IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & ODEK, JJ.A) CIVIL APPEAL NO. 344 OF 2013 BETWEEN

EAST AFRICAN BREWERIES LIMITED.....APPELLANT

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE MINISTER FOR STATE FOR

PROVINCIAL ADMINSTRATION.....2ND RESPONDENT

THE NATIONAL CAMPAIGN AGAINST

DRUG ABUSE AUTHORITY.....3RD RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Lenaola, J.) dated 27th February, 2013

in

Petition No. 84 of 2011)

****

JUDGMENT OF THE COURT

What we have to decide in this appeal is whether, as contended by the appellant East African Breweries Limited, the High Court at Nairobi (Lenaola, J., as he then was) erred in dismissing in its entirety the appellant?s petition challenging the Constitutionality of **Section 32** of the Alcoholic Drinks Control Act 2010, which provides as follows;

> ***"(1) Subject to this section, no person shall***
>
> ***(a) Manufacture***
>
> ***(b) Import***
>
> ***(c) Sell or distribute***
>
> ***An alcoholic drink, unless the package containing the alcoholic drink conforms to the requirements of subsection 2.***
>
> ***(2) Every package containing an alcoholic drink shall-***
>
> ***(a) bear a statement as to its constitutes; and***
>
> ***(b) have at least two of the health warning messages prescribed it the second schedule, in English or Kiswahili***
>
> ***(3) The statement and health warning referred to in subsection (2) shall comprise not less than 30% of the total surface area of the package.***

(4) All the warning labels specified in the second schedule shall be randomly displayed in each twelve-month period on a rotational basis and in as equal a number of times as is possible, on every successive fifty packages of each brand of the alcoholic drink and shall be randomly distributed in all areas within the Republic of Kenya in which the alcoholic drink is marketed.

(5) The Minister may, by notice in the Gazette, prescribe that the warning, required under this section, be in the form of pictures or pictograms:

Provided that such notice shall come into operation upon expiration of six months from the date of its publication.

(6) The importer of an alcoholic drink which does not conform to the requirements of subsection (2) shall, at the point of importation, ensure that the imported alcoholic drink bears such sticker containing the warning messages specified under subsection (2) as may be prescribed.

(7) The requirements of this section shall not apply to an alcoholic drink which is manufactured in Kenya for export.

(8) A person who contravenes any of the provisions of this section commits an offence and shall be liable to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding three years, or to both.

(9) This section shall come into operation upon expiration of six months from the date of commencement of this Act."

The appellant had contended in its petition before that court, which ii still maintains, that the provision was unconstitutional and unenforceable for the reasons that;

"(a) The said section violates the petitioner?s right to property as safeguarded under the provisions of Article 40 of the Constitution, to the extent that it diminishes the petitioner?s brand value and brand identity.

(b) The said section violates Article 24(1) of the Constitution to the extent that it purports to limit the petitioners fundamental rights and freedoms in a manner that is neither reasonable nor justifiable and in a more restrictive manner than is necessary to achieve the object of the Act.

(c) The said section violates the petitioner?s right to protection of the law as safeguarded under the provisions of section 27(a) of the Constitution, to the extent that it subjects the petitioner to substantial liability, should the petitioner continue to abide the provisions of the Weights and Measures Act (Cap. 513) and the Weights and Measures (Sale and Labelling of Goods) Rules.

(d) The said section violates the provisions of Article 2(5) and (6) of the Constitution, to the extent that it breaches Kenya?s obligations under the World Trade Organization, the International Organization of Legal Metrology and the Agreement on Technical Barriers to Trade.

(e) The implementation of the said section by the respondents, or their agents, without according the petitioner a hearing and addressing the petitioner?s grievances, contravenes Article 47 of the Constitution, to the extent that it denies the petitioner of its right to fair administrative action."

It filed a verifying affidavit sworn by its Director, Group Corporate Relations, one **Brenda Mbathi**, which sought to demonstrate evidentially, the matters complained of.

