



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CONSTITUTIONAL PETITION NO. 3 OF 2018

IN THE MATTER OF ARTICLE 22 (1), (2); 54(2); 55(B) 199(1) OF THE CONSTITUTION OF KENYA 2010 AND SECTION 8(2); 25(2) AND SECTION 32(4) OF THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF DENIAL VIOLATION AND INFRINGEMENT OF THE CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FREEDOM OF THE APPLICANTS

AND

IN THE MATTER OF THARAKA NITHI COUNTY APPOINTMENT OF THE COUNTY LIQUOR LICENSING COMMITTEE PURSUANT TO SECTION 4(2) OF THE THARAKA NITHI COUNTY ALCOHOLIC DRINKS ACT, 2015

BETWEEN

THACHUMA BAR OWNERS SELF HELP GROUP.....PETITIONER

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

J U D G E M E N T

1. The Petitioner herein Thachuma Bar Owners Self Help Group has sued the County Government of Tharaka Nithi, (1st Respondent), The Director of Public Prosecution (2nd Respondent) and the Attorney General (the 3rd Respondent) on the basis that the 1st Respondent has been arresting its members and charging them in court on various offences under Tharaka Nithi Alcoholic Drinks Control Act 2013 which statute they have impugned claiming that it is unconstitutional and it has not been published. They have also faulted the constitution of the Liquor Licensing Committee stating that the same is unconstitutional and not representative enough and that it was appointed by the Deputy County Governor contrary to **Section 32(4)** of the **County Government Act 2012**.

2. The Petitioners are seeking the following reliefs;

i. A mandatory injunction compelling the 1st Respondent to put in place a modified County Committee to deal with Liquor Licensing Control and Regulations under the Alcoholic Drinks Control Act, 2010 as per **Section 8(12)** of the County Government Act.

ii. That the operation of Tharaka Nithi Alcoholic Drinks and Control Act, 2015 be stayed until the Act is published in the Kenya Gazette as envisaged by **Article 199(1)** of the **Constitution of Kenya 2010**.

iii. That a prohibitory injunction do issue prohibiting the 1st Respondent its agents and servants from instituting and/or conducting any criminal prosecution under the Alcoholic Drinks Control Act 2010 and the Regulations thereunder in respect of the issues of licensing until the 1st Respondent puts in place the necessary County Committee (s) to issue licenses under the Act herein envisaged by the provisions of **Section 8 (2)** of the County Government Act.

iv. A prohibitory injunction to prohibit the 1st, 2nd and 3rd Respondents or their agents from arresting, detaining or preferring

charges over liquor licences against any person who was licenced to operate under Alcoholic Drinks Control Act 2010, until the Licensing Committee is created.

v. An order to compel the 1st Respondent to furnish the Petitioner with a copy of the gazette in which the Tharaka Nithi County Alcoholic Drinks Control Act No.6 of 2015 was published, a copy of the gazette in which the licensing regulations pursuant to the same were published, a copy of the gazette where the Liquor Licensing Committee was published, information leading to establishment of the County Licensing Committee and a copy of the Tharaka Nithi Alcoholic Drinks Control Act No. 6 of 2015.

vi. A declaration that the provision of **Section 25 (2)** of the County Government Act No.17 of 2012 is inconsistent with the provisions of **Article 199(1)** of the Constitution to the extent of the use of the words "**whichever comes earlier**" and hence invalid.

vii. Costs.

3. The Petitioner's case

The Petition is supported by the affidavit of Mercy Kainda who states that she is the Secretary of the Petitioner and a businesswoman dealing in alcoholic beverages. Her main complaint is that the Liquor Licensing Committee was appointed without due regard to the law and in particular she states that the same was done without observing the guidelines on representation of gender, youth and persons with disabilities. She also complains that there was no public participation.

4. In their written submissions made through learned counsel Mr. Ashford Gerrard Riungu Advocate, the Petitioners have insisted that the County Alcoholic Control Act was not gazetted properly in accordance with the law and that the same is unenforceable. They have faulted the charges preferred against their members on the basis of the impugned statute insisting that the same are misconceived.

