



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

PETITION NO. 6 OF 2016

(Formerly High Court Nakuru Petition No. 35 of 2015)

**IN THE MATTER OF CONTRAVENTION OF THE RIGHTS AND ARTICLES 27, 28, 29, 35, 47,
55 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF NAKURU COUNTY ALCOHOLIC CONTROL ACT 2015

AND

**IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL (SUPPLEMENTARY)
(LICENSING REGULATIONS 2015)**

BETWEEN

REUBEN MWANGI

t/a CLASSIC WINES & SPIRITS.....1ST PETITIONER/APPLICANT

SAMUEL RATANYA

t/a VETARAS WINES & SPIRITS.....2ND PETITIONER/APPLICANT

SIMON MWANGI

t/a TESIS WINES & SPIRITS.....3RD PETITIONER/APPLICANT

MOSES MBUGUA

t/a PRECIOUS WINES & SPIRITS.....4TH PETITIONER/APPLICANT

JAMES OKUNDA BUKACHI

t/a JAMAGA WINES & SPIRITS.....5TH PETITIONER/APPLICANT

-VERSUS-

NAKURU COUNTY COMMISSIONER.....1ST RESPONDENT

OCS GILGIL.....2ND RESPONDENT
HON. ATTORNEY GENERAL.....3RD RESPONDENT
INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

CONSOLIDATED WITH

PETITION NO. 7 OF 2016

(Formerly High Court Nakuru Petition No. 39 of 2015)

MERIDA EXPRESS LIMITED.....1ST PETITIONER/APPLICANT

CORNER WINES & SPIRITS.....2ND PETITIONER/APPLICANT

PETER KARIUKI MAINA

t/a WINESPOT.....3RD PETITIONER/APPLICANT

BEATRICE CHEBET KALYA

t/a BEACON WINES & SPIRITS.....4TH PETITIONER/APPLICANT

SAFARI AGENCIES.....5TH PETITIONER/APPLICANT

CARNIVORE WINES.....6TH PETITIONER/APPLICANT

ISAAC MACHARIA NGARANGE

t/a POLE POLE TRADING COMPANY.....7TH PETITIONER/APPLICANT

-VERSUS-

NAKURU COUNTY COMMISSIONER.....1ST RESPONDENT

OCS NAIVASHA.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

J U D G M E N T

The Petitions

1. The Petitions herein were heard simultaneously with the agreement of counsel for the respective parties. Both are identical in terms of the issues raised and orders sought by the Petitioners. The firm of Mirugi Kariuki & Co. Advocates acted for the Petitioners in both matters.

2. In Petition No. 6 of 2015, there are five Petitioners **Reuben Mwangi t/a Classic Wines & Spirits**,

Samuel Ratanya t/a Vetaras Wines & Spirits, Simon Mwangi t/a Tesis Wines & Spirits, Moses Mbugua t/a Precious Wines & Spirits and James Okunda Bukachi t/a Jamaga Wines & Spirits (1st to 5th Petitioners respectively). The Respondents in Petition No. 6 of 2015 are Nakuru County Commissioner, OCS Gilgil, Inspector General of Police and the Hon. Attorney General (1st and 4th Respondents respectively).

3. There are seven Petitioners in Petition No. 7 of 2015, namely **Merida Express Limited, Corner Wines & Spirits, Peter Kariuki Maina t/a Winespot Beatrice Chebet Kalya t/a Beacon Wines & Spirits, Safari Agencies, Carnivore Wines, Isaac Macharia Ngarange t/a Pole Pole Trading Company (1st to 7th Petitioners respectively). The Respondents in Petition No. 7 of 2015 are Nakuru County Commissioner, OCS Naivasha, Inspector General of Police and the Hon. Attorney General (1st and 4th Respondents respectively).**

4. As the two Petitions are identical in all material respects, it would be redundant to restate the averments in each. The Petitioners describe themselves as proprietors of registered firms duly licensed to carry on the business of distribution of alcoholic drinks made by major breweries, as agents. They claim that following the **“presidential directive on second generation alcoholic drinks”**, relevant public authorities inspected their premises and impounded second generation alcoholic drinks therefrom.

