



**County Government of Kiambu v Kariuki & 3 others (Civil Appeal
137 of 2017) [2021] KECA 351 (KLR) (17 December 2021) (Judgment)**

Neutral citation: [2021] KECA 351 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 137 OF 2017
MA WARSAME, F SICHALE & HA OMONDI, JJA
DECEMBER 17, 2021**

BETWEEN

COUNTY GOVERNMENT OF KIAMBU APPELLANT

AND

JAMES GACHERU KARIUKI 1ST RESPONDENT

JOHN NGUGI MUNGAI 2ND RESPONDENT

RICHARD MUNGAI KAGIRI 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

*(An appeal against the Judgment and Decree of the High Court of Kenya at
Nairobi (Lenaola, J) dated 24th February, 2017 in Petition No. 52 of 2016
as consolidated with Petition No. 308 of 2015 & Petition No.7 of 2016)*

County legislation ought to be published in the Kenya Gazette for it to gain legitimacy.

Reported by Ribia John

Constitutional Law – legislation - county legislation – publication of county legislation - procedure upon which county legislation came into force – publication in the Gazette - whether county legislation could come into force upon its publication in the County Gazette where the publication in the County Gazette preceded publication in the Kenya Gazette - whether the County Gazette could supersede the Kenya Gazette - whether the County Gazette was equivalent to a Kenya Gazette or a supplement of the Kenya Gazette – Constitution of Kenya, 2010, articles 199 and 260; County Government Act, Act No. 17 of 2012, section 25(1) and (2).

Statutes – interpretation of statutes – constitutionality of statutory provisions - County Government Act, Act No. 17 of 2012, section 25(2) - meaning and implication of ‘whichever comes first’ as used in section 25 of the County Government Act - whether section 25 of the County Government Act that presupposed the possibility of county legislation coming into force upon its publication in the County Gazette only where it preceded publication



in the Kenya Gazette was invalid - Constitution of Kenya, 2010, articles 199 and 260; County Government Act, Act No. 17 of 2012, section 25(1) and (2).

Brief facts

The County Government of Kiambu (appellant) lodged the instant appeal against the judgment and decree of the High Court in Petition No.52 of 2016 as consolidated with Petition No. 308 of 2015 and Petition No.7 of 2016 that declared section 25(2) of the County Governments Act inconsistent with article 199 (1) of the Constitution. The High Court had declared that section 25(2) of the County Governments Act was inconsistent with article 199 (1) of the Constitution, insofar as the wording used, ‘whichever comes earlier’.

The use of the phrase created a scenario where county legislation would come into force on being published in the County Gazette only. If such a publication would precede publication in the Kenya Gazette, it would undermine the intent of article 199 (1) of the Constitution, which provided that county legislation was to only come into effect upon being published in the Gazette (referred to as the Kenya Gazette and not the County Gazette).

The appellant’s contention was that it did not matter where the proposed County Legislation was published, the one published earlier took effect. The appellant further stated that the phrase ‘whichever comes earlier’ denoted the urgency of enacting the legislation into law upon publication and not to contravene any law or usurp the operation of the Constitution, and as such the section was not inconsistent with article 199(1) of the Constitution.

Issues

- i. Whether county legislation could come into force upon its publication in the County Gazette where the publication in the County Gazette preceded publication in the Kenya Gazette.
- ii. Whether the County Gazette could supersede the Kenya Gazette.
- iii. Whether the County Gazette was equivalent to a Kenya Gazette or a supplement of the Kenya Gazette.
- iv. What was the meaning and implication of the words, ‘whichever comes first’, as used in section 25 of the County Government Act?
- v. Whether section 25 of the County Government Act that presupposed the possibility of county legislation coming into force upon its publication in the County Gazette only where it preceded publication in the Kenya Gazette was invalid.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 199 - Publication of county legislation

(1) *County legislation does not take effect unless published in the Gazette.*

(2) *National and county legislation may prescribe additional requirements in respect of the publication of county legislation.*

Article 260 - Interpretation

In this Constitution, unless the context requires otherwise—

“Gazette” means the Kenya Gazette published by authority of the national government, or a supplement to the Kenya Gazette;

County Government Act, Act No. 17 of 2012

Section 25 - Coming into force of a law

(1) *A legislation passed by the county assembly and assented to by the governor shall be published in the county Gazette and Kenya Gazette within seven days after assent.*



(2) *Subject to subsection (3) the County Assembly legislation shall come into force on the fourteenth day after its publication in the county Gazette and Kenya Gazette, whichever comes earlier, unless the legislation stipulates a different date or time at which it shall come into force.*

Held

1. The first appellate court's primary duty was to re-evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per rule 29(1)(a) of the Court of Appeal Rules.
2. Article 199(1) of the Constitution provided that county legislation did not take effect unless published in the Gazette. Article 260 defined a Gazette as the Kenya Gazette published by the authority of the National Government or a supplement to the Kenya Gazette. Section 25 (2) of the County Government Act reinforced the position that county legislation ought to be published in both the Kenya Gazette and the County Gazette and that such publication may be done concurrently. The same section further provided that the legislation shall come into force on the fourteenth day after its publication in the County Gazette and Kenya Gazette, whichever came first.
3. It was on the wording 'whichever came first' that the respondents presupposed the possibility of county legislation coming into force upon its publication in the County Gazette only where it preceded publication in the Kenya Gazette. A County Gazette was a creation of the County Government Act and not the Constitution and could not by any craft of interpretation supersede its publication in the Kenya Gazette. The Constitution explicitly required county legislation to be published in the Kenya Gazette for the same to take effect.
4. A County Gazette was neither a Kenya Gazette nor a supplement to the Kenya Gazette as it departed from the definition of a Kenya Gazette used in article 199 and defined in article 260 of the Constitution. Pursuant to article 199 of the Constitution, section 25 of the County Governments Act was enacted to provide additional requirements with regard to the publication of County Legislation. Any additional requirements contemplated under article 199 should not derogate from the mandatory duty necessitating publication of County Legislation in the Kenya Gazette or its supplement, and no legislation could waive the need for such publication.
5. The provision of section 25 of the County Government Act was that county legislation ought to be published in both the Kenya Gazette and the County Gazette and such publication could be done one after the other. Section 25 provided that the legislation was to come into force on the fourteenth day after its publication in the County Gazette and Kenya Gazette, whichever came earlier.
6. The wording 'whichever comes earlier' under section 25 of the County Government Act presupposed the possibility of county legislation coming into force upon its publication in the County Gazette only where it preceded publication in the Kenya Gazette. Section 25 was a complete derogation from the prerequisite of the Constitution and was invalid to the extent of the words 'whichever comes first' as it envisioned that county legislation could come into effect without necessarily being published in the Kenya Gazette. The correct position was that county legislation ought to be published in the Kenya Gazette for it to gain legitimacy.

Appeal dismissed.

Orders

Costs to the respondents.

Citations

Cases

1. Tyson Ng'etich & another v Governor, Bomet County Government & 5 others (Petition 415 of 2014 [2015] eKLR) — Explained

Statutes

1. Alcoholic Drinks Control Act 2010 — Cited



2. Constitution of Kenya, 2010 — article 199 (1) , 260 — Interpreted
3. County Governments Act (No. 17 of 2012) — section 8 (2) , 25(2) — Interpreted

