



**Mutuma v Meru County Alcoholic Drinks Control Board & another; Bar
Hotels and Liquor Traders of Meru County (Interested Party) (Constitutional
Petition E031 of 2022) [2023] KEHC 20211 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20211 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CONSTITUTIONAL PETITION E031 OF 2022**

EM MURIITHI, J

JULY 13, 2023

**IN THE MATTER OF ARTICLES 1, 2, 10, 19, 20,
21, 22, 23, 27 AND 232 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES, 2013)**

AND

**IN THE MATTER OF ARTICLES 2, 3, 4, 7, 13 AND 19 OF THE AFRICAN CHARTER
ON HUMAN AND PEOPLES RIGHTS AND OTHER PROVISIONS THEREOF**

AND

**IN THE MATTER OF ARTICLES 5, 15 AND 17 OF THE
CONVENTION OF THE RIGHTS OF PERSONS WITH DISABILITIES**

AND

IN THE MATTER OF PUBLIC FINANCE MANAGEMENT ACT, 2012

AND

IN THE MATTER OF THE MERU COUNTY ALCOHOLIC DRINKS CONTROL ACT, 2016

AND

IN THE MATTER OF THE MERU COUNTY FINANCE ACT, 2019

BETWEEN

THURANIRA SELASIO MUTUMA PETITIONER

AND

**MERU COUNTY ALCOHOLIC DRINKS CONTROL BOARD 1ST
RESPONDENT**



COUNTY GOVERNMENT OF MERU 2ND RESPONDENT

AND

BAR HOTELS AND LIQUOR TRADERS OF MERU

COUNTY INTERESTED PARTY

JUDGMENT

1. The petitioner, a resident of Nkuene Ward, South Imenti Constituency, Meru County filed a petition dated 19/12/2022 praying for specific reliefs as follows:
 - a. This Honorable Court be pleased to issue a conservatory order to prohibit and/or restrain the Respondent from carrying out any inspection for licensing on Bars, Hotels and Liquor business premises within Meru County until this matter is heard and determined by this Honorable Court.
 - b. This Honorable Court be pleased to issue a conservatory order to prohibit and/or restrain the Respondent from withdrawing any monies from the operations account No. 063xxxxxxx at Family Bank, Meru town branch until this matter is heard and determined by this Honorable Court.
 - c. This Honorable Court be pleased to issue a conservatory order to prohibit and/or restrain the Respondent from charging any levies/taxes of issuing licenses Bars, Hotels and Liquor business premises within Meru County until this matter is heard and determined by this Honorable Court.
 - d. This Honorable Court be pleased to issue an order of reviewing/amending of the *Meru County Alcoholic Drinks Control Act* of 2016 to be in tandem with the *Public Finance Management Act* of 2012.
 - e. This Honorable Court be pleased to issue an order of enacting of new Meru County Finance Act to repeal the *Meru County Finance Act*, 2019 to be in tandem with the *Public Finance Management Act* of 2012.
 - f. That the Honorable Court be pleased to issue an order directing the 2nd Respondent to properly constitute Meru Alcoholic Drinks Control Board in line with the *Meru County Alcoholic Drinks Control Act* of 2016.
 - g. That the Honorable Court be pleased to issue an order directing the 1st Respondent to render accounts in respect to the Meru Alcoholic Drinks Control Board deposit account No. 0114xxxxxxx at Cooperative Bank, Meru town branch and the operations account No. 063xxxxxxx at Family Bank, Meru town branch for the dates between 1st September, 2022 up to 19th December, 2022.
 - h. Any other order/relief the Honorable Court decides to grant.
 - i. Costs of the Petition.



Petitioner's case

2. The petitioner avers that the 1st Respondent is not properly constituted since it has only 2 members from the public out of 5 and it has no substantive chairperson as provided for in the [Meru County Alcoholic Drinks Control Act](#) and therefore, it is dysfunctional. The current inspections of bar businesses within the sub-counties in Meru County is being carried out without proper procedures and authority from the 1st Respondent, and public participation and interagency collaboration as established in Section 15 of the [Meru Alcoholic Drinks Control Act](#). The bars owners' rights are being interfered with by the inspection team through threats of closure of their businesses and the 1st Respondent's deposit account No. 0114xxxxxxxx at Cooperative Bank and operations account No. 063xxxxxxxx at Family Bank are being operated by an unauthorized signatories from the 1st Respondent. The 2nd Respondent has illegally allowed the 1st Respondent to change bank account signatories without the proper approval of the 1st Respondent. The [Meru County Finance Act](#), 2019 is not in line with the [Public Finance Management Act](#), 2012 since the fees are exorbitant on bars and small markets and in comparison with other businesses it is discriminatory and out rightly unfair. The [Meru County Alcoholic Drinks Control Act](#) of 2016 is not in line with the current economic status and the 1st Respondent is charging levies that are not in line with Part IV in Section 25 of the [Meru County Finance Act](#), 2019.
3. The Petitioner swore a supplementary affidavit on 27/2/2023 in support of the petition.

The Respondents' case

4. The Respondents opposed the petition vide their grounds of opposition dated 6/1/2023, that,

“The grant of interlocutory injunction in the terms sought by the Petitioner would amount to an egregious restriction of the Respondents' duty to implement its statutory obligations provided under section 4 (10) of the [Meru County Alcoholic Drinks Control Act](#), 2016; The Applicant has not discharged the evidentiary burden required under section 107 (1) of the [Evidence Act](#) as the application lodged is not supported by any piece of evidence, supporting documentation or annexure and the assertions therein are mere speculations, baseless and pure surmise; The application goes against the well-established rule against prior restraint as it invites the Court to become involved at the interlocutory stage in the analysis and the consideration of the merits of the petition and the likely results of the substantive trial; Public interest outweigh the grant of injunctive orders pursued as the grant of the prohibitory orders sought would result to loss of county revenue; The Applicant is undeserving of the orders sought as it fails the requirement for grant of conservatory orders as established in the [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others](#) (2014) eKLR; and the entire application does not demonstrate any reasonable apprehension or legitimate threat to warrant the grant of restraining injunctive orders.”
5. Mbaabu Silas Muguna, the acting Chief Executive of the 1st Respondent swore a replying affidavit on 2/2/2023 in opposition to the petition, which in his view is not only impulsive but does not disclose any reasonable cause of action to warrant grant of the prayers as the same is founded on measly fibs, fabrication of documents and misrepresentation of facts. He avers that the petition is a mischievous endeavor designed to settle personal vendetta between him and the Petitioner in a malicious quest to frustrate his appointment and he prays that the Court expresses its disgust by dismissing it with costs. He is advised by counsel that the averments in the petition and affidavits in support are shallow, frivolous and devoid of a single merited issue of law worthy of consideration by this



Court. In carrying out its mandate, the 1st Respondent is establishing by-laws that shall govern its day to day activities which regulations shall be transmitted for deliberations by the County Assembly of Meru to ensure public participation is carried out and they are in tandem with the existing legislation. The 1st Respondent is properly constituted and its members have been running the activities of the board smoothly in accordance with the law and have the requisite quorum to make board resolutions. The board via a board meeting held on 13/12/2022 authorized the inspection exercise to ensure all bars and restaurants are compliant with the set laws and have dutifully paid the annual license fees and rates. The inspection exercise is being carried out in accordance with the law with the pre-requisite authorization of board and laid down procedures and no evidence whatsoever has been tendered to show the same is being carried out illegally. The County Executive Member in-charge of Finance is authorized to appoint signatories of the 1st Respondent bank accounts in line with section 9 (2) (3) of the Act. The petition places reliance on unauthenticated video copies whose evidence has no evidential or probative value to warrant the Court to issue the orders sought. He beseeches the court to take judicial notice of the fact that allowing a certain class of people to operate liquor business without paying the requisite license fees and levies will result to mushrooming of bars everywhere in the county leading to unfathomable levels of drug abuse contrary to the dictate of public interests. The Meru County Alcoholic Drinks Control Act does not prohibit persons living with disability from paying licenses and other levies, and the licenses levied are reasonable, proportionate and apply to all persons without discrimination. He is surprised why one Abednego M. Mioro would want special consideration yet other persons living with disability who engage in liquor business have been dutifully paying licenses and rates to the 1st Respondent. The restriction on licensing is a public policy issue meant to curtail the menace and drug abuse being experienced in the region and in any case the Petitioner has not demonstrated the prejudice the licensed members have been suffering as a result of the levies being charged. He is advised that the petition seeks to challenge the rationality of purely legislative policy decisions which is contrary to the separation of powers and exercise of sovereignty and the Court has no jurisdiction.

6. The Petitioner's allegations and grievances are not backed by any evidence and the allegation that the Meru County Alcoholic Drinks Control Act is not in line with Public Finance Management Act and Meru County Finance Act are not particularized in a precise manner and do not meet the legal threshold set out in Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272.

The Interested Party's case

7. The Interested Party supported the petition vide its replying affidavit sworn on 17/2/2023 by Benjamin Maingi, its treasurer. He avers that they wrote twice to the Governor Meru County raising their concerns of the liquor licenses, which letters yielded zero results. On 19/12/2022, they wrote a memorandum to the County Assembly raising their concerns on liquor fees and charges and gave their recommendations and prayers. He is advised that the Chief Executive Officer Meru County Drinks in acting capacity must be appointed by the County Executive Cabinet Member in charge of Culture after the resolution of Board through minutes and must be approved by the County Assembly and the name must be published in the County Gazette and/or the Kenya Gazette. The substantive Chief Executive Officer of the 1st Respondent one Mr. Paul Mwaki Arimi was unlawfully, illegally and irregularly removed by the 2nd Respondent. Although Mr. Abednego M. Mioro, who is a member of the Interested Party, a person living with disability and the owner of The Red Carpet Lounge, is exempted by the 2nd Respondent from paying any levies, he was assaulted by people from the 1st Respondent who forcefully wanted him to pay business license. On 15/12/2022, the 1st Respondent commenced inspection of bars, hotels and liquor business premises within Meru County and began charging some of their members levies that were not in line with Part IV in Section 25 of the Meru



County Finance Act, 2019. To ensure that their members are treated equally and legally, the Court should amend the Meru County Alcoholic Drinks Control Act. Due to the acts and commission by the Respondents in levying exorbitant and numerous licenses, they have been driven out of their business and they urge the court to grant the orders sought.

Analysis and Determination

8. Having considered the petition and the responses thereto, the only issue for determination is whether the reliefs sought therein should issue.
9. The matter proceeded to the hearing on the merit of the petition, and consequently, the conservatory orders sought in the interim under prayers nos. (a) (b) and (c) were spent.
10. What remained for determination were the prayers in (d) (e) (f) and (g) set out above. Indeed, in his oral submissions before the court, the applicant summarized his case as follows:

“The Petitioner does not wish the court to assess the levy. It only seeks an order that the respondent reviews the Finance Act 2019 to be in tandem with the Meru Alcoholic Drinks Control Act. The charges are not in line with the existing Finance Act 2019.”
11. The Petitioner invited the court to issue a conservatory order to restrain the Respondents from enforcing the law, which invitation this court did not grant where it directed that the petition be heard on its merits. Although clothed as a public interest matter of enforcement of rights, the petition is purely a licencing matter between the Petitioner and the Interested Party and the Respondents, as the licencing authorities.
12. The Respondents have deponed that the 1st Respondent is properly constituted as it comprises of Daniel Kinoti - Acting Chairman, Mbaabu Silas Muguna - Acting Chief Executive Officer, Paul Kimathi - Acting Chief Officer Public Health, John Kariuki – Acting Chief Officer Culture and Agnes Makena – Member. The 1st Respondent thus had the requisite quorum to conduct its day to day business.
13. The submission by the petitioner raising an objection that it is the Governor and not the County Secretary who has powers to transfer staff to the Board under section 59 of the County Government’s Act is an un-pleaded matter which could not be taken at the submissions stage because, as rightly urged by Counsel for the Respondent, parties are bound by their pleadings.
14. The Interested Party contends that its request to have a sit down with the Governor to address their concerns on the liquor fees and charges yielded no results. In its letter dated 11/11/2022, the Interested Party had sought waiver of liquor license fee to 50%, merger of business permits and liquor license and to have at least 2 of its members in the liquor board. The charging of liquor license fees and the business permits are properly provided for in the Meru County Finance Act. In its memorandum for review of the Meru County Alcoholic Drinks Control Act, the Interested Party sought the review of the opening hours of liquor establishments and consolidation of the liquor licenses into one. That would have adverse effects on the general public and the Respondents would lose a lot of revenue.
15. The functions of the 1st Respondent are provided under section 10 of the Meru County Alcoholic Drinks Control Act to include licensing, charging levies, control of alcohol abuse, elimination of counterfeit and substandard alcoholic drinks and ensure implementation of the Act. In doing so, the 1st Respondent convened a meeting on 13/12/2022 where the inspection of the bars and restaurants was authorized. The said inspection was aimed at enforcing compliance with the law and this court finds that the 1st Respondent acted within its mandate.



16. Needless to state, Article 185 of the Constitution provides for the Legislative authority of county assemblies as follows:

“ 185.

- (1) The legislative authority of a county is vested in, and exercised by, its county assembly.
- (2) A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.
- (3) A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.
- (4) A county assembly may receive and approve plans and policies for—
 - (a) the management and exploitation of the county’s resources; and (b) the development and management of its infrastructure and institutions.”

17. This court does not find any inconsistency between the Public Finance Management Act and the Meru County Finance Act, and even if there existed such inconsistency, the role of courts is purely implementation of laws and not their amendment and/or enactment as sought by the Petitioner. This aligns properly with the Commonwealth (Latimer House) Principles On The Three Branches Of Government, 2003 as to the relationship between the Judiciary and Legislature, in this case the County Assembly, as follows:

“ II) Parliament and the Judiciary

- (a) Relations between parliament and the judiciary should be governed by respect for parliament’s primary responsibility for law making on the one hand and for the judiciary’s responsibility for the interpretation and application of the law on the other hand.
- (b) Judiciaries and parliaments should fulfill their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.”

18. Section 9 of the Meru County Alcoholic Drinks Control Act provides that the Alcoholic Drinks Control Fund shall be administered by the 1st Respondent. The court does not find how the enforcement of compliance with the law by the Respondents is discriminatory against the Petitioner and persons living with disabilities. The petitioners have not been treated any differently from other persons in the implementation of the Act, and it has not been shown that they were entitled to treatment, which was denied, in any other manner on account of their disabilities.

19. The prayer for an order for accounts in prayer no.(g) of the Petition is wholly misconceived. It is the mandate of the County Assembly and Senate to supervise the County Governments on matters of



revenue, budget and finance. And the fiduciary obligations of the County Government to the citizens of the County cannot be enforced directly by the inhabitants as the Petitioner seeks to do. That is the role of the County Assembly and the Senate.

Orders

20. Accordingly, for the reasons set out above, the Court must find that the Petition is without merit and it is dismissed.
21. The court does not make any order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 13TH DAY OF JULY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Salesio Mutuma Thurania Petitioner in person.

Mr. Mwirigi Batista for Respondents.

Mr. M. Kirimi for the Interested Party.

