



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**AT MERU**

**PETITION NO. 8 OF 2015**

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

**Versus**

**COUNTY GOVERNMENT OF MERU ..... RESPONDENT**

**JUDGMENT**

**Introduction**

[1] This is a Constitutional Petition against the County Government of Meru. It is expressed to be brought under Articles 186 and 191 of the Constitution of Kenya, 2010. The petition seeks the court to determine whether Section 34 (2) of the Meru County Alcoholic drinks Control Act is in conflict with National legislation particularly Section 31 of the Alcoholic Drinks Control Act No. 4 of 2010, and Section 91A of the Customs and Excise Act (Cap. 472) as well as the Constitution and therefore wholly inoperative and impliedly repealed to the extent of its inconsistency with the National law. which the Petitioner argued on the scale of Articles 186 and 191 of the Constitution of Kenya, 2010 on consumer rights and protection; to establish whether the county law cited is in conflict with the National Laws and the Constitution. Section 31 of the National Alcoholic Drinks Control Act provides as follows:-

**31. Selling in sachets**

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

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

**(1)...**

**(a) no person shall manufacture, pack, distribute or sell an alcoholic drink in a container of less than 250 milliliter;**

**(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).**

**(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.**

Section 34 of the Meru County Alcoholic Drinks Control Act No. 3 of 2014 provides as follows:-

**“34.**

- 1. No person shall sell, manufacture, pack or distribute an alcoholic drink in sachets or such other form except as may be prescribed under this Act or any other relevant written law.**
- 2. Without prejudice to the provisions of subsection (1)-**
  - (a) no person shall manufacture, pack, distribute or sell in the county an alcoholic drink in a container having a capacity of less than 250 milliliter;**
  - (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 in national legislation relating to control of alcoholic drinks.**

Section 91 A of the Customs and Excise Act Cap 472 of the Laws of Kenya provides as follows:

**Packing or selling of alcoholic beverages 91A**

- 1. No person shall pack or sell an alcoholic beverage in a container 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 subsection (1) shall be guilty of an offence and liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.**

[2] Parties filed elaborate submission and cited ample judicial authorities on the issues each party ably articulated before the court. I shall consider all of them.

**Petitioner’s Case**

[3] According to the Petitioner, the effect of S.34(2) of the Meru County Alcoholic Drinks Control Act is to prohibit by criminal sanction the manufacture, sale packaging, distribution and or possessions of alcoholic drinks not packaged in glass containers of more than 250ml within the boundaries of Meru County. This arises because Section 34(2) of the Meru County Alcoholic Drinks Control Act is in direct conflict with Section 3 (2) of the National Alcoholic Drink Control Act and Section 91 A of the Customs and Excise Act. The conflict is in the fact that the county law provides for a standard of manufacture and packaging of alcoholic products within Meru County which is different from the standard of manufacture and packaging provided in the National Legislation. The National law provides that alcoholic drinks may be manufactured and packaged in non-glass bottles of not less than 200 ml. See Section 31(2) of National Alcoholic Drinks Control Act that packaging material maybe metallic, PET (Polyethylene terephthalate), or glass. They cited **Petition No. 320 of 2011- Elle Kenya Limited and others –vs- Attorney General & Others [2013] eKLR**. To the Petitioner the difference between the two legislations is in plain eyesight and begs for no explanation. The only question is: which law should prevail?

