



Kibuti (Suing in his Capacity as the Chairman of Mbeere South Bars, Wines and Spirits Association, Embu County) v County Government of Embu & another (Petition E007 of 2022) [2023] KEHC 19831 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19831 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
PETITION E007 OF 2022
LM NJUGUNA, J
JULY 5, 2023**

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 1 (1), 2 (1), (2) & (3); 3(1);10(2),73(1) (B); 185 (2); AND 259 (1) & (3) OF THE CONSTITUTION AND PARAGRAPH 4 (C) OF PART 2 OF THE CONSTITUTION OF KENYA.

IN THE MATTER OF: EMBU COUNTY TRADE PROMOTION, DEVELOPMENT AND LICENSING ACT, 2022.

BETWEEN

**JOSEPH KIBUTI PETITIONER
SUING IN HIS CAPACITY AS THE CHAIRMAN OF MBEERE SOUTH BARS,
WINES AND SPIRITS ASSOCIATION, EMBU COUNTY**

AND

**COUNTY GOVERNMENT OF EMBU 1ST RESPONDENT
COUNTY ASSEMBLY OF EMBU 2ND RESPONDENT**

RULING

1. Before this court is a notice of preliminary objection dated October 11, 2022 by the 2nd respondent on the following grounds;
 - i. The subject matter in the applications herein and the entire petition, is the enactment of Embu County Trade Promotion, Development and Licensing Bill, 2022.
 - ii. The procedure of enacting a county legislation is as provided for in sections 21,22,23,24 and 25 of the County Government Act, 2012.
 - iii. The article 199(1) of the Constitution of Kenya and section 25 of the County Government's Act, 2012 provide that a county legislation does not take effect unless published in the gazette.



- iv. From the grounds pleaded and documents attached, the applicant herein is challenging the procedure for the exercise of legislative powers by the Embu County government and in particular enactment of Embu County Trade Promotion, Development and Licensing bill, 2022.
 - v. That whereas the County Assembly passed the Embu County Trade Promotion, Development and Licensing bill, 2022, the same has never been assented to nor published in the gazette.
 - vi. The respondents have not and can never, in the existing constitutional and legal framework operationalize a legislation that is yet to take effect and come into operation.
 - vii. In the High Court of Kenya at Nairobi Constitutional & Human rights division Petition No. 52 of 2016, *James Gacheru Kariuki & 3 others v Attorney General & 11 others* [2017] eKLR. That since the legislation which is subject to these applications and petition is yet to be published in the gazette, it therefore lacks legitimacy and this honorable court cannot be invited to arbitrate on an illegitimacy.
 - viii. The Standing Order 147 (4) of the County Assembly of Embu Standing Orders is to the effect that any Bill which consideration has not been concluded at the end of a County Assembly term, lapses.
 - ix. To the extent therefore, the subject matter herein relates to and arises from a legislation that is unpublished in the gazette and yet to take effect, this court therefore has no jurisdiction to hear and determine the petition and applications arising therefrom.
 - x. The petition and the applications therein are bad in law, misconceived and discloses no reasonable cause of action as against the 2nd respondent thus rendering it fatally and incurably defective.
2. The petition is premised on the fact that the 2nd respondent enacted the alleged controversial Act while the 1st respondent assented the same into law. That the 2nd respondent while in the process of making the bill, did not consider the views of the applicant and/or the business community. That the 2nd respondent failed to hold the public hearings and/or considered views of the stakeholders. It was its case that section 18 of the Act provides that the license fee payable under the Act shall be established on principles of equity and fairness while the second schedule of the Act, provided for fees levied which is 100% increment of the previous fee charged.
 3. The court directed that the notice of preliminary objection be canvassed by way of written submissions and that parties file and exchange the same.
 4. The 2nd respondent collapsed his grounds in reference to the preliminary objection herein to wit; the jurisdiction of the court to hear and determine the application to challenge a non-existent county legislation and a legislation that Embu County Government has never implemented. That the subject petition and the application thereon dated August 1, 2022 and June 28, 2022 are clear that the underlying dispute is in relation to the Embu County Trade Promotion, Development and Licensing Bill, 2022. Reliance was placed on the case of *Mukhisa Biscuits Manufacturing Company Limited v West End Distributors* (1969) EA 696. It was argued that article 199 (1) of the *Constitution* of Kenya as read with section 25 of the *County Governments Act*, 2012, provides that a county legislation does not take effect unless published in the Gazette. That were the court to take the Bill to have been assented to as provided for under section 24(6) of the *County Governments Act*, 2012, the Act still had to be published in the gazette for it to come into operation. It was argued that the 1st respondent has not and



cannot in the existing constitutional framework, operationalize a legislation that is yet to take effect. Further reliance was placed on the cases of *James Gichuru Kariuki & 3 others vs The Attorney General & 11 others* [2017] eKLR and *Tyson Ng'etich & another v Governor Bomet County Government & 5 others*, Petition No. 415 of 214 [2015] eKLR. It was reiterated that until this law is fully enacted in accordance with article 199(1) of the Constitution of Kenya, the law that is operational is Embu County Trade Licensing Act, 2015. In the end, this court was urged to allow the preliminary objection herein.

5. The 1st respondent did not participate in the application herein.
6. I have considered the application herein and the written submissions by the 2nd respondent and I find that the sole issue for determination is whether the notice of preliminary objection is merited.
7. In the case of *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others* SCK Petition No 10 of 2013 [2014] eKLR the Supreme Court stated that:

“ A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

8. It is trite that a preliminary objection if allowed, may dispose off the entire suit without giving parties the opportunity to be heard. Therefore, this must be done with caution given that the court has a duty to hear all parties and determine the case on merit. In addition, this court has also a duty to safeguard itself against abuse of its process.
9. The 2nd respondent argued that this court has no jurisdiction to entertain the matter herein because the subject matter of the petition is a legislation that has not been published in the gazette or implemented.
10. Looking at the petition, the petitioner has sought the following order inter alia:
 - i. The 1st respondent be restrained from stopping the applicants from carrying out their business pending the hearing and determination of the petition.
 - ii. An injunction be issued to restrain the respondents either by themselves, their assigns, representatives, employees or agents from enforcing and/or levying the additional taxes.
11. The 2nd respondent submitted that this court has no jurisdiction to entertain the matter herein because the subject matter of the petition is a legislation that has not been published in the gazette or implemented while the petitioner submitted that the 2nd respondent enacted the Embu County Trade Promotion, Development and Licensing Act, 2022 without carrying out public participation and further, the 1st respondent issued a notice requiring the petitioner and other traders to take out new licenses in accordance with the Act which had increased the same by 100%; that they stood to be penalized and their businesses closed. Further, that the Embu County Alcoholic Drinks Control Act, 2021 has not been repealed, and therefore, the applicants stood the risk of being taxed double.
12. From the above, this court has independently searched for the two legislations and discovered that indeed the two legislations exist. In as much as the 2nd respondent stated that the Embu County Trade Promotion, Development and Licensing Act, 2022 has not been published in the Gazette a perusal of the said Act at the 1st respondent's website, shows that, the same has been indicated as having been printed and published by the government Printers thereby confirming the fact that the said legislation has been gazetted contrary to the submissions by the 2nd respondent.
13. In the same breadth, article 48 of the Constitution guarantees every person access to justice, in addition, under article 50(1) of the Constitution, every person has the right to have any dispute that can be



resolved by the application of law decided in affair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. In the instant case, the petitioner has approached this court with a desire to be heard, it is therefore my humble view that he should be accorded an opportunity to prosecute his case and the same to be determined to its logical conclusion.

14. As such, I find and hold that:

- i. The Notice of preliminary objection dated October 11, 2022 by the 2nd respondents is not merited and the same is hereby dismissed.
- ii. Given that the other parties did not participate in the application herein, there will be no order as to costs.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....**for the Petitioner**

.....**for the 1st Respondent**

.....**for the 2nd Respondent**

