



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 3 OF 2011

IN THE MATTER OF CHAPTER FOUR OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

IN THE MATTER OF THE BILL OF RIGHTS, RULES 11, 12 AND 13 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT AND PROCEDURE RULES, 2006

AND

IN THE MATTER OF CONTRAVENTION OR ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 27 AND 40 OF THE CONSTITUTION

AND

IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL ACT (NO. 4 OF 2010) AND THE ALCOHOLIC DRINKS CONTROL (LICENSING) REGULATIONS, 2010

BETWEEN

JOHN MURAYA MWANGI & 495 OTHERS.....PETITIONERS

VERSUS

THE MINISTER FOR STATE FOR PROVINCIAL
ADMINISTRATION AND INTERNAL SECURITY.....1ST RESPONDENT
THE ATTORNEY GENERAL.....2ND RESPONDENT
NATIONAL CAMPAIGN AGAINST DRUG ABUSE.....INTERESTED PARTY

AND

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 21 OF 2013

JOHN MACHARIA

WAMALWA YASINDI

ANDREW MURIITHI

IRENE NJOORA (*Suing on their own behalf and on behalf of*

persons whose names were attached to the Petition).....PETITIONERS

VERSUS

THE MINISTER FOR STATE FOR PROVINCIAL ...

ADMINISTRATION AND INTERNAL SECURITY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

MOLO DISTRICT ALCOHOLIC

DRINKS REGULATION COMMITTEE.....3RD RESPONDENT

AND

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 24 OF 2013

BETWEEN

DAVID WAHOME

LUCIA WANJIKU (*Suing on their own behalf and on behalf*

of the Molo Bar Owners Association).....PETITIONERS

VERSUS

THE MINISTER FOR STATE FOR PROVINCIAL

ADMINISTRATION AND INTERNAL SECURITY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

NJORO DISTRICT ALCOHOLIC

DRINKS REGULATION COMMITTEE..... 3RD RESPONDENT

NATIONAL CAMPAIGN AGAINST DRUG

ABUSE AUTHORITY.....4TH RESPONDENT

JUDGMENT

INTRODUCTION

1. This Judgment relates to three Petitions, that is Petition Nos. 3 of 2011, and Petitions Nos. 21 and 24 of 2013. As they raise the same issues, this court directed in the interest of expeditious dispensation of justice, that they be determined together under Petition No. 3 of 2011 which is the primary file on all the issues raised in the three Petitions. This Judgment therefore includes consideration of all the issues and allegations raised in all the three Petitions. I will commence by reference to the affected or impugned legislation, the Alcoholic Drinks Control Act 2010 (*No. 4 of 2010*) (*hereinafter as appropriate referred to as the Act*), in each of the Petitions.

2. In August 2010, Parliament enacted the Alcoholic Drinks Control Act (*No. 4 of 2010*) to provide for the comprehensive control of the manufacture, sale, consumption, distribution and promotion of alcoholic drinks in Kenya. It prohibits under Section 7(1) of the Act the manufacture or production, selling, disposing or dealing with; importing or causing to be imported, exporting or causing to be exported, any alcoholic drink otherwise than in accordance with a licence issued under the Act. The District Alcoholic Drinks Regulation Committee (*hereinafter referred to as the District Committee*), established under Section 8 (1) thereof was vested with the mandate to issue these licences.

3. The Act in Section 68 authorised the Minister in charge of matters of provincial administration, with the recommendation of the relevant agency which is defined in the Act as the National Campaign Against Drug Abuse Authority, to make regulations generally for the better carrying out of the objects of the Act. To this end, the Alcoholic Drinks Control (Licensing) Regulations, 2010 (LN No. 206 of 2010) were published. The Petitioners herein have challenged the various provisions in the Act and the regulations as being unconstitutional.

PETITION NO. 3 OF 2011

4. The Petitioners are bar owners and have brought the petition on their own behalf and on behalf of various bar operators in **Naivasha, Kinangop, Mombasa, Kipkelion, Murang'a, Kasarani and Ruiru**. By their Amended Petition dated and filed on 28th June 2012 the Petitioners seek the following orders -

(a) a declaration that the provisions of Section 7 of the Alcoholic Drinks Control Act and Paragraphs 2 (a) and (b) of the First Schedule and the Third Schedule of the Alcoholic Drinks Control (Licensing) Regulations 2010 have infringed on the Petitioners' fundamental rights and freedoms,

(b) an order of prohibition restraining the members of the Police Force or any of the Respondents from harassing, intimidating or in any other way interfering with the Petitioners' business operations in the name of enforcing the provisions of the Alcoholic Drinks Control Act,

(c) A declaration that the Petitioners are entitled to freely conduct their liquor business operations as per their previous licences without any interference for a period of 9 months from the date of commencement of the Alcoholic Drinks Control Act,

(d) costs of the petition.

5. The Petition was supported by the Affidavit of John Muraya Mwangi sworn on 28th June 2012. It is the Petitioners' contention that Section 7 (3) (1) is discriminatory and contrary to Article 27 of the Constitution in so far as it purports to exclude the application of its provisions to other premises wherein alcohol is sold and in particular canteens, mess, clubs, institutes run by Disciplined Forces and the National Assembly. They also allege that Section 12 of the Act which makes provision directing the District Committees not to issue licenses to the Applicants if they operate within 300 metres of schools contravenes the right to property under Article 40 of the Constitution.

