



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

PETITION NO. 3 OF 2018

BOMET COUNTY BAR AND WINES

OWNERS ORGANIZATIONPETITIONER

VERSUS

COUNTY GOVT OF BOMET.....1ST RESPONDENT

COUNTY EXECUTIVE MEMBER FOR

FINANCE AND ECONOMIC PLANNING.....2ND RESPONDENT

BOMET COUNTY ASSEMBLY.....3RD RESPONDENT

OFFICE OF THE DIRECTOR OF

PUBLIC PROSECUTIONS.....4TH RESPONDENT

INSPECTOR GENERAL OF POLICE.....5TH RESPONDENT

HON. THE ATTORNEY GENERAL6TH RESPONDENT

RULING

The application dated 28th March 2018 seeks the following orders:-

- (a) Spent
- (b) That the Respondents be restrained from interfering and or stopping the applicants from carrying out their businesses pending the hearing and determination of this application interpartes.
- (c) That an exparte conservatory orders do issue against the police officers in Bomet County restraining them from harassing, arresting and charging the Respondents pending the hearing and determination of this application interpartes.
- (d) That the Respondents be restrained from stopping the applicants from carrying out their businesses pending the hearing and determination of this petition.
- (e) That a conservatory order do issue against the police officers in Bomet County restraining them from harassing, arresting and charging the Respondents pending the hearing and determination of this petition.
- (f) That the County Police Commander do ensure compliance with the orders herein.
- (g) That pending the hearing and determination of the petition herein a conservatory order do issue restraining the principal magistrate's court in Bomet from proceeding with criminal case no. 302 of 2018. R- vs- Anna Koech.
- (h) That pending the hearing and determination of the petition herein a conservatory order do issue restraining the principal magistrates court Sotik from proceeding with

- (1) Criminal Case No. 454 of 2018 – R-vs- Mercy Cherotich
- (2) Criminal Case No. 502 of 2018 – R –vs- Caren Soi
- (3) Criminal Case No. 509 of 2018 – R- vs- Rose Chepkirui
- (4) Criminal Case No. 510 of 2018 – R –vs- Monicah Chirchir

(i) That a permanent injunction do issue restraining the Respondents from harassing, arresting and charging the members of the petitioner pending hearing and determination of this petition.

(j) That pending the hearing and determination of the petition the operations of part V first schedule (Alcohol Licence Fees) of the Bomet County Finance Act 2017 be suspended.

The grounds are that:

(a) That the Alcoholic Drinks Act (No 4 of 2010) is in conflict with Bomet county Alcoholic Beverages Control and Management Act 2014.

(b) That the Respondents have been applying both legislations interchangeably thus offending the petitioner's legitimate expectations.

(c) That the petitioner is at a loss as to which institutions are responsible for the granting of licences since the Respondents have failed to gazette or publish the names of the applicants and the types of licences applied for in a gazette or at the designated offices.

(d) That the respondents have been using the national legislation to regulate alcohol within the County despite the fact that the County Assembly is constitutionally mandated to make legislations to regulate liquor licence within the county.

(e) That the Bomet County Alcoholic Beverages Control and Management Act 2014 provides for the establishment of the subcounty alcoholic beverage control committees chaired by the sub county administrators and is mandated to issue licence in accordance with the said Act.

(f) That S. 8 of the Alcoholic Drinks Control Act 2010 established the District Alcoholic Drinks Regulations committee chaired by the District Commissioner and is mandated to issue licences in accordance with the said Act.

(g) That the application for a licence under the Bomet Alcoholic Beverages Control Management Act provides for appeal to the Board.

The first Respondent has not established a board to allow members to appeal to.

(h) That the Finance Act 2017 contravenes the provisions of article 190(2) of the constitution and S.133 of the Public Finance Management Act 2012.

(i) That the operation of the said Acts shall have serious financial implications on the petitioner.

(j) That the petitioner aware of the challenges and irregularities approached the Respondents with a view of settling the matter out of court.

(k) That the petitioner approaching the 1st, 2nd and 3rd Respondents with a proposal for consideration on 21/3/2018.

(l) That without notices the Respondents proceeded to close the petitioners places of business.

(m) That the Respondents have verbally threatened to continue arresting and charging the petitioner in court for operating without liquor licence.

(n) That the deadline issued for obtaining liquor licence was 31/3/2018.

(o) That the petitioner risk arrest for running bar/wines business without licence.

(p) That the petitioner has an arguable case with high probability of success.

This application is opposed. The 1st and 2nd Respondents in their replying affidavits contend that the application is to misconceived and bad in law on the grounds that:-

(a) The applicants allege that eth alcoholic Drinks Control Act 2010 violates the mandatory provision of article 191 of the constitution and the Finance Act 2017 and that the Finance Act contravenes the provisions of article 190(2) of the Constitution

without specifying with clarity the manner and nature of the violation and the extent the application and the petition is fatally defective and incurable as it offends cardinal principles of framing constitutional petitions and applications.

(b) The Notice of Motion application and the petition as framed does not with clarity and particularity disclose the nature of violation of the petitioners rights to warrant a comprehensive response from the Respondents rendering it fatally defective and incurable.

(c) The application is challenging the actions of the licensing committee which is an administrative action by way of constitutional petition and not a judicial review.

(d) The application and the petition is premature as its brought before a constitutional court in the first instance without expediting the available remedies and procedures since the actions complained of are administrative in nature and there are several avenues including judicial review under the fair administrative action Act 2015.

S. 7, 8 and 9 which was enacted pursuant to article 47(3) of the constitution.

(e) The appellants application raises general issues without disclosing the manner in which the Finance Act 2017 and the Bomet County Alcoholic Beverages Act 2014 violates the constitution with clarity save for recitation of various provisions of the constitution.

(f) That there exists other remedies available at private law to address the issues raised by the petitioners including petition to the County Assembly during the formulation of the Finance Act through public participation where they can raise issues of their concern.

(g) The applicants application is an attempt to amend the Finance Act 2017 through courts intervention whereas they had every opportunity to raise their grievances through public participation.

(h) The applicants application for licences have not been denied as alleged but is being considered on a case to case basis by the committee concerned.

(i) The applicants application is academic in nature since the petitioners are challenging the Finance Act 2017 which will lapse by end of May 2018.

(j) That courts presume the legality of acts until proved otherwise by those alleging the unconstitutionality and in the instant case the petitioners have not with clarity proved how the Finance Act 2017 is in violation of the Constitution.

(k) Without prejudice, even if the applicants allegation that their application for licences was denied was true, their grievances can best be addressed through a judicial review application by way of mandamus or certiorari pursuant to the fair administrative actions act 2015 and not through a constitutional application.

(l) That the application does not with precision disclose how the Bomet County Finance Act violates article 190(2) of the constitution and S. 133 of the Public Finance Management Act 2012 as required to enable the Respondents make a substantive and definite response and therefore fatally defective and incurable.

(m) That any provision in the Alcoholic Drinks Control Act (No.4 of 2010) and the Bomet County Alcoholic Beverages Act 2014 must be interpreted in a manner that does not invalidate the other provision in accordance with article 191 (6) of the constitution.

(n) That courts have presented the legality and constitutionality of legislations taking into account the object and purpose of enactment and the Historical basis. The Bomet Alcoholic Beverages Act was enacted to protect the general public from harm due to unregulated liquor.

5. That the applicants application in paragraph (h) alleges that the Finance Act 2017 contravenes the provisions of article 190 (2) of the constitution and S. 133 of the Public Finance Management Act 2012 without specifying with clarity the manner in which the Finance Act 2017 is in violation of the said provisions of the law and in total breach of the well- established principles of framing constitutional petitions and applications.

6. That the petitioners have not demonstrated by way of any cogent evidence that there exist no appeals board and neither have they demonstrated that they have attempted to appeal against any decision of the committee.

7. That the application and petition is in violation of the constitution of Kenya (Protection of rights and fundamental freedoms) practice and procedure rules 2013,rule 10(2) paragraph (a) (b) (c) (d) (e) (f) (g) by not disclosing the nature of injury suffered or likely to be suffered by the petitioners and (iv) by failing to give details of regarding the criminal case involving the petitioners and which is directly related to the matters in issue in the petition.

8. That the applicants alleges in paragraph (l) of the application that the said Acts have financial implications on the petitioner without specifying the acts in question and the nature of financial implications suffered by the petitioners.

9. That the applicants in paragraph J alleges that there have been several meetings and correspondences with the Respondents with intent to settle the matter out of court. This contention is misconceived since once a Finance Act has been enacted it cannot be subject to a discussion

with intention to suspend or amend the same without following the law.

