



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

PETITION NO. 3 OF 2014

IN THE MATTER OF THE CONTRAVENTION AND OR ALLEGED CONTRAVENTION OF ARTICLES 1, 2, 3, 10, 22, 40, 41, 46, 14, 18, 50, 159, 174, 196(1) (A), (B), 201, 209, 201, 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

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

AND

IN THE MATTER OF: THE CONTRAVENTION OR ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 201, 209 AND 40 OF THE CONSTITUTION

AND

IN THE MATTER OF CONSUMER PROTECTION ACT 2012

AND

IN THE MATTER OF KIAMBU COUNTY FINANCE ACT, 2013

AND

IN THE MATTER OF KIAMBU COUNTY ALCOHOLIC DRINKS CONTROL ACT, 2013 AND THE KIAMBU COUNTY ALCOHOLIC DRINKS CONTROL (LICENSING) REGULATIONS

BETWEEN

JOHN KINYUA MUNYAKA.....1ST PETITIONER

ESTHER WAMBUI GITAHU.....2ND PETITIONER

PAUL NJAU GITHANJI.....3RD PETITIONER

SUSAN WAKONYO NGANGA.....4TH PETITIONER

GODWIN CHEGE NJUGUNA.....5TH PETITIONER

JOSEPHINE WAHIHUINI.....6TH PETITIONER

RICHARD MUNGAI KAGIRI.....7TH PETITIONER

BONIFACE MWAURA.....8TH PETITIONER

JOSEPH NDEGWA GICHUKI.....9TH PETITIONER

JANE WAMBUI MUKIRU.....10TH PETITIONER

SIMON NDEGWA WAMBUI.....11TH PETITIONER

WALLACE KIBUNYWA NGUGI.....12TH PETITIONER

(Suing on their own behalf and own behalf of members of Kiambu Liquor Welfare Group)

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....1ST RESPONDENT

NATIONAL CAMPAIGN AGAINST ALCOHOL

AND DRUG ABUSE.....2ND RESPONDENT

MINISTRY OF HEALTH.....3RD RESPONDENT

COUNTY MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....4TH RESPONDENT

JUDGMENT

Introduction

The petition herein has been filed under **Article 165** of the **Constitution** and **rules 11** and **12** of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual) High Court Practice and Procedure Rules**.

The petitioners have described themselves as representatives of Kiambu Welfare Group which, as its name suggests, is a self-help group registered as such with the office of the Kiambu District Gender and Social Development Officer.

The first respondent is a county government established under **article 176(1)** of the **Constitution** while the second respondent is a body established under **section 4** of the **National Authority for the Campaign against Alcohol and Drug Abuse Act (Cap 121B)**. It is the successor to the **National Campaign Against Drug Abuse Authority** which was previously registered under the **State Corporations Act (Cap. 446)**. Amongst the functions for which the body is created is to collaborate with other lead agencies to implement and enforce laws on control of alcohol and drug abuse.

The third and fourth respondents are ministries in the Government of Kenya established to, *inter alia*,

implement the Government's policies in the affairs of health and internal security respectively.

Petitioners' case

Basically, the petitioners have faulted two pieces of legislation enacted by the first respondent's County Assembly on the basis that they have contravened or they are likely to contravene their constitutional rights; these laws are said to be the **Kiambu County Alcoholic Drinks Control Act, 2013** together with its regulations and the **Kiambu County Finance Act, 2013**.

As far as the **Kiambu County Alcoholic Drinks Control Act, 2013** is concerned, the petitioners have assailed it because in their view:-

- a. **Section 14(2) (b)** of that Act directs sub-county committees not to issue licences to the petitioners if they operate within a fuel station or a fast food restaurant; in the petitioners' view, this provision contravenes **article 40** of the Constitution on the protection of right to property.
- b. **Section 15(1) (b)** of the same Act is discriminatory because it denies licences to persons who have previously been convicted and sentenced to serve more than six months imprisonment; the petitioners claim that this provision contravenes their rights as stipulated under articles **27** and **40** of the Constitution.
- c. **Section 26 (4)** of the Act is alleged to be unconstitutional because it imposes criminal sanctions contrary to **article 50** of the **Constitution** as read with the **Penal Code (Cap 63)** and the **Fourth Schedule** to the **Constitution** on distribution of functions between the National Government and the County Governments.
- d. **Section 27** thereof is unconstitutional as it purports to oust the jurisdiction of the court contrary to **article 50(1)** and **159** of the Constitution.
- e. **Section 16** of the Act violates **article 46** of the **Constitution** on consumer rights and the international labour laws relating to hours of business operations.

Besides the parent Act, the petitioners have also faulted the **Kiambu County Alcoholic Drinks Control (Licensing) Regulations 2013** made thereunder. In particular, rule 6 thereof is said to contravene **article 40** of the **Constitution** because it prohibits the issuance of alcoholic licences to sell alcohol in areas that are deemed residential. The petitioners have also alleged that according to the **Third Schedule** to the **Act**, the licence fees has been hiked by more than 2000% which they allege is punitive and more importantly, contrary to **article 10(2)** of the **Constitution**.

With regard to the Finance Act, it is the petitioners' case that they have been locked out of the licensing authority contrary to the national legislation which expressly grants the stakeholders the right to representation in such an authority. Further the Act infringes or it is likely to infringe on the petitioners' constitutional rights and freedoms because:-

- a. The Act is alleged to have been drafted, debated and enacted without public participation or involvement of the petitioners in breach of **article 196** of the **Constitution** and **sections 87** and **115** of the **County Government Act**. The Act is also said to have been passed contrary to **article 10** of the Constitution which promotes national values and principles of governance.
- b. The Act is also said to have been passed against the principles of openness, equality and public participation in breach of **article 201** of the Constitution.
- c. The licence or permit fees set by the Act is alleged to be exorbitant and it violates the petitioners' consumer rights as outlined in **article 46** of the **Constitution**; the petitioners claim that the fees for the licences and permits is intended to push them out of business.

- d. The Act is also alleged to violate the petitioners' rights to public information contrary to **Articles 22 and 35 of the Constitution.**

Because of what, in the petitioners' view, is the respondents' flagrant infringement or likely infringement of the Constitution, the petitioners have petitioned for the following prayers:-

1. A declaration that **sections 14(2) (b), 15(1) (b), 26(4) and 27 of the Kiambu County Alcoholic Drinks Act 2013** have infringed on the petitioners' fundamental rights and freedoms.
2. A declaration that sections **14(2) (b), 15(1) (b), 26(4) and 27 of the Kiambu County Alcoholic Drinks Act, 2013** are unconstitutional, null and void.
3. A declaration that **rules 5 and 6 of the Kiambu County Alcoholic Drinks Control (Licensing) Regulations, 2013** are unconstitutional, null and void.
4. A declaration that the Third Schedule to the regulations relating to licenses as contained in **Kiambu County Alcoholic Drinks Control (Licensing) Regulations, 2013** are punitive, excessive and amounts to a violation of both procedural and substantive fairness and a breach of **article 10(2) of the Constitution** and **sections 87 and 115 of the County Government Act, 2012** and therefore void.
5. A declaration that **part I-X of the Schedule to the Kiambu County Finance Act, 2013** relating to fees payable for various permits and licenses contained in the Kiambu County gazette supplement issued on 10th December, 2013 is unconstitutional and contrary to **article 196 of the Constitution** and **sections 87 and 115 of the County Government Act, 2012.**
6. An order restraining the Kiambu County Government from effecting and/or implementing the operation of **part I-X of the Schedule to the Kiambu County Finance Act, 2013** on charges for permits and licenses.
7. An order directing the respondent to amend the said Act and/or to lower the said charges as per **section 9(1) of the Act** and after collecting the views of the public and/or petitioners' input.
8. An order of prohibition to prohibit members of the police force or any of the respondents their agents and servants from harassing, intimidating or in any other way interfering with the petitioners' business operations, in the name of enforcing the provisions of **Kiambu County Alcoholic Drinks Control Act, 2013.**

The petition is supported by the affidavit of Susan Wakonyo Nganga (Susan Wakonyo) sworn on 3rd March, 2014; she swore the affidavit on her own behalf and on behalf of the rest of the petitioners.

