



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CONSTITUTIONAL PETITION NO. 5 OF 2017

IN THE MATTER OF ARTICLES OF THREATENED OR LIKELY CONTRAVENTION OF ARTICLES 2(1), (10 (2), 27(1), 29(A), 35 (1), 40(1), 185 (2), 186 (2), 187 (2), 201, 209 AND FOURTH SCHEDULE PART 2 PARAGRAPH 4(c) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL ACT NO. 4 OF 2010 LAWS OF KENYA AND THE FOURTH SCHEDULE OF THE ALCOHOLIC DRINKS CONTROL ACT

AND

IN THE MATTER OF THE MACHAKOS COUNTY LIQUOR LICENSING ACT 2014

AND

IN THE MATTER OF THE MACHAKOS COUNTY FINANCE ACT 2014

BETWEEN

MAVOKO VILEO WELFARE ASSOCIATION.....PETITIONERS

VERSUS

THE COUNTY GOVERNMENT OF MACHAKOS.....RESPONDENT

RULING

1. The Petitioners herein have filed two Applications dated 7/6/2017 and 10/4/2018 seeking several reliefs. Some of the reliefs sought appear to cut across the two applications and they are as follows:

(i) (spent)

(ii) That this Honourable court be pleased to grant a temporary injunction against the Respondent by itself, officials, agents and their representatives from interfering with the Applicant's businesses in the pretext of collecting or enforcing revenue collection specifically the liquor licensing fee until the hearing and determination of this case.

(iii) That the Honourable court be pleased to issue an order compelling the Respondents to issue the petitioners with Trading Licences upon payment of the requisite fees without pegging the issuance of the Trading Licences on the payment of Liquor Licences.

(iv) That costs of the Applications be provided for.

2. The Applications are supported by the annexed affidavit of Catherine Ndunge Nzioka sworn on even dates and further on the following grounds namely:-

(i) That the Respondent has failed to come up with liquor Licence pursuant to the Machakos County Liquor Licensing Act 2014 and in the form prescribed in the schedule therein but has instead continued issuing Licences in the form prescribed in the Alcoholic Drinks Control Act 2010 yet the functions were devolved.

(ii) That the Respondent has exercised its jurisdiction to impose the licence fees unfairly by charging exorbitant and punitive fees for the liquor licence thereby rendering the petitioners businesses unviable and unworthy business ventures.

(iii) That in addition to the liquor licenses the Petitioners have to pay for Health Licence, Fire clearance Certificate, Trading/Single Business Permit Licences, Application Fees for all these licenses, inspection fees before issuance of any licenses, Music copyright fees among others.

(iv) That the fees being levied by the Respondent against for licenses are not provided for in the Machakos County Finance Act 2014 and therefore are not a true reflection of the intentions of the County Assembly or the Petitioners as there was no inclusion and or public participation when the rates were set.

(v) That there are high chances that the Petition against the Respondent will succeed as comparative analysis of the prevailing fees in neighbouring Counties depict that the Respondent's fees are exorbitant and punitive.

(vi) That the Respondent has been issuing liquor licenses premised on the wrong law and in a form not prescribed by the Machakos County Liquor licensing Act 2014.

(vii) That the Respondent will suffer no prejudice if the prayers sought are granted given that they have actually been granting licenses premised on the wrong law and in an improper manner contrary to what has been provided for in the Machakos County Liquor Licensing Act 2014.

3. The Applications were strenuously opposed by the Respondent who filed a replying affidavit sworn by Kilonzo Kovulo a Director of the Machakos County Directorate of Liquor Control and who raised several grounds of objection as follows:-

(i) That the Machakos County Directorate of Liquor Control uses the Third Schedule of the Alcoholic Drinks control (Licensing) Regulations 2010 to levy license fees because the Respondent is yet to set regulations under the Machakos County Liquor Licensing Act 2014.

(ii) That the Respondent relies on Section 39 of the Machakos County Liquor Licensing Act 2014 in which the Alcoholic Drinks Control Act 2010 is applicable where regulations have not been established by the County.

(iii) That the Respondent has neither breached the Petitioners rights or freedoms nor has it enacted any law which is inconsistent with the Constitution.

(iv) That the Respondent has not imposed any punitive or exorbitant licensing fees as alleged but only as prescribed under the Third Schedule of the Alcoholic Drinks Control (Licensing) Regulations 2010 as it is yet to come up with its own regulations.

(v) That the licenses issued are in the prescribed form and that trading licenses are different and separate from liquor licenses as each is paid separately.

