



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 96 OF 2020

IN THE MATTER OF : THE INTERPRETATION OF SCHEDULE 1.2 OF THE NAIROBI CITY COUNTY TRADE LICENSING ACT, 2019, SECTION 17 OF THE NAIROBI CITY COUNTY FINANCE ACT, 2018 WHICH AMENDED SCHEDULE 2.3 OF THE NAIROBI CITY COUNTY REVENUE ACT, 2015;

AND

IN THE MATTER OF : THE PROTECTION OF THE RIGHT TO PROPERTY AS ENSHRINED UNDER ARTICLE 40 OF THE KENYAN CONSTITUTION, 2010;

AND

IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23 & 40 (3), 47, 50, & 165 OF THE CONSTITUTION OF KENYA;

BETWEEN

PARKNGO LIMITED.....1ST PETITIONER

ROBERT ODEKA BUNGU.....2ND PETITIONER

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....RESPONDENT

JUDGMENT

THE PETITION

1. The Petitioners through a petition dated 9th March, 2020, seek the following orders and declarations:-

a) Prayer No. 1 Spent;

b) Prayer No. 1 Spent;

c) A declaration be and is hereby issued that the 1st Petitioner is not an owner of a private vehicles parking space as stipulated under the provisions of Schedule 1.2 of the Nairobi City County Trade Licensing Act, 2019, as well as Section 17 of the Nairobi City County Finance Act, 2018 which amended Schedule 2.3 of the Nairobi City County Revenue Act, 2015;

d) A declaration be and is hereby issued that the provisions of Schedule 1.2 of the Nairobi City County Trade Licensing Act, 2019 as well as Section 17 of the Nairobi City County Finance Act, 2018 which amended Schedule 2.3 of the Nairobi City County Revenue Act, 2015, do not apply to the 1st Petitioner;

e) A permanent injunction be and is hereby issued restraining the Respondent through its agents, officials and/or officers from harassing and intimidating the Petitioner, threatening to arrest or causing the arrests of the 1st Petitioner’s Directors, officials and employees as well as from demanding payment in respect of a trade license for any of the parking facilities managed by the 1st Petitioner within Nairobi County or in any other manner whatsoever interfering with the Petitioners’ business operations;

f) A declaration be and is hereby issued that the proceedings against the 2nd Petitioner in Nairobi City Court MCCR Case No. 15270 of 2019; Republic vs Robert Odeka Bungu are unlawful, unconstitutional and the same be and are hereby terminated;

g) An award of General, exemplary, aggravated and punitive damages against the Respondent for the contravention of the Petitioners' rights.

h) Costs of this Petition be borne by the Respondent.

THE PETITIONERS' CASE

2. The Petitioners' case is that on 16th July, 2019, the Respondent served upon the 1st petitioner's employees deployed at Southfield Mall in Imara Daima, within Nairobi County, a Demand Notice demanding the 1st Petitioner to pay to it an aggregated sum of Kshs. 562,755.00 allegedly being Licensing Fees for a Single Business permit.

3. The above licensing fees demanded by the Respondent was on the assumption that the fee was chargeable upon the 1st Petitioner under **Schedule 1.2 of the Nairobi City County Trade Licensing Act, 2019**, as well as **Section 17 of the Nairobi City County Finance Act, 2018** which amended **Schedule 2.3 of the Nairobi City County Revenue Act, 2015**, which Petitioners contend require owners of private vehicles parking spaces with a capacity of **one hundred (100) vehicles** to pay a sum of Kshs. 500,000.00 per year as Licensing Fees.

4. The Petitioners argue, the Respondents demand erroneously presumed that the 1st Petitioner was carrying on the business of parking as an owner of a parking facility which was not the case hence there was no basis for the Respondent to charge the said colossal sums as License fees.

5. The Petitioner therefore vide a letter dated 18th July, 2019, wrote to the Director Trade and Licensing, Nairobi objecting to the demand on the basis that it was not the owner of any private space parking facility, rather, the 1st Petitioner is only an ICT company whose core business is parking management but nevertheless an ICT firm, and therefore the proper party to be charged were the owners of private parking spaces.

6. The Petitioners aver that their aforementioned letter failed to elicit any response from the Respondent's Director of Trade and Licensing, thereby violating their right to a fair hearing regarding the matter.