According to the petitioners, sometimes in June 2013, the respondents applied for licences, apparently for operation of their businesses for the year 2013 but that they were not issued with the licenses ostensibly because of non-compliance with **Kiambu County Alcoholic Drinks Control Act, 2013.**

The petitioners' efforts to acquire licences for the current year have also not been successful because they have been advised that the sub-county committee has not been constituted. However, even in the absence of this committee, the first respondent's agents, servants or officers visited the petitioners' premises in November, 2013 with a view to inspecting them before the licences could be issued. It is the petitioners' case that the purported inspection was *ultra vires* the Act.

The deponent has also claimed that **Kiambu County Alcoholic Drinks Control Act, 2013** together with the regulations made thereunder are retrospective in nature since rates of fees levied by the Kiambu County Government for the licences and permits for the year 2013 are pegged on this Act and regulations which, as far as I understand the petitioners, came into force when their businesses were already up and running.

According to the petitioners, the second respondent had misled members of the public who include the petitioners herein that licences would only be issued or renewed upon enactment of the relevant laws by the County Governments; however, even before these laws came into effect, the petitioners were subjected to constant harassment by the police, servants and agents of the respondents for breaching the non-existent laws.

The deponent further alleges that the levies imposed are unreasonable and punitive and only meant to drive the petitioners out of business, considering that besides having to pay higher levies, they have been restricted to less hours of business.

Although the petitioners have no problem with the County Government of Kiambu enacting laws to provide for revenue collection, they are concerned that such laws should neither be harsh nor offensive and in any event they should not be unconstitutional.

The petitioners have reiterated that the laws they are being asked to comply with were enacted without their participation and therefore contrary to the Constitution which provides for such participation as a matter of right. In particular the petitioners have sworn that in a meeting held at Windsor Hotel on 17th September, 2013 and chaired by the Governor and the Deputy Governor of Kiambu County Government, their views on the impugned legislation were ignored and nobody knows the rationale behind the new rates for the levies by the County Government.

It is the petitioners' complaint that besides the fees required under the new laws by the County Government, they are also required to pay fees for such other licences as the public health licence, licences for catering levy and betting control licences. In their view, the new legislation does not take these additional payments into account.

The Respondents' case

The County Government of Kiambu responded to the petition through a replying affidavit sworn on its behalf by Wilson Mwita Maroa who is described in that affidavit as the County Government's interim Secretary. The affidavit was filed in court on 3rd April, 2014.

In his affidavit Mr Maroa conceded that indeed the County Government of Kiambu through its legislature enacted the **Kiambu County Alcoholic Drinks Control Act, 2013** and also published the regulations which were made under **section 67** of the Act but that neither the Act nor the regulations thereof infringe or are likely to infringe the constitutional rights of the petitioners as alleged or at all.

On the contrary, Mr Maroa has deposed that the Act together with its regulations were well intentioned and meant to protect the welfare of the people of Kiambu County and in particular, to safeguard against the problem of underage drinking; health hazards associated with alcohol; non-productivity amongst the County's populace; inadequate policies to control consumption of alcohol; insecurity and noise pollution within residential areas.

According to Mr Maroa the enactment of the Act and the regulations made thereunder was preceded by consultations with the stakeholders including the petitioners herein and members of the public in general. The deponent has annexed to his affidavit minutes of the meetings held on 25th July, 2013, 19th August, 2013 and 26th August, 2013 in which issues concerning legislation on control of alcoholic drinks were discussed.

Besides the opportunity to participate in the meetings on the enactment of the Act and the regulations, Mr Maroa has sworn that the Act itself has inbuilt mechanisms for participation of any interested party including the petitioners in the decision making process and resolution of disputes arising from the application of the Act; it is therefore the County Government's case that the petitioners' failure to take advantage of these mechanisms renders their petition premature.

As far as the Kiambu County Finance Act, 2013 is concerned, Mr Maroa has also conceded that the Kiambu County Assembly passed the Act but has denied that the Act infringes or is likely to infringe the constitutional rights of the petitioners. The deponent has sworn that the Finance Act was drafted, debated and enacted with the full participation of the stakeholders and the members of the public pursuant to **articles, 10 and 196** of the Constitution and **sections 87 and 115** of the **County Government Act**. Further the County Government denies that the fees levied for permits and licences in respect of sale of alcoholic drinks is exorbitant or that it violates the constitutional or consumer rights of the petitioners as enshrined in **article 46** of the Constitution or at all.

As a proof that members of the public were invited to participate in the enactment of the Act, the deponent has attached to his affidavit an advertisement circulated through the Daily Nation of 17th August, 2013 and has also contended that the Bill itself was published on the County Government's official website; through these advertisements, members of the public were invited to submit their memoranda on the Finance Bill, 2013 before it was submitted to the County Assembly for debate and enactment. There are also copies of attendance registers attached the deponent's affidavit showing persons who attended the meetings called by the County Government.

The deponent has sworn that though the Finance Bill was initially rejected by the County Assembly in November, 2013, it was later reintroduced for debate and enactment in December 2013.

Having engaged the public prior to the enactment of the impugned Acts of the County Assembly and the regulations made thereunder, and having complied with the Constitution and the County Governments Act, it is the first respondent's position that the foundation upon which the petition is based is faulty and it should therefore be dismissed with costs.

In its response to the petition, the second respondent filed its answer dated 3rd April, 2014 in which it has reiterated that the Kiambu County Alcoholic Drinks Act, 2013 is consistent with the national legislation on the control, sale and consumption of alcohol which is the Alcoholic Drinks Control Act, 2010. According to the second respondent, the objects for which the two Acts have been enacted include protection of the health of the individual due to dangers associated with the excessive consumption of alcoholic drinks; protection of minors from accessing alcohol; adoption and implementation of effective measures to eliminate illicit trade in alcohol including smuggling, manufacture and counterfeits.

The second respondent has argued that the policy measures reflected in the two legislative instruments are consistent with the Constitution and therefore the petitioners' petition is baseless.

There was no response from the third and fourth respondents though it is evident from the record that they were duly served with the petition.

In the absence of any representations from the third and fourth respondents, the petitioners' counsel and counsel for the first and second respondents took directions on the hearing of the petition; they agreed to have the petition determined by way of written submissions. I have duly considered their respective submissions together with the decisions they cited in support of the legal positions they have taken. I acknowledge counsel's efforts in this regard.

The Petitioners' submissions

In his submissions, counsel for the petitioners cited the Canadian Supreme Court decision in **Queen versus Big M. Drug Mart Limited (1985) 1 S.C.R. 295** for the proposition that the aim, enforcement and effect of a statute are necessary elements in the determination of its constitutionality. In that case the Supreme Court held that:-

“Both purpose and effects are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and application of the legislation. Purpose and

effect respectively, in the sense of the legislation's objects and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislations object and thus the validity."

It is with this understanding in mind that counsel argued that the objects of **Kiambu County Alcoholic Drinks Act, 2013** and the rules thereof, though noble, are unconstitutional in their enforcement and effect.

Counsel singled out the particular provisions of the Act that, in his view, contravene certain provisions of the Constitution. According to him **section 27** thereof contravenes **article 50 (1)** of the **Constitution**; this particular article guarantees every person a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or where circumstances so demand before an independent and an impartial tribunal or body. It is the petitioners' case that, under **article 25 (c)** of the Constitution such a right is absolute and cannot be derogated from.

Further, counsel argued that **section 27** of the impugned Act seeks to oust the unlimited jurisdiction of the High Court contrary to **Article 165(3) (a)** of the Constitution; he cited the decisions in **Law Society of Kenya versus Centre for Human Rights and Democracy & 13 Others [2013] eKLR** in which the House of Lord's decision in **Anisminic Ltd versus Foreign Compensation Commission and Another, [1969]2 A.C.147; [1969]2 WLR 163; 113 S.J. 55; [1969] 1 ALL ER 208** was cited with approval on the question of ouster clauses. In that case the court (Lord Reid) is quoted to have said:-

"It is a well-established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly- meaning I think, that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court."

Counsel also cited the case of **Marbury versus Madison, 5 U.S. (1Cranch) 137; 2 L. ED.60 (1803)**, where the Supreme Court of the United States of America is said to have held that the Congress could not, by legislation, enhance or vary the jurisdiction of the Court contrary to the express provisions of the Constitution. He also relied on the Court of Appeal's decision in **EpcO Builders Ltd versus Adam S. Marian, Arbitrator & Another, Civil Appeal No. 248 OF 2005**, for the position that if a cause of action is disclosed in a party's pleadings particularly on matters touching on violations of fundamental rights and freedoms, courts are under mandatory obligation to hear the party making such allegations.

On **Section 14(2) (b)** of the **Act**, counsel for the petitioner argued that it is unconstitutional to the extent that it restricts places where alcoholic drinks can be sold. This section of the Act provides that alcoholic drinks should not be sold in an outlet located within a fuel station or in a fast food restaurant. Counsel urged this court to find that such provision infringes the petitioners' private property rights which are guaranteed under article 40 of the Constitution. In this article, the Constitution provides for ownership of any kind of property anywhere in the Republic of Kenya and parliament has been barred from enacting any law that arbitrarily deprives an individual of such property or interferes with his enjoyment of the property.

The petitioners argue that with the enactment of this provision, they have been forced to close down their businesses which were located in the now prohibited areas; it is their case that the retrospective effect of this particular provision has unconstitutionally divested them of their proprietary rights acquired before the Act came into force. In support of this argument counsel cited the case of **Samuel Kamau Macharia & Another V Kenya Commercial Bank Ltd & 2 Others, SCK APP. No. 2 of 2011 [2012] eKLR** where the Supreme Court of Kenya held the general rule on this issue to be that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.

As for **section 15(1) (b)** of the Act which proscribes issue of licences to persons who have been convicted of an offence under the Act or any other Act whose sentence is imprisonment without an option of a fine

for a period in excess of six months, the petitioners have argued that this provision is contrary to **article 27** of the **Constitution** that guarantees the right to equality treatment and freedom from discrimination on any ground whether race, sex, pregnancy, material status, health status, ethnic or social class, colour, age, disability, religion, conscience, belief, culture, dress language or birth. For this argument, the petitioners' counsel cited the cases of **Community Advocacy and Awareness Trust & Others versus Hon. Attorney General Petition No. 243 of 2011 eKLR** and the **State of Kerala and Another versus N.M. Thomas & Others, Civil Appeal No.1160 of 1974** to underscore their right of equality before the law, more particularly as provided under **article 27** of the Constitution. In the learned counsel for the petitioners' respectable view, denying the petitioners or any other person a licence on the basis of a previous conviction is irrational and short of the object of Act as stated in section 3 thereof which is "*to protect the health of the individual in the light of dangers of excessive consumption of alcoholic drinks*".

Apart from contravening **article 27** of the Constitution, it was argued on the petitioners' behalf that the same **section 15(1) (b)** of the Act infringes on the rights of the petitioners to earn a living in disregard of article 43 of the Constitution that guarantees economic and social rights and articles 6 and 11.1 of the International Convention on Economic and Social Rights to which Kenya is a party and is also applicable to this country by virtue of **article 2(6)** of the Constitution.

Section 26 (4) of the Act has also been impugned as being unconstitutional because according to the petitioners, it purports to create offences and penalties for such offences; this function, according to the petitioners, is the function of the National Government and that this is clearly stipulated in **Part 1(7) (b)** and **(c)** of the **Fourth Schedule** to the Constitution. I understand the petitioners' case to be that **section 26(4)** of the Act is unconstitutional to extent that it purports to usurp the functions of the National Government.

On the question of license fees, the petitioners claim that under the Act, it has been increased by over 2000% which they claim, is unconscionable. Further, they claim that this increment was effected without any engagement of the stakeholders who in this case include the petitioners. The County Government's action, so they argue, is contrary to **article 201** of the Constitution which provides for openness, accountability and public participation in all matters of public finance.

The petitioners have also invoked the **articles 196(1)** and **10** of the Constitution on national values and principles of governance which have been defined to include transparency, accountability and participatory democracy. The same principles are said to underline sections 87 of the County Governments Act. The petitioners' case is that increment of levies without their participation in the deliberations that led to this increment contravenes **articles 10, 166(1)** of the **Constitution** and **section 87** of the County Government Act. The decision in the South African case of **Doctors for Life International versus Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11** was cited by the petitioners' counsel to guide this court on what amounts to facilitation of public involvement in the law-making process. While interpreting **section 72(1)(a)** of the Constitution of South Africa, which the petitioners argue is similar to **article 196 (1)** of the Constitution of Kenya, the court defined this concept to mean the taking of steps to ensure that the public participate in the legislative process. They also cited the case of **Glenister versus President of The Republic of South Africa & Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC)** which was cited with approval in **Nairobi High Court Petition No. 532 of 2013 Robert N. Gakuru versus The Governor of Kiambu County & Others**

The petitioners argue that the criteria for the determination of the fees levied is unclear and it is apparent that the County Government has not taken into consideration the fact that apart from the levies payable to the County Government, the petitioners are also required to pay separately for music copyright licence, public health licence, betting control licence, tourism licence, and catering levy tax and such other levies.

The petitioners' case is that, for the reasons given, the rules in the **First Schedule** to **Act** are unconstitutional.

