



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 453 OF 2016

MUIMARA ESTATE RESIDENTS ASSOCIATION PETITIONER

Versus

THE NAIROBI CITY COUNTY 1ST RESPONDENT

LICQOUR LICENSING COMMITTEE

EMBAKASI SOUTH 2ND RESPONDENT

KARIUKI KIMITI 3RD RESPONDENT

JUDGMENT

1. The Petitioner, a resident's association of Muimara Estate in the City County of Nairobi, filed this petition against the *City County of Nairobi*, The *Liquor Licensing Committee of Embakasi South* and *Kariuki Kimiti*, as the 1st, 2nd and 3rd respondents respectively challenging the 1st and 2nd respondents' decision to grant the 3rd respondent a liquor selling licence and the 3rd respondent's action of operating a bar and beer selling joint within Muimara estate.

2. The petitioner states that the Estate has young and School going children but that notwithstanding, the 2nd respondent which operates under the supervisory role of the 1st respondent granted a liquor selling license to the 3rd respondent and the 3rd respondent used the said license to put up un planned structures within the Estate and converted them into beer selling and drinking clubs despite objections from the residents.

3. The petitioner contends that the bar(s) and club(s) put up by the 3rd respondent have become a nuisance to the residents and are causing bad influence to their children thus violating their rights and fundamental freedoms. The petitioner has now sought the following reliefs:-

- a. A declaration that the respondents have infringed on the rights of petitioner's members and all the resident of Muimara Estate in Nairobi by allowing establishment and operation of a bar and alcoholic selling business within the estate.*
- b. A declaration that the 1st and 2nd respondents have failed in their constitutional right and mandate by allowing the 3rd respondent to operate a bar and night club within the petitioner's members' residences which in itself is breach of the law governing sale of alcoholic drinks.*
- c. An order directed to the 1st and 2nd respondents ordering them to withdrew, cancel and revoke all licenses or permits granted to the 3rd respondent or any other persons for operation of a bar, club or alcoholic selling business within the petitioners' estate.*
- d. An order of injunction restraining the 1st and 2nd respondent from licensing, allowing or permitting the 3rd respondent of any other persons to operate a bar, club or alcoholic sells business within Muimara Estate in Nairobi.*
- e. An order of injunction restraining the 3rd respondent from opening, operating or running a bar, club or alcoholic selling business within Muimara Estate in Nairobi.*

f. The respondents do pay the costs of this petition.

1st and 2nd respondents' response

4. The 1st and 2nd respondents filed grounds in support of the petition dated 11th November 2016 and filed in court on 14th November 2016. The respondents state that although they are responsible for regulating licensing of liquor trading and business within the county, the 3rd respondent ought not to have been issued with a liquor selling license, was not issued with such a licence and that he is illegally operating the business within a residential area in violation of section 7(2) (b) of the Nairobi City County Alcoholic Drinks Control and Licensing Act 2014. The 1st and 2nd respondents state firmly that they do not issue liquor licenses to businesses operated in residential areas since this is prohibited by section 11 of the Act.

5. It is also contended that the 1st respondent has never issued structural approvals to the 3rd respondent for construction of any structures in the petitioner estate thus the 3rd respondent is conducting illegal business which is a health hazard to the inhabitants of the estate and a clear breach of the law.

3rd Respondent's Response

6. The 3rd respondent filed grounds of opposition dated 16th December 2016 and filed on the same day in answer to both the application and petition, contending that he is only a landlord but not proprietor or licensee of any liquor selling license(s) and that he has been wrongly enjoyed in this petition.

Petitioner's Submissions

7. ***Miss Mutemi***, learned counsel for the petitioner relied on their written submissions dated 24th October 2017 and filed in court on 2nd November 2017 in arguing the petition. In the written submissions, it is contended the 1st and 2nd respondents have denied authorising the 3rd respondent to operate liquor selling club(s) within the petitioner estate; that the 3rd respondent as owner of the premises is operating a bar though he contends that he is only a landlord. According to the petitioner's counsel, the business is being conducted in the estate illegally given the position taken by the 1st and 2nd respondents.

