

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CONSTITUTIONAL PETITION NO. E005 OF 2024

MOBISA ONKOBA T/A MIANGA-INI BAR.....
PETITIONER

-VERSUS-

THE OFFICER COMMANDING POLICE STATION
(OCS) MAKONGENI-KIAMBU COUNTY.....1ST
RESPONDENT

THE HONOURABLE ATTORNEY GENERAL
OF THE REPUBLIC OF KENYA.....2ND RESPONDENT

JUDGMENT

This petition arose from alleged acts of the 1st respondent of closing the petitioner’s business said to have been operating on plot number 38/198 at Makongeni area of Thika Sub-County on Kiambu County on or about 14th March 2024. The petition seeks the following orders;

- a. A declaration that the 1st respondent violated the petitioner’s rights under the Bill of Rights in the Constitution particularly Articles 47, 27, 19, 40 and 43 of the Constitution, 2010.

- b. That the 1st respondent be restrained whether by itself, agents, servants and/or any person taking instructions from him from interfering with the petitioner’s liquor business at plot no. 38/198 Makongeni otherwise known

as Mianga-ini Bar for the year under the relevant operational licenses unless lawfully authorized.

- c. An order for compensation.
- d. Costs of the petition and interest.
- e. Any other relief that this honourable court deems fit and proper so to grant.

To the petition are attached license for the bar, screenshots showing some messages, a bank deposit slip, a photograph of the bar's door with 'closed' and 'X' marks, the petitioner's identity card and the petitioner's witness statement dated 29-04-2024. These documents are not exhibited in the in an affidavit and therefore are not produced on oath. The only affidavit filed in this matter is the one sworn on 29th April 2024 in support of interlocutory notice of motion dated 19th April 2024 which was spent upon grant of the prayers sought therein on 4-06-2024.

Despite the lack of affidavit in support of the main petition, I hold the view that I can still proceed to consider the merits of the petition pursuant to Rule 11 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules which provide that;

1. *The petition filed under these rules may be supported by an affidavit.*
2. *If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.*

My interpretation of the above Rule is that it is not mandatory for a constitutional petition to be accompanied by a supporting affidavit and a petitioner may choose to annex documents in support of the same without necessarily producing them by an affidavit. This choice must however be taken with caution as the petitioner would be exposing himself to challenges of evidential rules where issues are highly contested.

The petitioner pleads that he applied for a liquor license from the County Government of Kiambu for the year 2024 which was granted upon which he paid Kshs 60,000.00 on 14-03-2024. He adds that before the grant of the license, he had complied with the government's Public Health Officer directives.

The petitioner has averred further that on 20-03-2024, the 1st respondent and his security team invaded the business and ordered it closed claiming that he was acting on orders from above. He states that the closure which had no notice was illegal and unconstitutional as he was not given any reason for its closure, he was not afforded opportunity to be heard, only his bar among many others was closed and his economic rights were interfered with as the bar was his source of livelihood. He states that during the period the business remained closed, he lost Kshs 10,000.00 per day and some workers lost their jobs.

In reply to the petition, the respondents filed grounds of opposition dated 5th July 2024 which are hardly legible. From what I am able to read in the grounds, the respondents raised the following points of defence;

- a. The petitioner has not demonstrated with precision which of his constitutional rights have been violated.

- b. The 1st respondent is mandated to enforce the law under Section 8(2) of the Alcoholic Drinks Control Act in its capacity as a member of the District Committee established under Section 8(3) of the same Act.
- c. Payment of the requisite fees is not the end as there must be continuous regulation and compliance inspection are expected to be done during the pendency of the licensing period.
- d. The petitioner's business was within 300 metres from St. Patsy Baptist Academy and Furaha Academy and Juniors Schools contrary to Section 12(1)(a) of the Alcoholic Drinks Control Act and as such it did not deserve protection under Article 40 of the Constitution.

The petition was ordered to be heard by way of written submissions. The petitioner filed submissions dated 20th August 2024 and supplementary submissions dated 13th September 2024 which I have carefully read and considered. The respondents did not file any submissions despite having been accorded opportunity to do so on several occasions.

As a preliminary point, the respondents have claimed in their grounds of opposition that the petitioner has not pleaded with precision the rights allegedly violated and in which way as held in the cases of *Mumo Matemu vs Trusted Society of Human Rights Alliance (20x)* and *Anarita Karimi Njeru (1979) KLR 154*. I have looked at the petition and in my view, it complies with these requirements as far as the right to fair administrative action is concerned. There is no prescribed standard or statutory forms for pleading the violation of the rights or framing a petition and all that is required is to have clear and specific pleading of what and how the right has been violated. I note that paragraph 11 of the petition

not only identifies the rights to a fair administrative action and against discrimination but also the specific Articles of the Constitution where they are guaranteed although I can't say the same of the right to protection of property. In that regard, it is my holding that the petition is properly framed and competent.

The petitioner has stated that he was not given an opportunity to be heard before the business was closed neither was he given reasons for the action save that the officers were acting on orders from above. The respondents have not countered this assertion. I note from the grounds of opposition that the respondents do not deny that the business was closed. Actually, they instead tried to justify the closure by stating that the bar was within 300 metres from schools against the provision of Section 12 of Alcoholic Drinks Control Act and that the 1st respondent had the mandate to close the business.

Article 47(1) and (2) of the Constitution provides that;

- 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
- 2. If a right or 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.*

To operationalize that Article, the Parliament enacted Fair Administrative Actions Act whose Section 4(3) provides that;

Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;*
- (b) an opportunity to be heard and to make representations in that regard;*
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;*
- (d) a statement of reasons pursuant to section 6;*
- (e) notice of the right to legal representation, where applicable;*
- (f) notice of the right to cross-examine or where applicable; or*
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.*

The purport of the above provisions is that the person likely to be affected by the decision contemplated by a person in authority or office must be given at least an opportunity to make presentation before the action is taken in addition to the reason for the action. This enables the person to be affected by the decision an opportunity to challenge or at least seek remedial measures including correcting or amending of their situation. For instance, in this case, the petitioner would have made amends by either making arrangements to move after ascertaining the distance and approach the County Government for authority to use the same licence on another suitable plot.

Needless to say, before the licence was issued, it is presumed that the County Government or the Public Health Office inspected the premises and satisfied itself that the location was in compliance with the law. For the respondents to come and close down the business without giving the petitioner right to make presentation on the same and failing to give him reasons for the closure, was not only unlawful but

also an uncivilized way of doing things which has no space in a democratic country.

In a country where institutions work or should work, the authority issuing the licence should be the one revoking it of course through a due process. There is no indication from the respondent that they consulted or involved the licensing authority. By closing the business without involving the County Government which issued the license, the 1st respondent in my view acted *ultra vires* and abused the powers donated to it under the National Police Service.

The respondents have stated that the 1st respondent had the mandate to visit, inspect and enforce the law and regulate the petitioner's business under Section 12 of the Alcoholic Drinks Act. Respectively, this is a misrepresentation of the statutory provisions. Section 12 of the Act gives factors to be considered in granting license to premises by the Committee. The 1st respondent is just a member of the District Alcoholic Drinks Regulation Committee which consists of representatives of other 5 offices. Actually, I doubt that the 1st respondent is a member of the Committee because the representative provided in Section 8(3)(c) is Officer Commanding Police Division which is a different office from the 1st respondent although they are both under the National Police Service. Acting alone and in the manner it did, the 1st respondent cannot purport to have been acting in enforcement of Section 12. In any event, the licence had already been issued. The 1st respondent could not act as the beginning and end of the process.

It may have been obvious to the 1st respondent that the petitioner's business was within 300 metres from a school but that alone does not invalidate the license issued by the County Government without hearing the petitioner or the County. A

person is entitled to be heard irrespective of how obvious his culpability or error in law looks to the enforcing office. The Supreme Court of Kenya held in ***John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)*** that;

‘It is important to restate that a literal reading of the provisions of the Constitution of Kenya show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context.’

The petitioner has claimed that his right under Article 27 of the Constitution was violated in that other bars in the area were not closed. What I understand the petitioner saying is that he was discriminated. I find this to be a mere statement without supporting evidence. The petitioner has not mentioned these other bars and I see no basis to find that the petitioner was discriminated. Discrimination means treating one person or group of persons or community differently from others in similar circumstances without any objective and reasonable justification. In my opinion, discrimination cannot be declared where the predicate actions are unlawful or against the law. One cannot claim that since others have committed unlawful acts without being targeted by the law enforcers, they should also be let to enjoy their unlawful actions. In ***Law Society of Kenya v Attorney General & another [2019] KESC 16 (KLR)***, it was held that;

‘Discrimination therefore entails the unjust or prejudicial treatment of different categories of people in the same circumstances...’

The petitioner has also pleaded that his economic and social rights were violated as the business which used to earn him Kshs 10,000.00 per day was unlawfully closed. On this basis, the petitioner seeks compensation in form of damages to the

tune of Kshs 10,000.00 per day for the period the bar remained closed. However, there is nothing in the petition or the documents attached to it that shows the income the petition used to earn. There are no books of accounts, banking slips, cashbooks, bank statements, invoices or any financial document that would guide this court in making a decision on how much the petitioner likely lost during the period of closure. It is therefore not possible to ascertain the specific loss incurred by the petitioner.

It should however be noted that a petitioner whose constitutional rights are violated is entitled to general damages. These damages are at large depending on the circumstances of the case and the level of breach and attendant suffering. I am guided by the decision of Justice E.K. Ogola in ***Gulleid v Registrar of Persons & another [2021] KEHC 110 (KLR)*** where he held that;

‘In terms of the quantum of damages, awarding damages entails the exercise of judicial discretion, which should be exercised judicially, which means that it should be based on reason and principle rather than caprice or personal opinion.’

According to the record before me, the bar was closed on 20-03-2024. Conservatory orders were issued in this matter on 30-04-2024 and it must be assumed that the same were obeyed as the petitioner never made a complaint of non-compliance with the court order. It is therefore not true that the closure persisted up to 22nd July 2024 as submitted by the petitioner. The magnitude of the loss or the size of the business is not clear to me. In the circumstances, I exercise my discretion and award a sum of Kshs 200,000.00 as remedy for violation of the petitioner’s constitutional rights.

Prayer 2 of the petition was couched in a manner to suggest that it was to prevent closure of the business during the year the licence was operative. The conservatory orders issued on 30-04-2024 have been in force during the pendency of this suit. It is clear therefore that the prayer has been spent and cannot be granted at this stage.

The final orders are;

1. A declaration is hereby issued that the 1st respondent violated the petitioner's constitutional right to fair administrative action guaranteed under Article 47 of the Constitution of Kenya.
2. The petitioner is hereby awarded Kshs 200,000.00 being damages for violation of his constitutional rights.
3. The above sum shall attract interest from the date of this judgment until payment in full.
4. The petitioner is awarded the costs of this petition.

Dated, signed and delivered at Nairobi this **30th** day of **April** 2026.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Magani for the petitioner and in absence of the respondent.