



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 27 OF 2015

**IN THE MATTER OF: THE COUNTY GOVERNMENT ACT NO. 17 OF
2012 OF THE LAWS OF KENYA**

**IN THE MATTER OF: THE LAW REFORM ACT, CAP 26 OF THE
LAWS OF KENYA**

**IN THE MATTER OF: CRIMINAL PROCEDURE CODE CAP 75 OF
THE LAWS OF KENYA**

IN THE MATTER OF: THE MOMBASA COUNTY LIQUOR LICENSING ACT 2014

**IN THE MATTER OF: THE MOMBASA COUNTY DIRECTORATE OF
LIQUOR CONTROL**

**IN THE MATTER OF: MOMBASA COUNTY GAZETTE SUPPLEMENT
NO. 7 LEGISLATIVE SUPPLEMENT NO. 1
LEGAL NOTICE NO. 1**

**IN THE MATTER OF: THE KENYA GAZETTE NOTICE NO. 2495 OF
17TH APRIL 2015 VOL. CXVII NO. 39**

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

**AN APPLICATION FOR LEAVE OF COURT TO INSTITUTE JUDICIAL
REVIEW PROCEEDINGS AGAINST THE EXECUTIVE INCHARGE OF**

**TOURISM DEVELOPMENT AND CULTURE MOMBASA COUNTY,
MOMBASA COUNTY GOVERNMENT AND THE MOMBASA COUNTY**

DIRECTORATE LIQUOR CONTROL

BETWEEN

PATRICK MUKIRI KABUNDU.....

.....APPLICANT

AND

**1. THE EXECUTIVE IN CHARGE OF TOURISM DEVELOPMENT AND CULTURE
MOMBASA COUNTY**

2. THE COUNTY GOVERNMENT OF MOMBASA

3. THE MOMBASA COUNTY DIRECTORATE LIQUOR CONTROL.....

.....RESPONDENTS

1. THE DIRECTOR OF PUBLIC PROSECUTION

2. WEKESA SIMIYU

3. SAM IKWAYE

4 EDWARD JUMA

5. VICTOR SHITAKHA

6. STELLAH EKOR SULULU (MS)

7. RISHI ARUN PARIKH

8. LILIAN MSHAI KALELA

9. CHIEF OFFICER EDUCATION AND CHILDREN

10. CHIEF OFFICER WATER AND ENVIRONMENT

11. CHIEF OFFICER FINANCE AND ECONOMIC PLANNING

12. CHIEF OFFICER HEALTH

13. CHIEF OFFICER LAND AND PLANNING

14. CHIEF OFFICER TRANSPORT AND INFRASTRUCTURE

15. DAVIES MWASI KIONDO

16. CHARLES PETER MUTUA

17. WILSON KIAMA NGIBUINI

18. KENNEDY MUMBO

19. FRANCIS KIBUTHU

**20. RUTH WAMBUI.....INTERESTED
PARTIES**

EX PARTE: PATRICK MUKIRI KABUNDU

CONSOLIDATED WITH:

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITON NO. 18 OF 2015

**IN THE MATTER OF: ARTICLE 22 AND 23 OF THE CONSTITUTION OF KENYA AND
SUPERVISORY JURISDICTION AND PROTECTIN OF FUNDAMENTAL RIGHTS AND
FREEDOM OF THE INDIVIDUAL (HIGH COURT PRACTISE AND PROCEDURE RULES)
2013**

AND

**IN THE MATTER OF: CONTRAVENTIION OF CONSTITUTIONAL PROVISIONS AND
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 10, 20, 27, 29, 40, 47, 232 AND
259 OF THE CONSTITUTION REGARDING UPHOLDING OF THE NATIONAL VALUES
AND PRINCIPLES OF GOVERNANCE, PROMOTION OF VALUES THAT UNDERLIE AN
OPEN AND DEMOCRATIC SOCIETY, BASED ON HUMAN DIGNITY, EQUALITY, EQUITY
AND FREEDOM, RIGHT TO EQUALITY AND FREEDOM FROM DISCRIMINATION,
RIGHT TO FREEDOM AND SECURITY, PROTECTION OF PROPERTY, PROTECTION OF
ECONOMIC INTERESTS, RIGHT TO FAIR ADMINISTRATIVEACTION, PROMOTIN OF
VALUES AND PRINCIPLES OF PUBLIC SERVICE AND CONSTRUING OF CONSTITUTION
IN MANNER THAT PROMOTES ITS PRINCIPLES, VALUES, ADVANCES HUMAN RIGHTS
AND CONTRIBUTE TO GOOD GOVERNANCE**