[4] Contrary to what the respondents say, the Petitioner is of the view that the National Law should prevail. The Petitioner rejected the respondent’s arguments that the county law should prevail because it relates to liquor licensing which is an exclusive function of the county under part 2 of the Fourth schedule of the Constitution. Their reasons for rejecting the said arguments are:

- a. *That the power and function of regulating the standards of manufacture and packing of alcoholic drinks, or indeed any other produce, is distinct and separate from the function of licensing. Term licensing does not include manufacturing and processing. See case of **NBI Metropolitan PSV SACCO Union Ltd –vs- County Government of Nairobi Nairobi CA No. 42 OF 2014.***
- b. *That even if the function of liquor licensing was to be construed to include regulation of standards of manufacture or packing of alcoholic drinks, then each county will have its own standards and the problem of economic fragmentation cannot be avoided. For instance a manufacturer in Nairobi may have to transverse Meru in order to deliver alcohol in Isiolo. And this may be impeded if Meru standards are different from those of Isiolo and Nairobi. A possibility of having cheaper and low quality standards in different counties would also arise. Article 19 and 20 of the Constitution sets out the key principles the court should apply in determining whether a matter is fit for regulation by county governments or the National Government – the need for preservation of the economic unity of the county and free mobility of goods and service. Therefore regulation of packaging standards cannot be a county government function.*
- c. *There are National Government agencies which have been established by law for quality assurance, manufacture, packaging standards and consumers’ protection in relation to alcoholic products. These bodies include (i) Kenya Bureau of Standards (KEBS) under the Standards Act (Cap. 496 Laws of Kenya) (ii) KRA under Customs & Excise Act, (iii) NACADA. If County governments take over the function of manufacture, packaging and sale of alcoholic drinks in the name of licensing chaos shall follow.*
- d. *Under Part I of Fourth schedule of the Constitution, consumer protection is the exclusive power and function of the National Government. Matters of manufacture and packaging of alcoholic drinks fall within the realm of consumer protection and so within the function of the National Governments.*

[5] In conclusion, the Petitioner submitted that it does not seek deletion and nullification of the impugned section of the county law but rather a declaration that the said section is inoperative and implied repealed to the extent of its inconsistency with the National law. They beseeched the court to find that the National Law prevails over the County Law. They also asked the Court to order costs of the petition to be borne by the respondent as they have already adverted to bearing the burden of costs in their submissions.

### **Respondent opposed the petition**

[6] The Respondent opposed the petition on several fronts. They submitted that the Meru County Alcoholic Drinks Control Act No. 3 of 2014 was enacted by the County Government of Meru in accordance with its Constitutional mandate under Part 2 of the Fourth Schedule i.e. to regulate cultural activities, public entertainment and public amenities including liquor licensing. Therefore, it has mandate to impose conditions for licensing of liquor including sale, production, distribution, consumption and advertisement of liquor. See Articles 185 (1) and (2) of the Constitution of Kenya which enables the County Assembly to enact such legislations. National Government does not regulate Licensing of Liquor under the Constitution. In the absence of licensing mandate in the National Government there cannot be any conflict of laws between National legislation and County Legislation. They argued that, under Article 191 (1) of the Constitution, conflict of laws would only arise where there is concurrent jurisdiction of both the National Government and County Governments on a matter. But, that is not the case here as licensing is an exclusive mandate of County Governments. See the case of **Nairobi Metropolitan** (Supra).

[7] According to the Respondent, Section 34 (2) (a) and (b) of the Meru County Alcoholic Drinks Control Act does not breach Section 31 (2) (b) of the National Alcoholic Drinks Control Act and Section 91A of the Customs and Excise Act. They submitted that the County Legislation does not oust the National Legislation Alcohol Control. Indeed, it imports the national legislation

as alternative legislation on prescription of type of container and capacity of the container in the packaging, distribution or sale of alcoholic drinks. The Respondent categorically stated that, in any event, these issues were determined in **Meru Bar, Wines and Spirits Owners Self Help group vs County Government of Meru Meru HCC. Pet no. 32 of 2014** and the court found that the County legislations does not oust but imports the National legislation as alternative legislation or prescriptions for packaging, distributing and selling of alcoholic drinks in the County. In sum, the respondent submitted that all legislations enjoy the general presumption of constitutionality and it is the one of the person alleging its unconstitutionality to prove it. But the Petitioner has not discharge this burden. See Indian case of **Hambarda, Wakhan –vs- Union India (1960) AIR 554** and **John KinyuaMunyaka& 11 Others vs County Government of Kiambu, Murang’a Pet.No. 3 of 2014**.

