



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 274 OF 2015**

**BETWEEN**

**PATIALA DISTILLERS LIMITED .....PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF LAIKIPIA.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This Petition brings forth the applicability of the provisions of **Article 191** of the **Constitution** when there is a conflict between County Legislation and National Legislation and I note that the Petition impugns the provisions of **Section 35(2) of the Laikipia County Alcoholic Drinks Control Act** (hereinafter **County law**) on grounds that it conflicts with the provisions of **Section 31(2) of the Alcoholic Drinks Control Act No.4 of 2010** and **Section 91A of the Customs and Excise Act (Cap 472 Laws of Kenya)** (hereinafter **National law**).

**The Petitioner's case**

2. The Petitioner manufactures alcoholic drinks in Nairobi County for sale and distribution throughout the Republic of Kenya and it claims that its products are manufactured and packaged in accordance with the standards set nationally under the provisions of the **Alcoholic Drinks Control Act** and **Customs and Excise Act**. However, apparently its drinks do not meet the standards set by the County Law and consequently, its products' entry into the Laikipia County market is prohibited. It also contends that it is unable to transport or distribute its products in Laikipia County and to do so, the Petitioner would have to traverse the said County with perceived 'contraband products'.

3. It claims further that the effects of the implementation and operation of the County Law are prejudicial to its economic and business interests as well as those of other people in the same business.

4. Further, it is the Petitioner's case that **Section 35(2)** of the County Law directly conflicts with **Sections 31(2)** of the National Law by providing a standard of manufacture and packaging of alcoholic products that is different from the standard applied nationally.

5. It also claims that on the one hand, the County Law provides that the alcoholic drinks shall only be manufactured, packaged and sold within Laikipia County where they are packaged in glass bottles having a capacity of more than 250 milliliters in volume and on the other hand, the National Law provides that

alcoholic drinks may be manufactured and packaged in containers of 200 milliliters in volume which are not necessarily made of glass. It is therefore its case that the two laws provide for different and conflicting standards of the packaging of alcoholic drinks and are therefore in conflict with each other. As to what law should properly be applicable, it submits as hereunder.

6. Firstly, that the function of liquor licensing by County Governments does not include the right to regulate standards regarding manufacturing or packaging of alcoholic drink products.

7. Secondly, that there are national governmental agencies mandated to make provisions for quality assurance, manufacture, packaging standards and consumer protection in relation to alcoholic products. These bodies include the Kenya Bureau of Standards (KBS), the Kenya Revenue Authority (KRA) and the National Campaign Against Drug Abuse (NACADA).

8. Lastly, that under **Part 1** of the **Fourth Schedule** to the **Constitution**, consumer protection is the exclusive function of the National Government and the Petitioner submits that matters relating to the standard of manufacturing and packaging of alcoholic drinks fall within the realm of consumer protection and are therefore exclusively within the powers and function of the National Government.

9. It is the Petitioner's further submission that the National Law was enacted to create uniformity in regard to the application of standards and norms in alcoholic production, sale and consumption nationwide and in its view, the National Law should prevail in instances where there is a conflict as between it and County Legislation.

10. In its Petition dated 26<sup>th</sup> June 2015, the Petitioner therefore seeks the following orders;

*a) The Court be pleased to declare that the provisions of section 31(2) of the Alcoholic Drinks Control Act No. 4 of 2010, and Section 91A (1) and (1A) of the Customs and Excise Act (Cap 472 Laws of Kenya) prevail over Section 35(2) of the Laikipia County Alcoholic Drinks Control Act, 2014 in relation to the manufacture and packaging of alcoholic drinks.*

*b) The Court be pleased to declare that section 35(2) of the Laikipia County Alcoholic Drinks Control Act, 2014 is inoperative and impliedly repealed to the extent of its inconsistency to section 31(2) of the Alcoholic Drinks Control Act No. 4 of 2010, Laws of Kenya and Section 91A (1) and (1A) of the Customs and Excise Act (Cap 472 Laws of Kenya).*

*c) The Court be pleased to issue a restraining order barring the Respondent or its agents, servants or assigns from implementing and/or enforcing the provisions of section 35(2) of the Laikipia County Alcoholic Drinks Control Act, 2014 in so far as the same is inconsistent with the provisions of section 31(2) of the Alcoholic Drinks Control Act No. 4 of 2010, Laws of Kenya and Section 91A (1) and (1A) of the Customs and Excise Act (Cap 472 Laws of Kenya).*

*d) Costs of the suit.*

*e) Any other relief that the court may deem fit to grant.*

### **The Respondent's case**

11. The Respondent filed a response dated 13<sup>th</sup> November 2015 and it concedes that **Section 91A** of the **Customs and Excise Act (Cap 472)** provides for the packaging of alcoholic drinks in either glass or PET (polyethylene terephthalate) bottles or wooden or metallic containers.

