



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CONSTITUTIONAL PETITION NO. 4 OF 2017

**IN THE MATTER OF ARTICLES 2(1), 6(1), 10(2), 27(1), 29(A), 35(1), 40(1), 185(2), 186(1), 187(2) AND 4TH SCHEDULE PART 2
PARAGRAPH 4(C) OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF SECTION 3(A) OF THE CIVIL PROCEDURE ACT CAP 21

AND

IN THE MATTER OF SECTION 7(1), 14(4-5), 15 AND 50 OF THE ALCOHOLIC

DRINKS CONTROL ACT NO.4 OF 2010

BETWEEN

ISINYA BAR ASSOCIATION.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF KAJIADO.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE COUNTY COMMISSIONER, KAJIADO.....3RD RESPONDENT

RULING

INTRODUCTION

1. The Petitioner in this matter is an Association registered under the Societies Act Cap 490.
2. The 1st Respondent is the County Government of Kajiado.
3. The 2nd Respondent is the Honourable Attorney General of Kenya.
4. The 3rd Respondent is the County Commissioner of Kajiado County as established in section 15(1) and (2)(a) of the National Government Co-ordination Act No. 13 of 2013 Laws of Kenya.
5. The Petitioner filed a Petition on 29 March 2017 which Petition was amended on 28 June 2017 with leave of the court. The Petition dated 29th March 2017 was filed contemporaneously with an affidavit sworn by Stanley Waweru Njuguna as well as a Certificate of urgency and a Notice of Motion Application seeking injunctive reliefs pending the hearing and determination of the Petition.
6. Through the Amended Petition, the Petitioner enjoined the 2nd and 3rd Respondents into the matter.
7. The 1st Respondent filed a reply to the original Petition dated 24th April 2017 and filed on the same day. The 1st Respondent, on the 28th April 2017, through an affidavit sworn and filed on the same day by Irene Kotete Naioruwa further replied.

8. It was agreed by consent to abandon the Notice of Motion Application and dispense off with the Petition in its entirety.
9. The Petitioner proceeded to file witness statements and list of authorities on diverse dates in support of its case.
10. The 3rd Respondent then filed an affidavit in Reply dated the 13th of December 2017 and sworn on the same day.
11. The Petitioner filed their undated written submissions on the 17th of January 2018.
12. The 1st Respondent filed its submissions dated 5th March 2018 on the same day.
13. Having examined the pleadings filed by both parties as well as considered the submissions made by the respective advocates, I will now proceed to make my determinations. I begin by outlining the parties' respective positions on this matter.

THE PETITIONER'S CASE

14. With regard to the nature of the rights the Petitioners fears are being infringed or threaten to be infringed by the Respondents, the Petitioner posited that the Respondents have been in blatant disregard of Article 27(6) of the constitution, by failing to give full realization of rights by taking affirmative action programs and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination or any written law that seems to be unfair to a certain group of people.

15. They further averred that Article 40(1) of the constitution provides for the right to own property either individually or in association with others to own property anywhere in Kenya which the Respondents are violating by continuously having their agents or officials harass the Petitioner by unlawful arrest at various premises operating liquor business and during which arrests the Respondent's agents cart away stock in form of beer beverage, wines and spirits from the Petitioner's members' premises.

16. Additionally, it was stated that the Petitioners have already been subjected to torture especially physical contrary to the provisions of Article 29(a) of the constitution since they are arrested and detained frequently and sometimes for non-existent offences such as operating without a liquor license yet the Respondent has failed to issue liquor licenses.

17. Moreover, it was averred that the rights of consumers of liquor will be greatly infringed as the petitioner will result to increasing the prices of goods sold to consumers to counter the punitive revenues being collected by the County Government in order to keep their businesses afloat.

18. The crux of the Petitioners case is that the 1st Respondent came up with the Kajiado County Liquor Licensing Act 2014 without public participation and the Petitioners who own Bar Businesses only came to learn of the said Act much later after they forwarded their grievances to court. Additionally, it is claimed that the 1st Respondent has failed and or neglected to issue liquor licenses to the Petitioners and only issued liquor licenses for the financial year 2016/2017 in March 2017 after a lot of complaints from the Petitioners who had not been issued with licenses in the previous financial year of 2015/2016.

19. The Petitioner alleges harassment by the Respondents and their agents including arrests being effected by the officers of the 3rd Respondent who do not question the documentation held by the Petitioners.

20. Further, the Petitioner claims that the Respondents have been charging them exorbitant license fees and that it has been subjected to paying punitive sums to operate Bar business affecting the economic gain of the business by reducing the profit margins of the liquor business denying the petitioners a livelihood and the enforcement of the Liquor Licensing Act No. 4 of 2010 by any authorized officer as defined under Section 50 of the Act further worsens the situation as it allows any government officer the right to enforce liquor laws and allows corruption to thrive as this officers just harass the Petitioners for bribes.

21. It is the Petitioners averment that the National Alcoholic Drinks Control Act at Section 50 provides that any authorized officer can enter a premises dealing with alcoholic drinks if they have reasons to believe that provisions of the Act are being violated. The Minister shall, upon recommendation by the respective District Committee, appoint for each district, any person or class of persons to be authorized officers for purposes of this Act and the Minister shall issue a certificate of appointment to every person appointed under this section. In addition, Section 51(2) requires an authorized officer to produce on request a certificate issued by the Minister under Section 50. According to the Petitioner, the Agents of the 3rd Respondent do not possess this certificate and are never accompanied by authorized officers in their routine patrols where they have resulted to harassing the Petitioners and using force without warrants as provided for in Section 55 of the Act.

22. The Petitioner avers that its members are being subjected to payment of Health Licenses, Trading License (Single Business permit), liquor licenses, Tourism Levy among others. All these licenses coupled with mandatory handouts to authorized officers, frequent fines imposed when charged in court on account of malicious charges dig in to the Petitioner's members' business decreasing profit margins and thereby denying the Petitioner's a sound livelihood.

23. Based on the foregoing, the Petitioner approached the court seeking to be granted the following reliefs:

- a. An injunction restraining the 1st, 2nd and 3rd Respondent's agents who include Administration Police and Kenya Police from harassing the petitioners on account of Liquor or Health licensing related offences and the same is enforced by County Health officers and County Askaris.

- b. A declaration that the 1st, 2nd and 3rd Respondents are in contravention of Articles 29(a), 31(b) and Article 40(1) of the Constitution and Part 2 of the Fourth Schedule of the Constitution.
- c. A declaration that Section 50 of the Alcoholic Drinks Control Act No. 4 of 2010 has been misinterpreted by the Respondents as to who an authorized officer is and how they should carry on their duties.
- d. Interpretation of the Fourth Schedule of the Alcoholic Drinks Control Act No. 4 of 2010 Subsidiary Legislation as pertains a Bar & Restaurant Alcoholic Drink License and the time of operation provided therein.
- e. A declaration that the licenses imposed on the Petitioners are punitive and the rates payable should be readjusted by the County Assembly noting to conduct proper public participation.
- f. Any such orders, reliefs and/or directions as this Honourable Court may consider just and appropriate.

THE RESPONDENTS' CASE

24. The 1st Respondents case is that the Constitution of Kenya clearly stipulates the functions of issuing and regulating trade licenses under schedule 4 as that of the county government and as such authorizes County Governments to levy charges on the services they provide. Accordingly, it did pass and enact the Kajiado County Alcoholic Drinks Licensing Act 2014 whose commencement date is 14th November 2014. The Act systematically provides for licensing from application to granting of the license.

25. All the allegations with regard to harassment of the Petitioner's members were unequivocally denied and the 1st Respondent averred that there was in place unambiguous guiding legislation in the collection of levies accruing from licensing and no compliant proprietor faces undue demand. According to the 1st Respondent, the Petitioner bases its case on the Liquor Licensing Act No. 4 of 2010 that was in force before the dawn of devolved governance.

26. The 1st Respondents position was that the petition is amorphous and generalized because while the Petitioner has a membership of 489 businesses only 4 are referred to in isolated and unrelated circumstances. As per the 1st Respondent, the Petition is speculative, exaggerated, unsupported, is an afterthought, mischievous, lacks merit and is frivolous; it ought to be dismissed with costs.

27. It was averred that it was misleading for the Petitioner to purport the ministry of Gender, Social Services and I.C.T did not indulge them or seek any solutions to their concerns whereas the same Ministry had three different meetings with the petitioners. It was as a result of the aforesaid meetings that the procedure on how the liquor licenses should be issued was formulated.

28. It was the 1st Respondents averment that on the 9th of July 2017 233 licenses were issued to some of the petitioners who had applied, paid and their premises had been inspected as per the requirements of the law.

29. The 3rd Respondent on the other hand maintained that Article 186(1) of the Constitution and Part 1 of the Fourth Schedule provides for the function of the Office of the 3rd Respondent and that the said functions do not include authority to license as alleged by the Petitioners.

30. It was averred by the 3rd Respondent that its Functions are also well laid out in the National Government Coordination Act No of 2013 Part 3 which provides that the National government officers appointed by Section 15 of the said Act shall be responsible for the coordination of National government functions as set out in the Constitution.

31. The 3rd Respondent's position was that its officers do not have powers to authorize or to order or instruct the police officers, that such powers are conferred to the office of the Inspector General who has command of the National Police Service as Provided by Article 245 of the Constitution of Kenya 2010.

32. Further, it was averred that it is not within the 3rd Respondent's mandate to order or instruct police officers to discharge any of their duties and therefore no order had issued to the police to harass and intimidate the petitioners as such the 3rd Respondent had been wrongfully enjoined in this Petition.

33. It was prayed that the petition be disallowed as most prayers sought in the Petition are against persons who are not party to the Petition and the said prayers are as a result of blanket and ambiguous allegations. That the Petitioners had in no way specified with precision the manner in which the Respondents have denied, infringed and violated the Petitioner's Constitutional rights.

PETITIONER'S SUBMISSIONS

34. The Petitioner's advocate, Mr Turunga made extensive submissions on his part. I will not endeavour to reiterate verbatim but will rather summarize the salient concerns articulated.

35. Mr Turunga raised 10 issues for determination to wit:

- a. Is failure by the 1st Respondent to respond to the amended Petition tantamount to an admission of the contents of the petition?

b. Has the 2nd Respondent replied to the Petition? The 2nd Respondent has merely drawn the replying affidavit to the petition but the same is sworn by the 3rd Respondent who does not state that he is swearing it on behalf of the 2nd Respondent.

c. Was the issuance of licenses by the 1st Respondent on 9 July 2017 an afterthought and reactionary to the Petition which had already been filed?

d. Is the 3rd Respondent properly enjoined in the petition?

e. Are the Respondents responsible for the harassment meted out on the Petitioners?

f. Have the petitioner's rights under Article 31(b) and Article 40(1) been infringed and has Part 2 of the 4th Schedule of the Constitution been contravened?

g. Who is an authorized officer under section 50 of the Alcoholic Drinks Control Act and in operation under the devolved system of governance

h. What are the hours of operation of a Bar and Restaurant as contemplated by the fourth Schedule of the Alcoholic Drinks Control Act No. 4 of 2010.

i. Are the Petitioners paying punitive rates to the 1st Respondent and is there need for consolidation of the various rates payable to the Respondent into a single fund?

j. Who should be awarded costs of the Petition?

36. On the first issue, Mr Turunga submitted that the Petitioner amended its pleadings and the Respondent did not reply to the amended pleadings. The consequence of this pursuant to Order 8 rule 1(6) of the Civil Procedure Rules is that the Respondent is deemed to rely to his earlier answer reply to the initial petition before amendment. The said reply is dated 24 April 2017 and a subsequent replying affidavit is dated 28 April 2017.

37. Mr Turunga further submitted his client was not aware of the existence of the Kajiado County Alcoholic Drinks Licensing Act 2014 because the 1st Respondent failed to conduct public participation before enacting the said law. It is a Constitutional requirement that the 1st Respondent conducts proper public participation when enacting the laws. Counsel relied on **Petition No. 318 of 2012 at Nairobi, Law Society of Kenya -VS- Attorney General**.

38. Mr Turunga posited that the 1st respondent failed to give evidence of public participation despite the petitioner having alleged lack of public participation during enactment of this law. No evidence rebutting this allegation has been provided by the Respondent. No evidence of advertisements or any other form of communication inviting stakeholders such as the petitioner for public participation was brought forth. Counsel relied on **Kirinyaga United Bar Owners Association versus County Secretary Kirinyaga County Government Kirinyaga County & 6 Others (2014) EKLR**

39. The Petitioner submitted that the Law the Respondent relies on in its argument was not properly formulated thus the same being a law that is unlawfully being shoved down the Petitioners throats has caused the Petitioner's to suffer punitive licenses and rates and the same ought to be rethought and reformulated noting to have the petitioner's input vide proper public participation.

40. On the apparent reliance on the Alcoholic Drinks Control Act No. 4 of 2010 by the Respondent, Mr Turunga submitted that National legislation prevails over County legislation. In view of this the court needs to interrogate the inconsistency between the Kajiado County Alcoholic drinks licensing Act 2014 and the Alcoholic Drinks Control Act 2010 which is the superior legislation.

41. On the 2nd issue for determination the Petitioner's Advocate submitted that the 2nd Respondent failed to reply to the Petition his reasoning being that the 2nd Respondent drew and filed a response to the Petition vide an affidavit sworn by the 3rd Respondent herein. According to Counsel, Mr. David Kipkemei representing the 3rd Respondent, does not state that he is swearing the Affidavit on behalf of the 2nd Respondent. In the circumstances, counsel asserted, the proper assumption is that the 3rd Respondent swore the Affidavit in reply to the Petition in his capacity as the County Commissioner of Kajiado County who has been sued as the 3rd Respondent. The 2nd Respondent was sued on behalf of the Inspector General of Police and/or the representative of the Government. The 2nd Respondent has not sworn any affidavit despite drawing the affidavit sworn by the 3rd Respondent. Likewise, in his affidavit, the 3rd Respondent has neither stated that he is swearing the affidavit on his own behalf and on behalf of the 2nd Respondent neither has it annexed an authority to plead on behalf of the 2nd Respondent.

42. On the 3rd Issue it was submitted that the 1st Respondent failed to issue licenses for the year 2015/2016 and only issued licenses to the petitioner as an afterthought following the filing of the petition. As a result of this, various members of the Petitioner suffered in the hands of the police and were charged in court for offences relating to the licenses yet it was the Respondent who had neglected their duty to issue the licenses on time.

43. On the 4th and 5th issues it was submitted that the 3rd Respondent is properly enjoined in the Petition. Counsel's reasoning was that the office of the County Commissioner replaced the office of the provincial Commissioner in the former Constitutional dispensation. Therefore, the 3rd Respondent being an administrator of the National government at County level has a duty to administer the Administration Police in his County and is properly enjoined in the Petition. For this submission, Counsel invited the court to the Court of Appeal's position in

Minister For Internal Security and Provincial Administration v Centre For Rights Education & Awareness (Creaw) & 8 others 2013 KLR

44. It was submitted that the Respondents are responsible for the harassment of the petitioner and that they had not denied this averment. On the contrary, Mr. Turunga submitted, the Respondents acknowledge the assertions of the Petitioner but distance themselves from any such acts.

45. On the sixth issue Mr Turunga for the Petitioner submitted that his client's rights have been grossly violated. He relied on the witness statements and the documents filed in support of the Petitioner's petition for this submission. He went on to state that Article 31 of the Constitution provides for right to property including the right not have their property searched or seized. Part of the documents filed by the Petitioner include an application filed by the Petitioner's advocate for release of exhibits in a case where one of the members of the Petitioner had been charged with a liquor related offence and liquor from her premises seized. The application sought to have the exhibit in the matter released after the Prosecution withdrew the matter but to date the same has never been returned to the accused in the matter.

46. Addressing the 7th and 8th issues, the Petitioner's counsel submitted that to curb the harassment only County Askaris should be tasked with enforcement of liquor licensing as opposed to the general Police force as this was in line with Part 2 of the Fourth Schedule of the Constitution. Counsel submitted that there was an inconsistency between Section 50 of the Alcoholic Drinks Control Act 2010 and Part 2 Schedule 4 of the constitution. His reasoning was that while the Act provides for enforcement of liquor licensing and empowered authorized officers to enforce liquor licensing, it also states that other than the authorized officers appointed by the minister an authorized officer may be an officer empowered by any other act to enforce law and order. This is inconsistent with the provisions Part 2 of the Fourth Schedule of the Constitution which confers all the responsibility of liquor licensing including but not limited to enforcement to the County Government.

47. Counsel then asked the court to interpret paragraph 5 of the Fourth Schedule of the Alcoholic Drinks Control Act 2010.

48. On the last issue, Mr Turunga asked this court to find the impugned licenses as punitive and diverse. In addition, he wanted the court to compel the Respondent to consolidate its various licenses into a single fund for ease of payment and the amounts payable be revised downwards. Counsel reiterated his position that the 1st Respondent failed to conduct public participation and came up with rates which the Petitioner deems punitive and inappropriate and thus the said rates ought to be revised noting to have proper public participation by all the stakeholders, the Petitioner included.

49. Counsel concluded by submitting that costs follow the event.

1ST RESPONDENT'S SUBMISSIONS

50. The 1st Respondent's advocate submitted that the Petitioner's pleadings did not incriminate the 1st Respondent and that the reliefs sought by the Petitioner were amorphous and sporadic.

51. Counsel submitted that looking at all the witness statements by the petitioner there is a complete disconnect between the witnesses as to what their grievances are. While others talk of purported excessive fees others complain of being accused of operating beyond lawful time.

52. Mr Kakai for the 1st Respondent submitted that schedule 4 of the constitution authorizes county governments to regulate trade license and pursuant to that the county enacted the Kajiado County Alcoholic Drinks Act of 2014.

53. According to the 1st Respondent, the main issue was whether the 1st respondent has the right to raise revenue for better service delivery to its residents including the petitioner. It was submitted that this a constitutional mandate under Article 175(b) and Article 209. Mr Kakai relied on two authorities that have upheld the right of county governments to impose taxes. The authorities relied upon were **Nairobi Petition No. 532 Of 2013, Petition No. 12, 35, 36, 42, & 72 Of 2014 And Judicial Review Misc. Application No. 61 Of 2014(Consolidated)** and **Nairobi HC Petition No. 14 Of 2016 Eastleigh Business Association V Nairobi City County**

54. Mr Kakai submitted that on the basis of the aforementioned authorities the court should find that the grievances complained of are baseless and dismiss the petition with costs.

DETERMINATIONS

55. Having set out the basis for this case, I find that the main issues for determination are:

- a. Whether the Petitioner's rights and fundamental freedoms have been or threaten to be infringed by the Respondent
- b. Whether the Petitioner is entitled to the remedies sought

56. I will approach the issue of whether the Petitioner's rights have been violated by addressing the issues raised in their submissions. Before going into the substantive issues to do with the alleged violation of human rights, it is in order to address the preliminary issues. In my view these are whether failure by the 1st Respondent to respond to the amended Petition is tantamount to an admission of the contents of the petition, whether the 2nd Respondent replied to the Petition and whether the 3rd Respondent is properly enjoined in the petition

57. On whether failure to respond to the amended petition is akin to an admission of its contents, I am reluctant to hold so. The amendment to the Petition was for joinder of the 2nd and 3rd Respondents occasioned by directions from the court in line with Section 5 of the Practice and Procedure Rules 2013 for the Protection of the Fundamental Freedoms. This was done as some of the issues raised in the Petition affected the

3rd Respondent as allegations were made as to the conduct of officers under the 3rd Respondent. The substance of the amended petition was similar to the original petition. As such I am of the opinion that the 1st Respondent felt that it had already addressed the issues in its reply and affidavit.

58. The preceding paragraph adequately answers the question of whether the 3rd Respondent was properly joined in the Petition. To reiterate, the Petition made allegations against officers under the 3rd Respondent and it is only prudent that the 3rd Respondent be enjoined in order to respond. Section 5 as mentioned above gives the court the power to enjoin any person whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter.

59. Regarding whether the 2nd Respondent replied to the petition, my position is that this is not fatal to the petition nor does it affect it in the least. In a constitutional petition, the court has the power to hear and determine the petition in the respondent's absence as per Section 16(1) of the Practice and Procedure Rules 2013 for the Protection of the Fundamental Freedoms.

60. Turning to whether the issuance of licenses by the 1st Respondent was an afterthought and reactionary, this court finds that it cannot police the manner in which the 1st Respondent carries out its administrative functions. The timetable of issuance of licenses is not the province of this constitutional court and as such this court cannot speak to how a constitutionally created body carries out its functions for as long as the body acts procedurally. No evidence has been adduced by the Petitioners to prove that the 1st Respondent's action was not procedural.

61. The Petitioner asks this court to define an authorized officer under section 50 of the Alcoholic Drinks Control Act and in operation under the devolved system of governance as well as elaborate what the hours of operation of a Bar and Restaurant are as contemplated by the fourth Schedule of the Alcoholic Drinks Control Act No. 4 of 2010.

62. Section 50 provides:

50. Authorised officers

(1) The Minister shall, upon recommendation by the respective District Committee, appoint for each district, any person or class of persons to be authorised officers for purposes of this Act.

(2) The Minister shall issue a certificate of appointment to every person appointed under this section.

(3) Notwithstanding the provisions of this section, the following officers shall be deemed to be authorised officers for the purposes of this Act—

(a) public health officers appointed under the Public Health Act (Cap. 242); and

(b) any other person upon whom any written law vests functions of the maintenance of law and order.

63. The Petitioner in their submissions alleged that this section was inconsistent with Schedule 4 Part 2 of the Constitution with regards to liquor licensing. I do not agree with this position. Section 50 confers upon any other person upon whom written law vests functions of the maintenance of law and order power as an authorised officer. Part 2 Schedule 4 of the Constitution is concerned with the powers of the county government. The Petitioner submitted that liquor licensing and by extension enforcement of licenses is the purview of the County Government. This is indeed the case. However, the County Governments are at liberty to choose which authorised officers can carry out this mandate for as long as they are provided for under the law, which is the scenario were faced with in the instant case.

64. The Fourth Schedule of the Alcoholic Drinks Control Act No. 4 of 2010(Regulations) is very clear on the operating hours of a bar and restaurant, I do not see the need for further explanation.

65. The Petitioners submitted that the Kajiado County Drinks Control Act, 2014 was passed without public participation and as such they only became aware of its existence once the Petition was filed.

66. The issue of public participation has been extensively discussed in the years since the passing of the new constitution. The courts have pronounced authoritatively on this issue. The High Court in **Petition 532 of 2013 & 12, 35, 36, 42, & 72 of 2014 & Judicial Review Miscellaneous Application 61 of 2014 (Consolidated)** stated:

‘Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates. It is my view that it behooves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspects as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas, national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.’

67. In the instant case, the Petitioners submit that they only became aware of the Act when the Petition was filed as the Act was not subjected to public participation before it was passed. However, an examination of the evidence on record reveals that representatives of the Petitioner held various meetings with the 1st Respondent to discuss issues concerning licenses that were ostensibly issued pursuant to the Kajiado County Alcoholic Drinks Act, 2014.

68. The factual matrix of the case points out to a scenario where the Petitioners were not only aware of the existence of the Act but that they also actively engaged the 1st Respondent in trying to resolve issues surrounding the licenses under the Act. For the Petitioners to invoke the issue of public participation when they now feel aggrieved by the 1st Respondent and go as far as claim to not be aware of the existence of the Act is rather disingenuous.

69. While this court acknowledges the importance of Public Participation in the current Kenyan constitutional dispensation, the same cannot be used as a defence by an insincere Petitioner. The evidence speaks to the fact that the Petitioners were aware of the existence of the Act. This court is inclined to believe that the Petitioner resorted to using the issue of public participation to draw the court's attention and have it come to its aid.

70. The Administration Police Service is established under Article 243(2) (b) of the Constitution. The National Police Service Act No. 11A of 2011 at Section 27 sets out the functions of Administration Police as:

The functions of the Administration Police Service shall be the—

- (a) provision of assistance to the public when in need;
- (b) maintenance of law and order;
- (c) preservation of peace;
- (d) protection of life and property;
- (e) provision of border patrol and border security;
- (f) *provision of specialized stock theft prevention services;*
- (g) protection of Government property, vital installations and strategic points as may be directed by the Inspector-General;
- (h) rendering of support to Government agencies in the enforcement of administrative functions and the exercise of lawful duties;
- (i) co-ordinating with complementing Government agencies in conflict management and peace building;
- (j) apprehension of offenders;
- (ja) collection of criminal intelligence;
- (k) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

71. From the description, it is clear that one of the functions of the Administration police is to maintain law and order. This in effect puts them under the category of authorised officer as contemplated under Section 50 of the Alcoholic Drinks Control Act, 2010.

72. The Petitioners allege harassment on the basis that the Administration Police would go into their various establishments and ask for licenses, which they admit they were operating without albeit because the County Government had not issued them with licenses.

73. From where I stand, the Administration Police were carrying out their mandate as per the law. This cannot be tantamount to harassment.

74. The Petitioner contended that their rights under Articles 31(b) and Article 40 of the constitution had been violated. Article 31 provides:

31. Every person has the right to privacy, which includes the right not to have—

(b) their possessions seized;

75. Article 40 stipulates that:

40. Protection of right to property

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property

(a) of any description; and

(b) in any part of Kenya.

(2) *Parliament shall not enact a law that permits the State or any person—*

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) **The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five;

or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) **Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.**

(5) **The State shall support, promote and protect the intellectual property rights of the people of Kenya.**

(6) **The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.**

76. According to the Petitioner, the seizing of their property by the agents of the 3rd Respondent is an affront to their right to property. Looking at it objectively, the Administration Police Officers were carrying out their mandate as per Section 60 of the Alcoholic Drinks Control Act 2010 which provides:

60. Seizure

(1) **During an inspection under this Act, an authorised 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.**

(2) **The authorised officer may direct that any alcoholic drink or thing seized be kept or stored in the place where it was seized or that it be removed to another place.**

(3) **Unless authorised by an officer, no person shall remove, alter or interfere in any manner with any alcohol, alcoholic drink or other thing seized.**

(4) **Any person from whom an alcoholic drink or thing was seized may, within thirty days after the date of seizure, apply to the High Court for an order of restoration, and shall send notice containing the prescribed information to the Minister within the prescribed time and in the prescribed manner.**

77. This court finds that the 3rd Respondents Actions were within their mandate as the law provides for seizure of property and the 3rd Respondents acted procedurally as the Petitioners were in contravention of their mandate. As a result, this court finds that the Petitioners rights were not violated.

