



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NUMBER 32 OF 2014

**IN THE MATTER OF ARTICLES 10, 22, 23, 165, 191, 196 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
UNDER ARTICLE 47(I), & 27 OF THE CONSTITUTION**

AND

IN THE MATTER OF THE MERU COUNTY ALCOHOLIC DRINKS CONTROL ACT, 2014

AND

**IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL ACT, CHAPTER 121A OF THE
LAWS OF KENYA**

AND

**IN THE MATTER OF THE CUSTOMS & EXCISE ACT CHAPTER 472 OF THE LAWS OF
KENYA**

BETWEEN

**MERU BAR, WINES & SPIRITS OWNERS SELF HELP GROUP(Suing through its secretary)
IBRAHIM**

**MWIKA.....PETI
TIONER**

VERSUS

COUNTY GOVERNMENT OF

MERU.....RESPONDENT

J U D G M E N T

1. The petitioner, Meru Bar, Wines and Spirit Owners Self Help Group suing through Ibrahim Mwika, pursuant to Articles 10,22,23, 165, 191 and 196 of the Constitution of Kenya and on an alleged contravention of Article 47(1) and 27 of the Constitution, the County Alcoholic Drinks Control Act, 2014, The Alcoholic Drinks Control Act Chapter 121A and the Customs and Exercise Act Chapter 472 of the Laws of Kenya sought a declaration that the petitioner's fundamental rights and freedom have been

violated; that the Meru Alcoholic Drinks Control Act is inconsistent with the Constitution of Kenya, the Alcoholic Drinks Control Act, the Customs and Exercise Act and the Law of Contract; an Order do issue quashing the Meru Alcoholic Drinks Control Act in its entirety in the alternate and without prejudice to the above mentioned prayer, an order do issue quashing the ultra vires provisions of the Meru Alcoholic Drinks Control Act, costs of the petition and any other relief that this Honourable Court may deem just to grant.

2. The petitioner is an Association registered as a Self Help Group; under the Ministry of Labour, Social Security and Services composed of operators and dealers in Alcoholic Drinks in various capacities including bar owners; proprietors of wines and spirits, outlets, suppliers, distributors and retailers of Alcoholic Drinks. The Self Help group as per annexure "IMI" certificate of Registration No. 3556445 was registered on 19th September, 2014 and has 129 members as per attached signed list of member's annexure "IM2". The petitioner's petition is based on several grounds on the face of the petition inter alia; that the respondent, County Government of Meru, on 8th May, 2014, the 2nd respondent (there is only one respondent herein and the petitioner I believe meant the respondent herein) held a seating with its assembly where it conducted both a 2nd and 3rd reading of the Meru Alcoholic Drinks Control Bill and passed it albeit with a number of amendments; that the Meru Alcoholic Drinks Control Act was apparently assented to by the Governor on 25th June, 2014 and is indicated to have commenced on 18th July, 2014; that the petitioners and other stakeholders are aggrieved by the entire procedure and manner that was adopted in formulating and passing the Meru Alcoholic Drinks Control Act; that in formulating such public regulations and subsidiary legislation the respondent is required to abide by the provisions of Article 10 of the Constitution which demands inter alia; the rule of law, democracy and participation of the people as well as Article 196 of the Constitution requiring public participation and involvement of the public in its legislative functions and committees and finally Section 3(f) of the County Government Act.

3. The petitioners aver that being stakeholders in the Alcoholic Drinks Industry they were not at all involved in the formulation of the Act and neither were they invited to make contributions to it before it was tabled in the County Assembly. The petitioners urge their lack of knowledge of the Bill was not out of ignorance or lack of interest but because of the deliberate acts and omissions by the respondent in failing to publicize the Bill or entertain participation of the interested persons. The petitioners allege further there was no effort or attempt made by the respondent to advertise the proposed Bill in Newspapers, radio, public notices or even in its website- www.assembly.meru.go.ke and neither was there a circulation of the proposed Bill to the residents prior to its tabling before the house. That in addition the Bill was hurriedly passed not only without taking into account the interest of the stakeholders but also contrary to the Standing Orders of the Respondent's Assembly which require publication of a Memorandum of Objects, Public Participation, and which proscribe the conducting of 2 readings on a single day. That the respondent hurriedly conducted the 2nd and 3rd reading of the subject Act together and then thereafter constituted a committee of the whole house which passed the Bill into an Act.

4. The petitioners contend that they believe the Act as passed is inconsistent with the provisions of not only the Constitution of Kenya but also the National Legislation namely the Alcoholic Drinks Control Act as well as other statutes and consequently in accordance with Article 191 of the Constitution, where there is conflict between County legislation and National legislation in matters where there is concurrent jurisdiction National legislation prevails. The petitioner urges the Meru Drinks Control Act is inconsistent with the provision of the Constitution under Section 3(e), and (h) which they allude is inconsistent with Article 174(f) of the Constitution, Section 4 on composition of Alcoholic Drinks Control Boards in excluding participation of stakeholders contrary to Section 10 of the Constitution on inclusiveness in governance, Section 9 on composition of the sub-county Alcoholic Drinks Regulation Committee excludes the inclusion of Stakeholders contrary to principles or Article 10 and 27 of the Constitution; Section 15(1),(b) in so far as it excludes anyone convicted of criminal offence from holding a license rather than anyone convicted under the of rehabilitation under the Penal Code and Section 47 and 48 that prescribe promotion are inconsistent with Article 174(f) of the Constitution.

5. That the Act is inconsistent with the National Legislation on the following; Section 27 of the Act is inconsistent with the Law of Contract Act, Section 3, 87 and 115 of the County Government Act for lack

of public participation, Section 34 (2) (a) and (b) so far as it proscribes PET bottles is inconsistent with Section 37 2(b) of the National Alcoholics Drinks Control Act and Section 91A of the Customs and Exercise Act.

6. The petitioners averred that based on the objects of the Act as espoused by Section 3 the respondent must have proceeded on an unreasonable, erroneous presumption and error of fact to the effect that simple alcoholic drinks consumption without being in excess is itself evil, bad and unhealthy and that it was unreasonable to exclude stakeholders such as bar owners and distributors from the Alcoholic Drinks Control Board and Sub-County Committees resulting for lack of articulation of the petitioners' interest as stakeholders during licensing, renewals and refusals. The petitioner further referred to Section 14(1),(a) of the Act on one of the grounds of refusal of license in a residential area if it is considered that the area has adequate facilities to be unreasonable and skewed thinking and termed it as contrary to the laws of demand and supply, free trade and a liberal economy. The petitioners further raised the issue with Section 14(2) and (b) which prohibits sale of Alcoholic Drinks in a Petrol Station terming it as having no justifiable reason in view of the fact that petrol stations have shops, supermarkets and even restaurants with counters and can have requisite controls. The petitioner further urged the provisions of Section 39 proscribing sale of alcohol drinks to "authorized officers" so absurd considering that such officers unless on duty can per take of the entertainment. That Section 42 they urged in so far as it prescribes mixing of drinks to be unreasonable and unfair in that cocktails and other lawful mixes have been unjustifiably been proscribed. It was in the light of the foregoing that the petitioners aver that the Meru Alcoholic Drinks Control Act is unconstitutional, inconsistent with National Legislation, unfair, unreasonable, and was passed contrary to a fair procedure as enshrined in the Constitution and in the County Government Act. The petitioners averred that it would be just if the Meru Alcoholic Drinks Control Act is quashed to enable all interested parties to come up with an Act that is lawful, inclusive and clothed with public participation. Further the petitioner, urged that there is already National Legislation on the matter, that the Act passed is superfluous and its movers would have justice by only legislating either on what was provided for or limited to the operations of the County Board and Committees. The petitioners further seek the Act to be quashed and there be a declaration that their fundamental rights have been violated.