5. They have also taken issue with the appointment of Liquor Licensing Committee stating that the gazette notice was irregularly signed by the Deputy Governor Hon. Francis Kagwima. It is their view that the same violated **Article 179(5)** of the Constitution of Kenya and **Section 32 (4)** of the **County Government Act 2012** which in their view limits the powers of a Deputy Governor as he cannot nominate, appoint or dismiss any officer assigned any duty by the Governor.

6. The Petitioners have, in response to the questions on locus standi posed by Respondent, stated that **Article 258** of the Constitution, the law gives them the leeway to institute this proceedings and have relied on the decision of the case of **Michael Osundwa Sakwa -vs- Honourable the Chief Justice and Another [2012] eKLR** where the court held that the current constitutional dispensation permits the court to be liberal in interpreting the question of locus.

7. The 1st Respondent's case

The first Respondent through a Replying Affidavit sworn on 19th September, 2018 by Aggrey Karani Riungu the Chief Officer Department of Trade, Industry and Cooperative Development has opposed this petition.

8. The 1st Respondent has deposed that **Article 199(1)** of the **Constitution** has not been violated as Tharaka Nithi County Alcoholic Drinks Control Act, 2015 was gazetted on 25th August, 2015 by the Government printer, through County Gazette Notice No.6626 dated 17th May, 2018.

9. The 1st Respondent has further stated that there was no violation of **Section 32(4)** of the County Government Act 2012 as the liquor Licensing Committee was appointed by the County Executive Committee member in charge of trade and industry as provided under **Section 4(1)** of the Tharaka Nithi County Alcoholic Drinks Control Act 2015. It is further contended that the County Executive Committee doubles up as the Deputy Governor.

10. The 1st Respondent has also denied violating **Article 54(2), 55(b) and 27(8)** of the Constitution asserting in the appointment of the Liquor Licensing Committee persons representing the Youth and Women were appointed to the Committee.

11. The 1st Respondent has contended that the petitioner has not pleaded any particulars of infringements of their rights and to that extent the petition is bad in law.

12. In its written submissions done through learned counsel Mr. Dennis Muthomi Advocate, the 1st Respondent contends that a self-help group lacks capacity to sue in its own name adding that the Petitioner did not attach any evidence to show that its members are engaged in bar operations. It is further submitted that the charge sheets attached to their written submissions indicate that the persons charged were in relation to manufacture and selling of illicit brews which indicate that they are unlikely to be bar owners.

13. The 1st Respondent has also referred to the decision in **Michael Osundwa** (supra) and contended that the court also observed that liberal interpretation of locus standi does not mean that locus standi is no longer relevant in Constitutional Petitions and that if the courts permit proceedings where the petitioner has completely no business brining the matter, then the court would also be abetting abuse of court process.

14. The 1st Respondent has termed the petition vexatious and misleading pointing out that the appointment of Liquor Licensing Committee was done by the County Executive Committee member in charge of Trade and Industry.

15. It is the 1st Respondent's contention that the Petitioners have not clearly shown how the 1st Respondent has violated their rights, stating that they have no power to arrest and charge people and that in any event persons arrested were arrested for manufacturing illicit brews and there are no rights infringed in the circumstances.

16. The 1st Respondent has also denied that the county Legislation violated **Article 199(1)** of the Constitution submitting that **Section 25(2)** of the County Government Act 2012 provides that County Legislation shall come into effect 14 days after publication in the Kenya Gazette or County Gazette whichever comes earlier. It has relied on the case of *Africa Rafiki Ltd and 2 Others -vs- Nairobi City County Government and 3 Others* where **Lenaola J** was of the view that the Nairobi City County Betting Lotteries and Gaming Act 2014 which had been published as a special issue of the Nairobi County Gazette Supplement was in compliance with **Article 199(1)** of the **Constitution**.

17. 2nd Respondent's Case

The 2nd Respondent has also opposed this petition through grounds of opposition dated 19th September, 2018 and the written submissions.

18. The 2nd Respondent has also faulted the petition filed for lacking specificity in relation to the alleged infringements of the constitutional rights.

19. The 2nd Respondent has contended that its presence in court in this petition is unnecessary as in its view their mandate under **Article 157** of the constitution and **Section 4** of the Office of the Director of Public Prosecution Act is to prefer charges and present criminal cases.

20. In its written submissions the 2nd Respondent contends that the petition herein is incurably defective and on this score it has relied on the case of *Zubeda Waziri -vs- Speaker of the National Assembly and 4 others* where the court stated that a Constitutional Petition must be specific and clear and state the particulars of the acts complained of and that it is important for a party to file good and proper pleadings. The 2nd Respondent has contended that the petitioners have listed various articles of the constitution in the head of the petition but left the violations unspecified against the Respondents. The 2nd Respondent has cited **Rule 10(2) (d)** of the Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013) which makes it a mandatory requirement that the nature of the injury caused or likely to be caused to the petitioner be disclosed. It also makes it mandatory to disclose details relating to any civil or criminal cases related to the petition.

21. The 2nd Respondent has pointed out that the petition has no supporting documents or evidence and that the documents annexed to the application were never canvassed. It has further faulted the annexures to the written submissions stating that the same was frowned upon in the Court of Appeal case of *Douglas Odhiambo Apel and Another -vs- Telkom Kenya Ltd (2014) eKLR*.

22. The 2nd Respondent has justified the prosecution of the cases it is prosecuting stating that it is carrying out its mandate as the persons charged in their view committed an offence known in law.

23. The 3rd Respondent's Case

The 3rd Respondent filed a Preliminary Objection to this petition dated 31st July, 2018 which Preliminary Objection was to the effect that the Petitioner has no locus standi to bring this petition.

24. The 3rd Respondent in its written submissions has contended that the law under which the Petitioner is registered is not clear stating that the affidavit in support of the petition does not attach any authority by the members to the Secretary to plead on their behalf and that the constitution of the group has not been provided.

25. It is the 3rd Respondent's case that unincorporated groups such as the Petitioner cannot sue in their own names or through its members and has cited the provision of **Article 22(2) (b)** of constitution and the decision in *Kipsiwo Community Self Help Group -vs- AG and 6 Others [2013] eKLR* to back up the contention. It has also contended that the Petitioner has not disclosed locus standi.

26. The 3rd Respondent has denied that the County Legislation impugned by the Petitioner is not enforceable or that it contravened **Article 199(1)** of the Constitution stating that the impugned legislation was properly gazetted and has cited **Article 260** which defines a 'gazette' as "**Kenya Gazette published by the authority of the National Government or a supplement to the Kenya Gazette**". It has also cited the provisions of **Section 25(2)** of the County Government Act which states "**subject to subsection (3) the County Assembly Legislation shall come into force on the 14th day after its publication in the County Gazette & Kenya Gazette whichever comes earlier, unless the legislation stipulates a different date or time at which it shall come into force.**"-

27. The 3rd Respondent in a twist has also poked holes on the provisions of **Section 25(2)** of the County Government, contending that the use of words "**whichever comes earlier**" places that provisions at variance with **Article 199(1)** which places Kenya Gazette higher than County Gazette which appears not to be the case with **Section 25 (2)** of the County Government Act which places the two gazettes at par with each other. In its view the County Legislation can only gain legitimacy after publication in the Kenya Gazette or as a supplement to the Kenya Gazette. This position appears to lend credence to the petition herein

28. The Interested Party's Case

The Interested Party in this case, Tharaka Nithi Bar Owners Self Help Group has supported this petition vide an affidavit sworn on 29th

October, 2018 by one Nicholas Mutua Justine Gitari who states that he is the chairman for the said Interested Party.

29. The Interested Party has adopted the petition and the submissions made by the Petitioner adding that the current Liquor Licensing Committee of the 1st Respondent is unconstitutional because one member Mr. M' Muturuchiu Murungi is a bar owner who runs a club known as Eagles Club and his appointment was in breach of **Section 8(4)** of the Tharaka Nithi County Alcoholic Control Act 2015.

30. The Interested Party has also contended that the committee was formed in contravention of court order issued vide Judicial Review No. 5 of 2016 which had suspended the operations of the committee. It is their contention that the order was in force until 14th June 2018 while the committee was appointed on 17th May, 2018. They have further added that there was no public participation and that persons with disabilities were not engaged.

31. In their written submissions the Interested Party has contended that the Respondents opposition of the petition was based on technicalities and have urged this court to consider that the Respondent's illegal action would result to many people losing their businesses and livelihoods.

32. **Analysis and Determination**

This court has considered this petition and the respective responses to the same. The following issues in my view are up for determination namely:

i. Whether the Petitioner has locus standi.

ii. Whether Tharaka Nithi County Alcoholic Drinks Control Act 2015 is lawful and enforceable.

iii. Whether Section 25(2) of the County Government Act No.17 of 2012 is inconsistent with Article 199(1) of the Constitution.

iv. Whether the County Liquor Licensing Committee was properly and lawfully constituted.

33. (i) **Locus standi:**

According to Black's Law Dictionary, 10th edition at page 1084, Locus standi is defined as,

" Place of standing. The right to bring an action or to be heard in a given forum."

In the case of Afred Njau & 5 Others -vs- City Council of Nairobi [1983] eKLR the court adopted the following definition.

" The term locus standi means a right to appear in court and conversely as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such proceedings. Barring her from approaching the seat of justice even when it was evident that she was not a busy body in the matter negated the cardinal rules of natural justice. There was no injustice in our view which would have been occasioned to other parties had the 7th Respondent been heard. All the parties would have an opportunity to ventilate their claim and leave it to the court to determine whether the 7th Respondent's claim could succeed or not."

34. The Petitioner herein is a Self Help Group and the Respondents have stated that they do not have locus to bring this action which as per the above definition means that they ought not to have brought this action. The Petitioner in this case appears to have provided ammunition to the Respondents' claim because they have not clearly described themselves save that Mercy Kainda in her affidavit in support of the petition states that she is a Secretary of the Petitioner and a businesswoman dealing with alcoholic beverages and that is all.

In the case of Mirara & 2 Others -vs- Romano K. Mikigu [2013] eKLR, where court considered the issue of locus standi raised at the trial and observed as follows:

"The law on suits by or against unincorporated bodies is well settled. It was held by Bosire J (as he then was) in Free Pentecostal Fellowship in Kenya -vs- Kenya Commercial Bank (Nairobi HCCC No.5116 of 1992 (O.S)) that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of body or bodies".

The alternative is for the suit to be instituted by one or more persons in a representative capacity pursuant to the provisions of Order 1 **Rule 8** of the **Civil Procedure Rule**. The same position was adopted in Voi Jua Kali Association -vs- Sange & Others (2002) 2 KLR 474. In Kipsiwo Community Self Help Group -vs- A.G & 6 Others [2013] eKLR, where Honourable **Munya Sila J** held inter alia that,

"Self Help Groups having no legal personality cannot institute proceedings in their own name and that Kipsiwo Self Help Group had no capacity to institute an action in its own name. A person recognized in law had to sue on behalf of members of Kipsiwo Self Help Group and such members had to be named and identified with precision. The person bringing the action has to demonstrate that he has permission to bring the action on behalf of the members of the group or on behalf of the people he seeks to represent if it is a representative suit. The importance of this, is to recognize the persons who seek legal redress and so that orders are not issued in favour or against people who cannot be precisely identified. This may look minor but it is extremely significant. In litigation, rights and duties will be imposed on the litigants. If the court does not know who the

litigants are, then it becomes impossible for the court to enforce its own orders, for it will never be clear, who the beneficiary of the order was, or who had the obligations to obey or enforce such order.

35. This court has noted that the petitioner in its submissions perhaps upon reflection and hindsight attempted to give a description of who it is and what it does so as to have an interest in matters dealing with liquor licensing regulations and laws regulating the sector. The attempt however came rather late because the same ought to have been disclosed to enable the Respondents respond and defend themselves. They were entitled to know who the petitioner was and what interest it had with the Tharaka Nithi Alcoholic Drinks Control Act 2015 and other cited constitutional provisions and how the stipulated rights had been violated or threatened to be violated so that they are not taken by surprise as stipulated under the provisions of **Order 2 Rule 4(1)** of the **Civil Procedure Rule**.

36. This court, on the other hand is alive to the provisions of **Article 258(1)** of the **Constitution** which also shades some light on locus. It states as follows;

" Every person has the right to institute court proceedings, claiming that this constitution has been contravened or is threatened with contravention.

2) in addition to a person acting in their own interest court proceedings under clause (1) may be instituted by;

a) A person acting on behalf of another person who cannot act in their own name.

b) A person acting as a member of, or in the interest of, a group or class of persons.

c) A person acting in public interest or

d) An association acting in the interest of one or more persons."

A further reading of **Article 22 (1)** of the Constitution provide as follows:

" Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated infringed or is threatened".

The above constitutional provisions shows that the latitude of locus standi has really been expanded by the new constitutional dispensation because even the definition given about a person under **Article 260** shows that a person **"includes a company, association or other body of persons whether incorporated or unincorporated."** What flows from the above constitutional provision in my view indicate that even Self Help Groups, which are not normally body corporate or incorporated, can bring an action so long as they that their interests or rights have been infringed or about to be infringed. They cannot be faulted for lacking locus standi on account of merely not being unincorporated or lacking legal personality.

In this petition however, the descriptive part of the petition is wanting for specificity. The Petitioner through its Secretary does not state that the membership has given her authority to plead on behalf of the entire membership to qualify as a representative suit as provided under the provisions of **Order 1 Rule 13 Civil Procedure Rules**. Mercy Kainda in her affidavit in support of the petition has not stated that she is swearing the affidavit on behalf of other members and that omission in my view is fatal given the fact that the Respondents have questioned the capacity and the locus of the petitioner. I also note that the petitioner failed to describe the involvement of all the Respondents in the acts complained of and why they have been sued. It is therefore understandable why the 2nd Respondent felt aggrieved and posed a valid question as to why his presence in this petition was necessary. I of course note that in its written submissions, the Petitioner has gone ahead and given the requisite descriptions on all the Respondents and why they have been sued but that in my view is equally belated because the petition ought to have contained sufficient details and particulars to enable the Respondents defend themselves adequately.

37. The affidavit in support of the petition in my view is bare and wanting because for one to know who the petitioners are in this petition you must look at the Notice of Motion dated 23rd July, 2018 and the affidavit in support which is a bit detailed enough in respect to the description of the petitioner. That in my view shows that either the petitioner was in a hurry in drawing the petition and therefore omitted crucial details in the petition or it is not very sure who its members are and that is why perhaps the deponent does not state that she had the authority and capacity to plead on their behalf. Whatever the case, this court finds that the Petitioner has not clearly established its locus standi in this petition and despite the latitude given under the above cited provisions (**Article 22, 258 and 260**) this court is unable to save this petitioner on account of locus standi.

38. Whether Tharaka Nithi County Alcoholic Drinks Control Act 2015 is lawful and enforceable and whether Section 25(2) of the County Government Act No. 17 of 2012 is inconsistent with Article 199(1) of the Constitution.

The 2nd and 3rd issues are related and I shall determine them contemporaneously.

The Petitioner has raised on important issue which is the legality of **Section 25** of the County Government Act and Tharaka Nithi Alcoholic Drinks Control Act 2015 on this basis that the latter legislation was never and has never been gazetted. The provisions of **Article 199(1)** of the Constitution clearly states as follows:-

" County Legislation does not take effect unless published in the gazette."

A look at **Article 260** of the Constitution clearly defines that a Gazette,

"The Kenya Gazette published by the authority of the National Government or a Supplement to the Kenya Gazette."

There is no dispute that Tharaka Nithi County Alcoholic Drinks Control Act, 2015 was properly passed in the County Assembly and assented to by the Governor. What is in dispute is that it was not properly gazetted. The 1st Respondent has defended itself and exhibited a copy of a special issue of County Gazette Supplement showing that the impugned legislation was published via County gazette as provided under **Section 25** of the **County Government Act**. The provisions of **Section 25** of **County Government Act** provides as follows:-

1) " A legislation passed by County Assembly and assented to by the Governor shall be published in the County Gazette and Kenya Gazette within 7 days after assent.

2) Subject to the 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 legislation stipulates a different date or time at which it shall come into force." (Emphasis added).

The 3rd Respondent has conceded that the above provision is problematic because it is in conflict with **Article 199(1)** of the **Constitution**. **Section 25 (2)** of the **County Government Act** appear to suggest that publication of the legislation in the County Gazette is at par or in equal with publication in Kenya Gazette which runs afoul of **Article 199(1)** as read with **Article 260**. The publication of bills emanating from County Assembly just like in the National Assembly acquires the force of law upon publication in Kenya Gazette in accordance with **Article 199(1)** of the **Constitution**. To that extent, this court has no hesitation in finding that the phrase "***whichever comes earlier***" used in **Section 25 (2)** of the **County Government Act** unconstitutional for being inconsistent with **Article 199(1)** of the **Constitution**. The finding of this court is persuaded by the decision **James Gacheru Kariuki & 3 Others -vs- A.G & 11 Others [2017] eKLR** which arrived at the same conclusion and declared invalid the phrase "***whichever comes earlier***" in **Section 25(2)** of the County Government Act invalid and found that a County Legislation does not take effect unless it is published as such in the Kenya Gazette.

39. In light of the above and for the sole reason that Tharaka Nithi Alcoholic Drinks Control Act 2015 was and has not been published in accordance with **Article 199(1)** of the Constitution the said Legislation does not take effect or have the force of law until its publication in the Kenya Gazette is clearly stipulated under **Article 199(1)** of the **Constitution**.

For avoidance of doubt and in the interest of law and order in the alcoholic sector I shall give the County Government of Tharaka Nithi 90 days to regularize the publication of the said legislation. (The Tharaka Nithi County Alcoholic Drinks Control Act), in the Kenya Gazette. In default the legislation shall lapse and be invalid. Until then it shall continue operating in the interest of justice.

40. My above finding of course has a bearing to my finding on the last issue for determination which is whether the County Liquor Licensing Committee was lawfully and properly constituted. My finding is that it follows naturally that in the absence of valid legislation the Constitution of the Licensing Committee of Tharaka Nithi was irregular and improper. That committee needs to be properly constituted in accordance with the law once the 1st Respondents regularizes its position.

In conclusion, this petition for the reasons I have stated above fails save that this court having looked at the legality of both **Section 25(2)** of the County Government Act particularly the wording or the phrase "***whichever is earlier***" and the Tharaka Nithi Alcoholic Drinks Control Act 2015, I am satisfied that both are inconsistent with the Constitution of Kenya 2010 (**Article 199(1)** thereof) and are invalid to that extent. For the reasons advanced and as observed the County Government of Tharaka Nithi are hereby given 90 days from the date of this ruling to regularize the said impugned legislation and in default the said legislation shall stand nullified and rendered invalid.

I shall not make any order as to costs so each party shall bear own costs.

Dated, signed and delivered at Chuka this 16th day of May, 2019.

R. K. LIMO

JUDGE

16/5/2019

Judgment signed, dated and delivered in the open court in presence of Petitioner, Momanyi for 2nd Respondent, Muthomi, for 1st Respondent and holding brief for Mberkyata for 3rd Respondent and Kaaria holding brief for Mugo for Interested Party.

R. K. LIMO

JUDGE

16/5/2019