



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 1 OF 2018**

**IN THE MATTER OF ARTICLES 10, 22(1), 23(1) & (3) 47(1) & (2), 50(1), 165(3) (b), 260, 232 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF RULES 4, 11, 13 AND 23(1) OF THE PROTECTION OF RIGHTS OR FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES, 2013**

**And**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 10, 47 (1) & (2), 50(1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**IN THE MATTER OF THE MACHAKOS COUNTY LIQUOR LICENSING ACT, 2014**

**AND**

**IN THE MATTER OF INCREASED LIQUOR LICENSE FEES**

**JACOB KYULE**

**JOSEPH MUTAVI KITHU**

**NELLY NDUTA NZAU**

**suing on behalf of Machakos Bar & Hotel Owners Welfare Self – Help Group)**

**SIMEON KIOKO KITHEKA**

**(suing on behalf of Kenya National Chamber of Commerce**

**and Industry, Machakos County.....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF MACHAKOS.....RESPONDENT**

**JUDGEMENT OF THE COURT**

**A. Background**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners are the chairperson, secretary and treasurer of Machakos Bar & Owners Welfare Self Help Group and petitioning on behalf of the members of the welfare group and themselves while the 4<sup>th</sup> Petitioner is the chairman of Kenya National

Chamber of Commerce and Industry, Machakos County. The respondent is the county government of Machakos. The petitioners filed a petition on 21<sup>st</sup> February, 2018, challenging the hike in the liquor license fees payable by bar and hotel owners and alleged that the hike was effected without public participation.

2. In response to the petition, the respondent averred that the license fees have not been increased, but fees payable differ depending on the location of the business, size and type of business. Further, that the petitioners are not challenging the Machakos County Finance Act, 2018 and have not produced a search to show it's real registered membership and have no legal capacity for they are a self-help group.

3. The petition was anchored on the ground that the increase in the amount payable to obtain liquor licenses were in violation of **Article 47(1) and (2) and 50** of the Constitution for the petitioners were not heard. In addition, that the actions are a contravention of Article **10(1) (c) and 10(2) (c)** of the Constitution.

#### **B. Submissions by the Parties**

##### *(a) The petitioners' case*

4. Unfortunately, the petitioners' submissions are not on record.

##### *(b) The respondents' case*

5. The respondents were represented by B. M. Mungata and Co Advocates who filed their written submissions on 5<sup>th</sup> December, 2018. Learned counsel commenced the respondents' case on the issue of the Machakos County Directorate of Liquor Control. In arguing that the respondent had not been properly sued, counsel submitted that the said directorate is established as a public office under the county government vide Section **4(1) of the Machakos County Liquor Licensing Act**, and under its composition vide Section **4(2) there** is no requirement for appointment of representatives of Hotel Industry, Civil Society and Private Sector. In addition, counsel submitted that in terms of Article 235 of the Constitution and Section 57 of the County Government Act, appointment of staff of the directorate is the duty of the County Public Service Board and not the Respondent thus the petitioners ought to have sued the County Public Service Board.

6. On the issue of the Machakos County Liquor Licensing Committee, Counsel submitted that it is established by Section **4 (3) of the Machakos Liquor Licensing Act, 2014, and went ahead to list its composition as provided for in the Act**. Learned counsel submitted that the role of the Committee is distinct from the directorate and the directorate issues licenses on recommendation of the Committee and Sub-County Committees.

7. Counsel invited the Court to consider that the petitioners are not challenging the constitutional composition and constitution of the Liquor Licensing Committee. He submitted that the court should not labour much on that issue for the parties are bound by their pleadings.

8. On the issue of setting fees payable for liquor licensing that the petitioners had alleged that the respondent arbitrarily increased, it was argued that Section **28(1) of the Machakos County Liquor Licensing Act** provides for the license fees payable. According to counsel, during the enactment of the subsequent Machakos County Finance Acts, the fees payable for liquor licenses were not provided for by the County Assembly of Machakos and therefore the Directorate has recourse to **Section 39 of the Machakos County Liquor Licensing Act which applied the provisions of Alcoholic Drinks Control Act, 2010** in charging the fees while awaiting the Machakos County Assembly to pass a Finance Act on the same and the fees are provided for in the said Act **hence there has never been any increase as alleged**.

9. Counsel urged the Court to consider the import of the **Machakos Finance Act, 2018 wherein** there are different types of licenses that attract different fees, the said Act was annexure KK3. Counsel submitted that there is uniformity in the license fees charged across Machakos County for each specific category of license throughout the County, for example the license for a Restaurant Alcoholic Drink is different from that for a General Retail Alcoholic Drink.

10. Learned counsel for the respondent submitted that the petitioners have not challenged the constitutionality of the provisions of the **Alcoholic Drinks Control (Licensing) Regulations, 2010, the Alcoholic Drinks Control Act, 2010, the Machakos County Liquor Licensing Act and the Machakos County Finance Act 2018 together with its 4<sup>th</sup> Schedule**. It was counsel's submission that the petitioners must therefore comply with the said laws for their legitimacy is not in question. They cited the case of **Simeon Kioko Kitheka & 18 Others v County Government of Machakos & 2 Others (2018) eKLR** on the presumption of constitutionality of a statute that is not in doubt.

11. On the issue of "*allegation on quorum of directorate*", counsel submitted that **Section 14 and Rule 9 and 11 of the First Schedule to the Machakos County Liquor Licensing Act** provides for the quorum of the Directorate, and the petitioners have not brought proof of any decision that was made without a proper quorum and there is no prayer in the petition to quash any decision of the Directorate or committee. In developing this argument, counsel referred to **Section 20 to 25 of the Machakos County Directorate of Liquor Control Act** that provides the procedure for application, approval and issue of licenses and one of the requirements is payment of prescribed fees of the Constitution of the Directorate and the committee and hence the petitioners cannot be heard complaining.

12. Learned counsel concluded by urging the court to dismiss the petition with costs to the respondent for the petitioners have not demonstrated how their rights have been threatened, violated and or infringed with an order that the petitioners indemnify the respondent with the fees it has not charged as a consequence of the orders issued by the court because they did not deposit security for the same.

#### **C. Analysis**

13. The two issues for determination are whether the respondent's actions are unconstitutional and whether this Court should grant the orders

sought in the petition.

14. The petition dated 15<sup>th</sup> February, 2018, specifically sought orders restraining the respondent from increasing the fees payable for paying liquor license; declaring the constitution of the Machakos County Directorate of Liquor Control is wrong therefore it is incapable of making binding decisions; that the respondent allow the private sector that is represented by the petitioners to be represented in the County Directorate of Liquor Control as required by the Machakos County Liquor Licensing Act, 2014; that the respondent be compelled to accept the liquor license fees of Kshs 4,800/- and issue licenses to them; that the respondent be restrained from interfering with the petitioners and other bar owners from running their business and a declaration that the respondents acts are in breach of the petitioner's constitutional rights and particularly **Articles 47(1) and (2) and 50 (1) of the Constitution** and should be stopped.

15. This petition was first heard and determined vide an application dated 15<sup>th</sup> February, 2018 and on 11<sup>th</sup> June, 2018 the court granted interim conservatory orders preventing the respondent from in any way interfering with the applicants and other bar owners from running their business and compelling the respondent to accept Kshs 2400/- and Kshs 4,800/- as requisite liquor license fees for small bars and night clubs respectively pending the determination of this petition.

16. The main contention of the petitioners was that the respondent's actions in increasing the liquor license fees without involving their participation are unconstitutional and the Court was asked to make a declaration to that effect. Issues that were raised in the petition were not canvassed in any submission and in light of the foregoing, the test that remains is to evaluate the jurisdictional standing of this Court in handling this petition, is *whether the petition demonstrates constitutionality or unconstitutionality of actions by the respondent* or put in another way, *what has the respondent done or not done that is unconstitutional?*

17. Black's Law Dictionary, 9th Ed., p. 467 defines "**declaration**" as "**a formal statement, a proclamation, or announcement, especially one embodied in an instrument.**" It defines "**publication**" (p.1347) as "**generally, the act of declaring or announcing to the public.**" It then defines "**announce**" (p.106) as "**to make publicly known; to proclaim formally**" and defines *Gazette* as "**an official newspaper of the British Government in which acts of state, crown appointments, notices of bankruptcy and other legal matters are reported.**"

18. Declaration, from a legal perspective, requires the use of an **instrument**. *Black's Law Dictionary* (p. 869) defines "an instrument" as "**a written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note or share certificate.**" From the above definitions, it is clear that *an instrument bears legal force particularly because of its content, and its formal face of authority and validity and the instrument that is material here is legislation.*

19. According to the respondent, their actions are backed by legislations that are prima-facie legal and presumed constitutional therefore the petitioners are not entitled to the relief sought. This Court has previously held that the presumption of constitutionality of statutes is not in doubt. The Court in **Simeon Kioko Kitheka & 18 Others v County Government of Machakos & 2 Others (2018) eKLR** quoted the case of **Ndyanabo v A.G. (2001) EA 485** which stated:

***"in interpreting the Constitution, the court would be guided by the general principles that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge that legislation's status save that, where those who support a restriction on a fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restriction."* [emphasis mine].**

20. From the pleadings, and as submitted by the respondent, there is no challenge of the constitutionality of the provisions of **Alcoholic Drinks Control (Licensing) Regulations, 2010, the Alcoholic Drinks Control Act, 2010, the Machakos County Liquor Licensing Act and the Machakos County Finance Act 2018 together with its 4<sup>th</sup> Schedule** and on this basis alone decisions that stem from the application of the said statutes cannot be voided or invalidated. This means that prayer 6 fails.

21. I will then address the other prayers sought by the petitioners. I am keen on the issue of compelling the composition of the County Directorate of Liquor Control and startled by the prayer 3 for an order that "the respondent allow the private sector that is represented by the petitioners to be represented in the County Directorate of Liquor Control as required by the Machakos County Liquor Licensing Act, 2014." Section 4(2) of the very same law that the petitioners have quoted provides that the directorate is comprised of a director and staff appointed by the County Public Service Board. The import of the section is that the membership to the directorate is vide appointments and not via unilateral declarations and the said appointments to the Directorate are not made by the respondent but by an independent body who is not a party to the petition. It follows therefore the court is unable to make an order directed to the respondent yet the powers are provided for in a statute that has not been challenged, hence prayer 3 in the petition fails. In any event, if the petitioners desire to be employees of the Directorate, they are at liberty to channel their application to the requisite body for consideration. There is no evidence that any such application has been made by the Petitioners.

22. As regards, the prayer 1 that I shall address together with prayer 4 and 5, the respondent has denied increasing the fees and relies on the provisions of Section 28 and 39 of the **Machakos County Liquor Licensing Act** as read with **the Alcoholic Drinks Control Act, 2010**. **I note that** the 3<sup>rd</sup> schedule to the Alcoholic Drinks Control (Licensing) Regulations, 2010 *has* an elaborate list of license fees that are broken down in different categories. In view of the lacuna that was created by the lack of an annual County Finance Act for the year 2018 and recourse to the 2010 Act whose applicability is saved by Section 39 of the Machakos County Liquor Licensing Act this court cannot fault the respondent for their actions that are well-grounded in the law. It is clear, as I have established, that the Machakos County Finance Act, 2018 was passed and doing so was well envisaged by the provisions of Section 28 of the Machakos County Liquor Licensing Act and this being the position, the complaint that there was an increase in license fees cannot be accepted. It therefore follows that prayer 1 in the petition fails and also prayers 4 and 5 that are supported by the said prayer 1 crumble thereby.

23. Finally on the prayer 2 on the composition of the Machakos County Directorate of Liquor Control, the pleadings lack clarity, however it appears that the petitioner challenges the exercise of the powers of the County Public Service Board in making appointments. As pointed out, the Board is not a party to the suit, therefore the court sees no need to delve into this issue for it cannot make an order thereon regarding a

party that has not been enjoined into these proceedings. Hence prayer 2 of the Petition fails.

24. The respondent has sought a prayer for indemnity for fees not charged due to the orders obtained from the court. At this point it is not possible to grant the order being that the same is not indicated in the pleadings. It is noted that the Respondent did not see it fit to amend its response to the Petition and hence its recourse is only on the new licence fees effective from 20/07/2018 when the new law came into force.

**D. Determination**

25. After considering the relevant provisions of the law, as well as the submissions made before me, and after taking due account of the persuasive authorities from a number of jurisdictions, I have come to the conclusion that every law is presumed valid unless challenged. From the record before me, it cannot be disputed that the petitioners have not challenged the validity of the laws that the respondent is relying upon and on this account, I cannot entertain the prayers sought in the petition and thus reject the petition.

26. In the result this petition is dismissed with costs to the Respondent.

***Orders Accordingly.***

**Dated and delivered at MACHAKOS this 21<sup>st</sup> day of January, 2019.**

**D. K. KEMEI**

**JUDGE**