[8] The respondent submitted further that the County legislation has set out in Section 3 the noble objections and purposes it seeks to achieve including:

- a. **Protection of health**
- b. **Protection of minors from accessing alcohol, and**
- c. **Adoption and implementation of effective measures to eliminate illicit trade in alcohol.**

They urged the court to take judicial notice of the fact that; lives and vision have been lost by victims of illicit alcoholic drinks. This fact was also recognized in the case of **John Kinyua Munyaka (Supra)**. Therefore, the public interest being served by the Meru County Alcoholic Drinks Control Act No. 3 of 2014 is immense as it seeks to regulate alcoholic drinks which are harmful to the public. The County Act also went through the necessary public participation before it was enacted. Through the various gazette of public consultative meetings in Newspapers and Radio Stations of local and National circulation and coverage, the entire relevant audience was accordingly given notice on the proposed law as envisaged in Article 10 and 196 of the Constitution. Therefore, the court should dismiss the petition with costs as it does not have any merits whatsoever.

## **DETERMINATION**

[9] The ultimate decision of the court shall be:

- a) **Whether section 34(2) of the Meru County Alcoholic Drinks Control Act No 3 of 2014 is inconsistent with section 31(2) of the National Alcoholic Drinks Control Act, 2010, and section 91A of the Customs and Excise Act; and therefore wholly inoperative and impliedly repealed to the extent of the inconsistency;**

[10] However, answers to the above broad issue will entail a careful evaluation of all the arguments presented by the parties especially:-

- a) **That the function of setting standards for manufacture, and packing of alcoholic drinks belongs to the national government;**
- b) **That, on the other hand, the function of licensing belongs to the county government;**
- c) **That there is no conflict of law in the sense envisaged in article 191 of the Constitution between the national and county legislation as licensing is not one of the matters falling within the concurrent jurisdiction of both levels of governments;**
- d. **That the County legislation in issue imports rather than ousting the application for National legislation on alcoholic Drinks Control.**
- e. **That these issues are already moot having been determined in Meru HC. Pet. No. 32 of 2014.**

## **Conflict of Laws in the sense of article 191**

[11] Let me first set out when conflict of laws arises under article 191 of the Constitution and contrast that with other situations of *ultra vires* legislations for better understanding of this concept. Without doubt, under Article 191 of the Constitution, a conflict between national and county legislation would only arise in respect of a matter or matters falling within the concurrent jurisdiction of both levels of government but each making a provision that is different from or in conflict with the other. In my view, any other situation would be a case of *ultra vires* the powers of the offending government and the Constitution, that is to say, either level of government has enacted legislation on a matter it does not have jurisdiction under the Constitution. If the latter happens, the offending legislation is simply *ultra vires* and will be struck down as null and void *ab initio*. That is quite different from the situation envisaged in Article 191 as both levels are expected to have a concurrent jurisdiction on the matter except that a conflict has arisen between two laws governing the subject matter, of which the court is called upon to resolve as to which of the two laws prevails upon the other. In doing so, the court will consider the circumstances of the legislation, the subject of the legislation and the presence or lack thereof of the conditions specified in Article 191 (3) of the Constitution. The result of court's analysis under Article 191 of the Constitution should be that either the National Legislation or the County Legislation will prevail over the other on the particular subject. The entire judicial exercise under article 191 is governed by the relevant prescriptions of the Constitution on devolution, and the functions of the national government and county governments in relation to the matter at hand. But, let me tackle arguments on standards in manufacture of alcoholic drinks.

