



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

NELLLY 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.....PETITIONERS/RESPONDENTS

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant herein filed a Notice of Motion dated 16/10/2018 seeking for orders inter alia; that pending the hearing and determination of the petition herein the court do vacate and/or set aside its orders issued on the 10th May 2018 and 11th June 2018; that the costs of the application be borne by the Petitioner/Respondent.

2. The application is supported by the grounds on the face thereof and further by the supporting affidavit of Kovulo Kilonzo who is the Director of the Machakos County Directorate of Liquor Control sworn on even date and who deposed inter alia; that the new Machakos County Finance Act 2018 came into force on the 20/7/2018 thereby making it imperative to vacate the interim orders issued herein on 10/5/2018 and 11/6/2018 so as to pave way for the application of the said Finance Act; that the interim orders issued herein are currently being enjoyed by persons and/or bodies who are not parties to this suit and as such the interim orders should be vacated; that vacating the orders aforesaid will enable the parties to charge and pay the prescribed fees as per the new Finance Act 2018; that the 3rd petitioner herein failed to disclose that they had filed another similar Petition Number 9 of 2018 challenging the constitutionality of the new Finance Act and in which the said Act was found to be constitutional; that the Applicant has brought the application with clean hands and the request to have the orders discharged is procedurally fair; that the flat fee ordered by the court runs contrary to the prescribed fees as per the new Machakos County Finance Act 2018; that the current fees are not in any way unreasonable or untenable but rather in line with the objects and purpose of the new law; that the Applicant requires the fees in order to generate the needed funds to aid in the provision of services within the County.

3. In opposition to the application, the Respondent filed grounds of opposition dated 23/10/2018 as well as a replying affidavit by the petitioner dated 25/10/2018 the gist of which is that the court is functus officio and cannot vary its own orders. It was further claimed that the applicant has wrongly issued directions and set fees that are not backed by law as they were issued without the laid down legislative or policy framework. It was further contended that the Machakos County Finance Act 2018 came into force on 20/7/18 well after the orders were issued and hence cannot have retrospective effect. Finally, it was contended that the Applicant is continuously changing and reviewing license fees and has served a notice calling for public participation.

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

Applicant's Submissions

5. Mr. Nthiwa for the Applicant submitted that Section 60 of the Evidence Act enjoins this court to take judicial notice of all written laws and to find that the new Machakos County Finance Act 2018 which came into force on the 20/7/2018 is the current law applicable within Machakos County. He submitted that the said new law is legal since the County Government of Machakos is mandated by Article 185(1) (2) of the constitution to enact such laws. It was the learned counsel's submission that the new law has prescribed a schedule of fees to be paid by those engaged in businesses who include the petitioner herein and it has now become imperative to vacate the interim orders issued herein so that the new law takes effect as the Applicant needs the funds with which to provide services within the County. It was also submitted that the Applicant is a public entity with a perpetual seal whereas the petitioners are an amorphous group as there is no register from the Chamber of Commerce Machakos County to establish their legitimacy. It was finally submitted that the new fees shall only apply from the date of commencement and that any issues could be addressed by the petitioners with the County Assembly over the said Act. It was contention of the learned counsel that the petitioners had misled the court to grant them an order to pay minimum fees of Kshs. 2,400/= yet in their petition they were willing to pay Kshs. 5,000/-.

Respondent's Submissions

6. Mr. Muli for the Respondents submitted that the application is duplicitous and defective as it has been brought under the Civil Procedure Act. It was submitted that the interim orders were only granted on 10/5/2018 and 11/6/2018 and the only remedy is for the Applicant is to appeal. It was also submitted that the applicant has come to court with unclean hands as it has been harassing the petitioners for fees despite the existence of the interim orders and therefore the applicant's application should be dismissed.

Determination

7. I have considered the Applicant's application dated 16/10/2018 together with the rival affidavits and annexures. I have also considered the submissions of the learned counsels as well as the authorities cited. It is not in dispute that the petitioners herein filed their petition dated 15/2/2018 alongside an application seeking for conservatory orders. The said petition has already been agreed by the parties to be canvassed by way of written submissions and matter is due for mention on the 6/11/2018 to confirm filing of submissions. It is also not in dispute that conservatory orders have since been issued herein on the 11/6/2018 as follows:-

(a) *"A conservatory order be issued restraining the respondents from harassing the applicants and other bar owners lawfully running their businesses.*

(b) *The respondent be compelled to accept Kshs. 2,400/= and Kshs. 4,800/= as fees for licensing of small bars and night clubs respectively".*

It is also not in dispute that during the pendency of the above conservatory orders, the Machakos County Finance Act 2018 was enacted and which came into force on the 2017/2018 and which precipitated the filing of the present application by the Respondent/Applicant.

