



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**PETITION NO. 18 OF 2018**

**IN THE MATTER OF ARTICLES 1, 2, 3, 22, 27, 28, 35, 46 (1) (A) (B),**

**47, 165, 185, 196 (1) (a) (b), 201 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF CHAPTER FOUR OF THE CONSTITUTION OF KENYA**

**(AND IN THE MATTER OF ARTICLES 165 (3) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF CONTRAVENTION/ALLEGED CONTRAVENTION OF**

**ARTICLE 185 OF THE CONSTITUTION OF KENYA AND**

**IN THE MATTER OF SCHEDULE 3, PART 2 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF KIAMBU COUNTY ALCOHOLIC DRINKS CONTROL ACT, 2013**

**AND ALSO IN THE MATTER OF KIAMBU COUNTY ALCOHOLIC**

**DRINKS CONTROL DRAFT BILL, 2017**

**BETWEEN**

**RICHARD WAINAINA MUHINDI AND 2 OTHERS.....PETITIONERS**

**(Suing on own behalf and on behalf of members of Kikuyu Bar**

**Owners Savings and Co-operative Society Ltd)**

**AND**

**COUNTY GOVERNMENT OF KIAMBU..... RESPONDENT**

**CONSOLIDATED WITH**

**PETITION NO 17 OF 2018**

**IN THE MATTER OF ARTICLES 3(1) 10, 22, 23, 27, 47(1 & 2), 118 AND 232 OF THE CONSTITUTION**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

IN THE MATTER OF THE PROVISIONS OF SECTION 8(2) OF THE COUNTY GOVERNMENTS ACT

IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL ACT 2010

IN THE MATTER OF THE KIAMBU COUNTY ALCOHOLIC DRINKS CONTROL BILL, 2018

BETWEEN

MOSES MAINA MURAGE T/A U-SHOP DEPOT AND 18 OTHERS.....PETITIONERS

VERSUS

COUNTY GOVERNMENT OF KIAMBU..... RESPONDENT

**J U D G M E N T**

1. The two consolidated Petitions herein were filed 2 days apart, in the wake of the legislation process culminating with the enactment of the Kiambu County Alcoholic Drinks Control Act (hereinafter the Act). The Act's commencement date is 9<sup>th</sup> March 2018, also the date of its gazette. According to the preamble of the Act, it was intended **“to establish a framework for the licensing and regulation of the production, sale, distribution, consumption and outdoor advertising of alcoholic drinks; and for connected purposes.”**

2. Thus, by 12<sup>th</sup> March 2018 when the **Petition No.17 of 2018** was filed against the Kiambu County Government by **Moses Maina Murage** trading as **U-shop Depot** (the 1<sup>st</sup> Petitioner) and 18 Others, the Act was already in force. The gravamen of the Petition is that the Kiambu Alcoholic drinks Control Bill 2018, (the Bill) was not subjected to public participation as required by the provisions of Article 196 of the Constitution and Sections 87 and 115 of the County Governments Act. Secondly that the Bill violated the Petitioners' rights to property (Article 40(2) (a)) and to consumer protection (Article 46).

3. Thirdly, that the County Government had given an order or a directive and employed goons for the purpose of forcing the Petitioners to close down their liquor/alcohol businesses and further, denied the Petitioners the opportunity to apply for renewal of their liquor licences. The Petitioners sought a permanent injunction to restrain the County Government from harassing, intimidating them and unprocedurally closing or stopping the Petitioners' liquor operations; a declaration that the enactment of the Bill into law was not in accordance with Articles 118 (1) (b) of the Constitution and is therefore null and void; and conservatory orders to stay/suspend implementation of the Bill by the County Government.

4. The Petition was supported by the affidavit of the 1<sup>st</sup> Petitioner who claims to have the authority to plead on behalf of his co-Petitioners even though no such authority was filed. The affidavit repeats the material averred in the Petition. The County Secretary of the Kiambu County Government, **Dr. Martin Mbugua** swore the Replying affidavit in opposition to the Petition.

5. He deposed that legislation made by the County Assembly is recognized under Article 260 of the Constitution. That the County Government of Kiambu indeed enacted the Kiambu County Alcoholic Drinks Control Act, 2018 which addresses liquor licensing; that the said County legislation takes precedence over national legislation as liquor licensing is a devolved function; that the Kiambu Alcoholic Drinks Control Act, 2018 was duly gazette; and that any act of enforcement is carried out in accordance with the law, with due regard to public interest.

6. Further, he deposed that public participation was undertaken during the legislation process and that written memoranda and submissions were received from the public and as such, the County Government acted within the Constitution. Lastly, it was deposed that the Petitioners have not established the minimum threshold for the grant of the orders sought in the Petition and in any event, the Petition has been overtaken by events as the Bill is now an Act of the County Assembly of Kiambu.

7. Thus, it was surprising that in written submissions the Petitioners in Petition 17 of 2018 appeared to avoid any reference to the Bill and instead focused on the Act, and framing two issues as follows:

**“a) whether there was public participation prior to the enactment of the Kiambu County Alcoholic Drinks control Act, 2018 thus rendering the enactment of the Kiambu County Alcoholic Drinks Control Act, 2018 as unconstitutional (sic)**

**b) Whether the enactment of the Kiambu Alcoholic Drinks Control Act, 2018 and oral Directives by the County Governor has infringed on the Petitioner's Constitutional rights as well as public interest” (sic)**

8. **Petition 18 of 2018** was filed on 14<sup>th</sup> March 2018 by **Richard Muhindi Wainaina and two others** in their capacity as officials of **Kikuyu Bar owners Savings and Credit Cooperative Society Ltd (the SACCO)**. The core issue raised in the Petition is the alleged oral directive, by the Governor, Kiambu County issued on 8<sup>th</sup> March 2018 that all bar and liquor businesses be closed. The Petitioners complain that the directive and its enforcement constitute an infringement of the Petitioner's rights, *inter alia* under Articles 27, 28, 35, 43(1), 46, 47 of the Constitution and was made in contravention of the provisions of Articles 185 and 196 of the Constitution.

7. The prayers sought were firstly, a declaration that the directive be quashed, and secondly an order to restrain the Kiambu County Government from effecting the directive through closure of or interference with the Petitioners' businesses. The supporting affidavit was sworn by **Richard Wainaina Muhindi** as chairman of the SACCO. The affidavit states in part that the members of the SACCO did give

their views during the legislation process of the Kiambu County Alcoholic Drinks Control Bill, and that rather than pass the Bill into an Act, the Respondent had arbitrarily closed the Petitioners' businesses through the impugned directive, which constituted a violation of the Petitioners' stated rights.

8. In opposing the Petition the Respondent filed a Replying affidavit through the County Secretary, Kiambu County Government, **Dr. Martin Mbugua**. He deposed that the County Government of Kiambu enacted the Kiambu County Alcoholics Drinks Control Act, 2018, the law applicable in relation to regulating the alcohol industry within Kiambu County. He further deposed that the directive to close any liquor outlets was guided by the said Act and that any act of enforcement is guided by the provisions of legislation and with due regard to public interest, and that public participation was undertaken and memoranda from the Petitioners and others were received during the process. Lastly, he contended that the Petitioners have not established the minimum threshold for the grant of orders sought in the Petition.

9. The court directed that Petitions 18 and 17 of 2018 be consolidated and that Petition 18 of 2018 be the lead file. The Petitions were canvassed by way of written submissions.

10. In submissions, the Petitioners in Petition 18 of 2018 framed 3 issues:

- a) Whether the oral directive was lawful.
- b) Whether the Act is unconstitutional for want of public participation.
- c) Whether the Petitioners' rights were infringed by the directive and implementation thereof.

The Petitioners urged the court to declare the Act null and void.

10. The court having ordered that the Petitions be consolidated, the Petitioners in the two Petitions filed separate submissions. The gist of the submissions by the Petitioners in **Petition No. 17 of 2018** was as follows. The Petitioners submit that the principle of public participation in legislation is important constitutional principle and that the involvement of the actual stakeholders is equally important. It was submitted that in enacting the Kiambu County Alcoholic Drinks Control Act, 2018 the key stakeholders were not consulted. Counsel quoted the case of **Doctors for Life International vs Speaker of the National Assembly & others (CC12/05) and the Minister for Health & another vs New Clicks South Africa (Pty) Ltd & others (2006) (2) SA 311** where it was held that the concept of public participation is an essential constitutional obligation and the court must inquire whether a reasonable opportunity had been given to stakeholders to have an adequate say.

11. The Petitioners contend that the objects of the Kiambu County Alcoholic Drinks Control Act are unconstitutional in their enforcement and effect since they take away the Petitioners' economic rights. Reliance was placed on the case of **Queen vs Big M. Drug Mart Limited (1985) 1 S.C.R. 295** for the proposition that the objects and effect of a statute are necessary elements in the determination of its constitutionality. Counsel further submitted that the said Act discriminates against the Petitioners as it deprives them of the means of earning their livelihood and as such violates and negates the spirit of commerce, and is oppressive to the Petitioners. In conclusion, the Petitioners submitted that the said directive has led to the closure of their businesses. They prayed that the Court grants the prayers in the Petition.

12. The Petitioners in **Petition No. 18/18** submitted through their counsel that the impugned oral directive by the Governor, Kiambu County, and its enforcement infringes on the Petitioners' constitutional rights and denies them the benefit and protection of the law. It was also submitted that the Kiambu County Alcoholic Drinks Control Act, 2018 is unconstitutional as the Petitioners were not given a chance to be heard or participate in the making of the said law. Reliance was placed in the case of **Macfay vs United Africa Co. Ltd(1963) 3 All E. R. 1169** where it was held that if an act is void, it is a nullity and it qualifies to be struck out. Counsel also contended that the Respondents ought to have notified the Petitioners of their intention to take action that adversely affected their manufacturing and licensing rights as required by Section 4 of the Fair Administrative Actions Act, 2015.

13. It was further submitted that the Petitioners' right to freedom and security was violated by the continued use of threat, force and arrest by the County Government agents; that their right to privacy was violated due to the unlawful entry, search and seizure of the Petitioners' goods. It was also submitted that the right to fair administrative action was infringed as the Petitioners were never given a chance to be heard prior to the issuance of the alleged directive. To support this submission, counsel quoted the case of **General Medical Council vs Spackman (1943) 2 All E. R 337** in arguing that where the principles of natural justice are violated, the decision arrived at must be declared to be no decision at all. In conclusion, the Petitioners prayed that the Court declares the Kiambu County Alcoholic Drinks Control Act, 2018 null and void as it was passed in violation of the law and that the Petitioners be allowed to conduct their business and at the same time be issued with necessary business licences.

14. Counsel for the Respondent submitted that the Petitioners had adequate notice of the contents of the impugned Act and that they actively participated in its formulation; and that public participation was undertaken in formulating the Act. He referred the Court to the case of **Okiya Omtatah Okoiti vs County Government of Kiambu (2018) Eklr** where it was found that public participation had been conducted in the enactment of the Kiambu County Alcoholic Drinks Control Act, 2018. Counsel submitted that the court ought to decline the Petitioners' invitation to make a determination in regard to Article 118 as it has no application to the legislative function by County Governments.

15. Lastly, counsel submitted that the Petitioners have failed to specifically state the contents of the alleged directive and the parties and/or premises affected. The requirement for precise pleading as stated in the case of **Anarita Karimi Njeru vs Republic (1979) No.1 eKLR** was emphasised. It was contended that the Petitioners' allegations fall short of the threshold for establishing a constitutional infringement or violation and the court was urged to dismiss the Petitions with costs.

16. The court has considered the Petitions, rival affidavits and submissions by the parties. The common pleaded issue in the two petitions relates to the alleged directive by the Governor, Kiambu County that all bars and liquor businesses be closed. The date of the alleged

directive is given in the second petition as 8<sup>th</sup> March 2018 but no date is stated in Petition 17 of 2018. I have taken the trouble to set out the pleadings of the parties concerning the question of public participation and as raised by the parties' submissions. In both Petitions, however no averments were made concerning the enactment of the Kiambu County Alcoholic Drinks Control Act. In **Petition 17 of 2018**, the Petitioners refer to a Bill, but midstream attempted to amend their petition through submissions to impugn the Act which had been passed prior to the filing of the Petition.

17. The Petitioners in **Petition No. 18 of 2018** by their pleadings were preoccupied only with the alleged directive by the Governor and appeared to insinuate that no law had been enacted for the control of alcoholic drinks, albeit admitting participation in giving views in connection with the related Bill. Thus, in my view, the Petitioners' submissions concerning the Act introduced a case not pleaded in their respective pleadings at all. Having realized that the law had in fact been passed, they did not seek to amend their pleadings accordingly.

18. It is unacceptable that a party who pleads one case *via* his pleadings, would through his submissions, present a totally new case, and even urge prayers quite unrelated to his pleadings. Cases cannot be adjudicated upon justly if conducted through ambush and in violation of rules of procedure.

19. In **Mumo Matemu v Trusted Society of Human Rights Alliance and Others [2013]e KLR** the Court of Appeal stated that:

**“41. We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.**

**42. However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in *Anarita Karimi Njeru (supra)* underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to *Article 159* of the Constitution and the overriding objective principle under *section 1A* and *1B* of the Civil Procedure Act (Cap 21) and *section 3A* and *3B* of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth (1876) 3 Ch. D. 637* at 639 holds true today:**

***“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”***

**44. We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru (supra)*. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. “**

20. The Petitioners ought to have pleaded the issue of public participation in relation to the Act. In any event, the Petitioners in **Petition No.18 of 2017** admit that they participated in the enactment process of the impugned Act and gave their views by submitting memorandum, a copy of which is annexed to the Supporting affidavit as annexure “**PWM4**”. They cannot be taken seriously when they also assert in subsequent submissions that “**The Petitioners were never given a chance to be heard or to participate in any way in the making of the said law .... Their views and participation were ignored and their rights infringed upon.**” This same law was the subject of another petition before this court, namely **Petition No.48 of 2018 Okiya Omtata Okoiti v County Government of Kiambu**. That Petition was filed on 5<sup>th</sup> April 2018 and determined on 2<sup>nd</sup> November 2018.

21. In the further affidavit filed therein on 16/7/18, a letter, marked annexure “**0004**” is annexed. Dated 13<sup>th</sup> April 2018 it is written under the hand of **Richard M. Gachuri**, designated as the chairman of the Kikuyu Bar Owners Sacco, the Petitioner in Petition No. 18 of 2018. In view of the date of this letter, the chairman must be the self-same 1<sup>st</sup> Petitioner who has filed **Petition No.18 of 2018**, alongside other officials on behalf of the SACCO. Thus the name **Richard M. Gachuri** must necessarily be an alias for **Richard Muhindi Wainaina**, also stated to be the operator of “**Gachuri bar**” according to the list of SACCO members attached as annexure **PWM2** to the supporting affidavit in **Petition 18 of 2018**.

22. By the contents of this letter of 13<sup>th</sup> April 2018, it is evident that the SACCO leadership was aware of the existence of Petition 48 of 2018 and due to its interest in the matter, the subsequent judgment of this court. I will return to this letter later, but it suffices for now to state that the attempts by the Petitioners in Petition 18 of 2018 to introduce through submissions determined issues concerning public participation in respect of the Act can only be mischievous.

22. Nonetheless, I find it useful to reiterate relevant parts of my judgment in **Petition 48 of 2018** with regard to public participation in connection with the Kiambu County Alcoholic Drinks Control Act. The Court having reviewed the material before it and having noted the

fact that several entities, including the SACCO herein had given their views on the Act, proceeded to state that:

**“In Mui Coal Basin Local Community & 17 Others v Permanent Secretary Ministry of Energy & 15 Others [2015] e KLR relied on by the Petitioner, the court observed that public participation did not mean that everyone must give their views, which is impracticable. Rather that there ought to be evidence of “intentional inclusivity” in the participation program and which, on the face of it, took into account the principle that “those most affected by a policy, legislation or action must have a bigger say: and their views more deliberately sought and put into account.” That notwithstanding, there is no attendant requirement that each individual’s views will be included in the final policy or law: the public authority has no duty to accept any and every view, the opposite of which would effectively neutralize and stall the exercise of the authority’s mandate.**

**In the final analysis, the rule of the thumb is that a reasonable opportunity is given to the public and all interested parties, with timely access to information that is relevant to a process of legislation to facilitate the appreciation of the issue for consideration, and an opportunity to make a response. (see also Meru Bar, Wines Owners Self Help Group case).**

**Reviewing all the foregoing, I am persuaded that the public participation carried out in respect of the impugned Act passes the test of effectiveness. Indeed, the fact that the Petitioner only belatedly latched on to the issue of public participation and attempted to make it a centre piece of his petition appears to suggest that the issue was raised as an afterthought to shore up the Petitioner’s case. Given the primacy of the principle of public participation in legislative processes, it is unlikely that a party intent on challenging the process would overlook such an important aspect. In the result, the court resolves the third issue in the affirmative.”**

23. Nothing new has been pleaded in this case, or presented in submissions to detract from the foregoing findings of the court in respect of the Kiambu County Alcoholic Drinks Control Act. Nothing turns on this score therefore.

24. Regarding the alleged directive by the County Governor, the contents thereof were not proven through an affidavit by the person or persons who heard or recorded the alleged directive. It is not even demonstrated where the directive was issued- whether in a baraza roadside address etc. The Respondents by their replying affidavit have asserted that any directive made was consistent with the law, and any intended actions were to be based on the law, in this case the Act. Not a single person has sworn an affidavit to demonstrate that he was forced to close his business, or was harassed by employees or agents of the County Government or denied a chance to apply for a licence in furtherance of the alleged directive.

25. Once more, the SACCO chairman’s letter for 13<sup>th</sup> April 2018 earlier referred to appears to contradict the claims made in **Petition 18 of 2018**. It appears that the said chairman, and deponent to the supporting affidavit herein had obtained copies of liquor licence application forms and was seeking the counsel of Okiya Omtata (the Petitioner in Petition 48 of 2018) in the following terms:

**“Please peruse these applications forms and the conditions that the Kiambu our Government has imposed on our businesses and see what should be done towards this issue. (Documents attached). We are also afraid that the Kiambu County Government has not given a dead line date when the form was supposed to be returned and this opens a gate for the Governor and without notice that we close our businesses.....**

**We are also seeking your directions as to whether we should fill in application form since you have already filed a case in the High Court and whether it will not be admitting legality of the 2018 Kiambu County Alcoholic Drinks Control Act May you also advise whether it is possible to seek court’s order as a matter of urgency to stay the Kiambu County Government from implementing the issuing and processing of application forms until the case you have filed is heard and determined.” (sic)**

26. This letter as I said must be authored by the self- same person **Richard Wainaina Muhindi alias Richard M. Gachuri** as the affidavit filed in **Petition 18 of 2018**, sworn on 12<sup>th</sup> March 2018. The contents of the letter contradict key depositions in the latter affidavit especially paragraphs 18, 20, 21 as to the alleged closure of businesses and County Government’s admission of licence applications. I agree with the Respondent’s submissions that the Petitioner’s averments and depositions in respect of the alleged directive are sweeping, vague and without concrete substance.

27. The Petitioners herein seemed to expect this court to speculate on the precise substance of the directive and to conclude that it was unlawful and in violation of the Petitioners’ rights. The Petitioners case was founded on the making of an unlawful directive followed by unlawful actions. It was their duty to establish that such unlawful directive was made, its precise contents, and to further demonstrate how the rights of the Petitioners were violated or threatened as a consequence. This they have failed to do. The exhortation in **Anarita Karimi’s** case bears repeating:

**“We would, however again stress that 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.”**

28. Both the pleaded and argued case of the Petitioners herein fail this test. It is not enough to cite a multitude of constitutional rights allegedly violated or threatened without demonstrating how these have been violated by the alleged directive, whose contents are indeterminate in nature. The court cannot quash a directive that has not been established, and whose precise contents are unknown or unestablished, or issue orders to restrain the Respondent from implementing such alleged directive. For all the foregoing, this court finds no merit in the two petitions and will dismiss them. Parties will bear own costs.

**DELIVERED AND SIGNED AT KIAMBU THIS 11TH DAY OF DECEMBER 2019.**

**C. MEOLI**

**JUDGE**

In the absence of parties, with notice.

C/A Kevin/Nancy