



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

PETITION NO 57 OF 2018

IN THE MATTER OF ARTICLE 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLE 23 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES, 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010

AND

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

BETWEEN

MOSES KURIA NJUGUNA..... APPLICANT/PETITIONER

AND

THE COUNTY GOVERNMENT OF KIAMBU..... RESPONDENT

RULING

1. This petition was filed on 14th June 2018, contemporaneously with the Petitioner's motion of even date. The gist of the facts pleaded in the Petition is as follows. **Moses Kuria Njuguna** (the Petitioner) was during the material time the proprietor of a liquor outlet known as **Luxor Wines**, located at Githunguri township of Kiambu County.

2. He avers that on 21st March 2018 enforcement officers of the County Government of Kiambu (the Respondent) unlawfully seized his alcoholic goods worth KShs.90,000 and ferried them away in a motor vehicle registration **No.22CG 038**. Despite subsequent efforts by the Petitioner, the goods were not returned to him and the Respondents' officers have failed to account for all the seized goods. The Petitioner asserts that the stated actions constitute a violation of his rights to fair administrative action (Article 47) and to property [Article 40] and contravene several provisions of the **Kiambu County Alcoholic Drinks Control Act of 2018. 2**.

3. Several reliefs are sought in the Petition as follows:

“a) A declaratory order that the (Respondent) cannot and should not unlawfully seize Goods of the Petitioner and subsequently continue to hold or otherwise detain the goods illegally.

b) Order compelling the Respondent to immediately and unconditionally release goods of the Petitioner.

c) Compensation for infringement of protection of the Petitioner's right to property under Article 40 of the Constitution ."
(sic)

4. I notice that the Petition is not supported by an affidavit as envisaged by Rule 11(1) of the The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 commonly known as the **Mutunga Rules**.

5. The key prayers in the Petitioner's notice of motion are b, c and d which seek orders to compel the Respondent to unconditionally release the seized goods to the Petitioner, and pending the determination of the Petition to furnish an account or inventory in respect of the goods seized, and to preserve the Petitioner's goods. The grounds upon which the motion is based and the material in the supporting affidavit to the motion consist of a restatement of the pleadings in the Petition, namely the alleged illegal seizure of the Petitioner's goods in violation of the Petitioner's rights to fair administrative action and to property and in contravention of the **Kiambu County Alcoholic Drinks Control Act**.

6. On 27/6/18 the Respondent filed a notice of preliminary objection to the entire Petition and to the notice of motion. The substance of the objection is that this court lacks jurisdiction to entertain the Petition for several reasons. First, that under Section 66 (2) and 67 of the **Kiambu County Alcoholic Drinks Control Act** the Petitioner's grievance ought to be heard and determined by the County Appeals Committee. And further, that the Petition offends the requirement in Section 9(2) of the Fair Administrative Action Act that a party exhausts all alternative or internal mechanisms for resolution of disputes before seeking review of an administrative action in court. The Respondent sought to have the petition dismissed.

5. The preliminary objection was argued before me on 18/7/18. The Respondent's counsel, **Mr. Ranja** submitted that the Petition herein is premature as the Petitioner has not exhausted the prescribed dispute resolution mechanism under Section 66(2) of the **Kiambu County Alcoholic Drinks Control Act**. He relied on the decision of the Court of Appeal in **Mutanga Tea and Coffee Company Ltd v Shikara Ltd and Another [2015] e KLR** to support the proposition that where a mechanism or procedure for the resolution of a dispute is provided for addressing a grievance, such procedure must be adopted in the first instance. In his view, the Petition did not raise issues of a constitutional nature.

7. Mr. Ndungu for the Petitioner argued in opposing the preliminary objection that the Respondent had misunderstood the nature of the Petitioner's action. He pointed out that the Petitioner's reliance on the Fair Administrative Action Act did not transform his cause into one for the review of an administrative action. He asserted that the action before the court is brought to redress a violation of the constitutional right to property, and that, the citing of the Fair Administrative Action Act in the body of the petition was intended to demonstrate how the violation arose.

8. His position was that Section 66(2) of the **Kiambu County Alcoholic Drinks Control Act** does not oust the jurisdiction of this court. More so where an infringement of a right is involved and where an internal or alternative mechanism may not offer appropriate relief. He relied on the provisions of Section 9(5) of the Fair Administrative Action Act and the case of the **Council of County Government v Lake Basin Development Authority and 6 Others [2017] e KLR** in supporting his submissions.