7. It is the 1st Petitioner's position that it finally managed to procure a provisional permit issued by the Respondent on 7th August, 2019 after having paid a sum of Kshs. 10,000/= per site it was managing and a further payment of Kshs. 35,000.00/= for its unified Business permit on the advice of the respondent's own officers.

8. The Petitioners contend that on 16th of October, 2019, the Respondent's officers unlawfully raided the site managed by the 1st Petitioner located at Southfield Mall, Imara Daima and arrested the 2nd Petitioner where he was subsequently arraigned in Court on 17th October, 2019 in Nairobi City Court MCCR Case No. 1570 of 2019; Republic vs Robert Odeka Bungu.

9. The Petitioners contend that the unlawful imposing of licensing fees of Parking Facility Owner as compared to parking facility it manages as well as the arrest of the 2nd Petitioner is a violation of the Petitioners' constitutional rights, thereby necessitating the institution of this Petition.

THE RESPONDENT'S RESPONSE

10. The Respondent filed their Response to the Petition on 3rd July, 2020 and a Replying Affidavit sworn by Agnes Kisaka on even date in opposition to the Petition.

11. The Respondent's position is that they indeed served the 1st Petitioner's agents deployed at Southfield Mall in Imara Daima with a demand notice directing the 1st Petitioner to pay an outstanding sum of Kshs. 562,755/= being licensing fees owed to Nairobi County for businesses that manage a parking space with over one hundred vehicles as chargeable under **Schedule 1.2 of the Nairobi City County Trade Licensing Act, 2019** and **Section 17 of the Nairobi City County Finance Act, 2018**.

12. The Respondent avers its actions were done in accordance with the law and the Respondent was merely performing its statutory duty.

13. The Respondent avers that the Petitioners had made payments in their capacity as parking managers for various businesses and they never claimed it was a contractor and it is only when it was billed Kshs. 562,755/= for the Southfield Mall that it felt that the fees payable was exorbitant and would eat into its profits that it shifted the blame to the narrative that mall owners ought to be paying licensing fees.

14. The Respondent further claim that the amount the applicant paid for was in respect to a unified business permit and not in respect of licensing fees for a business permit that has parking slots for over one hundred cars.

15. With regards to **Nairobi City Court MCCR Case No. 15270 of 2019** the Respondent averred that the wheels of justice ought to take course and that the Petitioner would be accorded a fair trial.

16. The Respondent prayed that the Court dismiss the Petition with costs.

THE PETITIONERS' SUBMISSIONS

17. The Petitioners vide their submissions dated 19th October, 2020 supported their Petition.
18. The Petitioners raise five issues for determination which may be summarized as follows.
19. On the first issue, the petitioners submitted **Schedule 1.2 of the Nairobi City County Trade Licensing Act, 2019**, contains a table that delineates the amount of licensing fees that should be paid by proprietors carrying out specific businesses, under the provision Titled **Large private vehicles Parking: Capacity; over 100 vehicles**, same which provides for fees in the sum of Kshs. 500,000.00/=.
20. The Petitioners position therefore is that the fee payable should be borne by the owner of the mall and not the 1st Petitioner who has been merely contracted by the owner of the mall to manage the ICT components of automated parking.
21. The Petitioners sought to rely on the case of **Council of County Governors v Attorney General & another [2017] eKLR** in support of their averments.
22. It is Petitioners submission that the Respondent ought to have exercised caution in interpreting the Nairobi County Trade and Licensing laws in that paying the sum of Kshs. 500,000.00, would mean that even the guards contracted to guard the site and cleaners would be liable to pay for licensing fees and not mall owners.
23. On the second issue, the Petitioners submitted that the Respondent's officials in **Nairobi City Court MCCR Case No. 15270 of 2019; Republic vs Robert Odeka Bungu** was carried out in total disregard of the law for reasons that there are existing mechanisms provided under the **Nairobi City County Trade Licensing Act, 2019** that were not followed.
24. The Petitioners position is that the 2nd Petitioner's arrest and arraignment contravened **Article 47 and 50 of the Constitution** and therefore unconstitutional.
25. The third, fourth and fifth issues simply reasserted the violations in the first two issues and the petitioners therefore prays for the court to allow the petition and award damages as against the Respondent.

