



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 320 OF 2011
AS CONSOLIDATED WITH PETITION NO.s 3/2011, 108/2011, 110/2011,
135/2011, 182/2011, 232/2011, 311/2011 & 523/2011

ELLE KENYA LIMITED.....1ST PETITIONER
DYNAPLAS LIMITED.....2ND PETITIONER
EAST AFRICAN BREWERIES.....3RD PETITIONER
PATIALA DISTILLERS LTD.....4TH PETITIONER
LONDON DISTILLERS LTD.....5TH PETITIONER
MURANG’A BAR ASSOCIATION OPERATORS SELF GROUP.....6TH PETITIONER
ANTHONY MUNGA NDICHU.....7TH PETITIONER
THOMS THUKU NDICHU.....8TH PETITIONER
FRANCIS MBUTHIA NG’ANG’A.....9TH PETITIONER
PUBS, ENTERTAINMENT AND RESTAURANTS ASSOCIATION.....10TH PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT
NATIONAL CAMPAIGN AGAINST DRUG ABUSE (NACADA).....2ND RESPONDENT
MINISTER FOR STATE FOR INTERNAL SECURITY.....3RD RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS (DPP).....4TH RESPONDENT

AND

CANON GENERAL SUPPLIES (E.A)LTD.....1ST INTERESTED PARTY

NAIROBI LIQUOR MANUFACTURING ASSOCIATION.....2ND INTERESTED PARTY

Introduction

1. The Petition concerns the constitutionality of certain provisions of the **Alcoholic Drinks Control Act, No. 4 of 2010** (“the ADCA”) regarding packaging of alcoholic drinks. In particular, the Petitioners are opposed to **Section 31** of ADCA in as far as it specifies the mode of packaging for distilled alcoholic beverages. The impugned **Section 31** as it then stood and which is the subject of the present Petition reads 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 provisions of subsection (1), -

(a) no person shall manufacture, pack, distribute or sell an alcoholic drink in a container of less than 250 millilitre;

(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

(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.”

2. The Petitioners are manufacturers and distillers of alcoholic beverages or otherwise dealers of packaging material for alcoholic beverages. The Petitioners have hitherto packaged the alcoholic drinks in both 205ml and 250ml Polyethylene Terephthalate (PET)bottles.

3. Following request and consent of all parties concerned, I delivered a ruling on the 1st February, 2012 directing that all the Petitions be consolidated and be heard within the Petition No. 320 of 2011 as they dealt with similar matters.

4. The 1st Respondent, National Campaign Against Drug Abuse (NACADA) is a statutory Body and the relevant agency created pursuant to the provisions of **Section 2 of the Alcoholic Drinks Control Act, 2010** to deal with matters relating to alcoholic drinks.

The Petition

5. On 18th May, 2012 after hearing the parties, I directed that the Parties discuss and come up with a list of issues for this court’s determination. By consent of all parties, it was agreed that the list of **Agreed issues** lodged by the 1st and 2nd Petitioners on the 19th March, 2012 and dated the same day be adopted as the agreed issues. The following issues were framed as the issues for determination;

AGREED ISSUES

I. **Whether or not Section 31(2)(a) of the Alcoholic Drinks Control Act, 2010 to the extent that it bans packaging of alcoholic drinks in containers of less than 250ml is in contravention of and is ultravires the provisions of Section 91A of the Customs and Excise Act Cap 472 Laws of Kenya which allows packaging in not less than 200ml and hence a nullity in law.**

II. Whether or not Section 31(2)(b) of the Alcoholic Drinks Control Act, 2010 to the extent that it bans the use of Polyethylene Terephthalate(PET) bottles as the means of packaging alcoholic drinks in exclusive preference to glass bottles amounts to promotion of unfair and predatory trade practices which is to drive competitors out of business and is *ultra vires* the provisions of and the spirit of the Competition Act Cap 504 Laws of Kenya and hence a nullity in law.