Advocates

None mentioned

JUDGMENT

1. The County Government of Kiambu, the appellant herein, prefers this appeal against the judgment and decree of the High Court of Kenya at Nairobi (Lenaola, J.) dated 23rd February, 2017 and delivered on 24th February, 2017 in Petition No.52 of 2016 as consolidated with Petition No.308 of 2015 and Petition No.7 of 2016 declaring section 25(2) of the *County Governments Act* inconsistent with article 199 (1) of the Constitution.
2. The 1st respondent James Gacheru Kariuki, who was the petitioner in the High Court Petition No 308 of 2015, challenged the constitutionality of several Kiambu County legislations on grounds that they had not been published in the Kenya Gazette.
3. He sought that a mandatory injunction issues compelling the Attorney General, being the 4th respondent in this appeal, to put in place the necessary modified County Committee(s) to deal with the Liquor Licensing, Control, and Regulation under the *Alcoholic Drinks Control Act* 2010, as envisaged by the provisions of section 8 (2) of the County Government Act, 2012, that the said County Committees are put in place as , 2012, orders staying any operations under the Kiambu County Alcoholic Drinks Act 2013, and the Regulations, the Kiambu Emergency Fund Act, 2013 and Regulations, Kiambu County Education Bursary Fund Act, 2013 and Regulations, Kiambu County Youth, Women and Persons with Disability Enterprise Fund Act, 2014 and Regulations, prohibitory orders against County Government of Kiambu and Director of Public Prosecutions from instituting and or conducting any criminal prosecutions under the *Alcoholic Drinks Control Act* and Regulations in respect of issues of licensing an order prohibiting the Magistrate’s Court at Kiambu, Githunguri, Gatundu, Kikuyu, Limuru, and Thika from admitting any charges against any person who was licensed to operate a liquor outlet or manufacture under the Alcoholic Drinks Act 2010, by National Authority for Campaign Against Alcohol and Drug Abuse (NACADA) in Kiambu County, prohibitory orders to issue against County Government of Kiambu, Kiambu County Police Commander, and Kiambu County Commissioner, from harassing, arresting, detaining and or preferring charges over liquor licences against any person who has a licenced to operate a liquor outlet, or manufacture liquor under the *Alcoholic Drinks Control Act* 2010, in Kiambu County.
4. Basically his contention was that section 25(2) of the *County Governments Act* is inconsistent with article 199 (1) of the Constitution, in so far as the wording used... ‘whichever comes earlier...’ The 1st petitioner was of the view that the use of the said phrase would create a scenario where County Legislation would come into force on being published in the County Gazette only, if such a publication would precede publication in the Kenya Gazette, it would undermine the intent of article 199 (1) of the Constitution which provides that County legislation shall only come into effect upon being published in the Gazette (which according to the 1st petitioner refers to the Kenya Gazette and not the County Gazette).
5. John Ngugi Muigai, the 2nd petitioner’s case as contained in Petition No 308 of 2015, and Petition No 52 of 2016 was that under article 199 (1) of the Constitution, a County legislation only comes into effect upon being published in the Kenya Gazette and that the *County Governments Act* has given leeway for publication of legislation in the County Gazette to the exclusion of the Kenya Gazette. It



was his contention that any exclusive publication in the County Gazette contravenes the Constitution and renders section 25(2) of the *County Governments Act* inconsistent with article 199 (1) of the Constitution. The 2nd petitioner goes further to state that the word ‘Gazette’ has been defined under section 2 of the *Interpretation and General Provisions Act*, and no other definition as provided for under any other statute should stand.

6. The 3rd petitioner, Richard Mungai Kagiri’s case as contained in Petition No 7 of 2016 and No 52 of 2016 challenged the publication of County legislation in the County Gazette instead of the Kenya Gazette. His contention was that the Kiambu County *Alcoholic Drinks Control Act* and the Kiambu County Alcoholic Drinks Control (Licensing) Regulations, 2014 were only published in the County Gazette and not the Kenya Gazette as required and were thus invalid and unconstitutional.
7. The 1st respondent in essence agreed with the position taken by the petitioners that every County legislation must be published in the Kenya Gazette, regardless of whether it is published in the County Gazette. To the extent, section 25(2) of the County Government Act being inconsistent with article 199 (1) of the Constitution.
8. The 1st respondent however contended that Kiambu County *Alcoholic Drinks Control Act* and the Kiambu County Alcoholic Drinks Control (Licensing) Regulations, 2014, were published by the Government Printer as a supplement to the Kenya Gazette. It disputed the fact that the publications are done in the County Gazette, and that the use of the word ‘gazette’ by the Kiambu County was just a mechanism to distinguish various legislations from different Counties but still remain as notices supplementary to the Kenya Gazette.
9. The 1st respondent also maintained that there was no proof offered by the petitioners on the existence of a County Printer established by the Kiambu County Assembly for purposes of publishing County legislation. The 1st respondent stated that the legislation passed by the Kiambu County Assembly were within the law and in conformity with the procedural requirements of article 199 (1) of the Constitution.
10. The 2nd respondent’s position in the High Court was that a County Gazette is a supplement to the Kenya Gazette and relied on article 260 of the Constitution which defines Gazette to mean ‘the Kenya Gazette published by authority of the National Government, or a supplement to the Kenya Gazette.’
11. On the issue as to whether section 25 (2) of the *County Governments Act* is inconsistent with section 199 (1) of the Constitution, the 2nd respondent was of the view that section 25 deals with ‘coming into force’ of a County legislation whereas article 199 deals with ‘publication of County legislation’ which according to the 2nd respondent are separate and distinct, that the National Government through the Government Printer publishes County legislation as special issues of the Kenya Gazette in the style of County Gazette Supplements, and that the special issues of the Kiambu County Gazette Supplements meet the threshold provided for under article 199(1) of the Constitution and section 25 of the County Government Act.
12. Subsequently the three petitions were consolidated and the parties agreed that the issues for determination were whether the County legislation must be published for legitimacy in the Kenya Gazette or in the County Gazette only, whether section 25 (2) of the *County Governments Act* is inconsistent with article 199 of the Constitution, whether County legislation as presently published by the County Government of Kiambu is valid and whether the petitioners are entitled to the reliefs sought.
13. By a judgment dated 23rd February, 2017, the trial court having carefully considered the parties’ pleadings, testimony, and evidence of record, found that the Kiambu County Alcohol Drinks Control



Act 2013 and the Kiambu County Alcoholic Drinks Control (Licensing Regulations, 2014) as then published did not meet the dictates of article 199 (v) of the Constitution.

14. The learned judge's rationale was that the term County Gazette is not defined or provided for in the Constitution. That the Constitution only provides for a Gazette which has been defined as the Kenya Gazette published by the authority of the County Government or a supplement to the Kenya Gazette. Further, that the [County Governments Act](#) defines 'A County Gazette' as a Gazette published by the authority of the County Government or a supplement of such a gazette. That there is a clear distinction between a County Gazette and a Kenya Gazette, and that the Constitution explicitly requires County Legislation to be published in the Kenya Gazette for the same to take effect.
15. The learned Judge observed that a County Gazette is neither a Kenya Gazette nor a supplement to the Kenya Gazette and as such, County legislation only gains legitimacy upon its publication in the Kenya Gazette, or a supplement to the Kenya Gazette. The learned Judge also observed that the definition of a County Gazette completely departs from the meaning of the term Gazette as used in article 199 and defined in article 260 of the Constitution, and that a County Gazette, being a creation of the [County Governments Act](#) and NOT the Constitution, could not therefore supersede its publication in the Kenya Gazette.
16. The learned judge also observed that the word 'Kenya Gazette' MUST appear in the heading of a publication in either the Kenya Gazette or a supplement to the Kenya Gazette.
17. It is from the foregoing that the trial court made its finding that section 25(2) of the [County Governments Act](#) is inconsistent with article 199(1) of the Constitution to the extent that it uses the phrase 'whichever comes earlier' and is valid to that extent only.
18. The appellant challenges the judgment of the High Court on 12 grounds of appeal which it narrowed to two issues namely: a) Whether the County Government Act is inconsistent with article 199(1) of the Constitution, b) Whether article 199 of the Constitution requires County Legislation to be published in the Gazette and whether there is a difference between County Gazette and Kenya Gazette.
19. As regards whether the County Government Act is inconsistent with article 199(1) of the Constitution, the appellant concedes in its submissions that section 25 of the [County Governments Act](#) is meant to ensure that County Law is published before it is considered as law. However, it is the appellant's argument that the use of the phrase 'whichever comes earlier' denotes the urgency of enacting the legislation into law upon publication, and not an intention to contravene any law, or usurp the operation of the Constitution.
20. Further, that the phrase is complementary rather than contradictory to the Constitution. It is the Appellant's contention therefore, that it does not matter where the proposed County legislation is published, the one that is published earlier takes effect. In support of this argument, the Appellant relies on the High Court case of [Tyson Ngetich & Another v Governor Bomet County Government & 5 others \(2015\) eKLR](#) where the learned Judge noted that County Legislation does not take effect unless published in the Kenya Gazette. We hasten to point out that this cited case being a High Court decision, it is only of a persuasive nature in aiding this court to reach a decision.
21. The appellant thus insists that section 25 of the [County Governments Act](#) shows that the Act was formulated with the intention of coming into force of County Legislation, thus not inconsistent with the Constitution.
22. As to whether article 199 of the Constitution requires County Legislation to be published in the Gazette and whether or not there is a difference between County Gazette and Kenya Gazette, the appellant argues that in as much as article 199 of the Constitution provides that County Legislation



- does not take place unless published in the Gazette, section 25 of the [County Governments Act](#) provides that County Legislation shall not take effect until the fourteenth day after its publication in the County Gazette and Kenya Gazette, whichever comes earlier.
23. While conceding that article 199 requires publication of County Legislation in the Kenya Gazette to come into effect, the appellant nonetheless submits that the County Gazette falls within the purview of ‘supplemental gazette’, as the legislation in contention were gazetted as special issues of the Kiambu County Gazette supplement, and therefore fits the description, and does not require to be published in the Kenya Gazette for the legislation to take force.
 24. The appellant further states that at the time in question the County Governments were still transitioning into the new devolved structure, and were yet to have their own printers to publish their legislation, and according to the appellant’s reasoning, by dint of the Government printers publishing the County Legislation, it somehow got the status of a ‘supplement Gazette’ to the Kenya Gazette, and as such would not be required to be published in the Kenya Gazette.
 25. It is further argued that in as much as a difference being drawn between the Kenya Gazette and County Gazette, when the Counties were still in transition, they did not have the capacity to print their own Gazette and the Government Printer did the printing of the County Gazette as a special issue of the Kenya Gazette, and in doing so at the time, there was no distinction between the County Gazette and Kenya Gazette.
 26. In response the 1st respondent reiterates that County legislation can only come into effect after publication in the Kenya Gazette, and the phrase ‘whichever comes earlier’ is inconsistent with the Constitution as it envisages a situation where if County Legislation has been published in the County Gazette before the Kenya Gazette as would be the logical happening of things, then the County Legislation would already have come into force, and would not require to be published in the Kenya Gazette for legitimacy purposes.
 27. The 3rd respondent’s position is that the words ‘whichever comes earlier’ in the [County Governments Act](#) section 25 purports to allow County Legislation to take effect after publishing in the County Gazette without necessarily being published in the Kenya Gazette. The 3rd respondent contends that article 199 of the Constitution is very clear when it pronounces ‘unless published in the Gazette’, and in which instance Gazette means the Kenya Gazette and not County Gazette. The 3rd respondent also contends that there is a glaring difference between the Kenya Gazette and the County Gazette, and that the Legislation referred to are County Gazette Supplements and not Supplements to the Kenya Gazette.
 28. The 4th respondent, the Attorney General, agrees with the decision of the High Court, pointing out that section 25 of the [County Governments Act](#) makes it mandatory for legislation to be published in the County Gazette as well as the Kenya Gazette. The 4th respondent contends that the wording ‘whichever comes earlier’ equates publication in the County Gazette and Kenya Gazette presupposing that County Legislation comes into force upon publication in the County Gazette where it precedes publication in the Kenya Gazette. The 4th respondent contends that this contradicts article 199 of the Constitution, which provides that for any County Legislation to take effect, the same must be published in the Kenya Gazette. Further, that the Constitution does not recognize a County Gazette, which cannot be construed to mean a Kenya Gazette as the two are distinctly different. The respondent argues that the Kenya Gazette is superior to the County Gazette, and that the Kenya Gazette supersedes a County Gazette in its publication. It is emphasized that a County Gazette is not a Supplement of the Kenya Gazette.



29. This being a first appeal it is this court's primary duty to re-evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per rule 29 (1)(a) of the Court of Appeal Rules. The main issues in this appeal is whether the County Government Act inconsistent with article 199(1) of the Constitution.
30. The appellant's contention is that it does not matter where the proposed County Legislation is published, the one published earlier takes effect. The appellant further states that the infamous phrase 'whichever comes earlier' denotes the urgency of enacting the legislation into law upon publication and not to contravene any law or usurp the operation of the constitution, and as such the said section is not inconsistent with section 199(1) of the Constitution.
31. For the purposes of this Appeal the following provisions are to be borne in mind.

Article 199(1) of the Constitution 'County legislation does not take effect unless published in the Gazette.'

Article 260 defines a Gazette as 'the Kenya Gazette published by the authority of the National Government or a supplement to the Kenya Gazette.'

Section 25(1) 'A legislation passed by the County Assembly and assented to by the Governor shall be published in the County Gazette and Kenya Gazette within seven days after assent.

25 (2) 'Subject to subsection (3) the County Assembly legislation shall come into force on the fourteenth day after its publication in the county Gazette and Kenya Gazette, whichever comes earlier, unless the legislation stipulates a different date or n time at which it shall come into force.

32. Section 25 (2) reinforces the position that County legislation ought to be published in both the Kenya Gazette and the County Gazette and that such publication may be done concurrently. The same Section further provides that the legislation shall come into force on the fourteenth day after its publication in the County Gazette and Kenya Gazette, whichever comes first. It is on this wording 'whichever comes first' that the Respondents presuppose the possibility of County Legislation coming into force upon its publication in the County Gazette only where it precedes publication in the Kenya Gazette. It is plain to us that a County Gazette is a creation of the County Government Act and not the Constitution and cannot by any craft of interpretation supersede its publication in the Kenya Gazette. We are thus in agreement with the learned Judge that the Constitution explicitly requires County Legislation to be published in the Kenya Gazette for the same to take effect.
33. We note with approval that the learned judge's findings that a County Gazette is neither a Kenya Gazette nor a supplement to the Kenya Gazette, as it departs from the definition of a County Gazette used in article 199 and defined in article 260. Indeed, pursuant to Article 199 of the Constitution, section 25 of the [County Governments Act](#) was enacted to provide additional requirements with regards to publication of County Legislation. We agree with the learned judge that any additional requirements contemplated under article 199 should not derogate from the mandatory duty necessitating publication of County Legislation in the Kenya Gazette or its supplement, and no legislation can waive the need for such publication.
34. Our understanding of the provisions of section 25 is that County legislation ought to be published in both the Kenya Gazette and the County Gazette and such publication may be done one after the other. We note the observation made by the learned trial judge that section 25 further does provides that the legislation shall come into force on the fourteenth day after its publication in the County Gazette and Kenya Gazette, whichever comes earlier. It is now this wording 'whichever comes earlier' that is the



issue as it presupposes the possibility of County Legislation coming into force upon its publication in the County Gazette only where it precedes publication in the Kenya Gazette.

35. We find that the judge held and rightly so held that section 25 was a complete derogation from the prerequisite of the Constitution and was invalid to the extent of the words ‘whichever comes first’ as it envisions that County Legislation may come into effect without being necessarily being published in the Kenya Gazette. Indeed, the correct position is that County Legislation ought to be published in the Kenya Gazette for it to gain legitimacy.

36. From the foregoing this appeal has no merit and is dismissed with costs to the respondents.

DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

