Nyeri County Bar Owners Association v County Government of Nyeri (Constitutional Petition E003 of 2024) [2024] KEHC 12140 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 12140 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CONSTITUTIONAL PETITION E003 OF 2024

DKN MAGARE, J

SEPTEMBER 26, 2024

IN THE MATTER OF ARTICLES 1, 2, 10, 21, 22, 23, 27, 74(C), 196(B) AND 196 OF THE CONSTITUTION

AND

IN THE MATTER OF THE NYERI COUNTY ALCOHOLIC DRINKS CONTROL ACT, 2003

BETWEEN

NYERI COUNTY BAR OWNERS ASSOCIATION ..... PETITIONER

AND

COUNTY GOVERNMENT OF NYERI ..... RESPONDENT

JUDGMENT

1. The Petition dated 21/5/2024 sought the following reliefs:

    i. A declaration that the Nyeri County *Alcoholic Drinks Control Act* 2023 is unconstitutional and invalid.

    ii. Costs.

2. The petition is premised on the grounds in the petition as well as the supporting affidavit sworn by Teobald Mukundi Wambugu on 21/5/2024. They set out the grounds in support as follows:

    i. The Petitioner is an organization comprising of all legal beer retailers, wholesalers and distributors of alcoholic drinks within Nyeri County.

    ii. That up to around March 2024, alcoholic drinks control and management was being governed by the Nyeri County Alcoholic Drinks Control Management Act 2014.

    iii. On or about 15/3/2024, the County Governor assented to the Nyeri County Alcoholic Drinks Control Bill 2023 to become law.

iv. The said Act was passed without public participation as the purported public participation was a sham and mere public stunt as it did not consider the views of the Petitioner as major stakeholder.

v. The Respondent was mandated to accept all views from the Petitioner as major stakeholder considering the fact that the Petitioner would be greatly affected by the legislation.

vi. Failure to consider the views of the Petitioner was discriminative and against Article 27 of *the Constitution*.

vii. The Act failed to meet the threshold under Article 199 of *the Constitution*.

3. The Respondent filed grounds of opposition and a replying affidavit. The replying affidavit presented grounds inter alia that:

i. The petition was barred for nonjoinder of the legislative arm of the County.

ii. The petition failed to set forth precisely the constitutional provisions infringed and the manner in which they were infringed.

iii. Adequate public participation was conducted prior to the enactment of the impugned county legislation.

iv. The Respondent published the bill both on its website and Kenya Gazette on 12/10/2023.

v. The bill was presented before the county assembly for 1st reading on 31/10/2023.

vi. On 2/11/2023, the Respondent issued a notice of intended public participation to be conducted in 8 sub-counties of Nyeri County as follows:

a. Tetu – 17/11/2023

b. Nyeri Central – 14/11/2023

c. Mathira West – 14/11/2023

d. Mathira East – 15/11/2023

e. Kieni East – 15/11/2023

f. Kieni West – 16/11/2023

g. Othaya – 16/11/2023

h. Mukurweini – 17/11/2023

vii. The members of the public including the Petitioner were present as demonstrated by the register.

viii. The Respondent received 10 written memoranda from stakeholders including the Petitioner whose views were considered before the bill was passed.

ix. Expressing views as a member of public does not guarantee carte blanche inclusion.

Submissions

4. The Respondent filed submissions dated 20/6/2024 where they submitted that Section 8 (b) of the *County Governments Act*, 2012 as read together with Article 185(1) of *the Constitution* vests the

legislative authority of a County Government in the respective County Assembly which is by law a distinct and separate entity capable of suing and being sued in its name and the petition is fatally and incurably defective for not joining the County Assembly as a party. Reliance was placed on the case of Simon Wachira Kagiri v County Assembly of Nyeri & 2 Others (2013) eKLR where it was held as doth:

> County Assembly as a distinct institution in the County Government carrying out public duties as mandated by *the Constitution* and the County Government Act, is capable of suing or being sued in the absence of an express statutory provision.

5. The Respondent also submitted that anyone seeking constitutional redress from the High Court must specify with clarity their grievances, the constitutional provisions at issue, and the manner of their alleged infringement and that this petition failed for want of these details. They relied on Anarita Kirimi Njeru vs Republic (1979) eKLR.

6. The Respondent further submitted that before the enactment of the impugned Act, the Respondent took into account the nature of the intended legislation and the wide reach of business persons in the alcoholic beverages space who would be affected. They relied on the case of Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR to submit that: -

> " The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers."

7. It was also submitted that the Petitioner had alleged but not proved discriminatory conduct on the part of the Respondent. They cited Section 108 and 109 of the *Evidence Act* on the burden of proof. I was urged to dismiss the petition.

8. Further, they submitted that the petition is not anchored on any supporting affidavit, lacked specific complaints and that the Petitioner has not detailed exactly how the Respondent violated *the Constitution*.

9. It was their case that critical details are missing, such as specific views ignored, the views disregarded, reasons for disregard, and explanation as to why they believe their views were not considered. In particular, they had not elaborated how the public participation was merely a sham and a publicity stunt.

10. Regarding procedural failures, it was the Respondent's case that specific failures in public participation have not been outlined nor were there specific constitutional or statutory provisions which were allegedly ignored, or cited for amendment or deletion.

11. The Respondents submitted that this court distilled principles of public participation to enable consideration both qualitative and quantitative test in crafting the modalities of public participation. It was their case that the agency has considerable discretion but must however consider the governance needs of the people and effectiveness of the participation before the enactment of the Act.

12. They submitted that the Respondent took into account the nature of the intended legislation and the wide reach of business persons in the alcoholic beverages space who would be affected. They were cognizant of this fact and as a result the Assembly held town hall meetings on diverse dates across all the Respondent's sub-counties and invited both oral and written memoranda from the public.

13. It was their case that the mode chosen is well anchored in the law and ensured wide reach which was most effective. They submitted that there were attendance registers in the various stakeholder forums, where the attendance of members of the public was significant.

14. It was further postulated that, at least 10 stakeholder organizations, including the Petitioner, submitted comprehensive written memoranda. The information on this was disseminated and people had access to information as the bill was published both on its website and on the Kenya Gazette on 12/10/2023. That the notices of intended public participation were published in a local newspaper of nationwide circulation, informing members of the general public of the bill and how they can express their views, as well as the deadline for submitting various memoranda regarding the bill.

15. On the aspect of intentional inclusivity and diversity, they submitted that the impugned Act has significant implications for all stakeholders in the alcoholic beverages sector and in recognition of that fact, the Assembly made a concerted effort to engage a broad range of these stakeholders. This included barmaids to bar owners, as well as stockists, whether wholesalers or retailers, among others. The other principle they considered was that views must be considered in good faith. They stated that they considered the views in good faith. This is said to be evidenced by the Hansard, which was said to show that the debate members of the County Assembly had took into account the significant issues raised by the public. It was their submission that absence of specific references to the Petitioner and its proposals does not equate to disregarding their suggestions.

16. Lastly, they submitted on the principle that public participation should not undermine the legislative role and as such there needs to be a clear boundary between public participation and legislative work. It was their submission that the petitioner's request to declare the impugned act unconstitutional due to their views not being incorporated blurs this line as the Assembly's obligation was to debate the bill while considering public views, including the petitioner's. Considering these views does not mandate incorporating all proposals into the Act.

17. No submissions by the Petitioner are available in the e-filing portal or on the court file. Only a letter dated 1/7/2024 was filed, whose contents cannot be taken seriously. Courts operate on basis of pleadings and not letters.

Analysis

18. The issue for determination is whether the Nyeri County Alcoholic Drink Control Act 2023 is unconstitutional, null and void for want of public participation.

19. Before I venture into the merits, I note the Respondent has submitted that the petition is bad in law for failure to sue the County Assembly as a party. The Petitioner sued the County Government as an entity. There was in my view, no legal necessity to sue the County Assembly alongside the County Government. Article 176 of *the Constitution* provides as follows: -

> 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. What *the constitution* provides is that there is only one level of County Government. What the decision of Simon Wachira Kagiri v County Assembly of Nyeri & 2 others [2013] eKLR decided was fairly simple – that County Assembly as a distinct institution in the County Government carrying out public duties as mandated by *the Constitution* and the County Government Act, is capable of suing or being sued in the absence of an express statutory provision. In other words, the County Assembly can be sued on its own. It does not mean that it must be sued.

21. The County Government was accountable to the acts and omissions of the County Assembly and vice versa, and suing one to the exclusion of the other was not a fatal nonjoinder.

22. On the merits, public participation as a necessary national value and principle of governance warranting immediate implementation has been discussed by courts in a number of decisions. In Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR, the Court of Appeal had this to say about the importance of national values and principles of governance set out in Article 10(2) of *the Constitution*:

> " In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that article 10(2) of *the Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by article 259(1)(a) which enjoins all persons to interpret *the Constitution* in a manner that promotes its values and principles."

23. Likewise, in Ombati v Chief Justice & President of the Supreme Court & Another; Kenya National Human Rights and Equality Commission & 2 others (Interested Party) (Petition E242 of 2022) [2022] KEHC 11630 (KLR) (Constitutional and Human Rights) (17 August 2022) (Judgment) it was held as doth:

> " Participation of the people is not a progressive right to be realized sometime in the future. It is enforceable immediately. Any laws or rules made pursuant to constitutional or statutory provisions, must take this into account. Accordingly, and applying the above considerations, the inevitable conclusion that can be drawn is that the decision by the Supreme Court to exclude the participatory rights of the people before promulgation of the impugned rules, is unlawful and unconstitutional."

24. The content and the manner in which legislation is adopted must conform to *the Constitution*. Article 10 of *the Constitution* states as follows:

(1) The national values and principles of governance in this article bind all State organs, State officers, public officers and all persons whenever any of them––

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

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; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and;

(d) sustainable development.

25. Under Article 10 of *the Constitution*, the national values and principles of governance are binding on all State organs, State officers, public officers and all persons whenever any of them applies or interprets *the Constitution*, enacts, applies or interprets any law, or makes or implements public policy decisions. Public participation as a constitutional law imperative plays a pivotal role in legislative, policy and executive functions of both National and County Government and is an inevitable tool through which the views of citizens have to be considered in public decision-making processes. It informs stakeholders and the public of what is intended and affords them an opportunity to express, and have their views considered. That is why I tend to disagree with the submission by the Respondent that the views of the Petitioner were not meant to be considered as a matter of necessity or as a carte blanche. If this were the case, the Respondent had to state reasons for failure to consider such views in line with public participation feedback.

26. In a South African case of Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 Others CCT 86/08 [2010] ZACC 5, the Constitutional Court stated as doth:

> " Engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision. Public participation has been entrenched in our Constitution as one of the national values and principles of governance that binds all state organs, including the Supreme Court when, inter alia enacting law."

27. Public participation plays a central role in legislative, policy as well as executive functions of the Government as enunciated in the case of Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others [2018] eKLR, Mativo, J (as he then was) stated:

> " In a recent decision of this court, I observed that "my analysis of the Constitutional provisions yields a clear finding that public participation plays a central role in legislative, policy as well as executive functions of the Government." Both local and foreign jurisprudence are awash with decisions holding that 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. Any decision to exclude or limit fundamental participatory rights must be proportionate in order to be lawful."

28. The Petitioner herein alleged that the process leading to the enactment of the Nyeri County Alcoholic Drinks Act 2023 disregarded public participation as the views of the Petitioner were not taken into consideration. This does not appear to be the case. Provisions relating to placing the burden of drunk drivers or errors by police officers after drinking were removed from the Act pursuant to the Memorandum sent by the petitioner and other stakeholders. In the case of Kenya Human Rights Commission v Attorney General & Another [2018] eKLR, it was stated that:

> " Once a Petitioner attacks the legislative process on grounds that the law making process did not meet the constitutional standard of public participation, the Respondent is under a legal obligation to demonstrate that the legislative process did meet the constitutional standards of public participation".

29. What I understand to be the Petitioner's case is not that the Respondent did not carry out public participation. The Petitioner's case clearly is that the Respondent carried out public participation that was a mere formality and so a sham. However, the Petitioner did not specify the manner in which the public participation as conducted by the Respondent did not meet the constitutional imperative of a constitutional public participation under Article 10 of *the Constitution*.

30. It must be understood that public participation will bring out various views. Not all these views can be accommodated in the bill. If for example, a drunkard suggests that the bill must provide for free beers on Thursdays, and another proposes increase of taxation to 9000% while another craves for reduction of taxes to below 10%, which views will be taken in? In short, there are bound to be divergent views, such that the legislative body is bound to take them into consideration but not to adopt them entirely, hook, line and sinker. The legislative bodies must be given credit that they are not a bunch of morons with tabula rasa and only public views must constitute the bills.

31. The Respondent must take into account both the quantity and quality of the governed to participate in their own governance. However, the Respondent enjoys some considerable measure of discretion in determining the modalities of participation. This also includes the extent to which the public participation may derogate from the core of the bill. It is when the public vies are totally opposed to the bill that the government agency must then consider derogating partially or completely from the decision or bill. In the case of Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, a 3-judge bench of this court set out the following principles that public participation entails:

> " First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
>
> Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J of the South African Constitutional Court stated this principle quite concisely thus: The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (Minister of Health and another v New Clicks South Africa (Pty) Ltd and others *2006 (2) SA 311 (CC)*)"
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> Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic v The *Attorney General & another ex parte Hon Francis Chachu Ganya (JR Misc App No 374 of 2012*). In relevant portion, the court stated: "Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.

Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

Sixth, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand."

32. It is evident from the replying affidavit and annextures thereto, the Respondent was able to show that a notice for public participation was issued requiring written memoranda to be submitted on or before 9/11/2023 and participation to be held on stipulated dates, venues and times:

a. Tetu – 17/11/2023 at Wamagana Catholic Hall from 10.00 am - 11.30 am

b. Nyeri Central at Culture Hall – 14/11/2023 from 2.00 pm – 4.00 pm

c. Mathira West – 14/11/2023 at Kiriko PCEA Hall from 9.00am – 11.00am

d. Mathira East – 15/11/2023 at Karatina Town Hall from 2.00 pm - 4.00 pm

e. Kieni East at PCEA Hall Naromoru – 15/11/2023 from 9.00am to 11.00am

f. Kieni West 16/11/2023 at Mweiga CDF Hall from 2.00pm- 4.00pm

g. Othaya – 16/11/2023 at Othaya CDF Hall from 9.00 am – 11.00 am

h. Mukurweini on 17/11/2023 at Muhitu PCEA from 2.00 pm – 4.00 pm

33. The court also notes registers signed by members of the public produced by the Respondent denoting the attendance through public participation and the participants are drawn from all the 8 sub-counties. In the absence of the specific manner in which the public participation is said to have been flawed, it is difficult for this court to fault the Respondent in its process of public participation before enactment of the impugned Nyeri County *Alcoholic Drinks Control Act*. Faced with the same issues, the Court in Ndegwa (suing on his own behalf, in the public interest and on behalf of other Bar Owners' in

Nyandarua County) v Nyandarua County Assembly & another (Petition E011 of 2021) [2021] KEHC 299 (KLR) (16 November 2021) (Judgment) held as doth:

> " According to the Public Participation in the Legislative Process, Factsheet No. 27 by the National Assembly, public participation could be defined as the process of interaction between an organization and public with an aim of making an acceptable and better decision. The process involved informing, listening, dialogue, debate and analysis as well as implementation on agreed solutions. Public access and participation in both the national and county legislature was guaranteed specifically under articles 118(1)(b) and 196 (1) (b) of *the Constitution* which directed the national and county legislatures to respectively facilitate public participation. Furthermore, the legal framework for public participation was guaranteed by articles 10, 27, 33, 35 and 119 of *the Constitution* of Kenya, 2010
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> ... The County Assembly had a constitutional obligation to facilitate public participation on policy formulation, legislative process and any other decision affecting residents of the county. However, the respondents did not adduce any evidence to justify that any reasonable efforts were made by the Nyandarua County Government to facilitate public participation in accordance with the principles of public participation as entrenched in sections 3 and 87 and 91 *County Governments Act* in line with articles 10, 174 and 196 of *the Constitution*.
>
> No reasonable opportunity was given to the public and all interested parties. The residents of Nyandarua and relevant stakeholders were not accorded with timely access to information that was relevant to a process of legislation, which was the amendment to facilitate the appreciation of the issue for consideration and an opportunity to make a response especially by the stakeholders. The petitioner on behalf of other the bar owners and the public at large alleged that none of them were consulted during the amendment process; an allegation the respondents had not disproved. No explanation(s) was advanced to account for the flawed participation processes."

34. In this case, it is not the case of the Petitioner that they were not afforded reasonable opportunity to present their views. The Petitioner only maintained that its views were not considered and as such the entire exercise of public participation was also discriminatory. It is also not the case of the Petitioner that it was not allowed reasonable time within which to air out all its views. They participated and gave their views. I have seen amendments proposed and carried based on public participation. There were also others proposed but not carried. This is evidence of good faith. It must be understood that pubic participation is not equivalent to veto. The legislative prerogatives must be given accord unless it is clear that the legislature is rogue or the proposals derogate from all public views given. In Doctors for Life International vs. Speaker of the National Assembly and Others Others (CCT 12/05) 2006 ZACC), the court stated as follows:

> " It is true, as discussed previously, that time may be a relevant consideration in determining the reasonableness of a legislature's failure to provide meaningful opportunities for public involvement in a given case. There may well be circumstances of emergency that require urgent legislative responses and short timetables. However, the Respondents have not demonstrated that such circumstances were present in this case. When it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted. Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public

involvement are reasonable. The timetable must be subordinated to the rights guaranteed in *the Constitution*, and not the rights to the timetable.

35. I dare add that, anyone with something useful, will say it notwithstanding the amount of reasonable time given. Someone without anything to say, will not say, even where a whole decade is given.

36. Therefore, in my view, the Petitioner has failed to demonstrate the manner in which the impugned public participation in respect of the Act was contrary to the letter and spirit of *the Constitution* as to declare the Act unconstitutional, null and void. In Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others [2013] eKLR, Lenaola J (as he then was) observed that:

> " The petitioners have attacked the impugned legislation on grounds that it failed to comply with the process of public participation as required by *the Constitution*. Where legislation fails to comply with *the Constitution*, courts have powers to make necessary orders in that regard as was held in the Constitutional Court of South Africa in the case of Doctor's for Life International v The Speaker National Assembly and Others (supra) where it was stated as follows;
>
> > "It is trite that legislation must conform to *the Constitution* in terms of both content and the manner in which it is adopted. Failure to comply with the manner and form requirements in enacting legislation renders the legislation invalid. And courts have the powers to declare such legislation invalid

37. Based on the findings, I do not see the manner in which the Respondent's public participation exercise was a sham.

38. The specificity and precision taken in drafting constitutional petition was established in the case of Anarita Karimi Njeru v Republic (1979) KLR 154. The test was stated thus:

> " We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

39. The Supreme Court of Kenya in Communications Commission for Kenya & 5 others v. Royal Media Services Limited & 5 others [2014] eKLR on the same element of specificity and precision stated thus:

> " Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic [1979] KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have bene contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement."

40. On the issue of public participation, I observe that besides the single broad statement in the petition, the Petitioner has failed to bring forward any evidence or raise concise arguments on the alleged

manner in which the public participation conducted by the Respondent was a sham or below the constitutional bar, and has not particularize the views that were said not to have been considered.

41. On the other hand, the Respondent has placed materials before the court to justify that it carried out public participation to the required threshold before enacting the impugned legislation. In so finding, I am alive to the holding by the Court of Appeal in Law Society of Kenya v Attorney General & 2 others [2019] eKLR thus:

> " It was an error for the learned judge to require the appellant to prove the negative, for once it states there was no public participation, the burden shifted to the respondents to show that there was....
>
> Additionally, the onus is on the Parliament to take the initiative to make appropriate consultations with the affected people. It is therefore a misdirection for the learned judge to hold that the appellant had the responsibility to prove that the consultations did not happen.

42. The Petitioner also averred that the Act was contrary to Article 199 of *the Constitution*. Article 199 of *the Constitution* as follows:

1. County legislation does not take effect unless published in the Gazette.
2. National and county legislation may prescribe additional requirements in respect of the publication of county legislation.

43. No material was placed before the court to substantiate this fact and the Respondent on the other hand availed the Gazette Notice to demonstrate that the Act was published.

44. Before I depart, I note with concern that this is the 6th petition out of the 7 I have handled in Nyeri High Court that deals with alcohol. The other one was dealing with tea farmers. There may be time a candid discussion is held, whether the court is best placed to handle alcohol related questions. It is an area of public participation that should be held to get the question. It is not only the petitions but also in the criminal bench there are aspects of alcohol related violent crime.

45. As a parting shot, I agree with the decision in Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR, where the Court of Appeal in determining the essence of public participation held as follows:

> " The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers."

46. Influence, according to Oxford languages dictionary, means the capacity to have an effect on the character, development, or behaviour of someone or something, or the effect itself. Therefore, it is not the same as supplant or taking the place of. Public participation does not mean to substitute the views of the legislative assembly with those of the public.

47. It is lamented that the petitioner treated the petition with cavalier attitude and laxity instead of submitting despite being given chance to do so.

48. All said and done, having taken the totality of the petition into account, considered Respondent's submissions and having applied my mind to *the constitution*, the law and precedent, the court comes to the inescapable conclusion that this petition is unmeritorious and begs for dismissal.

49. The next question is whether any party is entitled to costs. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

50. Given that this was a dispute on matters of public importance and accountability, I direct that each party bears their own costs.

Determination

51. The upshot is that I make the following orders: -

    a. The Petition dated 21/5/2024 lacks merit and as such is dismissed.

    b. Being a public interest matter, each party shall bear own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF SEPTEMBER, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Petitioner

Ms. Kyalo for Muraguri for the Respondent

Court Assistant – Jedidah