AND

IN THE MATTER OF: MOMBASA LIQUOR LICENSING ACT, 2014

**IN THE MATTER OF: WEDNESBURY UNREASONABLENESS AND IRRATIONALITY
BY THE MOMBASA COUNTY GOVERNMENT**

**IN THE MATTER OF: CRIMINAL CASES NOS. 712 OF 2015 REPUBLIC VERSUS
PATRICK MUKIRI KABUNDU, CRIMINAL CASE NO. 1133 OF 2015 REPUBLIC, COLLINS
MARITINE AND KENNETH OTIENO, CRIMINAL CASE NO. 1140 OF 2015 REPUBLIC
VERSUS JOSEPHINE KAREMI, NAHASHON MUNGERIA, NYAMBANE WINES & SPIRITS
TUDOR AND CRIMINAL CASE NO. 1057 OF 2015 REPUBLIC VERSUS RUTH MUSUDI –**

KILINDINI BAR MAKANDE

BETWEEN

**1. DAVIES MWASI KIONDO & 5 OTHERS.....
PETITIONERS**

**(SUING ON THEIR BEHALF AND ON BEHALF OF ALL MEMBERS OF A WELFARE
GROUP KNOWN**

**AS MOMBASA COUNTY BARS, HOTELS, RESTAURANTS AND GUEST HOUSES
WELFARE GROUP)**

VERSUS

**MOMBASA COUNTY GOVERNMENT DIRECTOR OF PUBLIC
PROSECUTIONS.....RESPONDENTS**

JUDGMENT

INTRODUCTION

1. The applicants are bar owners operating within the County of Mombasa. They are aggrieved by the passing of the Mombasa County Liquor Licensing Act, 2014 which they say imposes exorbitant and unreasonable charges by way of licensing fees and charges. Its penalties are much stiffer compared with the Alcoholic Drinks Control Amendment Act, 2012. Some of the applicants, members of the Mombasa County Bars, Hotels, Restaurants and Guest Houses Welfare Group, also claim to have been unfairly excluded from membership of the Mombasa County Liquor Control Directorate and the Mombasa County Liquor Licensing Review Committee. The applicants are further aggrieved that several of them and/or their employees have been charged with offences under the Mombasa County Liquor Licensing Act illegally and retrospectively since the Act had not come into force nor had the appropriate committees been set up at the time of the arrest, and in any event, the prosecutorial powers in Kenya are exclusively vested in the Director of Public Prosecutions. Finally, it is alleged that the Act was passed without subjecting it to public participation fora for discussion with the concerned industry stakeholders.

2. It was submitted for the applicants that there was insufficient evidence to find that reasonable opportunity had been afforded for public participation. In particular, the absence of the notices inviting the public, minutes or a report of the forum was cited. The attendance lists annexed by the Respondents was said to comprise persons mostly drawn from the members of the Mombasa County Assembly, and few were stakeholder business people from the industry affected. The court was accordingly urged to grant the prayers sought.

3. Both applications are variously defended. The County Government denied all allegations of discrimination or impropriety. It was pointed out that the applicant welfare group had in November 2013 delivered a memorandum with their views and did attend public participation forums in September 2014 to discuss the Bill. It maintained that the prosecutors were legally gazetted as such in 2005 and 2007 under the Local Government Act (now repealed) and are properly in office by virtue of the transition provisions, pending their re-gazettement by the Director of Public Prosecutions.

THE PETITION

4. The Petitioners in Petition 18 of 2015 seek orders that:

- a. ...the Mombasa County Liquor Licensing Act, 2014 be quashed.

- b. ...Sections 4, 19, 40 and the 3rd Schedule of the Mombasa County Liquor Licensing Act, 2014 be quashed.
- c. ...until appropriate committees are set up as required in section 4 and 19 of the Mombasa County Liquor Licensing Act, 2014 with provision that caters for the interests of the Petitioners that the Mombasa Liquor Licensing Act, 2014 be stayed for all purposes.
- d. ...a declaration that the Respondent has no power in law to institute criminal proceedings against the Petitioners as that is a matter which is within the exclusive domain of the Director of Public Prosecutions.
- e. ...an order that all prosecutions initiated by the Respondent in Criminal Case No.712 of 2015 R vs. Patrick Mukiri Kabundu, Criminal Case No.1133 of 2015 R vs. Collins Maritine and Kenneth Otieno, Criminal Case No.1140 of 2015 R vs. Josephine Karemi, Nahashon Mungeria, Nyambane Wines & Spirits Tudor and Criminal Case No. 1057 of 2015 R vs. Ruth Musudi, Kilindini Bar Makande and any other cases that may be preferred against the Petitioners by the Respondent before the termination of this petition be quashed. Further, any affected person be refunded any cash bail, court fines that they may have paid and any sureties thereon be discharged.
- f. ...a conservatory order to restrain the Respondent from implementing any part of the Mombasa County Liquor Licensing Act, 2014 either pending the hearing of the petition or thereafter if such implementation would lead to infringements of the Petitioner's fundamental rights.

