



**Olkalou Sub-County Liquor Traders Association v Ministry of Interior  
& National Administration & 3 others (Constitutional Petition  
E002 of 2024) [2024] KEHC 5791 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5791 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CONSTITUTIONAL PETITION E002 OF 2024**

**CM KARIUKI, J**

**MAY 16, 2024**

**IN THE MATTER OF ARTICLES 1,2,3,10,20,21,22,23,27,35,48,73,159,160,165,174  
(C),196 (1) (B) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 2, 3,87 (F), AND 115 OF THE COUNTY  
GOVERNMENTS ACT,2012**

**AND**

**IN THE MATTER OF SECTIONS 4(1) (E) AND 5 (A) OF THE NYANDARUA  
COUNTY GOVERNMENT**

**AND**

**COUNTY ALCOHOLIC DRINKS CONTROL ACT NO. 4 OF 2019**

**BETWEEN**

**OLKALOU SUB-COUNTY LIQUOR TRADERS ASSOCIATION .. PETITIONER**

**AND**

**MINISTRY OF INTERIOR & NATIONAL ADMINISTRATION .... 1<sup>ST</sup>  
RESPONDENT**

**COUNTY COMMISSIONER NYANDARUA COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**NYANDARUA COUNTY GOVERNMENT ..... 4<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. The Petitioner initially filed the undated Petition and contemporaneously filed a Notice of Motion dated 12/3/2024 filed on 13/3/2024, seeking conservatory orders under Articles 40 and 159 of *the Constitution* of Kenya. Multiple other statutory Provisions of *the Constitution* and rules were cited along with the Constitutional Provision.
2. On the other hand, the Respondents filed a replying affidavit sworn by Abdirisac Jaldesa, the County Commissioner of Nyandarua County. He deponed that following the recent numerous loss of lives due to consumption of illicit/illegal alcohol in the country, the Cabinet Secretary, Ministry of Interior, and National Government issued directives on measures to curb illicit brews issued according to Section 4 (2) of the *Preservation of Public Security Act*.
3. The Respondents deponed that under Paragraphs 6 and 25 of the directives, the deponent was instructed to shut down all bars operating near residential houses and schools and those not approved to operate as such. The bars were closed in conformity to the same. Further, it was averred that Section 12 of Cap 121 and Section 23 of the Nyandarua County Alcoholic Drinks Act prohibits the sale of an alcoholic drink in a place near a residential or fundamental education institution. Article 40 of *the Constitution* only protects the property legally obtained.
4. It was deponed that the Petitioner has not attached any license to prove that it was operating the business legally. In the best interest of justice, the operators must be vetted afresh to verify their institutions and prevent them from operating their business in unauthorized areas.
5. They asserted that the closure of the bars was not discriminatory, as alleged by the Petitioner. Hence, their rights have not been violated, and thus, the Petition and application should be dismissed.
6. Consequently, on 9 April 2024, this Court ordered that:-
  - i. The Applicant shall amend their Petition and serve within five days, and
  - ii. the Respondents shall respond to the amended Petition within five days of service.
  - iii. The Petition shall be heard by viva voce evidence between the 22<sup>nd</sup> and 25<sup>th</sup> of April 2024.
7. As a result, the Petitioner vide their undated amended Petition filed on 15 April 2024 asserted that the Cabinet Secretary Interior and National Government issued directives on 6/3/2024 according to Section 4(2) of the *Preservation of Public Security Act* under Paragraphs 6 and 25 and after that instructed the 2<sup>nd</sup> Respondent to shut down all bars that were operating near residential houses and schools and those not approved to operate as such. It is averred that Section 12 of Cap 12 prohibits the sale of alcoholic drinks in places near residential or primary education Institutions.
8. The Petitioner asserted that they sought amicable solutions for the dispute pertaining to the illegal and unlawful imposition of the directions to no avail.
9. The Petitioner pointed out that in addition to the single permits and other charges to the 3<sup>rd</sup> Respondent, they pay the following taxes to the national Government in accordance with Article 219 of *the Constitution* and related legislation. Income tax Value added tax Custom duties Excise duty/tax



10. They asserted that the 4<sup>th</sup> Respondent does not offer or provide the Petitioners any service during their business. In the premises, the Petitioner contended that under Article 209 (4) of *the Constitution*, read with Section 116-121 of the County Government Act. Section 132 of the *Public Finance Management Act*, there was no basis for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to order the illegal closure of the bars without due process.
11. It was stated that the Respondents totally disregard *the Constitution* and have gone against national values and principles of governance as envisaged under Article 10 (2) (a) of *the Constitution*. Members of the public, especially those engaged in buying and selling alcoholic drinks in Nyandarua County, were never informed or given a chance to be heard.
12. The Petitioners argued that the impugned ministerial directive, if implemented, would lead to the Petitioner's collapse, and the livelihoods of about 500 business people and their dependents would be adversely affected. Further, they stated there is no room for blatant disregard for *the Constitution* under the new constitutional dispensation, more so Article 10. Hence, the Petition had been brought in good faith and the interest of justice.

