



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CONSTITUTIONAL PETITION NO. 8 OF 2018**

**In the Matter of:-**

**Articles 1 (1), (3) (B) ,1 (4),2,3,10,19,20,21,22,23,27,28,40,47,50,73,174,176,185 & 258 of the Constitution of Kenya and Functions of the County Government in the Fourth Schedule of the Constitution**

**And**

**Section 87,91,92,93 & 97 of the County Government Act**

**BETWEEN**

**SOUTH IMENTI BAR OWNERS S.H.G THROUGH**

**ITS CHAIRMAN JAMES GIKUNDA NTARAGWI.....PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF MERU.....RESPONDENT**

**RULING**

**Injunction in constitutional petition**

[1] The Notice of Motion dated 12<sup>th</sup> March 2018 is seeking *inter alia*, orders restraining the Respondent, its workers, agents and/or employees or anyone working at its behest from interfering with the Petitioners business operating as bars and restaurants pending the hearing and determination of this petition.

[2] The application is expressed to be brought under Articles 1 (i), (b),1 (4), (5), 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 40, 47, 50, 73, 174, 176, 185 and 258 of the Constitution of Kenya, 2010. It is supported by the grounds set out in the Motion and affidavit sworn by James Gikunda Ntaragwi. It was deposed *inter alia* that a majority of the applicant's members operates bars and restaurants which are ordinarily licensed to operate from 12 noon to 11 PM since restaurants sell food. And that from 2017 going backwards, the Petitioners members had applied for and licensed to operate bars and restaurants. However, this year when they applied for similar licenses, the Respondents, without any valid reason approved licenses for general retail business which was outside the members businesses. It was averred further that the Respondent has not given them any reason why the Petitioners' applications for bar and restaurants were not approved. They stated that they had invested in the business of bar and restaurants and that the Respondent's decision to deny them license for bar and restaurants was arbitrary for they were not previously informed of the reason for the denial of license.

[3] The Applicants filed submissions pursuant to the directions issued by the court on 20<sup>th</sup> March 2018. According to the Applicants, their application was anchored on Article 27 and 40 of the Constitution which provides: (1) that every person is equal before the law and has the right to equal protection and equal benefit of the law; and (2) that every person has a right either individually or in association with others to acquire and own property and the state shall not deprive a person of property of any description or of any interest in or right over property, respectively. They argued that the Constitution was the supreme law of the land and no law passed in contravention of the Constitution will stand; such law is null and void. It was further submitted that Meru County Alcoholic Drinks Control Act, 2014 as repealed and re-enacted in 2017 was in contravention of Articles 27 and 40 of the Constitution, and is a nullity and unconstitutional.

**Respondent: we merely enforced the law**

[4] The application was opposed via a Replying Affidavit filed in court on 20<sup>th</sup> March 2018, by Gitonga Akubu the Director of enforcement at Alcoholic Drinks Control Board of the Respondent who deposed inter alia that the Meru County Alcoholic Drinks Control Act of 2016, repealed the Meru County Alcoholic Drinks Control Act 2014. And the Alcoholic Drinks Control Board merely enforced the law in accordance with their functions set out in section 10 of the 2016 Act which is to:-

**“receive, review, approve and grant licenses in accordance with the applications recommended by the sub county committees.”**

He further deposed that the Third Schedule of the 2016 Act, (types of licenses) did not provide for the issuance of a **“bar and restaurant license”**.

[5] The Respondent also filed submissions and argued the Respondent could not issue the Applicant’s members with licenses for bar and restaurant as no such licenses were provided for in the applicable law. And that the Respondent simply followed the law as laid out by the Meru County Alcoholic Drinks Control Act, 2016. It was not, therefore, tenable for the applicant to allege that the Respondent was forcing them to take up licenses that they had not applied for. They are enjoined to enforce statutes that are passed by the County Assembly which is the legislative arm of the County Government. And they cannot speculate on the intention of the statute passed by the County Assembly, for, it was trite law that laws enacted are presumed to be valid and constitutional unless a court of law declares otherwise. Therefore, Meru County Alcoholic Drinks Control Act 2016 is valid and constitutional. In any event, the Respondent argued that the petitioners have not filed proceedings to specifically challenge the constitutionality and validity of the said Act for these proceedings are merely for injunction. Consequently, the Respondent contended that the applicants had failed to prove on a prima facie basis, how their rights under Article 40 of the Constitution of Kenya had been infringed in view of the fact that all laws passed by the County Assembly are deemed to be constitutional until proved otherwise.

## **DETERMINATION**

### **Injunction**

[6] The application before me is seeking for a temporary injunction within a constitutional petition based on alleged breach of the Constitution and infringement of rights. Provision of the relief of an injunction in constitutional petitions is doubtless a development of law. See article 23 of the Constitution which gives court authority to grant appropriate orders including an injunction in order to uphold and enforce the Bill of Rights. Article 23 of the Constitution is reproduced below:

#### **23. Authority of courts to uphold and enforce the Bill of Rights**

**(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.**

**(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.**

**(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—**

**(a) a declaration of rights;**

**(b) an injunction; [underlining mine]**

**(c) a conservatory order;**

**(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**

**(e) an order for compensation; and**

**(f) an order of judicial review.**

Such development of law on injunctions orchestrated by the new Constitution justifies what Ojwang Ag. J. (as he then was) stated in the case of **SULEIMAN vs. AMBOSELI RESORT LTD (2004) eKLR 589** at page 607 that:-

**‘...counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel on that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:-**

**“A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”....”**

*Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella Vs Cassman Brown the court has had to consider the following questions before granting injunctive relief.*

*i) Is there a prima facie case....*

*ii) Does the applicant stand to suffer irreparable harm...*

*iii) On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.....*

[8] The constitutional impetus as well as the entry of the overriding objective into our law now requires courts to take a much wider view of justice in order to do justice for all the parties in a suit. I will therefore apply the test I have set out above to the facts of this case. It is not in doubt that, sometimes this year, the applicants applied for license to operate bar and restaurant but the Respondent only approved licenses to operate general retail business as per the Meru County Alcoholic Drinks Control Act 2016. They argued that the approved licenses were outside the members' businesses. The applicants further contended that the Respondent did not give them any reason as to why they did not approve license to conduct the business of bar and restaurant which they were previously licensed to conduct.