### **Setting of standards**

[13] One thing I do not want to omit. The Petitioner argued that setting of standards in manufacture and packaging of alcoholic drinks is a matter of protection of consumer rights and belongs to the National Government. Article 46 of the Constitution provides for consumer rights which include right:

- (a) to goods and services of reasonable quality;**
- (b) . . .**
- (c) to the protection of their health, safety, and economic interest.**

The goods for which these rights relate are goods and services offered by public entities or private persons. Therefore, setting of norms and standards for purposes of manufacture and packing of goods is a matter falling within the realm of protection of consumer rights and is a function of the National Government especially on goods such as alcoholic Drinks which are available and used across the nation. The standard of manufacture and the quality of alcoholic drinks must be carefully regulated by the National Government for effective and uniformity in production of quality alcoholic drinks for the people of Kenya. That is why national legislations on standards, quality measures and manufacturing of such goods as alcoholic drinks were enacted, to wit, are the Standards Act and the National Alcoholic Drinks Control Act. I will revisit this later issue later. But the pertinent question in this petition is:

### **Does the Meru County Alcoholic Drink Control Act oust or import the National Legislation particularly the National Alcoholic Drinks Control Act and the Customs and Excise Act?**

[14] I will set out the relevant sections in contention for visual comparison and content analysis.

Section 31 of the National Alcoholic Drinks Control Act provides as follows:-

#### **31. Selling in sachets**

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

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

**(1)...**

**(a) no person shall manufacture, pack, distribute or sell an alcoholic drink in a container of less than 250 milliliter;**

**(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).**

**(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.**

Section 34 of the Meru County Alcoholic Drinks Control Act No. 3 of 2014 provides as follows:-

**“34.**

- 1. No person shall sell, manufacture, pack or distribute an alcoholic drink in sachets or such other form except as may be prescribed under this Act or any other relevant written law.**
- 2. Without prejudice to the provisions of subsection (1)-**

**(a) no person shall manufacture, pack, distribute or sell in the county an alcoholic drink in a container having a capacity of less than 250 milliliter;**

**(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 in national legislation relating to control of alcoholic drinks.**

Section 91A of the Customs and Excise Act Cap 472 of the Laws of Kenya provides as follows:  
**Packing or selling of alcoholic beverages 91A**

- 1. No person shall pack or sell an alcoholic beverage in a container 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 subsection (1) shall be guilty of an offence and liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.**

[15] Looking at the Section 34 of the Meru County Alcoholic Drink Control Act No. 3 of 2014, it expressly imports the national law as alternative legislation on prescriptions for Meru County in respect of the type of containers and capacity thereof in the manufacture, packing, distributing and selling of alcoholic drinks. See **Meru Pet No 32 of 2014** (supra). The national legislations including section 91A of the Custom and Excise Act and are imported into the County legislation and these legislations provide for the type of container in the manufacture, packing, distributing and selling of alcoholic drinks to be:

**...either be a glass or PET (polyethylene terephthalate) bottles or wooden or metallic containers.**

That is a careful draftsmanship. Much careless drafting would have resulted from failure to understand the purport of national legislation on the matter and oust it completely; and courts would certainly step in for proper adjudication of the matter. Therefore, the import of National legislations into Section 34 of the Meru County Alcoholic Drinks Control Act as alternative prescription for the manufacture, packing, distributing and selling of alcoholic drinks for purposes of licensing is not usurpation by the County Government of Meru of the function of setting standards as it was argued by the Petitioner. In my understanding, therefore, licensing under the said County legislation is of alcoholic drinks which comply with both the County as well as the National Alcoholic Drinks Control legislation. Ultimately, I find that the Meru County Alcoholic Drinks Control Act neither conflicts nor is inconsistent with the National legislation. I do not even think the kind of drafting of the said county legislation can be used to prevent any person from trading in alcoholic drinks in Meru as long as they comply with the said Act and the National legislation. At least the Petitioner has not said that it was denied licensing. Accordingly, the County legislation on alcoholic drinks control herein is not in the nature of ‘restraint in trade’ as was urged by the Petitioner.

