



**Wanjeru v County Secretary/Head of County Public Service County Government of Nyeri; Mwangi & another (Interested Parties) (Constitutional Petition E005 of 2024) [2024] KEHC 15988 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15988 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CONSTITUTIONAL PETITION E005 OF 2024  
DKN MAGARE, J  
DECEMBER 20, 2024**

**BETWEEN**

**KARANJA WANJERU ..... PETITIONER**

**AND**

**COUNTY SECRETARY/HEAD OF COUNTY PUBLIC SERVICE COUNTY GOVERNMENT OF NYERI ..... RESPONDENT**

**AND**

**PETER NDEGWA MWANGI ..... INTERESTED PARTY**

**JONAH WAWERU KAMAU ..... INTERESTED PARTY**

**RULING**

1. This is a rather controversial culmination of beer wars. This is the fifth matter I am handling over the question of Nyeri *Alcoholic Drinks Control Act* and the second one on Nyeri County Alcoholic Drinks Control (Licensing) Regulations, 2024. Alcohol in various facets looks like a pastime in Nyeri County.
2. Karanja Wanjeru has engaged in a scorched earth policy, filing several cases over the same questions hoping that it will gain traction. In a bid to obfuscate issues, the plaintiff changed the entire gamut of laws covering petitions and had a resulting mongrel that has not been seen before. Half of the case is a petition, while the other half is a plaint. It is a mermaid kind of creature. On the face of the case, the plaintiff seeks enforcement of fundamental rights and freedoms under several articles of *the constitution*, and several sections of the County Government Act, *Public Finance Management Act*, Public Procurement and Disposal Act, Urban Areas Act, among others.
3. There is an application filed by dint of section 20, 22, 23(3) 50(1), 165 and 258 of *the constitution*, as read with *the constitution* of Kenya Fundamental Freedoms Practice and Procedure Rules (Mutunga



rules). These rules, provide in particular at Rule 4 as follows in regard to contravention of rights or fundamental freedoms:

- (1) Where any right or fundamental freedom provided for in *the Constitution* is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.
- (2) In addition to a person acting in their own interest, court proceedings under sub rule (1) may be instituted by-
  - i. a person acting on behalf of another person who cannot act in their own name;
  - ii. a person acting as a member of, or in the interest of, a group or class of persons;
  - iii. a person acting in the public interest; or
  - iv. an association acting in the interest of one or more of its members.

4. The above rule has its rules in Article 22 of *the constitution*, which provides as follows:

1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-
  - a. a person acting on behalf of another person who cannot act in their own name;
  - b. a person acting as a member of, or in the interest of, a group or class of persons;
  - c. a person acting in the public interest; or
  - d. an association acting in the interest of one or more of its members.

5. The procedure for enforcement of rights is a petition. The petition is to be supported by an affidavit. The procedure for commencing a suit by plaint is provided for in civil disputes. It deals with ordinary cases as provided in Commencement of suit and case track allocation. Order 3, rule 1 provides as follows in relation to a suit:

- (1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.

6. What the Plaintiff in this case did was to combine the two processes in a very innocuous way. The supporting affidavit and notice of motion are supposed to be underpinned by the petition. The prayers sought in the application are as doth:

- a. Spent.
- b. That pending the interpartes hearing and determination of this application and the petition herein the Honourable court be pleased to issue an interim order suspending the circular containing “The Draft” Nyeri County Alcoholic Drinks Control (Licencing) Regulations, 2024 accessible from the County Government of Nyeri Website:- <https://www.nyeri.go.ke/documents> Ref: CGN/CS/ADCM/103/6.
- c. That pending the interpartes hearing and determination of this application and the petition herein the Honourable court be pleased to issue an interim order of injunction prohibiting the



respondents or any other agents from implementing in any way whatsoever the circular ref. supra as CGN/CS/ADCM/IV/102/6.

- d. That the Honourable court directs that the County Government of Nyeri conducts public participation in line with COUNTY PUBLIC PARTICIPATION GUIDELINES provided by the ministry of devolution and planning and council of governors.
  - e. That consequent to the grant of the prayers above the Honourable court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders and/or favour the cause of justice.
  - f. That the costs of the application be provided for.
7. There is no such petition, for which the application is to await. The orders sought are of nature of an injunction. An injunction in a civil suit follows the requirements set out in the locus classic case of *Giella –vs- Cassman Brown & Co. Ltd* (1973) EA, 358, 360, which sets out principles for grant of injunction. The court stated as follows, through the wisdom of Spry VP, as he was then: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

8. This is followed by the decision of the court of appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR. The Court of Appeal was of the view that these tests are sequential. The Court stated: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.

