March 2018. The preamble to the Act describes it as:

> **"An Act of the County Assembly of Kiambu to establish a framework for the licensing and regulation of the production, sale, distribution, consumption and outdoor advertising of alcoholic drinks; and for connected purposes**".

15. Three key issues therefore falling for determination as presented and canvassed by the parties are:

a) Whether the impugned Act offends the provisions of the Fourth Schedule to the Constitution regarding the distribution of functions and is therefore unconstitutional.

b) Whether Sections 30, 36, 63 and 69 of the Act are unreasonable, oppressive and constitute a violation of Articles 10(2) (a), 24, 31, 40, 47 and 73 of the Constitution.

c) Whether the process of the enactment of the Act was subjected to the requisite public participation.

Whether the Act Offends the Distribution of Functions in the Fourth Schedule to the Constitution ousing Finance Company of Kenya v J.N. a

16. The legislative authority of a county is vested in and exercised by the county assembly of the county. Article 185(2) of the Constitution provides:

> **"A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule."**

17. Article 186(1) reiterates the foregoing by stating that:

> **"(1) Except as otherwise provided by this Constitution, the functions and powers of the natural government and the country governments, respectively, are as set out in the Fourth Schedule"**

18. Sub articles 2 and 3 of the above Article further provide that a function or power conferred on both the county and national government is deemed to fall within the concurrent jurisdiction of each level of government, and that any function or power not assigned by the Constitution or national legislation to a county is a function or power of the national government.

19. The Constitution therefore does not anticipate a vacuum in the assignment or performance of functions between the national and county governments. However, it anticipates a conflict between national and county legislation where functions are shared. Article 191 of the Constitution therefore makes provision for the resolution of conflicts arising between national and country legislation with regard to matters that fall within the concurrent jurisdiction of the county and national government.

20. The Petitioner's grievance, as l understand it, is that the county government of Kiambu has by the impugned Act purported to extend its mandated functions beyond the parameters of the Fourth Schedule of the Constitution. The Petitioner contends that the role assigned to the county government under the Fourth Schedule is merely the licensing of liquor outlets and is akin to the role of the defunct Provincial/District Licensing Courts under the repealed Liquor Licensing Act. Moreover, that under the national legislation, the Alcoholic Drinks Control Act of 2010, which repealed the Liquor Licensing Act, the function of control and regulation of alcoholic drinks falls under the authorized agency, in this case the **National Authority for the Campaign Against Alcohol Drugs Abuse (NACADA).**

21. The relevant portion of Part 2 of the Fourth Schedule to the Constitution is in the following terms: -

> **"The functions and powers of the county are –**
>
> **1. ….**
>
> **2. County health services, including, in particular—**
>
> **(a) county health facilities and pharmacies;**
> **(b) ambulance services;**
> **(c) promotion of primary health care;**
> **(d) licensing and control of undertakings that sell food to the public;**
> **(e) veterinary services (excluding regulation of the profession);**
> **(f) cemeteries, funeral parlours and crematoria; and**
> **(g) refuse removal, refuse dumps and solid waste disposal.**
>
> **3. Control of air pollution, noise pollution, other public nuisances and outdoor advertising.**
>
> **4. Cultural activities, public entertainment and public amenities, <u>including--</u>**
>
> **a) betting, casinos and other forms of gambling;**
>
> **b) racing;**
>
> **c) <u>liquor licensing;</u>**
>
> **d) cinemas;**
>
> **e) video shows and hiring;**
>
> **f) libraries;**
>
> **g) museums;**
>
> **h) sports and cultural activities and facilities; and**
>
> **i) county parks, beaches and recreation facilities**." (emphasis added)

22. Neither the word 'liquor' nor "licensing" are defined in Article 259 of the Constitution. Nonetheless Sub Article 4 thereof provides that:

> **"In this Constitution, unless the context otherwise requires –**
>
> **a) .....**
>
> **b) the word "includes" means "includes, but is not Limited to"**

23. The meaning of words is important in the interpretation of a statute or a clause of the Constitution. However, such interpretation is not merely a matter of semantics. More importantly, the Constitution must be construed holistically and in a manner that *inter alia*, promotes its purposes, values and principles, advances the rule of law and the Bill of rights and contributes to good governance (see Article 259(1)). And as provided in Article 10, all state organs, state and public officers are bound by the national values and principles of governance whenever

they interpret or apply the Constitution.

24. In **Rafiu Rabiu v the state [1981] 2 NCLR, 293** cited by the bench in **Rawal v JSC and Others [2015] e KLR** the Supreme Court of Nigeria stated that:

> **"The function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities, must involve ,ours being a plural, dynamic society, and therefore, technical rules of interpretation of statutes are to some extent inadmissible in a way as to defeat the principles of government enshrined in the Constitution."**

25. The court in the **Rawal case** further observed that:

> **"Unlike a mere statute, the Constitution does not mechanically define government structures and relations between the government and the governed, as per Mohamed, AJ in S vs Acheson (1991) 25A 805. Rather the Constitution is a mirror reflecting the national soul, the ideals and aspirations of a nation, the articulation of the values that bind its people and discipline its government. In Ndyanabo vs Attorney General (2001) EA 485 the Court of Appeal in Tanzania stated that the... interpretation of a Constitution must be guided by the back principle that it "was a living instrument with a soul and life of its own."** This latter proposition is embraced in Article 259(3) of our Constitution.

26. In the matter of the Kenya National Human Rights Commission Supreme Court Advisory opinion Reference No.1 of 2012; [2014] e KLR the Supreme Court described holistic interpretation to:

> **"…mean interpreting the Constitution in context ... reading it alongside and against other provisions, so as to maintain a rational explication"**

The court cited the Tanzanian case of **Tinyefunza v Attorney General Constitutional Appeal No. 1 if 1997, [1997] UG CC 3 where it was held that:**

> **"... the entire Constitution has to be read as an integrated whole, and no one provision destroying the other. This is the rule of harmony.... completeness... exhaustiveness."**

27. A key distinguishing feature of the 2010 Constitution is devolution of power, whose objects as stated in Article 174 include the promotion of democratic and accountable exercise of power and

> **"(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state in making decision affecting them;**
>
> **(d) to recognize the right of communities to manage their own affairs and further their development."**

28. Thus, in construing the provisions of Part 2 of the Fourth Schedule, the court must bear in mind the foregoing. The Petitioner appears to promote a narrow or restrictive interpretation, which proposes the subordination of the relevant provision of the Fourth Schedule to a repealed Act of Parliament. For their part, the Respondents urge a contextual approach and further call to their aid the provisions of paragraph 13 of the Fourth Schedule, and the definition of drug under the **NACADA** Act, to defend their enactment of the impugned Act.