I find the following issues necessary for determination namely:-

(i) *Whether this court is functus officio*

(ii) *Whether the conservatory orders issued herein are now in conflict with the Machakos County Finance Act 2018*

(iii) *Whether the Applicant has presented sufficient reasons to warrant an order for vacating and/or setting aside the conservatory orders issued on the 10/5/2018 and 11/6/2018.*

8. As regards the first issue, learned counsel for the Petitioners has urged that this court is functus officio as regards the issuance of the conservatory orders. The definition of the word “*functus officio*” in relation to a court of law denotes a situation whereby the duties and functions of the court in relation to the matter in dispute have come to an end or have been fully accomplished. It is without doubt that this matter is still alive and ongoing as it has not been concluded yet. The petition is due to be determined as currently the parties herein are in the process of filing written submissions. That being the position, I do not agree with learned counsel for the petitioners that this court is already functus officio. The court has power to vary or review interlocutory orders as long as it is not yet functus officio as regards the determination of the entire suit. As of now, it is not in dispute that the petition is yet to be determined. In the case of **OKIYA OMTATA OKOITI VS COMMISSIONER GENERAL KENYA REVENUE AUTHORITY AND 2 OTHERS [2017] eKLR** Mativo J held as follows:

“The High Court has inherent jurisdiction to vacate or vary its own orders in cases where there would otherwise be an irremediable injustice but this power will only be exercised in exceptional circumstances, where justice requires the court to act or where a mistake has occurred which if unrepaired would cause a serious injustice”.

It follows therefore that this court is not functus officio at this stage of the proceedings since the petition is yet to be determined. If the Applicant in the end manages to convince this court to vary or set aside the conservatory orders then it shall be done.

9. As regards the second issue, it is noted that the conservatory orders were issued on the 10/5/2018 and 11/6/2018 and that while the said orders were in force, the Machakos County Finance Act 2018 was enacted with the date of commencement being 20/7/2018. The said Act came up with a new schedule of license fees to be paid by persons and entities carrying out businesses within Machakos County. The fees that were ordered to be paid pursuant to the conservatory orders aforesaid appear not to be in tandem with those prescribed by the new law. Indeed, Article 176 of the constitution creates the County Governments which are allowed under Article 185(1) (2) of the constitution to enact laws necessary for the effective performance of the functions and exercise of the powers of the County Government under the Fourth Schedule. The conservatory orders had been granted in the presence of the counsels for the parties. The said orders directed the petitioners to pay certain amounts of license fees to the Applicant herein pending the determination of the petition. It is not in dispute that the conservatory orders had been issued for the purposes of preserving the subject matter of the petition which is yet to be determined. If the new Finance Act has come up with new license fees then the petitioners ought to be left to enjoy the benefits of the conservatory orders pending the determination of the petition. If in the end the petition does not succeed, then the petitioners would be required to pay the difference in license fees unpaid from the date of the commencement of the Machakos County Finance Act 2018. The new law should not be allowed to oust a valid existing court order that was issued in the presence of both parties. To hold otherwise would cause great injustice to the petitioners whose petition is yet to be determined. The merits or otherwise of the petition is yet to be established. In the premises, I find that the conservatory orders issued herein are not in conflict with the Machakos County Finance Act 2018.

10. As regards the last issue, the Applicant has maintained that the conservatory orders are a hindrance to the need to generate revenue in order to render services to the county residents. The Applicant also claims that other persons who are not parties herein are enjoying and benefitting from those orders to the detriment of the Applicant. I have perused the petitioner’s petition dated 15/2/2018 and note that they have annexed a list of 87 members of Machakos Bar and Hotel Owners Welfare Group. There is a certificate of registration number 374027 indicating that the group was duly registered on the 22/12/2017. This being the position therefore it is clear that the petitioners have been disclosed and are the only ones enjoying the benefit of the conservatory orders. They are the ones who have come to court for redress. If there are other persons purporting to be members then it is not difficult for the Respondent to isolate them and proceed to levy the requisite license fees from them. As noted above, the petition is yet to be canvassed and the conservatory orders had been issued to preserve the subject matter of the dispute. The petition appears to raise some triable issues inter alia; that the petitioners seek to be represented in the Machakos County Directorate of Liquor Control; that the said Directorate was created without public participation; that some of the petitioners have been discriminated as the fees levied are not uniform yet mercantile practices require size of business to be established first. These triable issues merit a determination and that if the orders are vacated or set aside to pave way for the implementation of the new Finance Act, then the petitioners stand to be prejudiced and the determination of the petition will merely become an academic exercise. The Applicant will not be prejudiced since the petitioners are known as per certificate of registration and can be traced should the need for unpaid license fees is required; in an event the petitioners comprise a tiny fraction of the businesses community within Machakos County and the unpaid extra fees is not likely to cause a dent on the Respondent. The hearing of the petition should then be fast tracked and a determination made as a matter of priority so as to bring the dispute to a closure.

11. In the result, it is the finding of this court that the Applicant’s application dated 16/10/2018 lacks merit. The same is ordered dismissed. Parties are now directed to proceed to present their written submissions as directed on the 11/6/2018. Each party to bear their own costs.

Dated and delivered at Machakos this 6th day of November, 2018.

D.K KEMEI

JUDGE