THE JUDICIAL REVIEW APPLICATION

5. The applicants in JR No. 27 of 2015 seeks the following prayers (sic):

1. An order to summon the Government Printer to produce a letter from Mombasa County Government forwarding the commencement date received by planning office on 6th May 2015 from County Executive Secretary Mr. Joab Tumbo and presented in proof reading County Legislative books and payment receipts from Mombasa County touching on County Legislation No. 3597 dated 13th May 2015.
2. An order of certiorari to remove into this Honourable Court for purposes of quashing Gazette Notice presented to the Kenya Government Printer and on 13th May 2015 for proof reading work book county legislation no.3597 but dated 17th March 2015 back dated to 13th February 2015 as Mombasa County Gazette Supplement NO. 7 (Legislative Supplement No. 1, Legal Notice No. 1 of Mombasa Liquor Control and Licensing Act No. 12 of 2014 by Joab Tumbo County Executive Committee member Tourism Development & Culture, Mombasa County).
3. An order of certiorari to remove into this Honourable Court, for purposes of quashing Gazette Notice dated 17th April 2015 No. 2495 Vol. CXVII No. 39 that forms Mombasa County Directorate of Liquor Control.
4. An order of prohibition prohibiting and restraining the executive officers or members from implementing his decision carried out or presented on proof reading workbook County Legislation No. 3597 but dated 17th March 2015 backdated to 13th February 2015 as Mombasa County Gazette Supplement No. 7 (legislation supplement No.1, Legal Notice No.1 of Mombasa Liquor Control and Licensing Act No. 12 of 2014 by Joab Tumbo in the Kenya Gazette Notice.
5. An order of prohibition prohibiting and restraining the executive in charge of Tourism development Mombasa County, Mr. Joab Tumbo and officers or members from implementing his decision carried out Gazette Notice dated 17th April 2015 No.2495 Vol.CXVII No.39 that forms the Mombasa County Directorate of Liquor Control.
- f. An order staying and or suspending the implementation of the decision of the Executive in Charge of Tourism and Development Mr. Joab Tumbo carried out or published in the Kenya Gazette Notice No. 2495 Vol. CXVII No.39 dated 17th April 2015 that forms the Mombasa County Directorate of Liquor Control and notice presented to the Kenya Government Printers on 13th May 2015 proof reading work book County Legislation No. 3597 but dated 17th March 2015 back dated to 13th February 2015 as Mombasa County Gazette Supplement No.7 (Legislative supplement no.1, legal notice no.1 of Mombasa Liquor Control and Licensing Act, No.12 of 2014

by Joab Tumbo in the Kenya Gazette Notice.
g. Costs

ANALYSIS AND ISSUES

6. Much time and passion was expended in arguing these applications. In my humble view however they raise three straightforward issues which I will consider in turn and may be framed as whether –

- (a) whether the County of Mombasa Liquor Control Licensing Bill was subjected to discussion with stakeholders in public participation before being enacted into the Act of that name;
- (b) whether the County of Mombasa Liquor Control and Licensing Act may be applied retrospectively against the applicants in criminal law; and
- (c) whether the Petitioners in Petition Number 18 of 2015 were unfairly excluded from membership in the Mombasa County Directorate of Liquor Control.

A. OF WHETHER THE COUNTY OF MOMBASA LIQUOR CONTROL LICENSING BILL SUBJECTED TO DISCUSSION WITH STAKEHOLDERS IN PUBLIC PARTICIPATION FORUMS BEFORE IT WAS ENACTED INTO THE ACT BY THAT NAME?

7. Before discussing these issues, I wish to state for the avoidance of doubt, that Gazette Notice No.2495 published in the Kenya Gazette Vol. CXVII No.39 on 17th April, 2015 is concerned with the appointment of the 4th – 14th Interested Parties in the JR No.27 of 2015 to the Mombasa County Directorate of Liquor Control for a period of 3 years with effect from 1st April, 2015. The appointment was gazetted by the Mombasa County Executive Member for Tourism Development and Culture, Mr. Joab Tumbo. The Mombasa County Gazette Supplement No.7 of 17th March, 2015 is a Legislative Supplement No. I in which the said County Executive Member appointed 13th February, 2015 as the commencement date of the Mombasa Liquor Control and Licensing Act, 2014. It was published as a Special Issue on 17th March, 2015, and had the effect of back dating the commencement date of the Act to 13th February, 2015.

8. The Respondents have produced copies of attendance registers indicating that several stakeholders including representatives of NGOs, Self Help Groups, County Assembly Members, Civil Society Groups and liquor selling establishments. While the notices for the forums were not produced, it is evident from the list marked IR3 annexed to the Affidavit of Israel Ruhu, Legal Counsel, County Assembly of Mombasa sworn on 15th April, 2015 that the forums were well attended. The Affidavit also annexes a memorandum dated 11th November, 2013 which was delivered to the Respondent from the Petitioners giving their views.