6. The Petitioners have also challenged the Alcoholic Drinks Control (Licensing) Regulations (*hereinafter referred to as the regulations*). They allege that the said regulations are punitive, harsh and

have been made contrary to and in excess of the powers granted to the Minister. **Firstly**, it was contended that the First Schedule Part 1 (2) (a) and (b) prohibits the inclusion of certain classes of individuals from the membership of the District Committees whereas the Minister is not expressly authorised to limit such membership and in doing so he has effectively amended a substantive statute. It was also alleged that the License fees imposed under the Third Schedule are excessive and clearly meant to push the Petitioners out of business. They therefore urged the court to quash these rules and allow them to continue operating under the old licences.

THE RESPONDENTS' CASE

7. The Hon. Attorney General entered appearance for the First and Second Respondents and filed Grounds of Opposition dated 15th June 2011 in response to the Petition. It was the Respondents' submission that fundamental rights are not absolute and are subject to the rights and freedoms of others and the public interest, that the restrictions and limitations to each fundamental right and freedom are as important and bear the same constitutional description as the fundamental right itself and the court must therefore do a balancing act.

8. The Respondents also contended that the limitations contained in the Alcoholic Drinks Control Act are reasonable and permissible within the contemplation of Article 24 (1) (d) of the Constitution as they do not deprive the Petitioners' of their rights as a whole and Section 3 of the Act outlines the objectives of the law to include protection of children and the health of consumers. They therefore urged the court to dismiss the Petition with costs.

THE INTERESTED PARTY'S CASE

9. The National Campaign Against Drug Abuse Authority (*hereinafter referred to as the Interested Party but popularly referred to as "NACADA"*) was enjoined in these proceedings by the the order of court issued on 28th February 2012. It filed a Replying Affidavit sworn by one Florina Mwikali Mutua, the Interested Party's Legal Officer on 22nd November 2011.

10. The Respondent averred that the contention that the restriction against setting up of any business dealing with alcohol within 300 metres of any school infringes upon the Petitioners' rights is remote and far fetched and does not give way to the cognisance and consideration of the rationale behind the formulation of the rule which was to protect and safeguard school going children from the adverse effects of alcohol. The interested party further contended that the Act and Rules are not targeting or undermining the Petitioners' rights to acquire property but are in place to regulate the trade in which the Petitioners are engaged.

11. On the allegedly harsh regulations the Interested Party contended the regulations were made after intensive and broad consultations and negotiations with the relevant industry stakeholders including the Kenya Tourism Federation Secretariat who forwarded their proposal on 3rd December 2010. The Licensing fee structure proposed in the Regulations is intended to assist in locking out illegitimate alcohol selling businesses which pose great danger to the public.

12. The exclusion of the application of the licensing provisions with regard to the sale of alcoholic drinks at Parliament buildings and to members of institutions of the disciplined forces under Section 7 of the Act is not discriminatory as these premises are regulated by other rules and regulations governing the said institutions enacted under specific establishing Acts of Parliament and further the sale of alcoholic drinks in such premises is not intended for personal profit. The Interested Party urged this court to uphold the primary principle of interpretation and constitutional construction that if possible a legislation should receive such a construction as will make it operative and not inoperative as the law abhors a vacuum.

PETITIONS NO. 21 AND 24 OF 2013

13. These Petitions were respectively filed on 31st May 2013 (*Amended on 19th June 2013*) and 7th June 2013 by the Bar Operators within Njoro and Molo Districts. They sought the same prayers as

those in Petition No. 3 of 2011 and on similar grounds. They also further alleged that the provision directing the District Committees not to issue licences to the Petitioners if they operate within 300 metres of schools and residential premises creates a legal obligation which operates retrospectively and cancels, annuls and or limits an already existing right. This, they argued is against the tenets of the rule of law and is therefore unconstitutional, null and void.

14. It was also argued that Rule 15 of the Regulations which purports to increase the Licensing fees by 1000% was made without the Petitioners being heard in contravention of their right to fair administrative action under Article 47 of the Constitution. In addition, this rule and the Third Schedule takes into consideration the location of the premises as the only parameter to determine the amount of licence fees to be charged which is not only unreasonable but also contravenes the tenets of subsidiary legislation.

THE RESPONDENTS' CASE

15. In both Petitions, the Hon. Attorney General entered appearance for the First and Second Respondents but did not file any documents in opposition thereof. The Third Respondent did not enter appearance or file any response.

16. The Fourth Respondent in Petition No. 21 of 2013 and the Interested Party in Petition No. 24 of 2013 opposed the Petition by the Replying Affidavits of Florence Mwikali, the Legal Officer of the Fourth Respondent both sworn on 18th July 2013. It was their case that the provisions of the Alcoholic Drinks Control Act are intended to protect consumers under Article 46 of the Constitution. Further the 300 metres rule being challenged was aimed at protecting the health of persons under the age of 18 years by preventing their accessing alcoholic drinks and to protect them from the harmful habits of drunkards who visit the Petitioners' premises. This is in line with Article 57 (d) of the Constitution which guarantees the right of children to be protected from abuse, neglect and harmful practices, the Convention on the Rights of the Child and the African Charter on the Rights of the Child and the Children Act whose main principle is that the best interest of the child should be the primary consideration in all matters touching on children.

17. It was therefore the contention of the Fourth Respondent that the Petitioners are drawing on some articles of the Constitution in isolation with other provisions of the Constitution whereas the case here cannot be described as black and white and in fact, presents a situation where the court has to perform a balancing act between the rights of those buying and selling alcohol, the consumers and the general public.

18. Further, the Respondents denied that the 300 metres rule creates any retrospective obligation or cancels/annuls/limits any existing right because the Liquor Licensing Act, Cap 121, under which the old licences were issued, was repealed by Section 69 of the Alcoholic Drinks Control Act. Consequently, these licences will not be valid upon their expiry and the new licences will only be issued upon compliance with the new conditions.