8. The petitioner maintains that the noise, quarrels and yells from the bar infringe on the residents' right to dignity given the obscene language used by patrons in the bar. The petitioner further contends that the presence of the bar infringes on their right to a health environment and relies on the case of ***A.N.N v Attorney General*** [2013] eKLR on the definition of dignity. They also rely on other decisions and urge the court to allow the petition. The respondents have not filed submissions to the petition nor attended the hearing.

Determination

9. I have carefully considered the petition, the responses as well as submissions on behalf of the petitioner. This petition raises only one issue for determination, namely; whether the respondent's bar business has caused a violation of the petitioner's fundamental rights. The petition concerns the right of residents to live in dignity, tranquility and without disturbance. The residents live in a residential area and claim that the 1st and 2nd respondents have illegally allowed the 3rd respondent to operate a liquor selling business within the estate to the detriment of the residents and their children.

10. The 1st and 2nd respondents have denied granting a liquor selling license for the 3rd respondent and have agreed with the petitioner that the law does not allow selling of liquor in residential areas. They therefore contend that since they have not issued the 3rd respondent with a licence, he is illegally operating liquor selling business. The 3rd respondent has denied that he is operating liquor selling business in the estate contending that he is only a landlord but has not disclose who the tenant is.

11. Even without going into details on the issue of rights and fundamental freedoms of the residents, there is the question of whether the business, if any, that is being operated within the petitioner estate is lawful. The 1st and 2nd respondents have denied issuing a liquor selling licence to the 3rd respondent to operate such business in the estate. The 3rd respondent though has denied selling liquor within the estate, he however contends that he is only a landlord. If indeed the 3rd respondent is a landlord, he would surely know who the tenant is and what the tenant does in the premises.

12. Failure to disclose the name of the tenant and what business the tenant does is a clear testimony that the 3rd respondent is hiding something from the court. With the 1st and 2nd respondents' averments that they have not authorized the 3rd respondent to conduct such business which is uncontroverted, it is plain to the court that whatever business is being undertaken in the estate, whether by the 3rd respondent or anyone else, is illegal and unlawful.

13. Second, this is a residential area and according to the law, no liquor licence should be granted for liquor selling in public residential areas. **Section 11** of the ***Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014*** provides that the sub-county committee shall not grant a new licence for the sale of an alcoholic drink to be consumed on the premises unless the sub county committee is satisfied:-

“That it would be in the public interest for provision to be made for the sale of alcoholic drink for consumption on the premises in the particular locality in respect of which the application is made, and that the number of such premises in respect of which such licences have already been granted is insufficient for the requirement of the locality given the permitted maximum number of such premises as shall be prescribed by law; provided that no licence shall be granted to sell alcoholic drinks in any institution

for basic education including Primary or Secondary School or any residential area as have been demarcated by or under the relevant written laws”(emphasis)

14. It is therefore the law that there should be no liquor selling near schools or in residential areas. The reasons for this are not far to seek: schools are places for learning and inculcating morals a good upbringing of children and young persons while residential areas are living places where residents and their families seek rest. After hustle and bustle in their places of work, they retreat to residential areas for rest and wellness. That is also the place where they bring up their families. They expect least disturbance and that is why the law prohibits liquor selling in residential estates. Such places require peaceful and health environment for rest and co-existence.

15. The constitution in Article 42 gives everyone the right to a clean and health environment. A clean and health environment should be free from pollutants such as noise etc. That would explain why the Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014 prohibits sale of liquor in residential areas to ensure not only the safety of residents but also moral uprightness of children and the youth. Allowing bars and liquor selling business within residential areas will thus violate the residents’ right to live in dignity and clear and healthy environment, fundamental rights enshrined in the Bill of Rights.

16. Article 2 of the constitution provides that it is the supreme law and binds all persons and all state organs. Article 10 of the Constitution provides for the national values and principles of governance. Once again just like Article 2, this Article binds all State organs, State officers public officers and all persons whenever any of them discharges their duties either in applying or applying any law or even formulating public policy. The national values and principles enumerated at Article 10 (2) include human dignity, social justice and inclusiveness. The residents’ right to live in dignity is a right guaranteed in Article 28 of the constitution to have that dignity respected and protected.

17. Article 19 (1) of the Constitution makes it plain that the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies, while it states in Sub Article (2) that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings, including the residents of the petitioning estate .these rights and fundamental freedoms are sacrosanct and belong to those born as human beings. They are inviolable and inalienable.

18. As was stated by the constitutional court of South Africa in ***Dawood and Another v Minister of Home Affairs and Others*** (CCT35/99) [2000] ZACC 8, human dignity is a constitutional value that is of central significance and that dignity is not only a fundamental value in the Constitution, it is a justiciable and enforceable right that must be respected and protected.

19. And in ***S v Makwanyane and Another*** (CCT3/94) [1995] ZACC 3, the same court observed that the rights to life and dignity are the most important of all human rights, and the source of all other personal rights and that by committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others and this must be demonstrated by the State in everything that it does. I would add that the right to a clean and health environment stems from the right to life and that a clean and health environment guarantees enjoyment of the right to life to the fullest extent.

20. The residents’ right to live in a clean and healthy environment and with dignity is a right guaranteed under the constitution and is inviolable. Operating liquor selling business within the residential estate with all the attendant risks, and in violation of clear provisions of the law, cannot be countenanced. It is illegal unlawful and violates the residents’ right to live in a peace, tranquility and with dignity.

21. Selling liquor in the residential estate further violates the residents’ right to privacy guaranteed under Article 31 of the constitution. Although Article 31 does not state all that amounts to privacy, it is nevertheless in-exhaustive because it uses the words **“includes.”** According to ***Leland I. Salano v International Hotel*** [2013] eKLR, privacy is the control over the extent, timing, circumstances of sharing oneself, behaviorally and intellectually with others. Taking that definition into account it cannot be denied that it would be difficult to control the behavior of people who take liquor within a residential estate. Lack of behavioral control breaches the resident’s privacy.

22. As a constitutional right, the right to privacy protects the liberty of a person to make certain crucial decisions regarding his well-being without coercion, intimidation, or interference from anyone. Such crucial decisions may concern the person’s religious faith, moral values, political affiliation, marriage etc. The Constitution guarantees the right to make these decisions according to one’s conscience and belief and no one constitutionally permitted to regulate such deeply personal matters

23. Notwithstanding what I have stated above, there is really no opposition to this petitions because the 1st and 2nd respondent have denied granting a liquor selling license to the 3rd respondent to operate that business in the residential estate while the 3rd respondent has also denied operating such business within the estate. More still, the 1st respondent has denied granting the 3rd respondent approvals to put up any structures in the estate for that purpose. That being the case, everything seems to have been done in violation of the law. And despite all this, the 1st and 2nd respondents seem to have taken no step to ameliorate the situation.

24. Consequently and for the above reasons, I am satisfied that the petitioner’s members’ right to privacy, dignity and clean and health environment have been violated but the 3rd respondent who is operating an illegal business within the residential estate. The petition must therefore succeed.

25. In the end, the petition dated 24th October 2016 is allowed as follows;

a. A declaration is hereby issued that the 3rd respondent has infringed on the rights of petitioner’s members and the residents of Muimara Estate in Nairobi by establishment and operation of a bar and alcoholic selling business within the estate.

b. A declaration that the 1st and 2nd respondents have failed in their constitutional mandate by allowing the 3rd respondent to operate a bar and night club within the petitioner’s members’ residences which in breach of the law governing sale of alcoholic

drinks.

c. An order of injunction is hereby issued restraining the 1st and 2nd respondent from licensing, allowing or permitting the 3rd respondent of any other persons to operate a bar; club or alcoholic sells business within Muimara Estate in Nairobi.

d. An order of injunction restraining the 3rd respondent from operating or running any alcoholic selling business within Muimara Estate in Nairobi.

e. The 3rd respondent do pay costs of this petition.

Dated, Signed and Delivered at Nairobi this 30th day of October 2018

E C MWITA

JUDGE