The Attorney General and the Minister of State for Provincial Administration being the 1st and 2nd respondents respectively, filed grounds of opposition to the petition contending that the petition raised no constitutional issues for determination as diminution of anticipated profits did not constitute „property? as defined and protected under **Articles 260** and **40**, respectively, of the Constitution; variance between certain provisions of two statutes did not amount to a constitutional question, general rule of international law or treaty-provisions do not have the status of constitutional provisions; the WTO and I0LM standards and practices are not general rules of international law, and they have not been domesticated; and the challenged provision was for the larger public good which could not be subordinated to the appellant?s purely commercial interests.

On its part the National Campaign Against Drug Abuse Authority (Nacada), the 3rd respondent opposed the petition by a replying affidavit sworn by **Florina Mwikali Mutua** its legal officer. She swore that the impugned provision had the overriding purpose of protecting the public "socially, health-wise and economically" which the appellant sought to override for the sake of its commercial capitalistic interests; the appellants? customers had a fundamental right to accessing products protective of their health and other interests, and under **Article 46(1) (b)** a right to information necessary for their full awareness of the appellant?s products hence the need for a statutorily prescribed labelling which is also for the benefit of the larger public; the said section did not infringe any of the appellant?s rights and only complemented or supplemented the standards under the Weights and Measurements Act, with which it did not conflict. She went on to swear as follows;

"13. That providing a clearly legible health warning message on an alcoholic bottle has been proven to psychologically impact positively on the society and in the long term assist in curbing the abuse of alcohol. (Annexed hereto and marked FMM1 is a summary document of the Alcohol Public Unit of Australia forwarded to the Australian and New Zealand Food Inquiry)

14. That the provisions set out under section 32(3) of the Act that require manufacturers of alcoholic products to label 30% of their products with a warning health message is not the first of its kind globally as Thailand, a country that is ranked fifth in the world in terms of Alcohol consumption introduced legislation that required alcohol manufacturers to label their products in the

aforementioned percentile range so as to reduce the rampant alcohol abuse by members of its public. (Annexed hereto and marked FMM2 is an open letter from the European Alcohol Policy Alliance to the Thailand government commending their new regulations on alcoholic health warning labels)

15. That from the foregoing one may deduce that the provisions of section 32(3) of the Act as having informed and/or modeled from the Thailand Legislation on Alcoholic health warning labels.

16. That further Thailand has recently drafted legislation that shall set out to increase the percentile coverage of health warnings labels on alcoholic bottles to the ratio of the total surface area from the previous 30% to 40% cover, therefore the petitioner should not deem the requirements of the Act in regard to health warning messages as being arbitrary rather should conceptualize and/or accept it as a moderate requirement that they should adhere to. (Annexed hereto and marked FMM3 is an extract from the International Center for Alcohol Policies website on health warning).”

The deponent challenged as unbacked by evidence the appellant?s contention that it would cost an estimated Kshs. 880 million to replace its entire bottle-labelling equipment and added that the appellant nevertheless had the financial capacity to do so, and cast doubts on the appellant?s *bona fides* in failing to comply with the provision within the stipulated 6 months *“only to file suit at the last minute in order to subvert the law”* and also unveiled a new-look bottle for the *Tusker Brand* at an estimated cost of Kshs. I billion in April 2011 which would have been more than sufficient for purposes of complying with the statute. Further, the appellant?s challenge to the legislation would lead to a chaotic and selective application of the statute with other independent retailers having complied, and there was no basis for the claims that its brand name, value and identity would be dissipated by compliance. The appellant?s corporate commercial concerns should not override the public interest in regulating the manufacture and sale of alcoholic drinks that had hitherto led to deaths and health complications. Finally it was sworn that if the appellant was aggrieved by the said provision, it ought to have petitioned Parliament for amendment or repeal.

