



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO 453 OF 2016

MUIMARA ESTATE RESIDENTS ASSOCIATIONPETITIONER

VERSUS

THE NAIROBI CITY COUNTY.....1ST RESPONDENT

LIQUOR LICENSING COMMITTEE EMBAKASI SOUTH.....2ND RESPONDENT

KARIUKI KIMITI.....3RD RESPONDENT

RULING

Muimara Estates Residents Association, the petitioner filed a petition dated 24th October 2016 against Nairobi City County, Liquor Licensing Committee, Embakasi South, and Kariuki Kimiti (Respondents) wherein they sought a number of declarations. On the same day Petitioner took out a motion on notice brought under **Articles 23(3), 28, 31, 42, 53 and 47** of the Constitution and sought a conservatory order restraining the 1st and 2nd respondents from licensing the third respondent or any other person to operate a bar, club or alcoholic selling business within Muimara Estate in Nairobi, pending the hearing and determination of the petition. The application is supported by an affidavit by **Ngei Matibo** sworn on 24th October 2016.

The applicants who are residents of a gated residential Community Estate, argued that the presence of a bar, club or alcoholic selling business within the estate, violates their constitutional and fundamental right to privacy, dignity and healthy environment. It was stated that the residents living in the estate have families and school going children hence the presence of the bar is negatively affecting their lives.

The petitioners blame the 1st and 2nd respondents for allowing the 3rd respondent to operate a bar in a residential area which is infringing on the residents’ rights and which is also a breach of the 1st respondents laws especially **section 11(1)(a) and (b)** of the Nairobi City County Alcoholic Drinks Control Act, 2014.

The applicants state that the bar plays none stop loud music, patrons make noise while enjoying themselves, to the discomfort of the residents and their families, that the bar attracts all kinds of people to the estate which not only disrupts the residents comfort and normal life but is also a security risk to the residents..

The petitioners also faulted the respondents for not seeking their views while considering licensing the

operation of a bar within the estate. They therefore prayed that orders be granted restraining issuance of a license for operating a bar business in the estate until the petition is heard and determined. On being served, the 1st and 2nd respondents' advocates filed grounds of opposition dated 11th November 2016 supporting the applicant's case. According to the grounds, the 1st and 2nd respondents have never issued a liquor license in a residential area, the 3rd respondent is operating an illegal business within a residential area, the 1st respondent has never issued approval, to the structure in which the bar business is being conducted, the illegal business is a health and environmental hazard to the residents of the estate and that the 3rd respondent is in breach of the law, They also denied that any documents held as licenses for bar operations were authentic.

The 3rd respondent filed grounds of opposition through the firm of Mukunga, Wathome & Associates Advocates, dated 16th December 2016. The 3rd respondent stated that he is only a landlord and not the holder of liquor licence or proprietor of the bar business in the estate. He therefore stated that he was wrongly enjoined in this case.

Parties filed written submissions and opted to have the application disposed of by way of those written submissions. Mr. Musyoki, learned Counsel for the petitioners submitted that the bar business in the estate is causing problems to the families living in the estate. He submitted that noise from patrons and loud music played in the bar is a health hazard for the residents and a breach of the residents' privacy, dignity and security.

Learned Counsel submitted that the 1st and 2nd respondents have violated the applicant's rights to a peaceful residence, that they violated the law in granting a liquor licence to operate a bar in a residential estate which contravened section 11(1)(a) and (b) of the Nairobi City County Alcoholic and Drinks Control Act, 2014. According to counsel, this threatens the petitioners' wellbeing their children, families and has injured their dignity. He referred to the case of **A.M.N. v the Hon Attorney General [2013] eKLR** for the submission that human dignity is at the centre of protection of human rights so as to preserve the dignity of individuals and communities and to promote social justice and realization of potential of all human beliefs.

Counsel submitted further that the presence of the bar violates the children's rights under Article 53(d) of the constitution. Mr Musyoki referred to the case of **Satrose Auma & Others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & Others [2013]eKLR, Leland I. Salano v Intercontinental Hotel.[2013] eKLR** and **Peter Kinuthia Mwaniki & Others v Peter Njuguna Gicheha[2006] eKLR** to support his position. He prayed that the motion be granted.

The 1st and 2nd respondents' counsel filed written submissions dated 26th January 2017. The submissions were in support of the grant of the motion. According to the 1st and 2nd respondent's counsel, the 3rd respondent is operating business without a license contrary to section 7(2)(b) of Nairobi City County Alcoholic Drinks Control Act, 2014. Counsel maintained that no licenses are granted to operate liquor businesses in residential areas, that they have not granted a license for that purpose, that the premises in which the alleged business is conducted was not approved by the 1st respondent and for that matter it is an illegal structure. They however argued that they are none suited and prayed that their names be struck out from the petition.

I could not traced written submissions on behalf of the 3rd respondent on record and the court therefore proceeded on the premise that no submissions were filed on his behalf. On 14th November 2016, another party **Martin Mutegi** was enjoined in these proceedings as an interested party but there is neither a replying affidavit nor submissions.

I have considered the application, supporting affidavit, grounds of opposition and submissions by Counsel. I have also considered the authorities cited. The applicants are seeking orders restraining operations of a bar within the estate. The complaints are that selling of alcoholic drinks within the estate has a negative impact on their children, families as well as environment health of the residents. The

residents argue that the respondents have infringed on their fundamental rights of dignity, privacy and wellbeing.

