



**Gichuki v County Government of Nairobi & 6 others (Petition E222 of 2023)
[2025] KEHC 2364 (KLR) (Constitutional and Human Rights) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E222 OF 2023

LN MUGAMBI, J

MARCH 6, 2025

BETWEEN

ROSALID NYAWIRA GICHUKI PETITIONER

AND

COUNTY GOVERNMENT OF NAIROBI 1ST RESPONDENT

GOVERNOR, NAIROBI CITY COUNTY GOVERNMENT ... 2ND RESPONDENT

**COUNTY SECRETARY, NAIROBI CITY COUNTY GOVERNMENT 3RD
RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER FOR TRADE
CO-OPERATIVES AND TOURISM NAIROBI CITY COUNTY
GOVERNMENT 4TH RESPONDENT**

**CHIEF OFFICER BUSINESS AND HUSTLER OPPORTUNITIES NAIROBI
CITY COUNTY GOVERNMENT 5TH RESPONDENT**

**COUNTY ATTORNEY, NAIROBI CITY COUNTY GOVERNMENT 6TH
RESPONDENT**

**NAIROBI CITY COUNTY ALCOHOLIC DRINKS, CONTROL AND
LICENSING BOARD 7TH RESPONDENT**

Funds established by county governments must comply with constitutional principles of good governance and public finance

The judgment nullified section 43 of the Nairobi County Alcoholic Drinks Control and Licensing Act, 2014, which established the Nairobi County Alcoholic Drinks Fund. The High Court found the section unconstitutional, holding that the County Government lacked the explicit parliamentary authorization required to create such a fund and that its establishment failed to comply with the stringent transparency and accountability provisions



of the Public Finance Management Act. The court emphasized the importance of adhering to constitutional principles of good governance and public finance. Consequently, the fund was frozen, and all future revenues were directed to the County Revenue Fund until a legally compliant alternative fund could be established.

Reported by John Ribia

Devolution – counties – powers of counties to establish funds - Nairobi County Alcoholic Drinks Control Fund – constitutionality of counties establishing funds - adherence of the fund to principles of good governance and principles guiding public finance - whether a county government possessed the authority to establish specific public funds - whether Section 43 of Nairobi County Alcoholic Drinks Control and Licensing Act that establishes the Nairobi County Alcoholic Drinks Control Fund was unconstitutional for violating principles of good governance and guiding principles of public finance that included openness and transparency – Constitution of Kenya articles 10(2)(c), 201(a), 207(4)(b); Public Finance Management Act (Cap 12A) section 116; Nairobi County Alcoholic Drinks Control and Licensing Act section 43.

Brief facts

The dispute concerned the constitutional and statutory validity of the Nairobi County Alcoholic Drinks Control and Licensing Act, 2014, specifically focusing on section 43, which established the Nairobi County Alcoholic Drinks Fund. The petitioner challenged the legality of this fund's creation, arguing that the County Government lacked the necessary parliamentary authorization to establish such a fund, as mandated by the Constitution and detailed in section 116 of the Public Finance Management Act.

Further, the petitioner contended that section 43 of the County legislation fell short of integrating crucial transparency and accountability requirements outlined in the Public Finance Management Act, overlooking key oversight roles for officials like the County Executive Member for Finance and essential financial reporting to the Auditor-General and County Assembly. The omissions, it was argued, rendered the Act inconsistent with constitutional values of good governance and public finance principles.

Issues

- i. Whether a county government possessed the authority to establish specific public funds.
- ii. Whether Section 43 of Nairobi County Alcoholic Drinks Control and Licensing Act that established the Nairobi County Alcoholic Drinks Control Fund was unconstitutional for violating principles of good governance and guiding principles of public finance that included openness and transparency.

Held

1. The Constitution was to be interpreted in a holistic manner that promoted its values and principles, advanced rule of law, development of the law and contributed to good governance.
2. The management of and/or control of alcoholic drinks under the Constitution was a function assigned to County Government. In enacting legislation in respect of the subject matter under inquiry, the County Government was perfectly acting within the scope of its general mandate under article 185(2) of the Constitution.
3. Article 227 of the Constitution provided for the Revenue Fund for County Governments. The Constitution under article 207(4)(b) only recognized that Parliament that had the mandate to provide for establishment of other funds by Counties and the management of those funds.
4. Section 116 of the Public Finance Management Act provided that a County Executive Committee member for finance could establish other public funds with the approval of the County Executive Committee and the County Assembly. The administrator of a county public fund shall not later than three months after the end of each financial year, submit financial statements relating to those accounts to the Auditor-General and present the financial statements to the county assembly.
5. Parliament and not the Counties was the one empowered to authorize the establishment of other public funds. Section 43 of Nairobi County Alcoholic Drinks and Licensing Act 2014 which created the Nairobi County Alcoholic Drinks Fund was misplaced as such a fund ought to have been created in strict compliance with the provisions of section 116 of the Public Finance Management Act. Section



- 43 of the Nairobi County Alcoholic Drinks Control and Licensing Act fell short of transparency requirements incorporated in section 116 of the Public Finance Management Act. Section 43 of the Nairobi County Alcoholic Drinks Control and Licensing Act, 2014 was completely silent on the role of County Executive Member in charge of Finance despite the conspicuous role given to the County Executive in charge of Finance by Section 116 of the Public Finance Management Act which included the role of designating the administrator of the fund.
6. Section 116 of Public Finance Management Act integrated provision for enhancing transparency and accountability which the County legislation prominently overlooks. For instance, the requirement that not later than three months after the end of each financial year, financial statements relating to the public fund must be submitted to the auditor general and to the County Assembly; that there must be regulations in place to guide the operations of the fund, and, the requirement for publishing and publicizing the usage of those funds. The county legislation did not fulfil the dictates of article 10 of the Constitution which applied to all State organs, state officers and all persons whenever any of them enacts, applied or interpreted any law, makes or implements public policy decisions as it omitted integrating critical elements of good governance, transparency and accountability which were captured in section 116 of the Public Finance Management Act, 2012 and which ought to have been the guiding factor in that legislation.
 7. Section 43 of the Nairobi County Alcoholic Drinks Control and Licensing Act, 2014 was inconsistent with article 207(4)(b) of the Constitution as read with section 116 of the Public Finance Management Act. Section 43 did not promote the constitutional values and principles of good governance under article 10(2)(c) and also, article 201 (a) on guiding principles of public finance that included openness and transparency.
 8. The petitioner had not substantiated the allegation of unconstitutionality in regard to the appointment of the Board Members. The burden of proving the unconstitutionality of a statute rested on the person who alleged. The petitioner failed to convince the court that the provisions in respect to the procedure for appointment and the composition of the Board under the Alcoholic Drinks Control and Licensing Act, 2014 was unconstitutional.

Petition partly allowed.

Orders

- i. *Declaration issued that the entire section 43 of Nairobi County Alcoholic Drinks Control and Licensing Act that established the Nairobi County Alcoholic Drinks Control Fund was unconstitutional, null and void.*
- ii. *Order issued freezing any withdrawals from the Nairobi County Alcoholic Drinks Control Fund Bank Account at the Cooperative Bank Limited City Hall Branch, account number [particulars withheld] or any other bank account where such funds were being held until a legally and constitutionally compliant public fund was established in conformity with article 207(4)(b) of the Constitution as read with section 116 of the Public Finance Management Act. In the meantime, all funds raised under the Alcoholic Drinks Control and Licensing Act, 2014 were to be deposited into the County Revenue Fund Account.*
- iii. *Each Party was to bear its own costs.*

Citations

Cases

Kenya

1. *In the Matter of the Interim Independent Electoral Commission Constitutional Application 2 of 2011; [2011] KESC 1 (KLR) - (Explained)*
2. *Katiba Institute & Transform Empowerment for Action Initiative (Team) v Attorney General & another Constitutional Petition 209 of 2016; [2017] KEHC 4648 (KLR) - (Explained)*



3. *Republic v Fazul Mahamed & 2 others ex-parte Okiya Omtatah Okoiti* Miscellaneous Civil Application 617 of 2017; [2018] KEHC 9435 (KLR) - (Explained)

4. *Republic v Kenya Medical Laboratories Technicians and Technologists Board ex-parte Archdiocese Nairobi Kenya Registered Trustees* Miscellaneous Application 665 of 2017; [2018] KEHC 9303 (KLR) - (Explained)

Uganda

Tinyefunza v Attorney General of Uganda Constitutional Petition No. 1 of 1996; [1997] UGCC 11 - (Explained)

United States

US v Butler 297 US 1 [1936] - (Explained)

Statutes

Kenya

1. Constitution of Kenya article 2(4); 10; 20(4); 159(1); 185(2); 201; 207(4)(b); 259(1) - (Interpreted)

2. County Governments Act (cap 265) In general - (Cited)

3. Evidence Act (cap 80) section 107; 108 - (Interpreted)

4. Nairobi City County Alcoholic Drinks Control and Licensing Act (No 3 of 2014) section 43 - (Unconstitutional)

5. Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014 (Act No 3 of 2014) section 4, 6(1); 8; 5; 23; Schedule 2 - (Interpreted)

6. Public Finance Management Act (cap 412A) section 109, 116 - (Interpreted)

Instruments

Mwongozo – The Code of Governance for State Corporations, 2020

Advocates

None mentioned

JUDGMENT

Introduction.

1. The petition dated 30 June 2023 is supported by the petitioner’s affidavit in support of similar date. The gravamen of this petition challenges the manner in which the respondents are carrying out their mandate under the [Nairobi City County Alcoholic Drinks Control and Licensing Act](#). In similar fashion, the petitioner also impugns some of the provisions of the [Act](#). Consequently, the petitioner seeks the following reliefs against the respondents:

- a. A declaration that the actions of the respondents in mismanaging, misappropriating, and making unauthorised withdrawals from the Nairobi County Alcoholic Drinks Control Fund held at Co-operative Bank of Kenya Limited, City Hall Branch, account number [particulars withheld] are unconstitutional, unlawful, and in violation of the rights of the Petitioner and affected parties.
- b. A declaration that the failure to remit the collected funds to the County Revenue Fund, as mandated by law, constitutes a breach of constitutional and statutory obligations in relation to the Nairobi City County Alcoholic Drinks Control and Licensing Fund account held at Co-operative Bank of Kenya Limited, City Hall Branch, account number [particulars withheld].
- c. An order immediately freezing any withdrawals from the Nairobi County Alcoholic Drinks Control Fund Bank Account held at Co-operative Bank of Kenya Limited, City Hall Branch,



account number [particulars withheld] pending hearing and determination of this Petition and/or subject to orders by this court and directing that the account shall remain indefinitely frozen until such time that the respondents fully render account as per prayer (d) below.

- d. An order from the court directing the relevant respondent (as the designated representative and liaison for all signatories and persons in charge), to render a complete and full account of all funds credited and debited in the Nairobi County Alcoholic Drinks Control Fund Bank Account held in the Co-operative Bank of Kenya Limited, City Hall Branch, account number [particulars withheld], from January 2020 - present, including a detailed statement of transactions with dates, amounts, descriptions, and involved parties, and to disclose the source, purpose, and justification for each credit and debit, specifying transfers, withdrawals, or disbursements made, including beneficiaries, recipients, and purposes of fund utilisation with the relevant supporting documentation attached.
- e. An order of mandamus compelling the respondents to perform their statutory duties and obligations in relation to the proper administration and management of the Co-operative Bank of Kenya Limited, City Hall Branch, account number [particulars withheld].
- f. An order declaring that the administration of the Alcoholic Drinks Control Fund by the County Executive Committee Member responsible for Trade, instead of the County Executive Committee Member responsible for Finance as designated by the *Constitution*, the *County Government Act*, and the *Public Finance Management Act*, is unconstitutional.
- g. Issue a writ of certiorari to quash any licenses issued in contravention of the *Act*, on the grounds of *ultra vires*, unreasonableness, and error of law on the face of the record.
- h. Issue a writ of mandamus to compel strict adherence to the *Act's* requirements for license issuance, in accordance with the principles of fairness, proportionality, and legitimate expectation.
- i. Issue a writ of prohibition to prevent any further violation of the *Act* in the issuance of licenses, on the grounds of bad faith, abuse of power, and consideration of irrelevant factors.
- j. An order directing the establishment of specific term limits for Board members and ensure strict compliance with County Assembly vetting requirements for Board appointments, declaring the absence of these provisions as unconstitutional and an abuse of power.
- k. Issue a declaration that the Board established under the *Act* is unconstitutional, considering its ambiguous nature as either an Executive or Non-Executive body, its non-compliance with the '*Mwongozo Code of Conduct*,' and the County Public Service Board Regulations, as well as its inadequate representation of stakeholders.
- l. Direct the appointment of committee members specified under the *Act* in accordance with the transparency and inclusivity requirements prescribed by the *Act* and Constitutional provisions, in order to prevent abuse of power and the consideration of irrelevant factors.
- m. Direct the Board to fulfil its assigned functions, including the establishment of an Appeals Committee, and to implement a comprehensive procedural framework for appeals in accordance with its statutory obligations. Such implementation should ensure strict adherence to the principles of fairness, natural justice, and legitimate expectation.
- n. Declare that the failure of the Sub-County Alcoholic Committee to adhere to the explicit provisions of the *Act*, including the proper preparation and publication of notices in the Kenya Gazette, the County Gazette, and conspicuous locations at relevant premises, renders



the licenses issued by the Committee null and void. Such failure is deemed unconstitutional as it violates the fundamental principles of fairness, transparency, and natural justice.

- o. Order the proper composition of the Sub-County Alcoholic Committee to ensure adequate representation of stakeholders, including bar owners, the youth, and residents' association representatives, in accordance with the principles of fairness, proportionality, and natural justice.
- p. Grant any other appropriate relief deemed necessary by the court to rectify the constitutional violations, safeguard the principles of fairness, proportionality, natural justice, and legitimate expectation, and ensure the proper governance, compliance, and effective functioning of the Alcoholic Drinks Control and
- q. Cost of and incidental to this petition.

Petitioner's Case.

2. Prior to the promulgation of the *Constitution*, licensing and enforcement of liquor was a preserve of the national government. The licensing function was subsequently devolved to the county government while the enforcement function remained with the national government. Against this background, the Nairobi City County enacted the *Nairobi City County Alcoholic Drinks Control and Licensing Act*, 2014 with a view of effecting this function.
3. The petitioner asserts that this law was enacted hurriedly leading to an oversight of fundamental principles of enacting a law. The petitioner states that *Nairobi City County Alcoholic Drinks Control and Licensing Act* was enacted without adhering to the public participation requirement in line with article 10 of the *Constitution*. Owing to this, it is argued that the *Act* contains a number of unconstitutional provisions which as well contravene the *Public Finance Management Act* and other laws.
4. The petitioner contends that in addition to this law having unconstitutional provisions, it contains a number of irregularities in view of operation and implementation of the *Act*. The petitioner underscored the summarized issues as: mismanagement of the Alcoholic Drinks Control Fund, the Alcoholic Drinks Control Fund is unlawfully administered by the County Executive Committee Member responsible for Trade, Licenses are being issued in direct contravention of the provisions outlined in the *Act*, the constitutionality of the Board established under the Act is also impugned as does not define whether its nature is executive or non-executive and also fails to comply with the *Mwongozo – The Code of Governance for State Corporations*, the Board's failure to execute certain functions particularly appeals from the Sub-County Committees, composition of the Sub-County Alcoholic Committee is also constitutionally flawed, the Sub-County Alcoholic Committee fails to adhere to explicit provisions of the *Act* and the *Act* lacks provisions for Online Advertisement and fails to establish appropriate policies aligned with technological advancements.
5. The petitioner alleges that the respondents have grossly mismanaged the Alcoholic Drinks Control Fund that is established in the *Act*. It is averred that as per Section 109 of the *Public Finance Management Act*, all funds received from the fund ought to be remitted to the County Revenue Fund, which serves as a consolidated fund for such remittances. However, it is noted that, the Auditor General's report (June 2022) on the Nairobi City County Alcoholics Drinks Control and Licensing Board revealed that despite the collection of a substantial amount of Kshs 266,864,886, not a single shilling was remitted to the County Revenue Fund.



6. It is claimed that the respondents utilized the funds illegally, an action which undermines the constitutional principles of finance in relation to public funds in violation of Article 207 of the [Constitution](#) and section 116 of the [Public Finance and Management Act](#).
7. In relation to the composition of the Board under the [Act](#), the petitioner contends that due to its ambiguous nature, its existence is *ultra vires*. The petitioner moreover argues that the Board has never executed some of its functions such as consideration of appeals from the decisions made by the Sub-County Committees.
8. Additionally, the Board appointees as appointed by the 2nd respondent are argued not to represent the key stakeholders being: the residents' association representatives, bar owner representatives, and youth representatives. The petitioner adds that the appointees were not vetted by the County Assembly thus the manner in which the appointments were done is said to be unconstitutional. Equally it is argued that the appointments overlooked the role of the County Public Service Board and the principles of fairness and proportionality.
9. Furthermore, the petitioner contends that the direct issuance of licenses by the Sub-County Alcoholic Drinks Control and Licensing Committee under section 6(1) of the [Act](#) raises a constitutional concern and contradicts the established practices in other Counties where committees typically play a role in evaluating license applications and making recommendations to the licensing authority.
10. On this premise, the petition was filed so as to have this court intervene and stop the respondents' alleged conduct of impunity and disregard for the rule of law.

Respondents' Case.

11. In reaction to the petitioner's case, the respondents' filed grounds of opposition and a replying affidavit both dated 18 July 2023. The replying affidavit was sworn by the Ag. County Secretary, Patrick Analo Akivanga. Both responses are in relation to the petitioner's substantive notice of motion application dated 30 June 2023.
12. The grounds of opposition are on the basis that:
 - i. The application as drawn and filed is fatally defective, incompetent and does not lie in law.
 - ii. The grounds disclosed and the laws invoked in the application are absolutely misconceived and cannot justify this court to grant the orders sought.
 - iii. The application is bad in law, sensational, frivolous, vexatious, speculative, made in bad faith and a proper candidate for dismissal with costs.
 - iv. The application is intended to waste precious judicial time.
 - v. The grounds set out in the application are otherwise an abuse of the court process.
 - vi. The provisions under which the notice of motion has been brought cannot be the basis for this court to grant the orders sought.
13. In their reply, the Ag County Secretary, depones that section 43(3) of the [National County Alcoholic Drinks Control and Licensing Act](#) provides for the expenditure that is supposed to be covered by the fund and thus the petitioner cannot say that these monies were haphazardly withdrawn. He adds that the said withdrawal was done in good faith and in public interest.
14. He asserts that the petitioner's application seeks to unconstitutionally prevent the respondents from exercising their mandate as far as the role of Nairobi County Alcoholic Drinks Control Fund is



concerned. He argues that grant of the sought orders would paralyze operations within the Nairobi County Alcoholic Drinks Control Board.

15. It is as well contended that orders sought in the application seek to have the court render itself on the prayers in the petition at an interlocutory stage.
16. Moreover, it is argued that should the prayers be granted the *act* would create a vacuum which would undermine the gains that have been had in the fight against illicit alcohol and the controls in place, resulting in anarchy which would have dire effects.
17. To that end, he contends that the application which fails to meet the requisite threshold is frivolous, vexatious and made in bad faith and so should be dismissed.

Petitioner's Submissions

18. MTM Advocates for the petitioner filed submissions dated 28 May 2024. Counsel identified the issues for determination as: whether the respondents' failure to remit funds from the Nairobi County Alcoholic Drinks Control Fund to the County Revenue Fund violates article 207 of the *Constitution* and section 109 of the *Public Finance Management Act*; whether the administration of the Alcoholic Drinks Control Fund by the County Executive Committee Member responsible for Trade, instead of the County Executive Committee Member responsible for Finance, is unconstitutional; whether the composition and appointments to the Nairobi City County Alcoholic Drinks Control and Licensing Board comply with constitutional and statutory requirements; whether the Sub-County Alcoholic Drinks Control and Licensing Committees' issuance of licenses complies with the *Nairobi City County Alcoholic Drinks Control and Licensing Act*, 2014 and constitutional principles of fairness, transparency, and natural justice; and whether the respondents' actions in failing to establish an Appeals Committee and provide a procedural framework for appeals are *ultra vires* and unconstitutional.
19. On the first issue, counsel referring to these provisions and petitioner's averments submitted that indeed the respondents had acted in contrary to this law. This is since as seen in the Auditor General's report, there had been gross mismanagement of the Nairobi County Alcoholic Drinks Control Fund and a failure to remit the Ksh 266,864,886 to the County Revenue Fund. Counsel thus submitted that the respondents' blatant disregard for these provisions, continues to undermine the principles of financial accountability and transparency in public finance as envisaged under the *Constitution*.
20. Counsel on the second issue, states that section 116 of the *Public Finance and Management Act* provides that the County Executive Committee member for Finance may establish other public funds with the approval of the County Executive Committee and the County Assembly. In this matter, however it is averred that section 43 of the *Nairobi City County Alcoholic Drinks Control and Licensing Act* provides that there is established a fund to be known as the Nairobi County Alcoholic Drinks Control Fund which shall be managed by the county executive committee member responsible for trade. Considering this, Counsel asserted that the County executive committee member responsible for trade was illegally managing the Nairobi County Alcoholic Drinks Control Fund in breach of article 207 of the *Constitution* and section 116 of the *Public Finance and Management Act*.
21. On the third matter, counsel rehashing the petitioner's averments in the affidavit, submitted that the composition of the Board as established under the Act in section 4 of the *Nairobi City County Alcoholic Drinks Control and Licensing Act* raises constitutional concerns. Moreover, that it is not compliant with the *Mwongozo Code of Conduct*.



22. Moving to the fourth issue, counsel submitted that the Sub-County Alcoholic Drinks Control and Licensing Committees' habitually disregards the dictates of section 8 of the Act. Particularly, it is noted that the respondents tend to overlook section 8(3) of the Act which mandates the committee to expeditiously prepare and publish a notice containing crucial details of all license applications, including the applicants' names, the types of licenses sought, the respective premises, and the date, time, and location of the meeting.
23. Likewise, the Committee is required under the second schedule of the Act to sign licenses before their issuance however, in practice, licenses are issued without the required signatures, resulting in non-compliance with the explicit provisions of the Act. It was asserted that disregard for the law undermines the fundamental tenets of due process, rendering the licensing process arbitrary, unreasonable and susceptible to abuse of power.
24. Turning to the next point, counsel stated that section 5 of the Act provides that among the Board's functions is determination of appeals from the decisions of the sub-county committees. It was argued though that this function has never been implemented. Considering this, counsel contended that failure to establish the appeals mechanism was not only *ultra vires* but also in violation of the rules of natural justice as affected parties are denied their right to a fair hearing and redress.

Respondents' Submissions

25. On 18 May 2024, Okatch and Partners Advocates filed submissions for the respondents' and highlighted the issue for determination as: whether the petitioner is entitled to the reliefs sought in their petition.
26. Counsel submitted that that the petitioner had failed to prove the public interest, constitutional values and the proportionate magnitudes relevant to this case to warrant grant of the relief sought. Counsel equally emphasized that if the orders would be granted, the same would cause harm to the public given the role the Nairobi County Alcoholic Drinks Control Fund plays.
27. Counsel further submitted that the claim of unlawful withdrawals from the Nairobi County Alcoholic Drinks Control Fund were false as section 43(3) of the Nairobi County Alcoholic Drinks Control and Licensing Act outlines the expenditure to be met by these funds. Therefore, as deemed by the Act these monies are not arbitrarily withdrawn as advanced.
28. Counsel urged the court to appreciate that alcohol and drug abuse, especially among the youth, is a matter of public interest not only for the county government but also the national government.
29. On appointment of the Board, counsel submitted that the 2nd respondent is expected to appoint members whom he can trust and rely upon to undertake this mandate and enforce the laid down policies and regulations.
30. In sum, counsel relying on section 107 and 108 of the Evidence Act submitted that the petitioner had failed to prove her allegations particularly concerning the misappropriation of funds. Bearing this in mind, counsel submitted that the petitioner was not entitled to the relief sought.

Analysis and Determination

31. It is my considered take that the issues that arise for determination in this matter are as follows:
 - a. Whether the creation and administration of the Alcoholic Drinks Control Fund under the Nairobi County Alcoholic Drinks Control Act, 2014 is conformity with the Constitution and the Public Finance Management Act.



- b. Whether the Board as established under the *Nairobi City County Alcoholic Drinks Control and Licensing Act* is unconstitutional.
 - c. Whether the petitioner is entitled to the relief sought.
32. The *Constitution* provides for the manner in which it shall be interpreted under article 259(1) of the *Constitution*. The said constitutional provision provides thus:

This Constitution shall be interpreted in a manner that--

- a. promotes its purposes, values and principles;
 - b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - c. permits the development of the law; and
 - d. contributes to good governance.
33. *In the Matter of the Interim Independent Electoral* [2011] KESC 1 (KLR), the Supreme Court underscored the approach to be espoused in interpreting the *Constitution* by stating as follows:

“(86)The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). the *Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. the *Constitution* has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the preamble, in article 10, in chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.

(87) In article 259(1) the *Constitution* lays down the rule of interpretation as follows:

“This *Constitution* shall be interpreted in a manner that –

- (a) promotes its purposes, values and principles;
- (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights;
- (c) permits the development of the law; and
- (d) contributes to good governance.”

Article 20 requires the courts, in interpreting the Bill of Rights, to promote:

- (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
- (b) the spirit, purport and objects of the Bill of Rights.



(88) ... Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

(89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.”

34. There is need to consider a holistic view when carrying out the task of interpreting the Constitution as was held in Tinyefunza v Attorney General of Uganda Petition No 1 of 1997 (1997 UGCC 3) where the court emphasized

“that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other.”

35. The above principle also applies in the interpretation of statutes as was held in R v Kenya Medical Laboratories & Technicians & Technologists Board exparte Archdiocese of Nairobi Registered Trustees [2018] KEHC 9303 (KLR) where the court observed as follows:

“23. It is an elementary rule of statutory construction that no one provision of the statute is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument. It is the duty of a court in construing statutes to seek an interpretation that promotes the objects of the legislation and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the purposes of the legislation....

27. It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. ... Courts decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but cannot legislate itself...”

36. I shall be guided by the above principles as I assume the task ahead that requires that of considering whether the impugned legislation promotes the purposes, values and principles of the Constitution and advances the rule of law and contributes to good governance. I now turn to consider the specific issues highlighted above bearing in mind that under article 2(4) of the Constitution, any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.



Whether the establishment and administration of the Alcoholic Drinks Control Fund under the Nairobi County Alcoholic Drinks Control Act, 2014 is conformity with the Constitution and the Public Finance Management Act.

37. This issue cannot be determined without referring to the relevant constitutional provisions and the relevant legislation.

38. The management of and/or control of alcoholic drinks falls under part 2 of the Constitution as a function assigned to County Government. Paragraph 4(c) of part 2 of the Constitution designates the responsibility of liquor licensing to be a function of the County Government. In enacting legislation in respect of the subject matter under inquiry, the County Government was perfectly acting within the scope of its general mandate under article 185(2) of the Constitution which authorizes it

“to make any laws that are necessary for, or incidental to, the effective performance of functions and exercise of the powers of the County Government under the Fourth Schedule.”

39. The petitioner however contends that the mandate is not absolute as the legislation in question touches on a matter of public finances and thus challenges the provisions relating to the establishment of Nairobi County Alcoholic Drinks Control Fund under section 43 of the Nairobi County Alcoholic Drinks and Licensing Act for violating the relevant provisions of the Constitution and Public Finance Management Act, 2012. The said section 43 of the Nairobi County Alcoholic Drinks and Licensing Act provides:

Section 43

1. There is established a fund known as the Nairobi County Drinks Control Fund which shall be managed by the County Executive Committee member responsible for trade.
2. The Fund shall consist of-
 - a. such monies as may be appropriated by the County Assembly and such licence and other fees as may be payable under this Act.
 - b. sums received, including contributions, gifts or grants from or by way of testamentary bequest by any person.
 - c. moneys earned or arising from any investment of the fund all other sums which may in any manner become payable to, or vested in, the Fund
3. The Fund shall be used for meeting the expenditure relating to:
 - i. research, documentation and dissemination of information on alcoholic drinks in the county.
 - ii. promoting cessation and rehabilitation programs in the County.
 - iii. financing the operations of the sub-county committees and voluntary programmes in the county in accordance with such guidelines as may be prescribed.



40. The petitioner contends that the above legislation violates article 207(1) of the Constitution and section 109 of the Public Finance Management Act, 2012. She further adds that this is what has led to pilferage of funds collected under the fund as evidenced by the Auditor General's Report for year ending in June, 2022 where despite establishing that Kshs 266,864,886/- was collected; nothing was deposited into the County Revenue Fund as envisaged by the Constitution.

41. Article 227 of the Constitution provides for the Revenue Fund for County Governments by stipulating as follows:

1. There shall be established a Revenue Fund for each County government, into which shall be paid all money raised or received by or on behalf of the County Government, except money reasonably excluded by an Act of Parliament.
2. Money may be withdrawn from the Revenue Fund of a County Government only-
 - a. as a charge against the Revenue Fund that is provided for by an Act of Parliament or by legislation of the County; or
 - b. authorized by an appropriation by legislation of the county
 - c. Money shall not be withdrawn from a revenue fund unless the Controller of Budget has approved the withdrawal
4. An Act of Parliament may-
 - a. make further provision for withdrawal of funds from County Revenue Fund; and
 - c. provide for establishment of other funds by Counties and the Management of those funds.

42. The Public Finance Management Act whose preamble states that it is

“An Act of Parliament to provide for the effective management of public finances by the national and county governments; the oversight responsibility of Parliament and county assemblies; the different responsibilities of government entities and other bodies, and for connected purposes”

is thus germane in this inquiry as the Constitution under article 207(4)(b) only recognizes that it Parliament that has the mandate

“to provide for establishment of other funds by Counties and the management of those funds”.

43. It is thus necessary to examine the Public Finance Management Act to find out what Parliament has provided for in regard to the establishment of other funds by the Counties other than the County Revenue Fund. Section 116 of the Public Finance Management Act provides:

Power to establish other county public funds

1. A County Executive Committee member for finance may establish other public funds with the approval of the County Executive Committee and the county assembly.



2. For every county public fund established, the County Executive Committee member for finance shall designate a person responsible for administering that fund.
3. The administrator of a county public fund shall ensure that the earnings of, or accruals to a county public fund are retained in the fund, unless the County Executive Committee member for finance directs otherwise.
4. The administrator of a county public fund shall ensure that money held in the fund, including any earnings or accruals referred to in sub section (3) is spent only for the purposes for which the fund is established.
5. The County Executive Committee member for finance may wind up a county public fund with the approval of the county assembly.
6. On the winding up of a county public fund—
 - a. the administrator of the fund shall pay any amount remaining in the fund into the County Exchequer Account; and
 - b. the County Executive Committee member for finance shall, with the approval of the county assembly, pay any deficit in the fund from the County Exchequer Account.
7. The administrator of a county public fund shall—
 - a. prepare accounts for the fund for each financial year;
 - b. not later than three months after the end of each financial year, submit financial statements relating to those accounts to the Auditor-General; and
 - c. present the financial statements to the county assembly.
8. The administrator of a county public fund shall ensure that the accounts for the fund and the annual financial statements relating to those accounts comply with the accounting standards prescribed and published by the Accounting Standards Board from time to time.
9. Regulations may provide for the establishment, management, operation or winding-up of county public funds under this section
10. This section does not apply to the County Revenue Fund established under section 109 of this Act.
11. The funds and usage of money through the funds shall be published and publicised.
12. In this section—“administrator”, in relation to a county public fund, means a person designated by the County Executive Committee member for finance under subsection (2) to administer the fund;“County public fund” means a public fund established under subsection (1).

44. A holistic reading of the above statutory provision in regard to establishment of other public funds together with the specific constitutional provision reveals that Parliament and not the Counties is the



one empowered to authorize the establishment of other public funds. Juxtaposing these provisions against section 43 of the [Nairobi County Alcoholic Drinks Control and Licensing Act](#), I am persuaded that the said section 43 of [Nairobi County Alcoholic Drinks and Licensing Act](#) 2014 which creates the Nairobi County Alcoholic Drinks Fund is misplaced as such a fund ought to have been created in strict compliance with the provisions of section 116 of the [Public Finance Management Act](#), 2012. Further, a close scrutiny also reveals that section 43 of the [Nairobi County Alcoholic Drinks Control and Licensing Act](#) falls short of transparency requirements incorporated in section 116 of the [Public Finance Management Act](#). Firstly, section 43 of the [Nairobi County Alcoholic Drinks Control and Licensing Act](#), 2014 is completely silent on the role of County Executive Member in charge of Finance despite the conspicuous role given to the County Executive in charge of Finance by section 116 of the [Public Finance Management Act](#) which includes the role of designating the administrator of the fund.

45. Further, it is obvious that section 116 of [Public Finance Management Act](#) integrates provision for enhancing transparency and accountability which the County legislation prominently overlooks. For instance, the requirement that not later than three months after the end of each financial year, financial statements relating to the public fund must be submitted to the auditor general and to the County Assembly; that there must be regulations in place to guide the operations of the fund, and, the requirement for publishing and publicizing the usage of those funds. The County legislation does not in my view fulfil the dictates of article 10 which applies to all State organs, state officers and all persons whenever any of them enacts, applies or interprets any law, makes or implements public policy decisions as it omits integrating critical elements of good governance, transparency and accountability which are captured in section 116 of the [Public Finance Management Act](#), 2012 and which ought to have been the guiding factor in that legislation.
46. It is trite law that public bodies must always operate within the confines of the law as was held in [Republic v Fazul Mahamed & 3 others ex-parte Okiya Omtatab Okoiti](#) [2018] KEHC 9435 (KLR) where the court observed as follows:

“7. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our [Constitution](#). It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents' actions must conform to the doctrine of legality. Put differently, a failure to exercise power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd Micro Finance Regulatory Council and another* where the court held as follows:-

“(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law”[20]

8. The respondent's have a statutory and a moral duty to uphold the law and to comply with the law governing their operations.”
47. Clearly therefore, section 43 of the [Nairobi County Alcoholic Drinks Control and Licensing Act](#), 2014 is inconsistent with article 207 (4) (b) as read with Section 116 of the [Public Finance Management Act](#).



48. In addition, it is also the finding of this court that the said provision does not promote the constitutional values and principles of good governance under article 10(2) (c) and also, article 201(a) on guiding principles of public finance that include openness and transparency.

Whether the Board as established under the Nairobi City County Alcoholic Drinks Control and Licensing Act is unconstitutional.

49. On the issue of whether the Board established under the *City County Alcoholic Drinks Control and Licensing Act* is unconstitutional, this Court has carefully examined the *Nairobi County Alcoholic Drinks Control and Licensing Act, 2014* especially section 23 which provides for the appointment of the members of the Board. Other than expressing an opinion regarding the composition of the Board and the mode of appointment, the petitioner does not cite any specific provision of the *Constitution* that is infringed by enactment in question. This court is not a judge of opinions but of constitutional violations.

50. As was held in *R v Kenya Medical Laboratories & Technicians & Technologists Board exparte Archdiocese of Nairobi Registered Trustees* [2018] KEHC 9303 (KLR)

“...Courts decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but cannot legislate itself...”

51. This court thus appreciates its mandate and will thus not accept an invitation to substitute its opinion for that of County Assembly in regard to the composition and appointment of the Board Members. As was held in *Katiba Institute v Attorney General* [2017] eKLR;

“... In examining the constitutionality of the statute, it must be assumed the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in legislature enact laws which they consider to be reasonable for purpose they were enacted. The presumption is therefore in favour of constitutionality...”

52. The petitioner has not substantiated the allegation of unconstitutionality in regards to the appointment of the Board Members. The burden of proving the unconstitutionality of a statute rests on the person who alleges as was held in the American case of *US v Butler* 297 US 1 [1936] where the court stated as follows:

“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the *Constitution* which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”

53. The petitioner has thus failed to convince this court that the provisions in respect to the procedure for appointment and the composition of the Board under the *Alcoholic Drinks Control and Licensing Act, 2014* is unconstitutional.

54. In the final analysis, the petition partially succeeds on one issue only and I grant the following reliefs:

- a. A declaration is hereby issued that the entire Section 43 of *Nairobi County Alcoholic Drinks Control and Licensing Act* that establishes the Nairobi County Alcoholic Drinks Control Fund is unconstitutional, null and void.



- b. An order is hereby issued freezing any withdrawals from the Nairobi County Alcoholic Drinks Control Fund Bank Account at the Cooperative Bank Limited City Hall Branch, account number [particulars withheld] or any other bank account where such funds are being held until a legally and constitutionally compliant public fund is established in conformity with article 207(4)(b) of the *Constitution* as read with section 116 of the *Public Finance Management Act*. In the meantime, all funds raised under the *Alcoholic Drinks Control and Licensing Act, 2014* shall be deposited into the County Revenue Fund Account.
- c. Each party shall bear its own costs of this petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH MARCH, 2025.

L N MUGAMBI

JUDGE