The same Schedule to the Act is alleged to be discriminatory in the sense that business operation hours

within the County have been allocated depending on the nature of business. Further **rule 6** of the **Kiambu County Alcoholic Drinks Control (Licensing) Regulations 2013** is also said to be unconstitutional, null and void because it allegedly contravenes **article 40** of the Constitution because it prohibits issuance of licenses in areas where the premises in which alcohol is sold is deemed to be residential regardless of whether the building is in a commercial area or not.

As far as the **Kiambu County Finance Act, 2013** is concerned counsel for the petitioners submitted the Act was declared as being unconstitutional by this Court sitting at Nairobi and thus any aspect of this petition relating to this Act including the prayers sought has been overtaken by events.

In conclusion counsel for the petitioners cited the case of **Olum & Another versus Attorney General (2000) 2E.A. 508** where it was held that in determining the constitutionality of a statute, the court has to consider the purpose and the effect of the impugned statute; if the purpose or the effect of such a statute is to infringe a constitutional right, the court is bound to declare it unconstitutional. Counsel urged this court to find that indeed the impugned Act is unconstitutional and should be so declared in terms of the prayers in the petition.

Respondents' submissions

In response to the petitioners' submissions, counsel for the first respondent submitted that the **Kiambu County Alcoholic Drinks Control Act 2013** is constitutional and there is nothing unconstitutional about it, either as alleged or at all. Counsel submitted that there is always a general presumption that statutes enacted by the legislature are constitutional and anybody alleging the contrary bears the burden of rebutting this presumption. In this regard counsel relied on the decision in **Nairobi Metropolitan PSV Saccos versus County of Nairobi Government, Petition No. 486 of 2013** where the decision in **Hambarda Wakhan versus Union India AIR (1960) AIR 554** was cited with approval; in that case it was held that:-

“.....in examining the constitutionality of a statute it must be assumed that the legislature understands and appreciates the needs of the people and the law it enacts is directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore in favour of constitutionality of an enactment...”

The learned counsel for the first respondent also relied on the decision in the case of **Olum & Another versus Attorney General (supra)** which the petitioners also cited in support of their case; however, the first respondent's position as far as the decision in this case is concerned is that the purpose and the object for which the **Kiambu County Alcoholic Drinks Act, 2013** was enacted as expressly stated in **section 3** thereof do not infringe or threaten to infringe the petitioners' fundamental rights and none of the provisions enacted in that Act are unconstitutional.

In particular, the first respondent has argued that **section 14(2) (b)** is meant to protect the health of persons under the age of eighteen years by restricting their access to alcoholic drinks in fast food restaurants where they are known to frequent. This section, according to the applicant, does not infringe **article 40** of the Constitution. Counsel argued that as was held in the case of **East Africa Breweries Limited V Attorney general & 2 others (2013) eKLR** the rights of the larger public must be weighed against the petitioners' private rights. In any event, so argued the counsel, the petitioners did not place any material before court to demonstrate that they acquired any properties or interests in such properties that are likely to be divested upon enforcement of the impugned section.

In answer to the petitioners' argument that **section 15(1) (b)** contravenes **article 27** of the Constitution, counsel has cited the case of **Elle Kenya Limited & 9 Others versus Attorney General & 3 others (2013) e KLR** for the argument that inequality treatment in itself is not prohibited; what matters is whether the discrimination is based on rational grounds. Counsel argued that **section 15(1) (b)** of the Act was enacted with the overall objective of adopting and implementing measures to eliminate illegal trade in alcoholic drinks, which is a rational objective.

Counsel submitted that the petitioners' argument that this provision of the law is discriminatory has no basis and that the Act has inbuilt mechanisms available to any applicant who seeks either a new licence, a renewal of a licence or a transfer of a licence to address any grievances in the event that he or she is aggrieved by a decision of the issuing authority on such an application or for any other reason.

On the question of the County Assembly usurping powers to enact laws with penal sanctions, the first respondent's counsel argues that **section 26(4)** of the Act which is sought to be impugned on this ground finds its constitutional basis in **article 185(1)** of the Constitution which vests the legislative authority of a County Government in the County Assembly. Counsel has urged this court to find that it has not been denied that under the Fourth Schedule to the Constitution, licensing, regulation of production, sale, distribution and consumption of alcohol is a function delegated to the County Government. The first respondent's case is that, in the light of **article 185(1)** of the Constitution, and considering its functions stated in the Fourth Schedule, both the impugned legislation by its County Assembly and the process through which it came into being are constitutional.

I understand the first respondent's counsel to say that having been assigned various responsibilities at county level and having been endowed with the power to legislate, it is only reasonable that the County Government should legislate on the how these functions will be undertaken; as a matter of course, such legislation will include sanctions or penalties against those persons whose compliance is necessary for effective delivery on these functions. In the counsel's view, this is what **article 185(2)** means when it says:-

“A County Assembly may make laws that are necessary for or incidental to, the effective performance of the functions and exercise of the powers of the County Government under the Fourth Schedule.”

Counsel urged that it is trite that a law must have sanctions for breach of its provisions; in this regard, the learned counsel cited the case of **Murang'a Bar Operators Association Self Help Group versus Minister for State for Provincial Administration and Internal Security & 2 Others** where it said to have been held that there must be sanctions for the breach of the provisions of the Act in order to ensure compliance.

As far as **section 27** of the Act is concerned, counsel for the first respondent submitted that contrary to the petitioners' allegations that it contravenes **article 50 (1)** of the Constitution, that provision of the law only prohibits sale of alcohol in unauthorised and unlicensed outlets; it does not in any way bar any aggrieved party from accessing a court of law to seek a remedy whenever they feel aggrieved.

The first respondent's counsel has urged that all that is required of the petitioners by the impugned provisions of law is adherence to particular standards in the manner they conduct their businesses considering that their rights have to be balanced against the rights of the rest of the members of the public.

The first respondent's counsel also urged that the question of the amount of fees levied is a non-issue and ought not to arise solely because this court, in the counsel's view, does not have jurisdiction to delve into the issue of whether the fees levied is excessive or not. Counsel cited the decisions in the cases of **Nairobi Metropolitan PSV Saccos versus County of Nairobi Government, Petition No. 486 of 2013 and Elle Kenya Limited & 9 Others versus Attorney-General & 3 Others** (supra) where courts appear to be consistent that it is not the role of the court to interrogate the wisdom or otherwise of the enacted laws.

As for the issue of public participation in the enactment of the **Kiambu County Alcoholic Drinks Control Act, 2013** and its regulations, the first respondent's counsel submitted that the stakeholders including the petitioners herein participated in various fora that preceded the enactment of the Act and that the petitioners themselves admitted this fact in their own affidavit. The petitioners are said to have been given adequate opportunity to participate in the meetings where this issue was discussed except that their only contention seems to be that their views were not taken on board when this law was finally

enacted. In answer to this question counsel cited the decisions in **Minister for Health & Another versus New Clicks South Africa(Pty) Ltd & Others (2006) (2) sa 311** which was cited with approval in **Nairobi Metropolitan PSV Saccos versus County of Nairobi Government (supra)** that all that matters is that at the end of the day a reasonable opportunity is offered to the members of the public and all interested parties not only on their awareness of the issue and but that they are also aware that they have a chance to have a say on the particular issue. Besides the decisions in these cases counsel also relied on the case of **Association of Gaming Operators-Kenya & 41 Others versus Attorney General & 4 Others (2014) eKLR** for the proposition that public participation does not mean that public views must prevail and the fact that the outcome of such participation does not incorporate what the public views does not necessarily mean there was no public participation.

The second respondent associated itself with the submissions made on behalf of the first respondent but added that the impugned law is consistent in every respect with the **Alcoholic Drinks Control Act (cap 121A)** which is the national legislation enacted to provide for the regulation of the production, sale and consumption of alcoholic drinks, amongst other things.

Counsel asked this court to consider the background upon which **Kiambu County Alcoholic Drinks Act, 2013** was enacted; many people in the County had lost lives and eyesight or vision because of the sale and consumption of illicit brew. It is therefore in the public interest that consumption of alcohol is regulated.

According to counsel for the second respondent, while it is true that the petitioners enjoy the right to property, those rights must be balanced with the other people's right to life more particularly those who consume alcohol.

It was also submitted on behalf of the second respondent that restriction in the Act on the establishments and premises where alcoholic drinks can be sold is necessary to limit for instance children's accessibility to alcohol; the Act has, in this respect, taken into consideration the best interests of the child as enshrined in the Children Act, 2001 and also the Constitution. Besides children, motorists' accessibility to alcohol while driving was an important factor in considering whether it should be sold in such premises as fuel stations. The Act, according to the second respondent's counsel, was well founded.

Analysis and determination

After considering the submissions by the parties' counsel I note that of the prayers sought in the petition, only four are relevant for purposes of its determination; these are prayers directed at the **Kiambu County Alcoholic Drinks Act 2013** and the regulations made thereunder. It would appear that any prayers sought in respect of the Kiambu County Finance Act, 2013 have been overtaken by a judgment delivered earlier in a separate petition.

The petitioners' counsel submitted and it is apparent from the petitioners' affidavit in support of the petition that this petition is only one amongst several others lodged against the County Government of Kiambu challenging its legislative process and the resultant Acts by its Assembly. In the further affidavit sworn on 5th May, 2014 by Susan Wakonyo Nganga, there is attached a judgment delivered in the High Court at Nairobi on 17th April, 2014 in **Constitutional Petition No. 532 of 2013, Robert N. Gakuru & Others versus the Governor Kiambu County & Others** in which the petitioners sought, inter alia, a declaration that the **Kiambu Finance Act, 2013** violates various provisions of the Constitution and was therefore null and void. This petition was a consolidation of six petitions which the learned judge who presided over that petition found to be similar.

The **Kiambu Finance Act, 2013** was impugned because the petitioners in the petition filed in the High Court at Nairobi contended that they were neither consulted nor invited to contribute to the deliberations that culminated in the enactment of that Act.

In its judgment, the Court upheld the petitioners' argument and accordingly declared the Finance Act to have violated the Constitution; it was thus held to be null and void. This information is summarised in the decree extracted from the judgment a copy of which has been annexed to the affidavit of Wakonyo. It will

therefore not be of any use for this court to interrogate the same Act or make any orders thereof.

It appears that the Kiambu County Alcoholic Drinks Act, 2013 was passed almost at the same time as the nullified Finance Act but somehow it did not feature in any of the petitions that were consolidated in Nairobi High Court Petition No. 532 of 2013.

One notable difference in the petitioners' grievances against the Finance Act as contrasted with their cause against the Alcoholics Drinks Act, is the basis upon which they sought to have each of the two Acts nullified; while the Finance Act was mainly assailed for want of the petitioners' participation in the legislative process, the Alcoholic Drinks Act is impugned not necessarily because of a skewed legislative process but because of the purpose and effect of certain provisions of the Act on the petitioners' constitutional rights. The petition is clear that at least five sections in the Act are unconstitutional as far as the petitioners' rights are concerned; in particular:-

- a. **Section 14(2) (b)** of that **Act** directs sub-county committees not to issue licences to the petitioners if they operate within a fuel station or a fast food restaurant; in the petitioners' view, this provision contravenes **article 40** of the **Constitution**.
- b. **Section 15(1) (b)** of the same **Act** is discriminatory because it denies licences to persons who have previously been convicted and sentenced to serve more than six months imprisonment; the petitioners claim that this provision contravenes their rights as stipulated under **articles 27** and **40** of the **Constitution**.
- c. **Section 26 (4)** of the **Act** is alleged to be unconstitutional because it imposes criminal sanctions contrary to **article 50** of the **Constitution** as read with the **Penal Code (Cap 63)** and the **Fourth Schedule** to the **Constitution** on distribution of functions between the National Government and the County Governments.
- d. **Section 27** of the **Act** purports to oust the jurisdiction of the court contrary to **article 50(1)** and **159** of the **Constitution**.
- e. **Section 16** of the **Act** violates **article 46** of the **Constitution** on consumer rights and the international labour laws relating to hours of business operations.

It is apparent that the common thread running through the grounds upon which the Kiambu County Alcoholic Drinks Act, 2013 has been faulted is the question of constitutionality of its various provisions; in other words, the primary question left for determination as far as this Act is concerned is the constitutionality of certain provisions of that Act vis-à-vis the fundamental rights of the petitioners. As noted these provisions are sections **14(2) (b)**, **15(1) (b)**, **26(4)** and **27** of the **Act** together with rules **5** and **6** of the **Kiambu County Alcoholic Drinks (Licensing) Regulations 2013**.

In determining this petition, the constitutionality or lack thereof of these provisions should be interrogated in the context of the objective of the entire Act and the effects of Act's or the particular provisions' implementation. Looking at it from this perspective, it should not be difficult for this court to hold and declare the Act or the impugned provisions unconstitutional if either their object or effects or both bear that character.

Talking about the importance of the object and effect of a statute in evaluating its constitutionality the court in **Queen versus Big M. Drug Mart Limited (1985) 1SCR 295**, a decision cited by the learned counsel for the petitioners, said:-

"...both purpose and effects are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's objects and its ultimate impact, are clearly

linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislations object and thus the validity.”

And in **Olum & Another versus Attorney General (supra)** a decision that both the counsel for the petitioners and the respondents cited in support of their respective positions, it was held that:-

“...in order to determine the constitutionality of statutes, the court had to consider the purpose and effect of the impugned statutes and section thereof. If the purpose was not to infringe a right guaranteed by the constitution, the court had to go further and investigate the effect of its implementation. If either the purpose or the effect infringed a right guaranteed by constitution, the statute or section in question would be declared unconstitutional.”

The object of Act in focus in this petition, **the Kiambu County Alcoholic Drinks Control Act, 2013** can be discerned from its preamble; it was enacted to provide for the licensing and regulation of the production, sale, distribution, consumption and outdoor advertising, of alcoholic drinks and for connected purposes. The Acts' provisions and the regulations made thereunder are meant to achieve this purpose and in my humble view, they should be evaluated from this vantage point.

Proceeding on this premise, it is inevitable that one cannot consider the constitutionality of the impugned provisions without necessarily considering the object of the entire Act; the two are linked and as was stated in **Queen versus Big M. Drug Mart Limited**, *“purpose and effect respectively, in the sense of the legislation's objects and its ultimate impact, are clearly linked, if not indivisible.”*

The product whose production, sale, distribution, consumption is regulated by the Act in issue is in many ways not like any other consumable available out there for the general public consumption; people take it, for instance, to entertain themselves; they take it to bond or socialise and some even take it as an alternative antidote to stress, to soothe their nerves. Consumption of alcohol may also leave certain effects on its consumer. These effects may take one form or another and perhaps it is partly because of such effects that the reasons behind its consumption are as myriad as the effects it has on its partakers. The trouble is some of the effects alcohol has on its consumers are unintended and more often than not are detrimental to the consumers' health and their well-being generally; it is not uncommon that in worst case scenarios, these effects are fatal. In my humble view, it is in the context of these circumstances that legislation is necessary to regulate the production, sale and consumption of alcoholic drinks, of course, bearing in mind the rights of all those involved and those not involved.

As noted people drink for a variety of reasons; however, while they have every right to take as much alcohol as they can stomach, that right must be regulated as far as it is necessary to protect the rights of other members of society who have little or nothing at all to do with alcohol but whose rights may in one way or another be affected by the unfettered production, sale and consumption of alcohol.

It is equally important to protect the consumers themselves from the destructive effects of alcohol. Considering the likely side effects of alcoholic drinks on the health and well-being of the consumers, it is not only necessary but it is also an obligation on any responsible government to protect the public from such harmful effects that flow from the production, sale and consumption of alcoholic drinks; it would be a dereliction of duty on the part of the government, whether national or county, to leave the manufactures, sellers and consumers of alcoholic drinks to their own devices to detriment of the entire society. It is the responsibility of the Government through its legislative arm to legislate and provide guidelines that would ensure that this section of the populace enjoy their rights without interfering unnecessarily with the rights of others. In my view the Alcoholic Drinks Act, 2010 and the Kiambu County Alcoholic Drinks Act, 2013 are the sort of legislation that the governments at both levels have come with in delivering on this important responsibility.

Take, for example, **section 14(2) (b)** of the **Kiambu County Alcoholic Drinks Act, 2013**. This section of the Act which the petitioners have impugned provides as follows:-

14. (2) The Sub-county Committee shall not grant a licence for the sale of an alcoholic drink

in-

(a)....

(b) an outlet or premises located with a fuel station or a fast food restaurant.

This provision is alleged to be contrary to **Article 40** of the Constitution; the pertinent parts of the article alleged to have been infringed are **sub-articles (1) and (2)** which are to the effect that:-

40. (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 restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

The petitioners are aggrieved that prior to the enactment of the Alcoholic Drinks Act of the Kiambu county, they had their businesses running in the same areas as fuel stations or within their precincts; with the enactment of the Act, these places are now out of bounds for the kind of businesses that the petitioners are engaged in. According to the petitioners, the effect of this legislation has been the closure of businesses which were hitherto in the areas that have now been restricted by this new Act. It is in this light that the petitioners argue that besides the retrospective effect of the Alcoholic Drinks Act, their rights to own property of whatever description in any part of this republic as specifically guaranteed and protected under **article 40 (1) and (2)** of the **Constitution** has been violated. Worse still, it is their fear that should a fuel station “spring up” in future in a place where a liquor business is established it will be forced to close down.

I would outrightly disagree with the petitioners that **section 14(2) (b)** of the Kiambu Alcoholics Drinks Act deprives them of their right to property. This provision simply specifies, by exclusion, where liquor business outlets should be; in other words, the petitioners can operate their liquor businesses anywhere else apart from those places specified in the Act as premises where a fuel station is situated or a fast food restaurant.

I reckon the rationale behind this provision is to restrict easy accessibility to alcohol by motorists who drive to fuel stations to fuel their vehicles or by people, such as children who are by law prohibited from taking alcohol but who may find themselves in a fast food restaurant. Such restriction is meant to protect the lives of those motorists and other road users as well as the lives the vulnerable children. The petitioners have the right to own and run businesses but children, motorists and other road users have a right to life too, amongst other rights that are likely to be infringed if the motorists, for instance, access alcohol while driving.

There is no doubt, and I agree with the petitioners’ counsel, that the right to acquire and own property is guaranteed under **article 40** of the **Constitution**; however, this right is one of those rights that, under **article 24(1)** of the same Constitution, can be limited so long as such limitation is justifiable in an open and democratic society and with particular regard to the larger public interest. **Article 24 (1)** provides:-

24.(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then to the extent that the limitation is reasonable and justifiable in an open and

democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right or fundamental freedom;**
- (b) the importance of the purpose of the limitation;**
- (c) the nature and the extent of the limitation;**
- (d) the need to ensure that the enjoyment of the rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**

If, in the petitioners' view, their rights under **article 40** of the Constitution have been undermined by **section 14 (2) (b)** of the **Alcoholic Drinks Act**, the respondents have demonstrated to the satisfaction of this Court that the relevant factors enumerated in **article 24(1)** of the Constitution were taken into account in limiting the petitioners' constitutional rights under this article.

I am satisfied that the purpose for the limitation, if it is to be so regarded, is noble; it is necessary to protect the rights and fundamental freedoms of others; the extent of the limitation is such that the petitioners can still enjoy their constitutional rights as long as they are conscious of where their rights end and other peoples' rights begin; and the limitation is proportional to the overarching objective of the **Kiambu County Alcoholic Drinks Act, 2013**.

The question of fuel stations "springing up" in areas where petitioners operate is, at best, hypothetical or speculative, to the extent that none of the petitioner's constitutional rights have been contravened nor is there a threat of such a contravention in that respect. In any event, fuel stations or petrol service stations, as they are popularly known, do not just "spring up" anywhere; their locations are controlled by various legislations the most common being the Physical Planning Act (Cap 286) under which any person who may be adversely affected by a fuel station in the neighbourhood or in any particular location is invited to object to its construction before the requisite approvals for such construction are given.

On the issue of retrospective effect of **section 14(2) (b)** of the Act, counsel for the petitioners cited the case of Samuel **Kamau Macharia & Another V Kenya Commercial Bank Ltd & 2 Others**, SCK APP. No. 2 of 2011 [2012] eKLR where the Supreme Court of Kenya was confronted with the question of when a non-criminal legislation has retrospective effect; it held that:-

"[61] As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsburys Laws of England, 4th Edition Vo.44 at p.570). A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden"

What I understand the Supreme Court to be saying which, no doubt, is the correct position in law, is that a legislation that is retrospective in nature is not ipso facto unconstitutional as long as it is apparent either by express words or by necessary implication that that was the intention of the legislature. Such an intention is found in **section 68** of the **Kiambu County Alcoholic Drinks Act, 2013**. It provides as follows:-

68. (1) Notwithstanding any other provision of this Act to the contrary, a person who, immediately before the commencement of this Act was in accordance with Alcoholic Drinks Control Act, 2010 a manufacturer, importer, distributor or retailer of any alcoholic drink under

that Act, shall be deemed to be a manufacturer, importer, distributor or retailer of any alcoholic drink under this Act.

(2) The manufacturer, importer, exporter, distributor or retailer of any alcoholic drink in the contemplated referred to in subsection (1), shall, within four months of upon (sic) commencement of this Act, comply with the requirements of this Act.

It is apparent from this provision that the Act was going to apply with equal measure to the category of persons specified in that provision regardless of whether they were manufactures, importers, distributors or retailers of alcoholic drinks prior to Act's enactment.

In view of the express provision of **section 68** of the Act, there is no basis upon which the Act or any provision thereof including **section 14(2) (b)** can be assailed on the ground of being retrospective in its application. It is doubtful, however, whether the retrospective effect of the Act and more particularly **section 14(2) (b)** thereof was going to have any impact on the petitioners' existing licences. By the very nature of their trade, it appears that they apply for these licences every year; indeed all the licences they have annexed to the affidavit in support of the petition were expiring in the year 2013. There is no single licence that was exhibited to demonstrate that it was issued for the year 2014 and that with the enactment of the **Alcoholic Drinks Act** such licence had been rendered futile. Without the licences for the year 2014 having been issued under any of the pre-existing laws, it is difficult to understand the petitioners' argument that **section 14(2) (b)** of the Act has divested them of vested rights or has arbitrarily deprived them of their property.

Turning to **Section 15(1) (b)** of the **Kiambu County Alcoholic Drinks Control Act**, the petitioners have argued that it is discriminatory because it denies licences to persons who have previously been convicted and sentenced to serve more than six months imprisonment; to this extend it was argued that the provision contravenes **articles 27 and 40** of the **Constitution**. **Section 15(1) (b)** reads as follows:-

15. (1) The Sub-County committee shall not grant a new licence or transfer a licence to any person who-

(a)...

(b) has been convicted of an offence under this Act or of any offence of which the sentence is imprisonment without the option of a fine in Kenya or elsewhere for a period in excess of six months;

I have already alluded the **article 40** of the **Constitution** in my opinion on the constitutionality of **section 14(2) (b)** of the Alcoholic Drinks Act vis-à-vis the protection of right to property under that article. That opinion is equally relevant here except that the focus now is on that aspect of the article that bars the legislature from enacting law that limits enjoyment of the right to property on the basis of discrimination. The pertinent part of the article is **sub-article (2) (b)** which reads:-

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

(a)...

(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).

Article 27(4) of the **Constitution** specifies the grounds of discrimination that may taint a legislation purporting to limit or restrict the enjoyment of the right to property under **article 40** of the **Constitution**. This article reads as follows:-

27. (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.

The petitioners have argued that while the Constitution insulates them from discrimination on any of the foregoing grounds **section 15(1) (b)** of the Act is alleged to do quite the opposite to the extent that it restricts persons who have been convicted of an offence under the Act or any other Act whose sentence is imprisonment without an option of a fine for a period in excess of six months from accessing licences to trade in alcoholic drinks. The respondents invoked the concept of equality and argued that every person is equal before the law. In the decisions in the cases of **Community Advocacy and Awareness Trust & Others versus Hon. Attorney General Petition No. 243 of 2011 eKLR** and the **State of Kerala and Another versus N.M. Thomas & Others, Civil Appeal No.1160 of 1974** cited by the respondents the courts explained this concept of equality as understood in the Constitution to mean that it does not connote absolute equality; they were of the view that one may be classified and such classification will not necessarily be unconstitutional if it is based on a reasonable basis and free from artificiality and arbitrariness.

With due respect to the learned counsel for the petitioners, I have not seen any hint of artificiality or arbitrariness in the requirement that those in the business or aspiring to be in the business of manufacture, sale or trade in alcoholic drinks must be people of certain disposition. This threshold does not appeal to me to be discriminatory against a certain class of persons in the society in accessing available business opportunities; again this requirement is not unique to alcohol business alone, nowadays employers both in private and public sector would want to know whether their potential employee has been convicted of any offence before. If one misses out on an opportunity because of his past criminal record it is not the employer or potential employer to blame and an elimination based on this ground cannot be said to be discrimination as understood in article **27(4)** of the Constitution. In legislations like the Traffic Act one may be disqualified from obtaining or holding a driving licence either in the public interest or if he has been convicted of certain traffic offences.

As far the impugned provision is concerned, the Kiambu County Assembly, in its wisdom, has thought it necessary that persons with criminal records of particular offences should not trade in alcoholic drinks. In my view, it is a policy decision that this court is ill-equipped to interrogate. **In Re Application by Bahadur (1986) LRC 545 (Const.)** cited with approval **Nairobi High Court Petition No. 320 of 2011 Elle Kenya Ltd & Others versus The Attorney General & Others**, the court considered the question of fairness or unfairness of a statute; it concluded that:-

“I would only emphasise that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown.”

At page 304 of its judgment the court continued that:-

“It is not the function of the court to form its own judgment as to what is fair and then to amend or supplement it with new provisions so as to make it confirm to that judgment.”

I have also noted that **section 15 (b)** of the Kiambu Alcoholic Drinks Act, 2013, as are the rest of the provisions that the petitioners have impugned, is a replica of **section 13(1)** of the **Alcoholic Drinks Act, 2010** which is the national legislation for the regulation of the production, sale and consumption of alcoholic drinks. That section provides:-

13. (1) The District Committee shall not grant a new licence or transfer a licence to any person who-

(a)...

(b)...

(c) has been convicted of an offence and sentenced to imprisonment without the option of a fine

in Kenya or elsewhere for a period in excess of six months;

(d)...

(e)...

(f)...

The relevance of this section is that even if **section 15 (2) (b)** of the **Kiambu County Alcoholic Drinks Act, 2013** was to be nullified, the petitioners would still be caught out by the same law at the national level. Be that as it may, I do not find this piece of legislation discriminatory in terms of **article 27(4)** of the **Constitution**. Neither is it contrary to **article 43** of the Constitution that guarantees social and economic rights or any provision of the International Convention on Economic and Social Rights as suggested by the petitioners.

The petitioners have also assailed **section 26 (4)** of the Act on the ground that it purports to create offences and penalties for such offences, a task which, in the petitioners' view, is reserved for the National Government and that this is clearly stipulated in **Part 1(7) (b)** and **(c)** of the **Fourth Schedule** to the Constitution.

Section 26(4) of the Act states:-

26.(4) A licensee who permits any drunkenness leading to violent, quarrelsome or riotous conduct to take place on the premises to which the licence relates commits an offence.

There is no doubt that the **Kiambu County Alcoholics Drink Act, 2013** was enacted by the County Assembly of Kiambu County Government in exercise of its legislative authority with which it is vested under **article 185(1)** of the **Constitution**. **Article 185(3)** is clear that a county assembly may make laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule. Some of the functions for which the County may legislate for effective performance and exercise of the powers of the County government are control of public nuisances and liquor licensing. In my view a "**violent, quarrelsome or a riotous conduct**" in a liquor outlet would be a public nuisance that a county government is vested with power to control under **section 3** of **Part 2** in the **Fourth Schedule** to Constitution. I do not envisage how such control can be exercised other than through a legislative instrument that is backed by proportionate sanctions in the event of non-compliance. I understand **article 26(4)** in this context. The county government has not just been loaded with functions but it has also been endowed with the necessary mechanisms to ensure that those functions are effectively delivered; such mechanisms are the power to legislate laws with sanctions to ensure compliance.

The other provision in the **Kiambu County Alcoholics Act, 2013** that the petitioners took issue with is **section 27** of the Act. That section provides:-

27. No suit shall be maintainable to recover any debt alleged to be due in respect of the sale of any alcoholic drink which was delivered for consumption on the premises where it was sold unless it was sold for consumption with a meal supplied at the time of sale or unless the person to whom it was sold or supplied was at the time of the sale a lodger on such premises.

The petitioners gripe with this provision is that it allegedly purports to oust the jurisdiction of the Court contrary to **articles 50(1)** and **159 of the Constitution**. **Article 50(1)** guarantees every person a right to have any dispute resolved by an independent and impartial tribunal or body. **Article 159 (1)** on the other hand vests judicial authority in courts and tribunals.

My reading of **section 27** of the Act is that it is more of an equivocal provision rather than an unconstitutional one; I say so because the intention of the legislature is not clear. This lack of clarity does not necessarily render that provision of the law unconstitutional; it is an ambiguity that can be cured by an

amendment.

This provision is similar, word for word, with **section 23** of the **Alcoholic Drinks Act, 2010** and nullifying it while the national legislation remains intact would be an exercise in futility, assuming there was a genuine case for its nullification.

The final section for consideration is **section 16** of the Act as read with the **First Schedule** to the Act; the petitioners claim that this provision and the Schedule violate **article 46** of the Constitution and the **international labour laws** on hours of operation. The contentious part of **section 16** of the Act which the petitioners are complaining about is **section 16 (3)(c)** which says that every grant of a licence or its renewal or transfer shall specify the hours stipulated under the First Schedule. The First Schedule goes further to specify the hours within which liquor outlets may sell alcohol on weekdays and on weekends; as from Monday to Friday retailers can retail their alcohol from 5.00 p.m. to 11.p.m while on weekends and public holidays they are allowed to operate from 2.00 p.m. to 11.00p.m.

I am unable to see how these schedules have infringed the petitioners' constitutional rights under article 46 of the Constitution. **Article 46** protects the rights of consumers to have goods and services of reasonable quality; to have information necessary for maximum benefit of the goods and services; to protect their health safety and economic interest; and to be compensated for loss or injury arising from defects in goods and services. These rights are more to do with the consumers than retailers who in this case are the petitioners; however, regardless of whether they are pursuing to enforce their own rights or whether they are petitioning on behalf of their clientele the regulation of drinking hours cannot, by any stretch of imagination, be construed to interfere with consumer rights. If anything, **article 46** itself is clear that a consumer's right to health and safety is paramount; this right would certainly be compromised if the consumers were exposed to unbridled consumption of alcohol.

For the reasons I have stated earlier on in this judgment on the limits on enjoyment of ones rights to property under article 40 of the Constitution, I am persuaded that the timing of when alcohol can be retailed does not deprive the petitioners of their right to property.

Besides the specific provisions in the Act, the petitioners also condemned the regulations made under **section 67** of the Act and which were published in the Kiambu County Gazette Supplement No.1 of 6th January, 2014. The petitioners specifically picked out rules 5 and 6 as the offensive rules. Rule 5 relates to the consequences of failure by an applicant to submit the necessary information on an application for a licence while rule 6 relates the issue of a licence to an applicant if the relevant sub-committee is satisfied that the applicant has complied with the requirements under the regulations.

It has not been demonstrated by the petitioners how the requirement for particular information on application for a liquor licence contravenes their rights; neither have they demonstrated how the grant of a licence to an applicant who has complied with the requirements hurts them. For these reasons I cannot see why the two rules should be declared unconstitutional.

The other aspect of the regulations that was impugned is the Third Schedule thereof which sets out the rates for different types of licences. The petitioners claim against this schedule is that licence has been hiked by over 2000% which in their view is unconscionable, excessive and punitive. They also claim that they did not participate in the making of the regulations contrary to **articles 10(2)** and **196(1)** of the **Constitution** and **section 87** of the **County Governments Act, 2012**.

The concept of public participation was explained relatively comprehensively in several decisions cited by both counsel for the petitioners and the respondents. These are the **Doctors for Life International versus Speaker of the National Assembly and Others (CC12/05)(supra)** and the **Minister for Health & Another versus New Clicks South Africa(Pty) Ltd & Others (2006) (2) sa 311** which was cited with approval in **Nairobi Metropolitan PSV Saccos versus County of Nairobi Government (supra)**.

The common denominator in all these decisions is that what matters in the ultimate is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue

and to have an adequate say. There is a caveat, however, that it cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of the concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations.

In the affidavit sworn by Wilson Mwita Maroa on behalf of the County Government of Kiambu there are copies of minutes of meetings on the awareness amongst members of the public of the **Kiambu County Alcoholic Drinks Bill, 2013** which was eventually enacted into law. These meetings were held on 25th July, 2013, 19th August, 2013 and 26th August, 2013 when even the issue of regulations were discussed.

Although the petitioners have disowned the meetings it is worth noting that in paragraph 33 of the affidavit of Susan Wakonyo Nganga, the petitioners have admitted that their contribution in these meetings were not taken into account. The implication of this contention is that the petitioners had the opportunity to present their views but the bone of contention is that those views were ignored in the final regulations. The answer to such a contention is what was said by Lenaola, J. in **Nairobi Metropolitan Psv Saccos Union Limited & 25 Others versus County of Nairobi Government & 3 Others** that “... *public participation is not the same as saying that public views must prevail.*” Again in **Association of Gaming Operators Kenya versus the Attorney General & 4 others (2014) eKLR** it was held that public participation does not always mean that the outcome thereof must result in what the petitioners wanted.

In his submissions counsel for the petitioners submitted that the basis of fees charged ought to have been on the volume of alcoholic drinks sold or the monthly turnover and not on the basis of the location of the business. It is not clear whether this was amongst the views expressed by the petitioners in these meetings; if that was the case it was not borne out in the affidavit in support of the petition.

If the petitioners had the opportunity to participate in the meetings that came up with the Act and the regulations, meaning that their view must have been considered, it is beyond this court to determine how much should be levied as rates payable by the petitioners or any other person seeking a licence to retail liquor. I would adopt the reasoning of Lenaola J in **Nairobi Metropolitan Psv Saccos versus County of Nairobi Government (supra)** where he stated that:-

“I must also state that this Court cannot direct the 1st Respondent on how to exercise its duty of levying parking fees. The 1st Respondent has the option of legislating on the calculation of parking fees and in its wisdom it has done that taking into consideration public views, its policies as well as the revenue it ought to raise.”

For the foregoing reasons it is inevitable and I am minded to conclude that I am not persuaded by the petitioners petition that certain impugned provisions of the Kiambu Alcoholic Drinks Act, 2013 and the regulations made thereunder are in contravention of their fundamental rights and freedoms as alleged or at all. I am also not persuaded that any of those impugned provisions and the regulations are unconstitutional. In the ultimate I find that this petition has no merit and it is hereby dismissed. Parties shall bear their own respective costs.

Signed, dated and delivered this 10th October, 2014

Ngaah Jairus

JUDGE