### **Licensing Function**

[16] Having said the above, I note that the Petitioner seems to have laid preponderant emphasis on Section 91A of the Customs and Excise Act on the minimum amount of milliliters for purposes of packing and selling of alcoholic drinks. I have stated that the Meru County Alcoholic Drinks Control Act imports rather than+ ousting these national legislations. If there be any conflict between the National legislations, and, if any reconciliation is needed of the said National legislations, (1) it is not the issue before this court, and in any case, (2) it is a function of national organs clothed with legislative mandate, i.e. Parliament, other relevant bodies such as the office of the Attorney General and Law Reform Commission. But of importance and perhaps for further debate on this matter, note the objects for, as discerned from the Alcoholic Drinks Control Act are stated to be:

**“An Act of Parliament to provide for the regulation of the production, sale and consumption of alcoholic drinks, to repeal the chang’aa prohibition Act, the Liquor Licensing Act and for connected purposes”.**

Whereas the objects of the Custom and Excise Act are expressed in the said Act to be:-

**“An Act of Parliament to provide for the management and administration of the customs, for the assessment, charge and collection of customs and excise duties and for matters relating thereto and connected therewith.”**

[17] Without saying much I am aware of the later amendments to the Section 91A of the Customs and Excise Act and Courts have considered this matter before. I am also aware of the rule of construction of statutes based on later statute. Except, again I think by importing the national laws on alcoholic drinks, these national legislations are incorporated into the Meru County legislation, thus, there are no elements of any inconsistencies or overlap or conflict with the National Legislation for which the Meru County legislation could be declared inoperative. See for instance section 34(1) of the Meru County Alcoholic Drinks Control Act does not prevent sale, manufacture, packing or distribution of alcoholic drinks that are in *such form as may be prescribed under this Act or any other relevant written law*. The National Alcoholic Drinks Control Act and the Customs and Excise Act are relevant law in this respect. Accordingly, I find that the Meru County Alcoholic Drinks Control Act No. 3 of 2014 is not in conflict with the National Alcoholic Drinks Control Act or Customs and Excise Act.

[18] I have also looked at the purposes and objects for which the County of Meru Alcoholic Drinks Control Act was enacted and it is agreeable with the overall national objective and expectations of the people in the fight against illicit and lethal alcoholic drinks. The effect of the illicit liquor was expressed in **Meru HC PET NO 25 OF 2015** as follows and I am content to cite

it thus:

**“It is in the public domain that the government has resolved to fight manufacture, sale, distribution and consumption of illicit and lethal alcoholic drinks that have left in their path many deaths and maims to health of its victims. And as the aftermath, many children have been left without parents and bread-winners; homes and marriages have been deprived of spouse or spouses with the effects of home-breaks and routing of family unit. The mischief and ravages of illicit and lethal alcoholic drinks are visible, and if manufacture, sale, distribution and consumption of illicit and lethal alcoholic drinks is not stopped, it will continue with its holocaust on the people of Kenya. I need not over-emphasize these adverse effects of consumption of illicit and lethal alcoholic drinks in our society today”.**

[19] In sum, the Petitioner has not discharged the burden of proof to show that a conflict of laws exists as per article 191 of the Constitution. In the premises, and on the basis of the above analysis, this Petition lacks merit and is hereby dismissed. I also find that except the issue, on standard setting on manufacture and packing of alcoholic drinks, all the other issues raised herein had been determined in **Meru HC. Pet. No. 32 of 2014**. But, as this matter could be said to be public-spirited litigation on a matter of the Constitution, I will be hesitant to condemn the Petitioner to costs. Accordingly, I order that each party shall bear own costs. It is so ordered.

**Dated, Signed and Delivered in Court at Meru this 2<sup>nd</sup> day of**

**November 2015.**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

**M/s. Maura for Ojienda advocate for the respondent**

**Mr. Kaume for Kabugu advocate for the petitioner**

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**F. GIKONYO**

**JUDGE**