78. Section 87 of the National Police Service Act establishes the Internal Affairs Unit whose functions, under Section 87 (2), are to receive and investigate complaints against the police. The Independent Policing Oversight Authority also has power, under Section 7 of the Independent Policing Oversight Authority Act, No. 35 of 2011, to investigate the conduct of police officers. It is this courts considered view that the allegation of harassment by the Administration Police should be directed to these forums.

79. The yardstick used in enforcement of rights that are fundamental under our constitution that have been threatened or infringed the burden of prove rests with the petitioner. . The specific provisions and evidence in support of such acts of infringement or threats is to be precisely stated. This is the legal position as illustrated In the case of **Anarita Karimi Njeru vs R 1979 KLR 154 where** the court enshrined the principle in our jurisprudence in the following passage.we would however again stress that if a person is seeking redress from the High Court

or an order which invokes a reference to the constitution, its important if only to ensure that justice is done in his case that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.

80. Principally the petitioners who refer themselves in the name and style as Isinya Bar Association made references to various provisions of the constitution. At the heart of the dispute as alleged by the petitioners is a contravention of Article 29 (a) 31 (b) and Article 40 (1) of the constitution. For purposes of this petition Article 29 provides for right to freedom and security of the person while Article 31 safeguards right to privacy which includes right not to have

a. Their person, home or property searched

b. Their possession seized.

81. In Article 40 protection of right to property of any description owned individually or correctively is clearly protected. The petition dated 29th March 2017 according to the petitioners was precipitated by the harassment, arrest indictment of their employees and seizure of the alcoholic drinks. That the police officers action on trumped-up charges ensured that the petitioner's employees were fined and in default sentenced to prison terms. They also contended that the seized Alcoholic drinks were forfeited to the state denying them the much it needed income.

82. I have perused the affidavit sworn by representatives of the petitioners and the respondents reply on their involvement to a certain extent in the enforcement of the Kajiado County Alcoholic Drinks Control Act 204.

83. As I have stated elsewhere in this ruling the adjudication of criminal issued arising out of the action by agents, employees or servants of the respondents was referred to the chief magistrate court at Kajiado. The same constitution under Article 50 (1') provides "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independence and impartial tribunal or body.

84. Upon determination by such a court or tribunal any aggrieved party has a right to appeal to the superior courts i.e High Court of Kenya. Article 50 of the constitution makes specific provision for the jurisdiction of the courts in enforcement of rights to a fair hearing.

Essentially this constitutional court expects the presentation by the petitioners to allege that the primary court considering the charge failed to guard and protect the rights of a fair hearing

In all these allegations no prima facie evidence has been adduced to the scale of a violation or infringement on the bill of rights..This kind of scenario was discussed in the case of RE: Application by **Bahadur1986 L.R.C. (cost) 297 and 298** from the commonwealth court in Trinidad and Tobago as follows:

"The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringement of rights can found a claim under substantive law, the proper course is to bring the claim under the law and not under the constitution"

85. In so under pining and buttressing the right principles on adjudication of rights under the constitution and other institutions created by the same constitution Georges C.J. in the case of **Minister of Home Affairs v Bickle & Others (1985) L.R.C co 755** Noted as follows:

"it is established practice that where a matter can be disposed off without recourse to the constitution, the constitution should not be involved at all. The court will pronounce on the constitutionality of the statute only when it is necessary for the decision of the case to do so. The Judge went on to add that: Courts will not normally consider a consistence question unless the existence of a remedy depends on it. If a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the rights"

86. The provisions of Article 50 (1 and 6) above are framed in a manner which gives an aggrieved party in regard to a conclusion or order made by the trial court to appeal to, or apply for review by a higher court as prescribed by law. The complaints in this petition would have been raised at the trial court or on appeal or review to the superior court.

There is no evidence that prosecution mounted against the petitioners before the subordinate court was in breach of constitution or any written law.

87. The material dispute of facts generated by the petition would be adequately resolved by the magistrate court and any grievance approach the High Court on appeal or review.