III. Whether or not to the extent that Section 31(2)(b) of the Alcoholic Drinks Control Act, 2010 bans the packaging of alcoholic drinks in Polyethylene Terephthalate(PET) bottles, the Petitioners' fundamental right to equality before the law and the equal protection and benefit of the law as guaranteed by Article 27(1) of the Constitution of Kenya, 2010 and right to property as guaranteed by Article 40 of the Constitution of Kenya, 2010 have been violated.

IV. Whether or not to the extent that Section 31(2)(b) of the Alcoholic Drinks Control Act, 2010 bans packaging of alcoholic beverages in Polyethylene Terephthalate(PET) bottles, the Petitioners' fundamental right to equal treatment in the economic spheres as guaranteed by Article 27(3) of the Constitution of Kenya, 2010 has been violated.

V. Whether or not to the extent that Section 31(2)(b) of the Alcoholic Drinks Control Act, 2010 restricts the usage of glass bottles in the packaging of alcoholic beverages the same is unconstitutional and amounts to discriminatory legislation and hence *ultra vires* the protection guaranteed under Article 27(6) of the Constitution of Kenya, 2010.

VI. Whether or not a prohibition should issue against the Respondents from proceeding with the implementation of the provisions of Section 31(2)(a) and (b) of the Alcoholic Drinks Control Act, 2010 in terms of the 1st Respondents Notice in the Standard Newspaper dated 28.09.2011

VII. Whether the 1st Respondent has been rightly enjoined to this Petition

VIII. Whether this Petition is properly before this court and has merit

IX. Who should bear the costs of this Petition.

X. Whether or not the coming into force of section 3 of the Finance Act 2010 impliedly repealed section 31(2)(a) of the Alcoholic Drinks Control Act, 2010.

6. The Petitioners' case is set out in the various respective Petitions. In Petition No. 320/2011, the claim is set out in the Petition dated 15th December, 2011 supported by the affidavit of **Antony Otieno Ombok**, the Managing Director of the Petitioner sworn on the same date.

7. The Petitioner in the parent Petition seeks the following reliefs from this Court:

a) *A prohibition to issue against the Respondents from proceeding with the implementation of the provisions of Section 31(2)(a) and (b) of the Alcoholic Drinks Control Act, 2010.*

b) *A declaration do issue that section 31(2)(a) of the Alcoholic Drinks Control Act, 2010 to the extent that it bans the packaging of alcoholic drinks in containers of less than 250 ml is a contravention of and ultra vires the provisions of section 91A of the Customs and Excise Act Cap 472 Laws of Kenya which allows packaging in not less than 200ml and hence a nullity in law.*

c) *A declaration do issue that Section 31(2)(B) of the Acoholic Drinks Control Act, 2010 to the extent that it bans the use of Polyethylene Terephthalate(PET) bottles as the means of packaging alcoholic drinks in exclusive preference to glass bottles is ultravires the provisions of and the spirit of the Competition Act Cap 504 Laws of Kenya and hence a nullity in law.*

d) *A declaration do issue that Section 31(2)(b) of the Alcoholic Drinks Control Act, 2010 to the extent that it bans the use of Polyethylene Terephthalate (PET) bottles as a means of packaging alcoholic*

drinks is a contravention of the Petitioner's fundamental rights as guaranteed under Articles 27(1),(2), (4),(6) and (7) of the Constitution of Kenya, 2010 and a nullity in law.

e) *A declaration do issue that to the extent that the advertisement carried out by the 1st Respondent on 28.09.2011 seeks to criminalise the packaging of alcoholic beverages in Polythelene Terephthalate(PET) bottles of not less than 250 ml exclusively in favour of glass bottles in terms of the provisions of Section 31(2)(b) of the Alcoholic Drinks Control Act, 2010 the same is a mockery of the Constitution and the Competition Act Cap. 504 Laws of Kenya.*

f) *Costs of this Petition.*

g) *Any other order that this Honourable court may deem just and fair to grant.*

Petitioners' Case

8. The Petitioners basic contention is that the net effect of the foregoing legislation is that they have been banned from packaging their alcoholic drinks in plastic bottles and more so in the 205 ml containers and that, it is the Petitioners' case that the PET bottles used in packaging of their alcoholic beverages bear standardization marks of quality of the Kenya Bureau of Standards (KEBS) and that the products have been subjected to quality controls, tested and found to have met the international standards set down by the World Health Organization on guidelines of packaging materials for all beverages.

9. According to the Petitioners, the **Customs and Excise Act, Chapter 472 of the Laws of Kenya** expressly permits packaging of alcoholic drinks in containers of not less than 200 ml and that therefore, the impugned **Section 31** is *ultra vires* the provisions of **section 91A** of the Customs and Excise Act in as far as it purports to increase the minimum volume of packaging of alcoholic drinks to 250ml from 200ml without an amendment being effected to the latter statute.

10. The Petitioners argue that the requirement for packaging of alcoholic beverages in glass bottles is discriminatory in nature in as far as it does not apply to other players in the beverage industry and is a breach of the Petitioner's right to equal treatment as guaranteed under **Article 27(3)**. It is also the Petitioner's case that the effect of the legislation is to discourage competition in the economy by perpetuating restrictive trade practices, encouraging monopolies and concentration of economic power and thus *ultravires* the protection guaranteed by Article 27(6) of the Constitution.

11. Mr Tiego representing the 1st and 2nd Petitioners submitted that the aim of ADCA was to check excessive consumption of alcohol and that there is nowhere in the policy paper where a study had been carried out to show that packaging in plastic bottles was dangerous. He stated that the same packaging was done for foodstuffs and pharmaceutical products and that furthermore, alcoholic drinks were universally packaged in plastic bottles.

12. Counsel further submitted that the Act barred even the use of cans and that the provision would create competition against those who used bottles for packaging contrary to the guidelines under the Competition Act. Relying on various authorities in support of his case, counsel finally submitted that implementation of the impugned provisions took away the Petitioners' right to livelihood and were discriminatory in their effect.

13. Stressing on the existence of the two contradictory provisions with regard to packaging, one being under the ADCA and the other under the Customs and Excise Act, Mr. Amoko representing the 3rd Petitioner, urged the court to find that section 31(2)(a) of ADCA was impliedly repealed by section 91(a) of the Customs and Excise Act introduced by the Finance Act, 2010 and the former ought to be struck off.

14. Mr Kahogo for the 4th Petitioner was of the same view and submitted that Section 31(2)(a) and (b) created uncertainty as to which provision would be applied to the Petitioners' circumstances.

15. Mr. Olunya representing the 5th Petitioner adopted the arguments by other counsel and also relied on earlier submissions in Petition No. 523/2011, adding that Section 31(2)(a) was unconstitutional as it contravened Article 40 on the right to property. Counsel further sought that the criminal charges against the Petitioners be dropped and quashed and sought a further hearing on damages caused.

16. Mr Kiarie and Mr. Kahogo for the 10th and 4th Petitioners respectively adopted the submissions by Mr. Tiego and Mr. Kahogo also relied on the submissions in Petition 232/2011 reiterating that section 31(2)(a) and (b) were uncertain as to which one applied. He stated for instance that it was unclear whether the provisions applied to his client who compounded alcohol by distilling ethanol with water and other additives.

17. The Petitioners also took issue with a notice published by the 2nd Respondent in the standard newspaper of 28th September, 2011 which read in part as follows:

“PACKAGING OF DISTILLED ALCOHOLIC DRINKS

The Authority wishes to inform the public that Section 31(2)(b) of the Alcoholic Drinks Control Act 2010 provides that all distilled alcoholic drinks shall only be packaged, sold or distributed in glass bottles.

Further, the Authority wishes to advise that Section 70 of the Alcoholic Drinks Control Act, 2010 gave manufacturers, importers and retailers of alcoholic drinks nine(9) months within which to comply with the requirements of the Act.

The Act came into operation on 22nd November, 2010 upon Gazettement by the Minister of State for Provincial administration and Internal Security. Therefore, the nine(9) months grace period lapsed on 22nd August, 2011.

Accordingly, distilled alcoholic drinks MUST now be packaged in glass bottles.

TAKE NOTE that a person who contravenes this provision commits an offence and shall be liable to a fine not exceeding Kshs. 50,000 or six months imprisonment or both.”

The 1st Interested Party's Case

18. The 1st Interested Party is in support of the Petition and through its written submissions dated 17th May, 2012, contends that since Section 91A of the ADCA as amended by Section 3 of the Finance Act 2010 permits the bottling of alcoholic drinks in containers of not less than 200ml then the restriction imposed by the Alcoholic Drinks and Control Act, 2010 is not only *ultra vires* but also unreasonable and a violation of the Interested Party's rights as enshrined in the Constitution.

19. It was further submitted that it was a matter of public notoriety that a huge percentage of consumables are packaged in PET bottles the world over including water, medicine, milk, tomato sauce and juices. It was also the Interested Party's case that the 2nd Respondent tendered no evidence to show that only packaging of alcoholic beverages in PET bottles is prone to the contents thereof being adulterated and that glass bottles are tamper proof. Further, that no evidence had been tendered to show the superiority of glass bottles over PET bottles as far as adulteration was concerned.

20. The Interested Party also emphasized that the impugned provisions were discriminatory arguing that pitting plastic bottles against glass bottles raised serious discriminatory issues because most wines were packaged in caskets while other beers were packaged in aluminium cans and that there even existed tinned beers and tetra park packaged bottles. It was therefore its case that the requirement denied them their right to equal competition *vis a vis* other players in the industry who have invested in machinery and equipment specifically made to package in glass bottles.

21. It is further submitted that the impugned provisions served none of the objective of the ADCA and

that the same are irrelevant. Reference was made to various specifications by the KEBS in that regard.

Respondents' Case

22. According to NACADA, the 1st Respondent, the Petition is an abuse of the court process and ought to be dismissed. It contended that packaging of PET bottles for alcoholic products was illegalized owing to rampant adulteration by unscrupulous traders and that this was done by piercing the bottom of the plastic bottle containing the alcoholic product and withdrawing its contents then refilling the said bottle with foreign products. As a result of adulteration, deaths and various health complications had been reported.

23. The court was referred to previously decided cases on the same issue including **Peter Njoroge Mwangi and Others v the Attorney General and Others, Petition No. 73 of 2010** and **Crywan Enterprises Limited v the Attorney General and Others, Petition No. 196 of 2011** where the court did not find any unconstitutionality with the impugned provisions of the ADCA.

24. Mr Chege counsel who held brief for Mr. Kimondo for NACADA contended that no right had been infringed as the purpose of the provision was to curb the prevalent misuse of alcohol packaged in plastic bottles. Counsel faulted the Petitioners as being driven by profits and reasoned that though expensive, such a move was justified as it was for public good and that private good was subordinate to public good. Mr. Chege also argued that the move minimized damage on the environment.

25. Counsel further argued that the Petitioners had had nine months to comply with the provisions but that they had failed to do so and that many distillers and manufacturers had complied with the law.

26. Mr Okello acting for the 6th Respondent adopted Mr. Chege's submissions. He stated that the police had acted within the law and that no rights had been infringed. Counsel relied on the Affidavit in response to Petition 523/2011 and further submitted that no damages were payable by the 4th and 5th Respondents.

Determination

27. I must at the very outset point out that most of the issues framed and prayers sought in the Petition have been overtaken by events. I take judicial notice of subsequent amendment to the Customs and Excise Act early this year *vide* **Customs and Excise (Amendment) Act, 2013, Act No. 10 of 2013** which amended **sections 91A** and **Section 31** of the ADCA respectively. The section 31(2)(b) was amended by adding the words "**or PET(polyethylene terephthalate)**" of the ADCA which as amended now reads 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 provisions of subsection (1), -

(a) no person shall manufacture, pack, distribute or sell an alcoholic drink in a container of less than 250 mililitre;

(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 or PET(polyethylene terephthalate) bottles of the kind specified in paragraph 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."

[Amended part underlined]

That therefore dispels doubt as to whether PET bottles can be used in packaging champagne or any other distilled alcoholic drink.

The Amendment also amended section 91A of the Customs and Excise Act by adding a new subsection 1A as follows;

“(1A) For avoidance of doubt, the container referred to in subsection (1) shall either be a glass or PET (polyethylene terephthalate) bottle.”

28. Notable however, this latest amendment fails to expressly settle the controversy regarding minimum capacity of packaging the beverages. While ADCA retains it at no less than 250 millilitres, the Customs and Excise Act retains it as 200 millilitres pursuant to the Finance Act, 2010 as amended. In that year, Parliament found it necessary to take a positive step and replace the requirement of packaging from 250 to 200 millilitres through the **Finance Act, 2010 (Act No. 10 of 2010)** whose section 3 amended **section 91A(1)** in the following terms;

“The Customs and Excise Act is amended in section 91A(1) by deleting the words “two hundred and fifty millilitres” and substituting therefor the words “two hundred millilitres.” [Emphasis added]

29. The core question left for me to determine is whether the provisions of the Customs and Excise Act impliedly repealed section 31(2)(a) of ADCA. I will also briefly refer to the allegations of discrimination made by the Petitioners.

30. But before embarking on the substantive issue, let me first dispose of one of the issues framed by the parties, the question as to whether the Attorney General is properly enjoined as a Respondent to these proceedings. The National Campaign Against Drug Abuse Authority (NACADA) is a State Corporation under the Ministry of State for Provincial Administration established in the year 2007 under Legal Notice No. 140 of 2007. The interpretative section of ADCA defines “relevant agency” as *“the National Campaign Against Drug Abuse Authority or its successor in law as the public body or department responsible for matters relating to alcoholic drinks;”* NACADA is therefore the agency responsible for discharging the mandate stipulated under **Section 4** of the Act, including the mandate to; ***“advise the Minister generally on the exercise of his powers and the performance of his functions under this Act, and in particular to –***

(i) recommend to the Minister the permissible levels of the constituents of alcoholic drinks required to be prescribed under section 68 (2) (a);

(ii) advise the Minister on the harmful constituents and ingredients of alcoholic drinks required to be prohibited under section 68(2) (b);

(iii) advise the Minister on the test methods to be used in determining alcoholic drinks in order to test conformity with the requirements of this Act and any regulations made thereunder;

(iv) advise the Minister on the information that manufacturers shall provide, including information on product composition, ingredients, hazardous properties and brand elements required to be provided under section 68 (2) (c);

(v) advise the Minister on the packaging, sale and distribution of alcoholic drinks;

31. The office of the Attorney General is established under **Article 156** of our Constitution. **Article 156(4)** which provides for the mandate of the Attorney-General reads as follows;

“The Attorney-General—

(a) is the principal legal adviser to the Government;

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

(5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.

(6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.

(7) The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.”

32. My reading of the above provisions answers the question in the affirmative. NACADA is a public body and the Attorney General cannot be said to be said erroneously suited.

Whether the provisions of ADCA(section 31(2)(a)) are valid

33. The next issue is the relation between the conflicting positions of the two statutes I.e. section 3 (1) of ADCA and section 91A of the Customs and Excise Act as amended by the Finance Act of 2010. The Petitioners have urged that the impugned provisions were impliedly repealed by those of the Customs and Excise Act. They submitted that to the extent that it bans the packaging of alcoholic drinks in containers of less than 250 ml, it is in contravention of and *ultra vires* the provisions of section 91A of the Customs and Excise Act Cap 472 Laws of Kenya which allows packaging in not less than 200ml and hence a nullity in law.

34. I must at this point point out, as courts have always done that in interpreting legislation it is not the role of this court to interrogate the wisdom or otherwise of its enacted laws. As the court stated in *Re Application by Bahadur* [1986] LRC 545 (Const.), ***“I would only emphasise that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown... Further at page 304 it was stated that; “It is not the function of the Court to form its own judgment as to what is fair and then to “amend or supplement it with new provisions so as to make it conform to that judgment.”***

35. It is therefore not the business of this court to distill what it thinks should have been the law; whether the 200ml or the 250 ml is the 'right' or 'wrong' or 'fair' measure. As this Court stated in the case of ***Mount Kenya Bottlers Limited & 3 others v Attorney General & 3 others, Petition No. 72 of 2011***, the Courts cannot act as “regents” over what is done in Parliament because such an authority does not exist.

36. The US Supreme Court in ***U.S v Butler, 297 U.S. 1[1936]*** had this to say on a similar issue;

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

I adopt all the above holdings as applicable to this case.

37. The Alcoholic Drinks Control Act (“the Act”) was enacted in the year 2010 and came into operation

on **22nd November, 2010** upon gazettelement. Section 3 of the Finance Act, 2010 amended section 91 A of the Customs and Excise Act to provide for packaging of alcoholic beverages in more than 200ml. The Finance Act was assented to on **21st December, 2010** . According to section 1 of the Act, the provision was to apply retrospectively to **11th June** of that year. The question that begs an answer is which date is relevant for purposes of determining which Act was later. Impliedly therefore, Parliament repealed the existent provisions regarding packaging under section 31 of the Act. My view is that the operative date is the date when the Act in question is passed by parliament for that is when the legislative will is rubber-stamped regardless of when the Act is to come into operation. In *Karanja Matheri v Kanji*[1976-80]1 *KLR Harris J.* observed as follows(at Page 174):

“The Land Control Act was passed on 11th December 1967 and came into operation on the following day. The Limitation Act was passed on 19th April 1968 and, by section 1, is deemed to have come into operation retrospectively on 1st December 1967. Accordingly, the latter of the two Acts came into operation first, a factor which must be borne in mind in the application for the principle of interpretation that, in the case of conflict, the later of two statutes in date of enactment may be regarded as constituting an amendment of the earlier. Here the position would seem to be that the Court must regard the Limitation Act as having already been in operation when the Land Control Act was passed and brought into force but that, nevertheless, by having been enacted subsequently to the Land Control Act, the Limitation Act should be construed as having by implication amended it if and in so far as the two conflict.”

38. Similarly, even if the Finance Act, 2010 and which set a minimum of 200ml as the capacity of containers for alcoholic drinks, indicated 11th June as the date of operation, the fact remains that it was enacted subsequent to the Alcoholic Drinks Control Act in **27th December** of that year. This was about a **month after** the ADCA had come into operation which was 22nd November, 2010 and about **four months after** ADCA had been assented to as an Act of Parliament which was done on **13th August, 2010**.

39. In the English case of *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1K.B., the court stated as follows at page 746;

“If it is once admitted that Parliament, in spite of those words of the sub-section has power by a later Act expressly to repeal or expressly to amend the provisions of the sub-section and to introduce provisions inconsistent with them, I am unable to understand why Parliament should not have power impliedly to repeal or impliedly to amend these provisions by the mere enactment of provisions completely inconsistent with them.”

40. In *Street Estates, Limited v Minister of Health*[1934]1 K.B. at page 389, the Court stated;

“I asked counsel what meaning he attached to those words, and he said they meant nothing, because the Act of 1919 had said that nothing inconsistent with it shall have any effect. That appears to me absolutely contrary to the constitutional provision that parliament can alter an Act which it has previously passed. It can do so by repealing the previous Act, and I gather counsel admits that, if it does that, it does not matter that the Act of 1919 has said that Act shall have no effect. But it can also do it another way, namely, by enacting a provision clearly inconsistent with the previous Act; without going through them, four pages of MAXWELL ON THE INTERPRETATION OF STATUTES are devoted to cases in which without using the word “repeal” Parliament has repealed a previous provision by enacting a provision by enacting a provision inconsistent with it. In those circumstances it seems to me impossible to say that these words...have no effect.”

41. Further at page 390, Maugham L.J. went on to state as follows,

“It seems to me, in the first instance, plain that the legislature is unable, according to our constitution, to bind itself as to the form of subsequent legislation; it is impossible for Parliament to say that in a subsequent Act of Parliament dealing with this subject matter shall there never be an implied repeal. If Parliament chooses in a subsequent Act to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature.”

42. Back home, courts have addressed their minds to the issue of implied appeal. In the case of **Nzioka & 2 others v Tiomin Kenya Ltd, Mombasa Civil Case No. 97 of 2001**, Hayanga J. had this to say;

“...The EMC Act being a more recent Act must be construed as repealing the old Act where there is inconsistency....where the provision of one statute are so inconsistent with the provisions of a similar but later one, which does not expressly repeal the the earlier Act, the courts admit an implied repeal(See also Karanja Matheri v Kanji[1976-80]1 KLR 140)”.

43. Most recently, the court in the case of **Crywan Enterprises Limited v Attorney General & another, Petition No. 196 of 2011** opined as follows;

*“The petitioner's claim is based on the apparent inconsistency between the two Acts in so far they relate to packaging. In my view, there is no conflict as it is now settled that where there are two provisions in Acts of Parliament that are in conflict, the later Act repeals the former I agree with the dictum of **Avory J in Vauxhall Estates Limited v Liverpool Corporation(supra)** that, “...if they are inconsistent to that extent, then the earlier act is impliedly repealed by the later.”*

I agree and wholly adopt this reasoning.

Whether Impugned section discriminatory

44. Both the Petitioners and Interested Party put up a spirited fight that the impugned **section 31(2)(b) of ADCA** is discriminatory in as far as it seeks to regulate industry players of alcoholic drinks and not other beverages. The impugned provision reads thus,

“(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 or PET(polyethylene terephthalate) bottles of the kind specified in paragraph (a).” The underlined part was introduced by the recent 2010 amendment.

The Petitioners had also argued that the section's insistent on glass bottles effectively presents unfair competition against manufacturers of PET bottles in favour of manufacturers of glass containers. The second limb has obviously been effectively severed by the 2013 Amendments mentioned above, having been overtaken by events.

The Object and purpose of the Act under Section 3 of the Act is;

“3. The object and purpose of this Act is to provide for the control of the production, sale, and use of alcoholic drinks, in order to –

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

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

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

(d) inform and educate the public on the harmful health, economic and social consequences of the consumption of alcoholic drinks;

(e) adopt and implement effective measures to eliminate illicit trade in alcohol including smuggling, illicit manufacturing and counterfeiting;

(f) promote and provide for treatment and rehabilitation programmes for those addicted or dependent on alcoholic drinks; and

(g) promote research and dissemination of information on the effects of alcoholic drink consumption, in particular the health risks that may arise therefrom.”

45. **Article 27** of the **Constitution** which deals with equality and freedom from discrimination provides as follows;

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

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

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

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in Clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under Clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

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

46. The principle of equality and discrimination has long been a subject of court’s determination across jurisdictions. The Court in State of Kerala and another v N. M. Thomas and Others, Civil Appeal No.1160 of 1974 had this to say regarding equality principle;

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

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

47. The court in Lindsley v National Carbonic Gas Co **220 US 61 (1911)** at pp.76-79 addressed itself to the principle of reasonableness delivering itself in the following terms:

“A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.”