The learned Judge having considered those pleadings and the submissions by the parties before him dismissed the entire petition as unmeritorious. That decision has aggrieved the appellant who in the memorandum of appeal filed before this Court charges that the learned Judge erred in;

- ***Failing to consider and make any determination on its principal challenge based on Article 24 and proportionality***
- ***Taking an unduly restrictive view of the High Court?s role on challenged legislative provision and improperly deferring to the arguments of the Legislative and the Executive.***
- ***Failing to hold that it was incumbent upon the respondents to prove that the provision?s limitation on the appellant?s rights complied with and passed muster under Article 24(3) of the Constitution.***
- ***Holding that the impugned provisions of section 32(3) were justified under Article 46 for the protection of consumers.***
- ***Failing to appreciate that the appellant did not object to health warning labels and indeed had always been willing to abide by reasonable and proportionate requirements.”***
- ***Failing to find that the health warning label prescribed under the provision was a form of compelled speech and thus unconstitutional.***

The appellants advocates M/s Oraro & Co., filed detailed written submissions in which they addressed those grounds of appeal in two thematic clusters namely;

(a) Proportionality under Article 24 of the Constitution covering grounds 2, 4, 5, 6 and 9 and;

(b) The role of the courts in considering constitutionality of legislation, covering grounds 3, 7 and 8.

On proportionality, it was contended for the appellant that the learned Judge fell into error in not addressing the issue of whether the impugned section satisfied the requirements of **Article 24** of the Constitution on limitation of rights. According to the appellant;

“It was never the appellant?s contention that its right to property was absolute. The challenge was mounted on the basis that the surface area stipulation of section 32(3) was wholly disproportionate to the public good it ostensibly sought to promote. Article 24 provides a mandatory structured process for the resolution of such proportionality challenges. The burden is on the State to justify such intrusion of a right. It is for the Court to be satisfied that the burden has been discharged. The respondent indeed failed to discharge that burden and the learned Judge erred in failing to so find, indeed missed the proportionality analysis altogether.”

Citing this Court?s decisions in ***ATTORNEY GENERAL & ANOR vs. RANDU NZAI RUWA & 2 OTHERS [2016] eKLR*** and ***SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA) LTD vs. MINISTER FOR EDUCATON & OTHERS [2017] eKLR***, it was contended that the learned Judge erred in failing to follow and apply systematically the dictates of **Article 24** so as to establish whether or not the impugned provision was reasonable and justifiable, which the respondents were required to establish but offered only general reasons which were inadequate. It was argued for the appellant that the fact that the implicated rights related to the manufacture of alcohol did not make them any less important. As to the importance of the purpose as well as the nature and extent of the limitation, it was argued that;

> ***"While it might well be that there is indeed alcohol abuse in Kenya with adverse social ramifications, they (the respondents) must provide some actual data and evidence showing the incidence, extent and prevalence of such abuse demonstrating for example, whether it is regional or country-wide, the social profile of abusers etc as well as why it is expected that a one-third total surface area requirement is expected to be effective in ameliorating these deleterious consequences of alcohol abuse. The evidence most relevant to the constitutional inquiry to be undertaken by the Court would be such studies that were submitted and considered by National Assembly before enacting section 32. If this was the case, and only then would the court defer to its legislative judgment. But as this is not the case, section 32 is doomed."***

The appellant castigated the respondents for merely asserting, without particulars that;

> ***"Providing clearly legible health warning message has been proven to psychologically and positively impact the society and in the long term assist in curbing the abuse of alcohol and then annexing an extract of an advocacy piece submitted to the Australia and New Zealand Health Authority for several reasons."***

To the appellant, the Legislature did not engage in any serious sustained comperative study on the efficacy of such health warning labels before enacting **Section 32**. Moreover, it was not proper for social studies on those foreign countries to be adapted wholesale in Kenya which is socially and economically different. Dicta from the Supreme Court decision of ***JUDGES & MAGISTRATES BOARD & 2 OTHERS vs. CENTRE FOR HUMAN RIGHTS & DEMOCRACY & 11 OTHERS [2014] eKRL*** was cited in aid.

It was also argued that the respondents did not demonstrate that less restrictive means could not be used to achieve the intended purpose and that there was an actual relation between the two-third surface area health warning requirement and reduction of alcohol abuse. The reliance on what Thailand has adopted was criticized as there was no evidence that it was more effective than *"the more sensible and less restrictive"* South Africa requirements of one-eighth of the total size of the label so long as it was visible, legible and indelible.

