



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.347 OF 2012

BETWEEN

RICHARD M. KAGIRI.....1ST PETITIONER

JANE WANGU.....2ND PETITIONER

JAMES MBURU (*Suing on their behalf and on behalf of the members of Kiambu Liquor Welfare Group and their employees*).....3RD PETITIONER

AND

THE MINISTER FOR STATE FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

NACADA.....INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 13th 2012 was filed on 13th August 2012 by an entity known as Kiambu Liquor Welfare Group through its officials, Richard M. Kagiri, Jane Wangui and James Mburu. The Group is registered as a Self-Help Group and its certificate of Registration dated 6th August 2012 was issued by the Ministry of Gender, Children and Social Development.
2. The Petition principally challenges the provisions of **Section 7(3)(1) and Section 12(1)(c) of the Alcoholic Drinks Control Act** (hereinafter “the Act”) and the **Alcoholic Drinks Control (Licensing)Regulations, 2010** and specifically the **First Schedule, Paragraphs 1(2)(a) and (b)** thereof.
3. The said provisions of the law are said to be unconstitutional and have impacted negatively on the Petitioners' liquor selling businesses and also their right and that of their employees to gainful employment and fair remuneration as guaranteed by **Article 41 of the Constitution**.
4. They now seek the following orders in that regard:

“(a) A declaration that the provisions of Section 7 of the Alcoholic Drinks Control Act and paragraphs (1), (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) A declaration that the provisions of Section 7 of the Alcoholic Drinks Control Act 2010 are unconstitutional, null and void.

(c) A declaration that the provisions of paragraph 1(2)(a)(b) of the 1st Schedule and the Third Schedule of the Alcoholic Drinks Control (Licensing) Regulations are unconstitutional null and void.

(d) An order of prohibition to prohibit 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.

(e) A declaration that the Petitioners are entitled to freely conduct their liquor business operations as per their licenses without any interference.

(f) A declaration that the numerous/multiple licenses imposed on entity holders are burdensome, infringes on the economic fundamental rights as enshrined in the Constitution and are unconscionable, unreasonable, unbearable and unconstitutional.

(g) Costs of this application.”

Petitioners' Case

5. The case for the Petitioners is contained in the following pleadings and documents;

(i) The Supporting Affidavit of Richard Kagiri sworn on 13th August 2012. The same has been adopted vide the Affidavits in support sworn by Jane Wangui and James Mburu on the same day. None of the said Affidavits has any annexure to it.

(ii) An Affidavit in support of the Notice of Motion dated 13th August 2012. That Notice of Motion was seeking interlocutory orders of injunction to restrain the Kenya Police Service from arresting, detaining or in any other way harassing the Petitioners, their employees, agents, servants and or any other person connected to their businesses in any manner pending the hearing and determination of the Petition.

The said Affidavit has a number of annexures to it and I note that on 6th September 2012, Mabeya J. granted interim orders in the above terms.

(iii) Written Submissions together with authorities filed on 22nd April 2013 by the advocates for the Petitioners, M/s. Osoro Chege Kibathi & Co Advocates.

6. I should also state this from the outset; in the written Submissions, a number of facts which were never pleaded either in the Petition or in the Supporting Affidavit to it were introduced. They include the following;

(a) That the Petitioners and those they represent have bars which are within 300 metres of schools. The bars or schools are not named.

(b) That some of the schools, which are also not named, were established and sprung up within 300 metres of their bars, long after the bars had been opened.

(c) A list of seven criminal cases is given in which certain persons were allegedly charged with offences under the Act.

7. I will revert to the above issues later but as I indicated above, the Supporting Affidavit has no annexures to it but for the sake of substantive justice, I may well have to refer to the Affidavit in support of the Motion aforesaid where a number of annexures which are relevant, appear.

8. With the above background, **Section 7(1)** of the **Act** provides as follows;

“(1) No person shall-

(a) manufacture or otherwise produce

(b) sell, dispose of, or deal with;

(c) import or cause to be imported; or

(e) export or cause to be exported,

any alcoholic drink except under and in accordance with a licence issued under this Act..”

9. It is the Petitioners' contention that the above provisions contravene **Article 27** of the **Constitution** which provides as follows;

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

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

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against

any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against

another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed

under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide

for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”

10. It is their further contention that when a statutory provision purports to favour a group of people and businesses in the way licenses are issued, then it is discriminatory and in any event, it serves no legitimate purpose. Reliance in that regard is placed on the decision in **State of Kerala & Another vs N. M. Thomas & Others, C.A 1160 of 1974** and the arguments on alleged discrimination will shortly become apparent but suffice it to say that they relate to licensing of sale of alcohol within the National Assembly and military barracks.

11. Another alleged aspect of discrimination is that under **Section 16** of the **First Schedule of the Regulations**, the times within which to sell alcoholic drinks is said to be discriminatory. This is so, it is urged, because supermarkets and franchised retail stores are authorised to sell alcoholic drinks on any day of the week during the hours 10.00 a.m. - 8.30 p.m; hotels are authorised to sell alcoholic drinks for lodgers and their guests at any hour within the premises while restaurants are authorised to sell alcoholic drinks whenever a person is consuming a meal. On the other hand, the general retail alcoholic drinks license for bar owners is limited to sale of alcohol between 5.00 p.m. and 11.00 p.m. (*during week days*) and 12.00 p.m. to 11.00 p.m. (*during weekends*). It is their argument therefore that the selective application of the law is discriminatory and unconstitutional. Reliance in that regard is placed on the case of **Community Advocacy and Awareness Trust & 8 Others vs Attorney General, Petition No.243 of 2011.**

12. Regarding **Section 12(1)(c)** of the **Act**, the Petitioners contend that the said Section contravenes **Article 40** of the **Constitution** in as far as it purports to limit their right to own and acquire property. **Section 12(1)(c)** aforesaid provides as follows;

“(1) The District Committee shall not grant a new licence for the sale of an alcoholic drink to be consumed on the premises unless the District committee is satisfied-

(a) ...

(b) ...

(c) that the premises in respect of which the application is made are located at least three hundred metres from any nursery, primary, secondary or other learning institutions for persons under the age of eighteen years”

13. **Article 40** then provides as follows;

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

(a) of 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 of the grounds specified

or contemplated in Article 27 (4).

- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**
- (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—**
- (i) requires prompt payment in full, of just compensation to the person; and**
- (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.**
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.”**

14. It is on this aspect of their case that in submissions, the Petitioners have alleged in a nutshell that it is not their fault that their bar businesses are close to schools and other educational institutions and elsewhere above, I have indicated their contentions in that regard. It is also their case in the above regard that they are overburdened because under the Third Schedule to the Regulations aforesaid, the license fees for running a bar business have been increased from Kshs.4,800/- to Kshs.30,000/- which increment is totally unconscionable.

15. That in addition to the above payments they also pay for other licenses to sustain their businesses including the music copyright license, County Council license, public health license, betting control license, Ministry of Tourism license, catering levy tax and turn over tax.

16. I should indicate that having perused the annexures to the Supporting Affidavit attached to the Motion aforesaid, what I have seen as evidence in support of the above contentions are the following documents;

- (i) A list of the names of purported members of the Kiambu Liquor Welfare Group with the bar name and telephone numbers also listed. The members are 75 in number and it is unclear who prepared the list as it is on a blank typed sheet of paper only. Another list containing 233 names is said to contain the names of the Petitioners' employees.
- (ii) Four (4) Alcoholic Drink Licenses issued under the Act, issued to Esther Wambui Kamau to run a “general retail bar”, Peter Goko Nene to run a restaurant, Joseph Njau Mwaura to run a restaurant and Joseph Kinoro Gathua to run a restaurant.

