



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CONSTITUTIONAL PETITION NO. 3 OF 2016
(Formerly Nakuru Constitutional Petition No. 10 of 2016)

**IN THE MATTER OF CONTRAVENTION OF THE RIGHTS UNDER ARTICLES 19, 20, 21 (1),
22 (1) & (3), 23, 27, 28, 29, 40, 43, 47, 48, 50, 55, 159 (2) AND 165 (3) OF THE CONSTITUTION**

AND

IN THE MATTER OF NAKURU COUNTY ALCOHOLIC DRINKS CONTROL ACT

AND

**IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL (SUPPLEMENTARY)
(LICENCING) REGULATIONS, 2015**

BETWEEN

GEOFFREY MWANGI MUIRURI.....PETITIONER

-VERSUS-

NAKURU COUNTY COMMISSIONER.....1ST RESPONDENT

OCS GILGIL POLICE STATION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....RD RESPONDENT

INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

HON. SAMUEL MATHENGE NDIRITU.....5TH RESPONDENT

HON. JANE WANGUI NGUGI.....6TH RESPONDENT

J U D G M E N T

1) This Petition was brought by **Geoffrey Mwangi Muiruri** (the Petitioner) against the six Respondents on allegations of violation of Articles 27, 28, 29, 35, 40, 46, 47, 50, 55 of the Constitution in relation to the Petitioner. The Petition describes the Respondents as follows:-

“1 The Petitioner GODFREY MWANGI MUIRURI is a Male adult citizen of sound mind residing and working in Gilgil in the name and style of Mirangine Wines & Spirits within the

Republic of Kenya.

2. The 1st Respondent is the Nakuru county Commissioner. His address of service for purpose of this suit shall be through the Petitioner's advocate's office.

3. The 2nd Respondent is the officer commanding station Gilgil. Its address of service for purposes of this suit shall be through the Petitioner's advocate's offices.

4. The 3rd Respondent is the Honourable Attorney General of the Republic of Kenya the constitutionally designated principal legal advisor to the Government of Kenya and in that capacity vested with the legal authority of defend any suit against the national government and is sued herein on behalf of the Kenya National Police Service.

5. The 4th Respondent is the Inspector General of Police bestowed with constitutional powers of exercising independent command over the Kenya Police Service.

6. The 5th Respondent is the M.P. for Gilgil while the 6th Respondent is the MCA for Gilgil.”

2) The Petitioner claims his rights as enshrined in the above Articles have been infringed upon and prays for the following orders:-

“a) A declaration that the invasion, ransacking, destruction and damage is a violation of Petitioners rights and freedoms contrary to Articles 27, 28, 29 (c), (d) & (f), 39, 40, 43, 46, 47, 48, 50 and 55 of the Constitution.

b) Declaration that the prohibition and threat of arrest for lack of liquor licence is unconstitutional.

c) Declaration that continued harassment and failure to provide security in his business premises is a violation of Petitioner's Constitutional rights.

d) Permanent prohibition order restraining Respondents and their agents or servants from interfering in any way with Petitioner's business.

e) An order of compensation for loss of user from the closure of the premises till re-opening.

f) Special damages of Kshs 7,400,000/=.

g) An award of exemplary, aggravated and/or punitive damages for blatant, callous, oppressive and high hand violation of Constitutional rights of the Petitioner by the officers of government.

h) Cost of the Petition and interest.

i) Any other relief.”

3) By his Petition and supporting affidavit, the Petitioner presents the following case. The Petitioner is duly licensed to operate the business of distribution of alcoholic drinks manufactured by leading conventional breweries since 2010. His complaint is that on 12th July, 2015 the Respondents mobilized goons or gangs who illegally and in violation of the Petitioner's rights raided his business premises and destroyed his stock of alcoholic beverages alleging them to be illicit; that business equipment was also destroyed, thereby occasioning the Petitioner a loss amounting to Shs. 7.4 million.

4) That subsequently, the Respondents issued an illegal directive to the Petitioner warning against the reopening of the business, on pain of a further raid and arrest, and thereby occasioning the Petitioner further financial loss. He further asserts that the Respondents' actions were based on the now notorious

July, 2015 Presidential directive calling for the destruction of second generation or illicit liquor. The Petitioner laments that he did not receive prior notice of the revocation of the licenses under which he was operating, and therefore he has been denied the right to fair administrative action as guaranteed in Article 47 of the Constitution.

5) Further particularizing the breaches he complains of, the Petitioner asserts that his business was targeted for raids while similar businesses were allowed to continue operating, in violation of the right to equality and freedom from discrimination (Article 27 of the Constitution), that the Respondents' actions are in violation of his right to human dignity under Article 28 of the Constitution, and impinge upon his right to freedom and security of the person guaranteed under Article 29 of the Constitution. Also said to have been infringed are rights under Articles 35, 46, 50 and 55 of the Constitution.

6) On the date set for the hearing of the Petition, Mr. Obino who held brief for Mr. Chege for the Petitioner elected to rely on the material in the Petition, therefore elected not to make any submissions. For their part the 1st to 4th Respondents had filed grounds of opposition and filed written submissions. Although the 5th Respondent had been served with the Petition, he did not file any response. Nor did he attend the hearing. There is no evidence of proper service upon the 6th Respondent, however.

7) The 1st, 2nd, 3rd, and 4th Respondents filed grounds of opposition dated 31st August, 2016 which state that:

- a) The suit is an abuse of court process and lacks merit.
- b) Public interest outweighs the Petitioner's personal interest.
- c) The court ought not to usurp the discretion of Kenya Bureau of Standard, Kenya Revenue Authority, Ministry of Health and East African Community SQMT Act that regulate the alcohol sector.
- d) The suit is based on a distortion of facts, is frivolous, and contains irrelevant matters, misrepresentation.
- e) The Petitioner has no cause of action and has come to court with unclean hands.
- f) The Petition is incompetent and ought to be struck out.

8) In their submissions, the Respondents state that the dispute arose as a consequence of the directive issued on 1st day of July, 2015 by the President of Kenya, calling for a major crackdown on the production, distribution and sale of illicit liquor within the country. That a task force was appointed to streamline alcohol industry. The crackdown began on 10th July, by which time the Petitioner's license had expired and/or been cancelled and no effort had been made to renew or reinstate it. That the said license had expired on 6th November, 2014 and the Petitioner was still in operation at the material time, in contravention of the Alcoholic Drinks Control Act.

9) The Respondents urged the court to note that a county business permit does not exempt the business identified from complying with regulations on Health and Safety as established by the Government of Kenya and the County Government of Nakuru. They submit that people died from consuming illicit liquor and it is the duty of the State to protect life under Article 26 of the Constitution. The Respondents assert that public interest outweighs the interests of the Petitioner as an individual businessman. See **Kenya Guard Allied Workers Union -Vs- Security Guards Services & 38 Others Miscellaneous 1159 of 2004**.

10) It was submitted further that the crackdown on illicit liquor was in line with public interest. Also cited was the case of **John Kinyua Muyaka & 11 Others -Vs- County Government of Kiambu & 3 Others [2014] eKLR**.

The Respondents also assert that due procedure was followed, and unlicensed establishments cannot be allowed to continue operating. Further that the law imposes a duty on Cabinet Secretary, the police, Kenya Bureau of Standard and NACADA to take steps to rid the country of illicit liquor and to protect unsuspecting Kenyans from unscrupulous businessmen. See Section 14 of the Standards Act.

11) It is the Respondents' contention that the Petitioner has not adduced evidence to show that he reported the alleged destruction of his property to the police. That the averment that his business had been given a clean bill of health by relevant authorities is untrue and irrelevant as the Petitioner's alcoholic drinks business licence had expired and was hence operating illegally.

12) Regarding the claim by Petitioner that the closure of his premises is discriminatory, the Respondents dismiss it as baseless as no evidence has been proffered disputing the legality of the comparable establishments that are in operation. That the Petitioner has failed to state, with reasonable precision the provisions of the Constitution which are alleged to have been contravened and the manner in which they are alleged to have been infringed in respect of the Petitioner. Reliance was placed on the case of **Anarita Karimi Njeru -Vs- The Republic (1976 – 1980) 1 KLR 1272** and **Rashid Odhiambo Aloggoh and 245 Others -Vs- Haco Industries Limited**.

13) The Respondents finally submitted that the closure of the Petitioner's business premises was regular, procedural and according to the law. They urged the court to dismiss the Petition with costs.

14) Having considered all the material canvassed before me, it is not in dispute that following the well publicised directive by the President of Kenya in July 2015, several authorities, including the local administration in conjunction with the National Police Service, conducted countrywide raids in a bid to arrest and rout dealers in illicit alcoholic beverages, also described as second generation alcoholic drinks. The Petitioner, it would appear, was one of those operating an alcoholic drinks business in the material period.

15) The factual contents of his affidavit were not specifically controverted by the Respondents as no affidavits were filed in reply to the Petition. That notwithstanding the 1st to 4th Respondents included in their submissions some factual matters which properly belong to a Replying affidavit. Some of these confirm the contents of the Petitioner's Petition.

16) The case of **Anarita Karimi Njeru** (*supra*) is settled authority for the proposition that where a person is alleging a contravention or threat of contravention of a constitutional right, he must set out the right infringed upon and the particulars of such infringement or threat as it relates to himself. However in subsequent decisions it is evident, that the case of **Anarita Karimi Njeru** while it laid an important foundation must be read in the context of the Constitution of Kenya 2010.

17) The Constitution of Kenya 2010, grants the individual or group of persons a much wider latitude in terms of *locus standi*. In **Trusted Society Of Human Rights Alliance -Vs- Attorney General & 2 Others [2012] eKLR** the court observed regarding the decision in **Anarita Karimi Njeru**:

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the

complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

18) The Constitution of Kenya, 2010 imposes upon every person and state organ in Kenya the obligation to be bound by, to respect, uphold, protect and defend the Constitution (Articles 2 & 3). Further, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, (Articles 22(1) of the Constitution) and where the Constitution has been contravened or is threatened with contravention (Article 258 (1) (2) of the Constitution).

19) Further the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them makes or implements public policy decisions. Article 10 sets out these national values and principles of governance which include patriotism, national unity sharing and devolution of power, the rule of law, democracy and participation of the people, good governance integrity transparency and accountability.

20) Under the Constitution, the Court has to inquire and determine questions of contravention of the Constitution on their merit. Where it is possible to identify the question in issue from the pleadings and materials presented, then the court is bound to determine such matter even when the particulars of breach had not been clearly or specifically pleaded.

21) The Court of Appeal stressed this view in **Mumo -Vs- Trusted Society Of Human Rights Alliance & 5 Others** (*supra*), said -

“Our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard of locus standi that places hurdles on access to the courts, except only when such litigations is hypothetical abstract or is an abuse of the judicial process.

However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be seized at the instance of such person and must reject the application at the threshold.”

22) With the foregoing in mind, it is clear to me from the outset that the Petitioner’s invocation of rights guaranteed under Articles 35, 46, 50 and 55 has no factual anchor in the Petition and Supporting affidavit. These rights relate to access to information, rights of consumers and of the youth as well as the right to fair hearing, respectively. It is not clear to me why these rights are invoked while there is no evidence whatsoever that these rights were on the facts of case violated as against the Petitioner. Thus so far as I can tell, the only Articles of the Constitution that appear to have some relevance to the Petitioner’s pleaded case are Articles 27, 28, 29, 47 and 40 of the Constitution.

23) The genesis of the Petitioner’s problems is admittedly the impugned Presidential directive of 1st July, 2015, the subject of much litigation, and in particular, **Keroche Breweries Limited & 6 Others -Vs- Attorney General & 10 Others [2016] eKLR.**

24) In the said case, **Odunga J** at paragraph 82 stated clearly that the court would limit itself to the determination of three issues as follows:-

a) The legality and constitutionality of the Presidential directive which was the subject of the said petition.

b) The legality of the letter dated 3rd July, 2015 (by KEBS suspending Petitioners’ permits and

licences).

c) The legality and constitutionality of the Alcoholic Drinks Control (Supplementary Regulations (2015).

25) The Petitioners in **Keroche Breweries Ltd** and others were, unlike the Petitioner herein, licensed to operate breweries and related businesses. **Odunga J** carefully distinguished the propriety of the Presidential directive vis-à-vis law enforcement agencies and members of parliament, by stating *inter alia*:-

“I must hasten to add that where the President simply states what is already the law, there is no requirement for him to comply with the provisions of Article 135 of the Constitution since he would only be giving a reminder on the implementation of a function which he or she had already exercised.

It is contended that on the 1st of July 2015, H.E. the President of the Republic of Kenya ordered a crackdown on the production and sale of illicit liquor within the country. That this directive was given has not been disputed. The only issue is what its import and impact was. If this directive was in the exercise of the functions under Article 135 of the Constitution, I would have had no hesitation in declaring it unlawful since it was clearly not in writing and could therefore not be under seal and was incapable of being signed. I have listened to the video which was exhibited in these proceedings and it is clear that the President while addressing himself to what he termed “*pombe haramu*” in fact directed the closure of all “dens” notwithstanding whether or not they were licensed. As conceded by the Petitioners themselves, the proliferation of illicit liquor in this country has reached an alarming proportion. The effect thereof on the young people of this country is clearly devastating. If left unattended to, the effect will clearly reach a level where it would have to be a declared national disaster. The manufacture and distribution of such illicit liquors which have led to serious adverse effects on the health and lives of Kenyans must be stemmed and any Kenyan of good will must support the efforts by the Government to stamp such ignominious business. The Petitioners themselves expressly averred that they fully support and have always been in support, of all efforts by the Government to regulate and stamp out the production and sale of illicit liquor which is perpetrated by unlicensed persons and counterfeiters much to the detriment of the interests of legitimate brewers and the consumers at large.....

In this case the President’s directive while directed at illicit brews, ordered the Members of Parliament to spearhead the crackdown on the same. Whereas no one harbours any doubt that the President’s directive was clearly appropriate, had the President addressed himself to those who are statutorily mandated to implement the law relating to illicit liquor, no one would have been questioning his directive as in those circumstances he would not have been directing those organs to carry out a function which hitherto did not exist but would be waking them up to carry out their mandate. That the law imposes a duty on the Cabinet Secretary, the Police, KEBS and NACADA to take steps to rid the country of illicit liquor cannot be doubted. In fact the Petitioners appreciated that KEBS has a statutory mandate under the *Standards Act* to ensure standardisation in industry and commerce within Kenya and for the purposes of carrying out its mandates under section 4. To that extent the President would not have been deemed to be undertaking a fresh mandate under any law but simply directing those concerned to ensure that the law was implemented.

However, the President’s audience and those to whom the directive was addressed and whom he directed to report to him, the Members of the National Assembly and the Senate, were not those legally mandated to carry out what he was directing them to undertake. In my view, the President was giving them fresh mandate. Members of Parliament’s role is clearly provided for in the Constitution and in line with the principle of separation of powers, the President, in a Presidential System like ours should not direct Parliament in the manner in which it conducts its matters unless the Constitution expressly empowers the President to do so. In the

premises to the extent that the directives of 1st July, 2015 were directed to Members of Parliament, as opposed to the executive, who were further directed to report back to the President, the said directives violated the doctrine of separation of powers as well as Article 132(3)(b) of the Constitution as read with Article 135 thereof. (Emphasis added)

26) The 1st and 4th Respondents in this case are administration officials and security agents responsible for enforcing the law in respect of the manufacture and sale of alcoholic drinks. That law existed and exists independently of the impugned presidential directive. Secondly, in this case there is no evidence that the Petitioner's otherwise valid licence was cancelled or renewal denied due to the presidential directive, or at all.

27) The Presidential directive was found to be unconstitutional by **Odunga J** for violating the doctrine of separation of powers and for failure to comply with Article 135 of the Constitution to the extent that it instructed members of parliament to implement it. In this case, while the 5th Respondent is named as the local Member of Parliament, his supposed role in the raids is not clear in the pleadings.

28) The Petitioner in this case was admittedly operating wholesale liquor outlets without a valid liquor licence. The facts of the present case differ from those in the **Keroche Breweries** case in one major respect. In the latter case current and valid licences and permits had been withdrawn or suspended by the Respondent. The Petitioner in this case was operating on the basis of an expired licence issued under the Alcoholic Drinks Control Act.

29) Evidently, what happened as a consequence of the Presidential directive was a more vigorous law enforcement exercise regarding alcoholic beverages, and which eventually caught up with the Petitioner. Hence the constant reference to a "raid." I agree with **Odunga J** that so far as it was directed at the police and other relevant agencies, the President's directive cannot be assailed for unconstitutionality.

30) Admittedly, the Petitioner herein was clearly operating a liquor business in 2015 on the basis of a license which had expired in 2014. It matters not whether or not he was dealing in alcoholic drinks manufactured by established breweries or second generation alcoholic drinks. It matters not that he had trading licenses from the County Government or that his business had been previously certified. By his own documents his liquor distribution operations were not duly licensed under the relevant law, namely the Alcoholic Drinks Control Act or the respective County equivalent. Thus he cannot be heard to say that the Respondents did not communicate that his licence by NACADA under the Alcoholic Drinks Control Act had been revoked, because it was not; the licence had expired due to normal effluxion of time. Therefore Article 47 of the Constitution has no relevance to his grievance, so far as the license is concerned.

31) With regard to Article 27 of the Constitution, I do accept the submissions of the 1st – 4th Respondents that the Petitioner has not demonstrated the alleged discrimination namely, that he was treated differently from other operators in a situation similar to his: that other illegal operators were allowed to continue with their businesses. These operators are not even named or their particular circumstances set out in the Petition and affidavit.

32) Concerning rights under Article 28 and 29 of the Constitution, this court having found that the Petitioner was operating an illegal alcoholic business cannot go on to agree with him that the threat of his arrest and prohibition of the continued illegal trade amounts to a violation under these Articles.

33) The sentiments by **Ngaa J** in **John Kinyua Munyaka & 11 Others -Vs- County Government of Kiambu & 3 others [2014] eKLR** are relevant here:-

“Considering the likely side effects of alcoholic drinks on the health and well-being of the consumers, it is not only necessary but it is also an obligation on any responsible government to protect the public from such harmful effects that flow from the production, sale and consumption of alcoholic drinks; it would be a dereliction of duty on the part of the government, whether national or county, to leave the manufacturers, sellers and consumers

of alcoholic drinks to their own devices to detriment of the entire society. It is the responsibility of the Government through its legislative arm to legislate and provide guidelines that would ensure that this section of the populace enjoy their rights without interfering unnecessarily with the rights of others.”

34) The right to freedom of the person and security under Article 29 (a & c) and the right cited in respect of Article 28 of the Constitution are not absolute rights. Article 24 (1) states:

“(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

35) Clearly any activities carried out in breach of the law cannot be justified as a lawful exercise of a constitutional right. The Petitioner being in breach of the law cannot assert that the same is an exercise of his constitutional rights and that these were curtailed or violated when the Respondents issued prohibitions against his reopening the unlicensed liquor distribution business.

36) The Petitioner has complained that the protection of his right to own property was violated through the invasion of his business by the Respondents and the destruction of his goods. He claims to have lost business goods and equipment worth Shs 7,400,000/=. This sum is not particularized in the pleadings to reflect the exact property lost and its respective value.

37) The photographs of supposed business stocks annexed to the supporting affidavit do not help. These cannot be a substitute for a proper inventory of stock or evidence of purchase thereof. Much less be evidence of the type of drinks destroyed; whether conventional or second generation alcoholic drinks and their value. Indeed it is difficult to make out much from the said photographs.

38) On this aspect, it is also noteworthy that two of the County business permits attached to the supporting affidavit refer to the Petitioner’s business as “a small bar/traditional beer seller” (See annexure GMM 1 and 2). The bank statements annexed to the supporting affidavit cannot assist the court determine the nature, quality and value of alcoholic stock that was allegedly destroyed, or that the said stock comprised of legal alcoholic drinks.

39) Thus in my view, the Petitioner’s contention that the Respondents’ actions violated his rights under Article 40 of the Constitution appears tenuous. The question whether the Petitioner’s business was operating legally is also relevant here. A person stocking contraband goods cannot assert the exercise of a constitutional right. Moreover, the sum of Kshs. 7.4 Million claimed as damages appears to have been plucked from the air.

40) This Petition in my considered view has no merit whatsoever and must be dismissed with costs, for all the foregoing reasons.

Delivered and Signed at Naivasha this 19th day of October, 2017.

No appearance for the Petitioner

No appearance for the Respondents

Court Clerk – Barasa

C. MEOLI

JUDGE