



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

**PETITION NO. 295 OF 2015**

**KEROCHE BREWERIES LIMITED..... PETITIONER**

**VERSUS**

**CABINET SECRETARY,**

**MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT &  
OTHERS..... RESPONDENTS**

**RULING**

1. In this petition the petitioner seeks to quash *Alcoholic Drinks Control (Supplementary) (Licensing) Regulations, 2015* (hereinafter referred to as “the Regulations”), an order quashing the letter dated 3<sup>rd</sup> July, 2015 issued by the Kenya Bureau of Standards (hereinafter referred to as “KBS”) suspending the permits and licences granted to the Petitioner for production of portable spirits, an order compelling the Respondents to unlock and remove all seals, padlocks and any gadgets placed on the Petitioner’s premises for purposes of impounding the Petitioner’s property, a permanent order prohibiting the Respondents from confiscating, impounding, seizing and or destroying the Petitioner’s licensed brands of alcoholic drinks, beverages, spirits and all alcoholic products produced, manufactured and distributed by the Petitioner as well as damages both general and special not to forget costs amongst further orders which the Court may deem just and expedient.

2. Together with the petition, the petitioner filed a Notice of Motion dated 15<sup>th</sup> July, 2015 seeking to stay the implementation of the said Regulations, staying the notice issued vide the aforementioned letter suspending the Petitioner’s licence and permit to manufacture and produce its portable spirits under the brand name “Crescent”, prohibiting and restraining the impounding, burning, destroying or in any manner interfering with the petitioner’s production, distribution or retailing of its licenced alcoholic drinks, beverages and products including petitioner’s alcoholic drinks and products trading under the brand names “Crescent” and “Vienna Ice” and an order authorising the petitioner to remove the offensive padlocks, seals and any gadgets placed on the Petitioner’s premises for purposes of impounding its said products.

3. According to the petitioner who was represented in these proceedings by **Hon Muite, SC** and **Mr Esmail**, the cause of the matters in dispute herein have been the failure to adhere to the provisions of Article 135 of the Constitution which provides:

***A decision of the President in the performance of any function of the President under this Constitution shall be in writing and shall bear the seal and signature of the President.***

4. This requirement, it was submitted by **Hon. Muite**, is necessary in order to afford the specialised agencies work on the strategies of implementing the Presidential directive and determining those to whom the directive is targeted, in order to safeguard the interests of legitimate businesses.
5. It was submitted that the Petitioner is the second largest brewer in the Country certified by the KBS to use the Standardization Mark. Despite that by a letter dated 3<sup>rd</sup> July, 2015 the same KBS acting pursuant to an order by the National Government and the County Governments suspending all licences for manufacture of portable spirits pending the nationwide inspection of premises and analysis of alcoholic products, purported to exercise its powers under section 10A of the **Standards Act** (Cap 496) and Regulation 11 of the **Standardization Marks (Permits and Fees) Regulations**, suspended the permits to produce portable spirits to all manufacturers of the said spirits.
6. It was submitted that the National Government ought to be governed by the rule of law in particular the **Standards Act** and by acting pursuant to the directives of the National and County Governments, KBS was abdicating its role under the **Standards Act**. The rule of law, it was submitted requires that brewers of legitimate alcoholic drinks should not be placed in the same basket as illegitimate brewers. It was further contended that the said actions amount to a violation of Article 47 of the Constitution and that the Government cannot purport to be maintain the rule of law by disobeying the same.
7. The fight against illicit brews, it was asserted ought to be in accordance with the rule of law since the Government ought to protect the interests of legitimate businesses in order to create jobs. In order to attain its aim of stopping death arising from poisonous drinks, the Government was urged to work hand in hand with the legitimate brewers with a view to reducing the duties levied on the said products in order to ensure that safe alcoholic drinks are affordable. However, the blanket closure of businesses is an affront to the rule of law as the petitioner was not notified at all and there is no evidence that the petitioner's said products are poisonous.
8. While appreciating that the Respondents require time to comprehensively respond to the application, it was learned senior counsel's view that in the meantime conservatory orders ought to be granted in line with the order issued on 8<sup>th</sup> July, 2015 in Judicial Review Application No. 215 of 2015 between **Kenya Breweries Ltd & Another vs. Cabinet Secretary, Ministry of Interior and Co-Ordination of National Government & Others**.
9. In response to the application **Mr Sifuma** learned counsel for the 3<sup>rd</sup> Respondent urged the Court not to grant the interim conservatory orders at this stage since the Petitioner is challenging the constitutionality of the Regulations. It was however his view that KBS did not abdicate its role. He urged the Court to balance the interests of the Petitioner as well as the public interests. In his view since tests on the products are ongoing any conservatory orders issued herein would interfere with the same.
10. On his part, **Mr Kuria** learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents while agreeing with the need to expedite the hearing of the petition supported **Mr Sifuma's** submissions disagreed with the contention that the decision under challenge was taken by the President. According to him section 14 of the **Standards Act** empowers the Inspector of Police to ensure compliance the Standards and even take away non-compliant products.
11. In his rejoinder **Hon. Muite** was emphatic that the petitioner was not opposing the inspection and testing of its products by KBS an action which KBS regularly undertakes. However, in so doing the action must be lawfully undertaken as required under section 14 of the Standards Act and it ought not to exercise its powers arbitrarily.
12. I have considered the issues raised herein.
13. The first issue for determination is the circumstances under which the Court grants conservatory orders.

14. Article 23(3)(c) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order.

15. In the Privy Council Case of Attorney General vs. Sumair Bansraj (1985) 38 WIR 286 Braithwaite J.A. expressed himself follows:

**“Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the “Conservatory Order” in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, ... but on the other hand it would be well within the competence and jurisdiction of the High Court to “give such directions as it may consider appropriate for the purpose of securing the enforcement of ... the provisions” of the Constitution...In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) “subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have...the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too...The critical factor in cases of this kind is the exercise of the discretion of the judge who must “hold the scales of justice evenly not only between man and man but also between man and state.”**

16. The aforesaid principles were adopted by the High Court of the Republic of Trinidad and Tobago in the case of Steve Furgoson & Another vs. The A.G. & Another Claim No. CV 2008 – 00639 – Trinidad & Tobago. The Honourable Justice V. Kokaram in adopting the reasoning in the case of Bansraj above stated:

**“I have considered the principles of East Coast Drilling –V- Petroleum Company of Trinidad And Tobago Limited (2000) 58 WIR 351 and I adopt the reasoning of BANSRAJ and consider it appropriate in this case to grant a Conservatory Order against the extradition of the claimants pending the determination of this motion. The Constitutional challenge to the Act made in this case is on its face a serious one. The Defendant has not submitted that the Constitutional claim is unarguable. The Claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect and which will render the matter of the Constitutionality of the legislation academic.”**

17. Back home, Musinga, J (as he then was) in Petition No. 16 of 2011, Nairobi – Centre For Rights Education and Awareness (CREAW) & 7 Others stated that:

**“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.” [Emphasis mine]**

18. It is therefore clear that even pending the hearing of the application for conservatory orders *inter partes*, the Court has power to grant interim orders in the nature thereof in deserving cases.

19. In this case, it is contended that the Respondents' action is pursuant to a directive of H. E. the President which directive is in itself not in compliance with Article 135 of the Constitution which requires that the President's directives be in writing. It is further contended that the Respondents' actions are arbitrary in that they have not taken into account the fact that the Petitioner's business and products are legitimate and duly licensed by the very body which has purported to suspend the licences.

20. I wish to emphasise that at this stage the Court's concern is whether it ought to grant the conservatory orders pending inter partes hearing.

21. I have perused the letter dated 3<sup>rd</sup> July, 2015 and on the face of it, the letter seems to be arbitrary. In purporting to suspend the permits for all manufacturers of portable spirits, its effect is to literally ground such entities notwithstanding the legitimacy or otherwise of their businesses. Such a blanket and overbroad sweeping yet ambiguous directive ought to be frowned upon in any democratic society guided by the rule of law. Collective punishment, in my view is an antithesis to the rule of law and in my view such actions are a recipe to chaos and disorder. No wonder the petitioner contends that the directive is being enforced by hooligans. It is my view therefore that the petitioner's case cannot be termed frivolous.

22. On whether a stay ought to be granted, it is my view that there exist proper mechanisms for achieving what the Respondents intend to achieve without resorting to such arbitrary action which on their face appear illegal and unconstitutional. There is no bar to the Respondents carrying out inspection on the petitioner's premises to ensure that standards are maintained herein and where any products are found not to meet the minimum standards, take the necessary steps to prosecute the petitioner in accordance with the existing legal machinery. To resort to destruction of illicit products before the same are produced before the courts of law hence destroying evidence has the effect of rendering the very action that the Respondents intend to stop incapable of being realised.

23. Having considered the issues raised herein the appropriate order to grant and which I hereby grant is a conservatory order restraining the Respondents by themselves, their servants, agents or otherwise from confiscating, destroying, burning or in any other manner interfering with the petitioner's licensed brands, alcoholic drinks and beverages pending the hearing inter partes.

24. I further direct the Respondents to remove all padlocks, seals and any gadget placed on the petitioner's premises for the purposes of impounding the petitioner's said products pending the said *inter partes* hearing. The said action to be undertaken within 24 hours of service of this order on the Respondents and in default the Petitioner be at liberty to remove the same.

25. I however direct the petitioner to allow to the relevant officers access to the petitioner's premises for the purposes of carrying out their duties as provided under the law other than the impugned Regulations.

26. This Application is stood over to 21<sup>st</sup> July, 2015 for *inter partes* hearing or further orders.

**Dated at Nairobi this 17<sup>th</sup> day of July, 2015**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Hon Muite and Mr Esmail for the Petitioner/Applicant***

***Mr Kuria for the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 7<sup>th</sup> Respondents***

***Mr Sifuma for the 3<sup>rd</sup> Respondent***

