



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO.52 OF 2016
AS CONSOLIDATED WITH PETITION NO. 308 OF 2015 AND PETITION NO. 7 OF 2016

BETWEEN

JAMES GACHERU KARIUKI.....1st PETITIONER
JOHN NGUGI MUIGAI.....2nd PETITIONER
RICHARD MUNGAI KAGIRI.....3rd PETITIONER

AND

THE HON. ATTORNEY GENERAL.....1st RESPONDENT
COUNTY GOVERNMENT OF KIAMBU.....2nd RESPONDENT

PETITION NO. 308 OF 2015

BETWEEN

JAMES GACHERU KARIUKI.....1st PETITIONER
JOHN NGUGI MUIGAI2nd PETITIONER
REGINA NGONYO KIARIE.....3rd PETITIONER

AND

COUNTY GOVERNMENT OF KIAMBU.....1st RESPONDENT
CHIEF MAGISTRATE’S COURT AT KIAMBU.....2nd RESPONDENT
CHIEF MAGISTRATE’S COURT GITHUNGURI.....3rd RESPONDENT
SNR. PRINCIPAL MAGISTRATE COURT AT GATUNDU...4th RESPONDENT

SNR. PRINCIPAL MAGISTRATE COURT AT KIKUYU.....5th RESPONDENT
SNR. PRINCIPAL MAGISTRATE COURT AT LIMURU.....6th RESPONDENT
CHIEF MAGISTRATE’S COURT AT THIKA.....7th RESPONDENT
KIAMBU COUNTY POLICE COMMANDER.....8th RESPONDENT
KIAMBU COUNTY COMMISSIONER.....9th RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....10th RESPONDENT
HON. ATTORNEY GENERAL.....11th RESPONDENT

AND

PETITION NO. 7 OF 2016

BETWEEN

RICHARD MUNGAI KAGIRI.....PETITIONER

AND

THE COUNTY GOVERNMENT OF KIAMBU.....RESPONDENT

JUDGMENT

Background

1. Petition No. 308 of 2015, dated 20th July, 2015, was filed in this Court on 22nd July, 2015 and is supported by the Affidavit of James Gacheru Kariuki sworn on 20th July, 2015. The Petition in summary challenges the constitutionality of several Kiambu County legislations, which the Petitioners avers, have not yet been published in the Kenya Gazette as is mandated by the Constitution.

2. In that Petition, they seek the following orders *inter alia*:

(a) That a mandatory injunction do issue compelling the 1st Respondent to forthwith put up in place the necessary modified County committee(s) to deal with Liquor licensing, control and regulation under the Alcoholic Drinks Control Act, 2010 as envisaged by the provisions of Section 8(2) of the County Government Act, 2012.

(b) That the Court do stay any operations under the Kiambu County Alcoholic Drinks Control Act, 2013 and the Regulations thereunder and the Kiambu County Emergency Fund Act, 2013 and the Regulations thereunder and the Kiambu County Education Bursary Fund Act, 2014 and the Regulations thereunder and the Kiambu County Youth, Women and Persons with Disability Enterprise Fund Act, 2014 and the Regulations thereunder pending the hearing and determination of this application and or Petition and or until further orders of this Honourable Court.

(c) That a prohibitory injunction do issue prohibiting the 1st and 10th Respondents, their agents and servants from instituting and or conducting any criminal prosecutions under the Alcoholic Drinks Control Act, 2010 and the Regulations thereunder in respect of the issues of licensing until the 1st Respondent puts in place the necessary County committee(s) to issue licenses under

the Act herein envisaged by the provisions of Section 8(2) of the County Government Act, 2012 and until the Committee so established completes its task.

(d) That a prohibitory injunction do issue prohibiting the 2nd, 3rd, 4th, 5th, 6th and 7th Respondents from admitting any charges preferred against any person who was licensed to operate a liquor outlet or manufacture under the Alcoholic Drinks Control Act, 2010 by National Authority for Campaign Against Alcohol and Drug Abuse (NACADA) in Kiambu County until the 1st Respondent puts up in place the necessary Committee(s).