10. That the applicants application in paragraph (k) alleges that they presented their proposal on the amount to be charged in respect of the liquor licences to the Respondents on 21st March 2018 and surprisingly on 28/3/2018 before their proposal was conclusively considered they ingeniously brought this application and the petition.

11. That the Respondents have not forced the petitioners to close their businesses as alleged in paragraph l) of the application and the petitioners are put to strict proof thereof.

12. That the applicants allegations in paragraph (m) of the application is denied save that the petitioners are not exempted from operating without licences just like others in the same liquor licences.

13. That the 1st and the 2nd Respondents have an obligation to protect consumers by regulating liquor business hence the prayer by the petitioners to suspend the operation of part V- First Schedule (Alcoholic Licence Fees) of the Bomet County Finance Act 2017 is against public interest.

14. That public interest supersedes private interest and that the petitioners interest must be weighed against that of the general public.

15. That the prayers sought by the petitioners in the application and in particular paragraph 21 of the supporting affidavit is not tenable. The court cannot sanction an illegality by allowing the petitioners to operate without licences.

16. That it will be against public interest and policy for the court to allow the petitioners to operate without licences which is an offence under S. 4(2) of the Bomet County Finance Act 2017 and courts cannot sanction an illegality.

In respect to the 3rd Respondent and in the replying affidavit of David Shadrack Rotich

It is deponed that the 3rd Respondent adhered to the provisions of the constitution and the County Government Act in so far as the enactment of the Bomet County.

Alcoholic Beverage Control and management Act 2014 and the Bomet Finance Act 2017 are concerned.

5. That the process was undertaken in compliance with S.21 to 25 of the County Governments Act.

6. That the County Assembly is mandated to enact county legislation pursuant to article 185 of the Constitution of Kenya 2010.

7. That its clear that the law making process is an exclusive function and or mandate of the 3rd Respondent and that implementation thereof rests with the 1st and 2nd Respondents.

8. That the Bomet County Alcoholic Drinks Control Act of 2014 was enacted by the county Government of Bomet in accordance with the constitutional mandate under part 2 of the fourth schedule specifically, public entertainment and public amenities including liquor licensing.

9. That the Respondents have the mandate to impose conditions for licensing of liquor, including, sale production, distribution, consumption and advertisement of liquor.

10. That the enactment of the said legislation complies with articles 185(1) and (2) of the Constitution of Kenya which enables the County Assembly to enact such regulations.

11. It is the contention of the 3rd Respondent that the national Government does not regulate licensing of liquor under the constitution and that in the absence of licensing mandate in the National Government, there cannot be any conflict of laws between the National legislation and County legislation.

12. That under article 191(1) of the constitution, conflict of laws would arise only where there is concurrent jurisdiction of both the National Government and County Government on a matter.

13. That liquor licensing is an exclusive mandate of the County Governments have no conflict.

14. That no section f the Bomet County Alcoholic Drinks Control Act which is in breach of the National Alcoholic Drinks Control Act has been cited.

15. That the law is designed such a way that it does not outs the National legislation in alcoholic control.

16. That these issues have been determined by the courts.

Petition No. 32 Meru HCC

Meru Bar & Wines and Spirits Self Help Group –vs- County Government of Meru

17. That all legislation enjoy the general presumption of constitutionality and its upon the person alleging unconstitutionality that has to prove same.

18. That the County legislation has set out in S.3 the objectives and purpose it seeks to achieve including the protection of health protection of minors from accessing alcohol.

19. That the County Act went through the necessary public participation process before it was enacted. This was through advertisements of public consultative meetings, newspapers and radio stations of local and National Circulation. This was as envisaged under article 10 and 196 of the Constitution.

20. That the County Assembly's position is that both legislations have since taken effect having been given assent by the Governor and gazette by the Kenya Gazette.

Issues for determination

In the celebrated case of Giella –vs- Cosman Brown 1073 EA 358, it was held:-

1. That an applicant must show a prima facie case with a probability of success.
2. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable damage or injury, which would not be compensated by an award of damages.
3. If the court is in doubt it will decide an application on a balance of probabilities.

On the issue whether the applicant has an arguable case with a probability of success

The applicant contends that article 185(2) of the Constitution mandates the 3rd Respondent with the function of making laws for the better performance of the County Government.