9. In a brief response, **Mr. Ranja** submitted that while every suit has a constitutional underpinning, not every such suit qualifies as a constitutional matter. Conceding that the **Kiambu County Alcoholic Drinks Control Act** has not ousted this court's jurisdiction, he argued that the first port of call in a dispute of this nature is the County Appeals Committee as provided in the said Act.

10. The court has considered the parties' rival submissions and also carefully perused the pleadings on record. Two questions that fall to be determined are firstly, the nature of the dispute before the court, and secondly, whether the Petitioner is properly before this court or in the proper forum.

11. On the first question, it is necessary to state at the onset that in determining the nature of a proceeding, the court ought to pay attention to the pleadings. Pleadings constitute the Petitioner's case, including the cause of action and reliefs desired. The court will also consider the law by operation of which the cause of action arises

12. So far as the present cause is concerned, **Article 47** of the Constitution guarantees the right of every person to administrative action that is *inter alia* reasonable and procedurally fair (see **Section 4** of the Fair Administrative Action Act), while **Section 3** of the Act provides that any person whose rights or fundamental freedoms are likely to be adversely affected by an administrative action is entitled to be heard before the action or decision is taken. Under common law, the interests or rights likely to be affected may include privileges or legitimate expectations.

13. **Section 7** of the Fair Administrative Action Act essentially captures the traditional common law grounds upon which a decision or administrative action may be challenged. The grounds include illegality, bias on the part of the decider, denial of an opportunity to be heard, unreasonableness, violation of legitimate expectations of the affected party, and the like. In **Dry Associates Limited v Capital Markets Authority & Another Nairobi HC Petition No. 328 of 2011** it was held that the object behind Article 47 was to subject administrative processes to constitutional discipline, and therefore going beyond the traditional common law realm.

14. In the present constitutional dispensation therefore, it may not always be possible or desirable to establish a clear demarcation between the province of the old judicial review regime vis-à-vis the province of judicial review under the 2010 Constitution. Granted, an aggrieved party desiring to challenge or quash an administrative action may elect to approach the court under the old regime prescribed under Order 53 Civil Procedure Rules. In this regard the Petitioner has protested correctly, that this is not a classical judicial review action. Others may adopt the procedure prescribed in Section 7 of the Fair Administrative Action Act. Still others may opt to file a constitutional petition seeking judicial review orders as provided for under Article 23 depending on the cause of action. The court must look beyond the title of the pleading and consider the substance of the pleaded dispute.

15. In the instant matter, the Petitioner alleges the violation of his rights as guaranteed in Articles 40 and 47 of the Constitution by agents of

the Respondent government through the seizure of his goods. At paragraphs 14 – 17 of the Petition, the Petitioner reproduces portions of Article 47(1) and Sections of the Fair Administrative Actions Act. In particular, the Petitioner reiterates the definition of an administrative action in Section 2 of the Fair Administrative Action Act. The Petitioner also cites Article 40 of the Constitution before averring between paragraphs 19 – 27 the manner in which the Respondent’s agents contravened Sections 56(2) 63(1) of the **Kiambu County Alcoholic Drinks Control Act**.

16. It is useful to reproduce some of the averments in the Petition. Paragraph 22 states that:

“In the present circumstances, the Enforcement Officers of the Respondent stormed at the Petitioner’s business without notice on 21st March 2018; thereby contravening Article 47(1) of the Constitution and Section 4(3) of the Fair Administrative Actions Act” sic

17. Paragraphs 26 on the other hand states that:

“In light of the above clear contravention of the Constitution and statute as regards to fair administrative action, it therefore follows that the consequent detention of the Goods and property of the Petitioner is unlawful and consequently illegal”sic.

18. Then at paragraph 27:

“As regards protection of right to property under the Constitution, that right is infringed by dint of the Respondent’s actions resulting in deprivation of the right to property of the Petitioner through such means that do not include those exempted under Article 40(3) of the Constitution.” Sic

19. The subject matter of this Petition are the goods allegedly unlawfully seized from the Petitioner by agents of the Respondent. The substantive reliefs sought, in the Petition including the declaratory prayer (a) relate to the said goods.