The appellant also assailed the learned Judge for giving short shrift to the other asserted fundamental rights of equal protection of the law and free speech as it was *"impossible to comply with the surface area requirements of section 32(3) of the ADCA as well as the provisions of the Weights and Measures Act"* and that compelling manufacturers, distributors and sellers of alcoholic products to carry the health warning infringed on their freedom of expression which the Judge did not consider. In an attempt to buttress the importance of freedom of expression the appellant cited this passage from the U.S Supreme Court?s Justice Robert Jackson in ***WEST VIRGINIA STATE BOARD OF EDUCATION vs. BARNETTE; 319 US 624 1943***;

> ***"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."***

The appellant then trained its criticism on the learned Judge?s finding on the role of the courts while considering the constitutionality of legislation, which was that courts should not overstep judicial bounds into prohibited political space and that the courts could not direct Parliament on the kind of legislation to enact which was an abdication of his duty to determine constitutionality of legislative and other decision of Parliament as recognized in ***APOLLO MBOYA vs. ATTORNEY-GENERAL & 2 OTHERS [2018] eKLR*** and by the Supreme Court in ***SPEAKER OF NATIONAL ASSEMBLY vs. ATTORNEY GENERAL & 3 OTHERS [2013] eKRL***.

The appellant concluded its submissions by seeking ***"to correct and hopefully bury a heresy"*** which it termed an **"erroneous shibboleth"** that a party seeking relief for violation of fundamental rights cannot succeed if pursuing private commercial interests and maintained that the motives for seeking relief are irrelevant and that *"[t]he nostrum that public interest trumps private rights as a violent affront to our constitutional settlement."*

At the hearing of the appeal **Ms. Rachier**, learned counsel holding brief for Mr. Amoko for the appellant adopted those submissions wholesale and elected not to highlight them.

For the 1st and 2nd respondents, learned counsel **Ms. Odhiambo** began her address by contending that anticipated profits do not constitute property as defined under **Article 260,** and are therefore not protected under **Article 40** of the Constitution. Even if they were, the right to property is not absolute and can be limited especially when viewed against the interest of the public at large, and especially consumers whose rights could not be sacrificed at the altar of the appellants? interest in profits.

Those submissions were supported by **Miss Kiruri,** learned counsel holding brief for Mr. Owino for NACADA. She added that **Section 32** does pass constitutional muster under **Article 24** of the Constitution which contemplates limitation of rights by law if they be reasonable and justifiable. According to her, **Section 32(3)** was reasonable and justifiable taking into account the interest of the public and Parliament?s obligation under **Article 46** to enact legislation to protect consumers and ensure fair, honest and decent advertizing. It is Parliament?s prerogative to decide what would be fair, honest and decent and that is a power that is not subject to challenge except for unconstitutionality. Counsel challenged the appellants complaint about impossibility to comply due to the expenses to be incurred, stating that it had not been demonstrated that the requisite machinery was unaffordable, especially in the face of its admission that it had spent Kshs. 600 million for the machinery previously in use. It would therefore be quite able to afford the Kshs. 800 million it stated complying the new requirements would entail.

Miss Rachier, in briefly responding to those submissions submitted that the public vs. private rights discourse was not before the learned Judge and the respondents were introducing the same before this Court. She conceded that no right is absolute but contended that the learned Judge?s error lay in not properly considering proportionality under **Article 24(1).** According to counsel, the respondents did not discharge their evidential burden on the justifiability of the limitation and the provision did not pass constitutional muster.

This being a first appeal our jurisdiction entails a rehearing of the appeal on the basis of the record before us. We reevaluate the evidence that was before the Judge and make our own independent conclusions. In a matter such as the one before us, where no witnesses testified but the case was decided on the basis of affidavit evidence, we have wider latitude to depart from the findings of the first instance judge as he enjoyed no greater advantage than ourselves, the materials for consideration being the same. Still, where the decision challenged on appeal is one that lay on the discretion of the Judge, we would be slow to interfere, doing so only where it is established that the Judge, as was held in ***UNITED INDIA INSURANCE CO. LTD vs. EAST AFRICAN UNDERWRITTERS (KENYA) LTD [1985]KLR 898, (at 899);"(a) misdirected himself in law***

> ***(b)Misapprehended the facts***
>
> ***(c) Took account of considerations of which he should not have taken account***
>
> ***(d) Failed to take account of consideration of which he should have taken account***
>
> ***(e) His decision, albeit a discretionary one, is plainly wrong."***

See also ***MBOGO & ANOR vs. SHAH*** **[1968] EA 93**.

The central thrust of this appeal is that the learned Judge did not properly or at all address the question whether the impugned section of the Act satisfied the requirements of **Article 24** of the Constitution with regard to limitation of rights, at the heart of which is the question of proportionality. Article 24 gets engaged, to our mind, when it is first established or agreed that there does in fact exist a right which has been limited in some way. It has been argued before us, as it was before the court below, that the appellant did not in fact have a right recognized and protected under the Constitution. The argument is that what the appellant saw as threatened was its future profits and those did not amount to property as defined under **Article 260** so as to merit protection under **Article 40**. We will not spend much time on this aspect of the case because, much as the respondents seemed to fault the learned Judge for accepting too readily that the appellants? right to property was implicated when it was not, neither of them filed a cross-appeal against that finding and so nothing turns on their complaint.

The learned Judge understood the appellant?s location of their complaint under the right to property as follows;

> ***"The petitioner?s chief complaint in this petition is that the implementation of the labeling contemplated by section 32 of the Alcoholic Drinks and Control Act is unconstitutional as it serves to significantly diminish the brand name, brand value and brand identity all of which constitute a significant part of its intellectual property which amounts to a violation of the petitioner?s right to property as enshrined under Article 40 of the Constitution."***

We think that the learned Judge was correct to hold in the appellants? favour that its property rights were affected by the impugned provision. This has to be so considering that **Article 40** *inter alia* protects ***"property of any description"*** from arbitrary dispossession as well as limitation or restriction of its enjoyment by the owner unless certain conditions are met. It is telling that **Article 260** define property quite broadly to include;

> ***" ….***
>
> ***(c)Intellectual property or***
>
> ***(d)Money, choses in action or negotiable instrument."***

We shall say no more on the subject.

Turning to the crux of this appeal, namely whether the limitation of the appellant?s property rights passed constitutional muster, it is common ground that limitation *per se* is not the problem since it is agreed that the right is not absolute. On whether the impugned section unconstitutionally violated the appellant?s right to property, the learned Judge reasoned thus;

> ***"I am in agreement with the 3rd respondents that the right to property as provided for by Article 40 of the Constitution is not absolute. It can be limited. It is not one of the rights not to be limited by Article 25 of the Constitution. I am also alive to the provisions of Article 46 which provides for consumer rights. The Constitution is not a one way street in which the rights of others and other provisions of the law are discarded. Pursuant to the provisions of Article 46(1)(b) of the Constitution „consumers have the right to the information necessary for them to gain full benefit from goods and services?. I therefore opine that the health label as provided for by section 32 of the Alcoholic Drinks Control Act is important as it enables the consumers to have information necessary for them to gain full awareness of the products produced by the petitioner and the effect such produces would have on them, particularly on their health. Indeed, Article 46(1) (c) of the Constitution provides for the protection of the consumers health, safety and economic interests."***

Even though, facially, the appellant?s complaint that the learned Judge did not engage **Article 24** of the Constitution seems merited, a close reading of his analysis shows that he had in mind the ethos of the Article, namely legality, reasonableness and justification or proportionality which involves a striking of a balance between various interests and factors. The Article provides that;

> ***"24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only 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 extent of the limitation;

(d) The need to ensure that the enjoyment of 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."

We do not think that a judge is required to engage in some kind of mechanical, sequential application of each factor or element contained in that provision. All he needs to do is bear the same in mind in determining reasonableness or justification of the limitation to a right. This, we think, is what the Constitutional Court of South Africa had in mind in ***SAMUEL MANAMELA vs. THE DIRECTOR GENERAL OF JUSTICE CCT 25/99*** which we referred to with approval in ***ATTORNEY GENERAL & ANOTHER vs. RANDU NZAI RUWA & 2 OTHERS [2016] eKLR***, while addressing a section of the Southern Constitution which is in terms similar to our **Article 24(1) (a) – (e);**

"***It should be noted that the five factors expressly itemized in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately the question is one of degree to be assessed in the concrete legislative and social settling of the measure, paying regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.***