4. Parties agreed to canvass the two applications by way of oral submissions.

Applicant's submissions

5. Mr. Turunga learned Counsel for the Petitioners submitted that the Respondent has failed to come up with the prescribed form of liquor Licences as per the Respondent's liquor license laws and instead has resorted to the use of the Alcoholic Drinks Control Act 2010 yet this had been devolved to the County Governments and as a consequence the Respondent has been levying exorbitant licence fees to the detriment of the Petitioners. It was further submitted that the petitioners were not involved during the enactment of the Respondents Finance Act and thus the lack of public participation has given the Respondent the monopoly to levy very punitive licence fees rendering the petitioners businesses unviable as compared to other neighbouring Counties. Learned Counsel therefore submitted that the punitive licences be suspended in the meantime as the petition is canvassed. It was also submitted that the Respondent's demand that liquor licence fee be paid first before one obtains a trading licence be rejected by this court and the Petitioners be allowed to pay for the trading licence pending the determination of the liquor licensing fee which is disputed. The case of **GIELLA =VS= CASMAN BROWN [1973] EA 358** was cited on the basis that the Petition has met the threshold for a grant of conservatory orders pending the determination of the petition since the public interest tilts in favour of the petitioners.

Respondent's submissions

6. Mr. Nthiwa learned counsel for the Respondent submitted that the Petitioners have failed to discharge the grounds for grant of orders sought as no prima facie case with chances of success has been made. It was also submitted that the petition has not been supported by an affidavit verifying the facts as regards the alleged violations. It was further submitted that new applicants for liquor licence are not required to apply for trading licence but after one year and a renewal is sought then the relevant licences would be required to be furnished for perusal and which the Petitioners are not willing to do so thereby implying that they have been trading without licence. It was further submitted that the Respondent requires to see the old licences in order to enable the petitioners get new licences. It was also submitted that the Respondents County Finance Act had been in existence and being enacted every financial year yet the petitioners have never raised any problems with it and they are not even in the instant case seeking to declare the same unconstitutional. It was also submitted that the Petitioners request for the licence fees to be lowered would cripple the Respondent's activities towards service provision to the County residents bearing in mind that the petitioners identities have not even been revealed so as to establish the real beneficiaries of the conservatory orders being sought.

Learned Counsel also submitted that the Respondent is a constitutional body with a seal and continuity and would refund any monies in the event the petition succeeds whereas the petitioner's organization is a faceless one which would make it hard for the Respondent to pursue in the event the petition is dismissed yet prior to that they would have enjoyed conservatory orders.

Learned Counsel finally submitted that the liquor licence fees are lawful pursuant to Section 39 of the Machakos County Liquor Licence Act 2014 which allows the Respondent to resort to the Regulations under the Alcoholic Drinks Control Act 2010 and that the licence form is properly approved under the Machakos County Liquor Act 2014 and as such the applications lack merit as the balance of convenience tilts in favour of the Respondent who requires the revenue from the licence fees for provisions of services within the County.

Issues and determination.

7. I have considered the petitioners applications and the rival Affidavits as well as the submissions of the learned Counsels.

The issues I raise for determination are as follows:-

(i) Whether the Respondents Liquor Licence Fees imposed across the County are in tandem with the Machakos County Liquor Licensing Act 2014.

(ii) Whether the Applicants have satisfied the conditions warranting the grant of conservatory orders pending the determination of the petition.

8. As regards the first issue, it is noted that the main grouse the Applicants have against the Respondent is that the Liquor License fees imposed by the Respondent upon business people and persons are not only exorbitant and punitive but that they are not in consonance with the Machakos County Liquor Licensing Act 2014. The Respondent's Director at the County Directorate of Liquor Control in his replying affidavit has vehemently denied the accusation arguing that the Liquor licence fees imposed are in line with Section 39 of the Machakos County Liquor Licensing Act, 2014 which authorizes it to resort to Alcoholic Drinks control Act 2010 as they are yet to roll out the regulations under the Respondent's Liquor Licensing Act 2014. I have looked at the said Machakos County Liquor Licensing Act No.7 of 2014 which was enacted pursuant to part 2 of the Fourth Schedule to the Constitution as one of the functions and powers of the County Governments (devolved function) and which function is specified as 4(c) that deals with Liquor Licensing. Hence the Liquor Licensing was duly devolved by the Constitution to the County Governments. Section 39 of the Machakos County Liquor Licensing Act 2014 is a saving provisions as follows:-

“Without prejudice to the Provisions of this Act the Alcoholic Drinks Control Act 2010 shall continue to apply in the County, save for the matters specifically provided in this Act”

The Respondent's Director at the County Directorate of Liquor Control in his replying affidavit annexed a copy of licence fees generated pursuant to the County Liquor Licence Act 2014 which contains at the back thereof some liquor licensing policy guidelines numbered 1 – 14 for purposes of guiding persons engaging in liquor business. It would then appear that this is the true state of affairs within Machakos County until the requisite Regulations are promulgated. This would then explain the reasons why the Respondent is still relying on the Alcoholic Drinks Control Act 2010 and Regulations thereunder. Indeed every County upon the coming into force of the Constitution of Kenya 2010, is expected to have taken up fully the devolved functions. Some have done the same while others are yet to do so due to some teething problems associated with the setting up of a devolved government in the Counties. The Regulations under the Alcoholic Drinks Control Act 2010 provide for schedule on licence fees some of which have been annexed in the replying affidavit of the Respondent. Indeed the Applicants complain that the fees imposed are rather high and punitive and do not compare with neighbouring Counties. That may be the position but then the Applicants shall have to put up with the situation until the Respondent comes up with the Regulations pursuant to its County Liquor Licensing Act 2014. Ordinarily the responsibility of making laws falls on the shoulders of the County Assembly and therefore the members of the County Assembly shall be called upon to do the needful. Indeed the Respondent in its replying affidavit indicated that the Applicants have not raised any written complaints through the Respondents representatives in the sub- counties so that the matter could be addressed appropriately. Again it is noted that the Applicants have not sought to declare the said Machakos County Liquor Licensing Act 2014 unconstitutional. All they are lamenting about is that the liquor licence fees is quite high and is likely to drive them out of business. Whereas the complaints may be true, it must be noted that as long as the County laws are still in force and have not been declared unconstitutional or scrapped, the County Governments shall continue with the business or raising revenue for the purposes of rendering service to the citizenry. Hence I find the liquor licensing fees imposed by the Respondent is in tandem with its Liquor Licensing Act No. 7 of 2014.

9. As regards the second issue, the Applicants have sought for conservatory orders barring the Respondent from interfering with their businesses and further that the Respondent be compelled to issue the Applicants with trading licence without pegging the same on the Liquor Licence fee being paid as a condition. The Respondent's director at the directorate of liquor Licensing has averred in his replying affidavit that new applicants seeking for a trading licence are not required to take out a liquor licence but persons or businesses that had been conducting businesses and seeking a renewal licence are required to furnish evidence that they had the requisite licenses for the previous year. It was further the Respondent's concern that the Applicants are not willing to avail proof of the previous licences in order for the renewal applications to be effected. The Respondent is intent at obtaining the revenue from the Applicants while on the other hand the Applicants want the high licence fees be suspended in the meantime pending the determination of the petition. At this stage the Applicant is under a duty to establish that it has a prima facie case with a probability of success. The Applicants Counsel has sought reliance in the case of **GIELLA =VS= CASMAN BROWN [1973] EA 358** and maintained that the balance of convenience tilts in favour of the Applicants with regard to the suspension of the licence fees imposed by the Respondent. The principles established in the above case are three fold namely: - ***that an Applicant must demonstrate that he has a prima facie case with a probability of success; that the Applicant will suffer irreparable harm not capable of being compensated with monetary damages if the injunction sought is not granted; that in the event of doubt the court is to decide the matter on a balance of convenience.***

On the issue of whether a prima facie case has been made out, it is noted that the Petitioners petition has not been supported by an affidavit

verifying the facts and issues complained of. The petition is just alone and desolate without the requisite evidence. It remains just an allegation and nothing more. Further it has already been found in issue (i) above that the liquor licensing fees imposed by the Respondent are properly hinged and brought pursuant to the provisions of the Machakos County Liquor Licensing Act No. 7 of 2014 and therefore the fees currently imposed are *ipso facto* legitimate. Even if the licensing fees are afterwards found to be unaffordable by the Applicants, the same will still be legal and must be paid. Hence, I find the Applicant has not met the threshold of a prima facie case at this stage.

On the issue of irreparable harm, it is noted that the Respondent is a government entity with a perpetual succession and therefore if in the end the licence fees are found to have been excessive then the Respondent will readily refund the excess fees paid. The Applicants who have come under an umbrella of an association and have deliberately refused to disclose the members and numbers would not be in a position to reimburse the Respondent the license fees that will have been suspended. It would be impossible for the Respondent to trace the faceless members of the Applicant. All in all the Respondent would not have difficulty reimbursing the Applicants for any excess licence fees paid as long as receipts are presented. In any event the harm likely to be suffered by the Applicants is the excess licence fees which can be adequately catered for by the Respondent.

On the aspect of the balance of convenience, I find that the Respondent requires to obtain revenue in order to provide services within the County and if it is barred from levying the licence fees then a large section of the population is likely to suffer greater harm as compared to the individual Applicants who are based at Mavoko Town. The Respondent is required to offer services to about eight sub-counties with a huge population. I find therefore the balance tilts in favour of the Respondent and therefore the conservatory orders sought at this stage are not warranted. The Applicants have not met the threshold for an order of conservatory orders at this stage.

10. In the result, it is the finding of this court that the Applicants Applications dated 7/6/2017 and 10/4/2018 lack merit. The same are ordered dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Machakos this 20th day of July, 2018.

D. K. KEMEI

JUDGE

In the presence of:

Nthiwa - for the Respondent

Mukula - for the Applicants

Josephine - Court Assistant