



**Munyao & another v County Government of Makueni & another (Constitutional
Petition E001 of 2020) [2022] KEHC 10624 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10624 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CONSTITUTIONAL PETITION E001 OF 2020**

GMA DULU, J

MAY 25, 2022

BETWEEN

VERONICAH MUNYAO 1ST PETITIONER

HUGO MWIKYA 2ND PETITIONER

AND

COUNTY GOVERNMENT OF MAKUENI 1ST RESPONDENT

COUNTY ASSEMBLY OF MAKUENI 2ND RESPONDENT

JUDGMENT

1. Before me is a Constitutional Petition dated November 8, 2020 filed by two petitioners, in which the petitioners on behalf of Kibwezi East and West Bar and Hotels Association seek the following orders –
 1. A declaration do issue that Makueni Alcoholic Drinks Control Act 2014 and Makueni County Finance Act 2019 second schedule on liquor licences are unconstitutional as they offend article 209(3) of the *Constitution* of Kenya 2010 thus null and void.
 2. A declaration do issue that the demand by the respondent either by itself or through Makueni County Alcoholic Drinks Control Board and Sub County Committees of the full annual Liquor Licence Fee from the petitioners is unconstitutional thus null and void in view of the circumstances posed by the Covid-19 pandemic.
 3. That a permanent conservatory order do issue restraining and/or preventing the respondents either by themselves or through Makueni County Alcoholic Drinks Control Board and Sub County Committees from demanding full Liquor Licence fees from the petitioners for the year ending December 2020.



4. An order of injunction do issue prohibiting the respondent either by itself or through Makueni County Alcoholic Drinks Control Board, Sub-County Committees, its agents or any other person claiming to act under its instructions from harassing or interfering with the petitioners running their bar and hotel business save for the Covid-19 protocols set by the government.
 5. A declaration that the acts of the respondent herein are a breach of the petitioners' constitutional rights generally and more particularly Articles 10, 20(2), 27(2), 47(1) and (2), 50(1) 201, 209(3) and 186(1) of the Constitution.
 6. Costs of the petition.
 7. Any other relief this honourable court deems fit to grant in the circumstances.
2. No supporting affidavit was specifically filed in support of the petition, but an affidavit in support of both the petition and an application for interlocutory orders sworn by Hugo Mwikya on 6th November 2020 was filed.
 3. In the said affidavit, it was deponed that the deponent Hugo Mwikya the 2nd petitioner was the treasurer of Kibwezi East and West Bar and Hotels Association an association not yet registered and annexed a copy of a consent of his co-petitioner to swear the affidavit. It has also deponed that the respondents had increased fees for licences to punitive levels.
 4. A supplementary affidavit sworn by the same deponent on February 3, 2021 was also filed.
 5. It was deponed in the said supplementary affidavit that the society was in the process of being formally registered, and that the respondents had not filed any response to oppose the petition. It was also requested in the said affidavit that the orders to be issued by the court herein should apply to the list of members annexed to this affidavit.
 6. In response to the petition and application, the respondents filed a replying affidavit sworn on January 27, 2022 by Mark Wambua Muthoka the Acting County Revenue Director of the 1st respondent in which it was deponed that the petitioners were members of a non-existent association. It was also deponed that waiver of taxes and licensing fees was a process strictly dictated by law as stipulated under the Constitution of Kenya 2010, and further that the challenged legislation is not unconstitutional.
 7. The petition was canvassed through filing of written submissions. The petitioners' submissions were filed by Kilonzo Muli & Associates on November 8, 2021 in which counsel gave a brief of the facts of the case, and maintained that the petition is merited and relied on section 107, 108 and 109 of the Evidence Act (cap.80) to assert that the petitioners had proved that the respondents imposed illegal taxes unilaterally without subjecting the same to public participation.
 8. In the said submissions also, the counsel for the petitioners relied on a number of decided court cases.
 9. The 1st respondent's counsel M/s S.N Masila on their part filed submissions on 1st January 2022. In their submissions counsel asserted that in the year 2020, the 1st respondent received a request for waiver of half of the liquor licencing fees from bar owners in Makueni County, and considered and granted the same, and that the applicants were now demanding special exemption from taxes which cannot be granted.
 10. Counsel listed the issues for decision as first whether the petitioners had capacity to apply for waiver on behalf of members of an unregistered entity and whether they have a legal standing to sue. Secondly, whether the respondent should yield to the petitioner's request and grant an unlawful waiver. Thirdly,