12. The Respondent further states that liquor licensing falls within the exclusive mandate of a County Government and that **Article 191** of the **Constitution** only applies to conflicts between National and County Legislation in respect to matters falling within the concurrent jurisdiction of both levels of Government. That liquor licensing does not fall within such concurrent jurisdiction and in its view, matters concerning production, sale, distribution, promotion and use of alcoholic drinks fall within the

exclusive mandate of the Laikipia County Government.

13. The Respondent therefore contends that for the Petitioner to be licensed to trade in Laikipia County it must comply with the provisions of the County Law and further, **Section 3** of the said Law provides for the licensing of alcoholic drinks by the County Government in regard to the control of production, sale, distribution, promotion and use of such drinks. It is also its position that the impugned County Law does not prohibit distribution of the Petitioner's product across County boundaries as alleged but that necessary licences must be obtained in that regard.

14. In the Respondent's view therefore, no conflict exists as between the National and County Legislation in issue and the Petition ought to be dismissed with costs.

### **Determination**

15. From the pleadings, the issues for determination are as follows;

(i) Whether **Section 35(2)** of the **Laikipia County Alcoholic Drinks Control Act, 2014** is inconsistent with **Section 31(2)** of the **Alcoholic Drinks Control Act No.4 of 2010**, Laws of Kenya as read with **Section 91A (1)** and **(1A)** of the **Customs and Excise Act (Cap 472 Laws of Kenya)**.

(ii) Whether the provisions of **Section 31(2)** of the **Alcoholic Drinks Control Act No. 4 of 2010**, and **Section 91A (1)** and **(1A)** of the **Customs and Excise Act (Cap 472 Laws of Kenya)** prevail over **Section 35(2)** of the **Laikipia County Alcoholic Drinks Control Act, 2014** in relation to the manufacture and packaging of alcoholic drinks.

(iii) And if (ii) is in the affirmative, whether **Section 35(2)** of the **Laikipia County Alcoholic Drinks Control Act, 2014** is inoperative and impliedly repealed.

(iv) Who bears the costs of the Petition?

**Whether Section 31(2) of the Alcoholic Drinks Control Act No. 4 of 2010, and Section 91A (1) and (1A) of the Customs and Excise Act is inconsistent with Section 35(2) of the Laikipia County Alcoholic Drinks Control Act.**

16. The Petitioner's case is that **Section 35(2)** of the **County Law** conflicts with the National Law i.e. **Section 31(2)** of the **Alcoholic Drinks Control Act**, as well as **Section 91A** of the **Customs and Excise Act**. Its case is also that the County Law has set a standard different from the one provided for by the National Legislation.

17. In that context, the **Laikipia County Alcoholic Drinks Control Act Section 35(2)** provides that:

***35.(1) No person shall sell, manufacture, pack or distribute an alcoholic drink in sachets or such other form as may be prescribed under this Act or any other relevant written law.***

***(2) Notwithstanding the provisions of subsection (1); -***

***(a) no person shall manufacture, pack, distribute or sell in the county an alcoholic drink in a container of less than 250 milliliter or any other quantity as may be prescribed under any written law;***

***(b) any other distilled or fortified alcoholic drink shall only be manufactured, packed, sold or distributed in glass bottles of the kind specified in paragraph (a) or as may be prescribed under any written law.***

***(3) A person who contravenes this section commits an offence and shall be liable to a fine not***

*exceeding fifty thousand shillings, or to imprisonment for a term not exceeding six months, or to both.*

On the other hand, **Section 31(2)** of the **Alcoholic Drinks Control Act** provides that;

**31 (1) ...**

**(2) No person shall sell, manufacture, pack or distribute an alcoholic drink in sachets or such other form as may be prescribed.**

**(3) Notwithstanding the provisions of subsection (1);**

**(c) no person shall manufacture, pack, distribute or an alcoholic drink in a container of less than 250 milliliters.**

**(b) the alcoholic drink previously known as chang'aa or any other distilled alcoholic drink shall only be manufactured, packed, sold or distributed in glass or PET (polyethylene terephthalate) bottles or metallic containers of the kind specified in paragraph (a).**

