



Musila v County Government of Narok (Environment & Land Petition E009 of 2022) [2023] KEELC 20507 (KLR) (9 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20507 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND PETITION E009 OF 2022**

CG MBOGO, J

OCTOBER 9, 2023

BETWEEN

ALFRED MUSILA PETITIONER

AND

COUNTY GOVERNMENT OF NAROK RESPONDENT

JUDGMENT

1. On 29th December, 2022, the petitioner filed an undated petition seeking orders against the respondent as follows: -
 - a. A declaration be and hereby issued by the respondent's Alcoholic Drinks Committee on 19/08/2021 is null and void ultra vires the [Physical and Land Use Planning Act](#) 2019.
 - b. A declaration that it is only the [Physical and Land use Planning Act](#) 2019 that has jurisdiction to deal with the application for change of user.
 - c. A declaration and an order of specific performance that until the respondent determines the petitioner's application for change of user by either approving or rejecting with written reasons the applicant shall continue to operate his establishment unconditionally without the respondent withholding any license including the Alcoholic Drinks License.
 - d. A declaration that the respondent's inaction on the petitioner's application for change of user presented to the respondent in 2019 breached the Petitioner's constitutional rights under Articles 40(2), 47(1),60(1)(b) and 50 of [the Constitution](#) of Kenya, and was null and void for all intents and purposes.
 - e. A declaration that the respondents order dated 19/08/2021 that the petitioner's premise was residential and not breached (sic) the petitioner's constitutional rights under Articles



40(2),47(1),60(1)(b) and 50 of the Constitution of Kenya and was null and void for all intents and purposes.

- f. A permanent injunction do issue restraining the respondent, either by themselves, assigns, representatives, employees or agents from commencing or initiating the closure of petitioner's establishment until the respondent determines the petitioner's application for change of user by either approving or rejecting the same with written reasons.
 - g. An order of judicial review orders of certiorari to remove into this honourable court and quash the respondents purported rejection order dated 19/08/2021.
 - h. An award of damages of five million to the petitioner for the loss suffered.
 - i. Costs of and incidental to this petition; and
 - j. Any other order that this honourable court deems fit and just to grant in the circumstances.
2. The petition was supported by the affidavit of the petitioner sworn on 29th December, 2022 whose averments are similar to the background as described in the petition.
 3. The gist of the petition is that the petitioner is the owner of plot known as Block 6 No. 147 which he proposed for change of user from low density residential to commercial i.e. hotel with multi dwelling lodging unit vide an application with the respondent's department of physical planning in the year 2019. That since he made the application, he has not received approval or rejection with reasons to the application for change of user.
 4. According to the petitioner, since the inception of his establishment in the year 2000, the respondent has always issued the alcoholic drink license and since the coming in of the Physical and Land Use Planning Act 2019, the respondent has not been forthright in its dealings with the petitioner on the issuance of the license despite other establishments in proximity with the petitioner's carrying on their businesses and issued with the same license.
 5. That in a surprise move to avoid approving or rejecting the application for change of user, the petitioner's application for change of user was determined through the application form for the grant or renewal of liquor license as the ground for not approving the license with the reason being that the premise is in a residential area.
 6. The petitioner contended that the conclusion arrived at by the committee for the respondent was ultra vires its jurisdiction as provided in the Narok County Alcoholic Drinks (Regulation and Control) Act, 2016 on license for premise, sections 14 to 16. That the jurisdiction lies under the Physical and Land Use Planning Act 2019. Further, that there are other establishments in the same block 6 i.e. Lexington Hotel and New Villa Bar carrying on the same business while his establishment has been locked out.
 7. The petitioner further contended that there is an elaborate legally guided process for change of user, however, the respondent is using shortcuts through the alcoholic tribunal to lock out his establishment to the due process under the Physical Planning Act which is unfair and a denial of natural justice. Further, that the respondent's failure to consider its administrative mandate and opting to delegate its legal mandate to the Alcoholic Drink License Tribunal is in itself bad faith. That the Physical and Land Use Planning Act 2019, gives the county governments powers within their areas of jurisdiction to control land use and that the respondent has not complied with Section 61(2)(a) and (b) of the Physical and Land Use Planning Act 2019.
 8. The petitioner contended that he has run to this court for his rights to fair hearing and natural justice to be protected as no decision has been made by the respondent's relevant department that could



be the subject of appeal and that the stalemate has arisen as a result of the perceived inaction by the respondent's concerned authorities. Also, that his rights under Article 50(1) of *the Constitution* was violated by the respondent when he was subjected to a partial body to have his dispute resolved.