whether the Makueni Alcoholic Drinks Control Act 2014 and Makueni County Finance Act, second schedule on liquor licencing, is unconstitutional. Fourthly, whether the petition is merited, and fifthly, who should pay the costs of the suit.

11. I have already highlighted the prayers sought by the petitioners. They are requests for declarations and injunctive orders. Prayer 1 is for a declaration on the constitutionality of the Makueni County Finance Act Schedule on Liquor Licenses, while prayer 2 is for a declaration on the constitutionality of the demand made by the County Government of the full annual liquor licence fee for 2020. The other main prayers that is 3rd and 4th, are for restraining orders.
12. In my view, although the 1st respondent's counsel, has argued that the petitioners have no capacity to sue on behalf of members of an unregistered society, that legal position existed only before the 2010 Constitution. Thus the case of *Housing Finance Company Kenya Ltd -vs- Embakasi Youth Development Project* (2004) eKLR relied upon by them was good law only up to August 2010 when the present Constitution was promulgated.
13. Under the present Constitution, constitutional petitions like the one case herein are governed by the provisions of article 22 of *the Constitution*, which provides as follows-

22

- (1) Every person has the right to institute 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

14. Thus in my view, the two petitioners, being human persons, can validly file a constitutional petition on behalf of a group or class of persons, whether or not that group is registered. Besides, the respondents have stated in their documents filed herein, that they have already waived half of the charges to the same people whom they now claim to be an unregistered entity, and this court cannot thus allow them to deny the existence of that same group of bar and hotel operators.
15. I thus find that the two petitioners have capacity and locus standi to institute the present constitutional petition.
16. Did the respondents violate the *Constitution* in passing the impugned laws and demanding the licence fees? I note that the impugned Act was passed way back in 2014, and that the only new factor herein was the coming into the scene of the Covid-19 disease pandemic in 2020, when waiver of liquor licence fees was sought from the 1st respondent, and partly granted by the respondents.
17. I note also that both from the pleadings and the submissions, the petitioners have not given the specific provisions of the *Constitution* which were violated and also given the particulars of the manner of such alleged violations, for this court to be clear what the issues are. It is a primary requirement in constitutional petitions that the constitutional provisions and the particulars of violations have to be specifically pleaded. The petitioners merely relied on several statutory provisions under the



impugned County Liquor Licencing Act, the *Fair Administrative Action Act*, 2015 to say that their constitutional rights on fair hearing under article 50 of the *Constitution* were violated. That was not sufficient information to satisfy the requirements in constitutional petition pleadings.

18. In my view therefore, with the facts and evidence placed before this court through the pleadings, the petitioners have not satisfied the required threshold to show that any constitutional right in respect of themselves or those they claim to represent, have been violated. I thus find that the petition herein is unmerited and is for dismissal.
19. With regard to costs, as this appears to be a matter involving the business public, relating to County Government tax affairs affecting the public, I will order that parties bear their respective costs of the proceedings.
20. Consequently, and for the above reasons, I order as follows –
 1. The petition herein has no merits and is thus dismissed.
 2. Parties will bear their respective costs of the petition, as it appears to be a public interest matter.

DELIVERED, SIGNED & DATED THIS 25TH DAY OF MAY, 2022, IN OPEN COURT AT MAKUENI.

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George Dulu

Judge

