



**THE REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 175 OF 2018**

**(FORMERLY NAIROBI HC CIVIL CASE NO. 139 OF 2017)**

**NEW PORT INN LIMITED.....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF NAIROBI.....RESPONDENT**

**JUDGMENT**

1. The Petitioner, New Port Inn Limited, is a limited liability company registered in Kenya under the Companies Act, Cap. 486 while the Respondent is the County Government of Nairobi established under Article 6(1) of the Constitution of Kenya and the County Governments Act, 2012.

2. The matter herein was instituted by way of plaint in the Civil Division of the High Court of Kenya at Nairobi on 28<sup>th</sup> June, 2017 and registered as Civil Case No.139 of 2017. On 28<sup>th</sup> July, 2017 Mbogholi, J issued a temporary injunction restraining the Respondent from collecting the remaining single business permit fee from the Petitioner and to cease from closing, harassing, arresting, detaining or revoking the Petitioner's license until the hearing scheduled for 28<sup>th</sup> September, 2017.

3. The matter was later transferred to the Environment and Land Court at Nairobi by an Order issued on 19<sup>th</sup> April, 2018 by Mbogholi, J. On 3<sup>rd</sup> May, 2018, Okongo, J of the Environment and Land Court transferred the matter to this Division (Constitutional and Human Rights Division).

4. The Petitioner's case is premised on the plaint dated 27<sup>th</sup> June, 2017 and supported by an affidavit sworn on 27<sup>th</sup> June, 2017 by Joyce Teresa Akinyi Ochieng who is one of the directors of the Petitioner. The prayers sought in the plaint are:

**a) This Honorable Court to stop the illegal increment of the unified business permit;**

**b) Make a declaration that the provisions of the Nairobi County Finance Bill with regard to increment of the unified business permit is unconstitutional;**

**c) Compensate the plaintiff for the illegality and loss of business;**

**d) Costs of the suit plus interest on (b) and (c) above;**

**e) Any other remedy that this Honourable Court may deem fit and just in the interest of justice and equity.**

5. The Petitioner's case is that the Respondent has been increasing the single business permit, the unified business permit and the liquor licenses without any notice or operationalization through an Act of Parliament. According to the Petitioner, the process lacks transparency, is riddled with irregularities and is inconsistent with the Nairobi City County Finance Act.

6. The Petitioner states that they have been paying for the single business permit of Kshs. 30, 000/- as prescribed by the law since the onset of their business in 2005. While renewing the single business permit in the year 2014, the fee was increased from Kshs. 30, 000/- to Kshs. 45, 000/-, while in 2015 and 2016 the fee was increased from Kshs. 45, 000/- to Kshs. 120, 000/-.

7. The Petitioner avers that in 2014, the Respondent introduced the liquor license of Kshs. 70, 000/-. In 2016, the liquor license was split into day license and night license. This also saw an increase of the liquor license fee from Kshs. 70, 000/- to Kshs. 130, 000/-, with the day license costing Kshs. 30, 000/- and Kshs. 100, 000/- being paid for the night license. The Petitioner avers that it was further required to pay Kshs. 6, 000/- for the application for renewal of the permits and Kshs. 20, 000/- for the confirmation by the renewal committee. It is the Petitioner's assertion that all these new requirements are not stipulated by the law and neither were clear receipts issued for the payments.
8. It is therefore the Petitioner's view that the actions of the Respondent violate Articles 210 and 209 of the Constitution which states that such charges should be realized by the operation of an Act of Parliament. The Petitioner additionally asserts that the Respondent's demands are in direct violation to fair business practice that is free from oppressive actions that curtail the operation of businesses.
9. The Respondent opposed the petition through a replying affidavit sworn by Hesbon Mole Agwena on 22<sup>nd</sup> August, 2017. It is the Respondent's case that the Petitioner lacks *locus standi* to file the suit and that all the fees charged are in line with its Finance Act, 2015. The Respondent avers that the increments were due to change of code of business permit as per the Nairobi City County Finance Act, from code 515 of a medium accommodation facility to code 509 of small high standard lodging or hotel D class or house and not for the single Business permit as alleged. It is further averred that the liquor license fees are in line with the Respondent's Alcoholic and Drinks Control Regulations, 2014 (Third Schedule) for premises within the city.
10. The Respondent avers that the Petitioner only paid for the trade license and has not paid for the other charges such as food, hygiene, fire advertisement and health which are meant to be included in the unified business permit. It is asserted that the demanded payment of Kshs. 6, 000/- is consistent with the Respondent's Finance Act for applications for health inspection and liquor licenses. The Respondent denied making a demand for Kshs. 20, 000/- for confirmation by the renewal committee.
11. It is therefore the Respondent's case that the petition is devoid of merit and does not disclose any reasonable cause of action as it is statutorily mandated to enforce its laws within its jurisdiction. The Respondent is of the opinion that the Petitioner has not come to Court with clean hands.
12. Through submissions dated 28<sup>th</sup> November, 2018, the Petitioner contends that the Respondent failed to issue it with a notice of increment and that the stated figures were not gazetted. It is submitted that the Respondent's actions lacked transparency and clear receipts of the payments made. The Petitioner submits that the Respondent not only harassed it and its employees but also closed down its establishment and arrested and charged its directors and employees at the City Court under Criminal County Court Case No. 4685 of 2018.
13. The Petitioner submits that the Respondent's demands were in direct violation of Article 210 of the Constitution which provides that no tax or licensing fee can be imposed, waived or varied except as provided by legislation. Further, that the Respondent's actions were oppressive and aimed at putting the Petitioner out of business in direct violation to fair business practices. It is therefore the Petitioner's case that the Respondent's actions are in direct violation of Section 120(b)(d) of the County Governments Act, 2012 which requires that they be treated equitably and Articles 47, 176(1) & (4) and 191(2) of the Constitution.
14. The Respondent filed written submissions and a list of authorities dated 6<sup>th</sup> March, 2019. The Respondent submits that the verifying affidavit sworn on 27<sup>th</sup> June, 2017 in support of the plaint offends the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules, 2010 which requires that an affidavit for a company should be sworn by an officer of the company duly authorized under the seal of the company to do so. It is the Respondent's position that failure to comply with the cited rule renders the entire case incurably defective. According to the Respondent, the said requirement is not a procedural issue that can be cured by the provisions of Article 159(2)(d) of the Constitution. To buttress this argument reliance was placed on the case of **East African Portland Cement Ltd v Capital Markets Authority & 4 others [2014] eKLR**.
15. Turning to the substance of the petition, the Respondent contends that the Single Business Permit fee had not been increased contrary to the Petitioner's assertion. The Respondent argues that the increment alluded to by the Petitioner occurred because of a change of the code of the business permit from code 515 for a medium accommodation facility to code 509 for a small high standard lodging or hotel D class owing to the expansion of the business. It is the Respondent's case that the action was in accordance of the provisions of the Nairobi City County Finance Act, 2015. In addition, it is submitted that the fees for the single business permit and liquor licenses were published in the Nairobi City County Finance Act, 2015.
16. The Respondent denies the Petitioner's claim that the liquor license fee was increased stating that the fees and charges provided in the Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014 are the same with those in the Nairobi City County Finance Act, 2015. It is pointed out that the liquor license fees charged are consistent with those in the Third Schedule of the Alcoholic Drinks Control Regulations, 2014 which prescribes Kshs. 30, 000/- for restaurant alcoholic drinks in respect to business premises within the city during the day and Kshs.100, 000/- during the night.
17. In regard to the complaint about the unified business permit, the Respondent submits that the Petitioner only paid for the trade license and not the other required charges such as the health inspection fees. It is the Respondent's case that there has not been any increment of the fees for the unified business permit as alleged by the Petitioner.
18. The Respondent contend that the Petitioner has failed to give a description of the sections of the Nairobi City County Finance Act, 2015 which it wants to be declared unconstitutional and neither has he identified the constitutional provisions allegedly violated by the impugned law. The submission was supported by reference to the case of **Anarita Karimi Njeru v Republic [1979] eKLR** where it was held that a petitioner should set out with some level of particularity the specific right allegedly violated and the manner of its violation.
19. The Respondent further submitted that the Petitioner has not adduced any evidence to prove any illegality and neither were the particulars of the illegality pleaded. It was also submitted that the Petitioner did not demonstrate the loss by adducing evidence and the Court was therefore urged to decline this prayer. In summary, the Respondent asked the Court to dismiss the matter with costs.

20. The Respondent challenged the validity of the Petitioner's case. This being an issue that goes to the jurisdiction of the Court, it must be addressed in priority as it will determine whether the Court should delve into the substantive issues raised by the parties.

21. The Respondent contends that the Petitioner's suit is incompetent because the verifying affidavit sworn on 27<sup>th</sup> June, 2017 in support of the plaint offends Order 4 Rule 1(4) of the Civil Procedure Rules, 2010 which requires that where the plaintiff is a corporation, the verifying affidavit accompanying the plaint shall be sworn by an officer of the company duly authorized under the seal of the company to do so, failure to which the entire case is rendered incurably defective.

22. The question therefore is whether the plaint should be struck out for failure to comply with Order 4 Rule 1(4) of the Civil Procedure Rules, 2010. At paragraph 2 of the affidavit sworn on 27<sup>th</sup> June, 2017 in support of the notice of motion that was filed together with the petition, Joyce Teresa Akinyi Ochieng who introduces herself as the managing director of the Petitioner avers that she had been instructed and appointed by the other directors through minutes dated 7<sup>th</sup> June, 2017 to institute the suit. She even swore that she had annexed the minutes to the affidavit as JTAO-1, although the record does not disclose such an attachment. In view of this averment, and the failure by the Respondent to ask for the minutes, I find that it would amount to accepting the Respondent's objection would amount to entertaining procedural technicalities to the detriment of substantive justice hence violating Article 159(2)(d) of the Constitution.

23. It is also important to note that this matter has proceeded as a constitutional petition and the applicable procedural rules are the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which have no provision similar to Order 4 Rule 1(4) of the Civil Procedure Rules, 2010. If any authority is needed in support of this position, one can read the decision in **Offshore Trading Company Limited v Attorney General & 2 others [2021] eKLR**. I therefore find no merit in the Respondent's contention that the plaint should be struck out for being defective.

24. On the substance of the matter, the Petitioner submits that the Respondent did not notify it of the increment and neither was the increment gazetted as required by the law. The Petitioner argues that the Respondent's actions were in direct violation of Articles 209 and 210 of the Constitution which requires that taxes and charges be levied through an Act of Parliament.

25. In response to the Petitioner's case the Respondent submitted that the fee for the single business permit had not been increased. According to the Respondent, what the Petitioner calls an increase is merely a change of the payable fees that occurred as a result of the shifting of the Petitioner's business from one code to another in accordance with the provisions of the Nairobi City County Finance Act, 2015. It is submitted that the change was necessitated by the expansion of the Petitioner's business. It is additionally submitted that the fees for the single business permit and liquor were gazetted through the Nairobi City County Finance Act, 2015.

26. Article 209(3), (4) & (5) of the Constitution empowers county governments to impose taxes and charges as follows:

**(3) A county may impose—**

**(a) property rates;**

**(b) entertainment taxes; and**

**(c) any other tax that it is authorised to impose by an Act of Parliament.**

**(4) The national and county governments may impose charges for the services they provide.**

**(5) The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.**

27. The power granted by Article 209 is however subject to the qualifications found in Article 210(1) of the Constitution that:

**No tax or licensing fee may be imposed, waived or varied except as provided by legislation.**

28. It is important to observe that every legislation that is passed by a county government can only come into force once it complies with the provisions of Article 199 of the Constitution which provides that:

**(1) County legislation does not take effect unless published in the Gazette.**

**(2) National and county legislation may prescribe additional requirements in respect of the publication of county legislation.**

29. The additional requirements envisaged by Article 199(2) are provided by sections 23 and 25 of the County Governments Act, 2012. Section 23 states as follows:

**23. Publication of a Bill**

**A Bill shall be published by including the Bill as a supplement in the county Gazette and the Kenya Gazette.**

30. On its part Section 25 provides that:

## 25. Coming into force of a law

(1) A legislation passed by the county assembly and assented to by the governor shall be published in the county Gazette and Kenya Gazette within seven days after assent.

(2) Subject to subsection (3), the county assembly legislation shall come into force on the fourteenth day after its publication in the county Gazette and Kenya Gazette, whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force.

31. Courts have had an opportunity to make determinations on the importance of publication of County Bills. In the case of **Robert N. Gakuru & others v County Government of Kiambu & another [2016] eKLR** it was observed as follows:

**“102. It is clear therefore that section 23 deals with the publication of County Bills in the county Gazette and the Kenya Gazette. The responsibility of gazette of Bills squarely falls on the County Governments and where it is alleged that a particular Bill was never gazette, it is upon the County Government to prove the contrary. This calls for a determination of the purpose of Gazette. In Catholic Diocese of Moshi vs. Attorney General [2000] 1 EA 25 (CAT), it was held that the requirement that administration and remission orders made by the Minister under two statutory provisions (section 7(1) of the Customs Tariff Act of 1976 (Act 12 of 1976) and section 28(1) of the Sales Tax Act 1976 (Act 13 of 1976)), being administrative acts with no legislative effect whatever, be given publicity in the Gazette was no more than directory. The failure to comply with the directive, it was held, did not affect the validity of the orders since the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim “ignorance of the law does not excuse” more rational, in view of the growing stream of delegated legislation.**

**103. Therefore, it is my view and I so hold that unless the instrument in question expressly provides that an instrument is only valid upon gazette, the mere fact that the same was not gazetted before it came into force does not necessarily invalidate the same though the Court may well be entitled to suspend its operations until the same is gazetted. In my view, nothing turns upon non-compliance with section 23 aforesaid even if that contention is correct.”**

32. Further, in the case of **James Gacheru Kariuk & 3 others v Attorney General & 11 others [2017] eKLR**, the Court while making a determination on the implication of Section 25 of the County Governments Act observed as follows:

**“34. Pursuant to the above Article, Section 25 of the County Governments Act was then enacted to provide additional requirements with regards to publication of County legislation. At the outset, I must however state that any additional requirements contemplated under Article 199(2) of the Constitution should not derogate from the mandatory duty necessitating publication of County legislation in the Kenya Gazette or its supplement and no legislation however well intended can waive the need for such publication.”**

33. A look at the evidence adduced by the Respondent shows that the alleged changes did come about as a result of the operation of an Act of the County Assembly, the Nairobi City County Finance Act, 2015. As to whether the law was published, it has been established that the burden lies upon the Respondent to disapprove the Petitioner’s claim that the law was not published by adducing evidence to the contrary. Therefore, the question to be determined by this Court is whether the Respondent discharged this burden.

34. According to Section 82(d) (ii) of the Evidence Act, Cap. 80, proof of public documents is to be done as follows:

**Without prejudice to any other mode of proof, prima facie evidence of the following public documents may be given in the manner hereinafter shown, that is to say –**

**(d) acts, orders or notifications of the executive Government of Kenya, the High Commission or the Organization or any service, thereof, or any local authority, or of a ministry or department of any of the foregoing–**

**(i)...**

**(ii) by any document purporting to be printed or published by the Government Printer.**

35. The Respondent in this matter stated that a notice was issued through the County Gazette. This averment is indeed confirmed upon perusal of the Special Issue of the Nairobi City County Gazette Supplement No. 22 dated 25<sup>th</sup> November, 2015 which published as the first item the Nairobi City County Finance Act.

36. From the foregoing analysis two things are clear, first there exists a legislation in line with Articles 209 and 210 of the Constitution and second there was a publication of the Nairobi City County Finance Act, 2015. In answer to the Petitioner’s allegation that these constitutional requirements were not complied with, it is this Court’s finding and holding that the Respondent has proved that the Nairobi City County Finance Act, 2015 was enacted and published in accordance with the law.

37. Still challenging the legality of the impugned increment, the Petitioner argues that the increment of the fees for the unified business permit by the Nairobi City County Finance Act, 2015 is unconstitutional. The Respondent however retorts that the Petitioner has failed to indicate the sections of the Nairobi City County Finance Act, 2015 that should be declared unconstitutional and the constitutional provisions allegedly violated by such provisions.

38. It is trite law that for the court to grant a relief the same must be precisely pleaded. In respect of constitutional claims, this point was succinctly captured in **Anarita Karimi Njeru v Republic [1979] eKLR; Miscellaneous Criminal Application No. 4 of 1979** as follows:

**“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.”**

39. The applicability of the stated legal principle in the post-2010 constitutional epoch was upheld by Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** as follows:

**“(42) ... It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in *Anarita Karimi Njeru (supra)* underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to *Article 159* of the Constitution and the overriding objective principle under *section 1A and 1B* of the Civil Procedure Act (Cap 21) and *section 3A and 3B* of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle...**

**(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru (supra)*. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1<sup>st</sup> respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1<sup>st</sup> respondent.”**

40. The law as established in the cited decisions require that a constitutional claim should disclose the provisions allegedly violated by the respondent(s), the injury sustained by the petitioner or the public by the alleged violation and the remedy sought to rectify the violation. The mere citation of various constitutional provisions without stating how those provisions have been violated makes it difficult for the court to grant appropriate relief. Evidence to support the allegation of infringement of constitutional provisions should be adduced.

41. The importance of well drafted pleadings cannot be overstated. Pleadings can make or break a party’s case. The reason for the continued insistence by the courts that pleadings should be precise was stated in ***Thorp v Holdsworth (1876) 3 Ch. D. 637*** at page 639 (as cited in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**) thus:

***“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”***

42. The statement was also highlighted in the case of **Kenya Pharmaceutical Association & another v Nairobi City County and the 46 other County Governments & another [2017] eKLR** where it was opined as follows:

**“34. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial; The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression “material facts” is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action; a pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it.”**

43. Although the Petitioner states that the increments in the fees for the unified business permit are unconstitutional, it fails to specify the provisions of the Nairobi City County Finance Act, 2015 alleged to violate the Constitution. As already stated, the Respondent, like any other county government is mandated by the Constitution to impose charges for services it provides. The impugned law was passed as required by statute and the Constitution. The Petitioner has in the pleadings failed to narrow the case to the particular provisions of the impugned Act that are said to violate the Constitution. The Petitioner’s pleadings are therefore defective in that aspect and this Court therefore finds that no case has been disclosed against the Respondent.

44. It is not within the remit of the courts to interfere with the mandates of constitutional and statutory entities so long as those bodies are strictly walking within the constitutional path. The Court in the case of **Andrew Wasswa Atetwe t/a Kilimanjaro Auctioneers & 21 others v Mombasa County Government & another [2015] eKLR**, while recognizing this fact stated as follows:

**“The trade licensing fee is paid for trading in the County. In this regard, I agree with the decision of the court in *THUKU KIRORO & 4 OTHERS VS. COUNTY GOVERNMENT OF MURANGA [2014] eKLR*, where the court held –**

**“Moreover, where a statute or the constitution for that matter, has expressly delegated specific functions, duties or responsibilities to particular organs, state or otherwise, this court will be hesitant to intervene and curtail these**

**organs' efforts to execute their statutory or constitutional mandates, it is the duty of this court to interpret the constitution in a purposive rather than a restrictive manner. As far as devolution is concerned, the County Governments must be encouraged, and not restrained to deliver on their devolved functions as long as they are intra vires the constitution and the applicable statutes.””**

45. Where legislation is alleged to be unconstitutional the onus of proving the unconstitutionality falls on the person making the allegation. In this case the Petitioner failed to precisely disclose its complaint and also did not establish the unconstitutionality of the entire Nairobi City County Finance Act, 2015 or any of its provisions. What has been placed before this Court are generalized allegations of unconstitutionality of the impugned Act.

46. It is additionally observed that no evidence was adduced to support the allegation of unconstitutionality. Indeed, the Respondent's assertion that there was no increment of fees at all was never rebutted by the Petitioner and there is no reason to doubt the Respondent's case that the increase in the fees demanded from the Petitioner was as a result of reclassification of its business. Such mundane administrative action by the Respondent cannot be used to declare a legislation that has undergone the proper enactment process unconstitutional.

47. On the claim for damages, I find that the Respondent cannot be condemned to pay damages in a situation where it has not been shown that it did any wrong. I also note that the loss allegedly suffered by the Petitioner was not specifically pleaded or proved.

48. The upshot is that the Petitioner's claim is without merit and the same is dismissed. As regards costs of the suit, it is observed that although the claim has failed, it was about the enforcement of the Constitution. For that reason, I direct each party to meet own costs of the proceedings.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF  
SEPTEMBER, 2021.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**