



Gitonga & another v County Government of Mombasa & 5 others (Civil Appeal (Application) E211 of 2024) [2025] KECA 1082 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1082 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E211 OF 2024
SG KAIRU, KI LAIBUTA & GWN MACHARIA, JJA
JUNE 20, 2025**

BETWEEN

**JOSEPH MUTERO GITONGA 1ST APPLICANT
MOMBASA COUNTY ENTERTAINMENT, BARS, PUBS, RESTAURANTS,
HOTELS, GUEST HOUSES, WINES & SPIRITS OWNERS ORGANIZATION
(SUING THROUGH THE CHAIRMAN PATRICK KABUNDU AND THE
TREASURER LYDIA NGARI) 2ND APPLICANT**

AND

**COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT
CLERK, MOMBASA COUNTY ASSEMBLY 2ND RESPONDENT
DIRECTOR, MOMBASA COUNTY DIRECTORATE OF LIQUOR CONTROL
LICENCING 3RD RESPONDENT
NATIONAL POLICE SERVICE 4TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTION 5TH RESPONDENT
ATTORNEY GENERAL 6TH RESPONDENT**

(Being an application arising from the Judgment and Decree of the High Court of Kenya at Mombasa (Olga Sewe, J.) dated 19th September 2024 in HC. Petition No. E059 of 2023)

RULING

1. Mombasa County Entertainment, Bars, Pubs, Restaurants, Hotels, Guest Houses, Wines & Spirits Owners Organization, the 2nd applicant (the Organization) through its Chairman, Patrick Kabundu, has, by a rather lengthy application running into 30 pages and dated 8th November 2024, moved the Court under Rule 5(2) of the Court of Appeal Rules seeking an order that, pending the determination



- of this appeal, this Court “extend the status quo order issued on 20th September 2024 by Lady Justice O. A. Sewe as per 19th September 2024 (sic)...” so as to prohibit the respondents from instituting or conducting any criminal prosecutions under the Mombasa County Liquor Licensing Act, 2014; Mombasa County Trade License Act, 2014; and [Alcoholic Drinks Control Act](#), 2010.
2. The Organization has appealed the judgment of the High Court (Olga Sewe, J.) delivered on 19th September 2024 in Mombasa High Court Petition No. E059 of 2023 dismissing its constitutional petition that sought nullification of Mombasa County Trade License Act 2014, the Mombasa County Liquor Licensing Act 2014, and the [Alcoholic Drinks Control Act](#) 2010 on the grounds that the same are unconstitutional.
 3. We heard the application on 4th February 2025 when Mr. Patrick Kabundu (Chairman of the Organization) appeared in person and was supported by learned counsel Miss. Ng’ang’a who held brief for Mr. Oloo for the 1st applicant. Ms. Saru learned counsel appeared for the 4th, 5th and 6th respondents. There was no appearance for the 1st, 2nd and 3rd respondents despite notice of hearing having been served on them.
 4. The Organization had challenged the constitutionality of the Mombasa County Trade License Act 2014, the Mombasa County Liquor Licensing Act 2014, and the [Alcoholic Drinks Control Act](#) 2010, particularly on grounds of alleged failure to comply with constitutional requirements regarding publication in the Gazette and commencement dates. The Organization urged before the High Court that charging individuals with criminal offences under these un-gazetted Acts is illegal and unconstitutional, constituting a breach of the rule of law and fundamental rights. The High Court was not persuaded and dismissed the petition, and hence this appeal within which the present application is made.
 5. In his written and oral submissions before us, Mr. Kabundu who was supported in his submissions by Miss. Ng’ang’a, submitted that the appeal is arguable as demonstrated in the 17 grounds of appeal set out in the memorandum of appeal; that persons are wrongfully being charged with criminal offences under the impugned statutes and that, unless the orders sought are granted, they will be tried and convicted, and the appeal will be rendered nugatory; and that the appeal is a public interest matter.
 6. Miss. Saru for the 4th, 5th and 6th respondents opposed the application urging that the judgment of the High Court is correct; that allowing the present application will negate the doctrine of presumption of constitutionality of legislation; and that allowing the application will result in chaos through sale of illicit alcohol.
 7. Having considered the application against the applicable legal principles (See Stanley Kangethe Kinyanjui vs Tonny Ketter & 5 others [2013] eKLR), we are satisfied that the intended appeal is not frivolous. There is for example the argument involving interpretation of Article 199(1) of [the Constitution](#) of Kenya which provides that “County legislation does not take effect unless published in the Gazette” and whether there was compliance with the same in the enactment of the impugned statutes. The appeal is arguable.
 8. On the nugatory aspect, it was urged for the applicants that, unless the orders sought are granted, Mombasa citizens and businesses will continue to be charged and potentially incarcerated and fined under the challenged Acts, and that the appeal will thereby be rendered nugatory.
 9. We are however not persuaded that declining to grant the orders sought in the present application will render the appeal nugatory should it ultimately succeed. It is within the province of the trial courts where criminal charges may be instituted to determine the merits or otherwise of such charges, and a blanket order barring or prohibiting institution of charges would be disproportionate and



inappropriate. In the recent decision of this Court in Mutune vs. Republic (Criminal Application No. E290 & E292 of 2024 & Criminal Appeal (Application) No. E124 of 2024 (Consolidated)) [2025] KECA 496 (KLR), the Court reiterated the earlier pronouncement by the Court in Diana Kethi Kilonzo vs. Republic [2016] KECA 19 (KLR), stating as follows:

We finally address the question as to whether the remaining applicants have satisfied the conditions for the issuance of orders staying the impugned ruling and suspending the criminal proceedings. In addressing this issue, we are guided by the parameters set by the Court in Diana Kethi Kilonzo vs. Republic (supra) as follows:

22. The upshot on the issue of jurisdiction is, therefore, that under the inherent jurisdiction of this court and pending disposal of appeals from the High Court, an order of stay of proceedings can issue where it is demonstrated that the prosecution is actuated by malice and there is abuse of the court process and/or where such prosecution is instituted for an improper motive such as to harass and exert improper pressure upon the applicant. The subordinate court criminal proceedings will also be stayed if it is demonstrated that the prosecution is instituted in derogation of the applicant's constitutional rights. The jurisdiction is sparingly used and only where the justice of the matter so demands.#”

10. The present applicant does not, in our view, fit within those parameters. Moreover, the applicant appears to appreciate that granting the orders as sought would in effect pre-judge and pre-determine the substance of the appeal and has sought, as an alternative prayer, an order was sought for an expedited hearing and determination of the appeal, which is a matter the parties can take up administratively with the Presiding Judge of the Station through the Deputy Registrar.

11. In conclusion, the application fails and is hereby dismissed. We make no orders as to costs.

DATED AND DELIVERED AT MALINDI THIS 20TH DAY OF JUNE 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

DR. K.I. LAIBUTA, CArb, FCIArb.

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