19. The Fourth Respondent further denied that the Petitioners' right to fair administrative action under Article 47 had been infringed. The Alcoholic Drinks Control Act was passed after the requisite steps in Parliament, wherein the Petitioners were represented by their elected leaders, and have been drawn after consultative fora were held. The regulations were passed in accordance with the principles of the law, many ensuing issues were considered and the parties who would have been affected consulted. The Third Schedule provides for thirteen different types of licences and the Petitioners are at liberty to choose whichever best suited their purpose. In any event while fairness is indeed a requirement in the implementation of the Act, the Fourth Respondent's main focus in aiding the Government in implementing policies under the Act, is the protection of the general public.

20. On the allegation that Section 7 of the Alcoholic Drinks Control Act is discriminative, it was submitted that the Private Member Clubs are not entirely exempted from the provisions of the Act. The premises exempted are those manned by members of the disciplined forces which are regulated by

Section 36 the Armed Forces Act (*Cap. 199 Laws of Kenya*), and Section 85 of the Kenya Defence Forces Act (*No. 25 of 2012*).

21. The Interested Party was of the view that the prayers for Judicial Review orders of Certiorari, Mandamus and Prohibition cannot be issued as Judicial Review is concerned with the decision-making process and not merely on the private rights of the Petitioners or the merits of the decision being challenged. In this case, the Minister acted in accordance with the mandate under the Act and the Petitioners were well represented hence given a chance to air their views.

SUBMISSIONS

22. The Petitioners and the Interested Party filed written submissions to which they annexed various authorities which were highlighted in this court on 21/01/2014.

23. Mr Kurgat for the Petitioners submitted that Section 12 of the Alcoholic Drinks Control Act which prohibits premises located within 300 metres of a school or other learning institution for persons under eighteen years appears reasonable, it is in fact not so. It infringes on the rights of the Petitioners who were using their premises for running bar businesses before the enactment of the Act.

24. The fees imposed under the Third Schedule are unreasonable and were made in contravention of the right to fair administrative action under Article 47 of the Constitution. The Petitioners have been harassed and arrested on account of the provisions of the Fourth Schedule. He therefore urged the court to grant the prayers sought and quash the offending provisions.

25. Mr. Githui for the Petitioners in Petition No. 24 of 2013 associated himself with the submissions of Mr. Kurgat and adopted the submissions made in Petition No. 29 of 2011. He submitted that the concept of right to fair administration action under Article 47 of the Constitution entails procedural fairness and substantive fairness. Under procedural fairness, where the rules or regulations made affect a substantive right, it is then necessary to have public participation.

26. It was his submission that the Third Schedule was partly Ministerial and partly administrative. It affects those engaged in the business of selling alcohol and fairness demands that they be consulted before the same are made. What was alleged by the Respondents to be consultation was in fact communication of results.

27. On substantive fairness it was submitted that the court must consider Articles 24 and 47 of the Constitution. The benchmark of these Articles is that any rule or regulation must **firstly** be rationally connected to the objective, and must not be arbitrary or based on unreasonable considerations. **Secondly** the limitation must impact the rights of the affected parties as little as possible and **thirdly**, the effect of the limitation must be proportionate to the limitation.

28. The objective upon which licences fees was raised was not rational as the same was to raise funds for running of the Fourth Respondent. Its effect will be to wipe out the Petitioners' businesses.

29. Mr Gachanjwa and Mr. E.N Njuguna appeared for the First and Second Respondents. Mr Gachanjwa submitted that Section 3 of the Alcoholic Drinks Control Act provides that its object is to protect those under the age of 18 years from accessing alcohol. The reasonableness of this section goes hand in hand with Article 53(1)(d) of the Constitution, which provides for the protection of children from harmful and detrimental circumstances. It is not repugnant to any law or the Constitution. Counsel submitted that laws are not enacted in vacuum. The majority of the laws enacted are against social ills.

30. Counsel submitted that the Third Schedule which sets out fees is not unreasonable. The fees on issue of alcoholic drinks licences was last set in 1986 so the raise by 2000% was not unreasonable or unattainable and in any event one could choose the licence whose fees he can afford. He submitted that there is no discrimination under the law, and the same seeks to protect the nation including the Petitioners. The bodies or institutions excluded, like Parliament, are not profit making bodies. He

therefore urged the court to dismiss the Petition with costs.

31. Mr. Njuguna began his submissions by drawing to the court's attention that the Ministry for State for Provincial Administration and Internal Security is no longer in existence. He associated himself with the submissions of Mr. Gachanjwa. He raised an issue that the Petition herein was similar in substance to another Petition No. 29 of 2011 which had been filed in Nairobi and the Mombasa Bar Owners had also filed a similar Petition in Mombasa. However there was no evidence produced of these existing matters and this issue was only raised during submissions and could therefore not be considered by the court.

32. The issue of substantive justice was based on location and not turnover. There was no profit returns deposited with the Respondent. The Petitioners were duly engaged and there was communication made to the Bar Owners Association. In addition, there is no evidence that the Petitioners followed up after the enactment of the regulations and were denied audience. He too urged the court to dismiss the Petition with costs.

33. The Interested Party's submissions were that the essence of the Act is primarily to control the alcohol industry and further create revenue for the Government. It was intended to bring order to the otherwise uncontrolled and unregulated sale of alcoholic drinks which posed a threat to the health of consumers by allowing dangerous substances in the market.

34. The Interested Party opposed the grant of any order restraining the implementation of the regulations. This law must be applied to all including the Petitioners and further added that to exempt the applicants on the basis that their businesses are small bars would be unreasonable. It is discriminative if the law were applied differently and selectively on the basis of the size of the business.

35. The Interested Party therefore urged the court to dismiss the Petition and preserve the operation of the statute and its regulations as the same is constitutional.