#### Particulars of Violation by the Respondents

- i. They are failing to appreciate the provisions of Article 40 of *the Constitution* by threatening to confiscate and/or attach assets belonging to the Petitioners in enforcing the ministerial directive.
  - ii. Failing to appreciate the purpose of Articles 27, 28, and 46 of *the Constitution* on non-discrimination, right to dignity, and consumer rights of which assets belonging to the Petitioners are due for the market.
  - iii. Blatant disregard well laid-down provisions of the law
  - iv. Abrogating *the Constitution* and the *County Governments Act*, creating their law, and enforcing the same.
  - v. Selective application of the impugned ministerial directive.
13. *The Constitution* guarantees equal protection and benefits from the law, freedom from discrimination, right to property, suitable to fair administrative action, consumer protection, and the environment, which must be protected and respected.
  14. Consequently, the Petitioner humbly prays for:-
    - i. A declaration that the 1<sup>st</sup> Respondent's actions are brazen, illegal, egregious, discriminatory, and violate the Petitioner's constitutional rights.
    - ii. A declaration that the actions of the 1<sup>st</sup> Respondent have violated the rights of the Petitioners under Articles 1, 10, 27, 28, 40, 47, 48, 196, 199 and 209 of *the Constitution* of Kenya read together with Section 132 of the *Public Finance Management Act*, 2012 and Section 116-121 of the *County Governments Act*, 2012.
    - iii. An order of permanent injunction be issued prohibiting the 1<sup>st</sup> Respondent from enforcing illegal ministerial directives against the Petitioners within Nyandarua County.



- iv. A declaration that the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to enact and enforce a ministerial directive involving the public or interested parties was contrary to the Constitution and the County Governments Act, 2012, hence ultra vires.
  - v. An order of certiorari to remove into this honorable Court to quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.
  - vi. A declaration be issued to declare the ministerial directive of the 1<sup>st</sup> Respondent amount to a violation of the Petitioner's right to enjoy the benefit of ownership of property and freedom from arbitrary deprivation of ownership and use of property.
  - vii. A declaration be issued to declare that the seizure/detention of the Petitioner's assets in the purported enforcement of the impugned ministerial directive is the Petitioner's right to fair administrative action enshrined in Article 47 of the Constitution.
  - viii. A declaration be issued to declare that the ministerial directive for the closure of bars of the Petitioners by the 1<sup>st</sup> Respondent without a court order amounts to a gross violation of the Petitioner's right to a fair hearing protected by Article 50 (3) of the Constitution.
  - ix. The Petitioner be paid the cost of the Petition.
15. Additionally, the Petitioner filed an affidavit supporting the Petition, statement, and further affidavit dated 11 April 2024, sworn by Samuel Karanja.
  16. On the other hand, the 4<sup>th</sup> Respondent filed a replying affidavit dated 25 April 2024 sworn by John Ndungu Muriu, the County Member for Education, Children, Gender Affairs, Culture and Social Services in Nyandarua County, and deponed that the 4<sup>th</sup> Respondent and the Nyandarua County Assembly has enacted a county law called the Nyandarua County Alcoholic Drinks Control Act, 2024 that provides for the management, control, licensing and regulation of the production, sale, distribution, consumption of alcoholic drinks in the county.
  17. Further, the Petitioner fails to demonstrate knowledge of the existence of the Act by citing the Nyandarua County Alcoholic Drinks Control Act, 2019, which is repealed that the Act was assented to on 19 January 2024 and commenced its implementation on 22 January 2024.
  18. It was deponed that the Act has provided for the sale and consumption, enforcement, and operation hours, among other provisions for compliance. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents, all national Government agencies, have a role in implementing all county and national laws save the licensing.
  19. The 4<sup>th</sup> Respondent has a constitutional role under the Fourth Schedule and the Act under Part III to license alcoholic drinks within the county; the 4<sup>th</sup> Respondent has already forwarded to the Government press the Nyandarua County Alcoholic Drinks (Licensing) Regulations, 2024.
  20. That the 4<sup>th</sup> Respondent has not issued licenses under the Act; hence, the previous license holders under the repealed Act are presumed to have valid licenses until the said regulations and licensing committee are in place as per Section 70 (1) of the Act and the Petitioner is expected to comply with the Act and any other laws for alcoholic drinks control within the county.



