



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**CONSTITUTIONAL PETITION NO. E006 OF 2021**

**IN THE MATTER OF**

**THE ARTICLES 10, 19(2), 20(1), (2), (3) & (4), 21(1),22,23,27,29,40,165(3) (b) & (d) (111),201**

**(a) & (b), 209 (3) & (4) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF**

**CONTRAVENTION AND FUNDAMENTAL RIGHTS**

**AND**

**IN THE MATTER OF**

**THE COUNTY GOVERNMENTS ACT, SAMBURU COUNTY**

**ALCOHOLIC DRINKS CONTROL ACT, 2016 &**

**SAMBURU COUNTY FINANCE ACT, 2019**

**-BETWEEN-**

**SAMBURU BAR OWNERS,**

**WINES AND SPIRITS SELF HELP GROUP.....PETITIONER**

**-VERSUS-**

**COUNTY GOVERNMENT OF SAMBURU.....RESPONDENT**

**RULING**

1. The Petitioner through a Petition dated 30<sup>th</sup> June 2021 prays for various reliefs being as follows: -

*i. A declaration that the Second Schedule (Brims Code no. 2.500 - 2.577 & Brims Code 2.500M - 2.577M) of the Samburu County Finance Act, 2019 offends the principles of public finance, is discriminatory, unconstitutional, null and void to the extent that it requires members of the Petitioner to take out single business permits and liquor licenses for their businesses which amounts to double taxation*

*ii. An order of certiorari do issue to remove to this court and quash the provisions of the Second Schedule (Brims Code no. 2.500-2.577 & brims code 2.500M-2.577M) of the Samburu County Finance Act, 2019 for being offensive to the principles of public finance, discriminatory, unconstitutional, null and void.*

*iii. Cost of the petition be awarded to the Petitioner.*

*iv. Any other relief deemed fit by the honorable court to grant.*

2. The Petitioner simultaneously filed an application of the even date seeking the following orders: -

*i. Spent*

*ii. Spent*

*iii. Spent*

*iv. That pending the hearing and determination of the petition, there be a conservatory order restraining the Respondent by itself and law enforcement officers from arresting and arraigning before the court any member of the Petitioner on the basis of lack of two licenses under the Samburu County Alcoholic Drinks Control Act, 2016 and the Samburu County Finance Act, 2019.*

*v. That costs of this application abide the outcome of the petition.*

3. The application is premised on the grounds running from numbers (a) – (e) on the face of the application. It is further based on the affidavit of support by Fredrick Mukundi Aloisio sworn on 30<sup>th</sup> June 2021 and supplementary affidavit dated 9<sup>th</sup> September 2021. The Petitioner/ Applicant also filed written submissions in respect to the application dated 8<sup>th</sup> September 2021.

4. The Respondents opposed to the Petitioner's application and in doing so filed a Replying Affidavit by Sentaron Lenanyokie sworn on 23<sup>rd</sup> July 2021. The Respondent also filed ground of opposition dated 5<sup>th</sup> July 2021. Further they filed submissions in respect to the application dated 15<sup>th</sup> September 2021.

#### **PETITIONER'S SUBMISSIONS:**

5. The Applicant's case is anchored on the grounds set out on the face of the application and the supporting affidavit deposed by Fredrick Mukundi Aloisio, its chairperson. The crux of the Petitioner's case is that the ***Samburu County Finance Act, 2019*** was not subjected to public participation and the requirement of the Single Business Permit and Liquor Licenses under ***Samburu County Finance Act, 2019 and Samburu County Alcoholic Drinks Control Act, 2016*** respectively amounts to double taxation and thus is discriminatory and unconstitutional.

6. The Applicant submitted that in considering the instant application the honorable court is required to consider the parameters under which the conservatory order is issued under ***Article 23 of the Constitution Kenya, 2010***.

7. Reliance was placed on ***Kenya Association of Manufacturers & 2 Others Vs Cabinet Secretary –Ministry of Environment and Natural Resources & 2 Others (2017) eKLR*** to elaborate the guiding principles for issuing conservatory orders. It was the Applicant's averment that on all materials placed before this honorable court, the Applicant has brought itself within the four corners of the said principles as follows:

8. The Petitioner has demonstrated that indeed the Respondent has been charging double licenses against businesses of its members in form of Single Business Permits and Alcoholic Drinks Control Licenses under the impugned county acts.

9. No other businesses are charged two licenses by the Respondent and as such the allegation of discrimination has been proved which treatment is contrary to ***Article 27 of the Constitution of Kenya, 2010***.

10. Some of the members of the Petitioner have been charged with failure to take out two licenses with a case in point being its Chairman in terms of annexure "FMA 5"

11. No documentary evidence has been presented by the Respondent to disapprove the Petitioner's allegation that there was no public participation in passing the ***Samburu County Finance Act, 2019*** which is under challenge.

12. There is no denial that money collected from the licenses go to the same county basket as opposed to the various licenses cited in paragraph 23 of the replying affidavit which all go to the national government.

13. No justification has been tendered by the Respondent why members of the Petitioner should continue paying for double licenses when no other class of business is treated in a similar manner by the Respondent.

14. There is absolutely no evidence presented by the Respondent that ***Samburu County Finance Act, 2020*** exists and that ***Samburu County Finance Act, 2020*** was repealed by the former.

15. The only evidence available is that a bill was drawn to that effect but has not been passed by the county assembly and gazetted in the Kenya county gazette upon being assented to by the county governor.

16. The Petitioner submitted that in the case of ***Republic vs County of Nyandarua and County Assembly of Nyandarua ex-parte Nyandarua Recreational & Entertainment Self-Help Group (2018) eKLR***, upheld a similar petition and declared that the charging of double licenses by the County Government of Nyandarua in similar circumstances obtaining in the instant case amounted to double taxation.

17. Based on the doctrine of stare decisis, the Petitioner averred that it had established a prima facie case.

18. The Petitioner urged the honorable court to allow the application noting that members of the Petitioner are willing to continue paying for one license under the Samburu County Alcoholic Drinks Control Act, 2019 in the pendency of the petition.

#### **RESPONDENT'S SUBMISSIONS:**

19. The Respondent opposed the application arguing that it had conducted public participation during the enactment of ***Samburu County Finance Act, 2019 (now repealed)*** and further that allegation of double taxation are baseless and mistaken and perhaps merged from the Petitioner's misapprehension of the objectives of ***Samburu County Finance Act, 2019 and Samburu County Alcoholic Drinks Control Act, 2016***. The Respondent argues that the ***Samburu County Alcoholic Drinks Act, 2016*** is not a tax or revenue collection piece of legislation but it is primarily a control instrument even though revenue is generated therefrom.

20. The Respondent further submits that the two legislations were enacted in compliance with Constitution of Kenya, 2010 and in particular **Article 10** which espouses public participation.

21. The Respondent averred that the Petitioner and failed to establish a prima facie case and that further it has not demonstrated that denial of the conservatory orders will prejudice its case for the following reasons:

22. The Respondent has established that the ***Samburu County Finance Act, 2019*** which the Petitioner sought to have declared unconstitutional was repealed by ***Samburu County Finance Act, 2020*** and thus the former has no force of law.

23. Assuming that the ***Samburu County Finance Act, 2019*** was still in force the doctrine of presumption of constitutionality of a statute works against the Petitioner. Consequently, this honorable court should be reluctant to grant the conservatory orders on the account that the grant of such order will amount to displacing the doctrine of presumption of constitutionality of a statute before the same is rebutted by the Petitioner.

24. The Petitioner's members have been obtaining the two licenses being single business permit and liquor licenses under ***Samburu County Finance Act, 2019*** and ***Samburu County Alcoholic Drinks Control Act, 2016*** respectively since 2019 which is a period of 3 years and thus they will not be prejudiced in any way if they continue obtaining the two licenses for a few months during the pendency of this petition

25. That it is apparent that the Petitioner's petition is aimed at seeking a waiver of the license fees and the same can be deciphered from paragraph 18 of the Petitioner's supporting affidavit.

26. The Respondent will highly be prejudiced by grant of conservatory orders in that its stream of revenue will be curtailed and thus hampering service delivery to members of the public.

27. It was the Respondent's submission that the allegation double taxation is a fallacy in that similar legislation exists for instance the case of pharmacies and tourist establishments and that these dual taxation is constitutional and lawful. Reliance was placed on the case of ***Okiya Omtata Vs County Government of Kiambu (2018) eKLR***.

28. The Respondent's urged that honorable court to be guided by the decision of the High Court in ***The County Government of Nakuru; County Assembly of Nakuru (Interested Party) ex parte Edward Mwangi Gicheru & 19 others (2020)*** where the court declined to issue restraining orders during the pendency of the petition challenging the requirement of obtaining liquor license and single business permit.

#### **ANALYSIS AND DETERMINATION:**

29. The guiding principles upon which Kenyan Courts make findings on interlocutory applications for conservatory orders within the framework of **Article 23 of the Constitution** are now fully settled. In considering conservatory orders, the court is not called upon and is not required to make any definitive finding either of fact or law as that is the purview of the court that will in the long run hear the petition. Conservatory orders are remedies provided for under the constitution and are primarily meant to keep the subject matter of the dispute in situ.

30. In ***Mwangi Wa Iria & 2 others v Speaker Murang'a County Assembly & 3 others [2015] eKLR*** the court quoting the case of ***Kenya Small Scale Farmers Forum –v- Cabinet Secretary Ministry of Education NRB HCCP No. 399 of 2015 [2015] eKLR*** the principles set by a series of cases which ought to guide a court dealing with an application for conservatory orders were duly summarized. The court in paragraph 45 stated the guidelines and principles applicable as follows:

31. ***The Applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi –v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others –v- Attorney General & Others HCCP No. 7 of 2011.***

32. ***The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR and also Peter Musimba –v- The National Land Commission & 4 Others (No. 1) [2015] eKLR.***

33. ***If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.***

34. ***The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya's decision in Gatirau Peter***

35. ***The circumstances dictate that the discretion of the court be exercised in favour of the Applicant after a consideration of all material facts and avoidance of immaterial matters: see Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012 as well as Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.***”

36. I have considered the application which is the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited; the main issue for determination is whether the application herein meets the threshold for grant of conservatory orders as sought by the Petitioner.

37. The first issue in contention in this application is whether the Applicant has established a strong prima facie case that warrants the grant of conservatory orders. It has been held by various decisions that a prima facie case is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. Expressly, an Applicant has to show that he or she has a case which discloses serious and arguable constitutional issues to be tried or a case alleging violation of rights.

38. The Applicant asserted that the Respondent has been charging double licenses against businesses of its members in form of Single Business Permits and Alcoholic Drinks Control Licenses under the impugned county acts.

39. Additionally, it was their submission that no other businesses are charged two licenses by the Respondent of course if true if true same would be contrary to **Article 27 of the Constitution of Kenya, 2010** which provides that every person is equal before the law and has the right to equal protection and equal benefits of the law and that a person shall not discriminate directly or indirectly against another person on any ground, including race, sex, pregnancy, marital status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.

40. On the other hand, the Respondent argues that the **Samburu County Alcoholic Drinks Act, 2016** is not a tax or revenue collection piece of legislation but it is primarily a control instrument even though revenue is generated therefrom. It is evident that the county does indeed generate revenue from the said act by way of a license. The Respondent also argued that the **Samburu County Finance Act, 2019** had been repealed by **Samburu County Finance Act, 2020** and thus the former has no force of law. However, the Respondent did not produce the later to prove its existence and enactment while the Applicant went out of their way to exhibit to this court that the only evidence available is that a bill was drawn to that effect but has not been passed by the county assembly and gazetted in the Kenya County Gazette (*exhibit marked “FMA G”*).

41. It has not been rebutted that, the Petitioner’s members have been obtaining the two licenses being single business permit and liquor licenses under Samburu County Finance Act, 2019 and Samburu County Alcoholic Drinks Control Act, 2016 respectively since 2019 which is a period of 3 years and thus they will not be prejudiced in any way if they continue obtaining the two licenses for a few months during the pendency of this petition.

42. That it is apparent that the Petitioner’s petition is aimed at seeking a waiver of the license fees and the same can be deciphered from paragraph 18 of the Petitioner’s supporting affidavit.

43. The Respondent will highly be prejudiced by grant of conservatory orders in that its stream of revenue will be curtailed and thus hampering service delivery to members of the public.

44. **Article 159 (2) (d) of the Constitution**, compels this court to serve substantive justice between the parties and ensure that the conservatory orders that are issued are not to aid any party but to preserve the status quo that is being challenged by the petition. Without delving into the merits of the petition, I do note that the basis of the petition is the alleged lack of public participation and double taxation of the Applicants appertaining to the **Samburu County Finance Act, 2019** and the **Samburu County Alcoholic Drinks Control Act, 2016**.

45. ***I find that if the conservatory order is not granted, the Petition or its substratum will not be rendered nugatory: in terms of the authority of Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.***

46. ***Also The Public interest does not favour a grant of the conservatory order: in terms of the Supreme Court of Kenya’s decision in Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR.***

47. Accordingly, I find that the Applicants have not demonstrated the prejudice they will suffer on account of the alleged discriminatory requirement for double licenses before petition is heard. **Article 165 (3) of the Constitution** requires this court to intervene in actions where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation but this I find ought to be determined at the stage of hearing the petition.

48. This will require full hearing of the matter to establish the allegations made. It is therefore my humble view that it is in the best interest of the administration of justice to not allow the application dated 30<sup>th</sup> June 2021. Thus court makes the following orders;

- i. The conservatory orders sought herein are declined.***
- ii. That costs of this application abide the outcome of the petition.***
- iii. The petition to be heard on priority basis.***

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 7TH DAY OF OCTOBER, 2021.**

.....

**CHARLES KARIUKI**

**JUDGE**