THE RESPONDENT'S SUBMISSIONS

26. The Respondent further opposed the petition vide their submissions dated 4th January, 2021.
27. The Respondent raises four issues for determination which may be summarized as follows.
28. On the first issue, the respondent submitted that a demand for licensing fees does not and cannot amount to a deprivation of the right to property as contemplated by the Petitioners. It is Respondent's position that this matter is not a constitutional matter, rather it is a civil matter and is therefore wrongly brought before the Constitutional Court.
29. The Respondent averred further that the petitioners had failed to provide evidence that they are managers of the parking slots and do not therefore handle the proceeds of the parking for their own benefit but are relying on general allegations to the effect that revenues generated from parking spaces are exclusively enjoyed by the owners of the mall.
30. The Respondent in support of its position placed reliance in the case of **Christian Juma Wabwire v. Attorney General [2019] e KLR** and **Eliezar Kamau Thiong'o & 2 others v Kenya Airports Authority & another Interested Party & 2 others [2015]**.
31. The Respondent further urged that the Petitioners have not tabled evidence in the form of a contract between themselves and the owners of the mall to support the allegations that their work only involves running and management of the parking spaces. The Respondent avers further that money due for usage of parking slots are paid to PARKNGO, the Petitioners herein and no evidence has been tabled to the contrary, therefore, it is only fair for the Respondents to bill the petitioners the licensing fees.
32. The Respondent further contend that it is rather wanting that the Petitioners never pointed out the mall owners who they were working for in their letter addressed to the Respondent's Director for Trade and Licensing and therefore the same was a vital omission on their part, further, they aver that their demand to the Petitioners was clear in its warning in that failure to comply with the demand would lead to prosecution.
33. On whether the Petitioners' rights had been violated, the Respondent averred that **Section 12 of the Urban Areas and Cities Act Cap 256** provides that the management of a city and municipality shall be vested in the Respondent. This Act, gave rise to the enactment of the **Nairobi City County Finance Act, 2018 and the Trade Licensing Act, 2019** which gives the Respondent powers to raise revenue through taxes, fees and charges for various other services for the County Government, and therefore the Respondent was only acting within its statutory mandate.
34. The Respondent urge that the charging of the Petitioners' servant was done in accordance with the law in a Court of competent jurisdiction, for carrying on business without the requisite trade license under the law and was therefore lawfully arrested, the Respondent therefore urged that the law should let to run its course as the 2nd Petitioner would be accorded fair hearing.

35. The Respondent averred that the Petitioners have failed to prove any constitutional violations and should therefore be dismissed with costs to the Respondent.

ANALYSIS AND DETERMINATION

36. Having carefully considered the Petition dated 9th March, 2020, the Respondent’s Response to the Petition, the Petitioners’ and Respondent’s submissions, I find that the following issues arise for determination:-

a) Whether the Petition is properly before this Honourable Court;

b) Whether the petitioner is entitled to the orders sought.

A. WHETHER THE PETITION IS PROPERLY BEFORE THIS COURT.

37. The issue on whether this petition is properly before this Court is of great importance in the determination of the dispute herein. The Petitioners have approached this Honourable Court on the grounds of infringements and / or violations of their constitutional rights and fundamental freedom by the Respondent including but not limited to right to fair administrative action, right to fair hearing and the right to own property.

38. The Respondent on the other hand, averred that this petition fails to satisfy the threshold of a Constitutional Petition on the basis that the issues in dispute fail to raise any clear constitutional violations in the sense, that a demand for licensing fees does not and cannot amount to a deprivation of the right to property as contemplated by the Petitioners.

39. The Respondent has also averred that it acted within its statutory mandate hence no constitutional violation has been occasioned to the Petitioners.

40. The constitutional question is therefore relevant in the determination of the dispute herein.

41. The jurisdiction of the High Court is well established under *Article 165 of the Constitution of Kenya* which states;

(1) There is established the High Court, which—

(a)

(b)

(2)

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;

42. Further *Article 23(1) of the Constitution* states;-

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

43. From the aforementioned Articles, it is clear, the jurisdiction of this Court is confined to interpretation of any constitutional question as well as redress for violations and infringements of constitutional rights and fundamental freedoms.

44. The petition herein seeks a declaration that the 1st Petitioner is not an owner of a private vehicles parking space as stipulated under the provisions of **Schedule 1.2 of the Nairobi City County Trade Licensing Act, 2019**, as well as **Section 17 of the Nairobi City County Finance Act, 2018** which amended **Schedule 2.3 of the Nairobi City County Revenue Act, 2015** and therefore a declaration be issued the said provision do not apply to the 1st Petition.

45. On perusal of the above prayers in this Petition, the Court ought to ask itself, what are the Petitioners' intentions in seeking the abovementioned Declaratory Orders? Do the Petitioners' seek a genuine constitutional interpretation of the abovementioned sections or do they seek an advancement of private interests should the Court grant the orders sought in this Petition?

46. To answer the above questions, I will delve into the facts of this Petition and the issues in dispute and weigh on whether the Petitioners have come to Court with clean hands.

47. The Petitioners herein are aggrieved by the demand of a sum of Kshs. 562,755.00 by the respondent as license fees for a Single Business Permit and states that the fees are erroneous, exorbitant and unlawful contrary to **Schedule 1.2 of the Nairobi City County Trade Licensing Act, 2019**, as well as **Section 17 of the Nairobi City County Finance Act, 2018** which amended **Schedule 2.3 of the Nairobi City County Revenue Act, 2015** on grounds that the 1st Petitioner is merely a Parking Facility Manager and not a Parking Facility Owner under whom the above license fees should be levied.

48. Considering the crux of the dispute herein, this Petition *prima facie* is a commercial dispute over who should pay for parking license to the Respondent and why. Does this therefore qualify the petition to be properly before this Honourable Court?

49. The Petitioners vide their submissions seek the interpretation of **Schedule 1.2 of the Nairobi City County Trade Licensing Act, 2019**, as well as **Section 17 of the Nairobi City County Finance Act, 2018** which amended **Schedule 2.3 of the Nairobi City County Revenue Act, 2015** to determine whether they would pay the demanded parking licensing fees to the Respondent.

50. **Schedule 1.2 of the Nairobi City County Trade Licensing Act, 2019, provides;**

“1.2. TRANSPORT STORAGE AND COMMUNICATIONS

Includes maritime and airlines.... private vehicles parking / petrol stations / storage facilities

Large private vehicles parking: Capacity; over 100 vehicles - Kshs. 500,000.00.”

51. **Section 17 of the Nairobi City County Finance Act, 2018**, states;-

“S. 17: TRANSPORT STORAGE AND COMMUNICATIONS

Large private vehicles parking: Capacity; over 100 vehicles - Kshs. 500,000.00.”

52. It is noted that from the above two statutes it is, rather clear, that large private vehicles parking attract licensing fees of **Kshs. 500,000.00**. There seem to be no indication as to who should pay the said parking fees, as the two statutes appear to be silent on who should pay for the parking spaces.

53. The Respondent vide their submissions submitted that the petitioners failed to provide any evidence to support their assertions of being managers and not owners of the parking space at Southfield Mall, and according to the Respondents the Petitioner's therefore failed to prove what they allege.

54. Perusing the Petition keenly and upon a careful examination of the evidence submitted vide the Petitioner's supporting affidavit dated 9th March, 2020, there is no evidence of a contract specifying the Petitioners' duties as managers of parking facilities at the shopping mall.

55. Further, a perusal of the Petitioner's **annexure ROB-3 on page 4 of the Petition**, the petitioners' in their letter dated 18th July, 2019, merely claim their core business is parking management systems (ICT) and that the revenue collected through their parking systems belong to the facility owner, whom they do not name.

56. It is noted that it is quite clear, from the Petition and indications from the Petitioners that they have not come to this Honourable Court with clean hands. They seem to be on a fishing expedition.

57. The Petitioners failed to adduce evidence on a contract between themselves and shopping mall owners articulating their role. Further, the Petitioners failed to mention the parking facility owners they allegedly work for. One should ask, why can't the Petitioner's simply inform the shopping mall owners, who they work for, as independent contractors to pay for the license levied by the Respondent? Further, why are they shielding the said owners by failing to disclose their identity?

58. I agree with the Respondent's submissions that he who alleges must prove. In the case of **Eliezar Kamau Thiong'o & 2 others v Kenya Airports Authority & another Interested party Doshi Ironmongers Limited & 2 others [2015] eKLR**, the Honourable Court stated;

“In *Stephen Waskhe Wakhu & Another vs. Security Express limited [2006] eKLR* the Court stated:-

“A party seeking justice must place before the court all material evidence and facts which considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available hence the legal decision “he who alleges must prove.””

59. Upon consideration of the Petition, I find that the Petitioners have failed to provide all material evidence before this Court and thereby failed to prove their case.

60. Not to deviate from the issue at hand, is this petition properly before this Honourable Court?

61. In the case of *C N M v W M G [2018] eKLR*, this court weighed in on the constitutional question as follows;

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.”

The Court went on further to state;

“When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.^[17] .”

62. Looking at the nature of the dispute herein, the Petitioners appear to approach a Constitutional Court on commercial matters on who should pay license parking fees and proceeds to seek orders that require the interpretation of the Respondent’s statutes rather than the Constitution itself.

63. I find from the question raised by the Petitioners that this is a clear case in which the doctrine of constitutional avoidance comes to play. In the case of *Matatu Welfare Association & another v Invesco Assurance Co. Ltd & 3 others [2019] eKLR*, the Court stated in part;

“...I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is, the course which should be followed.” (Emphasis added)

64. In light of the foregoing, it is my view that the petition herein does not raise constitutional issues requiring this Court’s determination. The proper avenue the Petitioners should have approached, is the Commercial Court, that would have the benefit of examining the Petitioners’ and Respondent’s witnesses and properly interrogating and evaluating the parties evidence reach just determination.

65. This Petition is therefore not properly before this Honourable Court.

B. WHETHER THE PETITIONERS ARE ENTITLED TO THE ORDERS SOUGHT IN THIS PETITION.

66. The Petitioners vide their Petition seek a declaration that the 1st Petitioner is not an owner of a private vehicles parking space as stipulated under the provisions of *Schedule 1.2 of the Nairobi City County Trade Licensing Act, 2019*, as well as *Section 17 of the Nairobi City County Finance Act, 2018* which amended *Schedule 2.3 of the Nairobi City County Revenue Act, 2015* and therefore a declaration be issued the said provision do not apply to the 1st Petitioner.

67. I have already considered the first issue and found that the Petitioners have failed to satisfy this Honourable Court as to why the above declaratory orders should be issued. The Petitioners have failed to adduce evidence as regards their management and not ownership of parking facilities they manage. The Respondents have failed to disclose the names of the shopping mall owners whom they work for and to whom they allege the Respondent should bill for parking license fees. It is noted that, in fact, the Petitioners vide their letter dated 18th July, 2019, admit in their very own letter that they collect the revenue from the parking facilities (on the second paragraph of the letter), this therefore means they are in charge of the finances collected from the parking facilities they manage. Furthermore there is no reasonable explanation as to why they want to unlawfully abscond from paying the charges due and push the same to unnamed owners? This is not just as there is no good reason as to why the Petitioners are not acting justly.

68. In the case of *Republic v Kenya Revenue Authority Ex parte Gillfillian Air Conditioning Limited [2017] eKLR*, this court stated;

“Section 147 of the Act provides as follows:

A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for the payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act:

Provided that nothing herein contained shall relieve the owner of such goods from such liability.”

“Section 148 of the same Act, on the other hand provides *inter alia* as follows:

An owner of any goods who authorises an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorised agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed

the offence.”

69. Upon consideration of the aforesaid as well as going by the above persuasive jurisprudence, I infer from the said findings that the Petitioners ought to be responsible for actions performed on behalf of its masters. They cannot purport to pass the burden of paying parking license fees to unnamed owners and disassociate themselves from the property they acknowledge to manage on behalf of the said owners.

70. The above declaratory orders sought in the Petition in my view would therefore fail in totality.

71. Further, the Petitioners seek a declaration that the proceedings against the 2nd Petitioner in *Nairobi City Court MCCR Case No. 15270 of 2019; Republic vs Robert Odeka Bungu* are unlawful, unconstitutional and the same be and are hereby terminated.

72. The basis of this prayer is that the Respondent's action to arrest and charge the 2nd Petitioner in the above case failed to take into regard, fair administrative action as per **Article 47 of the Constitution** as they aver that the objection they raised on the parking license fees were ignored and that the *Nairobi City County Trade Licensing Act, 2019* provided for dispute resolution mechanisms which were not followed by the Respondent. The Petitioners' further aver that right to be heard was equally violated by the respondent contrary to **Article 50 of the Constitution** in arresting and charging the 2nd Petitioner.

73. The respondent on the other hand avers that they demanded payment of license fees to which they had warned the Petitioners that failure to comply would lead to prosecution under the requisite county acts. Further, it was Respondents position that this Honourable Court ought not to interfere with pending proceedings in a Court with competent jurisdiction as the 2nd Petitioner would be accorded the right to fair hearing.

74. Upon considerations of the Petitioners' evidence, and in particular **annexure ROB-6**, on page 8 of the Petition, it outlines the 2nd Petitioner's charge. The 2nd Petitioner has been charged with the offence of carrying on a business within the jurisdiction of the County of Nairobi while such premises are not licensed for purposes of carrying out such trade.

75. I find as regards the issues raised and evidence so far on record that there is need for the Court to exercise caution before interfering with ongoing criminal proceedings before any court.

76. In the case of *Attorney General v Attorney General for and on Behalf of Inspector General of Police & 3 others ex-parte Thomas Ng'ang'a Munene [2014] eKLR*, this Court reasoned;

“It is not for this Court to stop the DPP in his tracks simply because the Court believes that the DPP ought to have done better. The constitutional discretion given to the DPP ought not to be lightly interfered with especially if on the evidence in his possession if true may well sustain a prosecution. Trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on his defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words I am not satisfied based on the material before me that the Applicant will not receive a fair trial before the trial Court more so as no allegations are made against the 5th Respondent towards that direction. Therefore the mere insufficiency of evidence does not in my considered view justify the halting of a criminal trial.”

In these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings.” (Emphasis added)

77. Further, in the case of *Republic v Attorney General & 4 others Ex-Parte Kenneth Kariuki Githii [2014] eKLR*, this Court held;

“The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office.

The Court held further that;

“In these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. As judicial review proceedings are concerned with the process rather than merits of the challenged decision or proceedings the court is not entitled to make definitive findings on matters which go to the merit of the impugned proceedings.” (Emphasis mine)

78. The Petitioners herein are seeking declaration that the proceedings against the 2nd Petitioner in *Nairobi City Court MCCR Case No. 15270 of 2019; Republic vs Robert Odeka Bungu* are unlawful, unconstitutional and the same be hereby terminated. In my respectful view, the *Nairobi City County Trade Licensing Act, 2019*, under **Section 8 (2)** makes it an offence to carrying on a business within Nairobi County which has not been licensed. The Respondent's actions have a statutory basis and are not arbitrary to warrant this Constitutional Court's interference.

79. The Respondent is equally empowered under the *Nairobi City County Trade Licensing Act, 2019*, and *Nairobi City County Finance Act, 2018* to charge taxes for various services and raise revenue for the County Government. They are therefore within their statutory

mandate to enforce lawful measures to ensure revenue is collected to promote the Constitutional National Values and Principles of good governance in line with **Article 10 of the Constitution**.

80. Further, the Trial City Court will be guided by the tenets of judicial authority as the Constitution dictates and the 2nd Petitioner will be given an opportunity to defend himself, give his side of the story and equally challenge and adduce evidence as against the Respondent. In such an instance, a Trial Court would be the best placed Court in determining the issues the Petitioners' raise herein, upon which, they would be at liberty to even pursue a claim for malicious prosecution or even appeal the decision of the Trial Court should they feel aggrieved.

81. I therefore find no reason why this Court should interfere with the ongoing criminal proceedings at the Nairobi City Court and in my respectful view, this prayer equally fails.

82. I further find and hold that generally in determining whether a Petitioner satisfies the threshold of granting orders in a Constitutional Petition, the case of **Anarita Karimi Njeru v Republic [1979] eKLR**, comes to mind. In this case, the Court stated;

“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.” (Emphasis mine)

83. In my view, the Petitioners have failed to satisfy this constitutional court in the required degree which provisions of the Constitution the Respondent has infringed and the manner in which the same has been infringed.

84. The upshot is that I find that this Constitutional Petition is therefore not merited and accordingly, fails. The Petitioners Petition is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF NOVEMBER, 2021.

.....

J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA