



**Ombima & 60 others (Suing on His Own Behalf and on Behalf of Members and Sub County Committee Members of the Nairobi City County Alcoholic Drinks Control and Licensing Board) v Office of the Governor, Nairobi City County & 3 others (Petition E60 of 2023) [2024] KEELRC 579 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 579 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E60 OF 2023**

**B ONGAYA, J**

**MARCH 15, 2024**

**IN THE MATTER OF ARTICLES 3, 10, 19, 20, 22, 23, 27, 41, 47, 157, 162(2) AND 258 OF THE CONSTITUTION OF KENYA 2010**

**-AND-**

**IN THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3, 10, 27, 41, 47, 232 AND 259(1) OF THE CONSTITUTION -AND-**

**SECTIONS 4, 7, 9 AND 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, ACT NO. 4 OF 2015**

**-AND-**

**SECTION 4 OF THE NAIROBI CITY COUNTY ALCOHOLICS DRINKS CONTROL AND LICENSING ACT**

**-AND-**

**SECTION 35, 41 43 OF THE EMPLOYMENT ACT**

**BETWEEN**

**AINEAH NEWTON OMBIMA & 60 OTHERS (SUING ON HIS OWN BEHALF AND ON BEHALF OF MEMBERS AND SUB COUNTY COMMITTEE MEMBERS OF THE NAIROBI CITY COUNTY ALCOHOLIC DRINKS CONTROL AND LICENSING BOARD) ..... PETITIONER**

**AND**

**THE OFFICE OF THE GOVERNOR, NAIROBI CITY COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**



**THE OFFICE OF THE CHIEF OFFICER COMMERCE AND  
INDUSTRIALIZATION NAIROBI COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**THE OFFICE OF THE CHIEF OFFICER BUSINESS AND HUSTLER  
OPPORTUNITIES NAIROBI COUNTY ..... 4<sup>TH</sup> RESPONDENT**

## **JUDGMENT**

1. The petitioner filed the petition dated 31.03.2023 through K&K Law LLP Advocates seeking the following prayers:
  - a. A declaratory order that the decision of the respondent, in publishing Gazette Notice No. 3657 of 2023, revoking the appointment of the ex-parte applicants as members of the board and sub county committee members of the Nairobi City County Drinks Control and Licensing Board Committees respectively, whilst their contracts were still subsisting, was illegal and therefore null and void.
  - b. An order of prohibition restraining the respondent or their servants, their agents, or their employees from doing any act to the detriment of the applicants, in furtherance of the Gazette Notice No. 3657 of 2023.
  - c. An order of prohibition restraining the newly appointed board members (incoming board members) by themselves, servants or agents from purporting to carry on, or executing the functions of the board pending the hearing and determination of the application and petition.
  - d. An order compelling the respondent, their servants, their agents or their employees to reinstate the applicants to their respective positions as well as to allow them to execute their mandate and duty without any adverse interference whatsoever.
  - e. An order that the petitioner be compensated for the losses and damages they have suffered and continue to suffer, because of the aforesaid interference with their contract of employment.
  - f. An order that the petitioners be compensated for the underpayment of their emoluments following an erroneous computation of their allowances throughout the period they have served.
  - g. The court be pleased to order that costs of the application be borne by the respondent.
  - h. Pending the hearing and determination of the application and petition the court be pleased to issue a conservatory order staying the decision of 1<sup>st</sup> Respondent that was communicated vide gazette notice number 3657 of 2022.
  - i. That a declaration be made that the decision of the Respondent of appointing the members of Nairobi City Sub-County Alcoholic Drinks and Licensing Committees vide Gazette Notice No. 3657 of 2023 as illegal and improper against section 6 of the *Nairobi City County Alcoholic Drinks Control Licensing Act*, and unconstitutional contrary to Article 2, 10, 27, 41, 43, 47, 233 and 259 of the *Constitution*.
  - j. The costs of this application be provided for.



2. The petition was based upon the supporting affidavit of Aineah Newton Ombima's supporting affidavit and annexures thereto filed together with the petition and sworn on 31.03.2023. The petitioners' case is as follows:
  - a. That the petitioners were qualified and suitable to serve as board and sub county committee members of the Nairobi City County Drinks Control and Licensing Board.
  - b. That they were duly gazetted pursuant to gazette notice number 86-dated 12<sup>th</sup> of January 2021 duly exhibited.
  - c. That before they could dispense their duties their appointment was challenged vide petition cause *Murigu & Another v Nairobi City County Government & 4 others* (Petition E007 of 2021) [2022] KEELRC 1178 (KLR) (16 May 2022) leading to a nine-month suspension following a Court ruling staying their appointments pending the determination of the suit.
  - d. That judgement was delivered in their favour on 16<sup>th</sup> May 2020 by Nduma J upholding their appointment as lawful and proper and the judgment was exhibited.
  - e. Subsequent to the said judgment, their contracts of service came into effect. The respective contracts were exhibited.
  - f. That their contract that was to commence on the 8<sup>th</sup> January 2021 and end on the 8<sup>th</sup> of January 2024 was interrupted by the nine-month suspension.
  - g. That via gazette notice number 3657 of 2023 the petitioners' appointment were unceremoniously and unprocedurally revoked as members of the board and sub county committee members of the Nairobi City County Drinks Control and Licensing Board respectively whilst their contracts were still subsisting and produced the notice as exhibit.
  - h. That their revocation of appointment by the respondent was an injustice.
  - i. That they were underpaid in emoluments following an erroneous computation of their allowances throughout the period they served. They exhibited the Salaries and Remuneration Commission letter on the payment of taskforce allowance and remuneration of commissions of inquiry, tribunals, boards and committees appointed by government as exhibit.
  - j. They urged that unless the orders sought are granted the petitioners shall be forced to endure the injustice occasioned by the respondent's unprocedural impropriety and illegality.
3. The respondents filed the replying affidavit of Patrick Analo Akivaga, the Acting County Secretary, Nairobi City County (2<sup>nd</sup> Respondent) sworn on 09.06.2023. It was stated and urged as follows:
  - a. That the Governor exercises the power of appointments and revocation of appointment of the Board members solely without prior recommendations, approvals or consent of any other person.
  - b. That due procedure was followed in making the appointments of the petitioners herein in accordance with Section 6(1) (a) and (b) of the Nairobi City County Alcoholics Drinks Control and Licensing Act as well as Section 51 (1) of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya.
  - c. That no authority has been given and exhibited by the deponent in the supporting affidavit so as to swear the said affidavit on behalf of the other members hence the authenticity of the instant class suit by itself cannot be verified.



- d. The appointment of the current board members was done as a matter of necessity to help save the lives of the remaining youth of Nairobi City County as drug and alcohol abuse was out of control in the county. The revocation of the appointment was according to the doctrine of necessity.
  - e. The Governor being vested with the statutory authority to appoint is thereby vested with authority to revoke the appointment as envisaged in section 51 of the *Interpretation and General Provisions Act* Cap.21.
  - f. The Governor has authority to take charge of all matters in the County including control of alcohol and drug abuse.
  - g. The Governor was entitled to appoint members whom he can trust and rely upon to undertake the mandate and enforce the relevant policies and regulation to curb the menace.
  - h. The appointment of former Board members was revoked and the current Board members appointed per gazette notice No. 3567 dated 17.03.2023. The current Board members have assumed office and are discharging the functions. The Court should not undo the contracts of service of the current members of Nairobi County Liquor Licencing Board and Sub County Liquor Committees. The current members' contracts have just started to run and they are about 2.5 years of unexpired tenure while the petitioners' contracts are about to expire. The respondents should not be forced to retain the petitioners in service.
  - i. The appointment of new members was done by the Governor in good faith and in public interest.
  - j. They concluded by praying that the petition herein be dismissed with costs.
4. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
  5. To answer the 1<sup>st</sup> issue, there is no dispute that by gazette notice no. 3657 published on 17.03.2023 and dated 16.03.2024 the Governor of Nairobi City County Sakaja Arthur Johnson appointed the listed persons as Board and Sub County Liquor Board Committee Members for Nairobi City Alcoholic Drinks Control and Licencing Board effective 16.03.2023 for a term of three years. The appointments were done in exercise of the powers conferred upon the Governor to appoint per section 4(1) (f), 6(1), (3) (a) and (d) of the *Nairobi City County Alcoholic Drinks and Licensing Act*, 2014. The sections provide that the Governor appoint the chairpersons or members.
  6. To answer the 2<sup>nd</sup> issue, the petition has been drafted such that it is brought for the mentioned petitioner and 60 others whose authority to the named petitioner to act in that behalf have not been listed at all and their names and consent is not exhibited. The petition is found an abuse of court process and incompetent in that regard. The Court cannot grant relief in favour of persons who are at large. In that regard reliefs can only be considered with respect to the one named petitioner.
  7. To answer the 3<sup>rd</sup> issue the petitioner was appointed by the Governor sometimes on 12.01.2021 for a term of three years lapsing on 12.01.2024. The Court finds that as at the time of this judgment, the tenure has since lapsed by effluxion of time. The petitioner is not seeking to enforce the renewal clause. The tenure having lapsed it should be obvious that there is no basis for the Court to order a reinstatement for obvious impossibility of enforcement.



8. To answer the 4<sup>th</sup> issue, while urging and submitting that his appointment was revoked, the petitioner has not exhibited the decision revoking the contract. In such circumstances, it is difficult for the Court to make a finding of unfair, unlawful and unconstitutional termination as alleged for the petitioner.
9. To answer the 5<sup>th</sup> issue, the Governor is vested with the authority to make the appointments per the statutory provisions. He is also vested with the authority to revoke or terminate the appointments in terms of section 51 of the Interpretation and General Provisions Act Cap.21. However, in making the appointments and revoking the same the Governor is bound by the constitutional principles and values such as they are provided for in Article 236, 41, 47, 10, 232, and Chapter six of the Constitution of Kenya about due process or natural justice as well as fair play and reasonableness. In the instant case, there is no revocation shown to have taken place with respect to the petitioner's appointment. It might be that upon appointment of a new member in place of the petitioner, the petitioner considered his appointment revoked. However, that not being not the pleaded and urged case, the Court will not delve into the issues. Nevertheless, the Court returns that certainly the pleasure doctrine does not apply in the Governor's exercise of the appointment and termination of appointment under the Act. He cannot act arbitrarily and unreasonably with no regard to established constitutional and statutory provisions on making of appointments and terminations.
10. To answer the 6<sup>th</sup> issue, the Court finds that the reliefs sought were premised on the petitioner's case that his appointment was revoked by gazette notice no. 3657 of 2023. The Court has perused the gazette notice repeatedly but it does not mention any such revocation. There being no established revocation or termination established as was alleged, the petition must fail and no relief as prayed for will issue, as the same is not justified. The Court has considered all circumstances of the case and each party to bear own costs of the proceedings.

In conclusion the petition is hereby dismissed with orders each party to bear own costs of the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 15<sup>TH</sup> MARCH 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

