

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**PETITION NO. E021 OF 2024**

MARINE PARK RESORT (CHUKA)  
LIMITED.....PETITIONER/APPLICANT

VERSUS

PRINCIPAL SECRETARY INTERNAL SECURITY &  
NATIONAL ADMINISTRATION.....1<sup>ST</sup> RESPONDENT

PRINCIPAL SECRETARY STATE DEPARTMENT  
FOR BASIC EDUCATION.....2<sup>ND</sup> RESPONDENT

NATIONAL AUTHORITY FOR THE CAMPGAIN  
AGAINST ALCOHOL AND  
DRUG ABUSE.....3<sup>RD</sup> RESPONDENT

THE HONOURABLE ATTORNEY  
GENERAL.....4<sup>TH</sup> RESPONDENT

THE COUNTY GOVERNMENT OF  
THARAKA NITHI.....5<sup>TH</sup> RESPONDENT

TRANSLIGHT ACADEMY.....INTERESTED PARTY

**RULING**

1. The Applicant filed the present Notice of Motion dated 21<sup>st</sup> November 2024 seeking the following

orders: -

- i. Spent
- ii. Spent

- iii. That pending the hearing and determination of this application an order for injunction be issued restraining the Respondents whether by themselves, their servants, agents, representatives or anyone acting on their behalf from implementing the 1<sup>st</sup> Respondent's decision communicated vide circular referenced "MOINA/SEC.6/1" dated 12<sup>th</sup> November 2024 and titled "Closure of alcoholic drinks outlets within 300 metres of basic education institutions."
- iv. That pending the hearing and determination of this petition an order for injunction be issued restraining the Respondents whether by themselves, their servants, agents, representatives or anyone acting on their behalf from implementing the 1<sup>st</sup> Respondent's decision communicated vide circular referenced "MOINA/SEC.6/1" dated 12<sup>th</sup> November 2024 and

titled “Closure of alcoholic drinks outlets within 300 metres of basic education institutions.”

- v. That costs of this application be provided for.
2. The Application is premised on the grounds set out on the face of the Application and on the supporting affidavit of Patricia Kathure Kiruja the Applicant’s director sworn on even date.
3. The Applicant deponed that the Petitioner was incorporated in 2015 and began its operations, had applied for and obtained licences to engage in business of hotel, lodging, food & soft beverages, entertainment, gymnasium, spa, sauna, swimming, retail shops and sale of alcoholic drinks.
4. She averred that when the Petitioner bought the land it sits on and developed the same using bank facilities, no learning institution was situated around the premises and the nearest learning institution was Chuka University which is located 1.1 kilometres. That the Petitioner invested using

bank facilities, established a huge asset portfolio that pays taxes to both levels of government and has employed sixty people.

5. She stated that in 2020 a temporary structure was established fifty meters from the Petitioner and the said structure was named Translight Academy in 2022. That the Academy has no facilities as required by the Basic Education Act. She added that she had been informed that it was to be closed and she only learned that it still operates after she read the 1<sup>st</sup> Respondent's circular dated 12<sup>th</sup> November 2024.

6. The Applicant further deponed that on 27<sup>th</sup> May 2024, the Petitioner was issued with an annual liquor licence and permitted to engage in hotel and accommodation and alcoholic drinks which licence has neither expired nor been cancelled.

7. She stated that in licensing the Petitioner to sell alcoholic drinks from the year 2015, the 5<sup>th</sup>

Respondent through Alcoholic Drinks Control Directorate, Tharaka Nithi County Licensing Committee and Sub-County Alcoholic Regulation Committee acted within the purview of Tharaka Nithi County Alcoholic Drinks Control Act, 2021 enacted pursuant to Article 186 of the Constitution as read with Part 2 (paragraph 13) of the Fourth Schedule to the Constitution.

8. She further stated that despite the fact that regulation of alcohol drinks falls with the 5<sup>th</sup> Respondent's jurisdiction as provided for under Article 6 and 189 of the Constitution, the national government is part of the aforesaid committees through the regional commissioner, county police commander and sub- county police commander.

9. It was her statement that prior to issuance of the said license, the Petitioner's premises had been raided, besieged and its offices ransacked by the Respondents and their agents despite being the

very persons who issued the Petitioner with the requisite licences and authorised its operations.

10. The Petitioner stated that on 20<sup>th</sup> November 2024, a circular reference “MOINA/SEC.6/1” dated 12<sup>th</sup> November 2024 and titled “Closure of alcoholic drinks outlets within 300 metres of basic education institutions” was dropped at the Petitioner’s security desk by a person who declined to identify himself. That upon reading the circular, she established that the premises were enlisted for immediate closure allegedly for being within fifty metres from a school called Translight being that it operates contrary to Section 12 (1) (c) of the Alcoholic Drinks Act which circular was authored by the 1<sup>st</sup> Respondent.

11. She stated that the Petitioner’s premises are at the brink of being closed based on unconstitutional and illegal circular whose implication is to render more than sixty employees

jobless. That the decision to enlist the Petitioner's premises for closure was arbitral, capricious, unlawful and not preceded by a mandatory constitutional precondition of public participation.

12. The Petitioner further stated that the Respondents declined to notify the Petitioner of the nature and reasons for the decision and failed to give it an opportunity to be heard. That had the Petitioner been heard, the 1<sup>st</sup> Respondent would have avoided the decision by establishing that: -

- i. The Petitioner is a registered and licensed resort which sits on 12 acres of land and not a bar.
- ii. The Petitioner established the premises and developed the same way before the alleged school was constructed and closure therefore is anchored on retrospective application of the provisions of the Section 12 (1) (c) Alcoholic Drinks Control Act.

iii. The alleged school, the interested party falls short of preconditions set for its registration as it lacks the required facilities, it stands on 1.5 acres piece of land and composes temporary structures which pose a danger the learners who may innocently be using the institution.

13. Finally, the Petitioner averred that the 1<sup>st</sup> Respondent's decision implicitly and obliquely cancelled the licence it participated in issuing thus defying public trust bestowed on its office. That unless the temporary injunctive orders are granted, the Petitioner's premises will be closed exposing it to irreparable loss rendering the petition nugatory.

14. The 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> Respondents entered appearance through the Attorney General but did not file a response or submissions. The 5<sup>th</sup> Respondent also entered appearance but filed no further documents while the Interested Party did not enter appearance.

15. The 3<sup>rd</sup> Respondent filed a replying affidavit dated 3<sup>rd</sup> February 2025 sworn by Athony Omerikwa, its Chief Executive Officer. He stated that the 3<sup>rd</sup> Respondent is a state corporation created under the National Authority for the Campaign Against Alcohol and Drug Abuse whose mandate is to undertake various programmatic functions towards the campaign against alcohol and drug abuse in Kenya. That it is further mandated as the public body responsible for matters relating to alcoholic drinks.

16. He stated that the 3<sup>rd</sup> Respondent acknowledges that the Petitioner is a business entity affected by the directive issued by the government on closure of establishments located within 300 metres of basic education institutions as it is within fifty metres from a school called Translight.

17. He stated that the directive was founded on the Alcoholic Drinks Control Act, 2010 and other legal frameworks aimed at safeguarding children and ensuring a conducive learning environment free from the influence of alcohol and drug related activities. That the said directive was made in line with Article 21 of the Constitution which obligates the state to protect health, safety and all wellbeing of the public in furtherance of NACADA's statutory duty.

18. He further stated that the Petitioner was given ample time to comply with the legal requirements but their failure to do so necessitated the suspension of their licences in the interest of public health and safety.

19. It was stated that the actions taken by NACADA were in accordance with its mandate, the law and in the public interest and also the government's mandate to protect the welfare and

best interests of children as enshrined under Article 53 of the Constitution and related statutory provisions.

20. The 3<sup>rd</sup> Respondent averred that while they acknowledged the Petitioner's right to own property and conduct business, such right is not absolute and must be balanced against constitutional rights of children to education and a safe learning environment. That the closure was a reasonable limitation under Article 24 of the Constitution intended to achieve the legitimate aim of protecting children.

21. It was also stated that the Petitioner as a business operator has a duty to comply with existing laws and regulations including those introduced post-establishment provided they serve a lawful and public interest. That the Petitioner has not demonstrated compliance with Section 12 of the Alcoholic Drinks Control Act, 2010 which

prohibits the establishment of such a facility within a prescribed distance from a school.

22. It was further stated that the Petitioner's claim for financial loss is speculative and does not outweigh the greater public interest in ensuring the safety and welfare of children. That the directive was issued following extensive public consultations and was not arbitrary or unilateral decision and does not contravene the Petitioner's rights under Articles 22,23,43 or 47 of the Constitution.

23. The 3<sup>rd</sup> Respondent prayed that the Petition be dismissed with costs for want of merit.

### **Submissions**

24. The application was canvassed by way of written submissions pursuant to the court's directions. The Applicant filed their written submissions dated 17<sup>th</sup> March 2025 raising one issue for determination being whether the application is merited. The 3<sup>rd</sup> Respondent filed

their written submissions dated 4<sup>th</sup> April 2025 which addresses the Petition and not the instant Application. I shall therefore not consider them.

25. The Applicant submitted that it has a prima facie case with likelihood of success as its case is arguable and it has demonstrated violation of rights from both a Constitutional and Fair Administrative Act standpoints.

26. It was submitted that no evidence was led by the 3<sup>rd</sup> Respondent that indeed public participation preceded the circular which duty is decreed under Article 10 of the Constitution.

27. It was also submitted that the Respondents did not rebut the Applicant's allegation that it was never granted an opportunity to present its case before a decision to close its premises was made as required under Article 47 of the Constitution.

28. The Applicant submitted that the 3<sup>rd</sup> Respondent's actions did not take into consideration

that the Applicant had multiple licences for hotel, lodging, food & soft beverages, entertainment, gymnasium, spa, sauna, retail shops and sale of alcoholic drinks. That if the application is not granted, the petition will be rendered nugatory.

29. In support of its argument, the Applicant relied on the following authorities: -

- i. **Mrao Ltd V First American bank of Kenya Ltd & 2 Others [2003] eKLR** where the Court of appeal stated that a *prima facie* case includes but not limited to a genuine and arguable case.
- ii. **Law Society of Kenya V attorney General & 2 Others [2019] KECA 344 KLR** where the Court of Appeal stated that a Petitioner cannot be called upon to prove the negative.
- iii. **Kenya Water and Sanitation Civil Society Network & 38 Others v Kenya Wildlife Service; County Government of Mombasa**

**& Another (Interested parties) [2024]**

**KEHC 108 (KLR)** where the court held that there cannot be any greater public interest than upholding the Constitution and the law.

30. From the pleadings and arguments by the parties, I glean one issue for determination being whether the Applicant meets the threshold for grant of an interlocutory injunction.

31. The conditions for consideration in granting an injunction were settled in the celebrated case of **Giella v Cassman Brown & Company Limited [1973] EA 358** where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -

**"Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted**

**unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."**

32. The Court of Appeal in the case of **Nguruman Limited -v- Jan Bonde Nielsen & 2 others [2014] eKLR** held that:-

**"...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if**

**the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."**

33. Guided by the above principles, I shall proceed to determine whether the Applicant has satisfied

the threshold for the grant of an interlocutory injunction.

34. The Court of Appeal in **Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR**, Gicheru J. defined a *prima facie* case as follows:-

**"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".**

35. From the above definition, it is clear that a *prima facie* case means more than an arguable

case, and in which the evidence must show an infringement of a right or the probability of success of the applicant's case at the trial.

36. The Applicant contends that it has established a prima facie case on the grounds that it was duly licensed to operate its business and that the circular directing the closure of alcoholic outlets within 300 metres of basic education institutions was issued without affording it an opportunity to be heard and without public participation. The Applicant further asserts that its premises existed long before the establishment of the Interested Party's school and that the implementation of the directive would unjustly interfere with its investment and render more than sixty employees jobless.

37. On the other hand, the 3rd Respondent maintains that the directive was issued pursuant to the **Alcoholic Drinks Control Act, 2010** and

other legal frameworks aimed at safeguarding children and protecting the public from the harmful effects of alcohol and drug abuse. It is the 3rd Respondent's position that the Applicant's establishment is located approximately fifty metres from the Interested Party's school and therefore falls within the prohibited distance prescribed by law.

38. Upon careful consideration of the pleadings and affidavits on record, the court is unable to find that the Applicant has established a prima facie case with a probability of success.

39. First, I note that Section 12 of the Alcoholic Drinks Control Act prohibits the establishment of alcoholic drinks outlets within a prescribed distance from educational institutions. The purpose of this statutory provision is self-evident. It is intended to shield school-going children from

exposure to environment associated with alcohol consumption and related social harms.

40. The Constitution itself places a positive obligation upon the State to safeguard the welfare of children. Article 53(2) provides that the best interests of the child are of paramount importance in every matter concerning the child.

41. In the present matter, the Applicant does not dispute that its establishment is situated approximately fifty metres from the Interested Party's school. While the Applicant argues that the school was established after its business had already been operational, that fact alone cannot render inapplicable statutory and regulatory measures enacted in the public interest.

42. In **Kaaniru v Meru County Government & 4 others [2022] KEHC 16715 (KLR)**, Murithi J underscored that the objective of Section 12 of the Alcoholic Drinks Control Act is to safeguard

learning institutions from the adverse social influences and disruptions associated with the proximity of alcohol-selling establishments. The court observed that this statutory protection reflects an important public interest aimed at ensuring a safe and conducive learning environment for students. Consequently, where a conflict arises between the commercial interests of operators of alcoholic drink establishments and the statutory obligation to protect learning environments, the latter must take precedence. The court therefore held that regulatory measures taken to enforce the prescribed distance between alcohol outlets and learning institutions are justified and cannot be defeated merely on the basis of private business interests.

43. The Applicant also contends that the impugned directive was issued without affording it an opportunity to be heard and therefore violates

the right to fair administrative action under Article 47 of the Constitution. While the right to fair administrative action is a fundamental constitutional guarantee, it is equally settled that regulatory measures of a general nature aimed at safeguarding public welfare do not necessarily require individualized hearings before implementation.

44. The Applicant further argues that the closure of its establishment would cause significant financial loss and lead to the loss of employment for its workers. While the court does not trivialize the economic implications of such a directive, it is well settled that financial loss alone does not necessarily constitute irreparable injury capable of justifying the grant of an injunction.

45. The Court in the **Nguruman Limited case (supra)** expressed itself as hereunder: -

**“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages...”**

46. Moreover, the court must weigh the competing interests presented in this matter. On one hand is the Applicant's commercial interest in continuing its operations, while on the other hand is the State's constitutional obligation to protect children and ensure a safe learning environment free from the influence of alcohol-related activities.

47. In the circumstances of this case, I am persuaded that the public interest in safeguarding children and enforcing statutory regulations governing alcoholic drinks establishments outweighs the Applicant's private commercial interests.

48. The balance of convenience therefore tilts in favour of allowing the Respondents to enforce the regulatory directive pending the hearing and determination of the Petition. Granting the injunction sought would effectively suspend the implementation of a public regulatory measure

intended to protect school-going children, at this interlocutory stage.

49. In the end, I find that the Applicant has not demonstrated the existence of a *prima facie* case with a probability of success nor shown that it stands to suffer irreparable injury that cannot be compensated by damages. The balance of convenience too lies in allowing the Respondents to enforce the regulatory measures for the protection of children.

50. The Applicant has failed to meet the legal threshold for the grant of an interlocutory injunction. Accordingly, the Notice of Motion dated 21st November 2024 is hereby dismissed.

51. The interim orders are hereby discharged.

52. Costs of the Application shall abide the outcome of the Petition.

Orders accordingly,

**Ruling delivered, dated and signed at Chuka  
this 12<sup>th</sup> day of March, 2026.**

.....

**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered in the presence of Ms. Kidakwa for the 3<sup>rd</sup> Respondent, Mr. Mwenda Kathenya holding brief for Mr. Nyaga for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and N/A for the Applicant. Muriuki (Court Assistant.)**