5. That pursuant to inspection carried out by public health officers, their premises were found suitable. They complain that despite the foregoing the Petitioners have been prohibited by the Respondents, on pain of arrest, from proceeding with their operations. And that by denying them access to their premises, the Respondents have jeopardized the Petitioners’ sources of livelihood. That they were discriminated against as other similar businesses were allowed to continue operating.

6. In this regard, the Petitioners allege that the Respondent’s actions amount to a violation of their rights under the following Articles of the Constitution. Article 27 (right to equality and freedom from discrimination); Article 28 (right to human dignity); Article 29 (right to freedom and security of the person); Article 35 (access to information); Article 46 (consumer protection rights); and Article 47 (right to fair administrative action).

7. Thus the Petitioners assert that the Respondents are in breach of Constitution. They pray for:

“a) An order that the prohibition and threat of arrest on the premise of lack of liquor licence is unconstitutional hence null and void.

b) A declaration that the continued prohibition and harassment of the Petitioners and or failure to provide security in their businesses violated the Petitioners constitutional rights including the right to security of the person under Article 29, equality and or freedom from discrimination under Article 27, right of freedom of movement under Article 39, right to human dignity under Article 28 and the right to access employment as provided under Article 55 of the Constitution of Kenya,. 2010.

c) An order of prohibition against the Respondents or persons and or authorities claiming under them from interfering with Petitioners business, or closing, confiscating, damaging the wines & spirits in the Petitioners premises known as CLASSIC WINES & SPIRITS, VETARAS WINES & SPIRITS, TESIS WINES & SPIRITS AND PRECIOUS WINES & SPIRITS.

e) Costs of this Petition.”

8. Conservatory orders issued before the High Court sitting at Nakuru were by consent of the parties extended before me on 18th May, 2016 until the determination of the Petitions. All the Respondents in both Petitions were represented by the Hon. Attorney General. I do not find on record any affidavit or grounds of opposition in respect of the Petition by the Hon. Attorney General in Petition No. 7 of 2015.

9. However grounds of opposition were filed by the Hon. Attorney General in Petition No. 6 of 2015 in respect of the Petitioners' application for conservatory orders filed on 24/7/2015. Because some of the grounds stated therein touch on the Petition and are also argued, in the final submissions in both Petitions, it is perhaps useful, to capture the same here.

10. The gist of the said grounds is that the Petition lacks merit and is incompetent; that public interest overrides the Petitioners' individual interest; that any intervention by this court in the matter herein will amount to its usurpation of the discretion of responsible institutions such as the Kenya Bureau of Standards (KEBS), the Kenya Revenue Authority (KRA), the Ministry of Health (MOH) *inter alia*. And further that the Petitioners are placing reliance on expired health licences and irrelevant County Government licences, that the Petitioners have based their action on distortion of facts, misrepresentation and irrelevant matters, and have come to court with unclean hands.

The Petitioners' Case

11. By consent of the parties the two Petitions were argued through written submissions. Once more, parties filed identical submissions in either Petition.

12. The Petitioners' key premise is that their businesses were duly registered and licenced by the County Government of Nakuru and other bodies, to deal in alcoholic drinks. They complain that the order prohibiting them from their business premises as given by the Respondents adversely affects their economic activities. Three issues were framed for submission by the Petitioners as follows:-

- a) Whether the prohibition and threat of arrest is unconstitutional hence null and void.
- b) Whether there was a breach of the Petitioners rights
- c) Whether there was a breach of the rule of law.

13. As framed, the Petitioners' submissions are however difficult to follow, and in some respects do not appear to tie in with identified issues. On the first such issue, the Petitioners submit not concerning the alleged prohibition and threat of arrest but primarily about the 'presidential directive' itself not a central matter in the Petitions. Authorities cited therein appear not to specifically address the issue framed. In addition, the alleged threat of livelihoods resulting from "the directive" is reiterated. Also thrown in is the issue of the denial to the Petitioners by the Respondents or concerned authority of the right to a hearing. The above submissions are repeated once more under the second issue framed.

14. The case of **Doctors for Life International -Versus- Speaker of the National Assembly and others (CCT 12 of 2005) (2006) ZACC 11** as was cited in the **Nairobi Metropolitan PSV Sacco's Union Limited & 25 Others -Vs- County of Nairobi Government & 3 Others [2013] eKLR** is relied upon. Lamenting the alleged "**road side directive**"..... **implemented by security agents**", the Petitioners assert that they were not accorded a hearing before the decision was made. Thus it is argued that the Respondent's actions were unconstitutional.

15. Regarding Article 27 (1) of the Constitution, the Petitioners argue that the lawless enforcement, by the Respondents, of the unilateral directive denied the Petitioners the equal protection and equal benefit of the law. This, despite the Petitions themselves basing the complaint in respect of Article 27 on discrimination. Further cited in submissions is Article 29 (c) on the freedom and security of the person. Included in submissions is Article 31 (a) and (b) on the right to privacy and Article 50 is on the right to fair trial, both which were not pleaded in the Petition.

16. The submissions then revert to the question of procedural fairness and citing some authorities on the point. The basis of the submissions on this score however is a new complaint in respect of alleged failure by authorities to renew the Petitioners' licences. A further submission, based on the decision in **Kwanza Estates Ltd -Vs- Dubai Bank Kenya Ltd [2013] eKLR** is that the Petitioners have been deprived of their right to enjoy their property and to carry out business. Here Article 43, guaranteeing economic

rights is cited for the first time.

17. On the third identified issue, the Petitioners emphasise the illegality of the impugned “presidential directive”, borrowing heavily from the decision of **Odunga J.** in the **Keroche Breweries Limited & 6 Others -Vs- Attorney General & 10 Others [2016] eKLR**. The final submission on the matter is that public interest cannot override the rule of law and that the “presidential directive” that led to the Respondents’ actions was unconstitutional having failed to comply with Article 135 of the Constitution. Hence the Respondents’ actions pursuant to the impugned directive are unlawful.

The Respondent’s Case

18. For their part, the Respondents in part launch into factual matters as the basis of their submissions. These matters ought to have been raised by way of a Replying affidavit. The Respondents highlight the inadequacy of the copies of licences attached to the Petitions citing lack of relevance to the Petitioners’ particular business activities and also, invalidity due to expiry. The Respondents asserts that the Petitioners were carrying on the alcoholic drinks businesses illegally and that consumer protection is the mandate of the state under Article 46 of the Constitution and therefore a matter of public interest.

19. Two authorities, namely **Kenya Guards Allied Workers Union -Vs- Security Guards Services & 38 Others Miscellaneous Application 1159 of 2003** and **John Kinyua Munyaka & 11 Others -Vs- County Government of Kiambu & 3 Others [2014] eKLR** were cited in support of this submission. Further the Respondents contend that there are established statutory bodies with mandate to inspect premises, to licence and regulate the alcohol industry. Thus the court cannot usurp their mandate and discretion by intervening in this matter. That the responsible bodies such as the National Police Service, Kenya Bureau of Standards (KEBS), National Agency for the Campaign against Drug Abuse (NACADA) have a statutory duty to rid the county of illicit liquor and to protect Kenyans. The Respondents submitted that unlicensed businesses dealing in alcoholic drinks cannot be allowed to operate. That the closure of the Petitioners’ businesses is an outcome of the exercise said mandate by the Respondents.

20. On the question whether the Petitioners have been discriminated against, the Respondents submit that no evidence has been tendered to prove that other similar businesses that are allegedly operating are unlicensed. That the closure of the businesses of the Petitioners was regular and lawful.

21. Relying on the decisions in **Anarita Karimi Njeru –Vs- Republic (No. 1) [1979] 1 KLR 154** and **Rashid Aloggoh & 245 Others -Vs- Haco Industries Ltd [2007] eKLR** the Respondents argue that the Petitioners have not set out with reasonable precision the provisions of the constitution which have been violated and the manner they have been infringed in respect of the Petitioners. The Respondents position is that the Petitioners have based their Petition on distorted facts, misrepresentation, baseless and irrelevant matters and have come to court with unclean hands.

Analysis and Determination

22. The court has considered all the material canvassed by way of pleadings and submissions. Although the Petitioners have in the respective petitions failed to give dates or the facts of the precise context from which the Petitions arose, the following facts can be gathered from their submissions and those by the Respondents:-

- a) That the Petitioners have been operating businesses engaged in the sale of alcoholic drinks in the county of Nakuru.
- b) That prior to the Petitions being filed H.E. the President of Kenya issued a directive effectively ordering a crackdown on the production and sale of illicit liquor in the country. This directive which has gained notoriety and is the subject of much litigation was issued on 1st July 2015.
- c) That pursuant to the directive, various agencies involved in liquor regulation, licensing and law enforcement commenced a country wide crackdown, Nakuru County included.

d) That the Petitioners' premises were some of the businesses affected by the crackdown and were ordered to shut down after the impounding of the so-called 'second generation liquor'.

23. I believe the key question that this court is being called upon to determine is whether the undisputed actions of the Respondents i.e. ordering the closing down of the businesses of the Petitioners, on pain of arrest, violated the Petitioners constitutional rights. The rights enumerated in the Petitions as violated are the right to equality and freedom from discrimination (article 27 (1)); the right to human dignity (Article 28); the right to freedom and security of the person (Article 29); the right of access to information (Article 35); consumer rights (Article 46); the right to fair administrative action (Article 47); and affirmative action in favour of youth (Article 55).

24. Although not expressly mentioned in the Petitions the right to property under Article 40 is alluded to through the complaint that the Petitioners have lost livelihoods and investments following the closure of businesses. This is also reiterated in the submissions.

25. The case of **Anarita Karimi Njeru** (*supra*) is settled authority for the proposition that where a person is alleging a contravention or threat of contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat as it relates to himself. However in subsequent decisions it is evident, that the case of **Anarita Karimi Njeru** while it laid an important foundation must be read in the context of the Constitution of Kenya 2010.

26. The Constitution of Kenya 2010, grants the individual or group of persons a much wider latitude in terms of *locus standi*. In **Trusted Society Of Human Rights Alliance Vs. Attorney General & 2 Others** [2012] eKLR the court observed regarding the decision in **Anarita Karimi Njeru**:

"We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged."

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case." (Emphasis added)

27. The Constitution of Kenya, 2010 imposes upon every person and state organ in Kenya the obligation to be bound by, to respect, uphold, protect and defend the Constitution (Articles 2 & 3). Further, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, (Articles 22(1)) and where the Constitution has been contravened or is threatened with contravention (Article 258 (1) (2)).

28. Further the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them makes or implements public policy decisions. Article 10 sets out these national values and principles of governance which include patriotism, national unity sharing and devolution of power, the rule of law, democracy and participation of the people, good governance integrity transparency and accountability.

29. Under the Constitution, the Court has to inquire and determine questions of contravention of the Constitution on their merit. Where it is possible to identify the question in issue from the pleadings and materials presented, then the court is bound to determine such matter even when the particulars of breach

had not been clearly or specifically pleaded.

30. The Court of Appeal stressed this view in **Mumo Vs. Trusted Society Of Human Rights Alliance & 5 Others** (*supra*), said -

“Our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard of locus standi that places hurdles on access to the courts, except only when such litigations is hypothetical abstract or is an abuse of the judicial process.

However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be seized at the instance of such person and must reject the application at the threshold.”

31. By their Petitions, affidavits and submissions, the Petitioners herein assert that their alcoholic drinks businesses were being operated legally and under necessary licences, copies of which have been annexed to affidavits. Indeed, in their submissions, in support of the Petition, under the heading “**Brief Facts**”, the following statement is made:

“The Applicants are licenced and or registered to carry out businesses dealing in alcoholic drinks within the county and have been accorded the requisite approvals by the relevant officers.”

32. As regards the present Petitioners’ stated businesses, the most relevant licence is the Alcoholic Drinks Licence ordinarily issued by the NACADA or the specific county where equivalent County legislation has been passed. As pointed out in the Respondents’ submissions, none of the Petitioners held a valid alcoholic drinks licence authorizing their engagement in the sale of alcoholic drinks as at 1st July 2015. In Petition No. 7 of 2015 licences previously held by the 1st and 2nd Petitioners had expired on 31st March 2015; and in respect of 3rd and 7th Petitioners their licences expired on 10th August 2014. The licence in respect of the 4th Petitioner expired on 30th June 2015 while that issued to the 5th Respondent expired on 31st December 2015.

33. No copy of an alcoholic drinks licence was exhibited in respect of the 6th Petitioner. A copy of a licence attached instead was issued to one Douglas Nganga Kariuki t/a **Upcountry Wines and Spirits** expired on 30/6/2015. At any rate it has no relevance to this case as the licensee was not a party to any of the Petitions in question.

34. In Petition No. 6 of 2015, the position is much the same. Annexed copies of alcoholic drinks licences issued to the 1st and 3rd Petitioners expired on 6th November 2013. Single Business permits and Food and Hygiene permits issued by the County Government, copies of which were relied on by some of the Petitioners are irrelevant for the purposes of this case.

35. Hence the Petitioners have no answer to the Respondents’ assertion that their alcohol businesses were being operated illegally at the material time, that is, without the requisite alcoholic drinks licenses from relevant authorities. Perhaps, this explains the evident reluctance by the Petitioners to place their complaints within a timeline, despite constant references to the Presidential directive of 1st July 2015. It matters not that the Petitioners premises had been inspected or that their businesses were registered or that they were authorized agents of key alcoholic manufacturers.

36. Under the Alcoholic Drinks Control Act or equivalent County legislation, the Petitioners were required to obtain specific licences authorizing them to sell alcoholic drinks. The Petitioners all but admit their default in this respect at paragraph 21 of their submissions where they assert that:-

“To decide not to renew licences as held by the Petitioners amounts to collective punishment and in our view collective or criminal punishment has no place in current constitutional dispensation. The Petitioners licences were not renewed and were not accorded any reason as to why they establishments would not be licenced further in breach of their rights to fair administrative action.” (sic)

37. The underlined statement above demonstrates what the Petitioners have done severally; their cause of action has continued to evolve, sometimes contradicting the pleaded facts. In this instance reference to fair administrative action is made with regard to *non-renewal of liquor licences*, yet at paragraph 6 of the Petition and paragraph 10 of the Supporting affidavits the Petitioners make the firm assertion that they were lawfully operating under the necessary liquor licences in the material period. Indeed their complaint as regards the breach of Article 47 therein relates to alleged prohibition, notwithstanding the existence of such licences, from carrying their businesses.

38. In my considered view, the legality of the Petitioners’ business operation was the foundation of the Petitions, and it appears shaky. Equally tenuous is the Petitioners’ attempt to impugn the presidential directive and to gain mileage out of court pronouncements thereon in decided cases. Nowhere in the body of the Petitions herein is such a directive mentioned. However at paragraph 20 of the Supporting affidavit a deposition is made to the effect that:

“THAT I have been advised by my advocatesthat a blanket condemnation and enforcement of the presidential directive yet the products are inspected and certified.....before they are licensed for distribution is a violation of fair administrative action as envisaged under the Constitution.”

And further:-

“21. THAT no notice was issued on the revocation of the licenses by the Government and the same is in breach of fair administrative action as the holder of such licences were not consulted and or given a fair hearing in breach of rules of natural justice” (sic)

39. The issue of the presidential directive proceeds to take centre stage in the submissions under the Petitioners’ issue No. 1 with the Petitioners submitting *inter alia* that:

“The issuance of directive orders was an outright override of the judicial powers overlooking the separation of powers; a show of Executive usurping the powers of Judiciary.” (sic)

The theme continues under issue No. 2 and 3 where whole passages are taken out of the decision of **Odunga J in Keroche Breweries Ltd** to impugn the presidential directive and its implementation.

40. As pointed out earlier while restating the Petitioners’ submissions, some of the violations submitted upon are not contained in the Petition or the Supporting affidavits. The submissions appear disjointed and it is tempting to imagine that they were drafted by a novice or intern, rather than an experienced advocate in the esteemable law firm of Mirugi Kariuki & Co. Whatever the case, the attempt to support the present Petitioners’ case on the decision of **Odunga J in Keroche Breweries Ltd** demonstrates a casual reading of it by the Petitioners’ advocates.

41. In the said judgment **Odunga J** at paragraph 82 stated very clearly that the court would limit itself to the determination of three issues as follows:-

- a) The legality and constitutionality of the Presidential directive which was the subject of the said petition.
- b) The legality of the letter dated 3rd July, 2015 (by KEBS suspending Petitioners’ permits and licences).

c) The legality and constitutionality of the Alcoholic Drinks Control (Supplementary Regulations (2015)).

42. The Petitioners in **Keroche Breweries Ltd** and others were, unlike the Petitioners herein, licensed to operate breweries. **Odunga J** carefully distinguished the propriety of the presidential directive vis-à-vis law enforcement agencies and members of parliament, by stating *inter alia*:-

“I must hasten to add that where the President simply states what is already the law, there is no requirement for him to comply with the provisions of Article 135 of the Constitution since he would only be giving a reminder on the implementation of a function which he or she had already exercised.

It is contended that on the 1st of July 2015, H.E. the President of the Republic of Kenya ordered a crackdown on the production and sale of illicit liquor within the country. That this directive was given has not been disputed. The only issue is what its import and impact was. If this directive was in the exercise of the functions under Article 135 of the Constitution, I would have had no hesitation in declaring it unlawful since it was clearly not in writing and could therefore not be under seal and was incapable of being signed. I have listened to the video which was exhibited in these proceedings and it is clear that the President while addressing himself to what he termed “*pombe haramu*” in fact directed the closure of all “dens” notwithstanding whether or not they were licensed. As conceded by the Petitioners themselves, the proliferation of illicit liquor in this country has reached an alarming proportion. The effect thereof on the young people of this country is clearly devastating. If left unattended to, the effect will clearly reach a level where it would have to be a declared a national disaster. The manufacture and distribution of such illicit liquors which have led to serious adverse affects on the health and lives of Kenyans must be stemmed and any Kenyan of good will must support the efforts by the Government to stamp such ignominious business. The Petitioners themselves expressly averred that they fully support and have always been in support, of all efforts by the Government to regulate and stamp out the production and sale of illicit liquor which is perpetrated by unlicensed persons and counterfeiters much to the detriment of the interests of legitimate brewers and the consumers at large.....

In this case the President’s directive while directed at illicit brews, ordered the Members of Parliament to spearhead the crackdown on the same. Whereas no one harbours any doubt that the President’s directive was clearly appropriate, had the President addressed himself to those who are statutorily mandated to implement the law relating to illicit liquor, no one would have been questioning his directive as in those circumstances he would not have been directing those organs to carry out a function which hitherto did not exist but would be waking them up to carry out their mandate. That the law imposes a duty on the Cabinet Secretary, the Police, KEBS and NACADA to take steps to rid the country of illicit liquor cannot be doubted. In fact the Petitioners appreciated that KEBS has a statutory mandate under the *Standards Act* to ensure standardisation in industry and commerce within Kenya and for the purposes of carrying out its mandates under section 4. To that extent the President would not have been deemed to be undertaking a fresh mandate under any law but simply directing those concerned to ensure that the law was implemented.

However, the President’s audience and those to whom the directive was addressed and whom he directed to report to him, the Members of the National Assembly and the Senate, were not those legally mandated to carry out what he was directing them to undertake. In my view, the President was giving them fresh mandate. Members of Parliament’s role is clearly provided for in the Constitution and in line with the principle of separation of powers, the President, in a Presidential System like ours should not direct Parliament in the manner in which it conducts its matters unless the Constitution expressly empowers the President to do so. In the premises to the extent that the directives of 1st July, 2015 were directed to Members of Parliament, as opposed to the executive, who were further directed to report back to the President, the said directives violated the doctrine of separation of powers as well as Article

132(3)(b) of the Constitution as read with Article 135 thereof. (Emphasis added)

43. The Respondents in this case are administration officials and security agents responsible for enforcing the law in respect of the manufacture and sale of alcoholic drinks. That law existed and exists independently of the impugned presidential directive. Secondly, in this case there is no evidence that the Petitioners' otherwise valid licences were cancelled or renewal denied due to the presidential directive, or at all. Thus the Petitioners' submissions and quotations taken out of context from **Odunga J's** decision do not aid their case at all but instead contribute to the obfuscation of the real issues. The presidential directive was found to be unconstitutional for violating the doctrine of separation of powers and for failure to comply with Article 135 of the Constitution to the extent that it instructed members of parliament to implement it.

44. I observed recently in **Andrew Omwenga Wanjiku t/a Triangle Bar & Others -Vs- Nakuru County Commissioner & 3 Others Petition No. 5 of 2015** that:-

“Security agents and police have the duty and mandate to enforce the law, in this case the Alcoholic Drinks Control Act which is still in place, and requires that businesses/people dealing with alcohol be licensed accordingly. Actions taken lawfully by authorized persons in the enforcement of the Act, as appears to be the case here, cannot ordinarily give rise to a valid claim of violation or threat of violation of the alleged rights of those on the wrong side of the law.”

45. The Petitioners in this case were admittedly operating wholesale liquor outlets without liquor licences. They admit they had stocks of illicit liquor which was impounded. The facts of the present case differ from those in the **Keroche Breweries** case in several major respects. In the latter case current and valid licences and permits had been withdrawn or suspended by the Respondent bodies as paragraph 136 of the decision clearly indicates. Secondly, the Respondents herein are a part of the executive.

46. It is clear to all that what happened as a consequence of the presidential directive was a more vigorous law enforcement exercise regarding alcoholic beverages, and which eventually caught up with the Petitioners. Hence the constant reference to a “crack down.” I agree with **Odunga J** that so far as it was directed at the police and other relevant agencies, the President's directive cannot be assailed for unconstitutionality.

47. This court cannot lend its authority so as to give legal sanction to the Petitioners or any other business persons to carry on unlicensed business in alcoholic beverages, whether the beverages be described as licensed brands produced by conventional brewers or as second generation alcoholic beverages.

48. As observed by the Respondents, no evidence was tendered by the Petitioners that other unlicensed liquor businesses have been authorized to continue operating. Thus it is not clear how the Petitioners have been discriminated against (as pleaded in the plaint), or denied the equal benefit and equal protection of the law (per submissions).

49. The right to freedom of the person and security under Article 29 (a & c) and other rights cited in respect of Articles 27, 28, 29, 35 and 46, 47 are not absolute rights. Article 24 (1) states:

“(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.

Clearly any activities carried out in breach of the law cannot be justified as a lawful exercise of a right. The Petitioners being in breach of the law cannot assert that the same is an exercise of their constitutional rights that were curtailed or violated when the Respondents issued prohibitions.

50. Rather than demonstrate how their rights in the Articles pleaded in the Petitions have been violated as concerns themselves, the Petitioners by their submissions opened a whole new complaint of violation regarding the right to fair trial (Article 50) privacy (Article 31), in addition to arguments in support of only two of the Articles cited in the Petition, namely Articles 27 and 29. At the same time, bringing in a new complaint in relation to Article 47. Article 46 was advisedly left out. Obviously it is far-fetched and cannot apply in the facts of this case. I must say that the Petitions herein do not pass muster the tests laid down in **Anarita Karimi** and **Trusted Society of Human Rights Alliance**.

51. Ultimately, the question that presents itself to this court, upon reviewing all the foregoing is this: whether the lawful enforcement of the law regulating the sale of alcoholic drinks constitutes a breach of the Petitioners' stated rights in the circumstances of this case. The Petitioners did not have valid licences at the material time authorizing their admitted trade in alcoholic drinks. The orders or action by the Respondents forcing closure of the Petitioners' businesses or in default to face arrest and prosecution cannot qualify as a violation of their cited rights. The Petitions are misguided and without a sound legal basis.

52. I endorse the sentiments by **Ngaa J** in **John Kinyua Munyaka & 11 Others -Vs- County Government of Kiambu & 3 others [2014] eKLR**:

“Considering the likely side effects of alcoholic drinks on the health and well-being of the 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 the 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 detriment of the entire society. It is the responsibility of the Government through its legislative arm to legislate and provide guidelines that would ensure that this section of the populace enjoy their rights without interfering unnecessarily with the rights of others.”

53. In the result, I do agree with the Respondents that the Petitions have no merit and that the Petitioners have come to court with unclean hands, in the desperate hope of persuading this court to lend its authority by sanctioning their illegal business activities. Such in my considered view is the essence of the prayers in the Petitions. It would be a sad day indeed for the rule of law and public interest generally for any court to become a refuge for those who, with demonstrable impunity, continue to break the law regulating and prohibiting the production and sale of alcoholic beverages, licit or illicit. The Petitions are accordingly dismissed.

54. The two Petitions were brought to secure illicit personal interest and oblique purpose. They were premised upon patently shaky foundations. They have occasioned cost to the Respondents in addition to taking up the court's limited resources. I direct that the Petitioners pay the costs occasioned by the Petitions.

55. I apologize, that due to pressure of work, this judgment was delayed.

Delivered and Signed at **Naivasha** this **3rd** day of **March, 2017**.

N/A for the Petitioners

N/A for the Respondents

Court Clerk – Barasa

C. MEOLI

JUDGE