



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**MISC. APPLICATION NO. 76 OF 2011 (JR)**

**IN THE MATTER OF LEAVE TO APPLY FOR ORDERS OF PROHIBITION & MANDAMUS**

**AND**

**IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL ACT 2010**

**AND**

**IN THE MATTER OF MANUFACTURE AND DISTRIBUTION OF ALCOHOLIC DRINKS**

**AND**

**IN THE MATTER OF LICENSING UNDER THE ALCOHOLIC DRINKS CONTROL ACT 2010**

**AND**

**IN THE MATTER OF PACKAGING OF ALCOHOLIC DRINKS**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE DISTRICT COMMISSIONER MBEERE NORTH DISTRICT ..... 1<sup>ST</sup> RESPONDENT**

**THE DISTRICT COMMISSIONER MBEERE SOUTH DISTRICT ..... 2<sup>ND</sup> RESPONDENT**

**THE DISTRICT COMMISSIONER MASINGA DISTRICT ..... 3<sup>RD</sup> RESPONDENT**

**THE DISTRICT COMMISSIONER YATTA DISTRICT ..... 4<sup>TH</sup> RESPONDENT**

**THE DISTRICT COMMISSIONER EMBU EAST DISTRICT ..... 5<sup>TH</sup> RESPONDENT**

**THE DISTRICT COMMISSIONER EMBU WEST DISTRICT ..... 6<sup>TH</sup> RESPONDENT**

**THE DISTRICT COMMISSIONER EMBU NORTH DISTRICT ..... 7<sup>TH</sup> RESPONDENT**

**THE COMMISSIONER OF POLICE ..... 8<sup>TH</sup> RESPONDENT**

## EXPARTE

DANGAI HERBAL LIMITED ..... APPLICANT

### RULING

Pursuant to leave granted on 31<sup>st</sup> October 2011 the Exparte Applicant filed this Notice of Motion dated 12<sup>th</sup> November 2011 seeking the following orders;

- i. ***Prohibition to prohibit the Respondents from demanding from it Alcoholic Distribution licences; having their agents arrested; packaging their Naincu Opaque beer in plastic bottles, limiting their distribution areas and others as shown in the application.***
- ii. ***Mandamus to compel the Respondents to allow the Applicant distribute its beer in plastic bottles, and without harassment and threats.***

The application is supported by several grounds explaining what has been happening. This is all in the statement of facts.

The National Campaign against Drug Abuse Authority (NACADA) was allowed to be joined as an interested party in these proceedings. It filed a replying affidavit opposing the application.

The Attorney General for the Respondents filed grounds of opposition. All Counsels agreed to file written submissions. On record are submissions by Mr. Okwaro for the Exparte Applicant and the Attorney General for the Respondents only.

I have taken time to read through the material before me and the submissions by Counsels. The Exparte Applicant is asking this Court through this application to stop the Respondents from doing certain things (Prohibition) and to command them to do other things (Mandamus). Brief facts of this matter are that the Exparte Applicant is a co-incorporated under the Companies Act and carrying on business in Kenya. It is also the proprietor of a Brewery for Manufacturing/Brewing Opaque beer under the Brand name of NAINCU OPAQUE BEER. It is also licensed as a Manufacture/Brewer and Distributor of the said Alcoholic Drink under the provisions of the Alcoholic Drinks Control Act 2010. The above facts are not disputed. The Respondents herein are administrators in their various jurisdictions. The 8<sup>th</sup> Respondent was the head of the police service then. The Respondents are accused by the Exparte Applicant of using officers under them and the 8<sup>th</sup> Respondent to harass his agents and workers while they sell and distribute the Naincu Opaque beer. Some of them have even been taken to the Courts. (A charge sheet was annexed).

The main issue of contention here is that the Naincu Opaque beer is packaged in plastic bottles instead of glass bottles. The Exparte Applicant argues that Naincu is beer. It is not distilled and its not a spirit and so should not comply with the requirements under the Alcoholic Drinks Act.

The Respondents and Interested Party argue that Naincu Opaque beer is an alcoholic drink and must be packaged in glass bottles as the law demands. Its on this account that the Respondents have taken the actions they have against the Exparte Applicant. On the other hand the Exparte Applicant argues that the manner of processing this beer is what determines the manner of packaging. It has gone ahead to produce documents and certificates to show that Naincu beer is not distilled but is fermented.

There is no dispute that Naincu Opaque beer is a beer and an alcoholic drink for all intents and purposes. It is therefore governed by the Alcoholic Drinks Control Act 2010. Section 8 of the said Act establishes the ***District Alcoholic Drinks Regulation Committee***. This is the committee that deals with all manner of issues concerning licences, distilling and/or fermenting of beer/alcohol. There is criteria to be followed before one is issued or denied a liquor licence. This is the committee that regulates all

activities in the district which are alcoholic related. The 1<sup>st</sup>-7<sup>th</sup> Respondents are **ALL** members and maybe chairmen/women of those committees. They are the ones who have demanded for a licence from the Exparte Applicant.

Looking back at what used to happen before the enactment of the Alcoholic Drink Control Act 2010 one sees a scenario when all manner of substances were packaged in sachets and plastic bottles and referred to as beer and/or alcohol. These were haphazardly consumed leading to so many deaths. And that is why the glass bottle was introduced to prevent adulteration of the alcoholic drinks. Section 31 of the Act provides as follows;

1. ***No person shall sell, manufacture, pack or distribute an alcoholic drink in sachets or such other form as may be prescribed.***
2. ***Notwithstanding the provision of sub-section;***
  - a. ***No person shall manufacture, pack, distribute or sell an alcoholic drink in a container of less than 250 millitre***
    - b) ***The alcoholic drink previously known as chang'aa or any other distilled alcoholic drink shall only be manufactured, packed, sold or distributed in glass bottles of the kind specified in paragraph (a).***
3. ***A person who contravenes this section commits an offence and shall be liable to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding six months or to both.***

It is important that the whole of section 31 is read together and not just isolating section 31(2) (b). Section 2 of this Act defines "Alcohol" as

***"The product known as ethyl alcohol or any product obtained by fermentation or distillation of any fermented alcoholic product, rectified either once or more often, whatever the origin, and shall include synthetic ethyl alcohol, but shall not include methyl alcohol and alcohol completely denatured in accordance with the prescribed formulas"***

while "Alcoholic Drink" is defined as;

***"It includes alcohol spirit, wine, beer, traditional alcoholic drink, and any one or more of such varieties containing one-half of the percent or more of alcohol by volume, including mixed alcoholic drink and every liquid or solid, patented or not, containing alcohol, spirits wine, or beer and capable of being consumed by a human being"***

From these definitions Alcohol and alcoholic drink remains alcohol whether it is fermented or distilled. It contains alcohol and its effects are the same. If this Court creates the boundaries suggested by the Exparte Applicant then the objectives of the Alcoholic Drink Control Act will not be achieved.

It is true the Exparte Applicant may sell its products throughout the Country but if the people of any district through the District Alcoholic Drink Regulation Committee refuse to have a certain product because of its effect or impact on its people what do the Law enforcement officers do? They have to investigate it through the District Alcoholic Control Regulation Committees . Section 8-13 of the Act gives these committees wide powers in the issuance of licences. The representation on this committee is very wide. The Respondents (1<sup>st</sup>-7<sup>th</sup>) are the chairpersons of the various district committees. So if the Respondents in those capacities have demanded from the Exparte Applicant its licence, I do not see where the grievance arises from. These are the day to day activities of these committees. Did the Respondent demand of a licence from the Exparte Applicant unlawfully? As was stated in the case of **CHIEF CONSTABLE OF NORTHERN WALES POLICE -VS- EVAN [1983]3 ALL ENGLAND LAW REPORTS** it was held by Lord Brightman;

***“The Court will not however on a Judicial Review application or act as a Court of Appeal from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction or the decision's unreasonable. The functions of the Court are to see that a lawful authority is not abused by unfair treatment. If the Court is to attempt itself the task entrusted to that authority by the law, the Court would under the guise of preventing abuse of power be guilty itself of usurping power”.***

As the Respondents say they have cases of abuse of alcohol in the areas concerned, it is again the Alcoholic Drinks Control Regulation Committee members who are at the grassroots and who know exactly what is on the ground.

What the Exparte Applicant is asking this Court to do is not within the preview of Judicial Review. Judicial Review is radically different from the system of Appeals. An Appeal is concerned with the merits of a decision. In a Judicial Review the Court is concerned with the legality of the decision. Was the decision within the limits of the powers granted? Was the action taken lawful or unlawful?. This Court cannot through a Judicial Review stop officers from arresting and charging people they believe have violated the law. This Court cannot direct the Respondents not to demand for a licence from the Exparte Applicant if they as members of the District Committees have reason for so doing. If the Exparte Applicant is in possession of a licence lawfully issued to him why doesn't he want to produce it to the law enforcement officers on demand?

It is true that the Exparte Applicant offers employment opportunities to a member of Kenya. The committee created under section 8 of the Act and operating in the various districts represented by the 1<sup>st</sup> – 7<sup>th</sup> Respondents are just doing what is expected of them under the Act. The best that the Exparte Applicant could do is to appear before those committees and present his case to them. It has not been shown that a distribution licence issued by one district covers all other districts in the whole Country. Each district has its own peculiar circumstances depending on the effect of the abuse of alcohol.

As correctly stated by the Attorney General there may arise need to call witnesses to establish the effect of the contents of that Naincu Opaque beer and sort out the issue of his licence. That is something outside the jurisdiction of this Court in a Judicial Review matter.

I therefore find that the application lacks merit and I dismiss it with costs.

**DELIVERED, SIGNED AND DATED IN OPEN COURT AT EMBU THIS 9<sup>TH</sup> DAY OF JULY 2013**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of;**

**N/A by or either parties**

**Njue C/c**