



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Kaaniru v Meru County Government & 4 others (Constitutional Petition E026 of 2022) [2022] KEHC 16715 (KLR) (21 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CONSTITUTIONAL PETITION E026 OF 2022**

EM MURIITHI, J

DECEMBER 21, 2022

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 (PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS PRACTICE AND PROCEDURE RULES)**

AND

**IN THE MATTER OF UNFAIR ADMINISTRATIVE ACTION CONTRARY
TO ARTICLES 27, 40, 46, 47, 50, 1, 2, 3, 4, 5, 6 & 10 OF THE CONSTITUTION**

AND

**IN THE MATTER OF ARBITRARY, UNFAIR AND UNLAWFUL CLOSURE
OF LICENSED BUSINESS PREMISES SELLING ALCOHOLIC DRINKS**

AND

**IN THE MATTER OF SECTIONS 7, 8, 9, 10 & 11 OF THE
ALCOHOLIC DRINKS CONTROL ACT NO. 4 OF 2010**

AND

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT AND IN THE
MATTER OF MERU COUNTY ALCOHOLIC DRINKS CONTROL ACT**

AND

**IN THE MATTER OF ALCOHOLIC DRINKS CONTROL (SUPPLEMENTARY) LICENSING
REGULATIONS 2015 AND IN THE MATTER OF UNLAWFUL AND ARBITRARY
CLOSURE OF BUSINESS PREMISES OPERATING AS BARS, WINES & SPIRITS**

BETWEEN

RAEL KANIRU PETITIONER

AND

MERU COUNTY GOVERNMENT 1ST RESPONDENT



THE CHIEF OFFICER MERU COUNTY GOVERNMENT ALCOHOLIC DRINKS CONTROL BOARD	2ND RESPONDENT
MERU COUNTY EXECUTIVE TRADE	3RD RESPONDENT
THE ASSISTANT CHIEF KITHAKU SUB-LOCATION	4TH RESPONDENT
THE HONORABLE ATTORNEY GENERAL	5TH RESPONDENT

RULING

1. The petitioner filed an amended Notice of Motion dated 8/12/2022, pursuant to Articles 22 (1) and 23 of *the Constitution*, and Rules 23 & 24 of *the Constitution* of Kenya (Protection of rights and fundamental freedoms) Practice and procedure Rules, 2013 seeking:
 1. Spent
 2. That pending the hearing of this application this Honorable Court be pleased to issue an order restraining the Respondents either by themselves, servants, assigns and or those claiming to act on their behalf from unlawfully forcing the petitioner to relocate, harassing, coercing, intimidating or in any manner whatsoever interfering or disrupting the already licensed petitioner’s business premises.
 3. That pending the inter partes hearing and determination of the substantive petition, this Court be pleased to issue a temporary conservative order restraining the 2nd Respondent whether by themselves, their agents, servants or employees from forcefully relocating the petitioner’s business and from arbitrarily interfering with the petitioner’s lawful business.
 4. That pending the hearing and determination of the petition herein this Honorable Court be pleased to issue a conservatory order of prohibition restraining the Respondents whether jointly or severally and whether by themselves or through their agents from unlawfully harassing, coercing, arbitrarily intimidating or in any manner whatsoever interfering or disrupting the petitioner’s business operations, her employees, servants and or agents in the course of operating, selling or dealing with her business operations.
 5. That this Honorable Court be pleased to issue any further or other orders, directions or writs that it deems fit, just and appropriate to grant.
 6. That the costs of the application be in the petition.

2. The grounds relied on are set out in the body of the application and substantively in the supporting affidavit of Rael Kaaniru, the Petitioner/Applicant herein sworn on even date. She avers that she is the proprietor of Subira Bar & Forest Wines, which consist of a Front Bar and annex Wines & Spirits Wholesale located at Kithaku Market and which is duly licensed and registered liquor store/Bar. On 17/10/2022, the 2nd Respondent served her with a letter requiring her to relocate from her business premises by 1st December 2022 on the allegations that her business was neighboring a school, and that the community had thus resolved to close it down. At no time did she receive a notice from the Respondents that there was something wrong with her business premises which needed to be rectified.



She has neither been involved in the business of adulterated liquor nor have any pending claims in that regard nor received any complaint from her customers regarding the quality of the beer she sells. She has already applied for the renewal of her business license vide her application dated 4/11/2022, which was duly received and approved by the 2nd Respondent. Prior to the issuance of the said notice, no inquiry was made on her business premises or any inspection conducted and a report tabled in that regard as to her compliance. She has complied with the statutory requirements regarding the operation of a bar and the wines and spirits, and has put in place all the relevant public health conditions, and her business environment is safe. She believes that the said notice of closure was illegal and unreasonable, as she was not given an opportunity to be heard as required by the law before being condemned to relocate. She further believes that her right to own property was infringed in contravention of the Constitution. She feels discriminated against, as her business was the only one served with the said notice yet similar businesses in the same vicinity were allowed to continue operating. She urges the court to issue the conservatory orders sought to protect her from arbitrary acts of the 2nd Respondent and prevent the threatened violation of her constitutional rights. She is certain that no party stands to suffer any prejudice in the event the orders sought are granted.

3. The Applicant swore a further supporting affidavit on 9/12/2022 in support of her application.

The 1st - 3rd Respondents' case

4. The 1st - 3rd Respondents opposed the application through their replying affidavit sworn on 8/12/2022, by Dr. Silas Muguna, the acting CEO of the 2nd Respondent. Vide a community petition dated 15/11/2022 signed by 114 people and chaired by the Assistant Chief, the Community resolved for the closure of the Applicant's business and 3 other bars. As a result of the said meeting, the licensing officer namely Geoffrey Gikunda wrote a letter dated 17/10/2022 giving notice of the closure by 1st December 2022. The Applicant attended the Kithaku Public Meeting held on 10/10/2022 and even attested to the attendance register. The Applicant was then summoned to the office and notified about the community resolutions, which summons she honored and was advised to relocate by 31st December 2022, when the license expires. After visiting the scene to assess the situation on the ground, they agreed to give the Applicant time to look for another site to relocate before the inspection because the premises was situated barely 50 meters from a school entrance namely Muthangene Nursery School in contravention of Section 20(1)(C) of the Meru County Alcoholic Drinks Act, 2016, that requires alcohol selling premises to be 300 meters away from any learning institution. The decision was arrived at out of public outcry, as the Applicant's business has been endangering the lives of school going children who risk partaking or being influenced into drug and substance abuse. Despite the Applicant feigning ignorance of the meeting, she did in fact respond to the letter through her advocate brazenly declining to relocate to a different site. The 1st Respondent reserves the right to revoke/suspend any licenses if the same touch on public interest, and the Applicant's license was previously revoked/suspended for operating next to Katheri Boys Secondary School. The Applicant's business is still in operation until 31st December 2022 pending her compliance with the directive to operate at another premise after which she will have her license reinstated without any further payment. He likens the issuance of the orders sought to endangering the lives of school going children, and urges the court to dismiss the application with costs.
5. The deponent swore a further replying affidavit on 13/12/2022 averring that before taking action against the Applicant's business operations, they had received several complaints from both Muthangene Primary School, Muthangene Secondary School and Katheri North Boys Child Welfare.

DIVISION - The 4th and 5th Respondents' case



6. The 4th and 5th Respondents filed grounds of opposition on 15/12/2022 that, “The said motion has been made with unreasonable delay since the impugned notice was issued on 17/10/2022 whereas the amended motion was filed more than a month later; The motion offends express provisions of the *Alcoholic Drinks Control Act*, to wit Sections 2, 12, and 14, that empower the District Committee to engage in action or make decisions for purpose of giving effect to the object of the Act; The motion offends the doctrine of constitutional avoidance as Section 15 of the *Alcoholic Drinks Control Act* prescribes the cause of action at the disposal of the Applicant. It offends Section 9 (2) of the *Fair Administrative Action Act*; The motion does not demonstrate any instance the 4th and 5th Respondents acted ultra-vires entitling the Applicant to the orders sought; The application is vague and unsubstantiated, full of glaring conjecture and does not raise any Constitutional questions to be addressed by this court and as such an abuse of court process; The Applicant is undeserving of the orders sought as it fails the requirements for grant of conservatory orders as established in the *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR.”

Analysis and Determination

7. The Court has considered the Applicant’s application for conservatory order pending the hearing of the petition herein together with the submissions made orally by counsel for the parties.

Application for conservatory order

8. The Counsel for the 4-5 Respondents urged the court to consider the application along the principles for the grant of conservatory orders set out by the Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Civil Application NO. 5 of 2014, [2014] eKLR, (para. 86) that –

1. “Conservatory Orders bear a more decidedly public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders therefore are not, unlike interlocutory injunctions, linked to such private party issue as “the prospects of irreparable harm” occurring during the pendency of the case; or “high probability of success” in the Applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”
9. This Court respectfully accepts that the decision whether to grant a conservatory order, is a factor of the respective parties’ cases examined through the prisms of constitutional order and public interest and a weighing of the respective merits of the parties’ causes. See previous decisions of this court on consideration of conservatory orders such as *Nairobi Const. Pet. no.206 of 2016 Satinderjit Singh Matharuv.Armajit Singh Gahir& 5 others*, where the court held:

“Principles for the grant of the conservatory order

5. Despite varied nomenclatural expressions, the principles upon which the High Court considers application for conservatory orders in constitutional litigation are now settled by several decisions on the point, and may be condensed as follows:-
 1. The applicant must demonstrate prima facie case, or an arguable case, for the grant of the relief sought.
 2. The applicant must stand to suffer an irreparable harm, injury or loss not remediable by any other relief; and



3. As a remedy in constitutional litigation, the conservatory order calls for consideration of the public interest in the matter, and the balance of convenience between the petitioner's and the respondent's case must favour the grant of the conservatory order.

See generally, authorities cited by the petitioner, *AG v. Sumair Bansraj* [1985] 38 WIR 286; *Tunoi & Anor v Judicial Service Commission and Anor*, [2014] eKLR; *Judicial Service Commission v Speaker of the National Assembly & Anor*. (2013) eKLR; *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Ors.* [2014] eKLR; *Centre for Rights Education and Awareness (CREAW) & 7 Ors. v. AG* [2011] eKLR; and *Centre for Human Rights and Democracy & Ors. v The Judges and Magistrates Vetting Board* [2012]eKLR.

6. This Court has also previously expressed itself on the matter. See *Muslims for Human Rights (Muhuri)& 4 Ors. v Inspector General of Police & 2 Ors., Mombasa Petition No. 62 of 2014 of 22nd December 2014*, where the Court held as follows:

“The emerging principles for the grant of injunction or conservatory orders under the constitutional litigation, as I understand them, are firstly, that the applicant must demonstrate an arguable case - sometimes called prima facie arguable case - the reference to arguable case distinguishing it from the prima facie test of the *Giella v Casman Brown* [1973] EA 385 traditionally applied in regular civil cases; secondly, that the applicant must show that the petition would be rendered nugatory or that the damage that would be suffered in the absence of the conservatory order would be irreversible; and, thirdly, that in constitutional cases, the public interest in the matter would be considered and generally upheld. See *Kenya Transport Association Limited v. Cabinet Secretary for Transport and Infrastructure and Ors., Mombasa HC Petition No. 16 of 2014* where I considered some of the decisions on the matter as follows:

“The tests for the grant of conservatory orders has been variously expressed by different courts. See *Mombasa High Court petition No. 7 of 2011, Muslim for Human Rights and 2 Ors v the Attorney General*, per Ibrahim J. (as he then was), *Mombasa High Court Petition No. 47 of 2011 Harun Barky Yator v Judicial Service Commission (JSC)*, per Okwengu J, (as she then was), *Nairobi High Court Petition No. 557 of 2013*, per Majanja J, and *Mecha Magaga v Jackson Obiero Magaga* [2014] eKLR, per Okong’o, J. All the courts require for the grant of conservatory orders a prima facie case or a prima facie arguable case as in Yator’s case; irretrievability or irreparability if conservatory order is not granted and the subject matter is irretrievably lost (akin to the irreparability of damage test) and a balancing of the interests of the applicant and



the respondents. There arises confusion as to whether the test of standard of the applicant's case is on the prima facie or arguable case. Once accept that the court cannot determine the disputed merits of the case at the interlocutory stage, the correct standard must be the standard of arguable case. See *Mbuthia v. Jimba Credit Corporation* (1988) KLR 1. I also consider that Under Article 23 (3) of *the Constitution*, the court may make a broad spectrum of orders as conservatory orders to preserve the status quo where circumstances warrant and that may include fashioning a remedy to fit the particular circumstances of the application before the court.”

10. In line with the case and materials authorities and Supreme Court's guidance in *Munya v Kithinji*, the Court has considered the factors of prima facie case, the public interest in the matter and the inherent merit of the case, as below.

Prima facie/arguable case and the Inherent merits of the parties' causes

11. A consideration as to whether there exists a prima facie case to justify grant of conservatory orders would entail a determination of the inherent merit of the parties' cases in the terminology of *Munya v Kithinji*, supra. It must be recalled that a challenge on the Alcoholic Drinks Act 2010 as an infringement of the licensee's right to property was determined in the negative by the Court (Musinga, J. (as he then was)) in *Murang'a Bar Operators & Another v Minister For State For Provincial Administration and Internal Security & 2 Others* [2011] eKLR while considering an interlocutory application for conservatory orders to restraining the interference by government officers of their licenced alcoholic drinks business in a challenge on newly enacted The *Alcoholic Drinks Control Act* 2010, where the Court declined the order sought and said:

“As regards the provisions of Article 40 of *the Constitution* which guarantees protection of right to property, I did not find any merit in the petitioner's argument that the impugned Act or any section thereof is an infringement to their right to acquire and own property. Any Applicant whose establishment complies with the licensing regulations will continue to be licenced as there before. As earlier stated, the control mechanisms set out in the Act are necessary.”

12. The court must find that a prima facie case is not established because, the statute of the County Government and the National Government for the alcoholic drinks control have provisions which empower the county government to regulate the issuance of licences to Applicants for operation of business for the sale of alcoholic drinks. In addition, as discussed below the issue of discrimination in the refusal of licence for the Applicant compared to other businesses in similar situation is not well founded as no evidence of their particular situations as no licences have been shown to have been given to them and the court is not possessed of information that their businesses will be allowed to continue upon the expiry of the 2022 licences.
13. The *Alcoholic Drinks Control Act* 2010 applies to renewal as well as fresh applications for licences and provides at section 12 for the qualifications, with distance from educational institutions being an integral consideration, necessary for the grant as follows:



1. “12. Licence for premises

The District Committee shall not grant a new licence for the sale of an alcoholic drink to be consumed on the premises unless the District Committee is satisfied—

2. that it would be in the public interest for provision to be made for the sale of alcoholic drink for consumption on the premises in the particular locality in respect of which the application is made, and that the number of such premises in respect of which such licences have already been granted is insufficient for the requirement of the locality given the population density per square kilometre and the permitted maximum number of such premises as shall be prescribed by law:

i. Provided that no licence shall be granted to sell alcoholic drinks in any institution of basic education including primary and secondary schools or any residential area as have been demarcated by or under the relevant written laws; that it would be in the public interest for provision to be made for the sale of alcoholic drink for consumption on the premises in the particular locality in respect of which the application is made, and that the number of such premises in respect of which such licences have already been granted is insufficient for the requirement of the locality given the population density per square kilometre and the permitted maximum number of such premises as shall be prescribed by law:

1. Provided that no licence shall be granted to sell alcoholic drinks in any institution of basic education including primary and secondary schools or any residential area as have been demarcated by or under the relevant written laws;

3. that the premises in respect of which the application is made are in good repair and are in a clean and wholesome condition, and are provided with adequate and proper sanitary arrangements;

4. that the premises in respect of which the application is made are located at least three hundred metres from any nursery, primary, secondary or other learning institutions for persons under the age of eighteen years.

The District Committee shall not grant a licence for the sale of an alcoholic drink in a supermarket or such other related retail chain store unless it is satisfied that the Applicant has taken measures to ensure that the area in which the sale is to take place is not accessible to persons under the age of eighteen years.”

14. According to the Report of the Deputy Registrar dated 20th December 2022 upon site visit on the directions of the Court, the Applicant’s bars namely Subira Bar, Subira Bar 2 and Forest View Wines and Spirits are, respectively, 24 feet, 150 metres, metres and 160-170 metres from learning institutions for minors being Muthangene ECDE, Muthangene Day Secondary School, MCK Muthangene Primary School and MCK Women Fellowship Academy.

15. In these circumstances, the situation of Applicant’s bar infringes the law as to the proximity in distance of alcoholic sale premises from the educational institutions. It matters not that the Respondents have previously given the Applicant licences at the same sites. If the Respondents have not enforced the law previously, it is no bar from their enforcement of it now and in the future. It is trite that there can never be any estoppel against the operation of the law by reasons of acquiescence or waiver.

16. The rule of law depends on the scrupulous and strict enforcement of the law as it stands as at the time of enforcement. The adage ‘do it now for there may be a law against it tomorrow’ says it all! If it is law, it



may be enforced today and it is immaterial that it was not against the law yesterday. That the Applicant has had a licence for 3 years may, during the validity of licence, be a defence against forceful removal from the licensed premises on the ground of changed law. On expiry of a licence and consideration of a new licence, the provisions of the law may be given effect without regard to the previous licence.

17. It is also no defence that there are other bar operators within the same radius of 200 metres who have not been asked to close their businesses. Licence is personal and the fact that two or more persons may be denied a licence and asked to close is not a defence that only one has been asked to close down. It may be that the others are asked to close and have complied and do not seek to challenge the order for closure.
18. There was no evidence that the Respondents are exercising their regulatory authority in a discriminative manner. If such discrimination is proved, it may found an action for damages at the hearing of the main petition, but it cannot, in the respectful view of this court, support the grant of a conservatory order restraining the enforcement of an Act of Parliament governing the matter. In a similar matter where the Central Bank of Kenya took action against a bank allegedly for failure to observe reporting obligation of banks, something which the bank claimed other 26 banks had done, in *Family Bank Ltd. & 2 Ors v. DPP & 2 Ors* (Milimani HCCC NO. 488 of 2016, [2016] eKLR this court ruled as follows:

“It is not public interest to halt prosecution of an alleged offender, the evidence to support whose charge is available, in order to await investigations to establish evidence that may support the charge of others who are alleged, whether by the prosecutor or the alleged offender, to have been similarly involved in like offence.”

19. It is the same for action taken, as here, in accordance with the law against one of several offenders where the determination of the offence of the one offender has been done so as to await the completion or the implementation of a policy decision against all affected persons. The regulator is entitled to proceed against one or more offenders at a time, as circumstances of each case require.

Dispute as to notice, inquiry, right to be heard and consultation with the Applicant.

20. On the evidence before the Court, it is not possible at this stage to conclude that the applicant did not participate in the public participation meeting called upon receipt of a complaint by the community about the bar businesses, or that she was not afforded an opportunity to be heard before the decision was taken. The Respondents' evidence is that on the register of attendees, the names and identity and mobile phone particulars of the applicant are recorded indicating her attendance. The fact that resolutions for closure of the bars including her two bars were made at the meeting does not indicate that she was not at the meeting or that she was not given an opportunity to be heard on the complaint. However, whether the applicant was heard or she participated in the public participation meeting is a matter of fact that may be resolved at the hearing of the petition. It may invite an award of damages, if it is found that she was not heard or consulted on the matter. But it does not, with respect, affect the statutory right of the respondents to take action to implement the provisions of the *Alcoholic Drinks Control Act*, when such implementation is adjudged to be in the public interest.

Public interest consideration

21. The Applicant urges that the private interests should prevail over public interest because she is not the one who planned the town and she has duly paid licences for the last three years beginning 2020 and has applied for the 2022 licence and paid for the fees along with the application. She has also invested in her bar businesses at the sites upon acquiring the necessary licences from the Respondents.



Without prejudging the merits of the petition, the public interest consideration evident in the statutory provisions of section 12 of the national *Alcoholic Drinks Control Act* for the avoidance of interference and adverse impact on education of children is a reasonable limitation on any private rights to property through the business of alcoholic drinks. The object of the Act in keeping the schooling environment clean from all manner of disruption and distraction that may be engendered for the students, teachers and staff of the educational institutions is an obvious overriding interest against the bar owners' right to property or profit. With respect, the public interest embodied in the provision of the Act as to the distances from educational institutions must prevail over the private profiteering of an individual Applicant.

Prejudice on the Parties

22. Prospect of loss to the Applicant? As held in *Murang'a Bar Operators & Another v. Minister for State for Provincial Administration and Internal Security & 2 Others*, supra, the claim of infringement of the Article 40 right to property by enforcement of *Alcoholic Drinks Control Act* No. 4 of 2010 is not well founded. The court considers that with the Applicant's licence coming to an end and the Respondents' intimating decision not to renew licences in areas affected by the law, the only indulgence that the Respondents may be required to give is to provide for a smooth passage for the Applicants to remove her business structures, stock and equipment within a reasonable time after the expiry of the licence. Such indulgence cannot, however, support continued operation of the businesses in the meantime.
23. This Court is also mindful not to be pulled into the dispute between the parties to grant a conservatory order which has the effect to extend the life of the licence beyond its statutory period, a matter which is in the discretion of the Committee as set out in section 14 (1) of the *Alcoholic Drinks Control Act* No. 4 of 2010 as follows:
 1. "14 (1) Except as otherwise provided in this Act, a District Committee may, subject to this Part, grant, renew, transfer or remove a licence, and may embody therein such conditions as it may deem appropriate, or it may refuse to grant, renew, transfer, withdraw or cancel a licence."

Finding of the Court

24. The 1-3 Respondents' action is within the law and it is warranted in public interest and the application for conservatory order is, therefore, declined. Although clothed as a public interest matter of enforcement of rights, it is purely a licencing matter between the Applicant and the licensing authorities. If any wrong is adjudicated at the hearing of the Petition as having been committed in the exercise of the statutory powers of the Respondents as against the Petitioner, the same may be compensated by an award of damages. In the exercise of its discretion in terms of section 27 of the *Civil Procedure Act*, the Court will, therefore, award costs to the Respondents against the Applicant.

Orders

25. Accordingly, for the reasons set out above, the Applicant's application for conservatory Orders stopping the Respondents from implementing the provisions of the *Alcoholic Drinks Control Act* of the Meru County Government and the national *Alcoholic Drinks Control Act* No. 4 of 2010 is declined.
26. In the interests of justice, the Court allows the Applicant to arrange to remove her fixtures on the property now used as bars and known as Subira Bar, Subira Bar 2 and Forest View Wines and Spirits, together with any stock of alcoholic drinks and other beverages, and any equipment and/or fittings and facilities therein, within a period of thirty (30) days from today.



27. For the avoidance of doubt, the Order of Court herein issued does Not authorize any continued operation of the bar businesses after the expiry of the Applicant's 2022 licence(s) on the 31st December 2022.

28. Costs in the cause.

Order accordingly.

DATED AND DELIVERED ON THIS 21ST DAY OF DECEMBER, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Mukaburu, Advocate for the Applicant.

Mr. Mutuma, Advocate for the 1 - 3 Respondents.

Mr. Kieti, Principal State Counsel for the 4 -5 Respondents.