……*Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality of a limitation must be assessed in the context of this legislative and social setting."*

We think that looking at the present case as a whole, what was at stake was not a complex, dignity-defying matter implicating equality, freedom or the essence of our democratic credentials. Rather, what the learned Judge had to deal with was a balancing of the appellant?s private right to property that was intimately linked to its commercial activities on one hand, and the public duty to protect consumers from harm and to provide them with relevant information on the effects of the alcoholic products on their health. That consideration falls squarely within the peremptory factor in **Article 24(1(d)** to ensure that the enjoyment of the rights and freedoms of any individual do not prejudice the rights and fundamental freedom of others. It cannot surely be the case that any responsible State would permit its citizens to perish or otherwise come to harm as a result of consumption of certain products known to be potentially deleterious to their health without requiring that notices and warnings be brought to their attention by prominent and unmistakable means.

We are satisfied that the learned Judge did exercise his mind properly on the issue of balancing of interests, reasonableness, justification and proportionality as was required of him under **Article 24(1)** of the Constitution. It is also worth noting that as far as the right to property is concerned, **Article 40** itself sets out the specific parameters for its permissible limitation and the learned Judge applied the test therein to the impugned section and it passed muster. Overally therefore, we, like the learned Judge, find nothing offensive or constitutionally reprehensible about the impugned section.

The next thematic complaint against the learned Judge is that he adopted too narrow and limited a philosophy as to the role of courts, and misapprehended the appellants? prayer as an invitation to overstep the judicial bounds and essentially trespass into an area reserved for the legislative branch. The learned Judge?s reasoning on this aspect of the case, after first setting out the rival submissions made before him, is captured in paragraphs 36 and 38 of his judgment as follows;

"36. To my mind, the question as to whether to adopt a 30% of the total surface areas as proposed by section 32 of the Alcoholic Drinks and Control Act or 40% as it is in Thailand or the one eighth of the surface area as in South Africa is not a matter this Court can decide. Parliament is the body charged with the sole responsibility of enacting laws. When it did enact the provisions of the Alcoholic Drinks and Control Act, it had reasons for doing do. Alcoholic Drinks Control Act came into force on 22nd November 2010. Its purposes is stated in the preamble as, „An act of Parliament to provide for the regulation of the production, sale and consumption of alcoholic drinks, to repeal the Chang?aa Prohibition Act, the Liquor Licencing Act and for connected purposes.

….

38. Whether the information contained in the label has positive psychological impact on the society in assisting to curb abuse of alcohol in the long term or not is not in the manner this Court can determine. Better put, whether, the 30%, 40% or an eighth of the surface area is sufficient or not is still not for this Court to determine."

He then went on to conclude that the 30% total surface area coverage of the health warning label was neither unlawful nor unconstitutional. Moreover, it would be a violation of the doctrine of separation of powers were the court to arrogate to itself the role of determining for Parliament what kind of legislation to enact or in the instant case, what percentile coverage to impose unless Parliament enacted the law in

question *"in total breach of the Constitution."*

The learned Judge considered and followed the decision of the United States Supreme Court in ***U.S. vs. BUTLER 297 U.S. 1 [1936]*** which was to the effect that it is not for the court to approve or condemn legislative policy, less still pronounce in its wisdom or lack of it, its "*delicate and difficult office"* being only to ascertain and declare whether any challenged legislation accords with or contravenes the Constitution.

