



Wathigo v Nairobi City County Government & 3 others (Petition 021 of 2021) [2022] KEELRC 1283 (KLR) (14 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1283 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 021 OF 2021**

MN NDUMA, J

JULY 14, 2022

IN THE MATTER OF ARTICLES 3, 10, 19, 20, 22, 23, 27, 41, 47, 159,162(2) AND 258 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE ALLEGED VIOLATION 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 ALCOHOLIC DRINKS CONTROL AND LICENSING ACT AND GAZETTE NOTICE NO. 85 DATED 12TH JANUARY 2021 AND PUBLISHED ON 12TH JANUARY 2021 AND THE PURPORTED APPOINTMENT OF THE MEMBERS OF NAIROBI CITY COUNTY ALCOHOLIC DRINKS CONTROL AND LICENSING BOARD

BETWEEN

MICHAEL MBANYA WATHIGO PETITIONER

AND

NAIROBI CITY COUNTY GOVERNMENT 1ST RESPONDENT

ACTING GOVERNOR, NAIROBI CITY COUNTY GOVERNMENT 2ND RESPONDENT

GOVERNMENT PRINTER 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The petition was filed on 16th February, 2021 by the petitioner seeking the following reliefs: -
 1. That the Honourable Court be pleased to declare the decision of the 2nd Respondent of Appointing the members of Nairobi City County Alcoholic Drinks and Licensing Board illegal and improper against Section 4 of the *Nairobi City County Alcoholic Drinks Control and Licensing Act*, and unconstitutional contrary to Article 2, 1-, 27, 41, 43, 47, 233, & 259 of *the Constitution*.



2. That the Honourable Court be pleased to declare the Petitioner, Kennedy Odhiambo, Mutunga Mutingi, Rosalind Nyawira Gichuki and Leonard Mungai as the duly appointed Chairperson and Members of the Nairobi City County Alcoholic Drinks Control and Licensing Board.
 3. That the Honourable Court be pleased to declare the action of the 1st Respondent of withholding the Petitioners remuneration, sitting allowance and annual gratuity as member of Nairobi City County Alcoholic Drinks and Licensing Board illegal and improper against Section 18 of the *Employment Act*, and unconstitutional contrary to Article 41(1) and 41(2) (b) of *the Constitution*.
 4. That the Honourable Court be pleased to issue an Order of Certiorari quashing the Gazette Notice No. 85 dated 12th January, 2021 and published on 12th January, 2021 appointing the members of Nairobi City County Alcoholic Drinks and Licensing Board.
 5. That the Honourable Court be pleased to order the 1st respondent to pay the petitioner Kshs 166,000.00, plus interest, at Court rates, from the date of filing of this Petition till payment in full.
 6. That the Honourable Court be pleased to issue an Order of Mandamus directed at the 3rd Respondent to publish the names of the Petitioner, Kennedy Odhiambo, Mutunga Mutingi, Rosalind Nyawira Gichuki and Leonard Mungai as the duly appointed Chairperson and Members of Nairobi City County Alcoholic Drinks and Licensing Board in keeping with communique dated 7th December, 2020.
 7. That the Honourable Court be pleased to grant the Petitioners the cost of the Petition.
 8. That the Honourable Court be pleased to make any further orders as it deems fit.
2. The petition is premised on facts set out on paragraphs 6 to 11 of the Petition which may be summarized that the petitioner is a member of Nairobi County Alcoholic Drinks and Licensing Board as appointed under Gazette Notice Number 11267 dated 13th November, 2019 and published thereof in volume Exx1 – No. 163 on 29th November, 2019 replacing one Stephen Murathe.
 3. That on 7th December, 2020 the petitioners and Kennedy Odhiambo (Chairperson), Mutunga Mutingi, Rosalind Nyawira Gichuki and Leonard Mungai (members) tenure as Chairperson and members of Nairobi City County Alcoholic Drinks Control and Licensing Board was extended with effect from 8th December, 2020 ostensibly in line with the provisions of Section 4 of the *Nairobi City County Alcoholic Drinks Control and Licensing Act*.
 4. That the 3rd respondent despite receiving of the communique on the extension of the petitioners and the aforesaid Chairperson and members tenure, unlawfully neglected to publish the names of the petitioner and the rest.
 5. That on 12th January, 2021, vide Gazette Notice No. 85 published in the special issue on 12th January, 2021, the 2nd respondent appointed different members of Nairobi City County Alcoholic Drinks and Licensing Board.
 6. The petitioner contends that the present appointments were made when himself and named members were in office and the purported appointment were made in excess and/or without power contrary to Section 4 of the *Nairobi City County Alcoholic Drinks Control and Licensing Act*.



7. That the incumbents were not afforded any hearing or reasons for the illegal replacement and this was an affront to the petitioner's right to fair administrative action contrary to Section 4 of the Fair Administrative Actions Act, No. 4 of 2015.
8. That the 1st respondent has withheld the remuneration of the petitioner and his sitting allowances and annual gratuity for the months of October, to November, 2020 and January, 2021 which is unfair labour practice in violation of Article 41(1) and (2) (b) of the Constitution. That the petition be allowed as prayed.
9. The petition is opposed by a replying affidavit of the respondent who deposed that the tenure of the petitioner and the named chairperson and members expired on 7th December, 2020 and they are therefore former members.
10. That there was never any appointment of the petitioner that was in place and valid in law for the reasons that the petitioner's name was never gazetted
11. That without the gazetting of the petitioner's name in the Kenya gazette as by law required the purported appointment was null and void as the same was incomplete.
12. That in making the appointments of the new members of the Nairobi City Sub-County Alcoholic Drinks Control and Licensing Board, the 1st, 2nd and 3rd respondents acted in accordance with the law as there were no members that had been appointed as the committee members.
13. That the 2nd respondent is mandated by Section 6 of the Nairobi City County Alcoholic Drinks Control and Licensing Act, 2011, to appoint the members of the Sub-County Alcoholic Drinks Control and Licensing Committee, which mandate he rightfully exercised.
14. That the petition lacks merit and it be dismissed.

Determination

15. The parties filed written submissions which the Court has considered carefully together with the depositions and attachments by the parties. The Court at the outset notes that this matter is on the fours with a recent matter considered and determined by the Court being Employment and Labour Relations Court Cause No. E007 of 2021 wherein the Court in its judgment delivered on 16th May, 2022 found as follows: -
 - “ [40] There is a presumption of legality of a legal instrument duly adduced before Court unless compelling evidence is adduced to have the Court invalidate the document. The petitioners have failed to discharge that onus to the satisfaction of the Court.
 - [41] The Court is therefore satisfied that the persons appointed to the Nairobi, City Sub-County Alcoholic Drinks and Licensing Committee by the 2nd respondent were lawfully and properly appointed and they held the office lawfully as at the time of filing this suit.”
16. This finding applies *mutatis mutadis* to the circumstances of this case. The petitioners herein have failed to prove on a balance of probabilities that they were lawfully in office at the time the current officials of the Nairobi City Sub-County Alcoholic Drinks and Licensing Committees were appointed by the 2nd respondent. The term of the petitioner and his colleagues had expired by effluxion of time and their terms had not been lawfully extended *vide* any *officio* gazetting.



17. Accordingly, the Court finds that the petition lacks merit and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 14TH DAY OF JULY, 2022

MATHEWS N. NDUMA

JUDGE

Appearances

Mwangi Ndegwa for petitioner

Mr. Kibe for 1st and 2nd respondent

Odukenya for 3rd and 4th respondent