21. It was asserted that the Petitioners intend to take advantage of the lacuna of not having licensing regulations and committees to violate the existing laws on alcoholic drinks control.
22. The deponent averred that the Petition is an abuse of the court process, frivolous, and intended to undermine devolution and participation of the people, which is one of the key national values and principles of governance as provided under Article 10 of *the Constitution*. That the Petition is incompetent, misconceived, and intended to mislead the Court into granting orders prayed to the detriment and interest of the public.
23. Lastly, the 4<sup>th</sup> Respondent submitted that it is in the interest of justice urged to dismiss the Petition with costs to them.

### **Analysis and Determination**

24. Having considered the pleadings of the parties as well as their annexures thereto, I discern the following issues for determination: -
  - i. Whether the threshold for seeking redress through a Constitutional Petition has been attained;
  - ii. Whether the ministerial directive issued by the 1<sup>st</sup> Respondent is illegal and unconstitutional?
  - iii. Does the impugned ministerial directive violate the rights enshrined under Articles 1,10,27,28,40,47,48,196,199 and 209 of *the Constitution* of Kenya, read together with Section 132 of the *Public Finance Management Act*, 2012, and Section 116-121 of the *County Governments Act*, 2012?
  - iv. Whether the 1st and 2nd Respondent illegally ordered the closure of the Petitioner's bars contrary to *the Constitution*, the *Public Finance Management Act*, and the County Government Act?
  - v. Whether the Petitioner is entitled to any remedies.
25. The Petitioner alleged the violation of constitutional rights, particularly Article 40 of *the Constitution*, on protecting property rights, by threatening to confiscate and/or attach assets belonging to the Petitioners to enforce the ministerial directive. Further, the Petitioner contended that the purpose of Articles 27,28 and 46 of *the Constitution* on non-discrimination, suitable to dignity, and consumer rights of which assets belonging to the Petitioners are due for the market.
26. The Petitioner also pointed out that *the Constitution* guaranteed the right to equal protection and benefit from the law, freedom from discrimination, right to property, suitable to fair administrative action, consumer protection, and the environment, which must be protected and respected.
27. Accordingly, a burden is placed on them to demonstrate, with a reasonable degree of precision, how their rights or the rights of others under these provisions of *the Constitution* have been or are threatened with violation. They must set out precisely the Articles of *the Constitution* alleged to have been infringed and the manner of such infringement according to the principles laid out in the case of Anarita Karimi Njeru vs. Republic [1979] 1 KLR 154.



28. In *Trusted Society of Human Rights Alliance vs Attorney General and 2 Others* [2012] eKLR, the Court re-affirmed the holding in the *Anarita Karimi Njeru Case* and stated that:-

“We do not purport to overrule *Anarita Karimi Njeru* as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to prepare her case adequately and to save the Court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we think that the proper test under the new Constitution is whether a Petition, as stated, raises issues that are too insubstantial and so attenuated that a court of law appropriately directing itself to the issue cannot fashion an appropriate remedy due to the inability to fathom the constitutional violation alleged concretely.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the constitutional provisions alleged to have been violated. The substantive test inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

29. Furthermore, The Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR had the following on constitutional petitions: -

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, 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 vs. 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 a principle positively engages the constitutional dispute settlement process as a foundation of conviction and good faith.

30. In determining the first issue, this honorable Court is tasked with examining the allegations in the pleadings. To determine whether the Petitioner has met the threshold for proper pleadings in constitutional petitions, the answer lies in the pleadings. It is another issue whether they are established at all.
31. The Petitioner alleged that the Respondents, notably the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, by issuing and enforcing the impugned ministerial directive resulting in the closure of their bars and seizure and detention of their assets, undermined their constitutional rights provided for under Article 27,28, 40, and 46 of Constitution.
32. It was also stated that the 1<sup>st</sup> Respondent had enforced the law arbitrarily without notice to the Petitioner members. It was also discriminatory because some establishments were closed, and others were not closed. The Petitioners argued that the impugned ministerial directive, if implemented, would lead to the Petitioner's collapse, and the livelihoods of about 500 business people and their dependents would be adversely affected.
33. The Petitioner contended that the Respondent's actions violated the constitutionally guaranteed right to equal protection and benefit from the law, freedom from discrimination, right to property, proper to fair administrative action, consumer protection, and the environment, which must be protected and



- respected. In my considered opinion, after considering the Petitioner's pleadings, I find that the test in *Anarita Karimi Njeru vs. Republic* [1976] eKLR has been passed, namely setting out the complaint and the provisions of *the Constitution* that are alleged to have been violated.
34. The brief history of the matter is that the Cabinet Secretary Interior and National Government issued directives on 6/3/2024 according to section 4(2) of the *Preservation of Public Security Act* under paragraphs 6 and 25.
  35. After that, the Respondent was instructed to shut down all bars operating near residential houses and schools and those not approved to operate as such. The Respondents averred that Section 12 of Cap 121 prohibits the sale of alcoholic drinks in places near residential or primary education Institutions. It is also averred that the Petitioner members did not have licenses to authorize the business operation.
  36. According to the directives described above, on 8/3/2024, Respondent No. 1 and 2 closed all bars belonging to the Petitioner's members. No notice was issued to that effect, and the Petitioner members were not given a hearing, especially when determining the criteria for bars to be closed. The Petitioner members complained that some bars were favored in that they were not closed. Thus, the Petitioners' membership complained that they suffered huge losses as they had stock worth millions that could not be sold. The business was their source of livelihood. It was asserted that the criteria for closure were not disclosed to them.
  37. The Petitioner also annexed the certificate of registration SK 1 (though not in the court file), the membership list (113), and SK 2 copies of receipts for 2023 for paying for the County Licenses. The County Government is tasked to inspect and issue receipts and licenses for the operation of bars within that locality. That exercise has not taken place.
  38. The Respondents asserted that due to the recent numerous loss of lives due to the consumption of illicit/illegal alcohol in the country, the Cabinet Secretary, Ministry of Interior, and National Government issued directives on measures to curb illicit brews issued according to Section 4 (2) of the *Preservation of Public Security Act*.
  39. The Respondents deponed that under Paragraphs 6 and 25 of the directives, the deponent was instructed to shut down all bars operating near residential houses and schools and those not approved to operate as such. The bars were closed in conformity to the same. Further, it was averred that Section 12 of Cap 121 and Section 23 of the Nyandarua County Alcoholic Drinks Act prohibits the sale of alcoholic drinks in a place near residential or primary education institutions.
  40. Conversely, the Petitioners prayed for a declaration that the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to enact and enforce a ministerial directive involving the public or interested parties was contrary to *the Constitution* and the *County Governments Act, 2012*; hence ultra vires, an order of certiorari to remove into this honorable Court to quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and a declaration be issued to declare the ministerial directive of the 1<sup>st</sup> Respondent amount to a violation of the Petitioners right to enjoy the benefit of ownership of property and freedom from arbitrary deprivation of ownership and use of property. The Petitioners contend that the ministerial directive was illegal and contravened *the Constitution*.
  41. According to Article 259(1) of *the Constitution*, this Court is obligated to interpret it in a manner that promotes its purposes, values, and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.



42. In determining whether the ministerial directive is unlawful and unconstitutional, the provisions of *the Constitution* must be interpreted purposively in line with Article 259(1) and other principles of constitutional interpretation. In the case of *Institute of Social Accountability & Another v National Assembly & 4 Others* High Court, [2015] eKLR, the Court summed up these principles as follows:

“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 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*. In determining whether a statute is constitutional, the Court must determine the object and purpose of the impugned statute, for it is essential 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...

Fourth, *the Constitution* should be given a purposive, liberal interpretation...Lastly and fundamentally, it is the principle that the provisions of *the Constitution* must be read as an integrated whole, without any one particular provision destroying the other. However, each sustains the other (see *Tinyefuza v Attorney General of Uganda* Constitutional Petition No. 1 of 1997 (1997 UGCC 3)). We are duly guided by the principles we have outlined, and we accept that while interpreting the impugned legislation alongside *the Constitution*, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must consider the spirit of *the Constitution*.”

43. Furthermore, the Court is also obligated to interpret *the Constitution* holistically, which entails reading one provision alongside other provisions and considering the historical perspective, purpose, and intent of the provisions in question. In *Re the Matter of Kenya National Commission on Human Rights* [2014] eKLR, the Supreme Court considered the meaning of “a holistic interpretation of *the Constitution*” and stated:

“But what is a ‘holistic interpretation of *the Constitution*’? It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, to maintain a rational explication of what *the Constitution* must mean in light of its history, the issues in dispute, and the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other to arrive at a desired result.”

44. This court takes judicial notice that the country has been experiencing a severe alcohol and drug abuse problem, which has wreaked havoc in villages and cities alike, occasioning deaths, permanent blindness and incapacitation, broken homes, and destruction of the youth who have been rendered economically unproductive.
45. The Government is responsible for ensuring that alcohol consumption does not interfere with its people’s national values and well-being. Article 46 of *the Constitution* provides for consumer rights and states, among other things, that consumers have the right to goods and services of reasonable quality, to the information necessary for them to gain full benefit from the goods and services to the protection of their health, safety and economic interest and compensation for loss or injury arising from defects



in goods or services. Accordingly, the objective of the enactment of the *Alcoholic Drinks Control Act* and the Alcoholic Drinks Control (Licensing) Regulations, 2010, was to control the production and consumption of alcoholic drinks for the protection of the general public and especially the youth.

46. Section 12(1) of the *Alcoholic Drinks Control Act* on licensing for premises states that-

12.

(1) The District Committee shall not grant a new license for the sale of an alcoholic drink to be consumed on the premises unless the District Committee is satisfied -

-that it would be in the public interest for provision to be made for the sale of alcoholic drinks for consumption on the premises in the particular locality in respect of which the application is made, and that the number of such premises in respect of which such licenses have already been granted is insufficient for the requirement of the locality given the population density per square kilometer and the permitted maximum number of such premises as shall be prescribed by law: Provided that no license shall be granted to sell alcoholic drinks in any institution of basic education including primary and secondary schools or any residential area as have been demarcated by or under the relevant written laws;

-that the premises in respect of which the application is made are in good repair, are in a clean and wholesome condition, and are provided with adequate and proper sanitary arrangements;

the premises on which the application is made are located at least three hundred meters from any nursery, primary, secondary, or other learning institution for persons under the age of eighteen years.

47. The Nyandarua county *alcoholic drinks control act*, 2024 has provision for the same; thus, section 20 (1) states, "the premises .....in respect of which the application is made are located at least three hundred (300) meters from any nursery, primary, secondary or other learning institutions for persons under the age of eighteen years (18).

48. Moreover, recently, there has been a worrying trend where the country has lost a number of lives due to the consumption of adulterated alcoholic substances coupled with other adverse effects. To check the same, the 1<sup>st</sup> Respondent issued the impugned ministerial directives according to Section 4 (2) of the *Preservation of Public Security Act*, which stated that:-

- i. Regulations for the preservation of public security may make provision for—
- ii. deleted by Act No. 10 of 1997, Third Sch;
- iii. The registration, restriction of movement (into, out of, or within Kenya), and compulsory movement of persons, including the imposition of curfews:
- iv. Provided that no person shall be restricted on account of his political beliefs or activities;
- v. the control of aliens, including the removal of diplomatic privileges;
- vi. the censorship, control, or prohibition of the communication of any information, or of any means of communicating or of recording ideas or



information, including any publication or document, and the prevention of the dissemination of false reports;

- vii. the control or prohibition of any procession, assembly, meeting, association, or society;
- viii. the control or prohibition of the acquisition, possession, disposition, or use of any movable or immovable property or undertaking;
- ix. the compulsory acquisition, requisitioning, control, or disposition of any movable or immovable property or any undertaking;
- x. requiring persons to do work or render services, including the direction of labor and supplies, the conscription of persons into any of the disciplined forces (including the National Youth Service), and the billeting of persons;
- xi. the control and regulation of harbors, ports, and the movement of vessels;
- xii. the control and regulation of transport by land, air, or water;
- xiii. the control of trading and the prices of goods and services, including the regulation of the exportation, importation, production, manufacture, or use of any property or thing;
- xiv. amending, applying with or without modification, or suspending the operation of any law (including the legislation of the East African Common Services Organization) other than this Act or *the Constitution*;
- xv. any matter not specified in this subsection's foregoing paragraphs for which provision is necessary or expedient to preserve public security.

49. The directives titled 'New Stringent Measures to Curb Illicit Brews' amongst other measures provided in paragraph 6 and 25 that: -

6. Any licenses currently issued to bars and other outlets and premises by county governments that are contrary to the provisions of the *Alcoholic Drinks Control Act*, especially concerning licensing of premises within residential areas and around primary educational institutions, are null and void. County Security Teams are to secure the shutdown and seizure of such premises immediately.
25. All County Security Committees have received the approved and licensed list of manufacturers, distillers, pharmacists, and agrovets. The committees are hereby directed to shut down and destroy all illicit manufacturing installations, distilleries, agrovets, and chemists not within the approved list of licensed enterprises within ten days of this directive.

50. In my assessment, the purpose of the impugned ministerial directives empowered by the *Alcoholic Drinks Control Act* and the regulations thereunder was to provide a rigorous legal framework for the regulations made thereunder, provide a well-thought-out legal framework for the regulation of production, sale, and consumption of alcoholic drinks following the aforementioned distressing trend which is a function of the 1<sup>st</sup> Respondent. The ministerial directives' purpose and historical setting is to curb the spate of deaths, health hazards, and adverse effects that the country has experienced this year; the media is awash with reports of such deaths in various counties.



51. Ministerial directives should conform to *the Constitution* and be carried out in an orderly manner to achieve their purpose in accordance with the national values and principles of governance. Their import and impact should be well thought out and exercised in accordance with respect for the rule of law. They must be targeted at the purpose they are meant to achieve. They should be in writing and directed to specific persons and/or government bodies and/or agencies. The implementation of the directives should be carried out in an orderly manner and exercised in accordance with the provisions of *the Constitution*, particularly the Bill of Rights.
52. Resultantly, from the foregoing, the import and impact of the impugned ministerial directive were clear. It was written hoping to curb illicit brews that have caused devastating effects in this country. On that front, it is my finding that the ministerial directive was lawful. However, in my opinion, the most pertinent issue was the implementation of the directive thereof.
53. The Petitioner asserted that the arbitrary closure of the Petitioner's members bars violated their rights, particularly the provisions of Article 40 of *the Constitution*, by threatening to confiscate and/or attach assets belonging to the Petitioners in enforcing the ministerial directive. The Petitioner pleaded that the impugned ministerial directive violates the Petitioner's right to protection of property under Articles 40 and 43 of *the Constitution*.
54. The Court of Appeal in Malindi Civil Appeal 56 of 2014 Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR referred to the Black's Law Dictionary 8<sup>th</sup> Edition that defined arbitrariness in the following manner: -
- “It connotes a decision or an action based on individual discretion, informed by prejudice or preference, rather than reason or facts.”
55. Further, the High Court in Civil Suit No. 3 of 2006 Kasimu Sharifu Mohamed vs. Timbi Limited [2011] eKLR referred to Oxford Advanced Learner's Dictionary, A. S. Horby 6th, which defines the term 'arbitrary in the following way: -
- “the term arbitrary in the ordinary English language means an action or decision not seeming to be based on a reason, system and sometimes, seeming unfair.”
56. Article 40 of *the Constitution* states as follows: -
1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--
    - a. of any description and
    - b. in any part of Kenya.
  2. Parliament shall not enact a law that permits the State or any person—
    - a. to arbitrarily deprive a person of property of any description or any interest in, or right over, any property of any description; or
    - b. to limit or in any way restrict the enjoyment of any right under this Article based on any of the grounds specified or contemplated in Article 27 (4).
  3. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—



- a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
- b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
  - (i) requires prompt payment in full of just compensation to the person and
  - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
4. Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
5. The State shall support, promote, and protect the intellectual property rights of the people of Kenya.
6. The rights under this Article do not extend to any property found to have been unlawfully acquired."

57. For the Petitioner to succeed under this claim, it must prove its proprietary rights and how the Respondents have caused harm or injury to or the omission to take reasonable steps to prevent such harm and injury. The case of *Salim Seif Ambunya Andanje & Another vs. Alex Jepkoech Yano & Another* (2019) eKLR reinforced the fact that in order to protect the property right, a party must establish a proprietary right or interest in land as [the Constitution](#) does not itself create these rights or interests.

58. The Respondents contended that the Petitioner had not attached any license to prove that it was operating the business legally. However, it was also asserted that the Respondent had not yet established the licensing regulations and committees to facilitate the issuance of new licenses. It is clear that there was a lacuna in the issuance of new licenses; therefore, in my opinion, the Petitioner's members' licenses obtained in 2023 appeared to be still operational pending the issuance of new licenses. The Petitioner attached receipts proving members' payments for licenses to operate their bars and establishments issued by the 4<sup>th</sup> Respondent.

59. I have carefully perused the affidavit in support of the Petition and the annexures thereto. I find that the Petitioner had established that its members had propriety rights and interests in the closed establishments and could, therefore, base their claim on this right. It is clear that the Petitioner engaged in commercial business in the bars above and has therefore proven that its members had proprietary rights and interests in the circumstances of this matter, which ought to be protected by this Court from any arbitrary actions by the Respondents.

60. It is my considered opinion that even if the ministerial directive was lawful, the consequent actions taken given implementing the directive should respect the rights and fundamental freedoms, including those of the Petitioner's members who would be significantly affected by the closure of their businesses, thus affecting their source of livelihood.

61. Notwithstanding, this right should also be balanced against Section 12(1) of the [Alcoholic Drinks Control Act](#).



62. In *Keroche Breweries Limited & 6 others v Attorney General & 10 others* [2016] eKLR, the Court, on the presidential directive ordering a crackdown on the production and sale of illicit liquor within the country dated 1 July 2015, held that:-

“...However, the fight must be orderly, respect human rights and fundamental freedoms, and be conducted under the law and *the Constitution*. In other words, the appreciation of the need to rid the country of illicit alcohol does not give the Government a free hand to breach the law and *the Constitution*. In carrying out its mandate of protecting Kenyans, the Government must respect the rights of the same Kenyans it is obliged to protect.

Whereas compliance with the dictates of the rule of law may sometimes be frustrating and at times obstructive and inconveniencing to those in authority, that is a sacrifice we must make since, as appreciated in the preamble to *the Constitution*, we recognize the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. As was held by the Court of Appeal in *Judicial Commission of Inquiry Into The Goldenberg Affair & 3 Others vs. Job Kilach Civil Application No. Nai. 77 of 2003* [2003] KLR 249, democracy is usually a messy, often very frustrating, way of governance. In this respect, dictatorships are more efficient. However, as the same Court appreciated in *Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another Civil Application No. Nai. 43 of 2006* [2006] 1 KLR 77:...”

63. Mombasa High Court Constitutional Petition No. 159 of 2018 (supra). The Court stated as follows: -Further, Article 10 of *the Constitution* provides for the national values and principles of governance, which bind all State organs, State officers, public officers, and all persons whenever any of them apply or interpret *the Constitution*, enact, applies or interpret any law, or make or implements any public policy decisions.”
64. The Court of Appeal in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal No. 224 of 2017; [2017] eKLR held that:-

In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of *the Constitution* is justiciable and enforceable immediately. To avoid doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable, and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, the rule of law, and participation of the people to be realized progressively sometime in the future; it could never have been the intention of Kenyans to have good governance, transparency, and accountability to be realized and enforced gradually. Likewise, human dignity, equity, social justice, inclusiveness, and non-discrimination values cannot be aspirational and incremental but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a), which enjoins all persons interpreting *the Constitution* to promote its values and principles.

Consequently, in this appeal, we make a firm determination that Article 10 (2) of *the Constitution* is justiciable and enforceable, and violation of the Article can find a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.



65. Moreover, Article 47 of *the Constitution* on fair administrative action provides:
1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.
  2. Suppose a person's right or fundamental freedom has been or is likely to be adversely affected by administrative action. In that case, the person has the right to be given written reasons for the action.
66. Pursuant to Article 47(3), Parliament has enacted the *Fair Administrative Action Act*. Under Section 2 of the said Act, "administrative action" is expressed to include:
- “The powers, functions, and duties exercised by authorities or quasi-judicial tribunals or
- (ii) any act, omission, or decision of any person, body, or authority that affects the legal rights or interests of any person to whom such action relates.
67. Furthermore, Sections 4(1), (2) and (3) thereof provides:
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.
  - (2) Every person has the right to be given written reasons for any administrative action against him.
  - (3) Where an administrative action is likely to affect the rights or fundamental freedoms of any person adversely, the administrator shall give the person affected by the decision-
    - a. prior and adequate notice of the nature and reasons for the proposed administrative action;
    - b. an opportunity to be heard and to make representations in that regard;
    - c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
    - d. a statement of reasons pursuant to section 6;
    - e. notice of the right to legal representation, where applicable;
    - f. notice of the right to cross-examine or where applicable; or
    - g. information, materials, and evidence to be relied upon in making decisions or taking administrative action.
68. Accordingly, and given the provisions of fair administrative action, the Petitioner's members were entitled to prior and adequate notice of the closure of the bars due to the ministerial directive and under the *Alcoholic Drinks Control Act* and the Nyandarua County *Alcoholic Drinks Control Act, 2024* as the same was bound to affect their businesses adversely. Closing their bars without allowing them to recover their items of trade and stock was unfair mainly because the Respondents had not found that the traders were selling illicit liquor. The tenets of due process demand that fair administrative action prerequisite be adhered to before any adverse administrative action is taken against any person.



69. Additionally, the Petitioner asserted that the 1<sup>st</sup> Respondent was discriminatory as they were selective about the closed bars while the directive was clear on which bars should be closed.
70. Whist the impugned directives were lawful, their arbitrary enforcement violated the Petitioner's members' rights. The Petitioner's members should also consider that this Court cannot sanction the operation of bars next to schools or residential areas as the law is already evident. I reject the Petitioner's assertion that they should be left to operate their bars without interference, even near schools, which is against the public interest and provisions of stated statutes.
71. I believe enforcing the ministerial directive was the only thing inconsistent with the Petitioner's members' rights. The means chosen by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent should also consider the welfare of the affected parties, i.e., the Petitioner's members.
72. Further, the function of control and trading of alcoholic drinks under Schedule 4 Part 2 of *the Constitution* of Kenya lies under the mandate of the county government. The 4<sup>th</sup> Respondent has confirmed to the Court that " It has not issued licenses under the Act (2024); hence, the previous license holders under the repealed Act are presumed to have valid licenses until the said regulations and licensing committee are in place as per Section 70 (1) of the Act, of 2024.
73. This Court is empowered to fashion a remedy according to Article 23(3) of *the Constitution*. It is also worth noting that *the Constitution* calls for 'appropriate reliefs' and lists what these may include. In the context of Article 23(3), appropriate relief is required to protect and enforce *the Constitution*.
74. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. However, it does not mention the term 'structural interdicts'.
75. The relief which a court has the power to impose has been addressed by the High Court, which it stated, ...we are, therefore, of the view that Article 23(3) of *the Constitution* is wide enough and enables us to make appropriate reliefs where there has been an infringement or a threat of infringement of the Bill of Rights.
76. Additionally, Kenyan courts have embraced the reasoning in *Minister of Health & Others v Treatment Action & Other see Minister of Health and Others v Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002)*.  
“stating; if it is necessary to do so, the Court may even fashion new remedies to secure the protection and enforcement of these all-important rights... the courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if need be, to achieve this goal.”
77. Thus, by dint of that confirmation, the petitioners with 2023 licenses are deemed to hold valid licenses until the vetting for renewal for 2024 licenses is completed, and either each qualifies and gets renewed one or otherwise.
78. Having considered the issues raised herein, I make a finding that the appropriate orders to be issued are to the effect that;
- i. A declaration be and is hereby issued declaring that the seizure/detention of the Petitioner's assets and the closure of bars of the Petitioners in the purported enforcement of the impugned ministerial directive in violations of the Petitioner's members right to fair administrative action enshrined in Article 47 of *the Constitution* is unconstitutional and illegal.



- ii. Order be and is hereby issued directing the Respondents not to interfere with petitioners trading in their business premises, which are not within the prohibited range of proximity as Prescribed by the provisions of section 12(1) Alcoholic Drink Control Act 2010 and section 20 (1) (c) Nyandarua county Alcoholic drink Control Act 2024 until the outcome of the vetting process of the licenses for 2024 period.
- iii. The Petitioner's members whose bars are within the prohibited range (see above (ii) are allowed to access their premises to remove their tools of trade, stock, and belongings. They will have 60 days to make plans to close and/or move their business to alternative places of business.
- iv. The Respondents must ensure that the ministerial directives are applied to all the stakeholders without discrimination in terms of Article 27 of *the Constitution* of Kenya.
- v. Both sides (Petitioner's members and respondents) will report on the implementation of the above orders (ii, iii, and iv) within the next two months from the dates herein.
- vi. Those petitioners who have suffered loss and damage because of the unconstitutional implementation of the Cabinet secretary's impugned directive are at liberty to institute lawsuit(s) in Court and prove their claims (special and general damages).
- vii. Mention on 16 July 2024 for further directions.
- viii. Costs of the Petition to be born by respondents 1 and 2.
- ix. There be liberty to apply.

It is so ordered.

Judgment dated and signed at Nyandarua this 16th day of May, 2024 and delivered via Microsoft Teams platform.

**In the presence of:**

Mugo for 4th Respondent

Chepkurui for 1st, 2nd & 3rd Respondents

Gathumbi for Petitioners

C/A - Lekesike

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**C. KARIUKI**

**JUDGE**

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