The 3rd Respondent enacted the Bomet County Alcoholic Beverages Act which same has been selectively and interchangeably used with the Alcoholic Drinks Act 2010.

It is further contended that article 191(3) of the Constitution is that the effect that National legislation shall prevail over County Assembly, only, if the National legislation provides for a matter that cannot be regulated effectively by legislation enacted by individual counties.

It is further contended that the Respondents have been charging the members of the petitioner using National Legislation in spite of the existence of county legislation on liquor licensing.

Further that Article 190 (2) of the constitution provides that the County Government shall operate financial management systems that comply with any requirements prescribed by the National Legislation.

That S.133 of the Public Finance Management Act provides that not later than ninety days after the passing of the Appropriation Bill, the county Assembly shall consider and approve the Finance Bill with or without amendments.

It is the contention by the applicants that the Respondents have been using Finance Act 2017 for the Financial year 2016/2017 to levy charges and impose taxes on the applicants through a new act ought to have been enacted as per the provisions of article 190 (2) of the Constitution and S. 133 of the Public Finance Management Act.

It is submitted that the Finance Act being used lacks the legal force required and violates the mandatory provisions of the Constitution and the Public Finance Management Act thence the petitioners rights under the Constitution have been infringed.

On the issue of irreparable injury not adequately compensated by damages

It is submitted that there had been negotiations between the petitioners and the Respondents but suddenly the petitioner businesses were shut without good reasons and without right to appeal as there is no board so established. Counsel relies on article 47 (2) of the Constitution which provides that where a right of fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Further that article 35(1) (b) of the Constitution guarantees every citizen the right to access to information held by another person required for the exercise or protection of any right of access to information held by another person required for the exercise of any right or fundamental freedom.

It is contended that the threats by the Respondents of arrest and charging them infringes the petitioners right to freedom and security as enshrined in article 29(a) of the Constitution.

Counsel also relies on the provisions of article 10 of the Constitution which sets out the national values and principles of government that bind all state officers, state organs, public officers and all persons whenever they apply or interpret the Constitution, enact, apply or interpret any law made or implement public policy decisions.

On the issue of damages counsel relies on the case of *Olympic Sports House Limited –vs- School Equipment Centre Limited (2012) eKLR*

It is submitted the petitioner has a right to seek injunctive orders since it has a prima facie case with probability of success and that it has demonstrated that it will suffer irreparable harm which will not be adequately compensated and that the balance of convenience tilts in its favour.

In this petition, the prosecution does not deny that it charged the petitioners for selling liquor without licence contrary to S.7 (1) as read with S 62 of the Alcoholic Drinks Control Act No. 4 of 2010.

The criminal cases are

- (1) Sotik PMCC No. 502 of 2018 R –v- Caren Soi
- (2) Sotik PMCC 509 of 2018 R –vs- Rose Chepkirui
- (3) Sotik PMCC No. 501 of 2018 R –vs- Monicah Chirchir

It is the contention by the prosecution that the petitioner has not demonstrated how their rights have been infringed.

The prosecution relies on the case *of Naivasha Constitutional petitioner No. 3 of 2016* which is said to be similar to the present one.

The 5th and 6th Respondent submits that the petitioners have been running illegal businesses for failure to acquire licences and further that they have been selling liquor to students who are below the age of 18 years.

It is also contended that the licences attached to the application are illegal as they do not show the duration of their validity whether they are for wholesale business or retail.

Further that the petitioners have stated that they have applied for licences but they have never been told the reasons for denial. Hence, they are operating without licences.

The Law, Analysis and Conclusion

In this petition there have been several consents. The first one is dated 6/4/2018 whereby the petitioners were allowed by consent to continue operating their businesses as usual pending the hearing and determination of the application dated 28/3/2018 and there was an order of stay for the criminal cases in Sotik Law courts. Thereafter there were numerous mentions.

On 21/6/2018 the 1st, 2nd and 3rd Respondents entered into a consent with the petitioners that pending hearing and determination of the petition the petitioners do pay 50% of the applicable licence fees as provided for in the current Finance Act as passed by the 3rd Respondent.

2. That the petitioners should pay same within 60 days from the date of the consent which was 29/6/2018.

3. The police were restrained from arresting the petitioners within 60 days from that date.

The 60 days window period agreed in the consent has since elapsed. The petitioners had agreed to pay 50% of the applicable licence fees as provided for in the current Finance Act as passed by the 3rd Respondent. They cannot blow hot and cold at the same time.

They cannot argue and challenge the Bomet County Finance Act 2017 which they have already agreed is applicable as passed by the 3rd Respondent. What appears to be the bone of contention is what the petitioners feel are high licence fees.

It is not in dispute that they had applied for licences but had failed to raise the requisite fees. This present petition appears to be in all fours with the case of Naivasha Constitutional Petition No. 3 of 2016 whereby the Judge held,

“By his own documents his liquor distribution operation were not licensed under the relevant law, namely the Alcoholic Drinks Control Act or the respective county legislation... therefore article 47 of the constitution has no relevance to his grievance so far as the licence is concerned...”

Clearly any activities carried out in breach of the law cannot be justified as a lawful exercise of a Constitutional right”.

It is the contention that Alcoholic Drinks Act 2010 violates the mandatory provisions of article 191 of the Constitution.

Article 191 of the Constitution provides:-

(1) “This article applies to conflicts between national and county legislation in respect of matters within the concurrent jurisdiction of both levels of government.

(2) National legislation prevails if –

(a) The national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or

(b) The national legislation is aimed at preventing unreasonable action by a county...”

It is the contention of the petitioners that the Finance Act contravenes the provisions of article 190 (2) of the Constitution and S. 133 of the Public Finance Management Act 2012.

Article 190 (2) of the Constitution provides:- **“County Government shall operate financial management systems that comply with any requirements prescribed by national legislation”.**

S. 133 of the Public Finance Management Act provides:- **“Not later than ninety days after the passing of the appropriation bill, the County Assembly shall consider and approve the Finance bill with or without amendments”.**

In the court of appeal case of **Mumo Matemu –vs- Trusted Society of Human Rights Alliance – civil Appeal No 290 of 2012**, followed the principle in **Anarita Karimi Njeru -vs- R (1976-1980) KLR 1272** that requires that constitutional petitions be pleaded with reasonable precision.

It was not pleaded with reasonable precision how the Alcoholic Drinks Control Act 2010 violated the mandatory provisions of article 191 of the constitution nor was it pleaded with reasonable precision how the Finance Act was in contravention with the provisions of article 190 (2) of the constitution and S. 133 of the Public Finance Management Act 2012.

It was incumbent upon the petitioner to plead with clarity and particularity and state in what manner an act omission or the impugned provision of the law violates the constitution.

In the case of **Bernard Murage –vs- Fine Service Africa Limited (2015) eKLR** it was observed that not every violation of the law must be raised before the High Court as a constitutional issue. Where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first. In the present petition the issue is that of denial of licences which is an administrative one falling under the Fair Administrative Action Act 2015.

In the case of **John Kinyua Munyaka & 11 others –vs- County Government of Kiambu** reiterated the holding in the Indian case of **Hambada Wakhan –vs- Union India Air 1960 AIR 554** where it was held :-

“In examining constitutionality of a statute, it must be assumed that the legislature understands and appreciates the needs of the people and the law it enacts is directed to problems which are made manifest by experience and the elected representatives assembled in a legislative enact laws which they consider to be reasonable for the purpose for which they are enacted.

Presumption is therefore in favour of constitutionality of an enactment”.

The preamble to the Bomet County Alcoholic Beverages Control and Management Act 2014 read thus:-

“An act of the County Assembly to provide for the regulation of the production, sale and consumption of alcoholic beverage and connected purposes”.

It is a fact of common notoriety that there is high and unprecedented consumption of illicit liquor in the County of Bomet with serious ramifications on the health of the residents.

This is a national malaise and prompted the enactment of the Alcoholic Drinks Control Act 2010. These two Acts are complimentary and are geared towards the protection of health of the citizens of this county.

I am of the considered view that both laws are constitutional. The County Government of Bomet properly exercised its legislative mandate as envisaged under article 185(1) of the constitution.

In conclusion

I have considered the application and this petition and find that it has no merit. It is dismissed. Each party to bear its own costs.

Ruling delivered dated and signed this 10th day of December 2018 in the presence of Mr. Kipngetch for the applicant

M. MU YA

JUDGE

14/12/2018

Mr. Barasa – We pray that it be supplied to us.

Court – Certified copies of judgment to be supplied to the parties.

M. MUYA

JUDGE

14/12/2018