The appellant?s view seems to be that the learned Judge trod was way too gingerly, fearfully even, in not striking down the impugned section as unconstitutional. It contends that he ought to have been guided by the principles stated in ***APOLLO MBOYA vs. ATTORNEY GENERAL & 2 OTHERS*** (supra) and ***SPEAKER OF NATIONAL ASSEMBLY vs. ATTORNEY GENERAL & 3 OTHERS*** (supra), excerpts whereof it cited in aid. Having perused the judgments hailed by the appellant, we do not, with respect, see much difference in philosophy and approach between what they propounded and what the learned Judge adopted. Both they and the learned Judge do accept that in appropriate cases the courts can strike down legislation for being unconstitutional. Both they and the learned Judge are also very keenly aware that such power is sweeping and ought to be exercised with caution and in the clearest cases of constitutional violation. They are unanimous that it is not the courts to pass value judgments on the wisdom or advisability of legislative acts of Parliament. They should not go into an examination of the substantive merits of legislation. Indeed, while it is true that the doctrine of Parliamentary supremacy under which Acts of Parliament could not be questioned has no place in our constitutional set up where sovereignty resides with the people and all organs of state exercise only authority delegated to them by the people, with the Constitution itself being Supreme, it cannot be the case that the courts can purport to encroach upon matters that are reserved for the other branches of government, save in the clearest cases of procedural impropriety, obvious irrationality or violation of the Constitution. The mere fact that Parliament passes a law that a petitioner finds offensive or inconvenient is alone not a reason for invalidation of the law.

We think that upon a consideration of the case as a whole, the learned Judge was correct in holding that the issue of the percentage of the surface area the health warning label was to cover was not a matter for the courts. The courts do not by nature have the expertise and resources required for detailed examination of legislative policy and how the same translates into actual statutes. It is Parliament through its system of House Committees; public participation; and open, structured debate that is better placed to receive and consider materials, studies, reports and representations all matters germane to the making of laws in the various subjects that it is called upon to legislate upon.

We have seen from the record that the appellant did participate in many stakeholder engagements and discussions with Parliament?s relevant committees regarding the impugned provisions of the Alcoholic Drinks Control Act, 2010. We have even seen minutes or a summary of a meeting held on 16th March 2011 between 3 representatives each of the appellant and NACADA, who included the respective deponents of the affidavits filed in the court below, in which the appellant had in fact sought more time to comply with the impugned provisions of the Act. The minutes titled "*stake holder meeting. NACADA",* state in part as follows;

> ***"EABL stated that the additional investment required for new labeling machinery if the business has to change its labeling format will take more time and that the business will not be ready in the times stipulated by the Act with regards packaging especially since NACADA only confirmed their interpretation in March 2011 despite numerous requests from EABL. Thus, EABL requested NACADA for more time to comply ie additional 6-9 months if the labeling requirements remain as stringent as NACADA is stating."***

We think, with respect, that if a petitioners attempts to persuade a regulator and Parliament to either relax the strictures of regulation or to extend time for compliance but fails, his recourse must lie in compliance and making further entreaties to the relevant bodies so as to enlighten or otherwise convince them to their cause. It cannot lie in seeking the court?s orders to impose its views.

The final aspect of this appeal we need to address, albeit briefly, is whether the learned Judge erred in not seeing the requirement for carrying a health warning as a violation of the appellants right to free speech by compelling it to say what it did not believe. With great respect, we do not find much substance in this complaint given what we have already stated about the need to protect consumers of alcoholic beverages consistent with the provision of **Article 46** of the Constitution. We, for ourselves, see no violation of rights when the producer, seller or user of an item or substance that is potentially harmful to other persons is required to carry or exhibit a warning and a caution for the benefit of the persons likely to be affected. It seems to us to be the most reasonable and commonsensical thing without which the public at large would be exposed to untold dangers. Such warnings are commonplace and are required by rational regulation. We see in them no violation of the right to free speech.

The case cited by the appellant on this point, ***WEST VIRGINIA STATE BOARD OF EDUCATION vs. BARNETTE*** (supra) is no authority for the argument propounded. That case stated, that citizens cannot be coerced, without violence to their right to freedom of conscience and religion, to confess a particular officially-sanctioned orthodoxy in politics, nationalism, religion or opinion, a holding we unreservedly agree with. Nobody can be forced to hold a particular political or religious creed or opinion. That, however, does not mean that the manufacturer or seller of a substance that is potentially harmful to its consumers cannot be forced by law to carry a health warning on the substance so made or sold any less than the owner of a dog known to be wild and likely to attack passersby may be required to display a warning sign indicating "*Mbwa Kali"* (Fierce Dog). Such a requirement is not a violation of the right to free speech. It is a responsible, protective warning for the good of the public.

The upshot of our consideration of this appeal is that it is devoid of merit and we accordingly dismiss it with costs.

Dated and delivered at Nairobi this 25th day of January, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR