



**Changamwe Chapter Bar Owners Community Based Organisation
& another v County Government of Mombasa & 2 others (Petition
E010 of 2025) [2025] KEHC 12000 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12000 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E010 OF 2025**

**J NGAAH, J
JULY 30, 2025**

BETWEEN

**CHANGAMWE CHAPTER BAR OWNERS COMMUNITY BASED
ORGANISATION 1ST PETITIONER**

MOMBASA BAR OWNERS ASSOCIATION 2ND PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

MOMBASA COUNTY ASSEMBLY 2ND RESPONDENT

**DIRECTOR, MOMBASA COUNTY DIRECTORATE OF LIQUOR
LICENSING 3RD RESPONDENT**

RULING

1. Before court is a constitutional petition dated 2 April 2025 in which the petitioners have sought orders whose prayers have been couched as follows:

- “a) A declaration that the Mombasa County Finance Act, 2024 is unconstitutional, null and void for want of public participation in line with Article 1 (1), 118 and 174 of *the Constitution* of Kenya, 2010 as read together with Section 115 (2) of the *County Governments Act*.
- b) A declaration that the County Assembly of Mombasa violated the doctrine of legitimate and reasonable expectation when they informed the members of the public that they would not increase the liquor licensing charges and charges for doing business in Mombasa but proceeded to increase the same without involving the members of the public.



- c) A declaration that the Respondents cannot impose additional licensing charges upon the Petitioners members other than those prescribed through a legislation.
 - d) A conservatory order be issued to stay the implementation and/or any further implementation of the Mombasa County Finance Act, 2024. '
 - e) The costs of the petition.
 - f) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.”
2. The 1st petitioner is described in the petition as a duly registered community-based organization of bar owners within the Changamwe region in Mombasa county, while the 2nd petitioner is indicated to be a duly registered association of bar owners and dealers in the liquor industry.
 3. According to the petitioners, during public participation for the Mombasa Liquor Bill, 2024 and the Mombasa County Finance Bill, 2024, they presented what they have described as “a memorandum of objection” and recommendations on the two the Bills. However, the petitioners did not receive any response from the respondents.
 4. Even though the 2nd respondent had planned for public participation exercise on the Bills at Tononoka Hall on 14 November, 2024, the exercise did not take place on account of chaos and violence witnessed on the said day. Nonetheless, it was resolved that the Mombasa County Finance Bill, 2024 would replicate the existing Mombasa County Finance Act, 2023 so that the existing liquor licensing charges would remain unaltered.
 5. Following this resolution, when the Mombasa County Finance Bill, 2024 was tabled to the County Assembly on 23 December, 2024, the Members of County Assembly confirmed to the public that all the licensing charges would remain as before without introducing any new charges. Contrary to the County Assembly’s position, the Mombasa County Finance Act, 2024 has significantly increased the licensing charges.
 6. Accordingly, it is the petitioners’ position that the respondents have either violated or threatened to violate *the Constitution* and the law, in the manner in which they have passed the Mombasa County Finance Bill, 2024 and increased the charges for liquor licenses in Mombasa County.
 7. In particular, the respondents are said to have violated articles 1 (1), 118 and 174 of *the Constitution* of Kenya, 2010 by failing to give the petitioners and the public in Mombasa a right to participate in the decision to increase the licensing charges in the Mombasa County Finance Act, 2024. The respondents are also alleged to have violated article 47 of *the Constitution* when they failed to invite the petitioners to take part in the process giving rise to the increase in the liquor licensing charges despite the undertaking by the 2nd respondent not to increase the charges.
 8. The respondents are also said to have violated article 10 of *the Constitution* when they failed to act in an accountable and transparent manner so as to uphold the rule of law, transparency, accountability and good governance in the manner in which they made changes to the licensing regime in the County of Mombasa and, particularly, increasing the licensing charges when they had made pronouncements to the contrary.
 9. The petitioners also state that although their members previously accessed the single business permits through an online electronic licensing system, the respondents have since disabled the system to arm-twist the members of the petitioners and have threatened them with arrest if they do not pay the illegal



- charges. It is their position that the respondents' actions are unreasonable and ought to be restrained. The respondents, it is pleaded, are subject to the Constitution and the bill of rights and must be directed to act in accordance with the constitutional dictates.
10. On its part, this Honourable Court, is entitled to interfere with the respondents' conduct where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution. To be precise, under article 20 (3) (b) of the Constitution, the court is enjoined to adopt the interpretation of the bill of rights and adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
 11. Further, the petitioners' fundamental rights as set out in the Constitution shall be infringed if the interim measures of protection are not granted as stipulated under Articles 22 and 23 of the Constitution.
 12. Alongside the petition, the petitioners filed a motion dated 3 April 2025, basically seeking conservatory orders and, in particular, they seek suspension of the implementation of Mombasa Finance Act, 2024 pending the hearing and the determination of the petition. It is this motion that is the subject of this ruling.
 13. The application is expressed to be brought under articles 1, 2 (4), 10,21, 22, 23,40, 42,47,48,50, 69, 70, 159, 258 & 259 of the Constitution; rules 19, 23(1) & (2) and 24(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and section 115 of the County Governments Act, cap. 265.
 14. The facts as deposed in the affidavit of Dickson Omondi, the vice chairperson of the 1st petitioner, are as stated in the petition, the substance of which I have stated in the foregoing paragraphs.
 15. The 1st and 2nd respondents have opposed the application and both filed grounds of objection which are, more or less, in the same terms. According to the respondents, the application is misconceived and without merit. It is their position that there is no prima facie case to warrant the orders sought and, in any event, the orders cannot be granted before the hearing of the main petition and, after the court has considered the evidence before it. In any case, the orders sought are the same orders sought in the main petition.
 16. The application is also said to be seeking to invalidate or suspend the implementation of a legislative Act that, contrary to the applicants' assertions, bears no substantial difference from a previous Act. The impugned Act, according to the respondents, is on all fours with the previous Act (Finance Act, 2023) and that there has been no deviation in policy, structure, or function that would warrant the court's intervention or the grant of conservatory orders.
 17. It is contended that the Act is in force and the County Government's budgetary expenditure relies on money levied and collected in accordance with the Act. Allowing the application will cripple the operations of the County Government leading to disruption of services rendered to the public. This would be against public policy.
 18. The respondents also contend that the application is an abuse of the process of the court, lacking in specificity as to how the impugned Act or its enactment has occasioned a constitutional breach or how it is procedurally irregular or prejudiced the public.
 19. The 2nd respondent, it is averred, only executed its constitutional mandate to legislate and acted within the law while taking into account such imperatives as public participation and the 2nd respondent's standing orders. The application, it is urged, is an afterthought, designed to stall the implementation of a validly enacted law.



20. The provision for conservatory or interim orders in constitutional petitions filed under article 22 of *the Constitution* is article 23(3) (c) which states that, amongst the appropriate reliefs a court may grant, is a conservatory order. Rule 23 (1) of the *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 is to the same effect that a Judge before whom a constitutional petition is presented shall hear and determine an application for conservatory or interim orders.
21. The Supreme Court explained what “conservatory orders” entails in *Munya v Kithinji & 2 others* (Application 5 of 2014) [2014] KESC 30 (KLR) (2 April 2014) (Ruling) and stated as follows:

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.” (para 86).

Thus, among other factors the court will consider in granting or not granting conservatory orders in a constitutional petition are, “the inherent merit of a case” and the public interest.

22. Talking of the “inherent merit” of a case, the petitioners petition is pegged on the ground that there was no public participation in the enactment of the Mombasa County Finance Act, 2024. If the petitioners are right that such an exercise was wanting, they would be entitled to question the constitutionality of the Act under, amongst other legal provisions, article 118 of *the Constitution* according to which the legislature is enjoined to involve the citizenry in the legislative process. This article reads as follows:

Parliament shall-

- (a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and
- (b) Facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

At the County Government level, the onus is on the County Assembly to facilitate public participation in the legislative process.

23. Considering the petitioners’ petition on this issue, there is attached to the affidavit in support of the petition an advertisement by the County Assembly of Mombasa, inviting members of the public to a public hearing on the Bill. The date of the hearing was indicated as 14 November 2024 and the venue for the public hearing was Tononoka Social Hall. Besides the invitation for the public hearing, members of the public were also given the option of delivering a written memorandum through an email address provided in the notice
24. The petitioners have stated that the public participation of 14 November 2024 did not take place for the reason that the exercise was marred by “chaos and violence”. However, despite the chaos and violence, the petitioners have pleaded that it was still resolved, that the Mombasa County Finance Bill, 2024 would replicate the already existing Mombasa County Finance Act 2023 so that the existing liquor licencing charges would not be varied.



25. I assume that for a resolution to have been made, there must have been some sort of presentation made by the stakeholders, in this case, the petitioners and their members, in the context of a public participation. Even then, assuming that there was violence and chaos as suggested by the petitioners, they had the option of presenting a written memorandum through the email address provided. In any case, it is apparent from the petitioners' own pleadings in the petition that indeed they presented a written memorandum. Under the head of "facts" in the petition, they have pleaded as follows:
- “7. During public participation for the Mombasa Liquor Bill, 2024 and the Mombasa County Finance Bill, 2024, the Petitioners presented a memorandum of objection and their recommendations to the Bills. However, the Petitioners did not receive any response from the Respondents.”
26. In *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party) (Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment)* the Supreme Court laid out the general principles against which public participation must be weighed. These principles include:
- SUBPARA (a)
- Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made.
- SUBPARA (b)
- The fact that someone was not heard is not enough to annul the process.
- SUBPARA (c)
- Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
27. My assessment of the applicants' case is that they are more concerned about the end product of the public participation exercise than the exercise itself. Simply put, the respondents are accused of failure to implement the petitioners' recommendations. But whether the respondents should have implemented the proposals or recommendations by the members of the public, or the petitioners in particular, is a different question from the question whether they were accorded reasonable opportunity, including time and space, to present their views.
28. Faced with a similar question in *John Kinyua Munyaka & 11 others v County Government of Kiambu & 3 others [2014] KEHC 2641 (KLR)* I held that the common thread amongst several decisions on this concept of public participation is that what matters, in the ultimate, is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue at hand, the subject of public participation, and to have an adequate say.
29. There is a caveat, however, that it cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made.
30. In *Nairobi Metropolitan Psv Saccos Union Limited & 25; others v County Of Nairobi Government & 3 others [2013] KEHC 6096 (KLR)*, Lenaola, J. (as he then was) held that "...public participation is not the same as saying that public views must prevail." Again, in *Association of Gaming Operators Kenya versus the Attorney General & 4 others (2014) eKLR*, it was held that public participation does not always mean that the outcome thereof must result in what the petitioners wanted.



31. For these reasons, I am not persuaded that there are sufficient grounds for this Honourable Court to grant conservatory orders to the petitioners pending the hearing and determination of their petition. I am less persuaded that conservatory orders would be in the public interest, in the circumstances of this case. The application is thus dismissed. Costs will abide the outcome of the petition. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 30 JULY 2025

NGAAH JAIRUS

JUDGE