THE ISSUES AND ANALYSIS THEREOF

36. Having carefully considered the Petitions filed, the Supporting and Replying Affidavits, documents filed, submissions of counsel and authorities cited, I find the following to be the issues for determination-

- (a) whether Section 7 (3) (h) and (i) of the Alcoholic Drinks Control Act and the Fourth Schedule of the Regulations are unconstitutional,
- (b) Whether the provisions of Section 12 (1) (c) of the Alcoholic Drinks Control Act contravene the right to property,
- (c) Whether the regulations relating to qualification of members of the District Committee were made *ultra vires*,
- (d) whether the regulations providing for licencing fees are unconstitutional for lack of participation by the Petitioners.

I will consider each of the issues in turn.

OF WHETHER SECTION 7 (3) (h) and (i) OF THE ALCOHOLIC DRINKS CONTROL ACT AND THE FOURTH SCHEDULE OF THE REGULATIONS ARE UNCONSTITUTIONAL

37. It was alleged in the Petitions that Section 7 of the Alcoholic Drinks Control Act which exempt Parliamentary Buildings, canteens, clubs and other premises run by the Disciplined Forces are discriminative against the Petitioners and therefore infringe their right to equality as provided for under Article 27 of the Constitution-

27. (1) Every person is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

38. By the above Article, all persons are deemed equal before the law and are subject to it regardless of their status or positions. They are entitled to the benefits and protection accorded by the law which applies to the class under which they fall and the courts are bound to administer and apply the laws impartially. In my view, equality encompasses fairness in treatment, dignity, respect and access to fundamental rights and freedom.

39. In the case of **TABRO TRANSPORTERS LTD V ABSALOM DOVA LUMBASI [2012] eKLR**, the court took a broad approach in its construction of Article 27 to determine whether the requirement under the Civil Procedure Act that judgment debtor must deposit security as a condition of stay was constitutional where the judgment debtor was poor and could not comply with this condition. It was argued that this law, treated the poor and the rich differently, and amounted to unfair discrimination. The court declined to apply the Canadian authorities cited as according to it the provisions of S. 15(1) of the Charter and those under Article 27 were not similar. It held at paragraph 50 of its judgment-

“I would therefore prefer to adopt a broad approach that looks at the conduct complained of within the constitutional structure of the nation, the internationally accepted best practices and the circumstances of the case without trying to circumscribe at the outset any particular ground alleged to have been offended. That kind of assessment is not a justification but an evaluation of the context in which the differentiation occurs, which accords more with the spirit and purpose of the Bill of Rights.

The notion of disadvantage is established on the basis that the beneficiary party was treated less favorably than a judgment holder should, which constituted a disadvantage in a real and substantive way. Applying this test I have settled on, mere argument by the Applicant that the Respondent is poor and cannot refund the decretal sum, is not materially disadvantageous to the Applicant. It must be shown that the differentiation was applied to the detriment of the Respondent or some real disadvantage resulted or some right was infringed.”

40. In the American case of **RIGNER v STATE OF TEXAS (1940) 310 US 141**, the court held -

“The Fourteenth Amendment enjoins equal protection of the laws, and laws are not abstract propositions. They do not relate to abstract units, A,B, and C, but are expressions of policy arising out of specific difficulties addressed to the attainment of specific ends by use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”

41. In the South African Case of **PRINSLOO Vs. VAN DER LINDE [1998] 1 LRC 173-**

“If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to s 33, or else constituted discrimination which had to be shown not to be unfair, the courts would be called upon to review the justifiability or fairness of just about the whole legislative program and almost all executive conduct..... the courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory “in the constitutional sense” Taking as comprehensive a view as

possible of the way equality is treated in s8, we would suggest that it deals with differentiation in basically two ways: differentiation which does not involve unfair discrimination and differentiation which does not involve unfair discrimination.”

42. The court then proceeded to describe what amounts to unfair discrimination as follows-

“It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its peoples for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently..... Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element.... It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as “mere differentiation”. In regard to mere differentiation, the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest “naked preferences” that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. For the purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner....Accordingly, before it can be said that mere differentiation infringes s8, it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship, the differentiation would infringe s 8. But while the existence of such a rational relationship is a necessary condition for the differentiation not to infringe s 8, it is not a sufficient condition; for the differentiation might still constitute unfair discrimination if that further element.... is present.”

43. In the Kenya case of **FEDERATION OF WOMEN LAWYERS KENYA (FIDA-K) & 5 others v ATTORNEY GENERAL & ANOTHER** [2011] eKLR, the Court of Appeal stated-

“On the other hand, the requirement of equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the law so passed cannot create differences as to the persons to whom they apply and the territorial limit within which they are enforced. We are aware that individuals in any society differ in many respects such as age, ability, education, height, size, colour, wealth, occupation, race and religion. In our view any law made, must of necessity be clear as to the making of the choice and difference as regards its application in terms of persons, time and territory. Since the constitution can create differences, the question is whether these differences are constitutional. If the basis of the difference has a reasonable connection with the object intended to be achieved therefore the law which contains such a provision is constitutional and valid. On the other hand, if there is no such relationship, the difference is stigmatized as discriminatory and the provision can be rightly said to be repugnant to justice and therefore invalid.

The purpose of the Constitution may be either the elimination of a public mischief or the achievement of some positive public good. It can therefore be stated that discrimination is the essence of classification and that equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is among equals and classification is therefore to be founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved. There is also no denial of equality of opportunity unless the person who complains of discrimination is equally suited with the person or persons who allege to have been favoured.”

44. Thus the law on equality does not mean that everyone should be treated the same way, that is,

the substantive law should be the same for all persons, or that the law should be applied to all persons equally without discrimination as this would not only be unreasonable but unjust.

45. The provision is therefore violated by a difference in treatment between persons who are in comparable situations which is neither objective nor reasonable. Where such differential treatment is on account of factual differences with a legitimate aim taking into account the principles of legality proportionality and democratic practice, then the derogation from the right is deemed legitimate.

46. In the instant case, it was alleged that Section 7 (3) (1) (h) and (i) are unconstitutional to the extent that they exempt Parliament and institutions run by the Disciplined Forces from applying for a licence under the Act. The said section exempts application of Section 7(1) which prohibits any person from selling, disposing of or dealing with any alcoholic drinks except under and in accordance with licence issued under the said Act, and at sub-section (3) provides for dealings which are exempted -

(h) the sale of alcoholic drinks at Parliament Buildings, if sold with the permission of the Speaker of the National Assembly;

(i) the sale of alcoholic drink to members only of any canteen, club, institute, mess or similar institution of the disciplined forces.

47. It was argued by the Petitioners that Parliament and the Disciplined Forces are also involved in the business of selling alcohol to patrons just like the Petitioners, and the law should apply to them equally.

48. Whereas I agree that these institutions are also involved in the sale of alcoholic drink, the distinction from the Petitioners is that the sale in those premises is regulated. Indeed for a person to sell alcoholic drink within Parliament Buildings, he must seek the permission of the Speaker who may impose conditions to ensure that these activities are in accordance with the law.

49. Similarly, Subsection (3) (I) above only exempts the application of the Act to sale of alcoholic drink in premises run by the Disciplined Forces to its members implying that sale to the public must be in accordance with the Act. Its members are regulated under Sections 36 and 85 of the Armed Forces Act and the Disciplined Forces Act respectively, which prohibit drunkenness and misconduct through alcoholic drink and drugs for the members to whom the provisions of those Acts apply.

50. In contrast, the Petitioners activities were unregulated prior to the enactment of the Alcoholic Drinks Control Act, 2010. There were no adequate regulations to govern the persons to whom alcoholic drink could be sold, the times of sale or the premises where such alcoholic drink could be sold. As such the Act was enacted with the object to, *inter alia*, protect the health of consumers by regulating the sale of illicit brews, preventing excessive consumption of alcoholic drinks by preventing misleading or deceptive inducements and to protect the health of persons under the age of eighteen by preventing their access to alcoholic drinks.

51. The Petitioners do not fall within the categories under Section 7 (3) and as such the regulations that apply to Parliamentary Buildings and the Premises run by the Disciplined Forces do not apply to them. The factual context in this case is such that the law could not be applied equally in the situations presented.

52. It was further alleged that the Fourth Schedule of the Alcoholic Drinks Control (Licensing) Regulations as read together with Section 16 of the Act was discriminatory because it prescribed different times to different premises during which they could sell alcohol. Whereas the Petitioners' licence hours are limited to between 5.00pm and 11.00pm from Monday to Friday and 2.00pm to 11.00pm on weekends and public holidays, supermarkets and franchised retail stores (*urban*) drinks establishments may operate between 10.00 am and 8.30pm on any day of the week. The holders of hotel alcoholic drink licence are authorised to sell drinks at any hour on any day of the week to a lodger for his and his guests' consumption while under a restaurant's licence alcoholic drinks may be sold on any day of the week to

persons partaking meals at the restaurant.

53. It seems to me that that the categorization of the premises and determination of their licencing hours was one based on various considerations including the nature of the premises. The court lacks jurisdiction or the tools to determine policy and cannot go to the merits of the substance of legislation or the rationale behind it unless it is shown that the same is unconstitutional. The court therefore cannot question why a hotel owner should be issued a different licence from that issued to the Petitioners as such matters are outside its mandate.

54. The Petitioners have not established that persons who fall in the same category with any of the above establishments and were accorded unfair preferential treatment. As such the Petitioners have failed to demonstrate that their right to equal treatment and non-discrimination has been infringed. This ground of the Petition therefore fails.

OF WHETHER SECTION 12(1)(c) OF THE ALCOHOLIC DRINKS CONTROL ACT CONTRAVENES THE RIGHT TO PROPERTY

55. The Petitioners herein did not produce any evidence to prove title or other interest in land which interest they were being arbitrarily deprived by the State. Nevertheless, I will proceed to determine whether the provisions of S. 12 of the Alcoholic Drinks Control Act are unconstitutional to the extent that they limit use of land. The right to property is enshrined under Article 40 (1) of the Constitution and states as follows -

“40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

(a) any description; and

(b) in any part of Kenya

(2) Parliament shall not enact a law that permits the State or any person-

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit or in any way restrict the enjoyment of any right under this Article on the basis of any grounds specified or contemplated in Article 27 (4).”

56. This right to property upholds the right of a person to own property anywhere within the Republic of Kenya, and further protects his interest and rights over land, which include the right to use and develop the land and from being arbitrarily curtailed by the State.

57. However, this right to own, use land is not absolute and is subject to the limitations under Article 24 of the Constitution. In the first instance, the State may deprive a person of ownership of land in exercise of its power of eminent domain, which allows it to acquire private land for public use subject to prompt compensation. (*Article 40 (3)*).

58. In addition, the State may in exercise of the powers conferred upon it under Article 66 (1) of the Constitution regulate the use of any land, or any interest in or right over land, in the interest of defence, public safety, public order, public morality, public health, or land use planning. To this end, Parliament enacted the Alcoholic Drinks Control Act and provided in Section 12 (1)(c) that the premises in respect of which an application for a licence to sell alcoholic drinks is made must be located at least three hundred metres away from any nursery, primary, secondary or other learning institution for persons under the age of eighteen years.