20. As I understand the averments in the Petition, particularly as contained in paragraph 14 – 18 and 22, the Petitioner perceives the action complained of as an administrative action as defined in Section 2 of the Fair Administrative Action Act which has affected his legal rights or interests. The grounds upon which the decision/action of the Respondent’s agents is deemed by the Petitioner to be unlawful are:

- a) failure to give written reasons for the actions
- b) failure to give prior and adequate notice of the action
- c) the agents of the Respondents contravened provisions of the **County Government Alcoholic Drinks Control Act** as to identification, preparation of full seizure inventory.

21. Similarly, the prayers sought are also consistent with orders which may be granted in judicial review proceedings under Section 11 of the Fair Administrative Action Act.

22. I would therefore disagree with the Petitioner’s advocate that the present action cannot be categorized as one for the review an administrative action. The fact that the impugned action impacts upon the right to property does not of itself transform the cause into a constitutional matter. The ineluctable conclusion from a reading of the Petition itself is that the Petitioner’s action is predominantly an action brought for the purpose of seeking redress in respect of an administrative action that is alleged to be illegal.

23. The provisions of the Fair Administrative Action do apply therefore to the matter at hand as the Petitioner himself has demonstrated in his pleadings. Indeed, a review of the pleadings herein indicate beyond doubt that the Petitioner’s case is primarily one brought under the provisions of the said Act. The pleadings speak for themselves and it matters not whether the proceedings are described or presented in the format of a constitutional petition or judicial review.

24. Moving on to the second question, the Petitioner’s grievance relates to the alleged violation of his rights under articles 40 and 47 of the Constitution. The Petitioner has strongly defended his action as a constitutional petition that ought to be heard before this court therefore and not before the County Appeals Committee.

25. Section 66 of the **Kiambu County Alcoholic Drinks Control Act** provides as follows:

“1). There is established the County Alcoholic Drinks Appeal Committee

2). The County Appeals Committee shall be responsible for –

- a) receiving and hearing appeals from decisions made by any person or committee under this Act.**
- b) Carrying out any other functions as may be assigned by the Governor.”**

26. Under Section 67 of the Act, a person aggrieved by a decision made under the Act may appeal in writing to the County Appeals

Committee within 30 days of the decision. The section further sets out the procedure for the processing of the grievance once received.

27. Part of the Petitioner's complaint is that the Respondent's agents acted in contravention of the **Kiambu County Alcoholic Drinks Control Act** in carrying out the seizure complained of. The Petitioner asserts that the sections above are not couched in mandatory terms and that an aggrieved party may elect to apply to the High Court or to avail himself of the procedure prescribed under the County legislation, more so where the mechanism under the County act may not address his grievance adequately.

28. **The Council of Governors** case relied on by the Petitioner involved the determination of the constitutionality of several Acts of Parliament. The court found that only the High Court was clothed with the jurisdiction to hear and determine such a matter and therefore admitted the dispute. The decision is therefore distinguishable from the present one.

29. The facts of the case in **Mutanga Tea and Coffee** compare better with those herein. The Plaintiff therein was aggrieved by decisions made inter alia by a local authority under the Physical Planning Act in connection with a development it was opposed to. Eschewing the mechanism for redress stipulated in Section 29 of the Physical Planning Act, the aggrieved party filed an action in the High Court. The action was struck out in *limine* on account of a jurisdictional challenge raised by the Defendants by way of a preliminary objection. The Court of Appeal dismissed the appeal brought by the aggrieved party, observing that the Physical Planning Act did not envisage the possibility that some aggrieved parties could sidestep the dispute resolution mechanism under the Act to bring their grievances directly to the High Court.

30. I find it necessary to quote in *extenso* the reasoning of the Court of Appeal in that case :

“The real question then becomes whether an aggrieved party can ignore these elaborate provisions in both the PPA and the EMCA and resort to the High Court, not in an appeal as provided, but in the first instance.

This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. ***SPEAKER OF THE NATIONAL ASSEMBLY V. KARUME* (supra)**, was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by the Constitution. In granting the order, the Court made the often-quoted statement that:

“[W]here there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

(See also ***KONES V. REPUBLIC & ANOTHER EX PARTE KIMANI WA NYOIKE & 4 OTHERS* (2008) 3 KLR (ER) 296**).