**Section 91A** of the **Customs and Excise Act** then provides that;

**91A**

**(1) No Person shall pack or sell an alcoholic beverage in a container the capacity of which is less than two hundred milliliters.**

**1A For the avoidance of doubt, the container referred to in subsection (1) shall either be a glass or PET (polyethylene terephthalate) bottles or wooden or metallic containers.**

**(2) A person who contravenes the provisions of Section (1) shall be guilty of an offence and liable to fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years or both.**

18. From a plain reading of the above provisions of the law, **Section 35(2)** of the **County Law** and **Section 31(2)** of the **National Law**, both provide that manufacturing, packaging and distribution of alcoholic drink shall be in a container of less than 250 milliliters. It is therefore clear that these two provisions are not in conflict. However, the **Customs and Excise Act** provides at **Section 91A** that such manufacturing, packaging and distribution shall be in a container of less than 200 milliliters.

19. In that context, in *Elle Kenya Limited & 6 others v Attorney General & 3 others (2013) e KLR* this Court considered the inconsistency between the **Alcoholics and Drinks Control Act** and the **Customs and Excise Act** in regard to the manufacturing, packaging and manufacturing of alcoholic drink and stated:

***“That section 31(2) (a) of Alcoholic Drinks Control Act, 2010 is and remains invalid by virtue of being impliedly repealed by sections 91A of the Customs and Excise Act as amended by section 3 of the Finance Act, 2010. The former Act hence carries the day by reason of it having been enacted subsequent to the Alcoholic Drinks Control Act. Therefore, the provisions of the former Act are invalid and cannot continue to apply in view of the subsequent amendment to section 91A of the Customs and Excise Act.”***

The Court concluded;

***“That by the implied repeal of Section 31(2)(a) of the Alcoholic Drinks Control Act, Section 91A of the Customs and Excise Act, Chapter 472 is the applicable law in so far as the capacity of packaging of alcoholic drinks is concerned.”***

20. For avoidance of doubt, **Chapter 472 Laws of Kenya** is the **Customs and Excise Act**. I reiterate my finding above in the instant Petition and having so stated, the obvious conclusion at this point is that the national law applicable regarding the capacity of manufacturing, packaging and distribution of alcoholic drinks is **Section 91A** of the **Customs and Excise Act** and not **Section 31(20(a))** of the **Alcoholic Drinks Control Act**. It is also not debatable that **Section 35(2)** of the County Law is inconsistent with the provisions of **Section 91A** of the **Customs and Excise Act**.

21. In respect to that inconsistency, this Court has now been called upon to determine the applicable law as I shall do herebelow.

**Whether Section 91A (1) and (1A) of the Customs and Excise Act prevails over Section 35(2) of the Laikipia County Alcoholic Drinks Control Act.**

22. It is the Petitioner's contention that under **Article 185 (2)** of the **Constitution**, it is uncontested that the Laikipia County Assembly has the power to make laws for the effective performance of the functions of the County Government under the **Fourth Schedule** to the **Constitution**. In addition, it claims that while it is true that liquor licensing is a function of the County Government under **Section 4(c)** of the **Fourth Schedule** to the **Constitution**, it is important to go further and determine how that function is performed.

23. In that context, the regulation of production, sale and consumption of alcoholic drinks is done by the National Government in various Acts of Parliament. For example, as regards the packaging of alcoholic drinks, which is the issue in this Petition, the applicable law is the **Customs and Excise Act** and elsewhere above I have said why. There is also no doubt that County Governments are mandated to regulate liquor licensing and Laikipia County has done so through the County Law stated elsewhere above.

24. What then happens when there is a conflict of laws as is apparent in the present case? In that regard, **Article 191(2)** of the **Constitution** is applicable as it stipulates how disputes in regard to conflict between County and National Legislations are to be resolved. **Article 191(2)** provides thus:

***“191 (2) National legislation prevails over county legislation if—***

***(a) the national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or***

***(b) the national legislation is aimed at preventing unreasonable action by a county that—***

***(i) is prejudicial to the economic, health or security interests of Kenya or another county; or***

***(ii) impedes the implementation of national economic policy.***

***(3) The following are the conditions referred to in clause (2);***

***(a) the national legislation provides for a matter that cannot be regulated effectively by legislation enacted by the individual counties;***

***(b) the national legislation provides for a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—***

***(i) norms and standards; or***

***(ii) national policies; or***

*(c) The national legislation is necessary for—*

*(i) the maintenance of national security;*

*(ii) the maintenance of economic unity;*

*(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;*

*(iv) the promotion of economic activities across county boundaries;*

*(v) the promotion of equal opportunity or equal access to government services;  
or*

*(vi) the protection of the environment.”*

***County legislation prevails over national legislation if neither of the circumstances contemplated in clause (2) apply.”***

25. The important question at this stage is whether the conditions stipulated under **Sub-Article (2)** above have been met and in that regard, I opine as herebelow.