(e) That a prohibitory injunction do issue prohibiting the 1st, 8th and 9th Respondents, their agents, servants, employees or any other person claiming from any of them from harassing, arresting, detaining and or preferring charges over liquor licenses against any person who was licensed to operate a liquor outlet or manufacture under the Alcoholic Drinks Control Act, 2010 in Kiambu County until the 1st Respondent puts up in place the necessary County Committee(s).

3. Petition No. 7 of 2016, dated 7th January, 2016 was subsequently filed on 8th January, 2016 by sole Petitioner, Richard Mungai Kagiri, seeking to compel the County Government of Kiambu to furnish him with the following documents:

(i) A copy of the Kenya Gazette or a Supplement therein where the Kiambu County Alcoholic Drinks Control Act, 2013 was published or the relevant Gazette Notice numbers.

(ii) A copy of the Kenya Gazette or a Supplement therein where the Kiambu County Alcoholic Drinks Control Licensing Regulations were published or the relevant Gazette Notice numbers.

(iii) A copy of the Kenya Gazette or a Supplement therein where the sub-county liquor licensing committees were published or the relevant Gazette Notice numbers.

(iv) Information relating to events leading to the establishment of the sub-county liquor licensing committees.

4. On 21st January, 2016, when the matter came up for mention before me, parties agreed to have prayers (iii) and (iv) above marked as settled and consequently, I noted that the remainder of the Petition would be heard on merit and for determination of the question whether County legislation must be published in the Kenya Gazette, in the County Gazette only; or in both.

5. On 12th February, 2016, the 1st and 2nd Petitioners in Petition No. 308 of 2015 and the Petitioner in Petition No. 7 of 2016 jointly filed Petition No. 52 of 2016 dated 10th February, 2016 seeking the following orders:

(a) A declaration do issue that the provisions of Section 25(2) of the County Government Act, Act No. 17 of 2012 is inconsistent with the provisions of Article 199(1) of the Constitution of Kenya, 2010 to the extent of the use of the words, “whichever comes earlier” and hence invalid.

(b) An order condemning the Respondents to pay for the costs of this petition.

6. Petition No. 52 of 2016 is premised on the following grounds:

(a) That Article 199(1) of the Constitution has been contravened and is threatened with perpetual contravention.

(b) That the provisions of Section 25(2) of the County Governments Act, provides that when a county legislation is published in a county Gazette and the publication in the county gazette comes earlier than the publication in the Kenya Gazette or a supplement to the Kenya Gazette, the county legislation takes effect.

(c) That the contravention of Article 199(1) of the Constitution has assumed legalism in the Interim Judgment dated 13th November, 2015 by Lenaola J in the case of Africa Rafiki Ltd. & 2 Others v. Nairobi City County Government Petition No. 295 of 2014 as consolidated with Petition No. 1 of 2015 and Petition No. 315 of 2014.

7. In addition, on 1st April, 2016, the Petitioners in Petition No. 308 of 2015 further filed a Notice of Motion Application dated 29th March, 2016 seeking consolidation of all the three Petitions on the following grounds:

(a) That Petition No. 52 of 2016 coming up for mention before Lenaola J on 4th April, 2016 has a preceding question the basis upon which the question in Petition No. 308 of 2015 lies.

(b) That in the event that the instant Petition herein is determined before or separately from Petition No. 52 of 2016 the preceding question which is the inconsistency of the provisions of Section 25(2) of the County Government Act to the extent of the words “whichever comes earlier” with the provisions of Article 199(1) of the Constitution will remain unanswered in the Petition herein.

(c) That the Petitioners herein have fortunately discovered in good time that Section 25(2) of the County Government Act has previously formed the ratio decidendi in Petition No. 295 of 2014 as consolidated with Petition No. 1 of 2015 and Petition No. 315 of 2014.

(d) That the Petitioners herein have challenged the constitutionality of the provisions of Section 25(2) of the County Government Act to the extent of the words “whichever comes earlier” in Petition No. 52 of 2016.

(e) That in order that the Petitioners herein assist the court to save on judicial time and strive to achieve a clear jurisprudence, it is only just and prudent to consolidate the petition herein with Petition No. 52 of 2016.

(8) Subsequently to the filing of the above Notice of Motion Application, all the parties in the three Petitions appeared before me on 4th April, 2016, and by consent, agreed to the consolidation of all the three Petitions with Petition No. 52 of 2016 being the lead file. Thereafter, on 12th April, 2016, parties agreed that the issues that now fall for determination are the following:

(i) Whether County legislation must be published for legitimacy in the Kenya Gazette or in the County Gazette only.

(ii) Whether Section 25(2) of the County Governments Act is inconsistent with Article 199 of the Constitution.

(iii) Whether County legislation as presently published by the County Government of Kiambu is valid.

(iv) Whether the Petitioners are entitled to the reliefs sought.

9. It is worth noting that only the Hon. Attorney General and the County Government of Kiambu participated in these proceedings as Respondents and all the other Respondents enjoined in Petition No. 308 of 2015 did not make any appearance.

The 1st Petitioner’s Case

10. The 1st Petitioner, James Gacheru Kariuki, appears in person and his case is as contained in Petition No. 308 of 2015, Petition No. 52 of 2016 and the Supporting Affidavits sworn by himself on 29th March,

2016 and 20th July, 2015 as well as his oral submissions made in Court.

11. It was the 1st Petitioner's submission that **Section 25(2)** of the **County Governments Act** is inconsistent with **Article 199** of the **Constitution** since it provides that '*...County Assembly legislation shall come into force on the fourteenth day after its publication in the county Gazette and Kenya Gazette, whichever comes earlier...*' In that regard, he asserts that the use of the term '*whichever comes earlier*' in **Section 25(2)** aforesaid paints a scenario where a County legislation may come into force upon being published in the *County Gazette* only, if such a publication would precede its publication in the *Kenya Gazette*. He submits that the possibility of such a situation happening undermines the content and intent of **Article 199(1)** of the **Constitution** which provides that County legislations shall only come into effect upon being published in the *Gazette* and according to him, the term *Gazette* as used in the Constitution refers to the *Kenya Gazette* and not the *County Gazette*. Consequently, he implores this Court to declare **Section 25(2)** of the **County Governments Act** to be inconsistent with the Constitution in as far it uses the term *whichever comes earlier* in the above context.

12. The 1st Petitioner further challenges the finding of this Court in the case of ***Africa Rafiki Ltd & 2 Others v. Nairobi City County Government & 3 Others***, Petition No. 295 of 2014 which he submits, legitimized the application of **Section 25(2)** of the **County Governments Act** with regard to publication of a County legislation in the *County Gazette*.

The 2nd Petitioner's Case

13. The 2nd Petitioner, John Ngugi Muigai's case is as contained in Petition No. 308 of 2015 and Petition No. 52 of 2016. He submits that according to **Article 199(1)** of the **Constitution**, a County legislation only come into effect upon being published in the *Kenya Gazette* and asserts that the **County Governments Act** has given a leeway for publication of such legislation in the *County Gazette*, to the exclusion of the *Kenya Gazette*. In that regard, he submits that any such exclusive publication in the *County Gazette* contravenes the **Constitution** and therefore **Section 25(2)** of the **County Governments Act** is inconsistent with **Article 199** of the **Constitution**.

14. Furthermore, the 2nd Petitioner contends that the word 'Gazette' having been defined under **Section 2** of the **Interpretation and General Provisions Act, Cap 2** of the **Laws of Kenya**, no other definition as provided for under any other statute should be allowed to stand, and he therefore disagrees with the Respondents' contention that a *County Gazette* is a supplement to the *Kenya Gazette*.

The 3rd Petitioner's Case

15. The 3rd Petitioner, Richard Mungai Kagiri's case is as contained in Petition No. 7 of 2016, Petition No. 52 of 2016 and the Supporting Affidavit sworn by himself on 7th January, 2016.

16. Like his Co-Petitioners, he challenges the publication of County legislation in the *County Gazette* instead of the *Kenya Gazette* and has annexed to his affidavit the Kiambu County Alcoholic Drinks Control Act, 2013 and the Kiambu County Alcoholic Drinks Control (Licensing) Regulations, 2014 marked as exhibit "KM 1" and "KM 2", respectively. He asserts that these legislations were only published in the *County Gazette* and not in the *Kenya Gazette* as is required and are therefore invalid.

17. He further submits that he is at risk of being charged in Court with the offence of contravening the Kiambu County Alcoholic Drinks Control Act 2013 and the Regulations thereunder and that should the Court declare the referenced Kiambu County laws as unconstitutional, then his imminent prosecution would also be declared to be unconstitutional.

The 1st Respondent's Case

18. The 1st Respondent, the Attorney General, relies on his written submissions dated 26th May, 2016 and

his position is that every County legislation must be published in the Kenya Gazette whether or not it would eventually be published in the County Gazette. In this regard, he relies on the case of **Tyson Ng'etich & another v Governor Bomet County Government & 5 Others**; Petition No. 415 of 2014 [2015] eKLR where this Court noted that, “*Article 199(1) of the Constitution is crystal clear that a County legislation does not take effect unless published in the Gazette.*”

19. The AG further submits that the publication in the County Gazette envisaged under **Section 25(2)** of the **County Government Act** is an additional requirement to what is provided for under **Article 199(2)** of the **Constitution**. Consequently, publication in the Kenya Gazette takes precedence over publication in the County Gazette and the use of the words, ‘*whichever comes earlier*’ in **Section 25(2)** of the **County Government Act** places the provision at variance with **Article 199(1)** of the **Constitution** as it purports to place the Kenya Gazette and the County Gazette at par with each other. In support of his proposition, the AG made reference to **Article 2** of the **Constitution** which recognizes the Constitution as the supreme law of the land and it was his submission therefore, that the term, ‘*whichever comes earlier*’, is in conflict with the Constitution.

20. Notwithstanding his submissions above, it was his further contention however that the Kiambu County legislations in issue were published by the Government Printer as a supplement to the Kenya Gazette and disputed the submission that the publications are done in the County Gazette as alleged by the Petitioners. He asserts further that the use of the term Kiambu County in the heading of the ‘gazette’ notices exhibited by the Petitioners is simply a mechanism to distinguish various legislations from different Counties but they remain notices supplementary to the Kenya Gazette. In addition, he submitted that the Petitioners have not, in any way, provided evidence showing that there is indeed a County Printer established by the Kiambu County Assembly for purposes of publishing County legislations.

21. In conclusion, he contends that the legislations passed by the Kiambu County Assembly are within the law and in conformity with the procedural requirements of **Article 199(1)** of the **Constitution** and urges the Court to dismiss the Petition despite his submissions above on the illegality of **Section 25(2)** aforesaid.

The 2nd Respondent’s Case

22. The 2nd Respondent, the County Government of Kiambu in presenting its case relies on the Replying Affidavit sworn by Fredrick M. Kitema, on 20th January, 2016 as well as the written submissions dated 26th May, 2016, as well as the oral submission made in Court by its Counsel Miss Kamande.

23. The position of Kiambu County Government is that, a County Gazette is a supplement to the Kenya Gazette and in support of that proposition, its Counsel relied on **Article 260** of the **Constitution** which defines the Gazette to mean, ‘*the Kenya Gazette published by authority of the national Government, or a supplement to the Kenya Gazette.*’

24. On the issue of whether **Section 25(2)** of the **County Governments Act** is inconsistent with **Article 199(1)** of the **Constitution**, the 2nd Respondent’s position is that **Section 25(2)** deals with ‘coming into force’ of a county legislation whereas **Article 199** deals with ‘publication’ of county legislation. Accordingly, the two legal provisions are distinct and deals with two separate aspects, which are; publication of a county legislation and coming into force of a county legislation.

25. Further, the 2nd Respondent contends that in the spirit of co-operation between different levels of Government, the National Government through the Government Printer publishes county legislation as special issues of the Kenya Gazette in the style of County Gazette supplements. Thus the special issues of the Kiambu County Gazette Supplements as published, suffice and meet the threshold provided for under **Article 199** of the **Constitution** and **Section 25** of the **County Governments Act**. In furtherance of this position, the 2nd Respondent placed reliance on the decision in **Africa Rafiki Ltd & 2 Others v Nairobi City County Government & 3 Others** (supra) and consequently urged the Court to dismiss the Petitions.

Determination

26. The issues for consideration as framed and agreed upon by the parties are the following:

(i) *Whether County legislation must be published for legitimacy in the Kenya Gazette or in the County Gazette only.*

(ii) *Whether Section 25(2) of the County Governments Act is inconsistent with Article 199 of the Constitution.*

(iii) *Whether County legislation as presently published by the County Government of Kiambu is valid.*

(iv) *Whether the Petitioners are entitled to the reliefs sought.*

(a) Whether County legislation must be published for legitimacy in the Kenya Gazette or in the County Gazette only.

27. I shall begin my analysis on this issue by making reference to **Article 199(1)** of the **Constitution** which provides as follows;

“County legislation does not take effect unless published in the Gazette.”

28. **Article 260** goes ahead to define a ‘Gazette’ as;

“the Kenya Gazette published by authority of the National Government or a supplement to the Kenya Gazette.”

29. Thus, **Article 199(1)** may equally be read as, *“County legislation does not take effect unless published in the Kenya Gazette or a supplement to the Kenya Gazette.”*

30. It is also not in doubt that **Article 199(1)** of the **Constitution** imposes a mandatory obligation for publication of all County legislations in the *Kenya Gazette* or a supplement to the *Kenya Gazette* and it is only through such publication that a county legislation can gain legitimacy. *What therefore is a County Gazette, if at all and is there any relationship between a County Gazette and the Kenya Gazette?*

31. The term ‘*County Gazette*’ is not defined nor provided for in the **Constitution** which only provides for a *Gazette*, which has been defined as the *Kenya Gazette* published by the authority of the National Government or a supplement to the *Kenya Gazette*. However, the **County Governments Act** defines a ‘*County Gazette*’ as a *Gazette* published by the authority of the County Government or a supplement of such a *Gazette*. This shows that there is a clear distinction between a ‘*County Gazette*’ and a ‘*Kenya Gazette*’ and the difference as can be seen above is; whereas the ‘*Kenya Gazette*’ is published under the authority of the National Government, the ‘*County Gazette*’ is published under the authority of a County Government.

32. In essence, while the concept of a ‘*County Gazette*’ was introduced by the **County Governments Act**, the **Constitution** explicitly requires County legislation to be published in the *Kenya Gazette* for them to take effect. I so find.

(b) Whether Section 25(2) of the County Governments Act is inconsistent with Article 199 of the Constitution.

33. **Article 199** of the **Constitution** provides thus;

(1) County legislation does not take effect unless published in the Gazette.

(2) National and County legislation may prescribe additional requirements in respect of the publication of county legislation.

34. Pursuant to the above Article, **Section 25** of the **County Governments Act** was then enacted to provide additional requirements with regards to publication of County legislation. At the outset, I must however state that any additional requirements contemplated under **Article 199(2)** of the **Constitution** should not derogate from the mandatory duty necessitating publication of County legislation in the *Kenya Gazette* or its supplement and no legislation however well intended can waive the need for such publication.

35. For avoidance of doubt, the said **Section 25** provides as follows;

(1) A legislation passed by the County Assembly and assented to by the Governor shall be published in the county Gazette and Kenya Gazette within seven days after assent.

(2) Subject to subsection (3), the County Assembly legislation shall come into force on the fourteenth day after its publication in the County Gazette and Kenya Gazette, whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force.

(3) A County Assembly legislation that confers a direct benefit whether financial or in kind on members of the county assembly shall come into force after the next general election of members of the County Assembly.

(4) Subsection (3) does not apply to an interest that members of County Assembly have as members of the public. (Emphasis added)

36. While therefore **Section 25(2)** has made additional requirements to the publication of County Legislation, it has also specified the period and the process by which a County legislations comes into force in that ***‘...the county assembly legislation shall come into force on the fourteenth day after its publication in the county Gazette and Kenya Gazette, whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force.’***

37. Flowing from the above, I make several observations. Firstly, the provision reinforces the fact that County legislation ought to be published in both the *Kenya Gazette* and the *County Gazette* and that such publication may be done concurrently or one after the other. The Section goes further to provide that the *legislation shall come into force on the fourteenth day after its publication in the County Gazette and Kenya Gazette, whichever comes earlier* and the Petitioners now impugn the inclusion of the term, ‘whichever comes earlier,’ since it presupposes the possibility of a County legislation coming into force upon it’s publication in the *County Gazette* only and where it precedes publication in the *Kenya Gazette*.

38. As I have already stated above in my analysis of the first issue, a *County Gazette* is neither a *Kenya Gazette* nor a supplement to the *Kenya Gazette* and as such, County legislation only gains legitimacy upon its publication in the *Kenya Gazette* or a supplement to the *Kenya Gazette*. Further, as already elaborated upon, the definition of a *County Gazette* completely departs from the meaning of the term ‘Gazette’ as used in **Article 199** and defined in **Article 260** of the **Constitution**. A *County Gazette* and which is a creation of the **County Governments Act** and not the **Constitution** cannot in any event supersede in its publication, the *Kenya Gazette*.

39. I therefore agree with the Petitioners that to the extent that **Section 25(2)** of the **County Governments Act** envisions that a County legislation may come into effect without necessarily being published in the *Kenya Gazette* by use of the phrase, ‘whichever comes earlier’, then it is a complete derogation from the pre-requisite of the Constitution and hence invalid to the extent of that inconsistency.

(c) Whether County legislation as presently published by the County Government of Kiambu is valid.

40. In answering this issue, I shall interrogate whether the impugned Kiambu County legislation was published in the County *Gazette* or the Kenya *Gazette*. Closely related to this, is the determination of the question as to when the relevant legislation came into effect should I find that it was published in both the County *Gazette* and the Kenya *Gazette*.

41. The impugned legislation and the Regulations made thereunder are annexed to the supporting affidavit of the 1st Petitioner in Petition No. 308 of 2015 as well as the Supporting Affidavit of the Petitioner in Petition No. 7 of 2016. Exhibits ‘JGK2a’ and ‘KM1’ contain the **Kiambu County Alcohol Drinks Control Act, 2013** and an extract of the heading is as follows;

Kiambu County Gazette Supplement No. 5(Acts No.2)

REPUBLIC OF KENYA

KIAMBU COUNTY GAZETTE

SUPPLEMENT

COUNTY ASSEMBLY ACTS, 2013

NAIROBI, 19TH August, 2013

CONTENT

Act

PAGE

The Kiambu County Alcohol Drinks Control, Act, 2013.....

42. An extract of Exhibit ‘JGK2b’ and ‘KM 2’ which is the **Kiambu County Alcoholic Drinks Control (Licensing) Regulations, 2014** has the presentation shown below;

SPECIAL ISSUE

Kiambu County Gazette Supplement No. 1

6th January, 2014

(Legislative Supplement No.1)

LEGAL NOTICE NO.1

THE KIAMBU COUNTY ALCOHOLIC DRINKS CONTROL ACT

(No. 2 of 2013)

IN EXERCISE of the powers conferred by section 67 of the Kiambu County Alcoholic Drinks Act, 2013, the Executive Member responsible for alcohol control, makes the following Regulations:-

THE KIAMBU COUNTY ALCOHOLIC DRINKS CONTROL (LICENSING)
REGULATIONS, 2014

43. The Respondents in the above context argue that County legislations are published as special issues of the Kenya *Gazette* in the style of County *Gazette* supplements, and thus the special issues of the Kiambu County *Gazette* supplements as published suffice and meet the threshold provided in **Article 199** of the

Constitution and **Section 25** of the **County Governments Act**. I do not agree with that proposition because a supplement to the Kenya Gazette is technically a Gazette, the practice being that, a Kenya Gazette supplement is ordinarily used to publish *inter alia* Bills, Acts of Parliament and Legal Notices with the aim of supporting the weekly publication of the Kenya Gazette. There is therefore no material difference between a Kenya Gazette and a supplement to the Kenya Gazette but in this particular case, as long as the heading of the legislation indicates that it is a County Gazette supplement, then *ipso facto* it remains a County Gazette and not a Kenya Gazette. In that regard, it is clear from the heading of the Kiambu County **Alcohol Drinks Control, Act, 2013** and the **Kiambu County Alcoholic Drinks Control (Licensing) Regulations, 2014** that they were not published in the Kenya Gazette or a supplement to the Kenya Gazette.

44. An example of a Kenya Gazette supplement which is the **Excise Duty Act, 2015** is worded as follows;

SPECIAL ISSUE

Kenya Gazette Supplement No. 181 (Acts No. 23)

REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

ACTS, 2015

45. The word ‘Kenya Gazette’ therefore must appear in the heading of a publication in either the Kenya Gazette or a Supplement to the Kenya Gazette and it is misleading for the 2nd Respondent to claim that the Kiambu County legislations attached to the 1st Petitioner’s document are publications in the Kenya Gazette yet they have evidently been referred to as Kiambu County Gazette supplements. At the very least, the 1st and 2nd Respondents, should have provided evidence of publication of the challenged Kiambu County legislations in the Kenya Gazette. Instead, the 2nd Respondent, through its Replying Affidavit sworn on 20th January, 2016 by its County Secretary, Fredrick M. Kitema, in reference to Petition No. 308 of 2015 only makes a sweeping statement that it complied with **Article 199(1)** of the **Constitution** and operationalized the challenged laws by publishing them in the Kenya Gazette.

46. Further, the said affidavit goes on to state that, “*the County Gazette supplements through which the afore-mentioned laws were operationalized thus suffice and meet the threshold as provided in Section 25 of the County Governments Act, 2012 which require publishing of county legislation in both the County Gazette and Kenya Gazette.*” While I do not dispute that the **County Governments Act** provides for additional publications of County legislations in the County Gazette, but as already clarified earlier, any such publications must not deviate from the constitutional requirement of publications in the Kenya Gazette for the effectiveness of such legislations. Thus, the Respondents are plainly mistaken to assume that publication of a County Gazette supplement equates it to publication in a Kenya Gazette supplement. Both publications may be done by the Government Printer but those two kinds of Gazettes are distinct and serve different purposes the fact of the printer being the same notwithstanding.

47. It is therefore my finding that the **Kiambu County Alcohol Drinks Control, Act, 2013** and **Kiambu County Alcoholic Drinks Control (Licensing) Regulations, 2014** as currently published do not meet the dictates of **Article 199(v)** of the **Constitution**.

48. Before I leave this issue, the Petitioners made reference to my earlier decision in **Afrika Rafiki Ltd (supra)** but having looked at it again, the present issue was never one to be addressed in that judgment.

(d) Whether the Petitioners are entitled to the relief sought.

49. The Petitioners have sought diverse prayers in their various Petitions before this Court. In Petition No. 52 of 2016, the Petitioners seek a declaration that ***the provision of Section 25(2) of the County Government Act, Act No. 17 of 2012 to the extent of the use of the words, “whichever comes earlier” is inconsistent with the provisions of Article 199(1) of the Constitution of Kenya, 2010 and anything done in pursuance of the meaning of the words, “whichever comes earlier” is invalid.***

From my analysis above, it is clear that **Section 25(2)** of the **County Governments Act** is inconsistent with **Article 199(1)** of the **Constitution** to the extent of the use of the phrase ‘whichever comes earlier’.

50. Further, in Petition No. 308 of 2015, the Petitioners seek a mandatory injunction compelling the Kiambu County Government to put in place the necessary modified county committees to deal with liquor licensing control and regulation under the **Alcoholic Drinks Control Act, 2010** as envisaged by the provisions of **Section 8(2)** of the **County Government Act, 2012**. In essence, the Petitioners are impugning all actions done in reliance to **Kiambu County Alcohol Drinks Control Act, 2013**.

51. I should note in passing however that County Assemblies have been given powers to legislate on various issues as detailed out in the **Fourth Schedule** of the **Constitution** for the effective operations of their functions. In view of those powers, the Kiambu County Government enacted the **Kiambu County Alcoholic Drinks Control Act, 2013** to provide for the licensing and regulation of the production, sale, distribution, consumption and outdoor advertising, of alcoholic drinks and for other connected purposes. Pursuant to the said law, Regulations have been established, operationalizing the Act including providing how the Sub-County Alcoholic Drinks Regulation Committees ought to perform their duties.

52. I take the position that devolution being a new entrant into our **Constitution**, the implementation of its various visions therein is bound to be faced with several hitches. Some perceived challenges include what is now before me being the desire to fully operationalize the working of Counties by putting in place relevant legal safeguards in terms of legislation in a bid to ensure that Counties effectively perform the duties assigned to them under the **Fourth Schedule** of the **Constitution**. I therefore opine that it is in the interests of justice and for the public good, that the operations of Kiambu County are not brought to a stand still for reasons of reliance on an ungazetted law. I say so well aware that all State organs, State officers, public officers and all persons are bound by the **Constitution** and as such the edicts of the **Constitution** must be observed at all times.

53. In addition, I am aware that even in instances where a legislation is invalidated by a Court, the invalidation is not retrospective as was stated in **Chicot County Drainage Dist. v Baxter State Bank 308 U.S. 371 (1940)** where the Court held as follows:

“The past cannot always be erased by a new judicial declaration. The effect of the subsequent Ruling as to invalidity may have to be considered in various aspects-with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of sights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination...[:] it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified”
[emphasis supplied]

54. In that regard, I direct that the County Government of Kiambu and the Attorney General should ensure that all Kiambu County legislations that are not published in the Kenya *Gazette* are within a period of 3 months effectively so published in accordance with **Article 199(1)** of the **Constitution**. The lapse of 3 months will automatically lead to an invalidation of the said legislations. They shall in the meantime remain operational.

55. The Petitioners also sought a prohibitory injunction against the 1st to 10th Respondents, in Petition No. 308 of 2015 stopping them from instituting or conducting criminal prosecutions under the impugned laws. On this issue, I note that other than the 1st and the 11th Respondent, all other Respondents in Petition No. 308 of 2015 did not participate in these proceedings and I am therefore constrained not to

make any orders against them. In any event none of those issues were framed for determination in this judgment.

56. With regard to prayers in Petition No. 7 of 2016 seeking production of various documents by the County Government of Kiambu, it is my position that those prayers have been overtaken by events as the said documents sought to be produced are already part of the record and are also in the custody of the Petitioner therein.

Disposition

57. From my findings above, the proper orders to make are the following:

i) It is hereby declared that Section 25(2) of the County Governments Act is inconsistent with Article 199(1) of the Constitution to the extent that it uses the phrase “whichever comes earlier” and is invalid to that extent only.

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 Legislations in the Kenya Gazette within 3 months failure to which such legislation shall lapse and be invalid. For avoidance of doubt, until such an eventuality, the said legislations such continue to be operative.

iv) As for costs, let each party bear its own costs as I consider that the Petition before me was brought in the interests of the Kiambu County populace thus in the public interest.

58. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2017

E. CHACHA MWITA

JUDGE