Similar holding was made in John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others, Petition 15 of 2011 where the court opined, ***“Rightly or wrongly, and it is not for the courts to***

decide, the framers of the Constitution manifestly regarded as inadequate a blanket right to equal treatment..”

48. Similarly, in Community advocacy and Awareness trust & 8 others v AG, Petition 243 of 2011, the court stated at para.103 and reiterate the same here that;

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

(See also case of Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another, Petition No. 102 of 2011)

49. It is clear from the above chain of authorities that inequality treatment is not *per se* prohibited. The question as to whether a discrimination is fair or unfair hence illegal is to be weighed against the rationality test. This is to say that the aim of the inequality should be aimed to achieve a certain legitimate governmental objective. It follows that the question for my determination is not merely whether the provisions are discriminatory or amounts to unequal treatment, but whether such differentiation meets the threshold as bearing a rational connection with legitimate governmental motive.

50. The Respondents have explained that the target was aimed at securing public good. They have explained that the restriction was necessary on alcoholic drinks owing to rampant adulteration by unscrupulous traders who would pierce the bottom of the plastic bottle containing the alcoholic products and then refill the said bottle with foreign products as a result of which deaths and various health complications have been reported. In arriving at my decision. I have to bear in mind the context in which the impugned law commonly referred to as 'Mututho law' was enacted, amidst loss of lives of citizens. To my mind, there appears to have been a legitimate governmental purpose that the provision set to achieve and I do not find it irrational. As to whether that is right or wrong or wise is not within the precincts of this court's determination. I therefore reject the Petitioners' contention that the section is discriminatory hence unconstitutional in as far as it limits its application to manufacturers of chang'aa and other distilled alcoholic drinks to the exception of other beverage products.

Conclusion

51. I have considered the arguments by the parties, taken into account the subsequent developments in the law as regards requirement for packaging of alcoholic beverages since the initiation of the present Petition and have arrived at the following findings;

i. That Section 31(2)(a) of Alcoholic Drinks Control Act, 2010 is and remains invalid by virtue of it being impliedly repealed by section 91A of the Customs and Excise Act as amended by Section 3 of the Finance Act, 2010. The former Act hence carries the day by reason of it having been enacted subsequent to the ADCA. Therefore, the provisions of the former Act are invalid and cannot continue to apply in view of the subsequent amendment to section 91A of the Customs and Excise Act.

ii. That by the implied repeal of section 31(2)(a) of ADCA Section 91A of the Customs and Excise Act, Chapter 472 of The Laws of Kenya) is the applicable law in as far as the capacity of packaging of alcoholic drinks is concerned.

Stemming from the above findings, I hereby grant the following Orders:

i. A declaration that section 31(2)(a) of the Alcoholic Drinks Control Act, 2010(No. 4 of 2010) is inapplicable and non-existent in as far as it was impliedly repealed by the provisions of section 91A of Customs and Excise Act pursuant to the Finance Act amendment of 2010.

ii. *An order of prohibition barring the Respondents or their agents from proceeding with the implementation of the provisions of Section 31(2)(a) of the Alcoholic Drinks Control Act, 2010 or in any way harassing the Petitioners or their agents.*

52. Given the nature of the matter, I exercise discretion to order that each party bears its own costs.

53. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2013

ISAAC LENAOLA
JUDGE

In the presence of:

Irene – Court Clerk

Mr. Muthanwa, Mr. Kariuki, Miss Oraro for Petitioners

Mr. Chege for NACADA and

Mrs. Makasila for NACADA

Order

Judgment duly delivered.

ISAAC LENAOLA
JUDGE

Further Order

Copies of the judgment to be supplied to parties

ISAAC LENAOLA
JUDGE