



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILILANI LAW COURTS

CONSTITUTIONAL PETITION NO . 302 OF 2015

IN THE MATTER OF ENFORCEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 20, 21, 22, 23, 159, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF PROTECTION OF THE RIGHT TO FAIR HEARING GUARANTEED UNDER ARTICLE 50 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF PROTECTION OF THE RIGHT TO FAIR HEARING GUARANTEED UNDER ARTICLE 50 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF VIOLATION OF THE RIGHT TO A FAIR ADMINISTRATIVE ACTION ENSHRINED UNDER ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE PRESIDENTIAL DECREE TO DEAL WITH “SECOND GENERATION LIQUOR” ISSUED ON TUESDAY, 30TH JULY, 2015

IN THE MATTER OF INDISCRIMINATE, WANTON, ARBITRARY AND ILLEGAL DESTRUCTION OF LEGITIMATE BUSINESSES UNDER THE DISGUISE OF EFFECTING AND/OR ENFORCING AND/OR IMPLEMENTING THE PRESIDENTIAL DECREE DEALING WITH SECOND GENERATION LIQUOR

IN THE MATTER OF BREACH OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE, EMBODIED UNDER ARTICLE 10 OF THE CONSTITUTION OF KENYA, 2010 BY STATE OFFICER AND OFFICER OF THE COUNTY GOVERNMENT OF LAIKIPIA COUNTY

IN THE MATTER OF PROTECTION OF CONSTITUTIONAL RIGHTS GUARANTEED UNDER ARTICLES 10, 27, 40, 47, 50 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURUDICITION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

JAWABU AGRO SUPPLIES LIMITED..... PETITIONER

AND

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE OCS NANYUKI.....2ND RESPONDENT

THE COUNTY GOVERNMENT OF LAIKIPIA NANYUKI.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGEMENT

Parties

1. The Petitioner herein, **Jawabu Agro Supplies Limited**, is a Limited Liability Company incorporated under the **Companies Act** Cap. 486 of the Laws of Kenya, carrying on business in various parts of the Republic of Kenya.
2. The 1st Respondent herein, **The Inspector General of Police**, is described in the petition as the head of police service in Kenya while the 2nd Respondent is the Officer Commanding Station Nanyuki Police Station, responsible for supervising and overseeing the impugned acts.
3. The 3rd Respondent is the **County Government of Laikipia** (hereinafter referred to as “the County Government”) established under chapter eleven of the Constitution of Kenya, 2010, and responsible for regulating and licensing businesses in Laikipia County.
4. The 4th Respondent, **the Attorney General**, is the chief legal advisor to the Government of Kenya, the custodian of public interests, which is a constitutional office established under Article 156 of the Constitution of Kenya, 2010 and is sued on behalf of the Principle Secretary Ministry of Interior and Coordination.

The Petition

5. According to the petitioner, it carries on the business of procurement and sale of livestock feeds including but not limited to hay (sold in Haystacks, molasses, salt and commercial animal feeds). It was contended that on June 2015 the President of the Republic of Kenya issued a verbal public statement decrying the sale of illicit brew which he derisively referred to as “Second Generation alcohol” and the operation against illicit liquor and second-generation alcohol began on Thursday, 2nd July, 2015 after President Uhuru Kenyatta met legislators from Central Kenya at State House in Nairobi. Subsequently, there followed a spate of attacks on brewers accompanied by pouring and destruction of the so called “Second Generation alcohol” together with the packaging thereof which were witnessed in areas mostly known or popular for brewing of killer illicit liquor and like all other “mob-justice type” actions was accompanied with destruction of property, including; licit liquor, buildings and even vehicles.
6. According to the petitioner, this action led the President to warn citizens against destroying people’s properties on 5th July 2015. The petitioner averred that on 6th July, 2015 its officers got information that the county government and officers of the County administration were planning to wreak havoc on the Petitioner’s shop.
7. The Petitioner deals in the business of procuring, supplying and selling livestock feeds and foodstuffs including but not limited to Hay (in Haystacks), molasses, commercial feeds, rice germ, wheat bran among others depending on the availability of the subject livestock feeds and or commodity in the locality of the particular outlet of the Petitioner.
8. On receiving this information the officers of the Petitioner proceeded to the offices of the Officer Commanding Station (OCS) Nanyuki where he actually confirmed that the plans were underway to

actually invade the Petitioner's shop with the assistance of the police and after lengthy negotiations the OCS even called the county government officers telling them to confirm that the Petitioner's business was not licensed and the county government officials stated even if it was licensed, they had the capacity to revoke the said Business Permits and licenses.

9. The petitioner contended that there was no reason to invade its shop. Accordingly, the petitioner being convinced that the intended actions of the police would be illegal and went on to explain to them why the applicant's molasses was not even marketable to the brewers based on its nature and the grade and the economic viability of selling the micro quantities used by the brewers, and they seemed convinced and they showed all indication that they had abandoned their plans to invade the petitioner's establishment. However on 7th July, 2015, the police led by the OCS Nanyuki, who was personally present, the area chiefs and other officers of the County administration and the county officials went to the premises of the Petitioner at Raaga House, along the Nyeri Nanyuki Road in Nanyuki, and began to gain forced access to the building. The OCS called to tell **Joshua Wambugu**, a principal officer of the Petitioner that they wanted to break into the shop and the said **Mr. Wambugu** sent the landlady to the scene to suspend the breakage as **Mr. Wambugu** was not in Nanyuki at the time and the police could not wait and they were violently harassing and intimidating the proprietors of businesses neighbouring the Petitioner despite intervention by the local Member of Parliament, **Hon. Anthony Mutai**, on the basis that the Petitioner's business was legitimate. The Petitioner in fact averred that its business was fully compliant and duly licensed.

10. It was averred that on 8th July, 2015, the OCS led another group, comprising of individuals from the National Youth Service and since the Petitioner had locked the premises with a padlock, they carted away all the molasses in absence of any officer or employee of the Petitioner. The Petitioner was warned that any truck, vehicle or tanker bringing molasses to the shop would be burnt and its business permits were unhung and carried away.

11. The Petitioner contended that since it has no license to continue in its trade, it therefore cannot ferry more stock and fears the threat of destruction of its vehicles and trade/business stock on transit. The petitioner disclosed that the area Chief and the local administration complained that the Petitioner and/or its agents do not give handouts.

12. According to the Petitioner, the Respondents have variously and contumeliously breached the Constitution and violated the Petitioner's Rights and Fundamental Freedoms. To the Petitioner, its right to a fair administrative action enshrined under Article 47 of the Constitution of Kenya, 2010 was violated in that:

(i) The Respondents did not give it a hearing before proceeding on a wanton and arbitrary destruction of the Petitioner's property.

(ii) The Respondents abdicated their duty and failed to make appropriate and fair decision when called upon but resolved to violate the law by making decisions based on law.

(iii) The Respondents considered irrelevant matters in arriving at their decisions and conveniently ignore relevant factors in arriving at their decision to destroy the applicant's property.

(iv) The Respondents were public officers who failed to exercise their powers fairly and impartially and proceeded to make illegal, baseless, unreasonable and irrational decisions generally repugnant to sustainable development and contrary to the Constitution.

(v) The Petitioner was never given a hearing before the business licenses and the permits were "purportedly cancelled and or revoked" irregularly and by individuals who manifestly lacked the authority to do so.

(vi) The Respondents were motivated by malice, ulterior motives and personal interests in arriving at their decision(s).

(vii) The respondents used the presidential decree as a disguise to settle personal score and vendetta against the Petitioner, very well knowing that that was all they wanted to achieve.

(viii) The Respondents arrived at an irrational and unreasonable decision.

(ix) The Respondents acted *ultra vires* in directing and supervising the illegal wanton and arbitrary destruction of the Petitioner's property.

(x) The Respondents administer and enforce law and order which field of law they are well trained in and they have no reason or mandate to break the law.

13. It was pleaded that the Constitution of Kenya guarantees the right to a fair trial as one of the absolute constitutional rights that cannot be limited or abridged in any way or form for whichever reason, even under Articles 25 and 24 of the Constitution of Kenya, 2010. Further, the right to a fair hearing also entails the right to a fair and just decision, decision based on the facts and evidence available in the particular subject case, and a decision by an independent and impartial tribunal.

14. It was the Petitioner's case that as a result of the carting away of its licences, it was no longer able to carry on a legal business. Further, the trucks that were enroute to deliver business stock for the Petitioner were halted thus rendering the Petitioner's business uncertain.

15. It was the Petitioner's case that the aforesaid actions amounted to a violation of its right to property guaranteed under article 40 of the Constitution of Kenya 2010.

16. As a result of the foregoing the Petitioner contended that it had suffered loss and damage in the sum of Kshs 567,050.00 in form of loss of business and destruction and loss of property due to the arbitrary and wanton actions of the Respondents which it particularised as hereunder:

- a. 350 jerricans of 30 kilogrammes at Kshs. 150 each.....52,500
- b. 270 jerricans of 15 kilogrammes at Kshs. 60 each.....16,200
- c. 100 jerricans of 9 kilogrammes at Kshs. 40 each.....4,000
- d. 42 Drums of 350 kilogrammes at Kshs.2000 each.....84,000
- e. 11 Haystacks at Kshs. 250 each.....Kshs. 2,750
- f. 12 Tonnes of molasses KShs.18 @ Kg.....Kshs 216,000
- g. 8 Tonnes unpackaged molasses, 35 drums at Kshs. 18 @ Kg...Kshs.144,000
- h. Two (2) Weighing equipments and the metal handles..Kshs..... 10,000
- i. Seven (4) Metal Shelves at Kshs. 9,000 each.....Kshs. 36,000
- j. 2 padlocks.....Kshs. 1,600

17. It was pleaded that the Petitioner does not support the sale of illicit liquor and does not supply any individual who manufactures the said liquor, a fact clearly and well-known to the Respondents.

18. It was submitted on behalf of the Petitioner that it was nether afforded any opportunity to be heard to show cause why its business stock should not be carted away in furtherance of the president's directive.

19. The Petitioner therefore sought the following orders:

- a. A declaration that the invasion of the Petitioner's business and the wanton and arbitrary destruction of the Petitioner's property was a violation of the Petitioner's Constitutional rights to property, right to fair administrative action and the right to a fair hearing.
- b. A declaration that the directive of the principle Secretary of banning molasses is imbalanced, without public participation, unreasonable and unjustifiable in an open and democratic society and therefore constitutional.
- c. An order directing the Respondents to return/restore to the Petitioner the business permits and licenses for the year 2015.
- d. The Respondents be ordered to return to the petitioner eleven (11) haystacks, three Hundred and Fifty (350) jerricans of 30Kg; 270 jerricans of 15 Kgs; 100 jerricans of 15 Kgs; 42 Drums of 350 Kgs; 11 Haystacks; 12 Tonnes of molasses, packaged and branded, 8 Tonnes of molasses; unpackaged and store in reserve drums; 2 Heavy duty Weighing equipment the metal handles and advertisement materials, all properties of the petitioner.
- e. An order stopping the Respondents from harassing the Petitioner or the Petitioner's agents, breaking into Petitioner's business premises, carting away business stock, detaining and/or confiscating, torching motor vessels ferrying the Petitioner's business stock including and not limited to motor vehicles lorry trucks of Registration Numbers KBS 025 U, KBM 462 C, KBK 459 B, KBQ 378 C, TRAILER, ZD 6786, KAU 928 G LORRY TRUCK and any other vehicle or vessel that may be carrying the petitioner's cargo.
- f. An order directing the 1st and 2nd Respondents and all the officers under his command to accord to cease harassing the petitioner and to provide security to the Petitioner's business premises on plot numbers Nzoia LR 3383 nandolia; kitale LR no. 2116; Nakuru store on No 14228; Nanyuki store block 9/67; Karatina No. 1436 and any other of the petitioner's business premises stock of trade and vessels ferrying the Petitioner's stock throughout the republic.
- g. General damages and exemplary damages for violation of the Petitioner's Constitutional rights.
- h. Compensation for loss and destruction of property in the sum of Kshs. 567,050
- i. The costs of this Petition.

3rd Respondent's Case

20. The Petition was opposed by the 3rd Respondent.

21. According to the 3rd Respondent, the County Government, it conducts all its activities in strict adherence to the statutory law, the Constitution and the rule of law. The County Government averred that it has no knowledge of any invasion of the petitioner's business and that the allegations made by the Petitioner against the County Government are false, baseless and unfounded.

22. The County Government averred that all its decisions are reduced into writing and challenged the allegations of invasion made by the petitioner. To the County Government, it is not aware of any business carried out by the Petitioner within the County as the Petitioner had not disclosed the location thereof nor exhibited permits and licences at all. To the contrary the exhibits annexed by the petitioner do not support the contention that the petitioner carries out business within Laikipia County. The County Government therefore contended that the Petitioner's claims were untrue and baseless.

23. The County Government contended that it does not control the area chief, the OCS and/or the Inspector General of Police.

Determinations

24. I have considered the issues raised in this petition.

25. The issue of the Presidential directive was the subject of Petition 295 of 2015. Following the hearing of the said petition this Court on 15th January, 2016 made the following orders:

1. In so far as the Presidential directive was made pursuant to Article 132(3)(b) of the Constitution the same were unconstitutional as it did not comply with the provisions of Article 135 of the Constitution. Accordingly the same, pursuant to Article 2(4) of the Constitution, is void and has no legal effect.

2. The decision made by Kenya Bureau of Standards cancelling all the petitioners' permits and licences transmitted vide the letter dated 3rd July, 2015 is illegal and unconstitutional and is hereby quashed.

3. The *Alcoholic Drinks Control (Supplementary) Regulations, 2015* are unlawfully are hence null and void and are consequently quashed.

4. For avoidance of doubt any actions taken pursuant to the said actions are similarly unlawful and have no legal effect.

5. The issue of costs will be dealt with in the respective individual files.

26. The Court having disposed of the legality or otherwise of the said directive, the only issue before this Court is whether the petitioner herein suffered loss and damage as a result thereof. In **Idi Ayub Omari Shabani & Another vs. City Council of Nairobi & Another Civil Appeal No. 52 of 1984 [1985] 1 KAR 681** the Court of Appeal held:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove the damage and it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, this is what I have lost, I ask you to give me these damages. They have to prove it”.

27. In this case there is no evidence at all that the Petitioner was carrying out business within the Laikipia County where the cause of action herein is alleged to have arisen. The petitioner has not even disclosed whether it was operating from its own premises or whether the same were rented and if rented there is no lease agreement exhibited in respect thereof. Instead the Petitioner has exhibited documents relating to other jurisdictions other than the area relevant to these proceedings. Similarly there is no evidence that the petitioner was licenced to carry out business in the said premises. Whereas the petitioner alleges that its permits and licences were removed therefrom, one would have expected the petitioner to exhibit copies thereof.

28. In other words there is no basis upon which this Court can find that the petitioner was carrying out business in Laikipia County leave alone the actual loss and damage suffered. The law is that he who alleges must prove and in cases of this nature the petitioner must prove its case on a balance of probabilities. If the petitioner fails to do so, its case must fail since mere averments do not amount to proof unless the same are admitted.

29. In the premises this petition fails and is dismissed but with no order as to costs.

30. It is so ordered.

Dated at Nairobi this 8th day of March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mwangi K N for the Petitioner

Cc Mwangi