9. Odunga, J in the case of **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 others [2014] eKLR** in defining what public participation entails expressed the following opinion:

“75. In my view, public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purpose of fulfillment of the Constitutional dictates. It is my view that it behooves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many forums as possible such as

churches, mosques, temples, public barazas, national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”

10. Similar sentiments were expressed by the court in the case of **The North Rift Motorbike Taxi Association (NRMBTA) vs. The Uasin Gishu County Government [2014]eKLR.**

11. Lenaola J in **Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others (2013) eKLR** also opined on public participation that,

“...it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health v New Clicks South Africa (PTY) Ltd (supra) where he expressed himself as follows;

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

12. Similar views were expressed in **Kenya Small Scale Farmers Forum and 6 Others vs. Republic of Kenya and 2 Others, Petition No 1174 of 2007, John Muraya Mwangi & 495 others vs. Minister for State for Provincial Administration & Internal Security and 4 Others (2014) eKLR** and **Coalition for Reform and Democracy and Others vs. Attorney General, Petition No 628 of 2014** on the issue of public participation. I am of the firm view that it is not every suggestion from the public that will be incorporated into the Act. That certain views of the public have been left out of the Act is not a ground to claim that there were no consultations or discussions with the public. In this case, it has been proved that indeed the public were involved and informed about the Bill before it was passed, thus satisfying the requirement of participation of the people. I reject the Applicants’ contention to the contrary.

B. WHETHER THE ACT MAY BE APPLIED RETROSPECTIVELY AGAINST THE APPLICANTS IN CRIMINAL LAW:

13. The Supreme Court of Kenya in the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others, SCK APP. No. 2 of 2011 (2012) eKLR** held that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. That court held that -

“[61] As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsburys Laws of England, 4th Edition Vol.44 at page 570). A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden.”

14. A bill of attainder is an order of forfeiture of land and civil rights as a result of a sentence of death usually for high treason. There are no rights divested, nor is there a constitutional prohibition. Thus, a legislation that is retrospective in nature is not ipso facto unconstitutional as long as it is apparent either by express words or by necessary implication that that was the intention of the legislature and satisfies the conditions above.

15. In this case, it is alleged that certain of the applicants were charged by the Respondent in Criminal

Case No.712 of 2015 R vs. Patrick Mukiri Kabundu, Criminal Case No.1133 of 2015 R vs. Collins Maritine and Kenneth Otieno, Criminal Case No.1140 of 2015 R vs. Josephine Karemi, Nahashon Mungeria, Nyambane Wines & Spirits Tudor and Criminal Case No. 1057 of 2015 R vs. Ruth Musudi, Kilindini Bar Makande under the Act before it came into force.

16. It would offend the legality principle of criminal law to require the applicants to be charged and possibly sentenced under the new Act before it came into force. This principle demands that criminal liability and punishment be based only upon a prior enactment of a prohibition that is expressed with adequate precision and clarity. This court having determined that the magistrate's courts and the prosecution have the requisite jurisdiction to commence the proceedings against the applicants as they have, the applicants will have opportunity to raise the defence of defective charge sheet and competence of the prosecutors before the court, and the prosecution is of course at liberty to amend the charge sheet appropriately if need be an order of prohibition shall therefore not issue.

C. WHETHER THE PETITIONERS IN PETITION 18 OF 2015 HAVE BEEN UNFAIRLY EXCLUDED FROM MEMBERSHIP IN THE MOMBASA COUNTY DIRECTORATE OF LIQUOR CONTROL:

17. Section 4 of the Mombasa County Liquor Control Licensing Act provides that the County Executive Member may appoint to the directorate 6 members nominated by a cluster representing the Pubs, Entertainment and Restaurants Association of Kenya. Other nomination clusters have also been listed including the association of Hotel Keepers and Caterers within the County and the Coast Tourism Association. The Petitioners through their membership in these overall bodies are at liberty to present themselves for nomination. It has was not established that there was any malice or discrimination in the appointment of members to the directorate. It would appear that the Petitioners' main claim on this issue is that they have, as an association gained status worthy of recognition by the County by virtue of their membership numbers. The existing representative body (PERAK) would appear to have similar objectives, and their selection over the Petitioners' body was not expressly been faulted. The Petitioners have opportunity to seek representation through the clusters reserved for associations representing the private sector in the County. There is no ground for faulting the Respondents.

18. For those reasons I find no merit in either the Petition or the application for Judicial Review, and both are dismissed, with a direction that this being public interest litigation, each party shall bear its own costs.

19. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 13th day of October, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Kabundu

Mr. Lumatete for Respondent

Miss Kimori

Mr. Kibara

Mr. Kaunda Court Assistant

