



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CONSTITUTIONAL PETITION NO. E011 OF 2021**  
**IN THE MATTER OF**  
**CONTRAVENTION OF ARTICLES 19, 20, 21, 27 AND 40 (1) AND (3) OF**  
**THE CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF**  
**ARTICLES 2 (1), 22(1), 23(1), 165 AND 176 OF THE CONSTITUTION OF KENYA**  
**AND IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL ACT, 2016**  
**BETWEEN**  
**KENNETH KIMATHI .....PETITIONER**  
**VERSUS**  
**MERU COUNTY ALCOHOLIC DRINKS CONTROL BOARD .....1<sup>ST</sup> RESPONDENT**  
**COUNTY GOVERNMENT OF MERU.....2<sup>ND</sup> RESPONDENT**  
**RULING**

**OUTLINE OF FACTS**

1. What is before the court for determination is the notice of motion dated 18/5/2021 in which the petitioner seeks orders that:-

1. Spent
2. Spent
3. Spent

4. *That pending hearing and determination of the petition, a conservatory order be issued compelling the respondent to forthwith and unconditionally release to the petitioner/applicant, the petitioner's/applicant's properties listed herein below-;*

- |   |                       |
|---|-----------------------|
| <i>a) Smart beer – 82 bottles each @kshs. 200/=</i>       | <i>Kshs. 16,400/=</i> |
| <i>b) County beer – 81 bottles each @ Kshs 220/=</i>      | <i>Kshs. 17,820/=</i> |
| <i>c) Tusker cider beer – 70 bottles each @ Ksh 200/=</i> | <i>Kshs. 14,000/=</i> |
| <i>d) Tusker lager beer 71 bottles each @ Kshs. 200/=</i> | <i>Kshs. 14,200/=</i> |

- e) Guinness beer – 50 bottle each @ Kshs. 200/=      Kshs. 10,000/=
- f) White cup beer – 42 bottles each @ Kshs 200/=      Kshs 8,400/=
- g) Soda      - 51 bottles each @ KSHS. 50/=      Kshs. 2,550/=
- h) Flying horse beer – 48 bottles each @ Kshs. 120/=      Kshs. 5,760/=
- i) Smirnoff beer – 40 bottles each @ Kshs. 220/=      Kshs. 8,800/=
- j) Distilled water – 80 bottles each @ Kshs. 30/=      Kshs. 2,400
- k) Kane beer      - 41 bottles each @ Kshs. 200/=      Kshs. 8,200/=
- l) Chrome beer - 64 bottles each @ Khss. 200/=      Kshs. 12,800/=
- m) Faxe beer – 50 bottles each @ Kshs. 200/=      Kshs. 10,000/=
- n) Blue Ice beer      - 61 bottles each @ Kshs. 160/=      Kshs. 9,760
- o) Hunters beer – 71 bottles each @ Kshs. 270/=      Kshs. 19,170/=
- p) Triple ace beer – 43 bottles each @ Kshs. 200/=      Kshs. 8,600/=
- q) Safari Cigarettes – 40 packets each @ Kshs. 200/=      Ksh. 8,000/=
- r) Pool table sticks – 4 sticks each @ Kshs. 1000/=      Kshs. 4,000/=
- s) Pool table balls – 1 set @      Kshs. 4,500/=
- t) Pool table machine 1 @      Kshs. 15,000/=
- u) Home theater 1 @      Kshs. 45,000/=
- v) Pool table savings box with an uncounted amount of money collected for 1 week.

5. That pending hearing and determination of the petition, an order of injunction be issued restraining the respondents, their officers, employees, servants, agents and anybody else acting for, through or at their behest, direction or instructions from entering into trespassing onto breaking into, confiscating, carting away and or retaining the petitioner's/applicants properties in or whatsoever else, interfering with the lawful operation of the petitioner's/applicant's duly licensed **FRISON BAR** business established on Plot No. 4688 in Ruiru Market.

2. The summary of facts giving rise to the grievances and petition are that pursuant to the provisions of the law, the petitioner was licensed by the 1<sup>st</sup> respondent on behalf of the 2<sup>nd</sup> respondent and issued with an alcoholic drinks license No. CGM 02272 dated 04/2/201 whose license fee was paid on 17/02/2021 and the license made to be in force upto 31/12/2021. The said license was issued upon a prerequisite permit by the Public Health Authorities by a receipt dated 17/02/2021 together with a Health Clearance Form. The business was to be operated in the name of **FRISON BAR** and upon plot No. **4688 Ruiru market** upon which the petitioner spent the sum of **Kshs. 279,500** in decorations and furnishing as and a further sum of Kshs. 60,000 to procure a pool table and its accessories.