- (iii) A music copyright public performance licence issued to Check Point Bar (ran by Richard Mung'u).
- (iv) A single business Permit issued by the Municipal Council of Kiambu for Peter Goko Nene.
- (v) A licence issued to Peter Goko Nene by the District Public Health officer, Kiambu under the Food, Drugs, Chemical Substances Act (Food is also attached).

17. It is obvious that none of the officials of the Welfare Group have exhibited any of their own licences as representatives of the others but I presume that the persons named above are members of the said group.

18. On public participation, it is the Petitioners' case that while that principle is entrenched in **Article 10(2)** of the **Constitution**, paragraphs **2(a)** and **(b)** of the **First Schedule** of the Regulations prohibit a certain class of people from being members of the District Liquor Licensing Committee particularly holders of licenses for sale, manufacture and distillation of alcoholic drinks.

19. It is for the above reasons that the Petitioners claim that their businesses have suffered and that this Court has the mandate under **Article 165(3)(d)** of the **Constitution** to check the excesses of the Legislature and safeguard the rights of the citizenry by granting the orders elsewhere above set out.

1st and 2nd Respondents' Case

20. The Attorney General on 5th September 2012 filed the following Grounds of Opposition.

- “(1) That the Petition is incompetent and a gross abuse of the Court's process.***
- (2) That the rights claimed are not absolute.***
- (3) That there is no violation of the Constitution or constitutional right of the Applicant/Petitioner disclosed hence no justifiable cause.(sic)***
- (4) That there is no constitutional issue for the Court's determination.”***

21. Later, he filed written Submissions and indicated that they were being filed on his own behalf and on behalf of the 1st Respondent as well.

22. In the submissions, it is their joint case that firstly, the Petitioners have no authority to institute the present Petition on behalf of members of the Welfare Group and reliance in that regard is placed on **Order 1 Rule 13** of the **Civil Procedure Rules** and the decisions of Kimaru, J. in **Ndungu Mukonya & 473 Others vs Stephen Wangombe & 9 Others (2005) eKLR and John Njoroge & Others** (citation supplied is incomplete and no copy of the judgment was supplied either).

23. On the issue whether a permanent injunction should be granted as prayed, it is their case that following the decision in **Giella vs Cassman Brown & Co. Ltd [1973] E.A. 358**, the Petitioners have failed to show why judicial discretion should be exercised in their favour in the circumstances of their case.

24. As to whether any of the rights under **Articles 27, 40, 41** and **46** of the **Constitution** have been violated, it is the 1st and 2nd Respondents' contention that none of the rights pleaded are absolute and the limitation can be justified in the present circumstances because of the greater public good that the impugned legislation is intended to achieve. In that regard reliance was placed on the following decisions;

- (i) **State of Kerala vs N.M. Thomas (supra)** where it was held *inter-alia* that the rule of differentiation is inherent in the concept of equality and that the principle of equality does not

mean that every law must have universal application for all persons.

(ii) **Community Advocacy and Awareness Trust & 8 Others vs AG, Petition No.243 of 2011** where it was stated that where there is differentiation, the same must be premised on a national connection to a legitimate Government purpose.

(iii) **East African Breweries Ltd vs AG [2013] eKLR** where this Court determined that the rights protected by **Article 40** of the **Constitution** are not absolute and can be limited by dint of the same Constitution.

25. Authority No.(iii) above was also relied on to make the point that consumers have a right to be protected from harmful products and that the provision of the **Alcoholic Drinks Control Act** offers such protection.

26. Lastly that in previous proceedings vis; **Murang'a Bar Owners Association Self Help Group vs Ministry of Internal Security and Administration, Petition No.3 of 2011**, Musinga J. had made a finding that **Section 12(1) (c)** of the **Act** was not unconstitutional and this Court should make the same finding and dismiss the Petition with costs.