88. As matters stand, the law fullness of the arrest, seizure of alcoholic drinks or offences under the Kajiado County Alcoholic Control Act are matters that do not fall within the jurisdiction of this constitutional court.

89. The requirements of lawful arrest and elements of the petitioners personal liability are protected by Article 49 of the constitution. In enforcement of the provisions under Article 49 is given effect by section 21, 22, 23, 24 and 25 of the criminal procedure code (cap 75) of the laws of Kenya.

90. It is generally stated that any police officer empowered by law who has reason to believe that the person to be arrested has entered into or within any place and has reasonable grounds to suspect of having committed any of the offences mentioned in any statute may execute an arrest without a warrant.

91. We are not told that during an arrest by the 1st and 2nd respondents officers the petitioners were treated in a manner which was inhuman, degrading and in breach of human dignity.

To this end on the legal provisions I cite the English cases of **Dumbell vs Roberts 1944 ALL ER 326** where Scott L.J.

“The power possessed by constable to arrest without warrant – provided always that they have reasonable grounds for their suspicion is evaluable protection to the community; but the power may easily be abused and become a danger to the community; but the power may easily be abused and become danger to the community instead of a protection.

92. The protection of the public is safeguarded by the requirement, alive of common law and, so far as I know of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt.

93. Under Article 24 (1) the constitution authorizes limitation of right and fundamental freedoms in cases like the ones the petitioners are complaining about.

94. In my view the arresting officer had reasonable grounds that an offence under the Kajiado County Alcoholic Drinks Act of 2014 and the alcoholic drinks Control Act No. 4 of 2010 have been violated. This is evidenced by the fact that the petitioners after the arrest were arraigned before a magistrate’s court for them to take plea..In this respect the provisions under Article 50 on the rights to a fair hearing takes centre stage to insulate the accused persons from any violation or infringement during the judicial proceedings.

95. The validity of the statutory provisions on what constitutes an offence under the two acts have not been challenged.

96. The decision of the House of Lords in the case of **Associated Provincial Picture**.

Houses ltd vs Wednesbury Corporation 1948 1 KB 223 involving similar question of law held and said:

“Suspicion by itself, however will not justify an arrest. There must be a factual basis for it of a kind which the court would adjudge to be reasonable. The facts may be within the arresting constable own knowledge or have been reported to him, when there is an issue on a trial as to whether a constable had a reasonable course, is claim to have had knowledge or to have received reports on which he relied may be challenged. It is within this context that there a may be evidential issue as what he believed to be the fact. But it will be for the court to adjudge what were the facts which made him suspect innocence person he arrested was guilty of the offence which he was investigating”

97. Applying the above principles it is clear from the petitioner’s affidavits the respondents agents, servants and or employees arrested them and brought them before a magistrate who processed the case accordingly. It is at that stage of the proceedings the petitioner ought to have challenged that arrest and seizure of the Alcoholic Drinks. The decision arising out of the magistrate court is subject to an appeal or review.

These issues cannot be determined by the High court more so through a constitutional petition also hold the view that the right to privacy under Article 31 of the constitution

is like all other rights as provided for in the bill of rights which are subject to the imitation clause in Article 24 of the same constitution.

The petitioners have alleged that the arrest and seizure of their property was an infringement of their rights to private property what they have failed to do is to demonstrate that the police officers infringed their rights in a way that is not provided for under the constitution and provisions of enabling statutes.

“We would however again stress that if a person is seeking redress from the High court or an order which invokes a reference to the constitution, it is importance (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed” see ANARITA CASE SUPRA.

98. Finally, on the issue of punitive taxes, it is now trite law that county governments have the power to impose taxes to help in the collection of revenue.

99. The courts in **Nairobi Petition No. 532 Of 2013, Petition No. 12, 35, 36, 42, & 72 Of 2014 And Judicial Review Misc. Application No. 61 Of 2014(Consolidated)** and **Nairobi HC Petition No. 14 Of 2016 Eastleigh Business Association V Nairobi City County** have affirmed this power bestowed upon the County Government by Part 2 Schedule 4 of the Constitution.

100. This court cannot therefore purport to usurp the powers of the County Government to impose and collect taxes.

ORDERS

101. In the upshot, this court finds that the Petition filed on the 29th March 2017 and amended on 28th June 2017 is not meritorious and the same is dismissed but with no orders as to costs.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF APRIL 2018.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Turunga for the petitioners

No appearance for the 2nd and 3rd respondents

Mr. Maseno holding brief for Mr.Kaikai for the 1st respondent