It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, *including* reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “*including*” leaves no doubt that Article (159)(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail

construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner. In ***RICH PRODUCTIONS LTD. V. KENYA PIPELINE COMPANY & ANOTHER, PETITION NO. 173 OF 2014***, the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

“The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not.” (emphasis added)

31. While the **Mutanga Tea and Coffee** dispute was brought as a suit in the High Court, the principles stated therein are also applicable to a constitutional petition and the Court Appeal in the quoted portion endorsed the decision of the High Court in declining a petition for sidestepping the dispute resolution mechanism provided in relevant statute.

32. This court had occasion to draw parallels between the appeal mechanism prescribed in Section 66 of the **Kiambu County Alcoholic Drinks Control Act** and the mechanism provided under the Physical Planning Act in the case of **Okiya Okiiti Omtata v County**

Government of Kiambu [2018] e KLR being a petition challenging the constitutionality of the former County legislation. The court observed that:

“Similar appeal mechanisms are found in many national statutes including the Physical Planning Act and are consistent with the spirit of the Constitution, especially Article 47 and also the Fair Administrative Action Act. The Court is unable to appreciate any real or special fears the provision under consideration raises in respect of regulation of alcoholic drinks”.

33. As was also stated in **Bernard Murage v Fire Service Africa Ltd and 3 Others [2015] e KLR**:

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be first pursued.”

34. An exhortation issued in the judgment of **Lord Diplock in Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265** which is cited by superior courts in this jurisdiction is also relevant here:-

“The notion that whenever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by... the Constitution is fallacious. The right to apply to the High Court ... for redress when any human right or fundamental freedom is or is likely to be contravened, is diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action ... the mere allegation that a human right of the Applicant has been or is likely to be contravened is not itself sufficient to entitle the Applicant to invoke the jurisdiction of the Court... if it is apparent that the allegation is frivolous, vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”(emphasis added)

35. The legal infrastructure in Kenya comprises of the Constitution at the apex and other laws made by Parliament and by County Governments; all must be read together as part of the same legal ecosystem. This principle was affirmed in **Alphonse Mwangemi Munga and 10 Others v Africa Safari Club (2008) e KLR** where the court held that:

“The Constitution is the Supreme Law of the land but it has to be read with other laws made by Parliament and should not be construed to be disruptive of other laws in the administration of justice ... parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not.”

36. The Petitioner admits that there is a redress mechanism provided under the **Kiambu County Alcoholic Drinks Control Act**. He has not demonstrated to this court any exceptional circumstances to justify a departure from that procedure. Or that the forum in the Act is inadequate for redressing his grievance, which in my view appears fairly straight forward and ordinary. Under Section 67(a) the County Appeals Committee has wide powers. The County Appeals Committee is clearly intended to operate as a quasi-judicial body and is required to hear and determine appeals within 30 days. It is comprised of members drawn from different sectors of society some of them experts. By dint of Article 165(6) of the Constitution the High Court retains supervisory jurisdiction over any person or body exercising a judicial function except for superior courts.

37. The Petitioner’s chief complaint is the impounding of his goods by the Respondents agents, hence the prayers in the petition for the restoration of the goods. The wheels of the administration of justice would be perennially clogged if this court were to entertain each and every grievance emanating from the implementation or enforcement of the **Kiambu County Alcoholic Drinks Control Act**. Moreover, such usurpation of the clear function of the established dispute resolution mechanism would be inconsistent with the letter and spirit of Articles 159 (2) (b) and (c) and 165(6) of the Constitution and the county legislation, in this case the **Kiambu County Alcoholic Drinks Control Act**.

38. For all the foregoing reasons, it is my considered view that the Petitioner was in the first instance, bound to seek redress through the mechanism provided under section 66 and 67 of the **Kiambu County Alcoholic Drinks Control Act**. That is also the import of Section 9(2) of the Fair Administrative Action Act upon which the Petitioner has pleaded his case. In the circumstances, the court upholds the Respondent’s preliminary objection.

The Petition is hereby struck out with costs to the Respondent.

DELIVERED AND SIGNED AT KIAMBU THIS 16TH DAY OF NOVEMBER, 2018.

C. MEOLI

JUDGE

In the Presence of:

Mr. Ndungu for the Petitioner

Mr. Ranja for the Respondent

