



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. E007 OF 2021

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 23, 27, 28, 33(1), 40, 47, 48, 50, 60, 67, 73, 159(1) & (2), 165(3), 174(a), 183(2), 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

-AND-

IN THE MATTER OF SECTIONS 4 & 5 OF THE STATUTORY INSTRUMENTS ACT, 2013

-AND-

IN THE MATTER OF SECTIONS 2 & 5 OF THE NYANDARUA COUNTY ALCOHOLIC DRINKS CONTROL ACT, 2019

-AND-

IN THE MATTER OF NYANDARUA COUNTY ALCOHOLIC DRINKS CONTROL (LICENSING) REGULATIONS, 2021

-BETWEEN-

NYANDARUA COUNTY RECREATION & ENTERTAINMENT ASSOCIATION SUING THROUGH ITS OFFICIALS

JOHN KARIU NG'ANG'A (Chairman)

JAMES MUCHENGO MWAURA (Secretary)

JACKSON MAINA MWANGI (Treasurer).....PETITIONERS

-VERSUS-

THE COUNTY EXECUTIVE COMMITTEE MEMBER FOR CULTURAL ACTIVITIES,

PUBLIC ENTERTAINMENT & ALCOHOLIC DRINKS CONTROL NYANDARUA COUNTY.....1ST RESPONDENT

COUNTY GOVERNMENT OF NYANDARUA.....2ND RESPONDENT

-AND-

THE COUNTY ASSEMBLY OF NYANDARUA.....INTERESTED PARTY

RULING

1. By petition dated 05/07/2021 the Petitioners seek orders;

(a) A declaratory do issue that NYANDARUA COUNTY ALCOHOLIC DRINKS CONTROL (LICENSING) REGULATIONS 2021 as made by the 1st Respondent are unconstitutional for want of stake holder's participation before their making, as well as for being a threat to the stake holders' rights to fair administrative action and are therefore unlawful, null and void ab initio and

of no consequence whatsoever.

(b) An order of permanent injunction do issue against the Respondents herein restraining them by themselves, their servants, agents and/or persons claiming under their respective titles from implementing the NYANDARUA COUNTY ALCOHOLIC DRINKS CONTROL (LICENSING) REGULATIONS 2021 or in any way implementing their notice contained in the DAILY NATION newspaper of the 24/06/2021, at page 41.

(c) That costs of this petition be provided for.

2. The same is based on the facts set out in the petition paragraph 36, sub paragraph (1) – (17) Principally. Contemporaneously with the petition, the Petitioners lodged a notice of motion dated 05/07/2021 seeking prayers;

(a) Spent

(b) Spent

(c) That pending the hearing and determination of the petition filed herein, this Honorable Court be pleased to issue a temporary conservatory order against the Respondents herein by themselves, their servants, agents and/or persons claiming under their respective titles from implementing the NYANDARUA COUNTY ALCOHOLIC DRINKS CONTROL (LICENSING) REGULATIONS 2021 or in any way implementing their notice contained in the DAILY NATION newspaper of the 24/06/2021, at page 41.

(d) That costs of this application be provided for.

3. The same is based on the facts on the face of the motion and the supporting affidavit of Peter Ndung'u Rukwaro sworn on 05/07/2021 and annexures thereto and also a supplementary affidavit sworn by the same person on 14/07/2021. The respondent opposed applications via affidavit of Ann Mary Gathigia sworn on 9th July 2021

PETITIONER'S CASE:

4. The Petitioners describe themselves as the Chairman, Secretary and Treasurer of the Nyandarua County Recreation & Entertainment Association (herein after referred to as Association) and sue on behalf of the same Association. They say the Association (***whose membership population is not disclosed nor list furnished***) is said to be made up of members who are all bars, wines and spirit shops owners, distributors and/or manufactures of alcohol.

5. Their grievances arose as a result of an advertisement in Daily Nation Newspaper on 24/06/2021 by the 1st Respondent whereof he issued a notice to their members and such others traders of such commodities as they trade with notifying them to make their applications for their trade licenses on or before 07/07/2021 at 5.00pm, pursuant to **Nyandarua County Alcoholic Drinks Control Act, 2019, Amended Act, 2020 and Licensing Regulations, 2021.**

6. It is averred that the Petitioners/Applicants members were not consulted and were surprised to see advert in the newspapers. And that no notice was sent to them with the same effect.

7. They complain that the regulations content are unrealistic, oppressive, unconstitutional and unlawful as major stake holders in the industry in issue were not consulted.

8. They lament that the application forms have contents and or requirements together with declarations attached to them with contents which are unrealistic, oppressive, unconstitutional and /or unlawful.

9. It is averred that the implementation of the same regulations will occasion Petitioners members great injustice and irreparable damage.

RESPONDENTS 1 & 2 CASE IN OPPOSITION:

10. On the Respondents No. 1 & 2, the Chief Executive Officer 1st Respondent Ann Marry Gathigia swore an affidavit in opposition to the application on 09/07/2021.

11. In the affidavit she avers that the Nyandarua County Alcoholic Drinks Control Act, 2019 (hereinafter referred as the "the mother Act"), read together with Nyandarua County Alcoholic Drinks Control (Amendment) Act, 2010, Section 54, provides ***that the County Executive Committee Member for Youths, Sports, and Social Services shall make regulations in consultation with the management committee for the better carrying out of the objects of the said Act.***

12. The regulations are Statutory Instruments whose legal framework is governed by the Statutory Instruments Act, 2013. which provides for the making, scrutiny, publication and operation of statutory instruments. Sections 4 and 5 of the aforesaid Act provide for consultation before making statutory instruments, which is both a Constitutional and Statutory requirement.

13. The Nyandarua County Alcoholic Drinks Control (Licensing) Regulation, 2021 (hereinafter referred to as the "the Regulations") was gazetted on 22/06/2021 in accordance with the Statutory Instruments Act, 2013.

14. Upon gazettelement, the Regulations came into operations as provided for in Section of the Statutory Instruments Act, 2013 which states as follows;

“After the commencement of the Regulations that a Notice was published on the Daily Nation newspaper on the 24/06/2021 giving a fourteen (14) day notice requesting members of the public to make applications for retail, manufacturers’, distributors’ and wholesalers’ licenses in accordance with the said Regulations and the mother Act.”

15. It is averred that, the said licenses are sources of Government revenue as provided for in Chapter Twelve of the Constitution of Kenya, 2010, with regards to Public Finance. Thus the application fee payable is as prescribed in the Fifth Schedule, Part V of the Nyandarua County Finance Act, 2021, whose commencement date was 17/05/2021.

16. It is deponed that the issuance of Alcoholic Drink Licenses is not only a Constitutional requirement but also a customary practice that the Petitioners have over years been performing and adhering to.

17. Further that Mr. John Kariu Ng’ang’a who is one of the Petitioners herein is the Chairperson of Nyandarua Recreation and Entertainment Association.

18. That the aforesaid Petitioner alongside Ms. Margaret Wambui Kamamia (who is also a member of the Association) were part of the public participation exercise conducted in the making of the Regulations by virtue of them being members of the said Management Committee as pronounced in Section 54 (1) of the mother Act.

19. That the Petitioner, acting as the Chairperson of the Nyandarua Recreation and Entertainment Association in the Management Committee, did not at any event raise any objections to the making and contents of the Regulations.

20. That the Petitioners’ application is baseless on the following grounds;

(a) Public participation was done in accordance with the Constitution and the Statutory Instruments Act, 2013. The Nyandarua County Recreation & Entertainment Association was represented in the said public participation forums where the aforementioned Chairperson of the Association attended and participated.

(b) The Daily Nation newspaper notice dated 24/06/2021 was within the law as demonstrated above.

THIRD PARTY:

21. Did not participate in the application nor has it filed any affidavit despite being represented but their advocate stated that they supported the application.

22. The Applicants in a rejoinder via a supplementary affidavit aver that the requisite consultation was not made as provided by **Section 5(2) of the Statutory Instruments Act, No. 23 of 2013** in that persons likely to be affected by same instrument were not afforded adequate opportunity to comment on its proposed content before enforcement of the same.

23. That the alleged consultative meeting of 02/06/2021 attaches no list of attendee being stakeholders likely to be affected by the instrument. That the said meeting of 02/06/2021 was meeting of Nyandarua County Alcoholic Drinks Management Committee (*herein referred to as Management Committee*). That the annexures AMG-5 attached is a list of attendee of above said management committee.

ISSUES ANALYSIS & DETERMINATION:

24. After going through the materials in court, I find the issues are;

(a) Whether the application before court meets the threshold of grant of conservatory orders.

(b) If above in affirmative, what are the terms of grant?

(c) What is the order as to costs?

25. The court’s mandate in issuance of conservatory orders pending hearing and determination of petition is derived from **Articles 23, Constitution of Kenya as read with Articles 165 (2) (d)**.

26. As far as protection and safeguarding of rights goes, the Constitution of Kenya 2010 gives the courts a prominent role as the guardians of the Constitution and as the main body charged with the protection of the entrenched fundamental rights and freedoms.

27. Article 23 of the Constitution entrenches the authority of courts to uphold and enforce the Bill of Rights and it provides that the High Court has jurisdiction, to hear and determine applications for violation or infringement of, a right or fundamental freedom in the Bill of Rights. Furthermore, it states that in any proceedings brought under Article 22, a court may grant appropriate relief, including-

(a) A declaration of rights;

(b) An injunction;

(c) A conservatory order

28. Article 22(3) has further made a requirement for the Chief Justice to make Rules to enhance the adjudication of constitutional rights.

29. **Rule 23 of the ‘Mutunga Rules’ as developed in 2013** provides: -

“1) Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim order.

2) Service of the application in sub rule (1) may be dispensed with, with leave of the Court.”

30. **What then are Conservatory Orders?**

31. The word Conservatory order appears in Article 23 as one of the instruments that the Courts could use in order to protect the enforcement of Constitutional Rights.

32. Conservatory orders are by definition decisions arrived at by a Court of law to maintain status quo/current status of affairs to ensure that circumstances do not change while a matter is before a Court of law pending judgement. Basically, conservatory orders ensure that nothing changes circumstantially in a matter, pursuant to the existence of other factors to be determined by the court.

33. In granting a conservatory order, the danger looming over the realization of rights must be imminent, real and not theoretical. A conservatory order therefore serves as a sought of immediate ‘brake’ on a vessel in order to prevent any imminent foreseeable dangers.

34. It is important to note at this point that in the determination of whether a conservatory order should be granted, it should be presumed that the court is not invited to make any conclusive findings of fact or law on the dispute before it.

35. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order.

36. **When are conservatory orders granted?**

37. The applicable principles for the grant of conservatory orders were detailed by Onguto J. in the precedent set by Board of Management of **Uhuru Secondary School v. City County Director of Education & 2 Others [2015] eKLR**. In summary, the principles are that;

- *The Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he/she is likely to suffer prejudice.*
- *The Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.*
- *Whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.*
- *Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion*
- *It is clear that a party seeking a conservatory order is mandated to demonstrate that should the court fail to grant a conservatory order, there is a high probability of him/her suffering prejudice as a result of the violation or threatened violation of the Constitution. However, this must be weighed against public interest”*

38. The tenor, import and scope of a conservatory order was defined by the Supreme Court of Kenya in **Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others eKLR** as follows:

“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the applicants’ case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes”

39. **See also CREW & 7 Others Petition 16/2011, Plantinum Distillers Ltd v Kenya Revenue Authority 2019 KLR.**

40. Also a principle of proportionality comes to play. In considering whether or not to grant conservatory order, it is my view that the principle of proportionality plays not a remote role. As was stated by **Ojwang, AJ** (as he then was) in **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice. The learned Judge expressed himself as follows:

“...Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant”

41. In the case of **Martin Wambora v Speaker of the County of Assembly of Embu & 3 Others (2014) eKLR**, Mwongo J expressed himself as follows;

“To those erudite words, I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the Court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.”

42. Further not forgetting that under the provisions Section 107,108 and 109 of the Evidence Act cap 80 of laws of Kenya the burden of proof principles are set out to wit;

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

43. The burden of proof lies on whoever avers in that the one who avers must prove existence of a fact averred.

44. In our instance case, the Applicants aver that there was no existence of stakeholders’ participation when the Regulations impugned were enacted. The 3 officials of Association aver in the title of petition the act for the Association whose members are aggrieved by the regulations impugned. The members are not disclosed by any list/or register even by quantum of their population. It would appear only the 3 disclosed persons form the same association.

45. The other so called none members purportedly represented by the Petitioners are not even disclosed of their spread and none of them swore affidavit to claim non consultation or even being aggrieved by the impugned regulations.

46. John Kairu Ng’ang’a and Margaret Wambui Kamamia are averred to be members of the Petitioners’ Association and members of Management Committee which consulted public via participation.

47. The Petitioner Acting Chairman of Nyandarua Recreation & Entertainment Committee Association in Management Committee did not raise any form of an objection in entertainment of the regulations impugned during public participation exercise.

48. The Applicants have not rebutted the averment by getting their said members mentioned to swear affidavits in rebuttal.

49. The stakeholders’ attendee of public participation list is marked AMG-5 and same has not on prima facie basis been rebutted nor has any of attendee sought to swear affidavit in denial. Association Chairman is said to have been in attendance in forums on public participation and participated therein.

50. It was incumbent upon the Applicants to rebut the absence of stakeholders’ participation in line of the prescriptions of the cited provisions of the law.

51. Thus the Applicants have not established a prima facie case as enunciated in cited authorities, nor has court seen any demonstration of any harm, danger or irreparable damages on prima facie basis if regulations are enforced as notified by notice of 07/07/2021. The contents of forms and declarations in the schedules will have to be demonstrated during the hearing of the petition how oppressive or prejudicial they may be in practice.

52. Also here I rely on words of judges in the case of **Anarita Karimi Njeru v Republic [1979] eKLR** to the effect that;

“We would, however, again stress that 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”

53. The licenses are sources of Government revenue as provided for in Chapter Twelve of the Constitution of Kenya, 2010, with regards to Public Finance. Thus the application fee payable is as prescribed in the Fifth Schedule, Part V of the Nyandarua County Finance Act, 2021, whose commencement date was 17/05/2021.

54. The issuance of Alcoholic Drink Licenses is not only a Constitutional requirement but also a customary practice that the Petitioners have over years been performing and adhering to.

55. If the Applicants get orders sought and the petition fails, they have not demonstrated how they would compensate Respondent No. 2 the loss of revenue expected. On the contrary, if Applicants pays for license and the petition succeeds, they can be compensated via refund of quantifiable amount by Respondents.

56. In any event, the principle of proportionality favours denial of the orders sought as Respondent No. 2 will suffer more harm and so is the people of Nyandarua County who will not get services due to leanness of the resources.

57. Thus the court finds no merit to warrant grant of conservatory orders sought. Thus the court makes the following orders;

(i) The application herein is dismissed.

(ii) Costs in the main cause.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 21ST DAY OF JULY, 2021.

.....

CHARLES KARIUKI

JUDGE