The 1st and 2nd respondents have stated that they have not licensed any alcoholic selling business in the estate. The 3rd respondent has also stated that he is only the owner of the premises but is not the owner of such business. He says that Martin Mutegi is the tenant, but Martin Mutegi, the alleged tenant has said nothing about the petitioner's complaint.

The right to privacy, dignity and healthy environment are constitutional rights. **Article 28** of the constitution provides that every person has inherent dignity and the right to have that dignity respected and protected. **Article 42** on the other hand provides that everyone has a right to a clean and health environment which right is enforceable under **Article 70** of the constitution. Air pollution in form of noise is an infringement to the right to a clean and health environment. An applicant who seeks enforcement of the right to environmental health does not have to prove or demonstrate that he has suffered loss or injury. See **Article 70(3) of the Constitution**.

Section 11 of the Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014 Provides where relevant as follows;

i. The sub-county committee shall not grant a new licence for the sale of an alcoholic drink to be consumed on the premises unless the sub county committee is satisfied:-

a. That it would be in the public interest for provision to be made for the sale of alcoholic drink for consumption on the premises in the particular locality in respect of which the application is made, and that the number of such premises in respect of which such licences have already been granted is insufficient for the requirement of the locality given the permitted maximum number of such premises as shall be prescribed by law; provided that no licence shall be granted to sell alcoholic drinks in any institution for basic education including Primary or Secondary School or any residential area as have been demarcated by or under the relevant written laws" (emphasis)

There is no denial that the petitioners live in a residential area. There is no denial either that as a residential area, the law is clear that there should be no license of selling alcoholic drinks in such areas. The 3rd respondent has stated that he is not operating such a business and that he let out his building to one Martin Mutegi. He does not deny though that there is a bar in his premises. The 1st and 2nd respondents have been categorical that no licence has been granted for sale of alcoholic drinks in the premises. They even say that the building is an illegal structure.

The question that one would ask is who runs the bar and who has licensed him to conduct business of selling alcoholic drinks in a residential estate. Families reside with their children in the estate. These children need protection and that is why the law prohibits sale of such drinks near learning institution as well as residential areas. Selling alcoholic drinks in a residential area is harmful not only to children but the entire community. There are many social ills associated with alcoholic drinks and allowing such business in a residential area is an infringement of the residents' fundamental rights.

Article 53(1) (d) of the Constitution provides that every child has a right to be protected from abuse, neglect, harmful cultural practices, all forms of violence in human treatment and punishment or hazardous or exploitative labour. **Article 53(2)** is also clear that children's best interests are of paramount importance in every matter concerning children.

The complaint by the petitioners that the bar will have are negative impact on their children is not farfetched. It is real and obvious given the circumstances of this case. The applicants have sought conservatory orders pending the hearing and determination of the petition. Grounds for granting conservatory orders are well settled. A party must show that he/she has a prima facie case with a likelihood of success and that if the orders sought are not granted, he/she will suffer prejudice due to the continued infringement.

In the case of centre of **Rights Education and Awareness (CREW) & 7 others v Attorney General [2011] eKLR** Musinga J (as he then was) stated:-

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the conservatory order is granted, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution.”

The Supreme Court dealt with this issue in the case of **Gatiru Peter Munya v Dickson Mwaura Kithinji & 2 others [2014] eKLR** where it stated thus.

“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within Public agencies, as well as to uphold adjudicatory authority of the court in the Public interest. Conservatory orders therefore are not unlike interlocutory injunctions linked to such private party issues on the prospects of irreparable harm occurring during the pendency of a case or high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently should be granted on the inherent merit of the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

Yet again in the case of **Centre for Human Rights and Democracy & 2 Others V Judges and Magistrates Vetting Board & 2 Others Petition No 11 of 2012** the court observed that in deciding whether or not to grant conservatory orders, the following factors are relevance that is; the credential of the petitioner, *prima facie* correctness or nature of information available to the court whether the grievances expressed in applying for conservatory orders are genuine legitimate deserving or appropriate, whether the applicant has demonstrated the gravity or seriousness of the dispute or whether the applicant is engaged in wild vague indefinite or reckless allegations. (See also **Trade Union Congress of Kenya v National Hospital Insurance Fund [2015] eKLR**)

At the interlocutory stage, the court is not supposed to delve into the merit of the petition but to consider the applicants case based on the material before it and determine whether or not there is justification for granting conservatory orders and leave the issue of the merit of the petition for trial Court.

Having considered the application and the materials placed before me. I am satisfied that the applicants have made a case for granting the orders sought. Consequently, the application dated 24th October, 2016 is allowed and I make the following orders.

1. A Conservatory Order is hereby issued restraining the 1st and 2nd respondents from further licensing, allowing or permitting the 3rd respondent, or any other person, their agents, servants , and or any person acting on their behalf to operate a bar, club or alcoholic selling business within Muimara estate in Nairobi, until the hearing and determination of this petition.

2. Costs of the application to abide by the result of the petition.

Dated and Delivered at Nairobi this 7th Day of March 2017

E C MWITA

JUDGE