



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**JUDICIAL REVIEW APPLICATION NO. 1 OF 2018**

**IN THE MATTER OF ARTICLE 10, 47, 185(2) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATION ACTION ACT NO.4 OF 2015**

**AND**

**IN THE MATTER OF SECTION 89(5) OF THE CRIMINAL PROCEDURE CODE AND**

**IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL ACT NO. 4 OF 2010**

**AND**

**IN THE MATTER OF THE PROVISIONS OF SECTION 8(2) OF**

**THE COUNTY GOVERNMENT ACT NO. 17 OF 2012**

**BETWEEN**

**RICHARD MUNGAI KAGIRI.....1<sup>ST</sup> APPLICANT & 174 OTHERS**

**VERSUS**

**COUNTY GOVERNMENT OF KIAMBU.....1<sup>ST</sup> RESPONDENT & 22 OTHERS**

**RULING**

1. By an Amended Notice of Motion filed on 29<sup>th</sup> June, 2018, the *Ex Parte* Applicant sought the following orders:

**“a) Spent**

**a) THAT an order do issue prohibiting the 1<sup>st</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> Respondents, their servants, agents or any other person claiming from them from arresting, detaining in custody and/or in any other manner harassing persons operating licensable liquor outlets purportedly under the Alcoholic Drinks Control Act NO. 4 OF 2010 until and unless the act is modified in line with the provisions of Section 8(2) of the County Government Act No. 17 of 2012 and/or until the hearing and determination of this judicial review application and/or until further orders of this honourable court.**

**b) THAT an order do issue prohibiting the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents from admitting charges against persons charged under the Alcoholic Drinks Control Act No. 4 of 2010 until and unless the act has been modified in line with the provisions of Section 8(2) of the County Government Act No. 17 of 2012 and/or until the hearing and determination of this Judicial Review application and/or until further orders of this honourable court.**

**c) THAT the Honourable Court be pleased to consolidate this matter with Kiambu Criminal Revision No. 48 of 2017, 49 of 2017 and 55 of 2017 to save judicial time.**

**d) THAT pending the hearing and determination of the application herein there be temporary orders in terms of prayer (b) and (c) herein above.” (sic)**

2. The gist of the complaint in the motion is that the 1<sup>st</sup> Respondent has failed to enact an appropriate county liquor licensing legislation but has instead established unlawful liquor licensing committees under the Kiambu County Alcoholic Drinks Control Act 2013. That in the circumstances the court ought to intervene to protect licensable liquor outlets/operators in Kiambu County from harassment and illegal arrests and wrongful prosecution under inappropriate laws.

3. The Applicant, **RICHARD MUNGAI KAGIRI** swore an affidavit on his own behalf and on behalf of his Co-Applicants, in support of the motion. The gist thereof is that the erstwhile law applicable to liquor licensing was the Alcoholic Drinks Control Act No. 4 of 2010 until the establishment of the County Governments, and subsequently, the County Government is mandated to make appropriate liquor licensing legislation or where such law has not been enacted, to modify and apply the erstwhile Act as envisaged in section 8(2) of the County Governments Act; that the 1<sup>st</sup> Respondent has failed in this regard, but that the said 1<sup>st</sup> Respondent and 23<sup>rd</sup> Respondent (the Director of Public Prosecutions (DPP)s nevertheless had continued to cause the arrest and prosecution of licensable liquor outlet operators , even while the sub-county liquor licensing committees cannot issue licenses under the Alcoholic Drinks Control Act 2010 without the stated necessary modification of the law.

4. The 23<sup>rd</sup> Respondent filed its grounds of opposition on 18<sup>th</sup> June, 2018 in opposition to the application. Therein, the DPP asserted that the application herein is misconceived as it aims to cause amendment of a national legislation which is properly in force while also seeks to stop governmental bodies from executing their constitutional mandates, and as such the application should be dismissed.

5. When the matter came up for hearing on 18.10.2018, this Court, having noted the enactment of the Kiambu County Alcoholic Drinks Control Act in March 2018 posed to the Applicant the question whether in light of the passage of the Kiambu County Alcoholic Drinks Control Act, the motion by the Applicant had not been overtaken by events. The parties were directed to file written submissions addressing that question and subsequent oral highlighting.

6. The 1<sup>st</sup> Applicant filed his written submissions on his own behalf and that of his Co-Applicants. He submitted that this Honourable Court is duty bound to ensure an administrator adheres to the rule of law where a statute prescribes certain requirements and that the court needs to carefully scrutinize for validity the document going by the name Kiambu County Alcoholic Drinks Control Act, 2018. The Applicant's contention being the said document purporting to be a supplement of the Kenya Gazette had not been published in the Kenya Gazette with the authority of the national government and is therefore illegitimate and incapable of taking effect as law.

7. It was therefore submitted that in the absence of an effective county legislation, the 1<sup>st</sup> Respondent had failed to cause the necessary modifications to the Alcoholic Drinks Control Act, 2010 as stipulated by Section 8(2) of the County Governments Act, and as such any charges brought in respect of the offences of operating a licensable liquor outlet without a license cannot stand. In conclusion, the court was urged to allow the Respondents to file a Kenya Gazette in line with the Constitution.

8. The 1<sup>st</sup> Respondent's filed its written submissions through their counsel. To the following effect. That the instant suit has been overtaken by events following the decision of this Court in **Kiambu Petition 48 of 2018 Okiya Okiita Omtatah vs County Government of Kiambu**; and further that national legislation is only applicable with the necessary modifications where relevant county legislation is lacking but that this requirement does not envisage amendments to the former as contended by the Applicants. Counsel emphasizes that the Kiambu County Alcoholic Drinks Control Act, 2018 became law on 9<sup>th</sup> March, 2018 and has not been struck down, and in the circumstanced the instant suit has been overtaken by events and is without merit.

9. The 23<sup>rd</sup> Respondent filed its written submissions on 5<sup>th</sup> February, 2019. It was submitted that the roles of the DPP have constitutional underpinning and cannot be interfered with. The DPP placed reliance was placed on the case of **Kenya National Examination Council vs Republic Ex-parte Geoffrey Gathenji Njoroge & 9 others (1997) e KLR** as to the circumstances when the judicial review order of order prohibition can be issued against a public body. Such as where such body has or is acting in excess of its jurisdiction or in contravention with the law. It was submitted that the Applicants have not shown any such instance.

10. The court has considered all the matters canvassed in respect of the question posed by the court on the hearing date of the motion herein on 18.10.18. The question posed by the court was whether in light of the enactment of the Kiambu County Alcoholic Drinks Control Act, the motion by the Applicant had not been overtaken by events. There is no dispute that the County Assembly of Kiambu passed the Kiambu County Alcoholic Drinks Control Act which became law on 9<sup>th</sup> March 2018, pursuant to gazettelement. This Act has been the object of several litigation including **Petition No.48 of 2018, Okiya Omtata Okiita v County Government of Kiambu and Others**. The said Petition was dismissed by this court.

11. Also pending are two Petitions brought by the 1<sup>st</sup> Applicant herein and other officials and members of the **Kiambu Liquor Welfare Group** against the County Government of Kiambu and Others. These Petitions, being **No.47 of 2018** and **64 of 2018** were ordered consolidated. Petition 47 of 2018 was filed on 30<sup>th</sup> April 2018 and the latter on 29/8/18. While the former Petition challenges the validity of the Kiambu County Alcoholic Drinks Control Act (hereafter the Act) on the basis that it was not lawfully gazetted and could not therefore take effect, the latter Petition challenges prosecutions brought under the said law.

12 In **Petition 47 of 2018** the Petitioners seek declarations *inter alia* that the Kiambu County Alcoholic Drinks Control Act was not validly published and has therefore not taken effect as a law. In a ruling delivered on 29<sup>th</sup> June 2018 in the said Petition, this court dismissed a motion seeking to stay implementation of the said law pending the determination of the Petition No.47 and 64 of 2018. The Petitions are set to be mentioned on 18<sup>th</sup> February 2020 having been earlier adjourned at the instance of the Petitioner herein.

13. The foregoing is the context within which the instant cause must be considered. The cause was filed on 8<sup>th</sup> January, 2018 before the

coming into effect of the county legislation regulating the liquor business. The primary issue raised in the instant cause is whether erstwhile applicable national legislation, namely Alcoholic Drinks Control Act 2010 could be applied without modifying the legislation in line with Section 8(2) of the County Governments Act, in Kiambu County whose Assembly at the time of the filing of this cause, had not passed relevant legislation.

14. Undeniably, the context in which this cause was filed has changed. In January 2018, no county law had been passed by the Kiambu City Assembly to regulate the liquor business in the County. The Petitioner herein emphasises this in his affidavits. The relevant county law came into force some two months after the filing of this cause. In the arguments made by the Applicants to justify the continuation of this cause, the 1<sup>st</sup> Applicant appears to invite this court to ignore the fact of the existence of the Kiambu County Alcoholic Drinks Control Act, on the basis that the said law was not validly published. These are the same arguments the Petitioner is making by his **Petition No. 47 of 2018**. By virtue of the ruling of this court in that matter, the Kiambu County Alcoholic Drinks Control Act remains in force until this court determines otherwise in the said petition.

15. Courts deal with live disputes and do not act in vain. By insisting on sustaining this cause, the Applicants are inviting the court to engage in an academic exercise. The orders sought in this action, especially in prayers (b) and (c) of the motion are forward-looking, and in the present context appear irrelevant. Even if the Kiambu County Alcoholic Drinks Control Act were to be subsequently struck down by this court, the facts upon which the present case is based would still have changed as this cause was filed prior to the enactment of the county legislation.

16. In other words, the substratum of this cause has shifted and there can be no justification for this court to fritter away its scarce time resource in determining a cause that is no more than academic. That the Applicant's arguments in defending the sustenance of this cause dwell upon the validity of the Kiambu County Alcoholic Drinks Act of 2018 is testimony of this fact. The Applicants will have their day in court in the two pending petitions to make their case in respect of the validity of the current law.

17. With regard to the prayer (d) in the motion that seeks to consolidate criminal revisions No. 48 of 2017, 49 of 2017 and 44 of 2017 with this cause, I must say that if it was the intention of the Applicants to seek review orders in respect of any criminal prosecutions ongoing at the time of the filing of this cause, such matters ought to have been specifically pleaded within the motion and included in prayers. Beyond the prayer for consolidation, the amended motion and affidavit do not plead any cause of action or prayers in respect of a specific case or prosecution.

18. Secondly, it must be understood that the nature of the revision powers donated to this court under the Criminal Procedure Code are distinct from the powers of review under the Fair Administration Action Act and Order 53 of the Civil Procedure Rules. Patently, it does not appear tenable to combine a cause for judicial review and applications for criminal revision. The criminal revisions cited in the amended motion were filed in 2017 and can and ought to proceed independently of this cause as provided under the Criminal Procedure Code. Any question as to defects in charges in the cases, which are the subject of these revision applications that may have been preferred under the national law, the Alcoholic Drinks Control Act, without the modifications asserted by the Applicant herein to be necessary under Section 8 (2) of the County Government Act, can be made in the canvassing of those criminal revisions.

19. In the circumstances the court finds that the instant cause has long been overtaken by events, and that to further entertain what appears to be an expired cause of action, the court would be acting in vain. The Applicants are advised to proceed to prosecute **Petition No. 47 of 2018 as consolidated with Petition No. 64 of 2018**. The criminal revision applications should also be prosecuted without delay in light of the orders made herein.

**DELIVERED AND SIGNED AT KIAMBU THIS 13<sup>TH</sup> DAY OF FEBRUARY 2020**

.....

**C. MEOLI**

**JUDGE**

**In the presence of:**

The 1<sup>st</sup> Applicant in Person

No appearance for the Respondents

Court Assistant - Kevin/Nancy