



**Samburu Bar Owners, Wines and Spirits Self Help Group v County Government of Samburu
(Constitutional Petition E006 of 2022) [2022] KEHC 12337 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12337 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CONSTITUTIONAL PETITION E006 OF 2022**

CM KARIUKI, J

JULY 28, 2022

**N THE MATTER OF ARTICLES 10, 19(2) 20(1), (2), (3) AND (4), 21 (1), 22, 23, 27,
29 40 165(3) (B) (III), 201 (A) AND (B) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF COUNTY GOVERNMENT ACT, SAMBURU COUNTY ALCOHOLIC
DRINKS CONTROL ACT, 2016 & SAMBURU COUNTY FINANCE ACT, 2020**

BETWEEN

**SAMBURU BAR OWNERS, WINES AND SPIRITS SELF HELP
GROUP PETITIONER**

AND

COUNTY GOVERNMENT OF SAMBURU RESPONDENT

JUDGMENT

1. The petitioner lodged petition dated June 30, 2021 seeking prayers that:
 - I. A declaration that the second schedule (Brims Code No. 2.500-2.577 & Brims Code 2.500M-2.57M) of the Samburu County Finance Act, 2019 offends the principles of public finance, is discriminatory, unconstitutional, null and void to the extent that it requires members of the petitioner to take out Single Business Permits and Liquor Licences for their businesses which amounts to double taxation.
 - II. An Order of Certiorari do issue to remove to this Court and quash the provisions of the second schedule (brims code No. 2.500-2.577 and Brims Code 2.500M-2.577M) of the Samburu County Finance Act, 2019 for being offensive to the principles of public finance, discriminatory unconstitutional, null and void.
 - III. Costs of the petition be awarded to the petitioner.



2. The same was supported by affidavit sworn by Fredrick Mukundi Aloisio sworn on June 30, 2021 subsequently it was amended vide prayer (b) of the petition amended December 16, 2021:
3.
 - b) An order of Certiorari do issue to remove to this court and quash the provisions of the Second schedule (Brims Code No. 2.500-2.577 & Brims code 2.500M -2.577M) of the Samburu County Finance Act, 2019 2020 or any other county law providing for two licences for being offensive to the principles of Public Finance, discriminatory, Unconstitutional, null and void.
4. The parties agreed to canvass same matter via submissions which they filed and exchanged.
5. petitioner's Case and Submissions.
6. The petitioner is a Self Help Group registered under the Ministry of East African Community, Labour And Social Protection (as it then was under the National Government) currently known as the Ministry of Labour, Social Security And Services (under the respondent) whose membership is composed of barf operators and dealers in alcoholic drinks within Samburu County.
7. The respondent is the County Government of Samburu established under article 176 (1) of *the Constitution* of Kenya, 2010.
8. On July 8, 2016, Samburu County Alcoholic Drinks Control Act, 2016 came into force with the sole objective of providing licensing and regulation of production, sale, distribution, consumption and outdoor advertising of alcoholic drinks and for connected purposes.
9. The license fees payable under the Act is stipulated under the Samburu County Finance Act which is required to comply with the principles of public finance set out under article 201 (a) & (b) of *the Constitution* of Kenya, 2010 which includes openness, accountability, public participation and promotion of an equitable Society with the burden of taxation being shared fairly.
10. The last Finance Act for the respondent was passed in 2020 and assented to on 1st December 2020 with the sole aim of imposing or varying various permit fees, Cess, licenses, fees and charges and for connected purposes.
11. The said Act in the Second Schedule Brims Code 2.500 – 2.577 provides for levy of fees/Charges on services rendered inter-alia by members of the petitioner and different charges for the same business under Brims Code 2.500M – 2577M thereby leading to confusion and abuse by the respondents employees in enforcement of the Act.
12. The same Act under the Seventh Schedule Brims Code 7.3 provides for Liquor license fees for businesses operated inter-alia by members of the petitioner.
13. It is the petitioner's case that the various fees and Charges imposed by the in respect of businesses conducted by its members towards Single Business permits and Liquor Licenses amount to double taxation, are unconstitutional, offensive to principles of public finance, discriminatory, null and void.
14. The petitioner contends that no other business is required to take out two licenses by the respondent within the County and there is no legal justification for the same.
15. There was no public participation conducted by the respondent before the said Act was enacted and the same is therefore invalid.



16. The same Act does not promote an equitable society neither does it ensure that the burden of taxation is shared fairly in accordance with the dictates of principles of public finance under *the Constitution* of Kenya, 2010.
17. The amended petition is supported by the affidavit of Fredrick Mukundi Aloisi who is the chairperson of the petitioner sworn on December 16, 2021 and the earlier supplementary affidavit sworn on September 9, 2021.
18. It is deposed that membership of the petitioner is strictly drawn from bar operators and dealers in alcoholic drinks within Samburu County as per the membership list marked FMA2.
19. On July 8, 2016, the Samburu County Alcoholic Drinks Control Act, 2016 came into force with the sole objective of providing for licensing and regulation of production, sale, distribution, consumption and outdoor advertising of alcoholic drinks and for connected purposes.
20. The last Finance act for the respondent was passed in 2020 and assented to on December 1, 2020 with the sole aim of imposing or varying various permit fees, Cess, licenses, fees and Charges and for connected purposes.
21. The said Act in the Second Schedule Brims Code 2.500 – 2.577 provides for levy of fees/Charges on services rendered inter-alia by members of the petitioner and different charge for the same business under Brims Code 2.500M – 2.577M thereby leading to confusion and abuse by the respondents employees in enforcement of the Act.
22. The same Act under the Seventh Schedule Brims Code 7.3 provides for Liquor licence fees for businesses operated inter-alia by members of the petitioner.
23. As a result of the Samburu County Alcoholic Drinks Control Act, 2016 and the Samburu County Finance Act, 2019 members of the petitioner are required to take out two licences for their businesses.
24. It is the petitioner's case that the various fees and Charges imposed by the respondent in respect of businesses conducted by its members towards Single Business Permits and Liquor Licences amount to double taxation are unconstitutional, offensive to principles of public finance, discriminatory, null and void.
25. According to the petitioner, no other business is required to take out two licences by the respondent within the County and there is no legal justification for the same against members of the petitioner. As such it is our submission that the requirement for two licences is discriminatory and offensive to article 27 of *the Constitution* of Kenya, 2010.
26. The petitioner further complains that there was no public participation conducted by the respondent before the Samburu County Finance Act, 2019 was enacted and the same is therefore invalid as it offends article 10 of *the Constitution* of Kenya, 2010.
27. The said Act does not promote an equitable society neither does it ensure that the burden of taxation is shared fairly in accordance with the dictates of principles of public finance under article 2010 of *the Constitution* of Kenya, 2010.
28. On June 14, 2021, the respondent issued notice calling upon members of the petitioner to take out liquor licences for the year 2021 despite having paid for Single Business Permits under the Samburu County Finance Act, 2019 and there was fear that the respondent would embark on a crackdown against all those who had not done so.



29. The chief complaint by the petitioner is that the respondent is charging them for two licenses i.e. single business and liquor licenses. No other business pays for two licenses and this amount to double taxation. See Black's Law Dictionary defines what amounts to double taxation as follows: 'To constitute 'double taxation' that tax must be imposed on the same property by the same governing body during same taxing period and for the same taxing purpose'
30. This is clearly distinguishable from the examples given by the respondent in its replying affidavit since all the other licenses are charged by the national government. In this regard reliance is made on the decision in the case of *Republic – vs- County Government of Nyandarua ex-parte Nyandarua Recreational & Entertainment Self Help Group & 12 others* [2019] eKLR .
31. The second complaint is that the enactment of two Acts providing for different fees and charges against business run by the petitioner's members offends the principles of public finance under article 201 of *the Constitution* of Kenya, 2010. These principles include public participation in financial matters and promotion of equitable society where the burden of taxation is shared fairly.
32. It is the petitioner's case that there was no public participation in the process of enactment of the Samburu County Finance Act, 2020. Although the respondent disputes the said contention, there is no material placed by the respondent before the court to show in what manner the said public participation was conducted.
33. There is absolutely no evidence of publication and conduct of the alleged public participation. There is also no evidence as to which members of public participated in the alleged public discourse before the impugned Finance Act was enacted. Reliance is made on the case of *Okiya Omutata Okiiti Vs County Government of Kiambu* (2016) eKLR
34. In absence of any evidence on how public participation was carried out by the respondent, the allegation by the petitioner that none was conducted remains uncontroverted.
35. The petitioner contends that its members are being discriminated against by the respondent in that no other group of business people is charged double licenses. This has not been denied by the respondent. As such this ground of discrimination is established.
36. The fact that the petitioner's members have been obeying the County Laws providing for double licenses does not make then impugned double taxation constitutional nor lawful and the petitioner is entitled to challenge it before this honourable court. The examples of double licenses cited by the respondent in its replying affidavit are levied at different levels of government and are totally different from those charged under the impugned County legislations which go into the same basket.
37. The respondents opposed petition and filed replying affidavit and a further affidavit.
38. respondent Case and Submissions
39. The respondent opposed the Petition arguing that it conducted public participation during the enactment of Samburu County Finance Act, 2020 and further that allegation of double taxation is baseless and mistaken and perhaps emerged from the petitioner's misapprehension of the objectives of Samburu County Finance Act, 2020 and Samburu County Alcoholic Drinks Control Act, 2016.
40. The respondent argues that the Samburu County Alcoholic Drinks Control Act, 2016 is not a tax or revenue collection pieces of legislation, but it is primarily a control instrument even though revenue is generated there from. It is submitted that in its preamble the said Act provides as follows: "An Act of the County Assembly of Samburu to provide for licensing and regulation of production and



sale, distribution and consumption and outdoor advertising of alcoholic drinks, and for connected purposes”.

41. This demonstrates that this is a control instrument rather than revenue collection and thus the allegations of double taxation are unfounded.
42. The respondent further submits that the two legislations were enacted in compliance with the Construction of Kenya, 2010 and in particular Article 10 which espouses the principle of public participation.
43. There is a general presumption that every Act of Parliament (including Act of County assemblies) is constitutional and the burden of proof lies on every person who alleges otherwise reliance is made on the case of *Council of County Governors v Attorney General & another* (2017) eKLR, *Ndyanabo v Attorney General* (2002) AHRLR 243 (TzCA 2002)
44. *The constitution* of Kenya, 2010 pursuant to Article 259 espouses the principles of interpretation of *the Constitution*. The said provisions call upon the court to interpret *the constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights in a manner that contributes to good governance.
45. The crux of the petition before the court is whether the doctrine of public participation was considered during the enactment of the impugned statute. The petitioner in addition to that central argument has argued that the requirement to take out Single Business Permit and Liquor License under Samburu County Finance Act, 2020 and Samburu County Alcoholic Drinks Control Act, 2016 respectively amounts to double taxation and therefore it is discriminatory and thus violates article 27. These are the key contentions.
46. The respondent through the Affidavit sworn on May 23, 2022 by one Sentron Lenanyokie argued that public participation was conducted and indeed members of the petitioner were present and gave their views. The respondent under paragraph 6 of the replying Affidavit of sworn May 23, 2022 submits that, demonstrated that indeed public participation took place.
47. Public participation does not mean that every member of public should be consulted as the petitioner would want us to believe; to the contrary, what need to be shown is that the public was accorded some reasonable level of participation. A reasonable opportunity must be offered to members of the public and all interested parties to know about the issue and have an adequate say. The respondent had argued that they engaged members of the public including members of the petitioner as demonstrated by the further affidavit sworn on May 23, 2022 and the annexures filed alongside.
48. The *County Government Act*, No. 17 of 2012 also entrenches the public participation in line with article 10, 174 and 196 of *the Constitution* of Kenya, 2010, inter alia espousing the said principle. Section 87 of the *County Government Act* provides for the principles of citizen participation in counties .
49. Section 21(1) of the *County Government Act* provides that the county assembly exercises its legislative mandate through bills passed by the county assembly and assented to by the Governor. Such bills can be introduced by any member of the county assembly or member of a committee of the assembly. Section 23 requires the publication of a bill in the Country in Kenya gazette. The respondent in formulation of the impugned legislation complied with both the *County Government Act*, 2012 and *the Constitution* of Kenya, 2010.
50. The respondent has demonstrated that effective public participation took place before the impugned legislation was enacted. The respondent’s Further Affidavit sworn on May 23, 2022 illustrated the manner in which the public participation was conducted and thus the petitioner’s allegation is baseless.



51. It is imperative to note that the requirement for public participation does not mean that every person must be consulted or given an opportunity to give his view. Reliance is made on the case of *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) (2005) ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC), *Nairobi Metropolitan PSV Saccos –v- County of Nairobi Government, Okiya Omtatah Okoiti v County Government of Kiambu* (2018) eKLR , *Mui Coal Basin Local Community & 17 others v Permanent Secretary Ministry of Energy & 15 others* (2015) eKLR.
52. It is the respondent’s submissions that the law requires the respondent to demonstrate the effort made and the opportunity granted to the petitioner and other affected parties during the enactment of the impugned legislation.
53. The respondent submits that the law does not anticipate a situation where every member of the affected group is entitled to be heard and/ or give his views
54. Issues, Analysis and Determination
55. After going through, the pleadings, affidavits on record and the parties’ submissions, I find the issues are; whether the second schedule (Brims Code No. 2.500-2.577 & Brims Code 2.500M-2.57M) of the Samburu County Finance Act, 2019 offends the principles of public finance, discriminatory, unconstitutional, null and void to the extent that it requires members of the petitioner to take out Single Business Permits and Liquor Licences for their businesses? What is the order as to costs?
56. The petitioner’s chief complaint is that the respondent is charging them for two licenses i.e. single business and liquor licenses. petitioner contend that no other business pays for two licenses and this amounts to double taxation. Black’s Law Dictionary defines what amounts to double taxation as follows: -‘To constitute ‘double taxation’ that tax must be imposed on the same property by the same governing body during same taxing period and for the same taxing purpose’
57. Applicant submit that charging of licenses by the respondent is a measure of taxation and that the respondent is not entitled to charge two licenses for the same business. This is clearly distinguishable from the examples given by the respondent in its replying affidavit since all the other licenses are charged by the national government. In this regard, reliance is made on the decision in the case of *Republic – vs- County Government of Nyandarua ex-parte Nyandarua Recreational & Entertainment Self Help Group & 12 others* [2019] eKLR where a similar application was allowed by Lady Justice R.V.P Wendoh where at page 6/7, she held as follows: -

“Double taxation is illegal, oppressive and discriminatory in nature. It is also oppressive and hence contrary to the rules of natural justice and in my view, an order of certiorari must issue to call for the decision to pay for the licensed twice quashed. The provisions for licensing must be contained either the Finance Act or the Nyandarua County Alcoholic Drinks Control Act and one of the Acts must be quashed.”
58. The foregoing decision is similar on all fours with this case and despite being from a court of concurrent jurisdiction, the same is persuasive and ought to be followed under the doctrine of stare decisis.



59. In response the respondent contends that, Samburu County Alcoholic Drinks Control Act, 2016 is not a tax or revenue collection piece of legislation, but it is primarily a control instrument even though revenue is generated therefrom. It is submitted that in its preamble the said Act provides as follows:
- “An Act of the County Assembly of Samburu to provide for licensing and regulation of production and, sale, distribution, and consumption and outdoor advertising, of alcoholic drinks, and for connected purposes.”
60. Under article 210 (1) of *the constitution*, a license fee may be imposed via a legislation. The Samburu County Alcoholic Drinks Control Act, 2016 allowed imposition of the licence fees. The purpose of the licence is regulation of production and, sale, distribution, and consumption and outdoor advertising, of alcoholic drinks, and for connected purposes.
61. There is difference between tax and licence. As nouns the difference between tax and license is that tax is money paid to the government other than for transaction-specific goods and services while license is (label) a legal document giving official permission to do something; a permit. As verbs the difference between tax and license is that tax is to impose and collect a tax from (a person) while license is the act of giving a formal (usually written) authorization. See (<https://wikidiff.com/license/tax>).
62. I thus differ with the persuasive decision of my sister Wendo J in County Government of Nyandarua supra case. The impugned provisions of the legislations are in accordance with cited provisions of constitution and thus deemed constitutional. Various business entities and professional bodies pay both their professional licences to practice or do business and at the same time pay single permits to host counties.
63. There are multiple of examples of similar imposition of dual licenses, for instance in respect to pharmacies licensed under the Pharmacies and Pharmacies and Poisons Board that are also required to hold a business permit in the county in which they operate. So are the banking industry, insurances companies, etal.
64. There is no material to support the petitioner’s contention that the provision of the impugned Act that require a fee be paid on a licence in addition to the business permit fees violate Article 201. After all county governments are empowered under article 209(3) to impose and to collect revenue through taxes. Under article 209(3)(b) & (c) and for the purpose of this case, a tax in respect of entertainment would fall neatly within the objects of paragraphs 4(c) of the Fourth Schedule.
65. Thus, the complaints that the new Act violates the principles of public finance espoused in *the Constitution*, has no substance and I am not persuaded that a legislation whose sole object appears to be the operationalization of a provision in *the Constitution* can be said, without more, to violate fiscal principles.
66. On the issue of absence of public participation, it is the petitioner’s case that there was no public participation in the process of enactment of the Samburu County Finance Act, 2020. Although the respondent disputes the said contention, there is no material placed by the respondent before the court to show in what manner the said public participation was conducted.
67. There is absolutely no evidence of publication and conduct of the alleged public participation. There is also no evidence as to which members of public participated in the alleged public discourse before the impugned Finance Act was enacted.



68. In this regard reliance is made on the case of *Okuya Omutata Okoiti Vs County Government of Kiambu* (2016) eKLR at paragraph 94-98 where the court cited several decisions on public participation which may summarized as follows: -

Where legislation fails the test of public participation in terms of both content and manner in which it is adopted, courts have power to make necessary orders in that regard. Public participation is an aspect of the right to political participation in the affair of the state which includes engaging in public debate and dialogue with elected representatives at public hearings. It includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to participate. What is needed to be shown is that the public was accorded some reasonable level of participation. A reasonable opportunity must be offered to members of the public and all interested parties to know about the issue and have adequate say. It cannot be expected of law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. The nature of concerns of different sectors of the public should be communicated to the law maker and taken into account in formulating the regulations. Facilitation of public involvement in the legislative process means taking steps to ensure that the public participate in the legislative process. The courts can in appropriate cases determine whether there has been the degree of involvement that is required by *the Constitution*.

69. Thus, it is submitted that, in absence of any evidence on how public participation was carried out by the respondent, the allegation by the petitioner that none was conducted remains uncontroverted. I agree with that petitioners' proposition.
70. The respondent rejoinder is through the Affidavit sworn on 23rd May 2022 by one Sentron Lenanyokiewho argues that public participation was conducted and indeed members of the petitioner were present and gave their views. The respondent under paragraph 6 of the replying Affidavit of sworn May 23, 2022 depones that public participation took place.
71. The respondent argues that they engaged members of the public including members of the petitioner as demonstrated by the further affidavit sworn on May 23, 2022 and the annexures filed alongside. But other than that bare assertions, there is no material to demonstrate any public participation as provided by law and the cited cases.
72. The *County Government Act*, No. 17 of 2012 entrenches the public participation in line with article 10, 174 and 196 of *the Constitution* of Kenya, 2010, inter alia espousing the said principle. Section 87 of the *County Government Act* provides for the principles of citizen participation in counties which include:
- “Timely access to information, data, documents and other information relevant or related to policy formulation. Reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals... granting of permits and the establishment of specific performance proposal...”
73. Section 21(1) of the *County Government Act* provides that the county assembly exercises its legislative mandate through bills passed by the county assembly and assented to by the Governor. Such bills can be introduced by any member of the county assembly or member of a committee of the assembly. Section 23 requires the publication of a bill in the Country in Kenya gazette. The respondent in formulation of the impugned legislation complied with both the *County Government Act, 2012* and *the Constitution* of Kenya, 2010.



74. It is imperative to note that the requirement for public participation does not mean that every person must be consulted or given an opportunity to give his view. The Constitutional Court of South Africa case of *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) (2005) ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (30 September 2005)

“It cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. What is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law-maker and considered in formulating the regulations.”

75. I have perused the record and especially the respondent’s affidavits and I agree with petitioner there was no public participation in the process of enactment of the Samburu County Finance Act, 2020. Although the respondent disputes the said contention, there is no material placed by the respondent before the court to show in what manner the said public participation was conducted.

76. There is absolutely no evidence of publication and conduct of the alleged public participation. There is also no evidence as to which members of public participated in the alleged public discourse before the impugned legislation (Samburu County Finance Act, 2020) was enacted.

77. The respondent violated the provisions of the *County Government Act*, No. 17 of 2012 entrenches the public participation in line with article 10, 174 and 196 of *the Constitution* of Kenya, 2010, inter alia espousing the said principle.

78. Thus, the court holds that the absence of a valid public participation including the petitioners participation, the instant petition has merit and thus succeeds to that extent. Thus, the court makes the following orders;

- i. A declaration that the Samburu County Finance Act, 2020 offends the provisions of Article 10, 174 and 196 of *the Constitution* of Kenya, 2010 and the provisions of County Government Act, No. 17 of 2012 which entrenches the public participation thus it is unconstitutional, null and void.
- ii. However, to avoid crisis in the respondent operations as regards regulation the ‘sale, distribution, and consumption and outdoor advertising, of alcoholic drinks, and for connected purpose, the declaration above (i), is suspended for a period of twelve months (12) from dates herein to enable respondent to enact another Act in line with *the constitution* and in default ,the same Act will stand unconstitutional, null and void.
- iii. This being a public interest matter, parties to bear their costs.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 28TH DAY OF JULY 2022.

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CHARLES KARIUKI

JUDGE

