



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 20 OF 2017

IN THE MATTER OF ARTICLE 22, 23, 159 AND 165 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLE 27, 29, 31, 40, 50, 73 AND 75 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALCOHOLIC DRINKS LICENSING FEES COUNTY GOVERNMENT OF NAKURU FINANCE BILL 2016

BETWEEN

SIMON MUTUGI NDIRANGU & 64 OTHERS.....PETITIONERS

VERSUS

COUNTY GOVERNMENT OF NAKURU.....RESPONDENT

JUDGEMENT

1. The Petitioners are businesspeople who operate various businesses that sell alcoholic drinks in Nakuru West within Nakuru County and have been issued with alcoholic drinks licenses by the Respondent.

2. The Respondent is a County Government established under Article 176 of the Constitution of Kenya.

Petitioners case

3. The Petitioners filed a petition dated 8th June, 2017, seeking for prayers that:

a. Conservatory orders be granted restraining the Respondents or any other public officer or public body from closing their business situate in Nakuru West within Nakuru County.

b. The Respondent be compelled to charge the Applicant as per the scale laid down in the Finance Bill October, 2016.

4. The Petition is supported by the Affidavit of Simon Mutugi Ndirangu dated on the 8th June, 2017 and sworn on behalf of himself and the 63 other Petitioners. The Petitioners claim is that the Respondent in the year 2016 had charged the Petitioners Kshs. 18,000/- and Kshs. 30,000/- as liquor license fee but in the year 2017 the Respondent had increased the said fee to Kshs. 60, 000/- contrary to the provisions of the Nakuru Finance Bill, 2016.

5. The Petitioners further averred that the Respondent had back dated the said fees to start running from the year 2016 and had refused to issue the Petitioners with licenses for the year 2017 until they paid the balance of the liquor license fee for the year 2016 inclusive of the fee for 2017. Additionally it was claimed that the Respondent had threatened to close the Petitioners businesses.

6. The Petitioners averred that the Respondent's action was unconstitutional as the inflated costs had not been passed in their finance act and sought the courts intervention.

Respondent's case

7. The Respondent opposed the Petition by way of a Replying Affidavit dated the 21st June, 2017 sworn by Edith Kimani the Chief Officer in charge of Trade, Industrialization, Cooperative and Tourism.

8. According to the Respondent, the requisitions for payments for the liquor licenses were in tandem with the Nakuru Finance Bill, 2016 as per the wishes of the Petitioners and that therefore the Petitioners not established a cause of action nor had their constitutional rights been violated. The Respondent attached a copy of the Nakuru Finance bill 2016 and the Nakuru Finance Act 2016.

9. The Respondent further averred that the Petitioners had failed to act in good faith as they had failed to place before this court any application for renewal of licenses and a majority had not been paying for their licenses which starved the Respondent of revenue and urged the court to dismiss the Petitioners' claim to enable the Respondent to lawfully collect revenue.

Submissions

10. The petition proceeded by way of written submissions. The Respondent filed its written submissions dated 29th September, 2017 on the 16th October, 2017, while the Petitioners filed their submissions dated 4th December, 2017 on the 5th December, 2017. Parties subsequently highlighted their submissions on the 4th December, 2017.

Petitioners' submissions

11. Mr. Bosire, learned counsel for the Petitioners, submitted that the Respondent arbitrary increased the liquor license fee without any justifiable reason from Ksh.18,000/- and Ksh.30,000/- to Ksh.60,000/- which was contrary to the fee provided for in the Respondent's Finance Bill, 2016 and back dated the fee to the beginning of 2016. It was further submitted that the bill had not been passed when the Respondent imposed the inflated fees and cannot therefore act retrospectively.

12. Counsel further submitted that the fees were heavy on the Petitioners and that the liquor license fee infringed on their constitutional rights and urged the court to grant the orders as prayed.

Respondent's submissions

13. Mr. Orege, learned counsel for the Respondent, submitted that there was no arbitrary increase of liquor license fees and that the fees had been charged in accordance to the Finance Bill as per the request of the Petitioners and that the fees were fair and reasonable. It was further submitted that there was no violation of the constitutional rights of the Petitioners by the Respondents. Further, the petition was unsubstantiated, unjustified and was an abuse of the court process as the Petitioners had failed to specify who was paying which rates and what had been increased.

14. It was further submitted that the Petitioner was not seeking to have the Finance Bill now the Finance Act to be declared unconstitutional as the Act became operational in January, 2017.

15. The Respondent submitted that under Article 209 (3), (4) and (5) the Respondent was vested with powers to raise revenue by way of charges so as to effectively deliver services to its people. That the Petitioners who were operating business involving liquor were required to obtain both a trade license and a liquor license before operating their business. It was submitted that the Petitioners had failed to pay the license fees for the year 2017 denying the Respondent its rights to collect revenue. Additionally, it was submitted that previous amounts were misleading since it was below what was provided for in the Finance Act because the traders had concealed information.

16. Mr. Orege, finally submitted that the Petitioners had not paid the county and that the petition had been overtaken by events and prayed that the petition be dismissed with costs.

Petitioners' response

17. Mr. Bosire, learned counsel for the Petitioners, responded to the submission by the Respondent and stated that public participation is envisaged in the Constitution and that the Bill had only come into law after the Petition had been filed.

18. Before delving into the merits of the petition, I must agree with the Respondents' observation that the Petition lacks clarity. I must reiterate the importance of setting out with reasonable degree of precision the particulars of any alleged violations of the constitution as well as the Articles said to be infringed and the manner in which they have been infringed. Clarity serves the purpose of generating the issues for determination before the court and assists the opposite party to prepare a comprehensive response. This was the position held in **Anarita Karimi Njeru –vs- Republic [1979] KLR 154** and **Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**.

19. In the instant petition, the Petitioners have failed to set out which rights have been violated. All they have done is to set out the provisions of the Constitution in the heading of their petition and, as it were, thrown the same at the court for the court to somehow figure out the particulars of infringement. It is not enough to just throw at the court the said provisions and hope the court shall determine how their rights have been infringed. To that extent therefore the petition fails to meet the threshold set for constitutional petitions. Nonetheless, I will consider the question whether or not the petitioners' claim of increased licence fees was within the law.

Determination

20. I have considered the pleadings together with the written submissions by the parties. The only issues for determination are whether the

liquor license fee was arbitrarily increased by the Respondent and whether the fees were applied retrospectively.

21. At the onset, it is important to point out that the parties accept the position that County Governments are allowed to impose charges for services they provide including licensing fees under the Constitution.

22. **Article 209 (4)** of the Constitution of Kenya 2010 provides that:-

“The national and county governments may impose charges for the services they provide.”

Article 210 (1) of the Constitution further states:-

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

Article 185 (2) further provides:

“A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.”

23. Further, Legislation has been described in **Article 260** of the Constitution as:-

(a) an Act of Parliament, or a law made under authority conferred by an Act of Parliament; or

(b) a law made by an assembly of a county government, or under authority conferred by such a law;

Article 185 (1) states:-

“The legislative authority of a county is vested in, and exercised by, its county assembly.”

24. It is clear from the above reading of the Constitution that a County Government can impose licensing fees as long as the said fees is provided for in County legislation. It is not in dispute that the Petitioners carry out business involving selling of alcoholic drinks and it is further not in dispute that the Respondent has passed legislation in form of the Nakuru Finance Act, 2016 establishing licensing fees for businesses including liquor license fee. The contention by the Petitioner is that the Respondent is imposing licensing fees that were not in the Nakuru Finance Bill, 2016 and further that the Nakuru Finance Act, 2016 had not been passed when the Respondent started imposing the licensing fees.

25. I have looked at the Nakuru Finance Bill, of October, 2016 vis a vis the Finance Act, 2016 and I cannot find a difference between the fees in the Bill and those provided for in the Act. The Petitioner’s claim in this regard is therefore baseless.

26. Further, the Petitioners attached various requisition forms from the respondents showing the new licensing fees for the year 2017. The requisition for Spills Bar and Restaurant dated 30th May, 2017, New Dimples dated 24th May, 2017, James Kiprof Kabutiei dated 5th June, 201 and Visions Bar and Restaurant dated 30th May, 2017 show a liquor licensing fee under revenue code 8024 for the sum of Ksh. 60,000/-; while the requisition form for Kiinze Bar dated 5th June, 2017, New Dodoma Pub dated 2nd June, 2017, Rodwins Bar dated 7th June, 2017 show a liquor licensing fee under revenue code 8002 of Ksh.35000; the requisition form for Shabab Villa Hotel dated 7th June, 2017 shows a liquor licensing fee under revenue code 8022 for the sum of Ksh.45,000/-; while the requisition form for Club East dated 30th May, 2017 show a liquor licensing fee under revenue code 8035 for the sum of Ksh.30,000/-.

27. It is clear that the requisition forms adduced by the Petitioners show that the amounts charged by the Respondent are in tandem with the schedule in the Finance Bill 2016 the Finance Act, 2016 and have not been inflated. The fees as provided in the Finance Act and those provided for in the Finance Bill are the same as the amounts stated by the Petitioners in their petition.

28. On the contention that the Finance Act was passed after the petition, **Article 199** of the Constitution provides that:-

“a County Legislation does not take effect unless published in the Gazette”.

Further **Section 25** of the **County Government Act 12 of 2012** provides:-

i. 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.

ii. 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.”

29. A look at the Nakuru County Finance Act shows that it was assented to on the 16th December, 2016 and gazetted in the special issue of the Nakuru County Gazette Supplement No. 16 published on the 20th December, 2016. Further, Section 1 of the Act provided that the date

the Act came into force and it provided that the Sixth Schedule, where licensing fees for alcoholic drinks is found, would commence on 1st January, 2017. From the foregoing it is clear that the new licensing fees were applicable from the 1st day of January, 2017 which was 6 months before this petition was filed on the 8th June, 2017. It is not therefore accurate to state that the Finance Act, 2016 was passed after the filing of the Petition.

30. The Petitioners contended at the hearing of the petition that there was no public participation in the enactment of the Finance Act 2016. I note that this position was not in the pleadings as filed by the Petitioners and was only introduced in the submissions of their counsel. It is trite law that parties are bound by their pleadings and any averments not in the pleadings should be disregarded. This position was affirmed by the Court of Appeal in **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** when it cited with approval the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus:-

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....”

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

Consequently, the court cannot delve into whether or not the Finance act had been passed without public participation or indeed without the participation of the Petitioners.

31. On whether the Respondent applied the liquor licensing fee retrospectively, the Respondent has failed to respond to the said averments and has gone to further state in its submissions that *“The Respondent is under an obligation to ensure that persons who have been underpaying these taxes are put in the correct category under the various Brim Codes.”*

32. The principle of retrospective application of the law was settled by the Supreme Court in the case of **Samuel Kamau Macharia & Ano. vs. Kenya Commercial Bank Ltd & 2 Others, [2012] eKLR** where it was held:

“As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication it appears that this was the intention of the legislature.”

33. It is clear from the Respondent’s Finance Act, 2016 that the liquor licensing fees provided for in the sixth schedule came into force on the 1st January, 2017. In this regard the Respondent cannot purport to charge the Petitioners any increased or new fees not legislated for in the period preceeding 1st January, 2017. Any balances claimed by the Respondent therefore must be that which was provided for by law as at the period in question.

34. I find that the petition partially succeeds to the extent that the Respondent cannot apply the Finance Act 2016 retrospectively and must adhere to the commencement date stated in Section 1 of the Act being the 1st day of January 2017.

35. I further set aside my orders of 31st July, 2017 and order that the Petitioners pay the liquor license fees as prescribed in the Nakuru County Finance Act, 2016.

36. Each party shall bear their costs in this Petition.

Orders accordingly.

Judgement signed

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R.LAGAT KORIR

JUDGE

Judgment delivered, dated and signed at Nakuru this 12TH day of February, 2019

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JANET MULWA

JUDGE

In the presence of:

Linah/Ochieng..... Court assistant

N/A..... For the Petitioners

Mr. Kinuthia h/b for Orege..... For the Respondents