59. It was argued by the Petitioners that this regulation prohibiting the issuance of licences to

premises which are within three hundred metres of a school or other learning institution for persons under the age of eighteen years, greatly curtails their right to use premises and therefore infringes on their right to property under the Constitution.

60. Article 66 allows regulation on land use essentially in the public interest. The State is the custodian of public rights, has the duty of promoting and protecting the public interest. Thus they must regulate all activities on land use and ensure that they are for the public good and do not infringe on the rights of the community. The Petitioners therefore do not have the right to absolute use of their property or to sell alcoholic drinks and their rights must be balanced against those of the public.

61. The Respondents and Interested Parties argued, that the limitation imposed by Section 12 (3) (c) was necessary to protect children from being exposed to alcoholic drinks and from the harmful habits of the persons partaking these substances which may disrupt their academic activities. In my view, this limitation was in accordance with the purpose of regulating land use under Article 66 of the Constitution and therefore met the threshold under Article 24 of the Constitution, of being a reasonable and justified limitation of the right to use property in an open and democratic society.

62. However, where the State does not deprive a person of ownership and occupation of his land, but by regulations enacted, deprive him of complete use of his property, thereby rendering him incapable of carrying out any economic activity, such person is entitled to compensation. This was the holding of the US Supreme Court in **PENNSYLVANIA COAL CO. Vs. MAHON, 260 U.S. 393 [1922]** which case established the principle which was referred to as “*regulatory takings*” by which the courts recognized that government regulations have the same effect on a property owner as if the government had actually physically appropriated the land.

“A regulation does not, however, go “too far” so as to require compensation for a taking where it merely decreases property value or prevents property owners from doing exactly what they want with their property. As long as a regulation allows property to be put to productive economic use, the property has value and the regulation will not be deemed to deny all reasonable economic use of the property; there is no regulatory taking in that situation. Property owners do not have a constitutional right to the most profitable use of their property.”

63. In the instant case, the regulation was only in relation to the use of the land for purposes of setting up a business for sale of alcoholic drinks. It did not curtail the use of the premises to an extent which imposed an unfair burden on the Petitioners by rendering it impossible to exercise any economic use of the property.

64. In the premises therefore, I find and hold that the provision under Section 12(3)(c) of the Alcoholic Drinks Control Act prohibiting the use of premises within three hundred metres of any nursery, primary, secondary or other learning institution for children under the age of 18 years to be constitutional as the same does not in any way threaten to or infringe the Petitioners' rights to property. The state is also mandated to address the needs of the vulnerable groups in society which includes women, children and the youth. This provision is therefore within the constitutional duty of the state and failing to enact such legislation the state would have been in breach of Article 21 (2) as read together with Article 43 (a) (*Musinga, J's Ruling delivered on 24th January 2011 on the application dated 14th January 2011 made in Petition No. 3 of 2011*).

65. It was further alleged that this provision is unconstitutional for the reason that its application is retrospective and further seeks to cancel existing rights and interests. I however find that this allegation is without merit for the following reasons.

66. The Petitioners were bar operators and had valid licences to conduct their businesses issued under the repealed Liquor Licensing Act, (*Cap. 121 Laws of Kenya*). These licences were not perpetual and were renewed annually upon payment of the requisite fees and satisfaction of the conditions set out for the grant of the licence. The new Alcoholic Drinks Control Act, which repealed the Liquor Licensing

Act, imposed new conditions for the subsequent grant of a licence. Its provisions were only applicable to persons wishing to renew or apply for fresh licences. It did not apply to persons holding licences under the repealed Act but only came into force once the rights under the licence had been extinguished by the expiry of the licence. It was therefore not retrospective as it did not in any way apply to cancel or limit rights conferred by the licences issued under the repealed Act. Argument to the contrary has no basis at all. This ground too fails.

OF WHETHER THE REGULATIONS RELATING TO QUALIFICATION OF MEMBERS OF THE DISTRICT COMMITTEE WERE MADE ULTRA VIRES

67. The composition of the District Alcoholic Drinks Regulation Committee established under Section 8 (1) of the Alcoholic Drinks Control Act is provided for under sub-section (3) thereof to be as follows-

- (a) the District Commissioner of the District who shall be the chairperson;
- (b) the District Medical Officer of Health;
- (c) Officer Commanding Police Division;
- (d) One person nominated by every local authority in the District;
- (e) three residents of the District, appointed by the Minister at least two of whom shall be women;
- (f) one person designated by the relevant agency who shall be the secretary to the District Committee.

68. The First Schedule of the Regulations, which makes provision as to the conduct of the affairs of the District Committee, provides in Rule 1 (2) for persons who are not eligible for appointment as members of the District Committee. In sub-rule 2(a) and (b) by which the Petitioners are particularly aggrieved prohibits membership to -

- (a) the holder of any licence for the sale, manufacture or distillation of any alcoholic drink;
- (b) any person having a pecuniary interest in a partnership, company or society which is a licensee.

69. It was their contention that in enacting the above regulations, the Minister acted outside the powers conferred upon him by the parent statute as he had no authority to limit membership of the Committees.

70. In determining this question, it is incumbent upon this court to examine the relevant sections which donate the power to the Minister to make regulations. Section 68 (1) of the Alcoholic Drinks Control Act empowers the Minister to make regulations generally for the better carrying out of the objects of the Act and in particular prescribe anything required by the Act to be prescribed or prohibit anything required by the Act to be prohibited (S. 68(2)(a)). Section 8(5) of the Act further provides that the conduct of business and affairs of the District Committee shall be in accordance with the prescribed rules, implying that the Minister shall make the necessary regulation as to the business of the Committee.

71. The question that then follows is whether, in making provision for eligibility of the members the Minister was acting outside the mandate prescribed above. In interpreting the section, I am guided by the provisions of Section 31(a) & (d) of the Interpretation and General Provisions Act, (*Cap 2 Laws of Kenya*) -

“31. Where an Act confers power on an authority to make subsidiary legislation, the following

provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation-

(i) when subsidiary legislation purports to be made or issued in exercise of a particular power or powers, it shall be deemed also to be made or issued in exercise of all other powers thereto enabling (S. 31(a)),

(ii) where an Act confers powers on an authority to make subsidiary legislation for a general and also for special purposes incidental thereto the enumeration of the special purpose shall not be deemed to derogate from the generality of the powers conferred with reference to the general purpose (S. 31(d)).

72. In providing for the eligibility of the members the Minister was acting within the powers conferred upon him by Section 68 of the Act. Of course these provisions on the qualifications of members have the capability of locking out persons as it sets out the criteria, but these provisions are within the object of the Act, and flow from the powers conferred upon the Minister under the Act. My reading of Sections 8(3) (*composition of the District Committee*) and (5) (*other persons appointed by the Minister*) does not disclose a contrary intention.

In the premises, I find and hold that the regulations relating to qualifications of members of the District Committee were not made ultra vires the Act. Again this ground too fails.

OF WHETHER THE PETITIONERS WERE CONSULTED BEFORE THE ENACTMENT OF THE THIRD SCHEDULE

73. It was alleged by the Petitioners that the licence fees imposed under the Third Schedule are excessive and punitive and further that the same was made without the Petitioners being consulted first. Mr. Githui argued that this was against the tenets of procedural fairness in administrative actions which demanded that all those engaged in the alcohol business and who stood to be affected by the increment in licence fees be consulted.

74. The Respondents and Interested Party contended that players in the alcohol industry including the Kenya Tourism Federation Secretariat were duly consulted. The regulations were passed in accordance with the principles of law and many ensuing issues were considered. In any event, it was submitted there are thirteen different types of licences and the Petitioners are at liberty to choose whichever type best suited their purpose.

75. The concept of public participation in matters of governance is as important as it is vexing. It is derived from the Constitution. *Under Articles 1 (1), (2), (3), the sovereign power is vested in the people and is exercised by them directly or through elected officials. Article 10 further provides that the national values and principles of governance which bind all state organs, state officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions include democracy and participation of the people, good governance, integrity, transparency and accountability.* We borrowed the concept from the South African Constitution. Decisions on the issue from the Superior Courts of South African are therefore very persuasive.

76. *The concept of facilitation of public involvement was explained in the South African case of DOCTOR'S FOR LIFE INTERNATIONAL Vs. THE SPEAKER NATIONAL ASSEMBLY AND OTHERS 9CCT12/05)[2006] ZACC II, as follows-*

“The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the

conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.”

77. In the case of **KENYA SMALL SCALE FARMERS FORUM & 6 OTHERS V REPUBLIC OF KENYA & 2 OTHERS [2013] eKLR** the court held-

“One of the golden threads running through the current constitutional regime is public participation in governance and the conduct of public affairs. The preamble to the Constitution recognizes, “the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.” It also acknowledges the people’s ‘sovereign and inalienable right to determine the form of governance of our country...’ Article 1 bestows all the sovereign power on the people to be exercised only in accordance with the Constitution. One of the national values and principles of governance is that of ‘inclusiveness’ and ‘participation of the people.’ Other principles include the rule of law, democracy, human rights, integrity, transparency and accountability. These principles bind all State organs, State officers, public officers and all persons generally. Under Article 129, executive authority derives from the people of Kenya is to be exercised in accordance with the Constitution.”

78. These sentiments were echoed in the case of **NAIROBI METROPOLITAN PSV SACCOS UNION LIMITED & 25 OTHERS Vs. COUNTY OF NAIROBI GOVERNMENT & 3 OTHERS [2013] eKLR** where it was further stated-

“It is thus clear to me that the constitution contemplates a participatory democracy that is accountable and transparent and makes provision for public involvement.”

79. Thus, as was held in the case of **MERAFONG DEMARCATION FORUM AND OTHERS V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 JUNE 2008) -**

“the concept of public participation, is in line with the contemplation in the Constitution of elements of participatory democracy, in addition to representative democracy. Participatory and representative democracy must be seen as mutually supportive. Public involvement also enhances responsible citizenship and legitimate government. It furthermore accords with the constitutional principle of co-operation and communication between national and provincial legislatures.”

80. The courts have further held that there is no specific manner in which public participation is to be conducted as the Constitution is silent on this. All that is required is to establish that reasonable steps were taken to afford the public a chance to participate in the passing of the legislation or regulations. This was also the holding of the court in the **MERAFONG DEMARCATION FORUM AND OTHERS V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS (supra) -**

“The obligation to facilitate public involvement may be fulfilled in different ways. It is open to innovation. Legislatures have discretion to determine how to fulfil the obligation. Citizens must however have a meaningful opportunity to be heard. The question for a court to determine is whether a legislature has done what is reasonable in all the circumstances. In determining whether the legislature acted reasonably, this Court will pay respect to what the legislature assessed as being the appropriate method. The method and degree of public participation that is reasonable in a given case depends on a number of factors, including the nature and importance of the legislation and the intensity of its impact on the public.”

81. Section 68(1) of the Act confers upon the Minister the power to make Regulations on recommendations of the relevant agency. The relevant agency is defined as the “National Campaign Against Drug Abuse Authority (NACADA), NACADA being a state organ, is bound by the provisions of

the Constitution regarding public participation.

82. In their Replying Affidavit Florina Mwikali Mutua, the Fourth Respondent's Legal Officer (*in Petition No. 21 of 2013*), depones inter alia that the fees prescribed in the Third Schedule to the Regulations were suggested by the industry. The term “*industry*” is neither defined in the Act nor the Regulations. It can however be deduced from the structure of the Act and the Regulations that the term refers to licensed brewers, licensed wholesalers, and no doubt retailers such as the majority of the Petitioners, and that the fees were based upon economic circumstances prevailing in the industry, that the purpose of the Act and the Regulation made thereunder was to protect the general public and in particular children. The Respondent also pointed out that the Regulations give a wide variety of licences and that the Petitioners were at liberty to choose and apply for the type of licence which was most affordable to them.

83. By far the Petitioners' cry is that they were not consulted either in the process of enactment of the Act, or the making of the Regulations.

84. As already observed in the foregoing paragraphs of this judgment, the concept of public participation is an enigmatic and vexing one. There are those, like the Fourth Respondent who hold the view that it is impossible to consult every possible person in the process of enactment of legislation or the making of regulations. That school of thought holds that an Act of Parliament passes through constitutionally prescribed steps or procedures in Parliament, an institution where the Petitioners are ably represented by their Member of the National Assembly, and that both the Act, and the Regulations were passed after various consultative fora were held.

85. However, as noted both in the South African cases above (paras. 76 and 77, and in Kenya Case (*para. 78*), the concept of public participation enshrined in Articles 10 and 12 of the Constitution of Kenya 2010, is a difficult one but needs to be given effect both before and after legislative enactment. This may take several forms -

- (i) the concept envisages political participation in the conduct of public affairs, such as the right to vote, and to be elected or appointed to public office,
- (ii) the right to be engaged in public debate and dialogue with elected representatives at public hearings,
- (iii) the duty to facilitate public participation in the conduct of public affairs,
- (iv) ensuring that ordinary citizens the “*hoi polloi*,” the “*lala hoi*” have the necessary information and are given opportunity to exercise their say not merely in election and appointment to political office but also economic participation, and conduct of their affairs.

86. But, this begs the question on the methods or mechanisms for achieving public participation in the conduct of political and economic affairs of the country. Again the South African experience (*para. 80*) is of assistance – the obligation to facilitate public involvement maybe fulfilled in different ways. “***It is open to innovation***” - my emphasis. Legislative procedures are alien to ordinary citizens, more so to rural folk. The County Commissioners, and their deputies (*the successors of the ubiquitous Provincial Administration*) must mobilise their chief agents, the Chiefs and Assistant Chiefs (*whose titles have remained unchanged even in the new dispensation*) and inform ordinary citizens of impending legislation that would affect their welfare or the way they conduct their businesses. Such meetings or “*barazas*” must be documented and reduced into reports to the relevant ministries or state agencies, as records of public participation. The print and electronic media ought to give prominence to such public participation in respect of every County and Sub-County. The media have that mandate under Article 34 of the Constitution on the freedom of the media. Invitation to file memoranda by ordinary citizens, and records thereof be kept. Innovation is the name of the game to give effect to the concept of public participation. There are Rwandan Government documentaries showing H. E. Kagame, the President of Rwanda with shirt sleeves rolled-up attending public barazas at County and even Sub-County levels and listening to

questions and issues raised by ordinary citizens, and requiring the relevant technocrat or bureaucrat to answer them. Such occasions are absent among our relevant Cabinet Secretaries, and their Principal Secretaries. Let the Cabinet Secretary go to every County and seek citizen's views on new legislation in particular that which would affect the way they conduct their affairs.

87. To say that the Regulations give a variety of licences to suit every Petitioner's financial ability does not answer the Petitioners' point that they were not granted an opportunity to participate in the deliberations leading either to the enactment of the Act or the publication of the Regulations. The majority of the Petitioners are retailers of alcoholic drinks. It is impossible to consult each and every one of them. They are certainly represented by their members of the National Assembly, and Senate (*Parliament*), in the passage of any Act. Though the Fourth Respondent was short of specifics on consultations, it is a matter for judicial notice that NACADA run campaigns across the Republic leading to the publication of the Regulations. NACADA says that members of the “*industry*” were consulted. The Replying Affidavit of their Legal Officer fell short of specifics of who the members of the industry consulted were.

88. Although the Petitioners were equally loud on the large increase of fees for new licences they largely ignored the Respondents' contention that the fees for alcoholic drinks licences were last set in the year 1986, that is some 24 years ago before the new Act and Regulations introduced the new licensing regime. The court cannot therefore ignore the passage of time and lacks expertise to declare that the increase of fees is unreasonable.

89. Similarly the court cannot say with certainty that there was comprehensive consultation in the passage of the new Regulations. It cannot also say that there was no consultation. The benefit of doubt will therefore go to the purpose of the legislation to regulate the manufacture and sale of alcoholic drinks, and to protect consumers, and especially the children.

90. In the result therefore I find and hold that though the consultation may not have been as comprehensive as possible, there was such consultation before the Alcoholic Drinks Control (Licensing) Regulations, 2010 were published. The Petition fails on this ground as well.

FINAL ORDERS

91. Having found as above I make the following determinations -

- (a) Section 7 (3) (h) and (i) of the Alcoholic Drinks Control Act and the Fourth Schedule are constitutional and do not infringe on the right to equality and non-discrimination under Article 27 of the Constitution.
- (b) Section 12 (1) (c) of the Alcoholic Drinks Control Act does not infringe on the Petitioners' rights to property.
- (c) The provisions on the qualifications of members of the District Committee were not made *ultra vires*.
- (d) The provisions of the Licence Fees under Third Schedule are constitutional.

92. The Petition having failed on all grounds, it is dismissed with a direction that each party bears its own costs.

93. There shall therefore be orders accordingly.

Dated, signed and delivered at Nakuru this 8th day of May 2014

M. J. ANYARA EMUKULE

JUDGE