Interested Party's Case

27. On 20th September 2012, the National Authority for the Campaign Against Drug Abuse (NACADA) was enjoined by Majanja J. as an Interested Party and it filed Submissions on 6th August 2013 and 24th April 2014 and its case is as follows;

28. That it disagrees with the Petitioners in their argument that **Section 7** of the **Act** is discriminatory and is to that extent unconstitutional. In that regard, it has argued that the exemption of licensing of the sale of alcoholic drinks within the National Assembly and canteens, clubs, messes or similar institution within the disciplined forces is not because the consumers of alcoholic drinks in those places are special but because of the fact;

(a) That the sale of drinks within the National Assembly *“is regulated by the Parliamentary Standing Orders, hence the exclusion by the Act, to avoid conflicts of statute and to uphold Parliamentary immunity as recognised by Law”*

(b) That the sale of drinks within canteens, clubs, messes etc within disciplined forces was excluded from the provisions of the Act because *“... the sale of alcoholic drinks in these places is regulated by the **Kenya Defence Forces Act, No.25 of 2012**. Besides, the two key principles behind allowing the said Act to regulate the said sale within the confines of the military is to maintain a level of secrecy, considering the sensitive nature of the duties they carry out and to ensure and maintain a standard of discipline especially amongst soldiers on active duty which would in a nutshell be impossible if the sale of alcohol therein was regulated by the Alcoholic Drinks Control Act.”*

29. The Interested Party did not cite any **Standing Order** or **Section** of the **Kenya Defence Forces Act** that would support the above very fundamental submission.

30. On the application of **Section 12** of the **Act** and the *“300 metre rule”*, it is the Interested Party's submission that not a single person or institution is mentioned to bring the assertion out of the realm of the hypothetical and the claim ought to be disregarded for lack of evidence.

31. Regarding the allegation that the increase in licensing fees was unwarranted, the Interested Party submitted that since 1986, the fees levied under the repealed Liquor Licensing Act had not been reviewed and taking into account inflation over time, the new levies are logical and fair in the circumstances.

32. On 24th April 2014, the Interested Party filed Supplementary Submissions and relied on the decision

in **Nasilu Self Help Group vs NACADA & Another [2013] eKLR** where Ngenye Macharia, J. stated that the Act was enacted to regulate the manner in which alcohol was sold and to stem the many deaths that were occasioned by excessive consumption of alcohol. That therefore there was nothing unconstitutional when the people through Parliament enacted it.

33. Replying further on the decision in **Republic vs Chairman, Githunguri District Regulation Committee ex parte Marion Wanjiku & 2 Others [2014]eKLR**, it submitted that the renewal of liquor licenses is not affected by the fact that an educational institution may have been established within 300 metres of a bar during the life of a prior license.

34. On the right to property, **Ken Vitisia t/a Enzogu Sports Bar vs Sabatia District Alcoholic Drinks Regulation Committee [2013]eKLR** was cited to make the point that the right to own a bar business does not override the rights of students in an educational institution to undertake their learning in a conducive atmosphere.

35. The Interested Party's submission on the exclusion of certain persons from sitting in District Committees established under **Section 8** of the **Act** was that the exclusion is necessary to prevent conflict of interest situations and loss of objectivity in the granting of licenses. Such a provision is therefore neither unlawful nor generally unconstitutional, it submitted.

36. In **East Africa Breweries Ltd. vs Attorney General & 2 Others [2013] eKLR**, this Court implored a Petitioner to adjust its situation to be in accordance with the law and not to impugn a law to fit its circumstances. The Interested Party cited that decision in support of its proposition that the hours set for sale of alcohol are reasonable and beneficial to the Society as a whole and the interests of the Petitioner, allegedly a small group in society, must be tailored to meet the expectations of the law for the wider public good.

37. One last issue that was peripherally raised by the Petitioners was the claim that in enforcing the timeliness for sale of alcohol, the Kenya Police routinely harassed the Petitioners' employees. In answer, the Interested Party argued that no evidence whatsoever of that fact was tendered and without it, the Court cannot make any findings in favour of the Petitioners and the Petition for all the above reasons must be dismissed with costs.

Determination

38. Of late, this Court has been inundated with Petitions regarding recent enactments of legislation to curb excessive drinking of liquor and the consequences of reckless consumption of alcohol to the consumers and sometimes the innocent who may never have touched alcohol all their lives but who die in road accidents caused by drunk driving. While the Courts have been steadfast in interpreting the law in a progressive manner, it is obvious that the conflict between those involved in the sale of alcohol and the policy makers as well as the enforcers of legislation continues to simmer.

39. In the present Petition, Mr. Ojwang, learned Litigation Counsel framed the following issues for determination and I agree that they represent the main issues in contention although I have modified them slightly;

(1) Whether the Petitioner has the authority to institute the Petition on behalf of the other members of the Kiambu Liquor Welfare Group.

(2) Whether the Petitioner should be issued with an order of temporary injunction by this Court.

(3) Whether the Respondents have infringed on the Petitioner's rights and freedoms as provided for in Article 27, 40, 41 and 46 of the Constitution of Kenya 2010.

(4) Whether Section 7 and 12(c) of the Alcoholic Drinks Control Act (ADCA) and paragraphs 2(a) and (b) of the First Schedule part 1, 2(a) and (b), of the Alcoholic Drinks Control

(Licensing) Regulations 2010 are unconstitutional.

40. I will now determine the above issues as framed and then conclude with a decision on whether any of the orders sought in the Petition can be granted or not.

Whether the Petitioners have the authority to institute this Petition on behalf of other members of the Kiambu Liquor Welfare group

41. This issue was only raised by the 1st and 2nd Respondents but I will spend little time with it. **Article 258** of the **Constitution** provides as follows;

“(1) Every person has the right to institute Court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, Court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”

42. **Article 258(2)(b)** above is expressive of the situation of the Petitioners as individuals and representative of the Welfare Group. The *locus standi* rule as previously existing in the former constitutional order no longer subsists. The arguments in that regard by the 1st and 2nd Respondents are, with respect, outdated and cannot be sustained in the present constitutional dispensation.

The Petition is therefore properly before this Court and the answer to the issue as framed can only be answered in the affirmative

Whether the Petitioners should be issued with an order of prohibition to stop alleged harassment by members of the Kenya Police Service

43. The Petitioners have alleged that they have been harassed and intimidated together with their employees in a bid to enforce the Act. The allegation is made at paragraphs 15, 16 and 18 of the Supporting Affidavit of Richard Kagiri. No particulars of these allegations are given anywhere save that as stated elsewhere above, a list of seven criminal cases is given in submissions to buttress the argument of alleged harassment.

44. I wholly agree with the Respondents and Interested Party that the material placed before the Court is not sufficient to make a firm finding on this aspect of the Petition. While of course a Petitioner can plead anything, the value of the plea is only seen when evidence to back it up is given. The fact that a list of certain persons allegedly charged with unknown offences is cited in submissions is not evidence.

45. The Petitioners had and have a duty to prove the claim of harassment with sufficient particularity and when they treated the issue casually as they did, this Court can only tell them so and my finding is that the issue was treated in a pedestrian manner and no orders in favour of the Petitioners can be granted in an evidentiary vacuum.

Their claim in the above regard is therefore dismissed.

Whether the Respondents have infringed on the Petitioners' Rights and Freedoms as provided for in Articles 27, 40, 41 and 46 of the Constitution

46. This issue must of necessity be addressed with the 4th issue set for determination which is worded as follows;

Whether Section 7 and 12(c) of the Alcoholic Drinks Control Act and Paragraphs 2(a) and (b) of the First Schedule as well as parts 1, 2(a) and (b) of the 3rd and 4th Schedules of the said Act are Unconstitutional

47. To begin with, **Section 7** of the **Act** has been reproduced above and the Petitioners have argued that the exclusion of the National Assembly and disciplined forces in that Section violates **Article 27** of the **Constitution**.

48. The Respondents gave little answer to the above contention but the Interested Party extensively dealt with it in submissions and relied on the Parliamentary Standing Orders and the Kenya Defence Forces Act to defend the provision. While no specific Standing Order nor any Section of that Act were cited, I must begin by setting down the law as I understand it on unconstitutionality of Statutes.

49. In **U.S. Vs Butler, 297 U.S. I [1936]** which was quoted with approval in **East African Breweries (supra)**, the learned judge in the majority stated thus;

“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.”

50. In the dissenting opinion, the same issue was addressed in slightly different terms but the principle remains the same. The opinion was partly as follows;

“The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.”

51. I am attracted to the above lucid reasoning and Regarding **Section 7** of the **Act**, the Interested Party has attempted to justify both the wisdom and the lawfulness of the enactment of the exclusion clause and has concluded that it is actually not discriminatory and neither is it a violation of **Article 27** aforesaid.

52. Following **Butler (supra)**, the wisdom or lack of it in the enactment of the above Section is not a matter for this Court to determine but its constitutionality is well within the judicial radar.

53. If that be so, what is the law as to equality and non-discrimination?

54. All parties cited a paragraph from **State of Kerala & Another vs N.M. Thomas & Others, C.A No.1160 of 1974** where the Court stated thus;

“The principle of equality does not mean that every Law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its Laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is

not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality.

Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category. (Emphasis added)

55. At home, in **Community Advocacy and Awareness Trust (supra)**, the Court stated thus;

“While Article 27(1) provides for equality, the same provision does not prohibit differentiation or classification based on different requirements. What the Constitution requires is that any classification or differentiation based on prohibited grounds set out in Article 27(4) must bear a rational connection to a legitimate government purpose.” (Emphasis added)

56. Applying the above statements to the present Petition, what legitimate purpose will exemption of licenses for sale of alcoholic drinks in the National Assembly and in canteens, clubs and messes and others such institutions within the disciplined forces serve? **Section 3(a)** of the Act provides that one of its objectives is “*to protect the health of the individual in the light of dangers of excessive consumption of alcoholic drinks.*”

It matters not therefore whether alcoholic drinks are consumed at a bar in Kiambu or within the National Assembly or within an army barrack.

What matters is that excessive consumption of alcohol must be curbed.

57. Further, it makes no logical sense to say that one may drink alcohol at any time of the day and night within the restaurant in the Parliament Building or in the officers' mess at Langata Baracks but be limited in any establishment outside these premises. Consider for example the fact that so far as I know there is no accommodation for members of Parliament within the Parliament Building. What happens when a member indulges and has to drive himself out into the night to reach his home? Would the objectives of the Act have been properly achieved? Certainly not but that is not the point at all and the Petitioners completely misunderstood Section 7 and its proviso.

58. The proviso reads as follows;

“provided that this paragraph shall not apply to any such canteen, club, institute, mess or similar institution operated by any person for personal profit” (Emphasis added)

59. The presumption is that no profits are made in the named institutions and no licensing controls are necessary as opposed to the bars and restaurants operated by the Petitioners which are certainly profit making and which in any market economy require licensing and regulation.

60. Further, I have perused the **Kenya Defence Forces Act No.25 of 2012. Section 85** thereof provides as follows;

“(1) A person who is subject to this Act commits an offence if, due to the influence of alcohol or any drug-

(a) that person is unfit to be entrusted with his or her duty or any other duty which he or she might reasonably be expected to be called upon to perform; or

(b) that person's behaviour is disorderly or likely to bring discredit to the Defence Forces.

(2) Subsection (1) shall not apply to the influence of a drug on the person if-

(a) the drug was taken or administered on medical advice and the person complied with any directions given as part of that advice;

(b) the drug was taken or administered for a medicinal purpose, and the person had no reason to believe that the drug might impair his or her ability to carry out the duties mentioned in subsection (1)(a) or as the case may be, result in his behaving in a way mentioned in subsection(1)(b).

(3) In this Section-

(a) "drug" includes any intoxicant other than alcohol;

(b) "behaviour" includes as act, sign or anything said by that person.

(4) A person guilty of an offence under this Section is liable to imprisonment, upon conviction, for a term not exceeding two years or to any lesser punishment provided for by this Act. *(Emphasis added)*

61. Read together with the exclusion clause in **Section 7** of the **Act**, it is clear that the **Kenya Defence Forces Act** has a mechanism for dealing with excessive consumption of alcohol within institutions in the disciplined forces and I do not see any unconstitutionality in those provisions. But more specifically, one must look at **Section 7** from the purpose it is supposed to serve.

62. That Section has two components to it viz;

(i) the need to license dealings in liquor including sale thereof.

(ii) that licenses are granted only for those who deal with liquor for profit.

Whereas the Petitioners are clearly licenced because they sell liquor for profit, the sale of alcohol within establishments in the disciplined forces is not for profit.

In fact, it has been the case that the alcohol in such places as messes is sold duty free. Coupled therefore with the strict expectations of the Kenya Defence Forces Act, there is nothing discriminatory about **Section 7** and any distinction in the treatment of the Petitioners and the disciplined forces is not substantial but merely illusory. In any event, the discrimination, if at all, serves a legitimate and lawful purpose as explained above.

63. Turning back to the consumption of alcoholic drinks within premises in the National Assembly or with the permission of the Speaker, I have the following to say;

Sale of alcohol in premises within the National Assembly is not for profit and so the findings above holds true for that Institution. Further, the Speaker enforces the Standing Orders and the discipline of Members of the National Assembly through the Standing Orders. Aside from that fact, parliamentary privilege would exclude any licensing authority from enforcing any law within the National Assembly. How then, just like in military barracks, can licenses be enforced in such a situation?

64. On the face of it, the non-licensing sale of alcohol within the National Assembly and military barracks may seem discriminatory but in fact looked at purely from a practical legal prism, it is in fact not. I have elsewhere above given a typical lay view of the apparent discrimination; that alcohol knows no place or person. However, that lay view cannot be the basis for a substantial finding under the Bill of Rights.

65. The above would then lead me to the following findings on **Section 7** aforesaid;

The Section in the wisdom of the Legislature was crafted to serve a legitimate purpose and the exceptions to it have neither deviated from that purpose nor have they created a discrimination strong enough to attract constitutional sanction.

66. On **Section 12(c)** of the **Act** which relates to the 300 metres rule Musinga J. in **Murang'a Bar Operators (supra)** had this to say with regard to it;

“The State has Constitutional obligation to take legislative and policy measures to ensure that there is progressive realization of each and every right guaranteed under Article 43 of the Constitution and that includes the right to healthcare, accessible and adequate housing, reasonable standard of sanitation, freedom from hunger, adequate food of acceptable quality, clean and safe water, social security and education.

The State is also constitutionally mandated to address the needs of vulnerable groups within society and that includes women, children and the youth. Section 12(c) of the Act states that the premises in respect of which an application for liquor licence is made ought to be at least three hundred metres from any nursery, primary, secondary or other learning institutions for persons under the age of eighteen years. Such a person is a child as per the definition of “child” under Article 260 of the Constitution.

Turning to the hours when alcoholic drinks are sold, he stated thus;

As regards the licence hours for General Retail Alcoholic Drink Licence, these are from Monday to Friday during the hours of 5.00 p.m. to 11.00 p.m. and during weekends and public holidays during the hours of 2.00 p.m. to 11.00 p.m. I believe the hours were set as above so as to ensure that a proper balance is struck between working hours and leisure hours so that those workers who partake in alcohol do not engage in its consumption during working hours. I believe overall, the economic gain to be made or realized in limiting the operational hours is much more than the loss in income incurred by the Petitioner and its members and the county as values and principles of governance but cannot be attained if the most productive loss of the country's labour force spend long hours in alcohol consumption.

To that extent I do not [believe that the law is] unconstitutional at all

67. I agree with the learned Judge but more fundamentally, in the present Petition, again the Petitioners treated the issue very casually. I say so with respect because, like the Interested Party, I was surprised to note that not one piece of evidence was produced to support the claims elsewhere set out above. Which bar is near which school? Which educational institution was established after which already existing bar?

68. The lacunae in the evidence presented would only lead me to conclude that there is absolutely no reason to find in favour of the Petitioners regarding their arguments on **Section 12** aforesaid and that is all to say.

69. On paragraph **1(2)(a)** and **(b)** of the **First Schedule** to the **Alcoholic Drinks Control (Licensing) Regulations, 2010**, the argument made is that members of Kiambu Liquor Welfare Group have been denied an opportunity to sit as members of the District Committee which licenses the sale, manufacture and distillation of alcoholic drinks. **Regulations 1(2)** and **(3)** of the **First Schedule** for avoidance of doubt provides as follows;

“1. Tenure of office

(1) ...

(2) No person shall be eligible to be appointed as a member of the District Committee under Section 8(3)(d) and (e) of the Act if such person is-

(a) the holder of any licence for the sale, manufacture or distillation of an alcoholic drink;

(b) a person having a pecuniary interest in a partnership, company or society which is a licensee;

(c) a paid officer or paid agent of a partnership, company or society interested in the sale, or in the prevention of the sale, of alcoholic drink;

(d) a person employed directly or indirectly as an agent for the purpose of making application for a licence for any other person, or any partner of a person so employed as an agent;

(e) an agent or manager of, or a partner in, any trade or calling carried on upon premises licensed, or in respect of which a licence has been applied for, or the owner, lessor or mortgagee of those premises;

(f) an undischarged bankrupt;

(g) a person who, in Kenya or elsewhere, has been sentenced to imprisonment without the option of a fine and who has not received a pardon therefor.

(3) Any such person who knowingly acts or sits as a member of the District committee thereof whilst so disqualified commits an offence and liable to a fine not exceeding ten thousand shillings.”

70. There is little difficulty in appreciating the necessity for the above regulations; one cannot sit in judgment in his own cause. The real danger of bias and conflict of interest cannot be gainsaid where a member of a Committee on licensing is also a holder of the same licence which the same Committee grants, revokes and renews under **Regulations 6, 10 and 11** of the **Licensing Regulations, 2010**. The principle that a person is disqualified from participating in the making of a decision if there is a real danger that he or she will be influenced by a pecuniary or personal interest in the outcome, is of general application in public law and is not limited to judicial or quasi-judicial bodies or proceedings according to P.L.O. Lumumba in **An Outline of Judicial Review in Kenya, 1999 Edition, page 32.**

71. In the circumstance I am unable to find any discrimination in the Regulation cited.

Conclusion

72. Whereas the present Petition raises important issues for consideration, the manner in which evidence was presented and the facts as juxtaposed with the law would lead me to the final orders below.

Disposition

73. Having disposed of all substantive issues raised, there is no need to address any other peripheral issues including the issue of multiple licenses save that on these issues, I completely agree with the submissions of NACADA, the Interested Party, which I have detailed out above.

74. For the above reasons, the Petition is dismissed.

75. As for costs, although the Petitioners were litigating for self Interest, the circumstances would otherwise dictate that each party should bear its own costs. I say this because the issues raised are of a larger application than to the Petitioners alone.

76. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF JULY, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Ojwang for Respondent

No appearance for Petitioner

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE