Wambugu (Suing as the Chairman on his own behalf and on behalf of the Members of Nyeri County Bar Owners Association) v County Government of Nyeri (Constitutional Petition E013 of 2024) [2025] KEHC 2965 (KLR) (10 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2965 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CONSTITUTIONAL PETITION E013 OF 2024

DKN MAGARE, J

MARCH 10, 2025

BETWEEN

TEOBALD MUKUNDI WAMBUGU (SUING AS THE CHAIRMAN ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF NYERI COUNTY BAR OWNERS ASSOCIATION) .... PETITIONER

AND

THE COUNTY GOVERNMENT OF NYERI .... RESPONDENT

JUDGMENT

1. Articles 22 and 23 of *the Constitution* provides for the enforcement of the Bill of Rights. They are the route in which the fullest extent of the powers enshrined under Article 165 of *the constitution* can be tested. This court is called to action, whenever a person approaches the High Court alleging that their rights and fundamental freedoms under the Bill of Rights are contravened or are threatened with contravention. The court then is enjoined to render justice according to the law. It is in respect of the foregoing that, the High Court is clothed with jurisdiction under Article 165(3):

   Subject to clause (5), the High Court shall have—

   a. ....

   b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

   c ...

   d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-

i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

iv. a question relating to conflict of laws under Article 191; and

e. ...

2. The Petition dated 14.10.2024 was filed by Teobald Mukundi Wambugu suing as Chairman on his own behalf and on behalf of the members of the Nyeri County Bar Owners Association, seeking the following reliefs:

i. A declaration that the provisions of Section 5(3), 7(3), 22(1) (c), (e), (f) & (h), 23 (1) (a) & (b), 24, 26 (1) (b), 2 (b) & (c), 27 (5) (b) & (c), 33 (1), 43 (1) (2) (a) & (b) and 48 of the Nyeri County *Alcoholic Drinks Control Act* 2024 is unconstitutional and null and void ab initio.

ii. A declaration that Section 5(3), 7(3), 22(1) (c), (e), (f) & (h), 23 (1) (a) & (b), 24, 26 (1) (b), 2 (b) & (c), 27 (5) (b) & (c), 33 (1), 43 (1) (2) (a) & (b) and 48 of the Nyeri County *Alcoholic Drinks Control Act* 2024 are inoperative in so far as they are inconsistent with the County Government Act, *Alcoholic Drinks Control Act* and the Regulations made thereunder.

iii. An order of permanent injunction restraining the Respondent from enforcing the provisions of Section 5(3), 7(3), 22(1) (c), (e), (f) & (h), 23 (1) (a) & (b), 24, 26 (1) (b), 2 (b) & (c), 27 (5) (b) & (c), 33 (1), 43 (1) (2) (a) & (b) and 48 of the Nyeri County *Alcoholic Drinks Control Act* 2024.

iv. Costs

3. The Petition is premised on the grounds in the Petition as well as the supporting affidavit sworn by Teobald Mukundi Wambugu on 14.10.2024 as follows:

i. The Association is an organization comprising of all legal beer retailers, wholesalers and distributors of alcoholic drinks within Nyeri County.

ii. On 6.3.2024, there has released an unsigned circular titled ‘Notification of Government Action on Eradication of Illicit Brews, Drug, and Substance Abuse.’

iii. Vide the said circular the President of Kenya assigned the Deputy President the role of leading war on illicit brew.

iv. The Respondent subsequently issued a letter dated 4.7.2024 instructing that valid licenses are those currently in operation and should not be in contravention of the Nyeri County Alcoholic Drinks Act 2024 which became a source of harassment of the Petitioners.

v. There is no possibility that a license issued under the 2013 Act would be in consonance with a law passed over a decade after.

vi. The Regulations to carry out the objects of the Act were never in place until 3.10.2024.

vii. There were no county or sub-county liquor committees anticipated under Section 5 of the 2024 Act.

viii. The Respondent threatened that licenses will not be extended and late application will not be considered.

ix. That Section 5(3), 7(3), 22(1) (c), (e), (f) & (h), 23 (1) (a) & (b), 24, 26 (1) (b), 2 (b) & (c), 27 (5) (b) & (c), 33 (1), 43 (1) (2) (a) & (b) and 48 of the Nyeri County *Alcoholic Drinks Control Act* 2024 are unconstitutional and unlawful for the following reasons:

   a. There is no representation by the Petitioners.

   b. The 2013 and 2024 Acts were different.

   c. The conditions for grant of a license under the 2024 Act were unlawful.

   d. The offences under the 2024 Act caused a person to suffer twice over the same issue.

   e. There is discrimination among persons offering the same services.

   f. The 2024 Act allows impunity by legalizing withdrawal of license without notice to the holder.

   g. The time for transport of alcoholic drinks is limited between 6.00 am to 6.00 pm, which is unreasonable.

   h. The requirement for branding of motor vehicles is unnecessary.

   i. The regulation of measurement of alcohol-selling premises is untenable.

4. The Respondent filed a Replying Affidavit dated 29.10.2024 and sworn by Josphat Wamathai on the grounds inter alia that:

   i. The Petition lacks precision as required in the Anarita Karimi Case.

   ii. The Petition failed to set forth precisely the constitutional provisions infringed and the manner in which they were infringed.

   iii. The impugned sections are reasonable and meant to cure a social vice.

   iv. The notice dated 4.7.2024 was meant to bridge the gap between the 2013 and 2024 Act for continuity in licensing.

   v. Section 33 of the 2024 Act provides for temporary withdrawal or suspension of a license.

   vi. The Petitioner was never a member of the Sub-county Alcoholic Drinks Regulation Committee under the 2013 Act.

   vii. The 4th schedule to *the constitution* does not offer concurrent jurisdiction on liquor licensing.

Submissions

5. The Petitioner did not file submissions. Instead, they filed an application dated 30.1.2025 to allow them time to file a notice to act in person. I postponed the decision for a few days to allow them file submissions but they did not file any submissions. Nevertheless, I shall consider their pleadings and the law as it is.

6. The Respondent filed submissions dated 16.12.2024. It was submitted that the Petitioner had not precisely stated the impugned provisions of *the constitution* alleged to have been infringed. That parties were bound by their pleadings, and no remedy would be granted in the absence of pleadings. Reliance was placed on IEBC & Another v Mule & 3 Others (2014) eKLR.

7. The Respondent also relied on Anarita Karimi Njeru v Republic (1979) KLR 154, which provides as follows:

> "We would, however, again stress that if person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important ...that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

8. The Respondent further submitted that the Petitioner had not shown the unreasonableness of the impugned provisions. It was their position that the presumption of the constitutionality of laws would favour the Respondent. Reliance was placed on Nairobi Metropolitan PSV Saccos Union Limited & 25 Others v County Of Nairobi Government & 3 Others [2014] KECA 95 (KLR) as follows:

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

9. The Respondent submitted that impugned sections were not unconstitutional at all and did not infringe Articles 47, 186(2), 174 and 191 of *the Constitution*. They then addressed each section seriatim as follows:

   i. Section 22 prohibits licensing alcohol sales in residential areas, near schools (within 300 meters), and designated alcohol-free zones, ensuring minors are protected from alcohol exposure and enforcement is accessible.

   ii. Section 23 mandates that wine and spirits depots have a minimum floor area of 20 square meters to prevent unregulated small setups and promote occupational health and safety in the sale and distribution of alcohol.

   iii. Section 24 designates specific areas as alcohol-free zones, prohibiting the sale or consumption of alcohol in these locations to maintain public order.

   iv. Section 26 bars individuals previously convicted of offenses under the Act or any other imprisonable offense from obtaining alcohol sale licenses without the option of a fine, ensuring compliance with regulatory standards.

   v. Section 27 prohibits hotels from selling alcohol to non-lodgers and mandates designated bar areas to ensure responsible consumption, especially in hotels accommodating minors/children.

   vi. Section 43 regulates alcohol transportation, limiting it to the hours between 6:00 am and 6:00 pm and requiring vehicles to be branded. This reduces illicit trade and enhances distributor accountability.

vii. Section 48 prohibits license holders from selling alcohol to intoxicated individuals or encouraging further consumption, addressing risks such as alcohol poisoning, violent behavior, and drunk driving while promoting responsible sales practices.

viii. Section 83 repeals the Nyeri County Alcoholic Drinks Control and Management Act 2014 upon the commencement of the 2024 Act on 30th April 2024.

10. Reliance was placed on the case of Okiiya Omtatah Okoiti v County Government of Kiambu [2018] EKLR where it was reaffirmed that-

> "I would venture to find further that all other matters connected with licensing, including violations and enforcement, must necessarily lie with the County Government. There cannot be effective control without appropriate sanctions."

Analysis

11. The Petitioner stated to be suing as Chairman on his own behalf and on behalf of the Nyeri County Bar Owners Association members. He moved the court, alleging a breach of *the Constitution* and the *County Governments Act*. He applied to enforce the letter and spirit of the fundamental rights and freedoms in the letter and spirit of Articles 2, 10, 22, 23, 27, 43, 47, 48, 50, 159, 165, 174, 185, 186, 187, 191,196, 258 and 259 of *the Constitution*.

12. The powers of the court in the application of Bill of Rights in *the Constitution* are provided in Article 20 of *the Constitution* as follows:

    1. The Bill of Rights applies to all law and binds all State organs and all persons.

    2. Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

    3. In applying a provision of the Bill of Rights, a court shall-

        a. develop the law to the extent that it does not give effect to a right or fundamental freedom; and

        b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

    4. In interpreting the Bill of Rights, a court, tribunal or other authority shall 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.

    5. In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles –

        a. it is the responsibility of the State to show that the resources are not available; (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and

b. the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion

13. The Petitioner alleges breaches of fundamental rights through the Nyeri County *Alcoholic Drinks Control Act* 2024. Various sections of the said Act are contested. The court's duty is to look at both sections of the act individually and holistically to avoid a tunnel view of the legislation. In looking at the legislation, the court builds on the previous decisions and interpretations given to various articles of *the Constitution* while problematizing, conceptualizing, and contextualizing the legal imbroglio arising from the current dispute.

14. The principles which guide a court in determining whether sections of an Act of Parliament are unconstitutional were succinctly laid out in the case of Institute of Social Accountability & Another vs. National Assembly & 4 others High Court Petition No. 71 of 2014 (2015) eKLR, as follows:-

> "First, this Court is enjoined under Article 259 of *the Constitution* to interpret *the Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of *the Constitution* to protect and promote the purpose and principles of *the Constitution*.
>
> Second, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise....
>
> We therefore reiterate that this Court will start by assuming that the CDF Act 2013 is constitutional and valid unless the contrary is established by the petitioners.
>
> Third, in determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011]eKLR, Samuel G. Momanyi v Attorney General and Another (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect"

15. The object of a statute is realized through the impact produced by the operation and application of the legislation and its ultimate impact are linked. In the Canadian Supreme Court in R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 the Supreme Court enunciated this principle as follows:

> "Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.

16. In dealing with a challenge on the constitutionality of county or national legislation, this court is alive to the succinct principle that *the Constitution* of a nation is not simply a statute that mechanically defines the structures of government and the relationship between government and the governed. It is

a mirror reflecting our society, the identification of ideas and aspirations of our nation, the articulation of the values bonding the people of Kenya, and the disciplining of government to the standard dictated by *the Constitution*. That is why 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. In Kamau v Radido & 6 others (Being Sued as the Officials of the Kenya Magistrates and Judges Association) (Petition E226 of 2024) [2024] KEHC 5683 (KLR) (Constitutional and Human Rights) (23 May 2024) (Judgment), the court, EC Mwita, J posited as follows:

In Katiba Institute v Attorney General & 9 others (Petition 17 of 2020) [2023] KESC 47 (KLR), the Supreme Court stated that the entire Constitution has to be read as an integrated whole because it embodies certain fundamental values and principles which must be given effect to. Only then, would the import and tenor of the provision(s) of *the Constitution* be understood,

64. Further, the Supreme Court added that "Where words used in any provision of *the Constitution* are precise and unambiguous, then they must be given their natural and ordinary meaning. The words themselves alone in many situations declare the intention of the framers because...the language used 'speak the intention of the legislature.' "

65. Similarly, when interpreting *the Constitution* and developing jurisprudence, the Court should always take a purposive interpretation of *the Constitution* as guided by *the Constitution* itself. (Re the Matter of the Principle of Gender Representation in the National Assembly and the Senate, SC Advisory Opinion No. 2 of 2012; [2012] eKLR).

17. In the case of Katiba Institute & 3 others v Attorney General & 2 others [2018] eKLR, E C Mwita stated as follows:

    41. When it comes to the interpretation of *the Constitution*, the starting point should be Article 259 (1) of *the Constitution* itself, which lays down the principles that Courts must bear in mind when interpreting it. Article 259(1) provides that:

        1. 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.

        The values and principles of *the Constitution* that is; the rule of law, human rights and fundamental freedoms development of the law and good governance must permeate the process of constitutional interpretation.

    42. Courts have also over the years developed principles of constitutional interpretation through judicial pronouncements which are useful aids in the exercise of constitutional interpretation. First; as was stated in State v Acheson 1991 20 SA SOS;

    "*The Constitution* of a nation is not simply a statute which mechanically defines the structures of governance and the relationship between the government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of *the Constitution* must therefore preside and permeate the process of judicial interpretation and judicial discretion"

43. Second, *the Constitution* should not be given a rigged or artificial interpretation to avoid distorting the spirit, ideals and aspirations of the people. In the case of the Government of Republic of Namibia v Cultura 2000, 1994 (1) SA 407 at 418 the Court stated that;

"A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation."

44. This principle was emaciated in the case of Njoya & 6 Others v Attorney General & another [2004]eKLR where the Court stated;

"Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that *the constitution*, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document."

18. The court in Katiba Institute & 3 others v Attorney General & 2 others [supra] continued as follows:

> 45. Third, a Constitution has various provisions which should be given a holistic interpretation. It should be read as one document and not as several and or separate provisions. Each provision should be read as supporting the other and not one provision destroying the other. They should be given a harmonious reading as one document. In the case of Tinyefuze v Attorney General of Uganda Constitutional Petition No 1 of 1997 [1997]3 UGCC the Constitutional Court put it thus;
>
> "The entire Constitution has to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness. And exhaustiveness...."
>
> 47. Fourth, there is a general but rebuttable presumption that statutes enacted by parliament are constitutional, until the contrary is proved. This view is based on the fact that as peoples' representative, parliament usually enacts laws to serve people and therefore, Parliament understands why such laws are enacted and the problems they are intended to solve....
>
> 49. Fifth, the Court must also consider the cause- effect in interpreting *the Constitution*. The purpose of enacting a statute and the effect of implementing the statute will also determine the constitutionality of a statute. In the case of R v Big M Drug Mart Ltd [1985]1 SCR 295, the Supreme Court of Canada observed;
>
> "Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

19. In essence the five principles distilled above guide interpretation of *the constitution*. These are:

a. "*The Constitution* of a nation is not simply a statute which mechanically defines the structures of governance and the relationship between the government and the governed. It is a mirror

reflecting the "national soul", the identification of ideas and aspirations of a nation, the articulation of the values bonding its people and disciplining its government.

b. *The Constitution* should not be given a rigged or artificial interpretation to avoid distorting the spirit, ideals and aspirations of the people.

c. A constitution has various provisions which should be given a holistic interpretation.

d. There is a general but rebuttable presumption that statutes enacted by parliament are constitutional, until the contrary is proved.

e. The Court must also consider the cause-effect in interpreting *the Constitution*.

20. The foregoing principles will permeate through this discourse as the court problematizes, conceptualizes and contextualizes the questions set forth by the Petitioner.

21. The issue for determination is whether Sections 5(3), 7(3), 22(1) (c), (e), (f) & (h), 23 (1) (a) & (b), 24, 26 (1) (b), 2 (b) & (c), 27 (5) (b) & (c), 33 (1), 43 (1) (2) (a) & (b) and 48 of the Nyeri County *Alcoholic Drinks Control Act* 2024 are inconsistent with *the Constitution*, the County Government Act, the *Alcoholic Drinks Control Act* and the Regulations made thereunder.

22. Since the constitutionality of the county legislation is in issue, it is important to reiterate the applicable principles. In the Supreme Court of India in Hambardda Wakhana v Union of India Air [1960] AIR 554 it was held as doth:

> "In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore in favour of the constitutionality of an enactment."

23. The general rule is that there is a presumption of constitutionality of statutes. This, under *the constitution* that recognizes Baron De Montesqui's Doctrine of the separation of powers and cooperation of the levels of government by which no negation apply to both the national and county legislation to ensure the autonomy of functions at levels of government without unnecessary obstruction by either level but while upholding the requisite amity. This position was affirmed by the Court of Appeal of Tanzania in Ndyanabo v Attorney General [2001] E. A 495, which was a restatement of the law in the English case of Pearlberg v Varty [1972] 1 WLR 534. In the former, the Court held that:

> "Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative."

24. National and county legislation should be designed by the dictates of *the constitution* as *the constitution* obliges what to do and not to do. In Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) it was held that:

> "When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of *the Constitution*, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold

in any given case that Parliament has failed to do so, it is obliged by *the Constitution* to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by *the Constitution* itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of *the Constitution*. The right and the duty of this Court to protect *the Constitution* are derived from *the Constitution*, and this Court cannot shirk from that duty. As O'Regan J explained in a recent minority judgment, 'the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.' In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; '[w]hen deciding a constitutional matter within its power, a court...must declare that any law or conduct that is inconsistent with *the Constitution* is invalid'. This section gives expression to the supremacy of *the Constitution* and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of *the Constitution*, which declares that the 'Constitution is supreme...; law or conduct inconsistent with it is invalid'. It follows therefore that if a court finds that the law is inconsistent with *the Constitution*, it is obliged to declare it invalid..."

25. E Mwita J, dealt with the issue of restrictions on alcohol sale in certain areas, including residential estates in the case of Muimara Estate Residents Association v Nairobi City County & 2 others [2018] eKLR. In that case, his views and mine are on the same wavelength, he stated as follows:

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

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

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

20. The residents' right to live in a clean and healthy environment and with dignity is a right guaranteed under *the constitution* and is inviolable. Operating liquor selling business within the residential estate with all the attendant risks, and in violation of clear provisions of the law,

cannot be countenanced. It is illegal unlawful and violates the residents' right to live in a peace, tranquility and with dignity.

26. In this case, the Petitioner referred to a circular by the executive arm of government to have sparked reaction and quick operationalization of the 2024 Act. The constitutionality or legality of the said circular was not challenged. What is challenged is the Nyeri County *Alcoholic Drinks Control Act* 2024. This court, unless satisfied that the given sections of the Act are unconstitutional, will be unable to intervene in the activities under the executive umbrella both at national and county government, which are not demonstrated to infringe *the constitution* or the law. As correctly animated in the Malawian case of The State (on the application of Lin Xiaoxiao & Others) v Attorney General, Judicial Review Cause No 19 of 2020 -

> By way of concluding (for good now), the Court will be the first in joining the State in the fight against the corona virus epidemic. The Court will help in ensuring that all necessary measures put in place, be it by the legislature or the executive branches, are enforced. However, it has to be made clear that the Court will not be part of a fight against the epidemic that is being waged outside the dictates of the law. Equally true, the Court will not endorse measures that are unconstitutional and ultra vires. This country is founded on the rule of law: see sections 9, 12, 45(6) and 103 of *the Constitution*.

27. The approach to interpretation must be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of *the Constitution* as stated by the Supreme Court in the Advisory Opinion Application No. 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR.

28. The Respondent raised an issue that the Petition did not satisfy the precision required under the law. This court is unable to see the precise manner in which the alleged sections of the county legislation on the subject would infringe upon the specific provisions of *the Constitution*. The Petitioner's case was that Sections 5(3), 7(3), 22(1) (c), (e), (f) & (h), 23 (1) (a) & (b), 24, 26 (1) (b), 2 (b) & (c), 27 (5) (b) & (c), 33 (1), 43 (1) (2) (a) & (b), 48 and 83 of the 2024 Act infringed Article 174 of *the Constitution*. The provisions did not promote social and economic development contrary to Article 174 of *the Constitution*. Article 174 of *the Constitution* is about the objectives of the County Governments. It provides as follows:

    a. to promote democratic and accountable exercise of power;

    b. to foster national unity by recognising diversity;

    c. to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

    d. to recognise the right of communities to manage their own affairs and to further their development;

    e. to protect and promote the interests and rights of minorities and marginalised communities;

    f. to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;

    g. to ensure equitable sharing of national and local resources throughout Kenya;

    h. to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and

i. to enhance checks and balances and the separation of powers.

29. This court does not find any manner in which Article 174 of *the Constitution* would be infringed by each of the specific clauses. It was not shown how the power of self-governance to the people and enhancement of the people's participation in the power of the state and decisions affecting them would be infringed by the provisions of the said Act. In any event, no right pleaded to have been infringed or threatened. Read as a whole, the interpretation given by the Petitioner does not demonstrate infringement of Article 174 of *the constitution* on the part of the Respondent. In Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR, the Court of Appeal summarized the various principles of constitutional interpretation as follows:

> (21) .... Before the High Court embarked on the interpretation of the contentious provisions of *the Constitution*, it restated the relevant principles of interpretation of *the Constitution* as extracted from case law thus: -
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> · that as provided by Article 259 *the Constitution* should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.
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> · that the spirit and tenor of *the Constitution* must preside and permeate the process of judicial interpretation and judicial discretion.
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> · that *the Constitution* must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism.
>
> · that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).
>
> These principles are not new. They also apply to the construction of statutes. There are other important principles that apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as the presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of *the Constitution* has fidelity to *the Constitution* and has to be guided by the letter and spirit of *the Constitution*.

30. Further, the purpose for which the Petitioner sought to invalidate Section 33(1) was that it infringed on the right to fair administrative action by creating rules that were unreasonable. Article 47 of *the Constitution* is about administrative action, and the Petitioner had to seek judicial review of the alleged process, which they failed. It has been stated and I dare to repeat for emphasis that the cadre of judicial review under our constitutional dispensation is higher and administrative law is now hinged on Article

47 of *the Constitution* whose effect is to be enforced as a threat to the right to fair administrative action. Under this pretext, the state's administrative bodies only act within their mandate and not more and for whatever is done outside the mandate, judicial review is the corrective measure. In Daniel Ingida Aluvaala and Another vs Council of Legal Education & Another, [Pet No. 254 of 2017] I observed that:-

> " 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 decisions to be allowed to stand, it must be demonstrated that the decision is grounded on law.

31. In the case of Republic v Nairobi City Council Alcoholic Drinks Control and Licensing Board & another Ex parte Dlux Limited t/a Uptown Local [2022] eKLR, Justice A. K. Ndung'u, posited as follows regarding the right to be heard.

    18. In exercise of its powers under *the Constitution* or under legislation, public officers, state officers, state organs and independent bodies or tribunals may make decisions which may be characterized as judicial, quasi-judicial or administrative depending on the empowering provision of *the Constitution* or the law. The landmark decision of the House of Lords in Ridge v. Baldwin [1964] AC 40 clarified the law,that the rules of natural justice, in particular right to fair hearing, (audi alteram partem rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:

        i. The right to be heard by an unbiased tribunal.

        ii. The right to have notice of charges of misconduct.

        iii. The right to be heard in answer to those charges.

32. *The constitution* has thus embedded into our legal system a transformative development of administrative justice, which not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies but also entrenches the right to fair administrative action in the Bill of Rights. In Judicial Service Commission vs. Mbalu Mutava & Another[{2015} eKLR] the Court of Appeal held that:-

> " Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

33. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of President of the Republic of South Africa and Others vs. South African Rugby Football

Union and Others CCT16/98) 2000 (1) SA 1 at paragraphs135 -136 as follows with regard to similar provisions on just administrative action in Section 33 of the South African Constitution:-

> "Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades..."

34. As a derivative of Article 47 of *the Constitution*, Section 7(2) of the *Fair Administrative Action Act*, 2015 provides for grounds of Judicial Review which include bias, procedural impropriety, ulterior motive, failure to consider relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.

35. The Petitioner also levelled a generalised aspersions on the provisions of Sections 22(1) (c), (e), (f) & (h), 23 (1) (a) & (b), 24, 43 (1) (2) (a) & (b), and 48 of the 2024 Act as infringing on Article 191 as read with Article 186 (2) of *the Constitution*. It was pleaded that the said provisions also contravened Section 117 (1) of the County Government Act which provided for standards and norms of the public service delivery. The manner in which the provisions would render otiose the economic development parameter and the effect on Article 191 and 186 of *the constitution* was not laid before this court. Specificity and precision taken in drafting a petition were established by the High Court in the case of Anarita Karimi Njeru v Republic (1979) KLR 154. The test was stated thus:

> "We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

36. The Supreme Court of Kenya in Communications Commission for Kenya & 5 others v. Royal Media Services Limited & 5 others [2014] eKLR on the same element of specificity and precision stated thus:

> "Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic [1979] KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have bene contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement."

37. The upshot is that the Petitioner failed to precisely present a case for the unconstitutionality of the impugned provisions of the 2024 Act. Whereas precision may not be the last bastion, there need to

be a direct challenge on the specific sections. Without having the sections impeached, in terms of their excesses, it is not for the court to imagine what was the possible error in each section. The court of Appeal [Waki, Makhandia & Ouko, JJ.A] in Attorney General v Law Society of Kenya & another [2017] eKLR, posited as doth regarding interpreting statutes and *the constitution*.

What Chief Justice John Marshall observed in 1803 on the supremacy of the American Constitution in Marbury V. Madison, 5 U.S. (1 Cranch) 137 (1803), appear to have informed the enactment of the above section 3. Those words, which we reproduce below, apply to date in many jurisdictions, including ours. He said;

"*The Constitution* is the fundamental and paramount law of the nation, and that it cannot be altered by an ordinary act of the legislature. Therefore, an act of the Legislature repugnant to *the Constitution* is void...It would be an absurdity to require the courts to apply a law that is void. Rather, it is the inherent duty of the courts to interpret and apply *the Constitution*, and to determine whether there is a conflict between a statute and *the Constitution*: It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to *the Constitution*, if both the law and *the Constitution* apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding *the Constitution*, or conformably to *the Constitution*, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the Courts are to regard *the Constitution*, and *the Constitution* is superior to any ordinary act of the Legislature, *the Constitution*, and not such ordinary act, must govern the case to which they both apply......."

38. This court has not found any way in which *the constitution*'s provisions were infringed, and the Petition is devoid of merit. The petition also did not set out any infringement of *the constitution* that reached the constitutional muster.

39. The Petitioner also did not contend that the 2024 Act failed the requisite publication criteria. It was deposed that the 2013 Act did not have a commencement date, and the 2024 Act did not have a gazetted commencement date. The constitutional requirement for publication in the Gazette was with respect to the legislation and not the commencement date. Article 199 of *the Constitution* provides as follows:

    1. County legislation does not take effect unless published in the Gazette.
    2. National and county legislation may prescribe additional requirements in respect of the publication of county legislation.

40. The 2013 Act has not been challenged in this petition; the Act challenged is the one for 2024. The Petitioner annexed the bill for the enactment of the act. A bill can definitely not have a commencement date but a formula for commencement. Respondent annexed the Act, duly gazetted, and assented on 15.3.2024. The Act commenced on 30.4.2024.

41. Before departing, I need to comment on the challenge to the Act. The Act had earlier been challenged vide Petition No. E003 of 2024. That challenge was only in respect of public participation. The court made its decision on 26.9.2024, indicating that the petition was devoid of merit. The same parties filed this matter, now challenging again on different grounds. The former decision was reported as Nyeri County Bar Owners Association v County Government of Nyeri [2024] KEHC 12140 (KLR).

42. It is my considered view that the Petition was res judicata, having already been decided. A party cannot mount a piece meal challenge to an Act. In re Estate of Riungu Nkuuri (Deceased) [2021] eKLR the court stated as follows:

> The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
>
> a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. That former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was heard and finally determined in the former suit.
>
> e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

43. In the case of Attorney General & another ET vs (2012) eKLR it was held that;

> " The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit".
>
> In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....".

44. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of Henderson v Henderson (1843-60) All E.R 378, observed thus:

> " ...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but

to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

45. Res judicata applies to applications just like suits. In the case of Julia Muthoni Githinji v African Banking Corporation Limited [2020] eKLR the court stated thus:

> 14. After a careful reappraisal of the application for injunction before the lower court, I have come to the conclusion that the application was resjudicata and the entire suit was subjudice as there was an active pending suit before a court of competent jurisdiction being Nakuru ELC No. 272 of 2017. All issues raised in the suit before the subordinate court could be properly litigated in the suit pending before the ELC. The filing of the suit by the appellant in the subordinate court when she had a similar suit in the ELC Court was an abuse of the Court process which the Court cannot countenance.

46. A party cannot challenge an Act and then reposition himself to challenge the same on different grounds. The finding in the former suit was enough to dispose of the matter. This is true, in particular where the court dismissed the process of arriving at a decision. The same challenge has been mounted in a more cavalier manner, without setting out the particulars of unconstitutionality.

47. The upshot of the foregoing is that the petition is dismissed for lack of merit.

48. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

    1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

    2. The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

49. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> “ (18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law,

constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

50. All factors considered, the best order in the circumstances is for each party to bear their costs, being a public interest litigation, albeit being res judicata.

Determination

51. The upshot is that I make the following orders: -

a. The Petition dated 4.10.2024 is dismissed *in limine.*

b. Being a public interest matter, each party shall bear own costs.

c. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 10TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for Petitioner

Ms. Muraguri for the Respondent

Court Assistant – Michael