

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E005 OF 2023**

**JOHN KANG'ACHA GITHENG'O
PETITIONER**

VERSUS

NAIROBI CITY COUNTY

GOVERNMENT.....RESPONDENT

JUDGMENT

Petitioner's case

1. The petitioner had been carrying on hawking business in the Central Business (CBD) along Agha Khan walk/ City Hall Junction within Nairobi City County for several decades.

2. On 13th October 2022 the petitioner visited the offices of the Director of Trade and Licensing to apply for a hawking licence and met the Director (Johnson Akong'o). He was informed that the issue would be considered and was asked to call on him later.

3. On 18th October 2022 and 1st November 2022, the petitioner called on the Director's office to enquire about the hawker's licence and requested for an application form for the license but the request was declined. On 22nd November 2022, the petitioner again visited the office but was informed that the director had instructions not to issue hawking with licenses.

4. On 29th November 2022 the petitioner appealed to the Trade Licensing Appeals Committee and

presented the appeal to both the County Chief, Trade and Industrialization Officer and the office of the County Secretary but had not received a response from the Trade Licencing Appeals Committee and had not been able to get a hawker's license.

5. The petitioner claimed that the Directorate acted discriminatively in applying the provisions of Nairobi City County Trade Licensing Act, 2019 by denying him a license yet licences had been granted to Newspapers, Kenya Charity Sweepstake and Sports Pesa vendors a violation of article 27 of the Constitution.

6. The petitioner stated that hawkers operate businesses in open air and do not need to construct structures to shield themselves from harsh weather

conditions; the respondent's officers arrest hawkers trading in the streets, confiscate their goods and arraign them in court on charges of hawking without a license.

7. The petitioner maintained that the conditions for granting licences to hawkers and street vendors are stipulated in section 10 of Nairobi City County Trade Licensing Act, 2019 Act. The petitioner contended that under section 5 (3) (a)(iv) of the Act, the Directorate of Trade and Licensing is mandated to ensure inclusion of marginalized trading populations, such as hawkers and street vendors.

8. The petitioner cited sections 5, 6, 10 and 13 of the Act to reiterate that he applied for a hawker's licence as required by law but the Director failed to

comply with the law that guides issuance of a hawker's license, including to marginalized trading populations as required by section 5 (3). The respondent's officers were not also guided by the principle of selfless service as required by the Constitution.

9. Regarding the respondent's argument that approval by the Director City Planning is required before a hawker's licence is granted, the petitioner argued that if the Director of City Planning was to approve and recommend an applicant for a trade license before a license is issued, this would create a conflict of interests between the Director of City Planning and Director Trade Licensing by limiting the independence of the Director of Trade Licensing in the performance of his responsibilities as stipulated

in section 5 (1), (2) (d), (2) (g), 3(a) (iv), (3) (b) of the Act.

10. The petitioner asserted that functions of the Director of Trade Licensing are stipulated in the Act, while those of Director City Planning are not. The petitioner maintained that there was no need to construct a temporary structure in the CBD which required approval from the Director of City Planning since he operates hawking business in an open-air environment.

11. The petitioner also argued that the Director of Trade Licensing failed to comply with the provisions of sections 12 (4) and (5) of the Act; did not respond to his appeal or give reasons for denying him a hawker's license despite meeting the requirements

in section 12 (1-5) of the Act and there was no basis for denying him a license which was an affront to section 10(1) of the Act and amounted to discrimination a violation of article 27 of the Constitution.

12. The petitioner therefore urged the court to issue an order that the Director of Trade and Licensing gives him first, a hawker and street vendor application form; and second, an order that within fourteen days (14) after the application, the Directorate of Trade and Licensing issue him with a license to conduct hawking activities along Agha Khan Walk in the Nairobi Central Business District.

Respondent's case

13. The respondent opposed the petition through a replying affidavit sworn by Johnson Akongo Abwori. The respondent stated through Mr. Abwori, that granting or declining an application for a trade license is regulated by section 12 (1)-(5) of the Act. Applications for temporary structures within CBD require a recommendation and approval by the Director City Planning before a license can be issued to an applicant.
14. The respondent contended that the petitioner did not meet the conditions stipulated in section 12 of the Act and did furnish a copy of approved application form from the Director of City Planning since the Act applies to every person without exception.