9. On the 11th May, 2023 the respondent, through its Director of Land Registration- Godfrey Kwena filed a replying affidavit dated 10th May, 2023 in response to the petition sworn on 10th May, 2023. The respondent illustrated the procedure for obtaining a change of user as elaborated in paragraphs 4 to 6 of his affidavit. The respondent deposed that no such application for change of user was made by the petitioner on the alleged dates and that the coming into force of the Physical Planning Act was a wakeup call for stringent measures on business compliance and proper operation.
10. The respondent further deposed that it has no record of any application and therefore no process to determine the same on merit was ever commenced. Also, that the said property is residential hence the alleged application for change of user was meant to validate the use of property for commercial use. Further, that it follows that the determination by the respondent's committee save to the application by the petitioner for grant of renewal of liquor license was merited since upon the enforcement of the Physical Planning Act, the respondent noted and flagged most establishments that had not complied to ensure compliance.
11. The respondent deposed that the role of the committee to renew or grant liquor license is not merely to issue but rather to issue or deny on merits. Also, that the Alcohol Drinks Control Act 2016 committee did not make a blanket denial of the permit but also recommended that the petitioner attend the relevant committee for review. Further, that an application for change of user is not automated and each application is reviewed on its merit and the verdict can equally be to approve or deny. Also, that the petitioner's assumption that an application was made and that the right of change of user ought to have been allowed or the licenses ought to have been issued was misplaced.
12. The respondent deposed that the allegations that other establishments around the petitioner's establishment have licenses is neither here nor there for the reason that approval of licenses is done on an individual basis on merit and in the event where an application is not submitted to the respondent for deliberation and determination as the one said to be relied on by the petitioner does not bear the official stamp of the respondent as proof that it was duly presented for consideration, the petitioner cannot purport that his rights are infringed or declare the respondent to be in contravention of the law.
13. The petitioner filed a supplementary affidavit in response thereto sworn on 2nd June, 2023. The petitioner reiterated the averments in his supporting affidavit sworn on 29th December, 2022. The petitioner further deposed that he handed over his application for change of user to an employee of the respondent's which included PPA1, site plan, title deed advertisement and receipt of payment of Kshs. 10,000/- and that it is sad to see the respondent continue to uphold the decision by the Alcoholic License Tribunal at the expense of what the office of physical planning would legally have considered.
14. The petitioner further deposed that the assertion by the respondent is disingenuous as he has been operating his establishment since the year 2000 and the respondent has been approving his relevant business licenses. Further, that the establishments mentioned carry on similar business, approved under similar licenses and under similar procedure of vetting and as such, the respondent has not discharged the burden of evidence on the issue of discrimination against his establishment.
15. The petitioner decried the discrimination of treatment of the respondent's conduct as he lodged the required documents with the respondent's office and made payments on 13th January, 2020 of Kshs. 10,000/-. Also, that he made trips to the respondent's office and had a meeting with the CEC Lands



- who summoned the Director in Charge of Physical Planning to enquire why his application had not been acted upon.
16. Stanley Ngechu of Nakuplan Consultants-registered physical planners filed a supplementary affidavit in support of the petitioner's supplementary affidavit sworn on 2nd June, 2023. The said Stanley Ngechu in response to the replying affidavit deposed that the approval procedure contained in paragraph 4 of the respondent's replying affidavit was followed and submissions made to the respondent was received and an invoice issued. Further, that the advertisement process was followed and completed as per the extracts attached.
 17. He further deposed that the respondent's position that they did not receive the application is baseless as the invoice issued could only have been issued upon submission and recommendation for approval after scrutiny of the relevant documents. Also, that the allegation that the petitioner did not file an application for change of user is false for the reason that the documents went to the vetting committee and no comment was issued.
 18. The petition was canvassed by way of written submissions. On 23rd June, 2023, the petitioner filed written submissions dated 21st June, 2023 raising four issues for determination as follows: -
 - a. Whether the petition meets the competence threshold.
 - b. Whether the constitutional rights of the petitioner were violated by the respondent.
 - c. Whether the decision by the respondent (Alcoholic Drink License Tribunal) was ultra vires its mandate.
 - d. Whether the petitioner is entitled to the prayers sought.
 19. On the first and second issues, the petitioner submitted that the petition meets the competence test on violation of his right to equality and freedom from discrimination, the right to fair administrative action, the right to access to justice and the right to fair hearing. The petitioner relied on the cases of Anarita Karimi Njeru versus Republic [1979] eKLR, Attorney General versus Kituo Cha Sheria & 7 Others [2017] eKLR and Judicial Service Commission versus Mbalu Mutava & Another [2015] eKLR.
 20. The petitioner submitted that the respondent's failure to consider its administrative mandate and opting to delegate its mandate to the Alcohol Drink License Tribunal is in bad faith as it was held in the case of Keroche Breweries Limited & 6 Others versus Attorney General & 10 Others [2016] eKLR. Further, that he is aware that as much as he has a constitutional right of access to justice on the other hand, the High Court and the Court of Appeal have pronounced themselves to the effect that a party must first exhaust the other processes available by law established before moving the court. However, the processes to be exhausted are being abused and or camouflaged into shortcuts which the petitioner feels condemned without being heard. The petitioner relied on the cases of International Centre for Policy and Conflict & 4 Others versus The Hon. Uhuru Kenyatta & Others Petition No. 552 of 2012, Speaker of National Assembly versus Njenga Karume [2008] 1KLR 425, Republic versus Nairobi County Government Ex-parte Imara Holdings Limited [2019] eKLR and Lavington Green Development Limited & 2 Others versus The National Environmental Management Authority & 2 Others [2019] eKLR.
 21. On the third issue, the petitioner submitted that as much as there is a labourous process to be undertaken from Sections 7 to 10 of the Physical Planning Act which has established municipal, district and national liaison committees which are empowered to hear and determine appeals lodged by persons aggrieved by decisions made by local authorities under the Act. Likewise under Section 129 of



- the Environment Management and Co-ordination Act, the National Environment Tribunal is set to hear and determine appeals arising from decisions made by authorities which process the respondent has abandoned and frustrated and instead decided to use a tribunal that regulates liquor license to give a substantive decision that affects an application for change of user.
22. Further, that Section 61(2) of the Physical Planning Act, 2019 provides for regulation of land use and development to both residential and commercial premises. That failure by the respondent to follow the process laid out in Section 61 (2), the petitioner is stagnant and cannot move to appeal the no decision which he was not afforded an opportunity of being heard owing to the breach. Reliance was placed in the case of *Bethwell Allan Omondi Okal versus Telkom (K) Limited (Founder) & 9 Others* [2017] eKLR.
 23. On the fourth issues, the petitioner while relying on the cases of *Reuben Njuguna Gachukia & Another versus Inspector General of the National Police Service & 4 Others* [2019] eKLR and *Tinyefuze versus Attorney General of Uganda* [1997] UGCC3 submitted that his rights were indeed violated and is entitled to the prayers sought.
 24. On 6th July 2023, the respondent filed written submissions dated 3rd July 2023 and raised three issues for determination as follows:-
 - a. Did the petitioner demonstrate the allegation that the said change of user was indeed filed with the respondent for consideration.
 - b. Did the petitioner indeed follow the laid down procedure in as far as filing the change of user application.
 - c. Whether the determination of the Alcohol Tribunal to deny the licensing ultra vires.
 25. On the first issue, the respondent submitted that ordinarily, the process of receiving a document in a institution such as that of the respondent is by the respondent placing a stamp dated and a signature appended by the person receiving and that it is also expected that the petitioner presenting his copy for stamping as proof of receipt. However, in this case, the petitioner presented documents which this court will not be able to deduce whether they are documents presented or a process that never was. The respondent submitted that the documentation does not illustrate that the process was successfully initiated at the respondent's office. Also, that the annexure provided as much as they are meant to facilitate the process are not a justification that the said application materialized.
 26. The respondent further submitted that the averments by Stanley Ngechu of Nakuplan Consultants in his affidavit forms part of the initial stages of the application for change of user but does not illustrate the commencement of the process at the respondent's office. Further, that the narration by the petitioner will not aid this court in making a determination on the question of whether filing was ever done and the burden of proof lies with the petitioner who is alleging that indeed the process commenced.
 27. The respondent further submitted that an application for a change of user commences upon successful payment of the requisite fees and the reliance of an invoice by the petitioner as sufficient proof of payment is misplaced. It was the respondent's position that such invoice is annexed to the planning brief/report prepared by the physical planner. That invoicing does not trigger action but rather a direction to proceed and make payments required.
 28. On the second issue, the respondent submitted that the petitioner has failed to illustrate the process entailed in the replying affidavit of Godfrey Kwena as there is no proof of onsite application fee receipt and land rates payment receipts which are the basic components of compliance from the beginning.



Also, that the extract of communication via whatsapp between the petitioner and an alleged employee of the respondent contravenes Section 65 (5)(c), (6), (8) and 106 (B) of the *Evidence Act* which is a legal requirement that for the document to be admitted, it must be through an affidavit. The respondent relied on the case of Sophia Juma Swaleh versus Inspector General of Police & 3 Others [2016] eKLR.

29. On the third issue, the respondent submitted that the petitioner realized the flaws of the Alcohol Committee upon denial of an alcohol license which is tantamount to selective evaluation. That the position taken by the Alcohol Drinks Committee was after an application and compliance thereto by the petitioner through an application for grant of renewal of liquor license dated 4th August, 2021 which was disqualified on the premise that the business was in a residential area. Further, that the allegation that the physical planning committee communicated their change of user decision through the alcohol committee is misplaced as the petitioner had independently applied for the liquor license from the Alcohol Drinks Committee and expected a rejection or approval either way.
30. The respondent submitted that the Alcohol Drinks Committee was operating within its precincts and was provoked by the petitioner through the application dated 4th August, 2021 and not in any way as alleged by the petitioner in their own violation as a way to render the purported decision of the application of change of user to the physical planning office.
31. In conclusion, the respondent submitted that the petitioner ought to have instituted the process afresh and allow the respondent determine his application on merit.
32. The petitioner filed supplementary written submissions dated 19th July, 2023. The petitioner submitted that the respondent never raised an issue whether the respondent in its knowledge was aware of Vivian Seret, an employee in the respondent's office of physical planning and had the respondent had any reservation to the electronic evidence, the respondent had an opportunity to respond to it through the replying affidavit or further affidavit and not plead through written submissions. The petitioner relied on the cases of Mable Muruli versus Wycliffe Ambetsa Oparanya & 3 Others [2013] eKLR and In Re Estate of Washington Olweny (deceased) [2021] eKLR.
33. The petitioner further submitted that submissions do not amount to evidence unless expressly adopted as such and he relied on the case of Erastus Wade Opande versus Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007.
34. The petitioner further submitted that the issue on change of user is a matter which was lying with physical planning department since 2019 uncompleted and it was sub-judice for Alcohol Drinks Committee to pronounce itself on this issue. That if the Alcoholic Drinks Tribunal was not usurping the Physical Planning Act mandate to find whether the petitioner's establishment is residential or otherwise, the question that lingers is why had the petitioner's establishment operated since the year 2000 to 2021?
35. I have analysed and considered the petition, the replies thereof and the written submissions filed by both parties and the issues for determination are as follows: -
 - i. Whether or not the respondents violated the rights of the petitioner.
 - ii. Whether the petitioner is entitled to the orders sought.
36. It is not disputed that the petitioner in in this case is the owner of land known as Block 6 plot no. 147 situate in a residential area within Narok town. The petitioner has been running the business establishment since the year 2000 and has over the years been issued with alcoholic drink license. However, in the year 2019, the petitioner proposed a change of user from residential to commercial by placing the relevant documentation and paying the requisite fees before the physical planning office



of the respondent and to date, he has not received any approval or rejection with reasons thereto. For this reason, the petitioner contended that his change of user application was determined through an application form for the grant of renewal or liquor license which in rejecting the application stated that the premise is in a residential area.

37. The petitioner felt that the conclusion arrived at by the respondent was ultra vires the jurisdiction of the Narok County Alcoholic Drinks (Regulation and Control) Act 2016 as there is no section that provides if the committee can consider whether it should deny the license on an account of a premise being residential or commercial. That the said jurisdiction lies with the [Physical and Land Use Planning Act](#) 2019.
38. On the other hand, the respondent contended that the petitioner has not met the criteria in making an application for change of user as contained in paragraphs 4 to 6 of their replying affidavit. The respondent argued that the procedure commences with filing out the PP1A forms and accompanying the form with relevant forms and payment of requisite fees which the petitioner has not proved.
39. Before delving into the other issues, it is first and foremost important for the court to satisfy itself whether the petition meets the threshold as enunciated in the case of Anarita Karimi Njeru versus Republic [1979] eKLR.
40. Article 23(1) of [the Constitution](#) states;-

“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.”
41. From the foregoing Article, it is clear that the jurisdiction of this court has been confined to interpretation of any constitutional question as well as redress for violations of constitutional rights.
42. In the case of CNM versus WMG [2018] eKLR, the court weighed in on the constitutional question as follows;

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.”

The court went on further to state;

“When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.[17] The issues raised here will only require the Court to examine defamation law.

21. The question of what constitutes a constitutional question was ably illuminated in the South African case of Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others[18] in which Justice O’Regan recalling the Constitutional Court’s observations in S vs. Boesak[19] notes that:-

“[The Constitution](#) provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of [the Constitution](#) itself: If regard is had to the provisions of ..., [the Constitution](#), constitutional matters must include disputes as to whether any law or conduct is inconsistent with [the Constitution](#), as well as issues concerning the status, powers and functions of an organ of State..., the interpretation, application and



upholding of *the Constitution* are also constitutional matters. So too,..., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”[20]

22. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation.[21] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.”

43. I am satisfied that the petition meets the threshold for a constitutional petition since the petition is questioning the powers and functions of Alcohol Drinks Committee to determine his application for change of user. The other issue is whether the petitioners’ rights were violated. Article 40 of *the Constitution* provides that:

“ 40.

(1) Subject to article 65, every person has the right either individually or in association with others, to acquire and own property-

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the state or any person –

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over any property of any description; or

(b) to limit or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

44. Article 47 of *the Constitution* grants every person a right to fair administrative action. Subsections (1) and (2) thereof state that:-

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”



45. In addition, Article 50 guarantees every person a right to a fair hearing. Article 50 (1) provides that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or; if appropriate, another independent and impartial tribunal or body.”

46. As I have understood the petitioner, the concerned department (Physical Planning Office) failed to act on his application for change of user and whereas he continued carrying on his business which he has conducted since the year 2000, it was unfair for the Alcohol Drinks Committee to purport to reject his application on the grounds that the premise is in a residential area. However, the documents in support of his application for a change of user do not appear complete, the annexures said to be attached in the planning brief were not provided before this court. The respondent even while denying that the process was not initiated did not deny knowledge of the said Vivian Seret who is said to have been in receipt of the documents. What is coming out clearly is a blame game of either party's of failure to complete his or its obligations as far as a change of user application is concerned.

47. In my view and in the interest of justice, it would only be fair that the petitioner files his application afresh for consideration or otherwise before the physical planning committee of the respondent. As such, the petition is allowed in terms of prayer (f) to the effect that a permanent injunction is hereby issued restraining the respondent either by themselves, representatives, employees or agents from initiating closure of the petitioner's establishment until the respondent determines the petitioner's application for change of user upon filing of a fresh application for a change of user. Each party to bear its own costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 9TH DAY OF OCTOBER, 2023.

HON. MBOGO C.G.

JUDGE

9/10/2023

In the presence of:

CA: Pere Meyoki

