



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

**PETITION NO.277 OF 2015**

**BETWEEN**

**OFFICIALS OF THE ASSOCIATION OF SPIRITS**

**MANUFACTURERS OF KENYA.....PETITIONER/APPLICANT**

**AND**

**THE ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL NATIONAL POLICE SERVICE....2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY FOR INTERNAL SECURITY**

**AND CORDINATION OF NATIONAL GOVERNMENT.....3<sup>rd</sup> RESPONDENT**

**HON. FERDINAND WAITITU.....4<sup>th</sup> RESPONDENT**

**RULING**

1. At the core of the Application before me is the ongoing agitation against production and consumption of illicit liquor infamously known as **“second generation alcohol”** in various parts of the Country. It is alleged by the Petitioner that on 27<sup>th</sup> June 2015, the 4<sup>th</sup> Respondent organized and led a group of armed hooligans who invaded bars owned by the Petitioners’ members in Wangige Shopping Center within Kiambu County where they looted and destroyed the Petitioner’s members’ properties. They further alleged that a report of these actions was made at the Kabete Police Station but no arrests were made and the police did not take any action.

2. Subsequently, they claimed that on 1<sup>st</sup> July 2015, the President of Kenya delivered a speech to Members of Parliament from the Central Region of Kenya during which he allegedly condemned the sale of second generation liquor. The pronouncement by the President, it is claimed, has exacerbated the situation and led to increased raiding of licensed retail and wholesale alcohol outlets particularly within Kiambu County and the Central Region in particular.

3. The Petitioner in the above context claims that it is an association of manufacturers of spirituous liquor registered in Kenya under the provisions of the **Societies Act (Cap 108 Laws of Kenya)**. Its members are engaged in the business of manufacture, distribution and sale of excisable and dutiable alcoholic beverage and in its Notice of Motion application dated 6<sup>th</sup> July 2015, it seeks the following orders;

***“(a) That the Court be pleased to certify this Application urgent to warrant it’s being heard forthwith.***

***(b) That pending hearing and determination of this Application the Court be pleased to issue a conservatory order restraining the Respondents or their agents or any public officer or any person from publicly or otherwise organizing gangs or inciting members of the public or howsoever procuring the unlawful intrusion into the licensed premises of the members of the Petitioner or their duly licensed outlets or engaging in unlawful destruction of the Petitioner products, or looting or unlawful seizure of the Petitioners products.***

***(c) That pending hearing and determination of this Application the Court be pleased to issue a conservatory order directing the 2<sup>nd</sup> Respondent to deploy in accordance with his duty under the law adequate law enforcement personnel to provide lawful protection of the business premises of the members of the Petitioner and their duly licensed outlets from unlawful intrusion, looting, unlawful destruction and seizure of their products by organized gangs or any person.***

***(d) That pending hearing and determination of this Petition the Court be pleased to issue an order temporarily staying the implementation and/or enforcement of the decision of the 3<sup>rd</sup> Respondent expressed by public pronouncement on the 2<sup>nd</sup> July 2015 and reported in the media purporting to revoke and or suspending the licenses of the members of the Petitioner or those held by their licensed outlets.***

***(e) That the costs of this Application be provided for.”***

4. In his Affidavit sworn on 6<sup>th</sup> July 2015 in support of the Application, Robert Kanogo the Petitioner’s organizing secretary deponed as follows;

5. Firstly, that its members are licensed to manufacture liquor under the provisions of the **Customs and Excise Act and the Alcoholic Drinks Control Act 2010** as well as the relevant **Alcoholic Drinks Control Acts**. Consequently, they have set up industrial plants in various parts of the Country for manufacture of their products which are regularly inspected and evaluated for fitness for human consumption by the relevant authorities and especially by County Health Service Departments.

6. Secondly, its members are authorized and licensed to distribute their products throughout the Country and they do so, through a network of wholesale and retail outlets established by licensed wholesalers and retail distributors.

7. Thirdly, the Petitioner’s members’ products are of high quality, manufactured under high standards, are duly inspected and have been certified fit for human consumption by competent public bodies including the Kenya Bureau of Standards (KEBS), the Government Chemist, Public Health Officers, the National Campaign against Drug Abuse Authority (NACADA) and County Liquor Licensing Committees.

8. Fourthly, each of its member has obtained and has met the necessary minimum standards for grant of the requisite licenses to manufacture their brand which includes licence to manufacture excisable goods, breweries licence under the **Alcoholic Drinks Control Act and County Alcoholic Drinks Control Acts**, Certificates of analysis and fitness for human consumption from the Government Chemist, permits to use the standardization marks and certificates of analysis from KEBS. Further, that each of its members are authorized and duly licensed to distribute their products throughout the Country.

9. Lastly, he stated that each of the Petitioner’s members’ is tax compliant and have met their financial obligations to the National and County Governments.

10. The Petitioner therefore contends that the looting and destruction of licensed alcoholic drinks outlets has been allowed to continue unabated and is being encouraged by public officials. That the christening of

the licensed and approved alcoholic products as “second generation” and the blanket condemnation of legitimate manufacturers together with rogue producers goes against the legitimate expectation of the Petitioner to enjoy the protection of the law. That unlawful public declarations and resultant looting by mobs and destruction of property breeds lawlessness and is against public interest.

11. Mr. Muguku who represented the Petitioner’s case in addition submitted that an interim conservatory order was necessary because they had demonstrated that the Petitioners’ members had been subjected to violence and the 1<sup>st</sup> to 3<sup>rd</sup> Respondents had abdicated their constitutional duty to safeguard lives and property.

12. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents are yet to file any response to the Application but on the issue of interim conservatory orders, Mr. Njoroge acting for them submitted that grant of such orders would amount to a blanket condemnation of the Respondents and that no order should issue to hinder the enforcement of the law.

13. The 4<sup>th</sup> Respondent, Ferdinand Ndung’u Waititu, in opposing the Application filed an Affidavit sworn on 7<sup>th</sup> July 2015. He mainly challenges the capacity of the Petitioner to file the Petition and also challenges the legal status of its members. He particularly claims that its members are not licensed as alleged and those who were initially licensed no longer have any licenses as the previous ones have since expired. Accordingly, that they are in violation of the law and no order can be granted to unlicensed entities. Further, that the Petitioners have failed to produce any evidence that they were certified by KEBS to produce the liquor that they are selling. He also denied being involved and leading the alleged “gangs of hooligans” in looting bars and licensed retail outlets.

14. Mr. Kinyanjui learned Counsel for the 4<sup>th</sup> Respondent submitted that the Application was not founded on the Petition and therefore no orders can properly be issued against the 4<sup>th</sup> Respondent. He stated that the Petitioner has not demonstrated any basis on which a conservatory order can be issued and that a Court cannot issue blanket orders.

15. I have considered the pleadings and oral submissions made and I note that the Petitioner has sought conservatory orders pending the hearing and determination of its Application. In the case of ***Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others (2014) e KLR***, the Supreme Court explained the place of conservatory orders in legal proceedings as follows;

***“Conservatory Orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions linked to such private-party issues on the “prospects of irreparable harm occurring during the pendency of a case; or “high probability of success” in the applicants case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest, the Constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes”***

16. I am duly guided and applying the above principles to the present Application, I opine as follows;

- i. The orders sought in paragraphs (c) and (d) of the Application are vague, ambiguous and with respect to the Petitioner, are incapable of being granted for lack of specificity. I say so because when the Petitioner seeks **“lawful protection of the business premises of the members of the Petitioner”**, what premises are to be protected and where?

Further, when the Petitioner seeks orders to **“stay the implementation and/or enforcement of the decision of the 3<sup>rd</sup> Respondent expressed by public pronouncement on the 2<sup>nd</sup> July 2015”** and then attaches a newspaper cutting without a date or even the name of the newspaper itself, if it indeed it was such, how can the Court be expected to make such orders which may be incapable of

proper interpretation or enforcement and are supported by non-evidence? It is now trite that a party seeking orders from this Court must be specific and at the very least indicate with a measure of clarity what complaints it has, the evidence in support of it and clear orders capable of enforcement and enjoyment – See **Annarita Karimi Njeru (1976 – 1980) I KLR 14**.

- ii. Regarding the prayers in paragraph (b) of the Application, while it is similarly wide in scope, I gather that the Petitioner wishes to be protected from unlawful intrusion into its members' premises. The only problem with that prayer is that the premises are not mentioned and therefore it would be difficult to grant an order in the interim whose effect and specificity of enforcement would be unknown to this Court.

Court orders are not issued in a vacuum neither are they to be implemented in vacuum.

- iii. Although the 4<sup>th</sup> Respondent has been sued, it is obvious that no specific orders are sought against him in the Petition and none should be granted in the present Application.

17. Having so said however, this Court does not itself exist in a vacuum and must act within reason and do substantive justice when called upon to do so by dint of **Article 159(2)(a)** of the **Constitution**. I say so because when the Petitioner first approached this Court, it had limitations in terms of the pleadings submitted but it is now obvious that it is a lawful entity and has *bona fide* members who are being subjected to suffering by both State agents and members of the public. They too have rights and the **Constitution 2010** grants them protection when they are subjected to illegal actions.

18. In that regard, I take judicial notice that an operation to stop the manufacture of illicit and unhealthy liquor products has been launched by the State across the Country. If that be so, then the operation must be conducted within the Rule of Law otherwise anarchy will reign where both State agents and members of the public take the law into their hands.

19. In the circumstances and invoking **Article 23(3)** of the **Constitution** and in the wider interests of justice, I shall order as follows;

- i. The Application dated 6<sup>th</sup> July 2015 shall be amended to specify the **“licensed premises”**, **“licensed outlets”** and **“business premises”** referred to in paragraphs (b) and (c) of the said Application.
- ii. Because the Kenya Bureau of Standards (KEBS) and the National Campaign Against Drug Abuse (NACADA) have been variously mentioned in the Pleadings, I shall *suo motu* order their enjoinder as Interested Parties. The Petitioner shall forthwith serve them with all Pleadings.
- iii. Some County Governments have also been mentioned as having issued licenses for the members of the petitioner Association to manufacture and distribute licenses. The Petitioner shall, by an advertisement in a local daily of wide publications at its own cost, notify such County Governments of the pendency of these proceedings.
- iv. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are hereby directed to abide by the Rule of Law while conducting the operation to rid the Country of illicit liquor and they shall have regard to lawful licenses issued by relevant agencies like KEBS and County Governments and shall also not unlawfully destroy any private property in the course of so doing.
- v. Any Party is at liberty to apply.

20. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JULY, 2015**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Muriuki – Court clerk

Mr. Muguku for Petitioner

Mr. Njoroge for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Mr. Kinyanjui for 4<sup>th</sup> Respondents

**Order**

Ruling duly delivered.

**ISAAC LENAOLA**

**JUDGE**

**9/7/2015**

**By Consent**

Amended Application to be heard on 24/7/2015 and copies of the Ruling to be supplied to Parties.

Orders issued today to be advertised.

**ISAAC LENAOLA**

**JUDGE**

**9/7/2015**