15. The respondent relied on article 27 of the Constitution, Black's Law Dictionary 8th Edition and the decisions in *Anarita Karimi Njeru v Republic* [1979] eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance* [2014] eKLR, for the contention that the petitioner had not stated with specificity how he was discriminated against and demonstrate the grounds of discrimination.

16. The respondent maintained that the petitioner did not obtain a recommendation and approval from the Director, City Planning as required by law. He had also not demonstrated that Newspapers, Kenya Charity Sweepstake and Sportpesa vendors had not complied with the legal requirements, or that they had been exempted from complying with the law.

Determination

17. I have considered the petition, the response and arguments by parties. The issue for determination is whether the respondent discriminated against the petitioner in violation of article 27 of the Constitution. The petitioner argued in the affirmative while the respondent took the opposite view.

18. The petitioner's case is that he went to the office of the Director of Trade and Licensing to apply for a hawker's trade licence but was not given an application form. On further visits, he was informed that the Director had instructions not to issue hawking licenses.

19. The petitioner argued, therefore, that the respondent's department had acted discriminatively in applying the provisions of the law to deny him a trade license despite licensing Newspapers, Kenya Charity Sweepstake and Sports Pesa vendors, a violation of article 27 of the Constitution.

20. The respondent on its part argued that granting a license is regulated by law; that applications for temporary structures within CBD require recommendation and approval by the Director City Planning before a license is granted and that the petitioner did not meet the conditions stipulated in section 12 of the Act, including submitting a copy of approved application form from the Director of City Planning.

21. The respondent denied acting in a discriminatory manner, arguing that the petitioner did not demonstrate that Newspapers, Kenya Charity Sweepstake and Sportpesa vendors did not comply with the requirements of the law, or that they had been exempted from complying with the law to amount to discrimination.

22. Section 5 of the Act establishes the Department of Trade and Licensing which is responsible for, among others, issuing of trade licences. In regulating licensable activities, the directorate is required to set minimum standard and ensure-national unity; public safety and hygiene, environmental protection, inclusion of marginalised populations, such as hawkers and street vendors and promote transparency and public participation. The section

requires licences to be issued on the basis of clearly defined and transparent criteria.

23. Section 12 (1) of the Act provides that where the Director is satisfied that an applicant meets the requirements set under section 9, the officer shall grant the trade licence. Section 12(3) allows the Director to reject an application that does not meet the requirements in the Act. Section 12(4) requires the Director to communicate, in writing, the decision to reject an application for a trade licence within 14 days while subsection (5) requires that the communication of the decision to reject the application for a trade licence state the reasons.

24. Section 9 is on the application for a trade licence and provides that an application should be lodged in

the approved form; should contain such information and contain such documents as are required and non -refundable application fee. An application may also be submitted in an approved electronic form. The Directorate may require an applicant to furnish additional information before the application is considered.

25. Section 10 is on hawking licences and provides that (1) no person shall trade as a hawker or street vendor unless he or she has a valid hawker or street vendor's licence granted to him or her for that purpose unless they operate a business exempted from licensing. The licence should be in a prescribed form and should be granted subject to- the goods that may be hawked; the area within which hawking is to be operated; hours within which the goods may

be hawked and such other conditions as the licensing authority may think fit to impose.

26. Section 11 on consideration of applications, provides that an application should be considered within fourteen days and that an application may be rejected if the trade or business is not lawful; the premises on which it is proposed to be established is unfit for the purpose and for any other matter as may be prescribed.

27. It is therefore clear that section 10 which deals with hawking and street vendors' licensing, provides clearly prohibits persons from trading as a hawker or street vendor unless they have a valid hawker or street vendor' licence granted to them for that purpose unless they operate a business exempted

from licensing. The howking and streek vendor's licence is to be issued on application being made and granting the licence will depend on the goods to be hawked; the area within which hawking is to be operated; hours within which the goods may be hawked and such other conditions as the licensing authority may think fit to impose.

28. The petitioner's case is that he called on the Director's office and requested for an application form for hawker's trade license but the request was declined. It is clear that the petitioner had not submitted an application as required by section 10 of the Act. The petitioner did not also argue that application forms for trade licences are issued by the Director himself or are picked from the Director's

office to put the issue directly at the Director's doorstep.

29. Although the petitioner argued that he had been undertaking hawking business within the CBD for years, he did not state that he had a licence and was trading on goods permitted by law. The petitioner did not also state that he knew or did not know where to get an application form for trade licence.

30. Clearly, section 10 prohibits hawking and street vendor trade without licence unless the business is exempted from licensing. Hawking and street vendor's licence is issued on application in a prescribed form and the trade licence itself is also issued in a prescribed form. Granting the licence will depend on the goods to be hawked; the area within

which hawking is to be operated; hours of operation and subject to such other conditions as the licensing authority may think fit to impose. The petitioner's claim that he was denied an application form without stating who denied him the application form is not persuasive.

31. The petitioner again alleged discrimination, arguing that other traders and street vendors such as those selling newspapers, Charity Sweepstake tickets and SportsPesa had been allowed to conduct business but not him. This claim was denied with the respondent arguing that the petitioner did not show that those vendors had not complied with the law.

32. Article 22 of the Constitution allows a party to approach the court if there is a violation or threat to violate his rights and fundamental freedoms and the court has jurisdiction in terms of article 23(1) read with article 165 to determine the issue. A party approaching the court on that account, must place his claim within the ambit of article 23(1) so that the court can weigh his claim and respond where appropriate.

33. Article 23(1) on the authority of the court to uphold and enforce the Bill of Rights, provides that that this court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

34. To amount to a violation or threatened violation of either the Constitution, the law or rights and fundamental freedoms, the impugned action must be a legal wrong or a legal injury caused to a person or to a determinate class of persons by reason of violation of constitutional or legal right in contravention of any constitutional or legal provision. Where there is threat to cause a legal wrong or injury, the Court has powers to grant an appropriate relief to prevent the wrong or legal injury. The essence of the appropriate relief is not only to enforce the Constitution, but also to ensure that rights and fundamental freedoms enshrined in the Bill of Rights are protected and enforced-(*Fose v Minister of safety and Security* (CCT 14/1996) [1997] ZACC 6.)

35. In this petition, the petitioner was required to point out the constitutional or legal provisions violated and demonstrate actual or threatened violation to the satisfaction of the court. (See *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR; [2014] KESC 53 (KLR).

36. In other words, a party claiming violation of rights and fundamental freedoms should not only plead with precision, the rights violated and the provisions infringed but also demonstrate the link between the alleged violation, the rights infringed and the constitutional provisions invoked in order to put the respondent on notice over the petitioner's claim so as to respond appropriately.

37. As already pointed out, the petitioner wanted to apply for hawker's trade licence which the law permits but on certain conditions. The sections of the law highlighted earlier in this judgment, regulate the trading business; the manner of application and grant of trade licences. The sections are also clear that submitting an application does not guarantee that a trade licence will be granted.

38. In this petition, the petitioner did not show that he submitted an application but the application had not been determined as required by law to call on this court to intervene. Although the petitioner claimed that he had been discriminated against, he did not show that Newspapers, Charity Sweepstakes and Sportpesa vendors had not complied with the law and, as a result, that he had been treated differently to amount to discrimination.

39. The Department concerned deals with applications that have been submitted in accordance with the law and in the absence of such application it would be difficult for this court to determine whether the petitioner was discriminated against or not.

40. In the context of this petition, the argument on discrimination is so remote to be real or envisioned. There being no demonstration of discrimination, there would be no need for the court to embark on the analysis test to see whether the differential treatment amounts to discrimination on the grounds prohibited by the Constitution. (See *James Nyasora Nyarangi & 3 others v Attorney General* [2008]; *peter K Waweru v attorney General* [2006] eKLR and *Jacqueline Okeyo Manani & 5 others v Attorney General & another* [2018] eKLR.)

41. In the circumstances of this case, and looking at the reliefs sought, the petitioner wants the court to engage in matters reserved for other institutions. There would be no basis for the court to order the Directorate of Trade and Licensing to give the petitioner a trade license to conduct hawking activities along Agha Khan Walk in the Nairobi Central Business District when the law requires applications to be considered and approved or rejected with reasons.

42. This not only goes beyond the mandate of the court to determine disputes between parties, but also to requesting the court to assume the role of directing the respondent to grant trade licences for hawking business or any other trade, a mandate the law reserves for the respondent's department.

43. Consequently, and for the reasons above, this court is not persuaded on the merit of this petition. The petition is declined and dismissed with no order as to costs.

**Dated and delivered at Nairobi this 16th Day of
December 2025**

**E C MWITA
JUDGE**