



Gitonga & another v County Government of Mombasa & 4 others (Petition E059 of 2023) [2024] KEHC 3413 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3413 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E059 OF 2023**

OA SEWE, J

APRIL 11, 2024

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES
19, 20,21,27, 40(1) & (3), 50(2), 199(1), 210(1) OF THE CONSTITUTION**

AND

**IN THE MATTER OF ARTICLES 2(1), 22(1) 23(1),
165 AND 176 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL ACT OF 2016

BETWEEN

**JOSEPH MUTERO GITONGA 1ST PETITIONER
MOMBASA COUNTY ENTERTAINMENT, BARS, PUBS, RESTAURANTS,
HOTELS, GUESTHOUSES, WINES & SPIRITS OWNERS ORGANIZATION
SUING THROUGH THE CHAIRMAN PATRICK KABUNDU AND
TREASURER, LYDIA NGARI 2ND PETITIONER**

AND

**COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT
CLERK, MOMBASA COUNTY ASSEMBLY 2ND RESPONDENT
DIRECTOR, MOMBASA COUNTY DIRECTORATE OF LIQUOR
LICENSING 3RD RESPONDENT
INSPECTOR GENERAL, NATIONAL POLICE SERVICE 4TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 5TH RESPONDENT**



RULING

1. The Notice of Motion dated 4th April 2024 was filed herein under a Certificate of Urgency by the 1st petitioner, Joseph Mutero Gitonga, pursuant to Sections 1A, 1B, 3A and 22 of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya; Order 16 Rule 1 and Order 50 Rule 1 of the [Civil Procedure Rules, 2010](#). He thereby prayed for orders that:
 - (a) Spent
 - (b) Summons do issue to the Mombasa County Attorney, Mr. Jimmy Waliaula, to attend court for the purpose of being cross-examined in respect of averments made and evidence produced in support of Notice of Motion dated 18th March 2024.
 - (c) The proceedings in respect of the Notice of Motion dated 18th March 2024 and the orders emanating therefrom be stayed pending the examination of the Mombasa County Attorney, Mr. Jimmy Waliaula.
 - (d) In the interest of justice, the Court be pleased to arrest its ruling slated for 8th April 2024 pending inter partes hearing and determination of the instant application. (spent)
 - (e) The costs of the application be included in the main proceedings.
2. The application is premised on the grounds that the respondents have filed an application dated 18th March 2024 seeking, inter alia, the setting aside of the orders dated 13th February 2024, contending that the Mombasa County Liquor Licensing Act, 2014 is valid; the same having been published in the Kenya Gazette in 2014. The 1st petitioner further pointed out that, in contrast to the foregoing posturing, the 1st respondent issued a press statement dated 28th March 2024 indicating that they intend to repeal the entire Mombasa County Liquor Licensing Act 2014.
3. Accordingly, the 1st petitioner sought orders for the cross-examination of the County Attorney to explain the reasons for the intention to repeal the Act if, as was averred by him, it is a valid piece of legislation. The grounds aforesaid were expounded on in the 1st petitioner's Supporting Affidavit sworn on 4th April 2024, to which he annexed copies of the subject affidavits and other pertinent documents. The 1st petitioner took the stance that the evidence presented by the respondents is contradictory; hence the need for cross-examination.
4. The application was resisted by the 1st, 2nd and 3rd respondents on the basis of the Grounds of Opposition dated 8th April 2024. They contended that:
 - (a) The 1st petitioner is merely out to circumvent their application dated 18th March 2024, which was slated for ruling on 8th April 2024.
 - (b) The 1st petitioner is seeking to convince the Court into maintaining the orders of 12th February 2024.
 - (c) The issues raised are matters of evidence that do not warrant cross-examination of the County Attorney under Order 19 Rule 2 of the Civil Procedure Rules.
 - (d) The application is frivolous and vexatious and should therefore be dismissed with costs.
5. The application was urged orally on 8th April 2024 by Ms. Otieno, learned counsel for the 1st petitioner. She was supported by the 2nd petitioner, while counsel for the 4th and 5th respondents opted to take



a neutral stand. In view of the multiplicity of applications in this matter, Mr. Makuto for the 4th respondent proposed that the applications be abandoned so that the Petition can be fast tracked and disposed of expeditiously. He believed that this would be the best way of effectually resolving all the issues in this dispute. In this proposal, Mr. Makuto received the support of Ms. Anyumba for the 5th respondent and all the other counsel and therefore directions will be given shortly hereafter in that regard.

6. Cross-examination of deponents is provided for in Order 19 Rule 2(1) of the [Civil Procedure Rules](#), which states:

“(1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.

7. Thus, this being discretionary power reposed in the Court, it is to be exercised judiciously; and therefore some justification ought to be shown to warrant the invocation of the power. In connection with the above provision, it was observed in [GGR v HPS](#) [2012] eKLR that:

“The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross-examined. It would appear that where allegations of matters touching on fraud, mala fides, authenticity of the facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is a conflict of Affidavits on record or where the evidence deponed (sic) to is conflicting in itself. Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.”

8. In the instant matter, it has been asserted that there is a contradiction between the deposition made by the County Attorney, Mr. Jimmy Waliaula, in his Supporting Affidavit sworn on 18th March 2024 and an affidavit sworn by him in respect of Mombasa High Court Miscellaneous Application No. 9 of 2015. However, a consideration of the two affidavits reveals no such variance as both purport to demonstrate that the Mombasa County Liquor Licensing Act of 2014 was published in the Kenya Gazette and is therefore valid. It cannot be said therefore that the Supporting Affidavit is contradictory in itself. The other angle of the application is the assertion that the County Attorney ought to come and explain their intention to repeal the subject legislation. That would be to venture into the realms of speculation which, clearly, is not permissible.
9. Hence, on both scores, I find the application deficient. Moreover, whether or not the Act is indeed valid is the subject of the Petition dated 14th December 2023. It would therefore be premature to summon the County Attorney for purposes of cross-examination on that aspect only. Indeed, I am not convinced that such cross-examination would aid the Court in determining the pending applications.
10. Secondly, and more importantly, the parties having agreed to abandon all the pending applications in favour of the expeditious hearing and determination of the Petition, such cross-examination would amount to naught. In the premises, I find no merit in the application dated 4th April 2024. The same is hereby dismissed with costs.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 11TH DAY OF APRIL
2024

OLGA SEWE

JUDGE