7. The respondent on the other hand is opposed to the petition. The respondent filed a replying affidavit dated 13th October, 2014 in opposition to the petition through its Chief Officer Mercy mwendwa Ndiira. The respondent countered the petitioner's petition by averring that the regulations of licensing, production, sale, distribution, and consumption and as well as outdoor advertising of alcoholic is an exclusive Constitutional function of the County Government and the National Government has no role to play. The respondent further avers that whenever the National legislation is inconsistent with the County Government legislation on a subject then the County Government legislation prevails. The respondent in their reply at any rate asserts that the subject County legislation conforms to the National legislation.

8. On the issue of public participation the respondent contends that the petitioner has no basis in this petition as it was not in existence at the time of the enactment of the Meru County Alcoholic Drinks Control Act as the petitioner was not registered as at 18th July, 2014 when the subject Act was enacted. That the petitioner's certificate of registration evidently shows that the petitioner was registered on 19th September, 2014 two months after the subject Act had been enacted. Therefore the petitioner's contention that the petitioner was not consulted in the enactment of the subject Act are spurious as no amount of effort by the Respondent would cause a non-existent petitioner as of 18th July, 2014 to participate in the process leading to the enactment of Meru County Alcoholic Drinks Control Act 2014 on 12th July, 2014.

9. The respondent alleges that it has demonstrated as per annexure "MMN12" produced in replying affidavit of Mercy Mwendwa Ndiira that the respondent effectively notified, involved and took into account, the views of the public in the process of enacting Meru County Alcoholic Drinks Control Act No.3 of 2014 through public advertisement carried in the Daily Nation Newspaper dated 21/4/2014 at page 8, on the website of Meru County Assembly and that the respondent's County Assembly notifying the public that the Assembly would hold eight(8) public participation forums to consult the public on the Meru Alcoholic Drinks Control Bill 2014 to wit:-

- a. *At North Imenti sub-county Meru Town Kamunde Hall on the morning of 25th April, 2014*
- b. *At Tigania East sub-county, Muriri Social Hall on the morning of 25th April, 2014.*
- c. *At Buuri sub-County, Timau Social Hall, on the afternoon of 25th April, 2014.*
- d. *At Tigania West sub-county Uuru sub-county on the afternoon of 25th April, 2014.*
- e. *At Imenti South Sub-county Nkubu Social Hall on the morning of 26th April, 2014.*
- f. *At Igembe South and Igembe Central Sub-county on the morning of 26th April, 2014.*
- g. *At Imenti Central sub-county, Gatimbi Deputy Commissioner's office in the afternoon of 26th April, 2014.*
- h. *At Igembe North sub-county Laare Social Hall on the afternoon of 26th April, 2014.*

10. The respondent contends that the published public consultative meetings between the respondents County Assembly and the public over the Meru County Alcoholic Drinks Control Bill, 2014 took place as evidenced by the sample copies of the official receipts annexed to the affidavit of Mercy Mwendwa Ndiira which were issued to the respondent's County Assembly for public meetings as enumerated herein above. In addition to the aforesaid the respondent contends that on 22/4/2014, 23.4.2014 and 24/4/2014 the respondent's County Assembly advertised through local vernacular FM stations namely MERU FM and Muuga FM and that there was going to be public consultative meetings between the public and Meru County Assembly at the specified venues and dates over Meru Alcoholic Drinks Control Bill, 2014.

11. It is further the contention of the respondent that prior to the public consultative meetings held on 25th and 26th April, 2014 the respondent had published the Meru County Alcoholic Drinks Control Bill, 2014 way back on 28th February, 2014 under Meru County Gazette supplement NO. 1 of 2014 so as to give the public sufficient time to interrogate the contents of the bill and raise any concern they might have over the contents of the Bill. The Meru County Alcoholic Drinks Control Bill, 2014 is marked annexure "MMN13" in the affidavit of Mercy Mwendwa Ndiira. The respondent further averred that the subject law is in the public interest and should be allowed to rather satisfy the purely commercial interest of the petitioner.

12. This matter was on 30/9/2014 mentioned before Hon. Mr. Justice P. M. Njoroge, who upon hearing the petitioner *ex parte* granted conservatory orders staying the application and enforcement of Meru County Alcoholic Drinks Control Act, 2014 upto 16th October, 2014 and directed the parties to appear before me on 16th October, 2014. On 16th October, 2014 upon hearing Mr. Thuita, learned Advocate for the petitioner and Mr. Okoth learned advocate for the respondent the court in the interest of the parties extended the justice and balancing the interests of the parties extended the interim orders issued by Hon. Mr. Justice P. M. Njoroge and directed that the parties do attend court on 3/11/2014 for hearing of the petitioner itself. The counsel were directed to file and exchange their respective submissions before then and were to attend court on 3/11/2014 for highlighting on the same, if need be.

13. The respondent's counsel M/S Prof. Tom Ojienda and Associates advocates filed their submissions together with a list of authorities on 30th October, 2014 whereas the petitioner's submissions were filed by M/s Mwangi & Quandaru Advocates on 3rd November, 2014 together with authorities. The counsel filed different issues for determination by court. I have carefully considered the petition, affidavit in support and annexures thereto as well as the replying affidavit and annexures thereto. I have also considered the parties counsel rival issues for determination, the nature of the claim before this court and pleadings in support and opposition, the issues for consideration can be condensed or summarized as follows in the court's view.

- i. ***Whether Meru County Alcoholic Drinks Control Act No. 3 of 2014 is inconsistent with the Natural Law and further whether it is subsidiary legislation and whether Section 34(2) and (b) of Meru county Alcoholic Drinks Control Act No. 3 of 2014(1 is in breach of the Provisions of Section 31(2 (b), of the National Alcoholic Act No.4 of 2010 and Section 91A of the Customs & Excise Act(Cap.472) Laws of Kenya?***
- ii. ***Whether Meru County Alcoholic Drinks Control Act is inconsistent with the Constitution of***

Kenya and to what extent if so and further whether it hinders economic development within the meaning of Article 174(f) of the Constitution ?

iii. Whether the Meru County Alcoholic Drinks Control Act No.3 of 2014 was enacted without public participation in breach of Articles 10 and 196 of the constitution of Kenya and Section 3(f) of the County Government Act No.17 of 2013

14. The court has very carefully considered the submissions by Mr. Mwangi learned Counsel for the petitioner and submissions by Prof. Tom Ojienda, learned Professor for the respondent. The court has equally considered the respective learned counsel highlighting on their submissions and authorities relied upon and shall now proceed to consider the issues for determination in light of the pleadings and all annexed materials in support of the differing positions taken by the parties in this petition, as well as various Acts referred to and the Constitution of Kenya, 2010.

Whether Meru County Alcoholic Drinks Control Act, No.3 of 2014 is inconsistent with the National Law and further whether it is subsidiary legislation and whether Section 34(2) (a) and (b) of Meru County Alcoholic Act No. 3 of 2014 breach the provisions of Section 31(2) (h), of the National Alcoholic Drinks Control Act No. of 2010 and Section 91A of the Customs and Exercise Act(Cap.472 Laws of Kenya?

15. The petitioner's on his submissions on this issue relies on Article 191 of the Constitution of Kenya, 2010. Article 191(1),2(a),(b),(3),(4),(5) and (6) provides:-

“191. (1) This Article applies to conflicts between national and county legislation in respect of matters falling within the concurrent jurisdiction of both levels of government.

(a) The national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or

(b) The national legislation is aimed at preventing unreasonable action by a county that—

(i) is prejudicial to the economic, health or security interests of Kenya or another county; or

(ii) impedes the implementation of national economic policy.

(3) The following are the conditions referred to in clause(2)(a)—

(a) the national legislation provides for a matter that cannot be regulated effectively by legislation enacted by the individual counties;

(b) the national legislation provides for a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—

(i) norms and standards; or

(ii) national policies; or

(c) the national legislation is necessary for—

(i) the maintenance of national security;

(ii) the maintenance of economic unity;

(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) the promotion of economic activities across county

boundaries;

(v) the promotion of equal opportunity or equal access to

government services; or

(vi) the protection of the environment.

(4) County legislation prevails over national legislation if neither of the circumstances contemplated in clause (2) apply.

(5) In considering an apparent conflict between legislation of different levels of government, a court shall prefer a reasonable interpretation of the legislation that avoids a conflict to an alternative interpretation that results in conflict

(6) A decision by a court that a provision of legislation of one level of government prevails over a provision of legislation of another level of government does not invalidate the other provision, but the other provision is inoperative to the extent of the inconsistency.

16. The petitioner's position is that in view of Article 191 of the Constitution of Kenya, 2010, where there is a conflict between National Legislation and County Legislation in areas where both have concurrent jurisdiction the National Legislation prevails.

17. The respondent on the other hand takes a different view urging that the mandate of governance established by the people is defined by particular concepts, principles and values one of which of these concepts being **devolution** and devolved units which the Constitution of Kenya expressly recognizes. Article 6 thereof has a distinct and independent level of government from the National Government. Article 6(1) and (2) of the Constitution of Kenya provides:-

“6. (1) The territory of Kenya is divided into the counties specified in the First Schedule.

(2) The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.”

18. The respondent in articulating on the said Article and the importance and independence of devolved units referred to the case of **Speaker of Senate & Another versus Speaker of National Assembly & 2 others advisory opinion preference No.2 of 2013(2013)eKLR** where it was held:-

“The Kenyan people, by the Constitution of Kenya, 2010 chose to de-concentrate State power, rights, and duties, competences – shifting substantial aspects to county government, to be exercised in the county units, for better and more equitable delivery of the goods of the political order. The dominant perception at the time of constitution-making was that such a deconcentration of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfillment, through an enlarged scheme of actual participation in governance mechanisms by the people – thus giving more fulfillment to the concept of democracy.

[137] By Article 1 of the Constitution, the people's sovereign power is delegated to Parliament and the legislative assemblies in the county units, the national and county executives, and the judiciary and independent tribunals.

[138] Devolution as a required constitutional practice runs in parallel with an attendant set of

values, declared in Article 10 of the Constitution: the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, the protection of the marginalized.”

19. In our Constitution it is clear that the fundamental organ of devolved government is the County Assembly as expressly created under **Article 176(1) and (2) of the Constitution** which provides:-

“176. (1) There shall be a county government for each county, consisting of a county assembly and a county executive.

(2) Every county government shall decentralize its functions and the provision of its services to the extent that it is efficient and practicable to do so.”

20. On the issue of legislative authority of County Article 185(1) and (2) of the Constitution of Kenya, clearly points out that the same vests within the County Assemblies. The said **Articles 185(1) and (2)** provides:-

“185. (1) The legislative authority of a county is vested in, and exercised by, its county assembly.

(2) A county assembly may make any 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.”

21. In the case of **Nairobi Metropolitan PSV Saccos Union Limited & 25 others Civil Appeal NO. 42 of 2014(Nairobi)**, Court of Appeal, stated:-

“ The constitution created functions and legislative authority to make laws for effective performance of those functions.....”.

22. The County Assembly in exercise of a Constitutional mandate under **Article 185(1) and (2) of the Constitution of Kenya 2010** can make laws but could such laws be termed as “subsidiary legislation” as the petitioner contends in his submissions? **Section 3 of the interpretation and General provisions Act(Cap.2)**(defines “subsidiary legislation” that it means any legislative provision including a transfer of delegation of powers or duties) made in exercise of a power in that behalf conferred by a written law, by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument. A **“written Law”** conferring a mode to enact a subsidiary legislation is described by the said Section to mean:-

- a. *An Act of parliament for the time being in force*
- b. *An applied law*
- c. *Any subsidiary legislation for the time being in force, or*
- d. *Any County legislation as defined in Article 260 of the Constitution Article 260 of the Constitution of Kenya,2010 provides:-*

“County legislation” means a law made by a County Government or under authority conferred by a County Assembly.

23. In view of **Article 185 of the Constitution of Kenya, 2010** the legislative Assembly is not derived from an Act of Parliament for the time being in force or from an applied law or from an Act of legislation of another County but from express and specific provision of the Constitution. The Meru County Alcoholic Drinks Control Act No.3 of 2014 was passed in exercise of legislative authority of Meru County Assembly as enshrined in the Constitution of Kenya, under **Article 185(1) and (2) of the Constitution of Kenya, 2010**. The said Act I find is not and cannot be taken as a “subsidiary legislation” as the petitioner contended.

24. The petitioner contends that the respondent aver that the National Government has a role in regulating the liquor industry referring to **paragraph 4(c) of Part 2 of the Schedule 4 to the**

Constitution of Kenya he; admits that indeed the County Government is vested with the duty to manage liquor licensing however, the licensing is the only function directed to the County Government and entails only permitting the use of something or to allow an action to take place. It is further contended for the petitioner that a license may be issued by authorities, to allow an activity that would otherwise be forbidden and may require payment of fees and/or providing capability or keep authority informed on a type of activity and give them the opportunity to set conditions and limitations. The petitioner concede that it is no longer the duty of NACADA to issue licenses but the County Government, however, according to the petitioner, all other policies and standards concerning alcoholic drinks are a preserve of the National Government. The petitioner therefore submitted that it is not the case that the National Government has no role in the alcoholic drinks industry.

25. The petitioner therefore contends that any conflict between National legislation and the Meru Alcoholic Drinks Control Act would render the latter Act null and void to that extent of the inconsistency. The petitioner outlined numerous provisions. That according to them are in conflict with the National Law but mainly underlined the conflict regarding Section 34(2),(a) and (b) of the Meru Alcoholic Drinks Control Act in so far as it proscribes PET bottles as well as containers of between 200-249 milliliters is inconsistent with **Section 31,(2), (b) of the National Alcoholic Drinks Control Act and Section 91A of the Customs and excise Act** which provides:-

“91A(1) No person shall pack or sell an alcoholic beverage in a container the capacity of which is less than the two hundreds milliliters.”

26. The petitioner referred to Section 34(2),(b) of Meru Alcoholic Drinks Act which provides:-

“91A(1) No person shall pack or sell an alcoholic beverage in a container the capacity of which is less than the two hundreds milliliters.

The petitioner contends that **Section 34(2),(b) of the Meru County Alcoholic Control Act** is disallowing containers of between 200-249 milliliters yet they are allowed by a National Statute and to that extent, it is then null and void.

27. The petitioner further contend that in **Section 34(2),(b) the Meru County Drinks Control Act** asserts that no one will sell a distilled or fortified drink except those packed in glass bottles, however, **Section 37(2),(b) of “Mututho Law”- Alcoholics Drinks Control Act** provides that:-

“The alcoholic drink previously known as chang’aa or any other distilled alcoholic drink shall only be manufactured, packed, sold or distributed in glass or PET(Polythene Terephthalate) bottles or metallic containers of the kind specified in paragraph (a).”

28. The petitioner therefore contends that it seems that the National Law provides for bottles other than glass bottles and urges accordingly if the County Act does not recognize PET bottles, then it is inconsistent with the National Law and therefore null and void.

29. The respondent contended the petitioners’ submissions contending that Meru County Alcoholic Drinks Control Act No. 3 of 2014 is the legislation envisaged in **Article 185(2) of the Constitution of Kenya, 2010** passed by Meru County Assembly to regulate the mandate of the respondent under **part 2 of the Fourth Schedule to the Constitution of Kenya at paragraph 4(c)** is to regulate cultural activities, public entertainment and public amenities, including-(C) Liquor licensing. The respondent contends that the respondent does not share liquor licensing function with the National Government as the primary legislation for regulating liquor licensing in Meru County is not a National Legislation, but County Legislation entered for that purpose. It is therefore clear that under **Article 185(2) of the Constitution of Kenya**, Meru County Assembly has authority to:- make legislation to regulate the mandate of the respondent under part 2 of the Fourth Schedule of the Constitution of Kenya, at paragraph 4(c) to regulate cultural activities, public entertainment and public amenities including liquor licensing which function the respondent does not share with the National Government and as such I find that primary legislation for regulating liquor licensing in Meru County is not a National Legislation but a

County legislation.

30. The petitioner in this petition has contended that **Section 34(2),(a) and (b) of the Meru County Alcoholic Drinks Control Act No. 3 of 2014 is in breach of the provisions of S 31(2),(b) of the National Alcoholic Drinks Control Act NO. 4 of 2010 and Section 91A of the Customs and Excise Act(Cap.472 Laws of Kenya).** The impugned Meru County Alcoholic Drinks Control Act NO. 3 of 2014 was enacted by the respondent in exercise of its Constitutional mandate as per **Article 185(1) and (2) of the Constitution of Kenya** for the purpose of regulating a function conferred in **part 2 of the further schedule to constitution under paragraph 4(c).** That as per **Legal Notice 177 of 9th August, 2013 the Transition to devolved Government Act, 2012** Transition authority lies with the counties to regulate “cultural activities, public entertainment and public amenities including – liquor licensing.

31. In view of the foregoing I find that the mandate to impose such conditions as may be desirable for licensing or dealing in liquor within Meru County including sale, production, consumption, and advertising of liquor vests with the Meru County Government. That mandate can be exercised through legislation by the County Assembly of the respective County under **Article 185(1) and (2) of the Constitution of Kenya, 2010.**

32. I further find and hold that there is nowhere under part 1 of the Fourth Schedule of the Constitution of Kenya, 2010 which sets functions of the National Government under the devolved system of Government to regulate liquor licensing. I find the petitioner did not quote any Article or provision of the Constitution to the effect that National Government or any of its agency regulates liquor licensing function.

33. Having come to the conclusion that National Government does not regulate liquor licensing but country legislation, I find that conflict of laws between National legislation and County legislation does not arise as alluded to by the petitioner at all. The primary legislation regulating a mandate exclusively and legally vest in a County Government through the legislation by the County Assembly. The conflict of laws between the National Government and County Government can arise in a situation envisaged under **Article 191(1) of the Constitution of Kenya, 2010 provides:-**

“191. (1) This Article applies to conflicts between national and county legislation in respect of matters falling within the concurrent jurisdiction of both levels of government.

(a) the national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or

(b) the national legislation is aimed at preventing unreasonable action by a county that—

(i) is prejudicial to the economic, health or security interests of Kenya or another county; or

(ii) impedes the implementation of national economic policy.”

34. The liquor licensing I find and hold does not fall within concurrent jurisdiction of the National and County Government but is an exclusive mandate of the County Government. I therefore find that **Article 191(1) of the Constitution of Kenya, 2010** is not applicable in the instant petition.

35. The respondent in support of their proposition that liquor licensing is a mandate of the county governments referred to the case of **NAIROBI METROPOLITAN PSV SACCOS UNION LIMITED AND 25 OTHERS VERSUS COUNTY OF NAIROBI GOVERNMENT & 3 others, NAIROBI CIVIL APPEAL NO. 42 OF 2014(Supra)** where it was held:-

“In so far as the Constitution created County Governments and gave them certain functions and legislative authority to make laws for effective performance of those functions, we find that the Judge was right in declining to declare Paragraph 6: I of the Finance Act unconstitutional. We do not agree

with Mr. Kinyanjui's contention that although Section 18 (a) of the 4th schedule of the Constitution gives the functions of transport and communication to the National Government, the County Government is an organ of the Constitution, the one that is vested with the function of determining matters of traffic and parking fees. If it was the intention of the drafters of the Constitution to give the function of parking to the National Government, they should have expressly said so. Instead the Constitution states clearly that the functions of regulating traffic and parking are vested in the County Governments. In addition, the Traffic Act gives room to a local authority (read County Government) to use any other method in calculating the parking fees other than what is provided for under section 72(B).

As stated, we find no conflict between the Finance Act, the Traffic Act. Even if there was, the Finance Act would prevail as the Constitution that created the County Governments and gave them legislative powers and functions of regulating traffic and parking.”

I find the authority relevant and binding on this court.

36. It is contended by the petitioner that Section 34 (2),(a) and (b) is in breach of the Meru County Alcoholic Drinks Control Act No. 3 of 2014 breach provisions of **Section 31(2), (b) of Section 37(1), (b) of the National Alcoholic Drinks Control Act No. 4 of 2010 and Section 91A of the Customs and Excise Act(Cap.472) Laws of Kenya. Sections 34(1) and 2(a) and (b) of the Meru County Alcoholic Drinks Control Act NO. 3 of 2014** provides:-

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

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

(b) any other distilled or fortified alcoholic drink shall only be manufactured, packed, sold or distributed in glass bottles of the kind specified in paragraph (a) or as may be prescribed in national legislation relating to control of alcoholic drinks.”

36. The court has very carefully compared the contested Sections of the impugned Act with the provisions of the National Acts. **Section 34(2),(a) and (b) of the Meru County Alcoholic Drinks Control Act No. 3 of 2013** does not in any way attempt nor oust the application of National Legislation referred to by the petitioner namely **Alcoholic Drinks Control Act NO. 4 of 2010** and the **Customs and Excise Act(Cap.472)** in Meru County. The Act herein imports National legislation as alternative legislation for proscribing the type and capacity of the container to be used in packages, distribution or selling alcoholic drinks in Meru County contrary to assertion by the petitioner **S34 of Meru County Alcoholic Drinks Control Act** do not bar drinks from other counties or out of Meru County but is only intended to balance public interest and is also for good of the County. Further as earlier on held by this court even if there were conflict between **Section 34(2),(a) and (b) of the Meru County Alcoholic Drinks Control Act No.3 of 2014**(which the Petitioner has not demonstrated exists) with the provisions of **31(), (b), of the National Alcoholic Drinks Control Act No.4 of 2010** and **Section 91A of the Customs and Excise Act(Cap.472)** the County Legislation would prevail over the National Legislation as liquor licensing function is an exclusive mandate of the County Government and is not shared function between the National Government and the County Government.

37. The other issue for consideration is. The other issue is **Whether Meru County Alcoholic Drinks Control Act is inconsistent with the Constitution of Kenya and to what extent if so and further whether it hinders economic development within the meaning of Article 174(f) of the Constitution?**

38. The petitioner under paragraph 29 of his supporting affidavit outlined the manner in which he contends the Subject Act is inconsistent with the Constitution being inter alia; that Section 3(e) and (h) thereby so far as they unjustifiably outlaw excessive consumption.

39. The petitioner stated they only wished to reiterate the said paragraph 29 and only sought to highlight on the issue of composition of Alcoholic Drinks Control Board as set out in Section A and the Sub County Alcoholic Drinks Regulation Committees as set out under Section 9 of the Meru County Alcoholic Drinks Control Act **Section 4 & 9 of the Meru County Alcoholic Drinks Control Act.**

40. The petitioner urges that Sections 4 and 9 of the impugned Act goes against the principle of inclusiveness as enshrined under Article 10 of the Constitution of Kenya, 2010. The petitioner further urge the two Sections are tantamount to discrimination on the grounds of occupation as in the said boards and committee, there is no provision for inclusion for bar owners, alcoholic drinks distributors or alcoholic drinks manufacturers urging a provision for a person from the hospitality industry is a broad category of fields within the service industry that includes for example, lodging, event planning, theme parks, transportation, cruise line, transport industry amongst many others. The sections are further attacked for failure to particularize anyone in the alcoholic drinks sector and the petitioner is not amused by such exclusion urging other licensing bodies such as Transport Licensing Boards are largely composed of key stakeholders yet the boards and committees under the Act lack even a guaranteed seat for even one member of the stakeholders. The petitioner therefore urges the court to hold that the subject Act is inconsistent to that extent and declare the subject Act inconsistent with the Constitution to that extent.

41. There is always the general presumption that a legislation is constitutional and the burden of rebutting the presumption is always with he who alleges to the contrary. It must always be assumed that the legislative body understands the needs and aspiration of the people and legislation enacted is intended to address problems manifest in the society the respondent in supporting the provision herein referred to the case of **JOHN KINYUA MUNYAKA & 11 OTHERS VERSUS COUNTY GOVERNMENT OF KIAMBU AND 3 OTHERS(MURANGA) HC. PETITION NO.3 of 2014** where the High court reiterated the holding in the Indian Case of **HAMBARDA WAKHAN VERSUS UNION INDIA AIR(1960) AIR 554** where I was held as follows:-

“.....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...”

42. The enacted Meru County Alcoholic Drinks Control Act No. 3 of 2014 was intended to address the problems manifest by experience in Meru County. One may wonder what are those problems which the legislative body understood and wanted to be prevented within Meru County? **Section 3 of the subject Act** sets out the problems sought to be addressed by the enactment of the subject Act in the object and purpose of the Act. **Section 3 of the Meru County Alcoholic Drinks Control Act No. 3 of 2014** states the object and purpose of the Act to Include:-

“3. The object and purpose of this Act is to provide for licensing of alcoholic drinks by the County government pursuant to Part II of the Fourth Schedule to the Constitution so as to control the production, sale, distribution, promotion and use of alcoholic drinks and the promotion of research, treatment and rehabilitation of persons dependent on alcoholic drinks in order to: –

(a) protect the health of the individual in the county from the dangers of excessive consumption of alcoholic drinks;

(b) protect persons under the age of eighteen years from the negative impact on health and social development arising from exposure to advertisements of alcoholic drinks;

(c) protect consumers of alcoholic drinks from misleading or deceptive inducements and inform them of the risks of excessive consumption of alcoholic drinks;

(d) protect the health of persons under the age of eighteen years by preventing their access to alcoholic drinks;

(e) inform and educate the residents in the county on the harmful health, economic and social consequences of the consumption of alcoholic drinks;

(f) adopt and implement effective measures to eliminate illicit trade in alcohol including smuggling, unlawful manufacturing and counterfeiting; (g) ensure fair and ethical business practices related to production, distribution, promotion and sale of alcoholic drinks;

(h) reduce and mitigate the negative health, social and economic impact on communities resulting from production, sale and consumption of alcoholic drinks.”

43. Legislations such as the subject Act is important for the court to interrogate at the background upon which an Act was enacted. The background is a matter of public notoriety which a court ought to take Judicial notice of such as that many people in Meru County and the neighboring counties` have lost lives and eyesight or vision because of uncontrolled sale and consumption of illicit alcoholic drinks, thus public interest should be considered in the matter of this nature.

44. In the instant petition the petitioner challenges the constitutionality of Sections 3(e) and (h), 27, 47, and 48 of the Meru County Alcoholic Drinks Control Act 3 of 2014. Section 3(e) and (h) of the Meru County Alcoholic Drinks Control Act provides:-

“(e) inform and educate the residents in the county on the harmful health, economic and social consequences of the consumption of alcoholic drinks;

(h) reduce and mitigate the negative health, social and economic impact on communities resulting from production, sale and consumption of alcoholic drinks.”

The said Sections have good intentions and are intended to address problems manifest in the society at Meru County. The objectives of the Act in educating County residents. on harmful effects, economic and social concerns of consumption of alcoholic drinks, and how to reduce and mitigate such adverse effects show adverse effects whose that the respondent understands the needs of the Meru County Residents. I find that there is nothing wrong or illegal in the County carrying out such noble tasks. I find contrary to petitioner’s assertion that there is constitutional, rational and reasonable grounds in setting out such objectives of the Act.

The petitioner referred to Section 47 and 48 of the impugned Act contending that they impose a **blanket ban** on promotion of Alcoholic Drinks. The said Sections 47 and 48 of Meru County Alcoholic Drinks Control Act NO. 3 of 2014 provides:-

“47. (1) No person shall promote an alcoholic drink by way of outdoor advertisement –

(a) in a manner that is false, misleading or deceptive or that is likely to create an erroneous impression about the characteristics, health effects, health hazards or social effects of the alcoholic drink;

(b) through painting or decorating a residential building with the name of the alcoholic drink or manufacturer, colour and brand images or logos associated with a manufacturer of an alcoholic drink or any other related form; and

(c) in places demarcated under any written law as residential areas or within a distance of three hundred metres from a nursery, primary or secondary school, or other institution of learning for persons under the age of eighteen years, or a place of worship, health facility or a public playground or any other public land or property or in a public service vehicle.

(2) A person who contravenes the provisions of this section commits an offence and shall be liable to a fine of not less than one hundred thousand shillings and not exceeding five hundred

thousand shillings, or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.

(3) Pursuant to Article 24(2) of the Constitution, the right to freedom of expression set out in Article 33 of the Constitution is limited to the extent specified in this section for the purpose of: –

(a) protecting consumers of alcoholic drinks from misleading or deceptive inducements to use alcoholic drinks; and

(b) protecting persons under the age of eighteen years from the negative impact on health and social development arising from exposure to advertisements of alcoholic drinks. Promotion at underage events 48. (1) No person shall promote an alcoholic drink:-

(a) at any event or activity associated with persons under

the age of eighteen years;

(b) using such things or materials that are associated with persons under the age of eighteen years.

(2) Any person who contravenes the provisions of this section commits an offence and shall be liable to a fine of not less than one hundred thousand shillings and not exceeding five hundred thousand shillings or imprisonment for a term not exceeding three years or to both such fine and imprisonment.

(3) Pursuant to Article 24(2) of the Constitution, the right to freedom of expression set out in Article 33 of the Constitution is limited to the extent specified in this section for the purpose of protecting persons under the age of eighteen years from the negative impact on health and social development from exposure to advertisements of alcoholic drinks.”

I have very carefully considered Section 47 and 48 of the impugned Act and I find the petitioner's contention to be unjustified and misleading. The said Sections protect promotion of alcoholic drinks by way of outdoor advertisement in a manner that is false, misleading or deceptive or advertising of alcoholic drinks on residential areas or within three hundred metres from a learning institution or advertising of alcoholic drinks at the event associated with children. A quick perusal of Sections, 44, 45, 46, 47, 48 and 49 of the Alcoholic Drinks Control Act NO.4 of 2010 reveal that Sections 47 and 48 of the Meru County Alcoholic Drinks Control Act have no differences.

45. The Section challenged by the petitioner are intended as per the subject Act to meet the object and purpose of the Meru County Alcoholic Drinks Control Act. The product whose consumption, production, sale and distribution the impugned Act is required to regulate is not a basic need for human beings to survive, it is a luxury as opposed to any other consumable goods available for general public consumption. Those who take the substance do it for different purposes and some even do it without knowing whether it has side effects or not. Some take it to feel high though it has no medicinal value. The consumption of alcohol may result into harmful effects on its consumer. It may have negative impact on the health and social development on its consumers and even break family, besides making consumers unproductive. That though the consumers of alcohol may have the right to take as much alcohol as their pockets and stomachs may be able to accommodate, that right is not absolute as it ought to be regulated as far as it is possible to protect the rights of other members of the society who do not indulge in such liabilities and whose rights may be affected by the unfettered, production, sale, consumption, advertisement and deception. The government has also an obligation to protect the unenlightened or unsuspecting or innocent alcoholic consumers from the destructive effects of alcohol bearing in mind that it is not only necessary but is an obligation of a responsible government to enact legislation to protect its citizen's health and persons under the age of 18 years from negative impact on health and social development, from misleading and deceptive inducement and give useful information and beneficial

information of the risks of excessive consumption of alcohol drinks, educate citizens on the harmful, health, economic and social consequences associated with consumption of alcoholic drinks, control manufacturing and counterfeiting and should government fail to act as expected it would be an abdication of duty on the part of the government, whether national or county, to leave the manufacturers, sellers, distribution and providers of alcoholic drinks to operate as they deem fit to the detriment of the entire society. It is the duty of the government to exercise due diligence in carrying out its responsibility through its legislative arm to legislate and provide rules and ensure that the society under them enjoy their rights without interference with their health and with the rights of others.

46. I therefore find and hold that prohibition of the promotion of alcoholic drinks in a manner that is false, misleading, or deceptive advertising in residential buildings or places demarcated under any written law as residential areas or within a distance of three hundred metres from a nursery school or primary school to Secondary School or other institutions of learning for persons under the age of eighteen years or a place of worship, or health facility, or a public playground or any other public land or property or public service vehicle as envisaged under Section 47 and 48 of the Meru County Alcoholic Drinks Control Act No. 3 of 2014 is necessary as such promotion alcoholic drinks may influence negatively on the children underage who reside and live in the residential areas and/or attend social events within such areas and as such I find there is necessity of protecting the general society from harmful effects of alcoholic drinks arising out of concealment of harmful effects by dealers in alcoholic drinks in their advertisements of alcoholic drinks.

47. The provision of Section 27 of the Meru County Alcoholic Drinks Control Act No. 3 of 2014 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 in 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.”

Section 23 of the Alcoholic Drinks Control Act No. 4 of 2010 is similar to Section 27 of the subject Act. The Meru County Alcoholic Drinks, Control Act No. 3 of 2014 and Alcoholic Drinks Control Act No. 4 of 2010, being later in time of enactment as compared with the Law of Contract Act(Cap.23) take precedence over the Law of Contract Act(Cap.23). In the case **of JOHN KINYUA MUNYAKA & 11 OTHERS VERSUS COUNTY GOVERNMENT OF KIAMBU & 3 OTHERS, MURANGA & 3 OTHERS , MURANGA HC PETITION NO. 3 OF 2014(Supra)** Hon. Justice J. Ngaah observed:-

“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.”

I agree entirely with the learned Judge that since the two provisions are similar word for word, there is no basis for the petitioner to have prayed for subject Act to be deemed inconsistent with the National laws or the Constitution. That after all where such inconsistency exists the County legislation prevails. I therefore find and hold that the Meru County Alcoholic Drinks Control Act No. 3 of 2014 is not inconsistent with the Constitution of Kenya and further it does not hinder economic development but provides proximate, easily and assessable services to the Meru Society.

The last issue for consideration is **WHETHER the MERU COUNTY ALCOHOLIC DRINKS CONTROL ACT NO. 3 OF 2014 WAS ENACTED WITHOUT PUBLIC PARTICIPATION IN BREACH OF ARTICLES 10 AND 196 OF THE CONSTITUTION OF KENYA AND SECTION 3(F) OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012.**

48. Under the new Constitutional dispensation, public participation is a requirement in the formulation or legislation. The participation of people is one of the National values and principles of governance **under Article 10(2),(a) of the Constitution of Kenya, 2010. Section 10(2),(a),of the Constitution** provides:-

“(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.....”

Under Article 196(1),(b) of the Constitution provides for public participation and County Assembly is obligated to facilitate public participation and involvement in the legislation and other business of the assembly and committee. Such requirement is mandatory. Section 196(1),(b) of the Constitution provides:-

“196. (1) A county assembly shall—

(b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.”

The same mandatory requirement is reiterated under **Section 3(f) of the County Government Act No. 17 of 2012** which provides:-

“ the object and purpose of this Act is to.....provide for public participation in the conduct of activities of the County Assembly as required under Article 196 of the constitution.”

49. Further to the above Section 87 of the County Government Provides for principles of citizen participation in counties. Section 87(a) of the County Government Act(Cap.265) provides:-

“Citizen participation in County Governments shall be based upon the following principles:-

(a) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation.

(b) reasonable access to the process of formulating and implementing policies, law and regulations, including the approval of developments, proposals, projects and budgets, the granting of permits and establishment of specific performance standards.”

50. The petitioner submitted that the main case touching on public participation in Kenya was the case of **ROBERT N. GAKURU & 2 OTHERS VS GOVERNMENT OF KIAMBU COUNTY & 3 OTHERS(2014) EKI** in which case Hon. Justice Odunga while delivering judgment in the case cited extensively with approval the Sought African Case of **DOCTORS FOR LIFE INTERNATIONAL VS SPEAKER OF THE NATIONAL ASSEMBLY CCT 12/05(2006)ZACC11** in which case it was held right to political participation is a fundamental Human Right. The learned Judge also cited the case of **GLENISTER V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA CCT 48/10(2011) ZACC6** in which it was held that the invitation to the public to participate must give the public sufficient time to prepare, study a Bill and formulate representation to be made.

51. The learned Judge under paragraph 84 of his judgment held that no public participation as contemplated under the Constitution and the County Government Act, 2012 took place and found the Kiambu Finance Act 2013 was null and void.

52. The petitioner in the instant petition asserts that there was no participation of public in the legislation of the subject Act and in particular no participation of the owners, distributors, and manufacturers of Alcoholic drinks were sought. The petitioner pointed out that though the respondent under paragraph 24 of the Replying Affidavit states that an advertisement was carried out in the Daily Nation on 21st April, 2014 and through other advertisement in the local vernacular station and attached hotel booking for the forums, the respondent has deliberately failed to attach a list of those who attended the forums, if any, and further that it is not indicated whether the participants were supplied with the Bill or not. The petitioner referred to the case of **ROBERT N. GAKURU & 2 OTHERS V GOVERNOR KIAMBU COUNTY & 3 OTHERS(Supra)** at paragraph 76 of judgment of Hon. Justice Odunga where he observed as

follows:-

“In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may for as possible such as churches, mosques, temples, public barazas, national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that. Dealing with the issue I wish to reiterate what was held in Doctors for Life International vs. Speaker of the National Assembly and Others (supra) to the effect that:”

The petitioner therefore urged the court to find and hold that the respondent has not bothered to show how many people attended the forums and what their participation entailed and further there is nothing to show that the major stakeholders were consulted.

53. The petitioner has further taken issue with the respondent's assembly in passing the Meru County Alcoholic Drinks Control Act, terming the procedure taken in passing the Act as a rushy in manner and that it flouted its own procedures under the standing orders. The Respondent is accused of having adopted the standing orders of TRANSITIONAL AUTHORITY pursuant to the provisions of **Section 14(1),(a),(7) and (8) of the County Government Act(No.17 of 2012)** which provides that:-

“14(1) A county assembly—

(a) may make standing orders consistent with the Constitution and this Act regulating the procedure of the county assembly including, in particular, orders for the proper conduct of proceedings; and

(7) Until a county assembly makes its standing orders under subsection (1), the standing orders of the National Assembly shall, with the necessary modifications, apply to that county assembly.”

54. The petitioner submits that the respondent flouted the said standing orders in a number of ways in that there was no Memorandum of objects that accompanied the bill and even a look at the Bill on the respondent's website www.assembly.meru.go.ke reveals that position and urged that it is contrary to the provision of the standing Order 117 which stipulate that:-

“No bill shall be introduced unless such Bill together with the Memorandum referred to in Standing Order 114(Memorandum of objects and reasons), has been published in the County Gazette and the Kenya Gazette(as a Bill to be originated in the County Assembly), and unless, in the case of a County Revenue Fund Bill, an Appropriation Bill or a Supplementary Appropriation bill, a period of seven days, and in the case of any other Bill a period of fourteen days, beginning in each case from the day of such publication, or such shorter period as the County Assembly may resolve with respect to Bill, has ended.”

55. The petitioner further urge in addition the standing order 118 states (1) except with the leave of the County Assembly, not more than one stage of a Bill might be taken at any one sitting urging that the 2nd and 3rd reading were conducted on the same day but did not indicate whether leave of county assembly was not obtained.

56. The petitioner further added a further flaunting of the Standing Order occurred due to lack of public participation by the required sectoral committee contrary to standing order 121(3) which provides:-

“The Sectorial Committee to which a Bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the committee makes its report to the County Assembly.”

The petitioner concluded by urging that due to the procedural lapse, the Subject Act was not validly passed and should be declared null and void.

57. The respondent's response to the petitioner's contention that there was no public participation, on part of the petitioner is that to begin with the petitioner herein was not in existence and it wasn't registered as of 18th July, 2014 when the impugned Act was enacted as shown in their Certificate of Registration annexed to the petitioner's supportive affidavit sworn on 29th September, 2014, which shows that the petitioner was registered on the 19th day of September, 2014, two months after Meru County Alcoholic Drinks Control Act, 2014 had been enacted. The respondent therefore contended the petitioner's assertion that it was not consulted is as per respondent spurious as no amount of effort by the respondent could have caused a non-existent petitioner to participate before the enactment as of 18th July, 2014 in a process leading to enactment of Meru County Alcoholic Drinks Control Act 2014 on 18th July, 2014.

58. In the instant case there is no dispute that the petitioner was not in existence as of the time of passing the bill however the petitioner's members were in existence as individuals and before the court can decide on the issue as to whether the subject Act was enacted without the public participation the court will examine whether the guiding principles in determining whether public were effectively involved in a legislative enactment of the subject Act, were complied with.

59. The Counsel for both the petitioner and the respondent have at great detail submitted on the concept of public participation and referred to several Acts as well as several decisions. These are **ROBERT N. GAKURU & OTHERS V KIAMBU COUNTY HCCP NO. 532 OF 2013 (NAIROBI) (Supra)**, **DOCTORS FOR LIFE INTERNATIONAL V SPEAKER OF THE VALUE ASSESSORS CCT 12/05(2006) ZACC II, (Supra)**, **GLENISTER V PRESIDENT OF REPUBLIC OF SOUTH AFRICA CCT48/10 (2011) ZACC 6 (Supra)** and **JOHN KINYUA MUNYAKI & 11 OTHERS V COUNTY GOVERNMENT OF KIAMBU & 3 OTHERS, MURANGI HCCP NO. 3 OF 2014 (Supra)**. The **Law Society of Kenya V the Attorney General & 2 Others HCP NO.318/2012, MOSES MUNYENDO & 918 OTHERS V THE ATTORNEY GENERAL & ANOTHER HCP NO.16/2013.**

60. The common denominator in all these decisions is that what Matters in the ultimate is that a reasonable opportunity has been given to the public and all interested parties with timely access to the information relevant to the process of legislation so as to know about the issue at hand and have opportunity to give their response. There is a caveat however, that it can't be expected of the legislature that every person who claims to be affected by the laws or regulation that are being made to have a hearing or a say but a representative can do. However it is prudent as concerns different sectors of the public that they should be able to communicate their views to the law maker either in advance through any possible means including through memorandum, text messages or in person or even by circular letters or notice in any form so as to be taken into account. In formulating the final regulations the Respondent annexed annexure 'MMN12' through an affidavit of Mercy Mwendwa Ndiira sworn on 13th October, 2014 on behalf of the Respondent. It is deposed on behalf of the Respondent that the respondent effectively and extensively notified, involved and took into account, views of public in the process of enacting Meru County Alcoholic Drinks Act No. 3 of 2014. The Respondent has asserted that it caused public advertisement in the Daily Newspaper dated 21/04/2014 at page 8 and on the website of Meru County Assembly and the Respondent County Assembly notified the public that the Assembly would hold eight public participation forums to consult the public on the Meru County Alcoholic Drinks Control Bill 2014.

61. The Respondent averred that the published public consultative meetings as alluded to took place between the respondent's County Assembly and public over Meru County Alcoholic Drinks Control Bill 2014 as evidenced by sample receipts issued to the respondent. That on 22/04/2014, 23/04/2014 and 24/04/2014 the Respondent's County Assembly advertised through local vernacular FM stations, being Meru FM and Muuga FM of the Public Consultative meetings between the Public and Meru County Assembly at the specified venues and dates over Meru County Alcoholic Drinks Control Bill, 2014, further prior to the Public Consultative meetings held between 25th and 26th April 2014, the Respondent had published the Meru County Alcoholic Drinks Control Bill 2014 way back on 28th February, 2014 under Meru County Gazette Supplement No. 1 of 2014 to give public sufficient time to interrogate the contents of the Bill and raise any concerns they might have over the Bill.

62. I have carefully perused the affidavit of Mercy Mwendwa Ndiira and annexures marked "MMN12" and "MMN13". The Petitioner has not contested the annexures "MMN12" and "MMN13" nor has the petitioner controverted the contents of the affidavit of Mercy Mwendwa Ndiira. The public advertisement carried in the Daily Nation Newspaper were headed as follows:- **"Meru County Alcoholic Drinks Control Bill 2014 Public Participation Schedule Meru County Government office of the Clerk Meru County Assembly Public Notice"**.

63. The advertisement proceeded to set out dates, times, sub-county and venue of the meeting. The attached Hall hiring receipts from various groups clearly indicated the purpose of the hire was for public participation on Alcoholic Bill 2014. **The Annexure "MMN13" is a special issue, Meru County Gazette Supplement No. 1 (Bill No. 1) being the Meru County Alcoholic Drink Control Bill, 2014 issued on 28th February, 2014.**

64. In my view and in view of the steps taken by the Respondent by publishing the Meru County Alcoholic Drinks Control Bill, 2014 on 28th February, 2014, advertising for public meetings in the Daily Nation Newspaper of 21/04/2014, 4 to 5 days before public meetings and stating the purpose of the meetings and setting out the venues, date and time in advance that gave the members of public a reasonable opportunity including the petitioners as individuals to prepare to give their views but not as a group as by then the group was not in existence and all interested parties to know about the matter in issue and all had sufficient time to prepare and have a say or communicate their response. The petitioner's contention that the Respondent is obliged to show how many people attended those forums and what that participation entailed is untenable in view of the fact that the petitioner never alleged that no one attended those forum and that the subject was not the one in issue. The fact that the Respondent produced evidence that published public consultative meeting between Respondent's Assembly and public took place over the subject Bill 2014 is enough proof that public participation took place. The contents of Respondent's affidavit through Mercy Mwendwa Ndiira remain uncontested by the petitioner. The petitioner did not assert that members of public who attended the meeting were denied participation in the public meeting. It is the duty of the petitioner but not of the respondent to give the names of members of public (if any) who attended the meetings but were excluded from taking part in the meeting. The burden of proof lies with the person who asserts, that is the Petitioner. The burden of proof does not shift at all. I am satisfied that the Respondent effectively and extensively notified, involved and took into account, views of the public in the process of enacting the Meru County Alcoholic Control Drinks Act No. 3 of 2013 as required **under Article 10 and 196 of the Constitution of Kenya 210 and section 3(f), 87 and 91 of County Government Act No. 17 of 2013.**

65. All Statutes come with a presumption of constitutionality and it is for the petitioners to discharge the burden of proving that a statute is unconstitutional. **(see Law Society of Kenya versus Attorney General, Nairobi HCCP 312/2012 (Supra) and Moses Munyendo & 908 others versus Attorney General Nairobi HCP 16 of 2013)**

66. In order to determine whether there has been public participation the court is required to interrogate the entire process leading to the enactment of the legislation. The court is entitled to take into account of judicial notice of County Assembly standing orders that require before enactment, any legislation must be published as a bill and to go through various stages in the County Assembly. The court is entitled to take into account that the standing orders provide for public participation, in some sense. The bill must also be

advertised and go through various committees of the County Assembly which admit public participation and take views and recommendations of the public when such committee makes its report to the County Assembly.

67. Whether or not there was public participation after the bill was read as published in the instant case is a question of fact and that it is for the petitioner to have pleaded that in the petition and to prove that in fact the constitution was violated to an extent that the resulting law is null and void. The Respondent has given evidence through the replying affidavit that there was public participation. The petitioner's organization was not consulted as it was not in existence by then. The public in my view and as per affidavit of Mercy Mwendwa Ndiira and annexures thereto were consulted and gave their views and in my view those who attended public meetings were representatives of the public. Further the law do not require that each individual and organization to present their views so long as their views are represented by others who attend the public participation.

68. On the issue as regarding the County Assembly legislation stage the petitioner has not proved to the required standard that the process was faulty and flawed, in absence of evidence to the contrary the court would take that the process of enactment was in accordance with County Assembly standing orders which provides for public participation as it has not been demonstrated that the process was devoid of public participation.

69. The upshot is that the petitioner has failed to prove that the petitioner's fundamental rights and freedom have been violated, that the Meru Alcoholic Drinks Control Act is inconsistent with the Constitution of Kenya; the Alcoholic Drinks Control Act, the customs and Excise Act and the Law of Control Act, consequently the petitioner's petition dated 29th September, 2014 is hereby dismissed but as the matter is of public interest I order that each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF DECEMBER, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

- 1. Mr. Mwangi Advocate for the petitioner**
- 2. Prof. Ojienda Advocate for the respondent**

J. A. MAKAU

JUDGE