29. Considering the respective arguments, the court cannot, given the entire context and spirit of the Constitution, accept the narrow interpretation of the Fourth Schedule canvassed by the Petitioner, or worse import an interpretation or application of the provisions in dispute from a repealed Act. The Liquor Licensing Act was together with the Chang'aa Act repealed by the **Alcoholic Drinks Control Act of 2010**. The objects of the former Act, which commenced in 1957 as contained in the preamble were "**to make provision for regulating the sale and supply of liquor, and for matters incidental thereto and connected therewith". The** Act created bodies based on the defunct Provinces/Districts, as Licensing Courts whose key function was to consider and grant applications for licenses.

30. The preamble to the Alcoholic Drinks Control Act describes the legislation as **"An Act of Parliament to provide for the regulation of the production, sale, and consumption of alcoholic drinks, to repeal the Chang'aa Prohibition Act, the Liquor Licensing Act and for connected purposes."** Section 3 of the Act sets out an expansive list of the objects and purposes of the Act, including the protection of health of individuals, and the protection of underage persons and of consumers, public education, elimination of illicit trade in alcohol, treatment and rehabilitation of addicts and the promotion of research and dissemination of information on the effects of consumption of alcoholic drinks.

31. While the Liquor Licensing Act was mainly concerned with the licensing of liquor outlets, the Alcohol Drinks Control Act has a much wider scope albeit equally providing for Licensing. The Licensing function under the Alcoholic Drinks Control Act was also localized at the district level prior to the 2010 Constitution. Other key features of the Act include the functions assigned to the relevant agency (NACADA) – with regard to the objects and purposes of the Act, and include promotion of national treatment and rehabilitation programs, generally advising the minister on national policy regarding production, manufacture, sale and consumption of alcoholic drinks, and rendering technical advice to the minister regarding the standards applicable to alcoholic drinks etc.

32. One may ask: What necessitated the new Act in 2010? Or in other words, what mischief was intended to be cured through the enactment of Alcoholic Drinks Control Act? As **Makau J** in the **Meru Bar, Wines & Spirits Owners Self Help Group** and **Ngaah J** in **John Kinyua Munyaka & 11 Others v County Government of Kiambu & 3 others [2014] e KLR** observed, the ravages and toll inflicted on society by

excessive consumption of both licit and illicit liquor and the advent of counterfeit alcoholic drinks had become self -evident and required urgent attention by the national government.

33. Nonetheless, consistent with previous legislation, the 2010 law assigned the role of licensing of liquor to a local authority, the District Committees. It is clear from a reading of Section 7 through to 9 that the function of licensing covered the manufacture, production and sale of liquor. Part 1 of the Fourth Schedule to the Constitution sets out the functions of the national government. In the Part 1, there is not the remotest reference to the control, regulation or licensing of alcoholic beverages at all as a function of national government.

34. As earlier stated, the objects of the Liquor Licensing Act, despite its name, included regulation of the sale and supply of liquor and matters connected therewith. The provisions of the Act were primarily concerned with licensing. Despite its name, the Alcoholic Drinks Control Act was from its objects concerned with regulation of production, sale and consumption of alcoholic drinks and connected purposes. Part III of the Alcoholic Drinks Acts relates to Licensing and the subtitle to Section 7 reads "Control of alcoholic drinks". It provides:

> **"No person shall –**
>
> **a) manufacture or otherwise produce;**
>
> **b) sell, dispose of, or deal with;**
>
> **c) import or cause to be imported; or**
>
> **d) export or cause to be imported any alcoholic drink except under and in accordance with a license issued under this Act."**

35. The licensing body is the Committee at the District level, today's equivalent of a sub-county. The Alcoholic Drinks Control Act received presidential assent in August 2010 but commenced in November 2010. Given this background, if it was the intention of the Constitution makers was to limit the functions of the county government to the *mere licensing of bars*, as the Petitioner asserts, nothing could have been easier than the use of express words to that effect. In my view the liquor licensing function must be read in context and in tandem with the provisions of the Alcoholic Drinks Control Act.

36. Any other reading such as proposed by the Petitioner would result in two absurdities. The first would be that while counties would be expected license only liquor outlets, they could not purport to license manufacturers or distributors who set base within the county boundaries. This is clearly inconsistent with the Constitutional object of devolution that counties manage their own affairs. The second absurdity is that there would be a vacuum created regarding the body responsible for licensing distributors, manufacturers or importers of alcoholic drinks. Under the 2010 legislation, the function fell within the mandate of the District Committee. There are no districts in the present constitutional dispensation and therefore no district committees can lawfully be set up.

37. It is well to note that under the Alcoholic Drinks Control Act, all functions related to the regulation, and control of alcoholic drinks were merged together under the Licensing Function. What the Petitioner appears to propose is a severing of the disputed function in a manner which to my mind is inconsistent not only with the basic definitions but also the purpose behind the words, "control," "regulation" and "licensing". These words are all employed in Part III of the Alcoholic Drinks Control Act of 2010 and overlap in meaning as can be seen below.

38. Black's Law Dictionary (10th ed. 2014) provides the following definitions of the said words:

> **"Control**
>
> **1. To exercise power of influence over, the judge controlled the proceedings.**
>
> **2. To regulate or govern by law, the budget office controls expenditure.**
>
> **3…**
>
> **License**
>
> **1. A privilege granted by a state or city upon the payment of a fee, the recipient of the privilege then being authorized to do some act or series of acts that would otherwise be impermissible. A license in this sense is a method of governmental regulation exercised under the police power, as with a license to drive a car, operate a taxi service, keep a dog in the city, or sell crafts as a street vendor. – Also termed *permit.***
>
> **2….**
>
> **Regulate**
>
> 1. **To control (an activity or process) esp. through the implementation of rules.**
>
> 2. **To make (a machine or one's body) work at a regular speed, temperature, etc.**

Regulation

1. **Control over something by rule or restriction, the federal regulation of the airline industry**. "

39. The effect of paragraph 4(c) of Part 2 of the Fourth Schedule was in my view to lift and devolve the entire licensing function as a whole and to assign it to the county government. It is true that the words control, or regulation are not used in the paragraph but are necessarily implied in the word licensing. I therefore fully associate myelf with the finding by **Makau, J** in the **Meru Bar, Wines & Spirits** case that the county level government, and not the national government, bears the constitutional mandate to make and enforce legislation for the control of alcoholic drinks. And there is no reference in the paragraph to limitation of the licensing function to bars or liquor outlets as the Petitioner has suggested.

40. It has also been argued that the county government may have no capacity to enforce standards or to carry out their function. That is an entirely different matter. At any rate, the impugned Act recognizes national standards as enforced by the Kenya Bureau of Standards and the National Authority for the campaign against Alcoholic and Drug Abuse which are a prerequisite for the issuance of certain licenses. See Section 20 of the County Alcoholic Drinks Control Act. The Petitioner confined himself in his submissions to the preamble and objects of the impugned Act as stated in Section 3. He did not deem it necessary to highlight specific provisions within the Act itself to demonstrate the alleged enlargement of functions beyond the functions assigned in Part 2 of the Fourth Schedule.

41. For my part, I have reviewed the sections in all the eight parts of the impugned Act. The language of the sections is clear and upon a literal, harmonious construction, it is my view that they convey the intention of the country assembly, namely, to control or regulate through licensing the aspects of the liquor trade which involve production, sale, distribution, consumption and outdoor advertising and for the treatment, and to provide for rehabilitation of alcohol dependent persons. Hence the creation of a special fund. The facilitative, licensing administrative and enforcement sections of the Act point towards these objectives. The county legislation has obviously borrowed heavily from the national legislation. On the whole the objects and purposes of the Act align to the nature and the effective performance of the county functions under the Fourth Schedule.

42. For all these reasons, I am not prepared to accept the narrow interpretation of the country's mandate under paragraph 4 (c) of the Fourth Schedule. In my considered view therefore, the licensing function is a regulatory or controlling function every sense of the word which by dint of paragraph 4 (c) of the Fourth Schedule, was devolved to the country government in respect of all matters touching upon liquor, including manufacture, production, sale and consumption. I would venture to find further that all other matters connected with licensing including violations and enforcement must necessarily lie with the County Government. There cannot be effective control without appropriate sanctions. The Petitioner's narrow approach to the relevant provisions of the Fourth Schedule is not tenable as it ignores the relevant context and is based on an artificial construction of the meaning of words used in the Constitution and in the Alcoholic Drinks Control Act. For all these reasons, the court will answer the first question in the negative.

Whether Sections 30(3), 36, 63, and 69 of the Kiambu County Alcoholic Drinks Control Act are oppressive, unreasonable and ultimately unconstitutional

43. It did appear from the material canvassed by the Petitioner that his chief grievance against the Kiambu Alcoholic Drinks Act is the preamble which states:

> **"AN ACT of the County Assembly of Kiambu to establish a framework for the licensing and regulation of the production, sale, distribution, consumption and outdoor advertising of alcoholic drinks; and for connected purposes."**

And also with Section 3 of the Act which imports almost verbatim from the national legislation the regulatory objects in the preamble and the stated purposes of regulation inter alia; mitigation and reduction of negative health, social and other impacts resulting from the sale and consumption of alcoholic drinks, protection of underage persons by preventing them access to alcoholic drinks, eliminate illicit brews, counterfeit, adulterated and substandard alcoholic drinks.

44. As **Ngaah J** noted in the case of **John Kinyua Munyaka the** object and purpose of an impugned legislation is an important consideration where a constitutional challenge is raised:

> **"Talking about importance of the object and effect of a statute in evaluating its constitutionality the court in Queen v Big M. Drug Mart Ltd (1985) 1 SCR 295, ... said:**
>
> **"... both purpose and effects are relevant as 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. The object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, are clearly linked. Intended and achieved effects have been looked to for guidance in assessing the legislations object and thus validity."**

45. It may be relevant to state that the decision in **John Kinyua Munyaka** related to a challenge brought against the Kiambu County Alcoholic Drinks Act of 2013. From a reading **Ngaah J's** judgment the objects thereof were not dissimilar to those in the impugned Kiambu County Alcoholic Drinks Control Act of 2018. The learned Judge observed the necessity for regulation of alcoholic drinks due to their peculiar nature, and adverse effect they sometimes have on consumers and their health. I agree entirely with these sentiments as expressed by **Ngaah, J** in the following words:

> **"Considering the likely side effects of alcoholic drinks on the health and well-being of consumers, it is not only necessary but it is also an obligation on any responsible government to protect the public from such harmful effects that flow from**

production, sale and consumption of alcoholic drinks; it would be a dereliction of duty on the part of the government, whether national or county, to leave the manufacturers, sellers and consumers of alcoholic drinks to their own devices to the detriment of the entire society."

46. The stated purpose of the impugned Act in Section 3 is in my reading a justification of the intended regulation and control of alcoholic drinks on the face of it, the objects and purpose of the Act appear noble and to be aligned to the licensing function envisaged in the Fourth Schedule and the empowering provisions of Article 185 (2) of the Constitution. Generally speaking, an act of parliament enjoys a presumption of constitutionality (see **Ndyanabo v Attorney General of Tanzania [2001] EA 459**.

47. Where the legislation is said to violate fundamental rights and or freedoms, a key plumb line is provided in Article 24 which provides as follows:

"(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) ------

(5) ------"

48. While I agree that Article 24 is critical in considering the justification of a limitation of a right, it cannot be considered in isolation. Other provisions or principles, depending on the subject matter may come into play, as in this case and the Constitution itself engenders a holistic interpretation. A provision of statute that contravenes any article of the Constitution is unconstitutional for that reason. That said, the Petitioner who alleges that an act is unconstitutional and or that it constitutes an unjustified limitation to a right or freedom bears the burden of proof. It is not enough for a Petitioner to, as it were, to make generalized statements on the Act impugned without pinpointing the specific offending sections of the law.

49. The Petitioner has argued that the above stated provisions of the Kiambu County Alcoholic Drinks Control Act are unreasonable and oppressive. Regarding Section 30 (3) the Petitioner is irked by the requirement that a licensee is obligated to display a list of alcoholic drinks, manufacture distributed, stored, offered for sale or in any way handled by the licensee. That because of the format of **Form B** of the Fourth Schedule to the Act, a new license will be required whenever new products are introduced in the market. That since the premises or licensee is licensed to sell only licit liquor the authority itself ought to take responsibility to display the list of alcoholic drinks it has authorized.

50. The connection between this provision and Article 47 of Act is stated to be that **Form B** empowers the Director under the impugned Act to cancel, without notice, any license for failure by the licensee to comply with the undertaking in **Form B** to only sell the brands for which the license is issued. In defending the section, the Respondent cites the unique notoriety of the prevalence of illicit brews in the central region of Kenya and asserts that the requirement for the display of the list of drinks envisaged in Section 30 (3) is intended to protect consumers and prevent licencees from abusing licenses by selling illicit brews.

51. Regarding this and other sections, the Respondents urge the court to be persuaded by the decision in **Re Application by Bahadur (1986) LRC 545 (Const.)** as cited with approval in **Nairobi High Court Petition No. 320 of 2011 Elle Kenya Ltd and Others v the**

Attorney General and 3 Others [2013] eKLR. To the effect that the court should in considering provisions in a statute assume that what was done by the legislative body is fair. **Elle's case** involved a petition challenging the constitutionality of some provisions of the Alcoholic Drinks Control Act, 2010. It was alleged that certain provisions of that act violated the Petitioners' rights to property, equal protection and benefit of the law.

52. The Petitioners were distillers and manufacturers of alcoholic beverages. **Lenaola J,** (as he then was) observed inter alia that;

> **"I must at this point point out, that as courts have always done that in interpreting legislation, it is not the role of this court to interrogate the wisdom or otherwise of … enacted laws. As the court stated in Re Application by Bahadur [1986] LRC 545 (Const); "I would only emphasize that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what is done is fair until the contrary is shown. It is not the function of the court to form its own judgment as to what is fair and then to "amend or supplement it with new provisions so also make it conform to that judgment."**

53. Lenaola J, (as he then was) further stated:

> **"It is therefore not the business of this court to distill what it thinks should have been the law... The US Supreme Court in US Supreme Court in US v Butler 297 US 1 (1936) had this to say under a similar issue:**
>
> > **"When an Act of Congress is approximately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenging and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislature policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends"**

54. That is the role that this court is mandated to carry out regarding the impugned sections of the **Kiambu County Alcoholic Drinks Control Act, 2018.** The five- judge bench in **Murugi Gateria Mugo v Judges and Magistrates Vetting Board & Others [2018] e KLR; Constitutional Petition No 325 of 2013** had this to say regarding interpretation of statutes:

> **"It is trite that, in construing a statutory provision, the first and foremost rule of construction is that of literal construction. All that the court has to see at the very outset is what does the provision say in its plain, grammatical and ordinary language. If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of its statutes need not be called into aid save when the legislation intention is not clear. However, the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words displayed by the legislature. In the words of Lord Greene M.R in the case of Re A debtor (No. 335 of 1947) (1948) 1 ALL ER 533 at Page 536 it was stated that: -**
>
> **"there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used".**

55. The Court proceeded to state that:

> **"If the language is clear and explicit, the court must give effect to it, for in that case the words of the statute speak the intention of the legislature. (See War Bruton vs Loveland (1832) 2 B at 480 for Jindal CJ at P 489) and Major General Tunyefunza vs A.G Court of Appeal petition no.1 of 1996).**
>
> **In the case of P. Asokan vs Western India Plywoods Cannanore AIR 1987 KER 103the court expounded and shed more light on statutory interpretation as follows: -**
>
> **"….in relation to the interpretation of statutes, courts have a positive role to play. If a section yields two different interpretations, that which leads to an arbitrary or shockingly unreasonable result has to be eschewed. If an interpretation is such that it will expose the enactment to a distinct peril of interpretation such that it will expose the enactment to a distinct peril of invalidation as offending a constitutional provision, the courts would be fully justified in reading down the provision and giving it an interpretation consistent with its constitutionality. Even the courts, without much of enthusiastic exuberance of judicial activism, can bring about just results by meaningful interpretation".** (Emphasis added)

56. I agree entirely with the foregoing statements of law and with the court's decision in **Nairobi Metropolitan PSV Saccos v County of Nairobi Government** adopting the **Indian decision in Hambarda Wakhan v Union India AIR (1960) AIR 554.** In which case it was stated inter alia that;

> **"... in examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the needs of the people and the law it enacts as directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore in favour of constitutionality of an enactment."**

57. With the foregoing principles in mind, I have looked at the provisions of Section 30 (3) of the impugned Act, **Form B** of the Fourth Schedule of the Act, in juxtaposition with Article 47 of the Constitution. Section 30(3) provides that:

> **"In addition to the requirements under this Act, a person licensed under this Act shall display in a conspicuous place a list of alcoholic drinks manufactured, distributed, stored, offered for sale or in any other way handled by the licencee".**

58. Form B in the Fourth Schedule is a declaration, apparently required to be made by a licensee as a commitment not to deal in illicit or unlicensed brews. Section 30(3) relates to a situation where a licensee has a license for dealing in alcoholic drinks whose list he must display. There may be some relationship between the **form B** and the requirement of Section 30(3). However, in my own reading, Section 30(3) is principally concerned with the display of a schedule of alcoholic drinks sold or handled by the licensee. I cannot understand why a genuine licencee would be wary of displaying the "menu" of alcoholic beverages available for sale at his premises.

59. Read in its plain and ordinary meaning, and bearing in mind the objects of the Act, I do not see that section 30(3) offends Article 47 in any way. The Respondent, in dispelling any sinister motive in the section explains that the condition is intended to guide patrons or buyers or consumers of beverages and to prevent the abuse of licences for the sale of illicit brews.

That sounds reasonable enough.

60. Secondly, the requirement of the section does not refer to specific brands of alcoholic drinks as claimed by the Petitioner but merely to "a list of the alcoholic drinks" handled by the licensee. I have perused the types of licences prescribed in the Fourth Schedule in **Form G & H**. I do not find any space provided therein for specific brands of alcoholic beverages. Section 2 and 3 of the First Schedule provides for two types of licences and respective categories **A, B, C & D**. None of these refer to specific brands or types of drinks a licencee is authorized to handle. In the result, I am unable to appreciate the Petitioner's concerns in respect of Section 30(3) of the Act, and associating it with **form B** does not advance the Petitioner's argument.

61. Further, in my view the Respondent is generally entitled to attach conditions to a licence for a proper purpose. Be that as it may, there may exist valid questions regarding the format of **Form B** which on the face of it could potentially allow for the cancellation of a license without notice to a licencee. In such eventuality, the licensee is certainly entitled to be heard in line with Article 47 and the Fair Administrative Action Act with which the Respondent must well be acquainted. I cannot find the statutory underpinning for **Form B,** and while the requirement for an undertaking by licensees to only sell licit brews, may be justified by the objects of the legislation, I think that the sanction provided is too drastic. It is contrary to the spirit and provision of article 47 of the Constitution. Form B is not a provision but a mere form. It can be amended to remove the offensive portion so that it conforms with Article 47.

62. Regarding Section 36, the Petitioner has conceded that it is a variation of Sections 12 and 13 of the Alcoholic Drinks Control Act of 2010. It is true that these sections provide the criteria for creation of alcohol-free zones in respect of certain areas. I agree with the Petitioner that the absence of criteria in the section providing for the declaration of alcohol-free zone appears contrary to the national values and principles espoused in Article 10(2) of the Constitution. Nonetheless the apparent deficiency is cured by the fact that the alcohol sale free zones can only be created with public participation and approval of the county assembly. Besides, the people's representatives and the people themselves are best placed to determine which areas ought to be classified as alcohol sale free zones. It seems unlikely that the provision could be applied in a manner that creates a blanket restriction in the entire county.

63. Equally, the section ought to be read together with Section 24(6) (e), (f) and (g) of the impugned Act which in my opinion approximate better to the provisions of Section 12 of the Alcoholic Drinks Control Act of 2010. The act of declaring other alcohol sale free zones, in addition to those excluded for licensing of alcoholic businesses under Section 24 would require some justification by the executive. The fact that Section 36 is not explicit on the areas envisaged or criteria for the classification does not in itself render the provision unconstitutional in light of the requirement for the subjection of the decision to direct and indirect public participation.

64. The content of Section 63(1), (2) and (3) appears to be a replication of Section 60(1) to (3) of the Alcoholic Drinks Control Act, 2010.The Respondent's legislation however omitted subsection (4) of the latte 2010 Act which states:

> **"Any person from whom an alcoholic drink or thing was seized may, within 30 days after the date of seizure, apply to the High Court for an order of restoration, and shall send notice containing the prescribed information to the minister within the prescribed time and in the prescribed manner "**

Under Section 61 of the 2010 Act the High Court may order that the alcoholic drink or thing be restored.

65. These powers of seizure are not dissimilar to the powers donated to police officers under section 26 of the Criminal Procedure Code or an authorized officer under Section 62 of the Forest Conservation and Management Act. The nature of the subject matter of the impugned legislation is relevant: there may occur situations where the public interest of the moment will necessitate the immediate seizure of things or alcoholic drinks in relation to which the officer believes or has reasonable grounds, that the Act has been contravened. Under the Forest Conservation and Management Act a seizure must be reported to the nearest court within specified timelines.

66. Whilist I agree that the impugned section impacts upon the rights to protection of property, privacy, or to fair administrative action, the question to ask is whether the provision goes beyond the limitation of rights allowed under Article 24 of the Constitution. Even considering the harm to life and limb that has, and would be occasioned by the production and consumption of toxic alcoholic drinks, a necessary caveat is that there ought to be a mechanism similar to that contained in section 60(4) the Alcoholic Drinks Control Act, 2010, to facilitate the necessary balance between the rights of the individual against that of the public. It is not enough that the section provides for the documentation and preservation of seized goods.

67. That said, whether or not the County Government omitted such a mechanism enabling a party whose goods have been seized to apply to

the court, does not in any way close the door upon any applicant especially where no formal charges have commenced against him in connection to the seized goods. The County Appeals Committee created under Section 66 of the impugned Act, to hear appeals on decisions made under the Act may possibly be moved to review a seizure decision. I say so without determining the point as the parties did not address themselves to the provisions of Section 66 and 67 in that regard. In appropriate cases, the High Court may be moved under the wide provisions of the Constitution, and the burden of proving that the seizure action was reasonable and justifiable in the circumstances will be upon the one who asserts so. Within the current constitutional dispensation and judging from the exuberant manner in which citizens continue to approach the courts to enforce their rights, it matters little that Section 63 does not include a provision for the making of an application for the restoration of seized goods. To my mind, Section 63 may be incomplete as it stands, but it would be stretching things to declare it as outrightly unconstitutional. Even if this court were to find otherwise, a similar provision would remain in our statute books in the form of Section 60 of the Alcoholic Drinks Control Act. Any deficiencies in section 63 of the impugned Act may be cured by an amendment providing for the making of an application and for the period within which the application may be made by the owner of seized goods, for their restoration. Subject to the stated caveat, my view however is that broadly viewed, the intended limitation is reasonable and justifiable for the protection of the life and health of members of the Public.

68. By his submissions, the Petitioner has taken issue with Section 65 of the impugned Act which he claims constitutes an illegitimate donation of power to the County Executive Committee. This challenge is not pleaded in the Petition. Nonetheless save for the titles of the actors involved, the section appears to be an exact rendition of the provisions of Section 68 of the Alcoholic Drinks Control Act, 2010. And in my view is an improved version to the extent that it provides that the envisaged regulations are to be *approved* by the County Executive Committee, whereas under the 2010 Act the role of the agency is merely *recommendatory*.

69. With regard to Section 66 of the Act, which is also not among sections challenged in the pleadings, and upon a juxtaposition with the provisions of the Section 15 of the Alcoholic Drinks Control 2010 Act, the former envisages a more participatory process, and a forum that is more readily available for the resolution of disputes arising from the licensing process, thereby improving access to justice. It is a matter of common knowledge that the High Court is inundated with numerous legal disputes and delays, to the detriment of an aggrieved party, of the hearing of licensing appeals cannot be ruled out. The fact of inclusion of different categories of members in the envisaged appeals committee alone is not proof that the committee represents the rule of the "mob" rather than the rule of law.

70. Similar appeal mechanisms are found in many national statutes including the Physical Planning Act and are consistent with the spirit of the Constitution, especially Article 47 and also the Fair Administrative Action Act. The Court is unable to appreciate any real or special fears the provision under consideration raises in respect of regulation of alcoholic drinks.

71. Moving now to the objections raised in respect of Section 69 of the Act, I consider it useful to reproduce the section:

> **"69(1) Notwithstanding any provision of this Act to the contrary, a person who immediately before the commencement of this Act held an alcoholic drinks license which would have otherwise been valid under the Kiambu Drinks Control Act, 2013; shall be required to immediately and not later than thirty days from the date of commencement of this Act to apply for a license under this Act.**
>
> **(2) An application under sub-section (1) shall act as a stay against any proceedings or enforcement actions that would have otherwise been undertaken under this law.**
>
> **(3) ....."**

72. The Petitioner views the provision as a violation of the right to property and to fair administrative action, because in his reading, the provision amounts to an automatic termination of valid alcoholic drinks licences. The Respondent has stated that the section is a transitional clause as indicated in the subtitle. The transition clause in the Alcoholic Drinks Control Act at Section 70 compares well with Section 69 of the impugned Act, save that the period granted for compliance in the latter Act is 30 days whereas the former section provided for a compliance period of 90 days. An argument could be made as to whether or not the period of 30 days is reasonable or not.

73. What cannot be disputed is the fact that the section does not provide for the automatic extinguishing of valid licenses so long as the affected party commences the process of transiting to the license regime under the new law, as provided in Part IV of the Kiambu County Alcoholic Drinks Control Act. The provision recognizes any valid licences issued under the 2013 Kiambu County Alcoholic Drinks Control Act, deeming them valid in the period anticipated under part IV. In its wisdom, the county legislature considered a 30-day grace period reasonable; and if it is found to be unworkable a simple amendment to extend time is an adequate cure. In so far as the section allows a grace period, for licencees holding valid licences under the 2013 Act, to carry on with their business while they commence the process of acquiring a licence under the new law, the same is generally reasonable. All the licencee under the old Act is required to do is to commence the application process under the new law.

74. Where the window has closed before the application was made, or where a person did not have a valid licence as at 9th March 2018 a liquor manufacturer or trader would run into legal difficulties if he continued his operations. He is caught up and cannot properly claim a violation of the right to property or other related right in respect of his already retired licence. All the licences exhibited by the Petitioner as issued under the 2013 legislation were set to expire in December of 2017. In the circumstances, I do not agree that Section 69 of the impugned Act is unreasonable, oppressive or unconstitutional.

75. Complaints that the licence application forms were only available online after the closure of the 30 -day grace period are neither here nor there. There is no evidence that hard copy or printed forms were not available in the said period. The copy of a newspaper advertisement annexed to the Petitioner's Supplementary affidavit is a general notice by the Respondent informing members of the public that application under the new law was ongoing and that the application forms were available online.

76. That the new legislation imposes licence conditions that may not have existed under the old law does not *ipso facto* render the new Act

unreasonable. It must be borne in mind that the primary purpose of licensing is the control of the subject matter, of course within reason. The new law was enacted to address a specific contextual mischief as earlier observed. Unless otherwise demonstrated, the county legislature was entitled to prescribe new conditions in keeping with the said mischief so long as the conditions do not represent an egregious violation of the law and the Constitution.

77. Thus, the mere fact that the new legislation requires the Applicant to submit building plans or to restructure their premises in keeping with the licence requirements does not render the requirement unreasonable. After all, there is likely to be members of the public or workers in premises used for the production of liquor. Similarly, liquor outlets are intended for the entertainment of members of the public who partake of alcoholic drinks. An assurance that the premises are fit for purpose and consistent with considerations of the health and safety of the general public patronizing such outlets is the legitimate duty of the licensing authority. In the result, this court returns a negative answer to the second issue stated for determination.

78. In closing, I must state that the court does not encourage a practice where a Petitioner, having pleaded its case in filed pleadings, continues to update it by introducing new grounds in further affidavits so that the tenor and shape of the cause appears to evolve or mutate at every opportunity that presents itself. Such a practice makes it difficult for the parties and the court to capture the true gravamen of a Petitioner, and in some cases would give an impression that the Petitioner was not entirely convinced or satisfied with the substance of his initial pleadings. This is not in any way a suggestion that a party cannot amend their pleadings; I am saying that a party who desires to recast its case as initially pleaded must seek to amend the same as provided under the law and not do so through patently covert means.

Whether the Impugned Act was Subjected to Effective public participation

79. As earlier observed, the Petition and affidavit in support of the Petition and the Supplementary affidavit of the Petitioner do not raise any issue related to public participation. This issue however appeared to take up the Petitioner's bulk of written submissions. How did this come about? At **paragraphs 31 – 32** of the Replying affidavit of **Dr. Martin N. Mbugua** sworn on behalf of the Respondent and filed on 7th June 2018, the deponent had deposed that the County Government in enacting the impugned bill observed the provisions of Article 10(2) of the Constitution and Section 87 of the County Governments Act which require public participation in the formulation of legislation. At paragraph 31 the deponent asserted that upon the publication of the bill the Respondent invited the members of public on 23rd February 2018 to give their views on the law. That advertisement in this regard were carried in a daily newspaper and vernacular radio stations. The copies of advertisement notices are annexed as **MM3** comprising an advert in the Standard Newspaper and what appears to be a notice in vernacular language by **Media Max** the latter which also mentions the two Bills contained in the Standard Newspaper advertisement.

80. Paragraph 32 of the above Replying affidavit states *inter alia* that:

> **"The call to the public to provide their comments was well received and the committee and hold a public hearing on the said 1st March 2018 and in addition did receive written memoranda in respect to the intended law. Annexed and marked MM4 is a copy of attendance sheets and memoranda."**

81. It was while responding to this Replying Affidavit, that the Petitioner in his Further **Affidavit** filed on 16th July 2018 first raised the issue of public participation by stating at paragraph 34 that "**the public participation held does not meet the threshold set in the Constitution, in legislation, ... for effective public participation. The exhibits MM3 and MM4 do not provide evidence of effective participation."**

82. Further particularizing the above grievance, the Petitioner proceeded to take issue with the timing and size of the newspaper advert, the fact that only eight days were allowed to file written memoranda and only one sitting reserved for oral presentations, alleged rushed passage of and assenting to the bill and the failure to reflect feedback.

83. The Petitioner further states at paragraph 35 of the affidavit that:

> **"I am aware that whereas, on 21st to 23rd November 2017 the Respondent conducted some public participation on Kiambu County Alcoholic Drinks Control Draft Bill, 2017, no report on the views collected was published, requests for feedback were ignored, and the Kiambu County Alcoholic Drinks Control Bill 2018, was published and fast tracked."**

84. In his submissions, he asserts that despite attempts by the Respondent to involve the public in the law-making process, there was no evidence that the Respondent "**facilitated adequate opportunities for effective public participation."** Moreover, that the public participation process in 2017 in respect of the draft bill was of no consequence as only a published bill is capable of being subjected to such participation under the County Governments Act. More so as the 2017 so-called draft bill differed from the 2018 Bill. This was stated in response to arguments by the Respondent that the process of enacting the 2018 law started in 2017 and that the entire process culminating in the 2018 Act is relevant. And further that public participation does not necessarily mean that the input of certain members of public is included in legislation.

85. There is no dispute that the process of enacting the 2018 bill was preceded by another process in respect of the 2017 bill. No copy of the said bill has been submitted for the perusal of this court, but some deduction may be derived from the memorandum to the 2017 bill annexed to the Petitioner's Further Affidavit. Two facts are not in dispute. First, the so-called bill related to the regulation or control of alcoholic drinks. Secondly, public participation on the said 2017 bill was carried out in various fora and memoranda received in November 2017. Evidently the said bill did not proceed to the final stages to become an Act of the County Assembly, but it appears that public hearings had been held between 21st and 29th November 2017.

86. Some of the entities who submitted memoranda include the **Kikuyu Bar Owners** and **Kabete Bar Owners.** As of January 2018, the chairmen of these entities were writing to the County Secretary of the Respondent demanding a feedback report on **"public participation on**

alcoholic drinks control draft bill 2017". This letter, which is part of annexure **O004** attached to the Further affidavit of the Petitioner filed on 16th July 2018 states *inter alia* that:

> **"We are writing to your office requesting you to facilitate us with a consolidated feedback report on the views collected during the public participation that you called on 14th November 2017 and conducted between 21st to 30th November 2017.**
>
> **Secondly, we are also requesting for a feedback report on our written proposal submitted to County Government through the director of alcoholic drinks office including written proposals from various stake holders."**

87. Also annexed are copies of memoranda submitted in respect of the 2017 and 2018 bills [see annexure **O004** to the Further Affidavit of the Petitioner].

88. Public participation is entrenched in the County Governments Act (Section 3 and 87 *inter alia*) in line with Articles 10, 174 and 196, *inter alia* espousing the said principle. Section 87 of the County Government Act provides for the principles of citizen participation in counties which include:

> **a) "timely access to information, data, documents and other information relevant or related to policy formulation;**
>
> **b) reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals ... granting of permits and the establishment of specific performance proposals...."**

89. Section 21(1) of the County Government Act provides that the county assembly exercises its legislative mandate through bills passed by the county assembly and assented to by the governor. Such bills can be introduced by any member of the county assembly or member of a committee of the assembly. Section 23 requires the publication of a bill in the County and Kenya gazette. None of the parties herein have presented adequate material to enable this court determine whether indeed the 2017 bill technically complied with the above legal requirements. Suffice to say that consultative proceedings were conducted within the Kiambu County in 2017 regarding the formulation of a law for the control of alcoholic drinks and was centered upon a so-called draft bill. This background in my view is relevant to the events of 2018 concerning the Alcoholic Drinks Control bill published on 21st February 2018.

90. The Petitioner's complaint in this regard is the effectiveness of the public participation facilitated in respect of the said latter bill. I do not agree that the evidence of advertisements of the process proferred by the Respondent was in the circumstances inadequate. The Standard Newspaper advert sets out details that are adequate, and there is no evidence to controvert the deposition that there were announcements on vernacular radio statements. In the adverts, eight days were given for the collection of written views and culminated with oral presentations on 2nd March 2018. Members of public were advised on how to obtain copies of the bill. The record of the day's proceedings shows that 25 people gave presentations. Liquor dealers and others filed written memoranda which clearly indicate that the parties had access to the bill, and other necessary information.

91. If the response to the 2018 bill appears limited, it could well be due to the fact of an earlier similar process. There is no evidence that any person was turned away at the public hearing held on 2nd March 2018 or failed to participate for lack of information. None of the 136 members of **the Kiambu Liquor Business Owners** referred to in paragraphs 17 and 18 of the Petitioner's certificate of urgency filed herein on 10/5/18 has sworn an affidavit to that effect. Their letter [annexure **000 – 3]** purportedly written to the Petitioner on 27th April 2018 instructing or asking the Petitioner to seek legal intervention regarding the 2018 Act speaks in part of the **"numerous interjections for the county to work with us to have an inclusive document that would look into all areas of concerns on matters liquor in Kiambu County "**and states that the Act was **'sneaked' into the county without due process."**

92. Equally, **Kikuyu Bar Owners Sacco** by the letter purported to be dated 13th April 2018 and annexed to the said Petitioner's affidavit seeks that the Petitioner "peruse" the (license) application forms in respect of the 2018 Act **"and see what should be done towards this issue".** They further seek the Petitioners **"directions as to whether (to) fill in these application forms since you have already filed a case in the High Court and whether this (completion of forms) will not be admitting the legality of the 2018 Kiambu County Alcoholic Drinks Control Act". Kikuyu Bar Owners** did present written memoranda concerning the impugned Act, in the stipulated period, which is signed by 47 members (see annexure **O004 t**o Further Affidavit). Like the **Kiambu Liquor Business Owners** they do not specifically complain that the period or facilitation of public participation regarding the 2018 bill was inadequate. One discerns the vague complaint that their particular views may not have been incorporated into the enacted legislation.

93. The Petitioner has cited a plethora of legal authorities guiding the weighting or assessment of the effectiveness of public participation, but having read and re-read his material, I am unable to find any serious demonstration of the alleged misdeeds on the part of the Respondent, or the alleged restrictions placed in the way of county residents from participating. In this case there were two closely related consultative processes over the same subject matter namely alcoholic drinks control legislation.

94. Once more, I associate myself with the statements made by **Lenaola J** in **Nairobi Metropolitan PSV Sacco** (Supra). He observed that:

> **"[45] The Petitioners have attacked the impugned legislation on grounds that it failed to comply with the process of public participation as required by the Constitution. Where legislation fails to comply with the Constitution, courts have powers to make necessary orders in that regard as was held in the Constitutional Court of South Africa in the case of *Doctor's for Life International v The Speaker National Assembly and Others (CCT 12/05) 2006 ZACC II* where it was stated as follows;**
>
> ***"It is trite that legislation must conform to the Constitution in terms of both content and the manner in which it is adopted. Failure to comply with the manner and form requirements in enacting legislation renders the legislation invalid. And courts have***

the powers to declare such legislation invalid".

95. The learned Judge further observed that**:**

The essence of the duty for the public to participate in legislative process is to my mind an aspect of the right to political participation in the affairs of the State. In this aspect, the Constitutional Court of South Africa in the case of *Doctors for Life International v The Speaker National Assembly (supra)* explained the importance of public participation as follows;

> ***"The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all, it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to Ngcobo J*** *also observed in the South African case of* ***Matatiele Municipality & Others -Vs- President of the Republic of South Africa & Others (2) CCT73 05A [2006] ZACC 12; 2007 (1) BCLR 47 (CC) that democracy envisages both direct participation by citizens and through representation by those elected as representatives".***

96. *Returning to the* ***Metropolitan*** *case* ***Lenaola J*** *concluded that:*

Applying the above principles and in the totality of the evidence before me, it is clear that the 1st and 2nd Respondents involved the public in the process leading to the enactment of the Nairobi City County Finance Act of 2013 ,they engaged those who would be affected by their decision and the latter were given details of the proposals and an opportunity of stating their objections if any. To my mind the process was highly public as there were public forums, meetings with stakeholders, media reports and even lobbying and an opportunity to make written representations through written memoranda.

Further, it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in *Minister of Health v New Clicks South Africa (PTY) Ltd (supra)* where he expressed himself as follows;

"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."

I am also in agreement with the sentiments expressed by Chaskalson, Chief Justice of South Africa, in the Constitutional Court of South Africa case *of Minister of Health v New Clicks South Africa (PTY) Ltd (supra)* where he stated that;

"[155] It cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. What is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law-maker and taken into account in formulating the regulations." (emphasis added)

97. Odunga J in **Robert N. Gakuru** case (supra) stated that:

"Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process…… Parliament and the provincial legislature must be given a significant discretion in determining how best to fulfill their duty to facilitate public participation. This discretion will apply in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislature programmes. Yet however great leeway given to the legislature, the courts can, and appropriate cases will, determine whether there has been the degree of involvement that is required by the constitution. What is required ……will no doubt vary from one case to case."

98. In **Mui Coal Basin Local Community & 17 Others v Permanent Secretary Ministry of Energy & 15 Others [2015] e KLR** relied on by the Petitioner, the court observed that public participation did not mean that everyone must give their views, which is impracticable. Rather that there ought to be evidence of "intentional inclusivity" in the participation program and which, on the face of it, took into account the principle that **"those most affected by a policy, legislation or action must have a bigger say: and their views more deliberately sought and put into account."** That notwithstanding, there is no attendant requirement that each individual's views will be included in the final policy or law: the public authority has no duty to accept any and every view, the opposite of which would effectively neutralize and stall the exercise of the authority's mandate.

99. In the final analysis, the rule of the thumb is that a reasonable opportunity is given to the public and all interested parties, with timely access to information that is relevant to a process of legislation to facilitate the appreciation of the issue for consideration, and an opportunity to make a response. (see also **Meru Bar, Wines Owners Self Help Group case**).

100. Reviewing all the foregoing, I am persuaded that the public participation carried out in respect of the impugned Act passes the test of effectiveness. Indeed, the fact that the Petitioner only belatedly latched on to the issue of public participation and attempted to make it a centre piece of his petition appears to suggest that the issue was raised as an afterthought to shore up the Petitioner's case. Given the primacy of the principle of public participation in legislative processes, it is unlikely that a party intent on challenging the process would overlook such an important aspect. In the result, the court resolves the third issue in the affirmative.

Other Issues

101. Two issues raised peripherally by the Petitioner require only a brief consideration. The first issue relates to alleged double taxation visited upon the citizenry of Kiambu County through the application of the Act's requirement for liquor traders to obtain a licence in addition to a previous requirement that they also hold a single business trade permit. The Respondent's Replying Affidavit distinguishes the purposes of the two requirements. It appears from all the material canvassed that the license required under the impugned Act is primarily a control instrument even though revenue is generated therefrom. In this case part of that revenue is to be plowed into the Alcoholic Drinks Fund to facilitate the objectives of the Act. On the other hand, the business permit authorizes general trading and is primarily a source of revenue for the county in which a trader has been permitted to trade. A trader selling tomatoes in a county market surely belongs in a different category from a trader in or manufacturer of alcoholic beverages.

102. There are other examples of similar imposition of dual licenses, for instance in respect to pharmacies licensed under the Pharmacies and Poisons Board that are also required to hold a business permit in the county in which they operate. There is no material to support the Petitioner's contention that the provisions of the impugned Act that require a fee be paid on a licence in addition to the business permit fees violate Article 201. After all county governments are empowered under Article 209(3) to impose and to collect revenue through taxes. Under Article 209(3)(b) &(c) and for the purposes of this case, a tax in respect of entertainment would fall neatly within the objects of paragraphs 4(c) of the Fourth Schedule. Regarding complaints that the new Act violates the principles of public finance espoused in the Constitution, I am not persuaded that a legislation whose sole object appears to be the operationalization of a provision in the Constitution can be said, without more, to violate fiscal principles.

103. The Petition before me is for all the reasons given, without merit and is dismissed. The parties will bear their own costs in light of the nature of the litigation.

DATED AND SIGNED AT KIAMBU THIS 2ND DAY OF NOVEMBER 2018

C. MEOLI

JUDGE

In the presence of:

Petitioner – Absent

Mr. Ranja for the Respondent

Court clerk - Kevin