3. During the life of the license, and despite compliance with the law, on the 30/4/2021 while the petitioner's business was being run, a contingent of police officers in the company of those identified as agents of the respondents invaded the establishment in motor vehicle registration Nos. 12CG024A and 12CF022A and violently broke the counters and forcefully loaded an assortment of the drinks as well as other stock and tools in trade onto the motor vehicle and carted same away without any notice or reason for their actions. The petitioner trailed the two motor vehicles to the 1<sup>st</sup> respondent's yard on the same day and again on 30/5/2021 but on all occasions no reason or justification was given leaving the petitioner with no option but to seek the remedies now sought by the petition.

4. On these allegations in the petition which are reiterated in the affidavit in support of the application the petitioner asserts that the actions by the respondent have been in violation and contravention of his constitutional rights to economic empowerment, ownership of property and the freedom against discrimination under articles 19,20,21 27 and 40(1) of the constitution. The violation is alleged to be demonstrated by crippling of the business without a justifiable cause, taking away and refusing to release the property without any reasonable or justifiable cause and thus arbitrary deprivation of property which is confiscated to present a prima facie case and injury that may be irreparable unless the orders sought are granted. By such acts complained about, the petitioner claims loss of business at Kshs. 15,000 per day it being contended that there was no wrongdoing by the petitioner on the fact that there have never been lawful process taken against him since the invasion and todate and therefore the petitioner is entitled to conservatory orders to sustain the substatum of the petition seeking the declaration sought, general, punitive and exemplary as well as liquidated damages.

5. In resisting the application the respondent filed a replying affidavit sworn by one Violet Gacheri, the sub-county liquor licensing officer,

Buuri East who asserts to be conversant with the facts of the matter as the person entrusted with the duty of inspection of bars to ensure compliance with the law and policy guidelines conditions before issuance of a license

6. In her affidavit she justifies the raid and invasion to have been founded upon a letter of complaint by Kamutune sub location community which complained about loud noise and sale of illegal drugs at the bar. Based on the complaint, she proceeded to the bar at about 5 p.m. and found the bar operation with some patrons acknowledging to have been therein as early as 2.00 p.m in violation of one of the conditions of the license that it operates between 5 p.m and 11 p.m on weekdays and from 2.00 p.m to 11 p.m. on weekends. She therefore contends that there was satisfaction that the petitioner had breached the license condition regarding hours of operation hence they, with his contingent of officers proceeded to confiscate stock in trade and tools of trade and that they were in the process of taking photographs of the confiscated goods when rowdy boda boda operators threatened breach of peace thus forcing her team to leave in a hurry and abruptly. She thus denied carting away the goods in the value alleged by the petitioner and further that the petitioner rights must be enjoyed in appreciation of the right of other Kenyans. It was in conclusion asserted that the petition was premature and thus an abuse of the process of the court for failure to exhaust the remedies provided under the Meru Alcoholic Drinks Control Act 2016 and the constitution of the Republic of Kenya.

7. There were two other affidavits sworn by one **GEOFFREY GIKUNDA, SYLAS M'MBIJIWE** exhibited as an annexure to the replying and which largely retreated the contents of the replying affidavit without much additions save that the bar would open as early as 9 am and operate past midnight with loud music.

8. With the leave of the court, the petitioner, filed a supplementary affidavit in answer to the replying affidavit. The gist of the supplementary affidavit is that the bar had not been opened outside the permitted hours and that the three affidavits by the respondents had no truth in them. It then attacks the alleged letter of complaint for failure to show receipt by the addressee and those it was copied to, failure to show that the complaint had been lodged with the police, failure to demonstrate any approach to the petitioner and the landlord and lastly failure to demonstrate the date and venue the community allegedly met. Breach of the conditions of the license was denied it being asserted that had there been such legal steps would have been taken as against the petitioner by the respondents.

9. On the quantity of the confiscated items the petitioner pointed out that even though it is sworn on oath that 18 bottles of county beers, 14 bottles of Kibao beers and 15 bottles of smart beers were confiscated, the release order signed by both parties show that only a portion of the conceded items were released. He thus invites the court to find the respondent to be less than candid and set out a list of the items yet to be released despite the existence of a court order and the value of such property. He then faults the respondent for failure to take an inventory and brushing his request for reasons and release of the property and reiterates failure to pursue any charges in court for violation of the law. He denied the presence of any boda boda operator at the scene asserting that such a conduct could have been thwarted by reinforcement from the nearby police station.

10. On the allegation by Mr. Mbiwiwe Silas that the petitioner and his landlord had been approached with the complaint about noise, he denied same as false in that he has talked to his landlord who denies such approach then reiterated that no report was ever made to the police and the area chief. He then terms the letter of complaint as tailor made for the purposes of this matter and that the raid was at 5.27 not 5.00 p.m and that at the time there were only 2 – 3 patrons. The alleged inventory by Mr. Geoffrey Gikunda is viewed fake and that any breach of peace by boda boda operators ought to have been reported to the police at Ruiru but was never so reported. He then exhibited the two affidavits by James Mworira Njagi and Joseph Mwirigi M'Muthuri who he described as close neighbours and who assert that the bar operates between 5 and 11 pm, never plays loud music, does not sell drugs and that they were present and witnessed the officers break into the counter bar and cart away the drinks and other tools of trade.

#### **SUBMISSIONS OFFERED**

11. It was agreed and directed that the application be canvassed by way of written submissions which were filed by the petitioner and the respondents on the 18/8/2021 and 18/10/2021 respectively.

12. In his submissions the petitioner urges the court to find that on the basis of the papers filed, the petitioner is properly before the court and therefore the application for conservatory orders deserves being allowed as prayed. The decision on **sleek lady cosmetics Ltd Vs County Executive, Transport, Infrastructure and Public Works Mombasa & another (2020) Eklr** is cited for the proposition of the law that before a court gives conservatory orders, it must be satisfied that a prima facie case has been made out, that the petitioner is likely to suffer prejudice as a result of the violation unless conservatory orders are granted and that there are prospects of the petition and its substratum being rendered nugatory. The decision in **Witmore Investment Limited Vs County Government of Kirinyaga (2014) eKLR** is also cited for its same proposition.

13. On prima facie case, **Mrao Ltd Vs First American Bank & others (2003) eKLR** was cited on the definition of a prima facie case to be the kind a tribunal properly directing itself would conclude that there is a right which has been infringed by the opposite party. To the petitioner, the confiscation was out rightly unlawful because he was licensed to operate and confiscation is not part of the duties of the respondents' officers and that there was no basis for same hence failure to take any legal steps to date as demonstrated by release of part of the goods unconditionally. It was thus asserted that there was evident violation of the rights under Articles 19,20, 21 27 and 40 of the constitution for which conservatory orders need to issue to obviate continued violation.

14. On irreparable loss and the petition being rendered nugatory the position taken is that there is sufficient demonstration that the business was unlawfully crippled and he continues to suffer loss of Kshs. 15,000 per month which averment had not been denied or controverted and that unless conservatory orders are granted, nothing will stop the respondent, from a repeat and perpetuated loss of business. The decision in **sleek lady (supra)** was relied on from the proposition that grant of conservatory orders do enhance constitutional value and objects of specific rights or freedoms in the bill of right.

15. Lastly on balance of convenience, submissions were offered that it is wholly untenable for the respondents to confiscate the property on alleged violation of the law and fail to prefer criminal charges now for a period of some 7 months and therefore the balance of convenience lies on grant of the orders so that nobody is seen to be operating above the law.

16. For the respondent submissions offered were to the effect that they were propelled into action pursuant to the complaint by the community of the petitioners area of operation and that a visit to the premises revealed loud music and a confirmation by some patrons that he had been into the premises before 5 p.m in violation of the licence conditions. The decision in **Peter Munya Vs Dickson Mwenda Kithinji & 2 others (2014)eKLR**, was cited for the law that a conservatory order should be given on the inherent merits of the case with public interest, constitutional values and the proportionate magnitudes and priority levels attributable to the particular cause. Applying those principles to the instant case, the respondent takes the position that there has not been satisfaction of the principles because the petitioner was issued with a license with conditions which conditions had been breached by the petitioner hence he has no prima facie case demonstrated because his rights can only be enjoyed with due regard being given to the rights of others in particular the residents of the area where bar is operated, based on the legal position that constitutional provisions must be interpreted holistically without one appearing to destroy the other but each sustaining the other. It was urged that the petitioner's rights alleged to have been violated by the respondent should not be enjoyed in derogation to the public rights under article 43 of the same constitution and that the respondent is entitled to revoke a licence under the Act.

17. For those reasons, the respondents contend that the prayers sought are not merited and need not be granted but the entire application deserves dismissal.

### **ANALYSIS AND DETERMINATION**

18. Being an application for conservatory orders, the courts mandate remains that of finding a demonstration of the prima facie case with chances of success the applicant must demonstrate that unless the orders are granted, it stands to suffer a damage incapable of reparation by an award of damages and that the petition and its substratum may stand destroyed and rendered nugatory without much to be achieved at conclusion<sup>[1]</sup> My appreciation of the matters pleaded by both sides is that the 1<sup>st</sup> respondent was performing its statutory inspection duties under section 69 of the Meru County, Alcoholic Drinks (Control) Act, 2016. The provisions stipulates:

**69 (1) "During an inspection under this Act, an authorized officer may seize any alcoholic drink or thing by means of which or in relation to which the officer believes on reasonable grounds that this Act has been contravened and a full inventory thereof shall be made at the time of such seizure by the officer"**

19. While the petitioner contends that confiscation is not part of the respondent's officers' duties, I do find that there is indeed a statutory basis under section 69 of the Act for the 1<sup>st</sup> respondent to have conducted the confiscation. However, the dispute is whether that confiscation was done and pursued lawfully. The petitioner alleges that ever since the confiscation no lawful steps have been taken against him towards demonstration that he had breached a provision of the statute. That assertion when taken together with the position taken by the two affidavits by persons alleging to be immediate neighbours to the premises where the bar is operated, that no loud music is played there, bar is operated with license hours and no drugs get peddled there, remain unchallenged by the respondents.

20. I take the view that confiscation under section 69 of the Act is only permitted to forestall and stop the contravention of the statute and also to preserve evidence for an intended prosecution. It is thus not undertaken to deprive the owner of the goods. Infact confiscation is limited to Alcoholic Drinks or things by means of which the law has been contravened. That gives me the understanding that the purpose of confiscation is to preserve evidence of contravention of the Act with a view to proving same against the licensee. Confiscation is not by itself the end goal. Accordingly, I do find that it is indeed an arguable point whether in failing to charge the petitioner with any offence since 30/4/2021 there has not been violation of the petitioner's rights. That must be left to go to the merits of the petition but I find it to present a prima facie case with prospects of success. That is the substratum upon which consideration of whether or not to grant a conservatory order must be looked at.

21. On whether there is an injury that may prove irreparable unless the orders are granted pending determination of the petition and where the balance of convenience lies, I do find that compliance with the law is all important for the values of democracy including the rule of law to be attained. That however is not a mandatory consideration when one gets guidance from the decision in **Gatirau Peter Munya (supra)**

22. It is therefore important that a creature of the law abide by and comply with every dictate of the law. It is said that only part and not all of the confiscated items were released on the strength of the court order issued herein. No explanation has been offered for such failure yet no denial has been made against the assertion by the petitioner to that effect. I consider a disposition by a party towards violation of the law and court orders as the kind of injury that is irreparable even by an award of damages because the injury portends degeneration of good public order and respect of the law as the very fabric of societal good. The need to obey the law cannot be gainsaid.

23. I do find that unless conservatory orders are granted here, disregard of the law will be perpetuated to the detriment of not only the petitioner but the society at large who expect the law to be complied with.

24. In coming to this conclusion I have not delved into the merit issue of whether the respondents are finally demonstrated to have committed the violation as alleged. I am only saying that on the face of it there was an apparent failure by the 1<sup>st</sup> respondent to carry out its mandate in strict compliance with the law it was seeking to enforce.

25. In the end I do allow the application dated 18/5/2021 in terms of prayer 3 in respect of the property not released as demonstrated on the release order of 18/6/2021 and marked exhibit "KK1" in the supplementary affidavit of the petitioner filed in court on the 18/8/2021.

26. I also grant prayer 5 but without negating on the 1<sup>st</sup> respondents' right to carry out its statutory duty of inspection and enforcement of the intendment of the statute. I do grant an injunction to restrain any acts that contravene or fail to uphold the dictates of section 69 of the Act.

27. In conclusion, I do grant the following orders -;

i. That pending hearing and determination of the petition, a conservatory order is issued compelling the respondent to forthwith and

unconditionally release to the petitioner/applicant all the property confiscated on the 30/4/2021 and not released pursuant to the release order dated 18/8/2021.

ii. That pending hearing and determination of the petition, an order of injunction is issued restraining the respondents, their officers, employees, servants, agents and anybody else acting for, through or at their behest, direction or instructions from seeking to perform their statutory duty of enforcing the Meru County, Alcoholic Drinks (Control) Act, 2016 without strict compliance with Section 69 thereof.

28. The costs of the application shall abide the outcome of the petition.

**DATED SIGNED AND DELIVERED AT MERU THIS 17TH DAY OF DECEMBER, 2021**

**PATRICK J.O OTIENO**

**JUDGE**

In presence of

Mutisya for petitioner

No appearance for the respondent

**PATRICK J.O OTIENO**

**JUDGE**

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[\[1\]](#) Center for rights Education awareness Vs AG (1017) Eklr

Gatirau Peter Munya Vs Dickson Mwenda Kithinji (2014) eKLR