Githii v County Government of Nyeri; Mwangi & another (Interested Parties) (Constitutional Petition E016 of 2024) [2025] KEHC 4416 (KLR) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4416 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CONSTITUTIONAL PETITION E016 OF 2024

DKN MAGARE, J

APRIL 8, 2025

[FORMERLY KERUGOYA PETITION CAUSE NO. E016 OF 2024]

IN THE MATTER OF ARTICLES 10, 20, 21, 23, 27, 28, 33, 43(1) 159 AND 199(1) OF THE CONSTITUTION

BETWEEN

PETER KARIUKI GITHII ..... PETITIONER

AND

COUNTY GOVERNMENT OF NYERI ..... RESPONDENT

AND

PETER NDEGWA MWANGI ..... INTERESTED PARTY

JONAH WAWERU KAMAU ..... INTERESTED PARTY

JUDGMENT

1. Many years ago, it was understood that once a decision is rendered in rem, it applies to all and sundry. This may have changed over time while I was away. The viscous alcohol wars have raged with the filing of various matters attacking the Nyeri County Alcoholic Drinks and Control Bill and subsequent Acts. This Petition dated 22.10.2024 was filed in Kerugoya High Court before it was rerouted to this court.
2. The Petitioners sought the following reliefs:
    i. The Respondent be put to strict proof as regards the alleged publication of the Nyeri County Alcoholic Drinks and Control Bill, 2023 on 12.10.2023, in the Kenya Gazette.

ii. The Nyeri County Alcoholic Drinks and Control Bill, 2023 be declared unconstitutional, null and void.

iii. Costs

3. The petition is premised on the grounds in the petition and the verifying affidavit sworn by Peter Kariuki Githii on 22.10.2024 as follows:

i. The Bill violates Article 199(1) of the *Constitution* for failure of gazettement in the Kenya Gazette.

ii. The purported Gazettement of the Bill on 12.10.2023 is inaccessible to the Public.

iii. The Bill is discriminatory within the meaning of Article 27 and Article 10 of the *Constitution*.

iv. The public notice dated 2.10.2023 was done without locus standi.

v. The Respondents failed to satisfy Section 85 of the *Evidence Act*.

4. What locus standi means, contextually is beyond comprehension. It is the use of pompous Latin words meant to obfuscate the issues and mire the determination of the matter in an incessant imbroglio leaning to doom and hubris. The Respondent did respond to the Petition. The parties did not file submissions. The burden and standard of proof are not lessened by the failure or otherwise of the Respondent to defend the claim. In the case of Samson S. Maitai & Another -vs- African Safari Club Ltd & Another [2010] eKLR, the High Court in trying to define Formal Proof stated thus:

> " ..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

5. After my ruling of 3.2.2025, the petitioner did not appear interested in the petition. In that ruling, this court declined to recuse itself as there was no raison d'etre for doing so. The petitioner does not have the luxury of choosing and picking the court to hear him.

6. This judgment was slated for 3.4.2025. Parties did not log into the court. I placed this matter aside, but they did not log in. Given that the court had a lengthy physical hearing in Mombasa, it did not want to take chances. The parties may have logged in while the court was proceeding physically. Consequently, ex abundanti cautela, the court decided to postpone this judgment, which was ready, to today. I could not understand both parties' absence, so I directed that the parties be served.

Analysis

7. The issue for determination is whether the Nyeri County Alcoholic Drink Control Bill 2023 is unconstitutional, null and void for want of public participation. The petitioner sought an order declaring the Nyeri County Alcoholic Drinks and Control Bill, 2023, unconstitutional and null and void for violating, inter alia, Article 199(1) of the *Constitution*. The said article provides as follows:

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

8. For a question to be raised, it must be justiciable and not moot. Annexed to the petition was a copy of the Nyeri County Alcoholic Drink Control Bill 2023, which had been duly published in the Gazette.

9. Whereas bills must be published, Article 199(1) did not deal with bills. It deals with county legislation. The legislation arising from the bill was the Nyeri County *Alcoholic Drinks Control Act*, 2024. The same has not been attacked in this matter. This court dealt with the Act's constitutionality from inception to execution. The courts have also dealt with regulations arising therefrom in Wanjeru v County Secretary/Head of County Public Service County Government of Nyeri; Mwangi & another (Interested Parties) [2024] KEHC 15988 (KLR). The constitutionality of the said Act was dealt with in the case of Nyeri County Bar Owners Association v County Government of Nyeri [2024] KEHC 12140 (KLR). In that, the court held as follows:

> In this case, it is not the case of the Petitioner that they were not afforded reasonable opportunity to present their views. The Petitioner only maintained that its views were not considered and as such the entire exercise of public participation was also discriminatory. It is also not the case of the Petitioner that it was not allowed reasonable time within which to air out all its views. They participated and gave their views. I have seen amendments proposed and carried based on public participation. There were also others proposed but not carried. This is evidence of good faith. It must be understood that pubic participation is not equivalent to veto. The legislative prerogatives must be given accord unless it is clear that the legislature is rogue or the proposals derogate from all public views given. In Doctors for Life International vs. Speaker of the National Assembly and Others (CCT 12/05) 2006 ZACC), the court stated as follows: "It is true, as discussed previously, that time may be a relevant consideration in determining the reasonableness of a legislature's failure to provide meaningful opportunities for public involvement in a given case. There may well be circumstances of emergency that require urgent legislative responses and short timetables. However, the Respondents have not demonstrated that such circumstances were present in this case. When it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted. Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable must be subordinated to the rights guaranteed in the *Constitution*, and not the rights to the timetable.
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> 35. I dare add that, anyone with something useful, will say it notwithstanding the amount of reasonable time given. Someone without anything to say, will not say, even where a whole decade is given.
>
> 36. Therefore, in my view, the Petitioner has failed to demonstrate the manner in which the impugned public participation in respect of the Act was contrary to the letter and spirit of the *Constitution* as to declare the Act unconstitutional, null and void. In Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others [2013] eKLR, Lenaola J (as he then was) observed that: "The petitioners have attacked the impugned legislation on grounds that it failed to comply with the process of public participation as required by the *Constitution*. Where legislation fails to comply with the *Constitution*, courts have powers to make necessary orders in that regard as was held in the Constitutional Court of South Africa in the case of Doctor's for Life International v The Speaker National Assembly and Others (supra) where it was stated as follows;"It is trite that legislation must conform to the *Constitution* in terms of both content and the manner in which it

is adopted. Failure to comply with the manner and form requirements in enacting legislation renders the legislation invalid. And courts have the powers to declare such legislation invalid

37. Based on the findings, I do not see the manner in which the Respondent's public participation exercise was a sham.

10. The petitioner argued that the purported Gazettement of the said Bill on 12.10.2024 was inaccessible to the public. Therefore, the Petitioner did not argue that there was no publication. The petitioner argued that the Gazettement was inadequate because it was inaccessible. No evidence was placed before the court regarding the bill's inaccessibility. This changed the gamut of the petition. The initial issues were with the publication. Now, the adequacy of publication goes to the root of constitutionality. This is because, in another matter, challenging the Act, in rem, the issue of public participation was dealt with comprehensively.

11. The court's duty is not to look at the adequacy of the publication but whether the bill was published. With respect to the essence of pleadings, the Supreme Court of Kenya, in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

12. A party claiming a violation of the *Constitution* has the duty to lay before the court precise circumstances based on which the court can infer that the *Constitution* is threatened or violated. The apex court discussed the predeterminants of a proper Constitutional Petition in the decision made in Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR, where the court stated as follows:

> 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 been 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.

13. A deviation from the *Constitution* must not be illusionary. It must be tangible and discernible from a party's pleadings. In Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR the Supreme Court emphasized the need for precision as follows: -

(48) ... where a party in an election petition invokes this court's jurisdiction under article 163(4)(a) of the *Constitution*, it is not enough for one to generally allege that the Court of Appeal erred

in its decision(s) and that its reasoning and conclusions took a constitutional trajectory. The constitutional trajectory stated by this honourable court is not illusionary. It is tangible and should be discernable from a party's pleadings. A party is under a constitutional forensic duty to clearly set out the particulars of the constitutional transgressions that in his/her opinion the Court of Appeal committed in their interpretation and/or application. Those grounds must be pleaded with precision and the constitutional principle and/or provision alleged to have been violated clearly set out.

14. The axis of this court's power to determine the constitutional validity of any legislation is Article 165(3) of the *Constitution*. The Article provides that:

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

(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-

(i) the question whether any law is inconsistent with or in contravention of this constitution.

15. The Petitioner should have laid down and particularized precisely how the Bill infringed on the Articles of the *Constitution* or as a whole. The preciseness of pleadings was set out in Anarita Karimi Njeru v Republic [1979] KLR, where the court observed as follows:

> 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...

16. The allegations by the Petitioner herein relate to the failure of due process in publishing legislation. Due process, substantive justice, and the exercise of jurisdiction are a function of precise legal and factual claims. This due process was not demonstrated whatsoever. In Kenya Medical Practitioners, Pharmacists and Dentists' Union v University of Nairobi & another [2021] eKLR, the court discussed the need for precision in approval to the precedent in Anarita Karimi decision and observed as follows: -

> The foregoing finding (Anarita Karimi Njeru) received endorsement from the Court of Appeal in Nairobi Civil Appeal No 290 of 2012, Mumo Matemu v Trusted Society of Human Rights Alliance[2013] eKLR when the Learned Judges remarked on the importance of compliance with procedure under article 159 of the *Constitution*, the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* and need for precision in framing issues in constitutional petitions. It was observed thus:
>
> (41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions

> alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

17. The Petition did not satisfy the precision required of constitutional petitions. The Petitioner failed to precisely plead how the alleged Bill violated Article 199(1) of the *Constitution*. It was contradictory for the Petitioner to assert that the Bill was purported to be published when it was not without stipulating the parameters for such publication to be proper publication. It was also not pleaded how the Bill contravened Articles 27 and 10 of the *Constitution* on discrimination.

18. It was left to the court to discern the infringements alleged. The court cannot act on conjecture, speculation, or hyperbole. What the Petitioner has done is to petition the court and ask for relief unknown in law. What does the following prayer mean?

> "The Respondent be put to strict proof as regards the alleged publication of the Nyeri County Alcoholic Drinks and Control Bill, 2023 on 12.10.2023, in the Kenya Gazette."

19. If I allow this prayer, what is the petitioner seeking? The need for a precise and comprehensive petition is paramount, as addressed by the Court of Appeal in Migori County Government & another v Migori County Transport Sacco (Civil Appeal 110 of 2017) [2021] KECA 7 (KLR) (23 September 2021) (Judgment):

> A constitutional petition ought to set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they were alleged to be infringed. A constitutional petition ought to be drafted with some reasonable degree of precision, identifying the constitutional provisions that were alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. It was not enough to merely cite constitutional provisions. There had to be some particulars of the alleged infringements to enable the Respondents to respond to and/or answer the allegations or complaints. The Respondent's petition stated the particular provisions of the *Constitution* violated and the manner of violations attributed to the appellants.

20. Consequently, the first limb of the prayers sought is otiose and accordingly fails. It has neither the legs to stand on nor life to be resuscitated. The second prayer has been dealt with comprehensively regarding the subject matter herein. Due to the separation of powers, the court was mandated to intervene in legislative powers but with reasonable constraints based on constitutional and legality parameters, which the Petitioner failed to demonstrate. On the question of separation of powers and privilege, the Court of Appeal, in Mumo Matemu v Trusted Society of Human Rights Alliance[2013] eKLR considered the scope of application of the separation of powers doctrine, and adopted the High Court's standpoint in the following terms:

> "[Separation of powers] must mean that the Courts must show deference to the independence of the legislature as an important institution in the maintenance of our constitutional democracy, as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions...."
>
> > "[I]n a jurisdiction such as ours in which the *Constitution* is supreme, the Court has jurisdiction to intervene where there has been a failure to abide by [the]

> Standing Orders which have been given constitutional underpinning under the said Article. However, the Court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case."

21. The second limb is subject of the doctrine of res judicata. In public matters, a decision in rem in one matter binds all and sundry. It is not a must that everyone must also file a similar petition. The question of constitutionality of the Nyeri County *Alcoholic Drinks Control Act* 2024 was put to bed in Nyeri Petition Number 3 of 2024. Can it be revisited or is it res judicata? 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."

22. 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.

23. The doctrine of res judicata arises from Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya which defines the doctrine of Res Judicata in the following terms: -

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

24. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 4 and 6 provide as follows:

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court

competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. Explanation. –

(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

25. What constitutes res judicata was addressed in depth in the case of Re Estate of Riungu Nkuuri (Deceased) [2021] eKLR where 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."

26. 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. This was so held in the case of Attorney General & another ET vs (2012) eKLR where 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.....".

27. There is nothing new introduced in the claim. The questions raised, albeit in a hazy manner, relates to the constitutionality of the Nyeri County *Alcoholic Drinks Control Act* 2024. In this side attack, the Petitioner is attacking the publication of the bill leading to the enactment of the Nyeri County *Alcoholic Drinks Control Act* 2024. The questions for attack now were available in the former suit. What the petitioner has done is to convolute the former suit and present a similar one as if it is a brand new petition. No court should knowingly decide a matter that has been fully adjudicated by a competent court of law. In the case of Henderson v Henderson [1843-60] ALL ER 378 the court states as follows:

> " ... where a given matter becomes the subject of litigation in and of adjudication by 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 brought forward as part of the subject in contest but which was not brought forward only because they have from negligence, inadvertence or even accidently omitted party 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 reasonable diligence might have brought forward at the time."

28. The separation of powers is what Baron De Montesquieue in his postulation, The spirit of the law chapter xi, 3, 1748, described as a check to abuse of powers. It was motivated by the understanding that whoever is given authority is prone to misuse it and extend it as far as they can. In order to avoid this kind of exploitation, it was essential that one power be a check on the other. As a result, the notion of executive, judicial and legislative branches of government was to preclude the exercise of arbitrary powers among the 3 arms and the cushion of tendencies towards anarchy.

29. It was the duty of the Petitioner to demonstrate that the actions and omissions of the County Assembly of Nyeri were contrary to the specific provisions of the *Constitution* and the manner in which this happened. This is because what was in contest was a Bill and not an Act. For being a Bill, it meant the county assembly was in the process of making it a county legislation. The court would only interfere with precaution to avoid trekking the path so delicate and treacherous into the boundaries well within the legislative role of the county. The High Court, in Okiya Omtatah and 3 Others v. Attorney-General and 3 Others (2013) eKLR stated thus:

> " To agree with the National Assembly that this Court cannot interrogate its work will amount to saying that the National Assembly can fly beyond the reach of the radar of the *Constitution*. That is a proposition we do not agree with. Our view is that all organs created by the *Constitution* must live by the edict of the *Constitution*."

30. The court is thus alive that the broad profile of the *Constitution* commits law-making process to parliament and the county assemblies. This court can resolve disputes relating to uncertainties in the enactment and implementation of national and county legislation in case of uncertainties that relate to the mode of legislative drafting implementation within the purview of constitutional provisions. This is however in line with limitations to judicial authority such as separation of powers and justiciability concepts.

31. In the case of Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR, J.L. Onguto J posited as follows regarding justiciability.

29. The justiciability dogma and all principles under it are part of our Constitutional law and jurisprudence. The court in John Harun Mwau & 3 Others –v- AG & 2 others HCCP No. 65 of 2011 (unreported) stated as follows:

> " We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the *Constitution* conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy."

30. Later in Hon. Martin Nyaga Wambora –v- Speaker of County Assembly of Embu and 5 Others HCCP No. 3 of 2014, the court observed as follows:

> " It is clear from the above definition that whether a matter before a Court is justiciable or not depends on the facts and circumstances of each particular case but the Court must first satisfy itself that it has jurisdiction to entertain the matter before it can resolve the issue of justiciability.'

31. In Coalition for Reform and Democracy (CORD) & 2 Others -v- Republic of Kenya & Another HCCP 628 of 2014 [2015]eKLR, the court cited the case of Patrick Ouma Onyango & 12 Others –v- AG & 2 Others Misc. Appl No. 677 of 2005 wherein the court had endorsed the doctrine of justiciability as stated by Lawrence H. Tribe in his treatise American Constitutional Law, 2nd Ed. Page 92 as follows:

> " In order for a claim to be justiciable as an article III matter, it must "present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted." In part, the extent to which there is a 'real and substantial controversy is determined under the doctrine of standing' by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also in part a feature of the controversy itself-an aspect of 'the appropriateness of the issues for judicial decision...and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of 'ripeness' which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contigencies and of 'mootness' which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the 'political question' doctrine, barring decision of certain disputes best suited to resolution by other governmental actors'.

32. In Judicial Service Commission v. Speaker of the National Assembly and 8 Others (20130 eKLR, the court proceeded on the basis that the separation of powers doctrine obligated it to be conscious

of certain limitations to judicial authority; the court remarked that some issues, by the terms of the *Constitution*, had been expressly committed to other arms of government. The court stated as doth:

> " the *Constitution* disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the *Constitution*, then the Courts are empowered by Article 165(3)(d)(ii) to determine whether anything said to be done under the authority of the *Constitution* or any other law is inconsistent [with] or in contravention of the *Constitution*."

33. Since what was in contest was a Bill, which is an actual legislative act in being; it was not in general permissible to this court to impugn through the process of the courts a bill before it has actually become law. A relevant observation on such issues has been made by the Nigerian Scholar, Law Professor B.O. Nwabueze' The Presidential Constitution of Nigeria (London, Sweet & Maxwell, (1983) in these terms:

> " The review by the ordinary courts of the constitutionality or legality of legislative and executive acts, and of the propriety of administrative acts of a quasi-judicial nature is the main bulwark of constitutionalism in the Commonwealth and the United States....The court's jurisdiction for this purpose may be invoked by an aggrieved party..., provided he can establish a locus standi entitling him to challenge the act in question. This condition means that what can be challenged is an actual legislative act in being; it is not in general permissible to impugn through the process of the courts a bill before it has actually become law."

34. Even if it were not for the foregoing, it is now clear that this Petition was overtaken by events upon operationalization of the Nyeri County *Alcoholic Drinks Control Act*, 2024. While I have clarified the issues raised herein, even if I had found fault with the manner in which the Respondent acted, I would still have declined to grant the orders sought herein. As was held in John Harun Mwau & 3 Others – vs- A.G & 2 Others [2012] eKLR:

> " ...this court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the *Constitution* conferred under Article 165 (3)(d) does not exist in a vacuum and it is not exercised independently in absence of a real dispute. It is exercised in the context of a dispute or controversy..."

35. The Petition is, therefore, devoid of merit. It is accordingly dismissed.

36. The next question is costs of the petition. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say as regards costs: :

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

37. 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.

38. The Respondent did not give a spirited fight. In the circumstances, being an attempt to have a second bite of the cherry, the court could have been inclined to award costs. However, given the foregoing, each party will bear their own costs.

Determination

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

    a. The Petition dated 22.10.2024 is dismissed for lack of merit.

    b. Each party shall bear own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 8TH DAY OF APRIL, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Petitioner present

Ms. Stella Muraguri for the Respondent

Interested Party present

Court Assistant – Michael

M. D. KIZITO, J.