[9] The Respondent's argument was that the only licenses which an applicant may be granted are specifically set out in the Third Schedule of the Meru County Alcoholic Drinks Control Act 2016. And that they simply enforced the said law in approving the licenses for the applicants. They saw these proceedings as an attempt to have the Respondent punished for enforcing a law which is valid and constitutional until declared otherwise.

### **Presumption of validity and constitutionality of legislation**

[10] Upon consideration of this application, the reply thereto and the rival submissions by the parties, one argument stands to be of preliminary significance. The argument is that; the validity or constitutionality of the Meru County Alcoholic Drinks Control Act 2016 has not been specifically challenged in the Petition, hence, that question cannot be decided at an interlocutory stage or orders be issued on the basis of submissions of counsel in that genre. I agree with the Respondent that a challenge on the validity and constitutionality of a legislation is a serious matter which must be clearly pleaded. I have perused the petition. It does not specifically indict or ask the court to declare the Meru County Alcoholic Drinks Control Act 2016 to be invalid and unconstitutional. The argument has been offered in the submissions by the applicants. However, the less I say about that point at this interlocutory stage the better in order to avoid any prejudice to any party in that respect. Accordingly, I will presume the Meru County Alcoholic Drinks Control Act 2016 to be valid and constitutional for purposes of the application for injunction.

### **Prima facie case**

[11] Coming back to the main; the applicants are complaining that the action of denying them a licence for bar and restaurant is an infringement of their right to property, thus, inconsistent with article 40 of the Constitution. Is the action of the Respondent a violation of the Constitution or right to property?

### **License must be in accordance with the Act**

[12] The Respondent argued that, in granting license to the applicants, they merely acted in accordance with the Meru County Alcoholic Drinks Control Act 2016 which provides the licenses to be issued. Section 26 (1) of the Meru County Alcoholic Drinks Control Act 2016 provides for the type and conditions of licenses that may be issued as follows:

*“The several licenses which may be granted under this Act shall be those specified in the Third Schedule.....”*

[13] The Third Schedule provides the licenses that shall be issued under the Act are; **manufacture's license, wholesale license, retail license and distributors license**. The Act clearly does not provide for bar and restaurant license as contended by the Petitioners. As long as the Act remains in force, licenses for manufacture, sale and distribution of alcoholic drinks shall be regulated by the Act. And any licence issued must be in accordance with the Act. To apply for or expect issuance of a licence otherwise than in accordance with the enabling legislation is naïve and a violation of the law. The applicants' applications in issues were governed by the Meru County Alcoholic Drinks Control Act 2016. Of significance to note is that they applied under the repealed Act of 2014 which was wrong and misplaced. They also applied for licenses which were non-existent licenses in the law applicable, to wit, bar and restaurants. The applicants admitted and the annexures show that their previous licenses were for bar and restaurant under the repealed Act. None of the licenses still subsists; they expired on 31<sup>st</sup> December 2017. Again, it has not been shown that an existing license was affected by the new Act. As such, no property or right can attach to expired licence. Thus, arguments on property right front based on expired licenses do not hold sway. Notably, an application for or renewal of licence is not granted automatically. It may be granted or declined in accordance with the enabling legislation. The applicants are licensed in accordance with the applicable law unless they wish to return the license3s. See their arguments that the Respondent should have simply rejected the application for bar and restaurant if it was not in accordance with the law. This is quite a brave statement but I wish they wrote formally to the Respondent asking for recall of the licenses they believe is not appropriate. The foregoing notwithstanding, at this stage and for purposes of the application for injunction, I will only state that the applicants have not established a violation of right or denial of licence. Therefore, is there a prima facie case which has been established? In the case of **MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS CIVIL APPEAL NO 39 OF 2002** prima facie case in civil cases was said to be:-

*“...a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a*

*right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.*

There is no prima facie case which has been established as to bring conviction to this court that a right has been infringed as to call for an explanation or rebuttal thereof.

[14] I apply the other test on whether the applicants will suffer irreparable damage unless an injunction is granted. Seldom will an applicant who has not establish a prima facie case argue successfully that he will suffer irreparable damage. In this case, the applicants are licensed in accordance with the existing law. They have not establish a clear case that they will suffer irreparable damage. In totality, by whatever yardstick, the balance of convenience tilts in favour of denying the injunction. Accordingly, I dismiss the application dated 12<sup>th</sup> March, 2018 with no orders as to costs. It is so ordered.

**Dated, signed and delivered in open court at Meru this 23<sup>rd</sup> July, 2018.**

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**F . GIKONYO**

**JUDGE**

In the presence of:

Mr. Muchomba advocate for Kithinji advocate for Applicant

Mr. Mwirigi advocate for Respondent – absent

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**F . GIKONYO**

**JUDGE**