



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CONSTITUTIONAL PETITION NO. 47 OF 2018

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF SECTION 199(1) OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE CONTRAVENTION OF SECTION 23 & 25(1) OF THE COUNTY
GOVERNMENT ACT NO. 17 OF 2012**

AND

**IN THE MATTER OF AN ILLEGITIMATE DOCUMENT (THE KIAMBU COUNTY
ALCOHOLIC DRINKS CONTROL BILL 2018 (PURPORTEDLY VIDE KENYA GAZETTE
SUPPLEMENT NO. 6 OF THE YEAR 2018 AND DATED 21ST FEBRUARY 2018)**

AND

**IN THE MATTER OF KENYA GAZETTE SUPPLEMENT NO. 6 FOR THE YEAR 2018 DATED
7TH FEBRUARY 2018 CONTAINING THE WAREHOUSE RECEIPT SYSTEMS BILL 2018**

AND

IN THE MATTER OF KENYA GAZETTE VOL. CXX-NO. 19 DATED 9TH FEBRUARY 2018.

AND

**IN THE MATTER OF A DOCUMENT (THE KIAMBU COUNTY ALCOHOLIC DRINKS
CONTROL ACT 2018 (PURPORTEDLY VIDE KENYA GAZETTE SUPPLEMENT NO. 7 OF
THE YEAR 2018 AND DATED 9TH MARCH 2018)**

AND

**IN THE MATTER OF A DOCUMENT (KIAMBU COUNTY ALCOHOLIC DRINKS CONTROL
ACT 2018 (PURPORTEDLY VIDE KENYA GAZETTE SUPPLEMENT NO. 7 OF THE YEAR
2018 AND DATED 13TH MARCH 2018)**

AND

**IN THE MATTER OF KENYA GAZETTE SUPPLEMENT NO. 7 OF THE YEAR 2018
CONTAINING LEGAL NOTICE NO. 44 (THE INCOME TAX EXEMPTION AND LEGAL
NOTICE NO. 45 (THE INCOME TAX AMENDEMENT) AND DATED 8TH FEBRUARY 2018**

BETWEEN

**RICHARD MUNGAI KAGIRI SUING AS A MEMBER AND IN THE INTEREST
OF KIAMBU LIQUOR WELFARE GROUP.....PETITIONER/APPLICANT**

AND

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

THE CABINET SECRETARY FOR INTERIOR

AND CO-ORDINATION OF NATIONAL GOVERNMENT...2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. By a Notice of Motion dated 27/04/2018, the Petitioner/Applicant herein sought the following orders:

a) “SPENT

b) **That a conservatory order do issue staying the implementation of the illegitimate document going by the name Kiambu County Alcoholic Control Act, 2018.**

c) **That such further or other reliefs do issues as will meet the ends of Justice.**

d) **That the costs of this Application be provided for.”**

2. The Application is premised on the grounds that the Respondents have published an illegitimate Kenya Gazette Supplement No. 7 of the year 2018 which contains the Kiambu County Alcoholic Drinks Control Act 2018.

3. The Application is opposed by the Respondents.

The Pleadings

4. **Richard Mungai Kagiri** filed a supporting affidavit dated 27th April, 2018. He deponed therein that he is a member of **Kiambu Liquor Welfare Group** and authorised to plead on behalf of by the group. He further stated that the group saw a public notice posted in the Daily Nation Newspaper purporting to commence the implementation of an illegitimate Kiambu County Alcoholic Drinks Control Act, 2018. The Applicant avers that the purported Kenya Gazette Supplement No. 7 of 2018 contains different matters namely, legal notices in respect of Income Tax Exemption and Income Tax amendments.

5. It was asserted that the alleged illegitimate document was never published in the Kiambu County Gazette and the Kenya Gazette. The Applicant further averred that the document has been published one year after the determination of a Petition before Lenaola J, namely, **James Gacheru Kariuki v County Government of Kiambu & Others (2017) eKLR**. The Applicant stated he stands to suffer infringement of his freedom and security by the enforcement of the illegitimate document while the Respondents will not suffer any prejudice, if the application is granted.

The 1st Respondent's Response

6. The 1st Respondent replied to the Applicant's Notice of Motion through an affidavit by **Dr. Martin N. Mbugua**, the County Secretary, Kiambu County. He deponed that the County Government has the legal

mandate to make legislation, under the Constitution. He asserted that the Kiambu County Alcoholic Drinks Control Act, 2018 was published in the Kenya Gazette in strict adherence with the law. Lastly, it was deponed that the Applicant had failed to show how he would suffer prejudice and that the orders sought, if granted, would occasion great prejudice to the fight against illicit brews and alcoholic beverages; the abuse of such alcoholic beverages being rampant in the county. The application was canvassed by way of oral submissions. Parties reiterated the contents in their filed affidavits in arguing the Motion.

The Parties' Arguments

7. The Applicant emphasised that the Kenya Gazette of 9th February, 2018 does not carry the publication of the Kiambu County Alcoholic Drinks Control Act, 2018 as alleged by the Respondents. He asserted that failure to publish the impugned Act as provided that under Article 199(1) of the Constitution has the result that the law cannot take effect as a county legislation. He also relied on Article 260 of the Constitution and Section 25 of the County Governments Act. The Applicant stated that if the orders sought are not granted, he and members of his group will suffer prejudice as they will be subjected to arbitrary arrest and prosecution based on an "illegitimate document".

8. Counsel for the 1st Respondent Mr. Ranja urged the court to consider whether there is a prima facie case established and whether prejudice is likely to be suffered by the Applicant. He pointed out that the impugned Act was already operational.

9. Counsel for the 2nd and 3rd Respondents Miss Mutinda contended that mere apprehension of prejudice by the Applicant cannot suffice to warrant the suspension or stay of implementation of the impugned law. Reliance was placed on the case of **Bishop Kimani & others vs The Attorney General & others (2009) eKLR**. Counsel further argued that the Respondents have made efforts to give effect to devolution, and the instant application is only intended to defeat the exercise of the 1st Respondent's constitutional mandate. The court was urged not to grant the conservatory orders sought.

ANALYSIS AND DETERMINATION

10. The key issue arising from the pleadings and arguments is whether the Kiambu County Alcoholic Drinks Control Act, 2018 has been validly published in the Kenya Gazette as required by Article 199(1) of the Constitution. Article 199(1) of the Constitution provides that County legislation does not take effect unless published in the Gazette.

11. The Applicant's contention is that the Kiambu County Government has published an illegitimate Kenya Gazette Supplement; Kiambu County Alcoholic Drinks Control Bill *vide* Kenya Gazette Supplement No. 6 which, he further contends, actually contains the Warehouse Receipts Systems Bill, 2018. The Applicant avers that the 'illegitimate' document was neither published in the county gazette nor in the Kenya Gazette. The same position is held by the Applicant in regard to the Kiambu County Alcoholic Drinks Control Act, 2018: the Applicant alleges that the purported Kenya Gazette Supplement No. 7 actually contains a notice in respect of the Income Tax Exemption and Income Tax Amendment, a different matter.

12. The Applicant further complained that the Kiambu County Alcoholic Drinks Control Act, 2018 was published one year after the judgment in **James Gacheru Kariuk & 3 others v Attorney General & 11 others [2017] eKLR**, which required that certain county legislation be published within 3 months from the date of the judgment. The Applicant relied on the case of **James Gacheru Kariuk & 3 others v Attorney General & 11 others [2017] eKLR** where **Lenaola J** ordered the Kiambu County Government to regularize the publication of all its County legislations within 3 months, else the legislation would be rendered invalid.

13. The 1st Respondent on the other hand stated that pursuant to due legislative process, the Kiambu County Alcoholic Drinks Control Act, 2018 was published in the Kenya Gazette. They annexed the said

Kenya Gazette supplement No. 7 dated 9th March, 2018. The 1st Respondent emphasizes that there has been abuse of illicit brew within the Kiambu County, hence the need to regulate illicit and licit alcoholic drinks in the region.

14. The court has considered the material placed before it by the parties, by way of affidavits and annexures thereto, as well as the arguments raised in regard to the Motion dated 27th April, 2018. In some respects, the present litigation is a carry-over from the decision of **Lenaola, J** (as he then was) in **James Gacheru Kariuki & 3 others v Attorney and 11 others (2017)eKLR**. In that petition, the petitioners obtained general declarations including the following:

“ i)

ii) It is hereby declared that a County legislation does not take effect unless it is published as such in the Kenya Gazette in line with Article 199(1) of the constitution and thereafter in the County Gazette, if need be.

(iii) The Kiambu County Government shall regularize the publication of all its county legislation in the Kenya Gazette within 3 months failure to which such legislation shall lapse and be in valid. For avoidance of doubt, until such an eventuality, the said legislations such continue to be operative”(sic)

15. The present Petitioner and four others namely, **James Gacheru Kariuki, John Njugi Muigai and Regina Ngonyo Ngige** were variously co-petitioners in the Petitions no. 52 of 2016, 308 of 2015 and 7 of 2016 all consolidated in the above matter. Prayer (b) in **Petition No.308 of 2015** above is substantially similar to prayer (b) of the instant Motion. The impugned law in the former was the Kiambu County Alcoholic Drinks control Act of 2013. The Chief ground raised in the former petitions was the failure by the Kiambu County Government to publish legislation in the Kenya Gazette as required by Article 199(1) of the Constitution.

16. The gravamen of the present petition, as I understand it is that, the Kiambu County Alcoholic Drinks Control Act 2018 which was apparently passed subsequent to the decision of **Lenaola J**, is illegitimate as it has equally not been published as the relevant purported Kenya Gazette Supplements no 7 of 2018 (for the Act), relates to different subject matters. Ditto for the Gazette Supplement no. 6 of 2018 (in relation to the Bill). Thus, the Motion seeking conservatory orders in respect of the impugned law.

17. Pausing there, it is important to note that the impugned legislation herein being annexure “**MM1**” to the Replying Affidavit bears the following title:-

“**SPECIAL ISSUE**”

Kenya Gazette Supplement No. 7 (Kiambu County Acts No. 2).

Under the court of arms are the following words:

“**REPUBLIC OF KENYA**

KENYA GAZETTE SUPPLEMENT

KIAMBU COUNTY ACTS, 2018

CONTENT

Act - PAGE

The Kiambu County Alcoholic Drinks Control Act, 2018 1 ”

At the bottom of the page are the following words:

“PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER NAIROBI”

18. The Petitioner’s annexure **RMK 12** is the special issue of the **“Kenya Gazette Supplement No. 6 (Kiambu County Bill No. 6)”** and is dated 21st February 2018, while annexure **RMK 13** is a special issue of the **“Kenya Gazette supplement No. 6 (National Assembly Bills No. 2)”** dated 7th February, 2018 and included as a supplement in the Kenya Gazette of 9th February, 2018.

19. The annexure **RMK 16** is headed:-

“SPECIAL ISSUE

Kenya Gazette Supplement No. 7

Legislative Supplement No. 4”

It is dated 8th February, 2018 and relates to the Income Tax Act.

20. On the face of it, therefore and without determining fully the merits of the matter, the impugned gazette supplement **MM1** and **RMK 15** appears to have no relation to the annexures **RMK 13,16,17**, which, by their titles are supplements relating to different matters. The mere fact that the supplements bear the words **“Kenya Gazette Supplement No. 6” or No. “7”** does not render them readily comparable for purposes of contradistinction with the impugned publication. Upon a plain perusal of all the gazette supplement copies before the court, it is evident that in each, the bracketed words inserted in the title, after the supplement number therein, appear to refer to different subject matter. The title, of each supplement has to be read in full for purposes of comparisons.

21. It is a legal truism that every statute passed by the national or county legislatures enjoys a presumption of legality. An Applicant seeking conservatory orders must demonstrate a prima facie case with likelihood of success; that there exists real danger that he will be exposed to prejudice as a result of violation of the Constitution, if the orders sought are denied; and that his petition will thereby be rendered nugatory. See Wilson *Kaberia Nkunja v The Magistrate and Judges Vetting Board and others Petition 154 of 2016 (2017) eKLR*.

22. The Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others (2014) eKLR* crystalized the nature of conservatory orders and set out requirements for the grant thereof, including a consideration of public interest, stating:

“(86) “conservatory orders” bear a more decided public-law connotation:Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

Thus where a conservatory order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal cause of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered function in public interest.”

22. In *Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 others (2014) eKLR*, *Mwongo J* emphasising the requirement that a successful Applicant must demonstrate real danger of violation or threat of violation hence prejudice, stated *inter alia* that:

“The danger must be imminent and evident, true and actual and not fiction: so much so that it deserves attention or redress by the court. Thus, an allegedly threatened violation that is

remote and unlikely will not attract the court's attention."

23. In the present case the impugned law has already come into effect and based on the presumption of legality, will stand unless otherwise overturned. In my considered view, the Petitioner has not made a compelling case to demonstrate what prejudice he stands to suffer if the conservatory orders are not granted. The burden of rebutting the presumption of legality of an act of the legislature, even at a *prima facie* level lies, with the person challenging that fact. On the face of it the impugned law, was published and what the Applicant seems to be inviting the court to do at this preliminary stage, is to investigate the finer details behind the apparent publication.

24. There was a tenuous and half-hearted attempt to suggest that the impugned gazettelement of the law was done pursuant to the declarations issued by **Lenaola J**, in the **Gacheru** case. The Petition herein cannot be rendered nugatory where a party has not satisfied the court that he has a compelling *prima facie* case and that he is in real danger of prejudice through violation or threatened violation of the Constitution. Or in other words, prejudice resulting from the alleged violation or threat thereof.

25. The exhortation by **Ibrahim J** (as he then was) in **Kizito Mark Ngaywa v Minister of state for Internal Security and Provincial Administration and another petition No. 4 of (2011)eKLR**, in reiterating his previous decision in **Bishop Jospeh Kimani and Other v Attorney General and Other Petition No. 699 of 2009**, still holds true:-

"It is a very serious legal and constitutional step to suspend the operation of statutes and statutory provisions. The court must wade (in) with care, prudence and judicious wisdom. For the High Court to grant orders in this regard, I think one must at the interlocutory stage actually show that the operation of the legislative provision are a danger to life and limb at that very moment"...

26. Observing that the principle of presumption of constitutionality was a democratic imperative, the learned Judge continued to state that:

"The court to be able to suspend the legislation during peace time where there is no national disaster or war, would in my view be interfering with the independence and supremacy of parliament in its constitutional duty of legislating lawLegislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservatory orders to suspend the operation of statutes, statutory provisions or even regulations should be wholly avoided except where the national interest demand and situation is certain".

27. Coincidentally, the Petitioner in **Kizito Mark Ngaywa** had sought a declaration to the effect that a section of the Alcoholic Drinks Control Act of 2010 was inconsistent with the Constitution. In the instant case, the challenge to the Kiambu county Alcoholic Drinks Control Act appears to be based primarily on the question whether the said act was properly gazetted in terms of Article 199(1) of the Constitution. A determination of this question will require a full hearing to investigate the circumstances of the impugned publication *via* the Kenya Gazette Supplement or otherwise.

28. In light of the foregoing I am not persuaded that the Petitioner has made out a case warranting the granting of the conservatory orders sought. The Motion dated 27th April 2018 is dismissed. Costs will abide the outcome of the petition.

Directions on the hearing of the petition will be given on 17th September, 2018.

Delivered and signed at Kiambu this 29th Day of June, 2018.

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C. Meoli

JUDGE

In the presence of:

Applicant/Petitioner – In person

Mr. Ranja for the 1st Respondent

Miss Mutinda for 2nd and 3rd Respondents

Nancy Mburu Court Assistant