26. Firstly, the National Legislation effectively regulates licensing of alcoholic drinks manufacturing, sale and packaging thereof. The applicability of that legislation to packaging of alcoholic drinks would then imply that the Petitioner and any other manufacturer of alcoholic drinks ought to manufacturer and package any alcoholic drink in accordance with the requirement that the minimum capacity should be 200 milliliters as set out under **Section 91A** of the **Customs and Excise Act**, which is the operative National Legislation as I have shown elsewhere above.

27. Secondly, all alcoholic drinks must be packaged in accordance with **Section 91A** of the said **Law** to ensure that there is a common standard including on marketing in the Country for the products so manufactured.

28. Thirdly, there is an assurance of a common nature of mobility of goods within Kenya and that the Petitioner’s products would be acceptable in all the Counties in the Country since the National Law would apply in all of them.

29. Lastly, the applicability of the National Legislation would necessarily prohibit disparity in the manner in which the packaging of alcoholic drinks is regulated and to my mind, the National Legislation would also ensure that norms, standards and national policies are uniform throughout the Country.

30. In the end, the National Law would therefore apply uniformly throughout Kenya and it is now obvious to me that the predicament the Petitioner finds itself in because, if every County was to legislate differently, on the requirements regarding capacity of packaging of alcoholic drinks, disharmony would be created and it would be difficult to adhere to the law and carry out any organized business.

31. It is therefore my finding from the above facts that the **Customs and Excise Act**, as far as manufacturing, packaging and sale of alcoholic drinks is concerned, prevails over the Laikipia County law.

**Is Section 35(2) of the Laikipia County Alcoholic, Drinks and Control Act, 2014 inoperative and impliedly repealed?**

32. I have found that the provisions of the **Customs and Excise Act** prevail over the **Laikipia County Alcoholic, Drinks Control Act** and the next question would then be whether the **Laikipia County Alcoholic, Drinks and Control Act** is inoperative and impliedly repealed to the extent of that

inconsistency.

33. To answer that question, I shall refer to the provision of **Article 191(6)** of the **Constitution** which plainly answers the questions as follows:

***“A decision by a court that a provision of legislation of one level of government prevails over a provision of legislation of another level of government does not invalidate the other provision, but the other provision is inoperative to the extent of the inconsistency”.***

34. The Article requires no more than a literal reading and it therefore follows that **Section 35(2)** of the **Laikipia County Alcoholic, Drinks and Control Act** is inoperative to the extent of the above inconsistency. It is consequently not binding and does not have the force of law.

### **Disposition**

35. In conclusion, I have found that the National Law applicable in regard to packaging, manufacturing and sale of alcoholic drinks is the **Customs and Excise Act**. I have also found that **Section 91A** of the **Customs and Excise Act** prevails over **Section 35(2)** of **Laikipia County Alcoholic, Drinks and Control Act**. Having so found I shall make the following findings and orders;

***(a) A declaration be and is hereby issued that the provisions of Section 91A (1) and (1A) of the Customs and Excise Act (Cap 472 Laws of Kenya) prevail over Section 35(2) of the Laikipia County Alcoholic Drinks Control Act, 2014 in relation to the manufacture and packaging of alcoholic drinks.***

***(b) A declaration be and is hereby issued that Section 35(2) of the Laikipia County Alcoholic Drinks Control Act, 2014 is inoperative to the extent of its inconsistency with Section 91A (1) and (1A) of the Customs and Excise Act (Cap 472 Laws of Kenya).***

***(c) A restraining order be and is hereby issued barring the Respondent or its agents, servants or assigns from implementing and/or enforcing the provisions of Section 35(2) of the Laikipia County Alcoholic Drinks Control Act, 2014 in so far as the same is inconsistent with the provisions of Section 91A (1) and (1A) of the Customs and Excise Act (Cap 472 Laws of Kenya).***

***(d) As the matter was one of interpretation of the Constitution and statute, let each party bear its own costs.***

36. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER, 2016**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 7<sup>TH</sup> DAY OF DECEMBER, 2016**

**EDWARD MURIITHI**

**JUDGE**