In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”



9. Unfortunately for the parties, the questions herein are decidedly public in character. There is a presumption of constitutionality of legal statutes. Therefore, rules and regulations cannot be challenged in a civil suit since it is not possible to pierce the veil of legitimacy without the powers of interpretation and declarations set out in Article 23. The Court of Appeal [SG Kairu, P Nyamweya & JW Lessit, JJA] in the case of National Assembly of Kenya v Kina & another (Civil Appeal 166 of 2019) [2022] KECA 548 (KLR) (10 June 2022) (Judgment) posited as hereunder:

It is indeed within the jurisdiction of the High Court under article 165(3) (b) and (d) of *the Constitution* to determine any questions raised as regards the infringement of the Bill of Rights, the interpretation and constitutionality of laws, and the constitutionality of decisions and actions of Parliament. In this respect it is also notable that the presumption of constitutionality is a legal principle that is used by courts during statutory interpretation, and not a principle that excludes the jurisdiction of courts. Under this principle, when interpreting statutes, courts start with the premise that statutes enacted by the legislature are constitutional, unless and until it is established, they violate specific provision of *the Constitution*.

The principle was explained by the Supreme Court of India in L Kamra v New India Assurance (1992) AIR 1072 by Justice K Ramaswamy as follows:

“The court ought not to interpret the statutory provisions, unless compelled by their language, in such a manner as would involve its unconstitutionality, since the legislature or the rule making authority is presumed to enact a law which does not contravene or violate the constitutional provisions. Therefore, there is a presumption in favour of constitutionality of a legislation or statutory rule unless ex facie it violates the fundamental rights guaranteed under part III of *the Constitution*.”

29. The presumption of constitutionality is therefore not absolute, and will not be upheld when there is a violation of *the Constitution* by Parliament when enacting a statute, or by the provisions of a statute. The High Court therefore did not err in assuming jurisdiction when the question of the constitutionality of section 66(1) of the *Marriage Act* of 2014 as enacted by Parliament was raised by Mr Ole Kina.
10. Nevertheless, the facts as laid out do not show a prima facie case. Even if there was a legitimate petition, there is nothing to go on trial. In the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR, the Court of Appeal noted that: -

“4. A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

11. The suit as filed is a nullity. There is nothing that can save it from its own ignominy. It is null and void and breaches all fundamental rules for filing petitions. In Mcfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without



more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

12. The principles underlining the granting or refusal of injunction are well settled as stated in the case of *Esso Kenya Limited. vs. Mark Makwata Okiya* Civil Appeal No. 69 of 1991, where the Court of Appeal stated as follows:

“The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff’s alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available.”

13. This court cannot issue an injunction against regulations when their constitutionality is not challenged in any petition. The court cannot issue orders which are bare and without basis. The application does not raise any question that flows from a petition. What the plaintiff did was just to drop sections of the law and some mundane arguments without setting forth what the actual breach was. The Applicants admit that there was public participation for the regulations. The case that challenged the Act was decided and as such it is irrelevant in that respect. In *Nyeri Petition Number 3 of 2024*, this court stated as follows:

- 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.

14. It is not enough to state that the timelines violate Nyeri County Public Participation Guidelines. The applicant must set out the actual breaches. It is not enough to write down a series of lamentations and throw them at the court for the court to scan and find head or tail. There must be proof of those particulars.

15. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:



- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
  - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
16. 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.
17. The application dated 22/7/2024 is unmerited and is consequently dismissed. The suit is a nullity and cannot be sustained. The entire suit is struck out. Given the multiple nature of the applications and suits, the Plaintiff shall bear costs of 65,000/=.

### **Determination**

18. The upshot of the foregoing, is that I make the following orders:
- a. The application dated 22/7/2024 is unmerited and is consequently dismissed.
  - b. The suit is a nullity and cannot be sustained. The entire suit is struck out.
  - c. Given the multiple nature of the applications and suits, the Plaintiff shall bear costs of 65,000/=.
  - d. 30 days stay.
  - e. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20<sup>TH</sup> DAY OF DECEMBER, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**



**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

Pro se applicant

Pro se interested parties

Mr. Irungu for the Respondent

Court Assistant – Jedidah

