



**Republic v County Government of Murang’a; County Assembly of Murang’a (Interested Party);
Murang’a Bar Operators Association Self Help Group (Suing Through Simon Mwangi Njoroge
– Chairman, Betty Kagwirie Ileri – Secretary And Simon Macharia Kairu –Treasurer) (Exparte)
(Judicial Review E001 of 2023) [2024] KEHC 605 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 605 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG’A
JUDICIAL REVIEW E001 OF 2023**

CW GITHUA, J

JANUARY 30, 2024

**IN THE MATTER OF MURANG’A COUNTY ALCOHOLIC DRINKS
CONTROL ACT,2022 AND MURANG’A COUNTY FINANCE ACT,2018**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF MURANG’A..... RESPONDENT

COUNTY ASSEMBLY OF MURANG’A.....INTERESTED PARTY

EXPARTE:

**MURANG’A BAR OPERATORS ASSOCIATION SELF HELP GROUP (SUING
THROUGH SIMON MWANGI NJOROGE – CHAIRMAN, BETTY KAGWIRIE
IRERI – SECRETARY AND SIMON MACHARIA KAIRU –TRESURER)**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF MURANG’A RESPONDENT

AND

COUNTY ASSEMBLY OF MURANG’A INTERESTED PARTY

AND

**MURANG’A BAR OPERATORS ASSOCIATION SELF HELP GROUP
(SUING THROUGH SIMON MWANGI NJOROGE – CHAIRMAN, BETTY**



JUDGMENT

1. Pursuant to leave granted on 27th June 2023, the Exparte Applicant, (hereinafter the applicant) an Association of bars, hotels and liquor traders operating within Murang’a County through its officials instituted judicial review proceedings against the respondent by way of a Notice of Motion dated 4th July 2023 seeking the following orders;
 - i. An order of Certiorari to remove to this court for purposes of quashing a decision by the County Government of Murang’a to charge separately for Single business permits and Alcoholic drinks control licenses in respect of the same businesses operated by members of the applicant in contravention of the Murang’a County Finance Act, 2018, and the Murang’a County *Alcoholic Drinks Control Act*, 2022;
 - ii. An order of Prohibition to remove into this court for purposes of prohibiting and restraining the respondent from demanding, levying, charging, collecting, retaining or imposing double charges for business licenses upon members of the applicant in contravention of the Murang’a County Finance Act, 2018, or any subsequent Finance Act of the County.
2. The Notice of Motion is anchored on the depositions made in the supporting affidavit sworn on 4th July 2023 by the Exparte applicant’s Chairman Mr. Simon Mwangi Njoroge and the annexures thereto. Mr. Njoroge deposed that the Murang’a County *Alcoholic Drinks Control Act*, 2022, (the Act) was enacted by the Interested party in April, 2022, to provide for the regulation of production, sale, consumption and outdoor advertising of alcoholic drinks; creation of offenses and connected purposes. The deponent averred that the Act does not provide for payment of licenses and/or permit fees for operation of bars, hotels and liquor outlets and the only fees payable were those stipulated under the Murang’a County Finance Act, 2018 (the Finance Act)
3. Further, the deponent contended that under Section 13 of the Finance Act and Schedule Nine thereof, there was no provision requiring traders in the liquor industry like members of the applicant to pay for both an Alcoholic Control License and a trade License; that the respondent had issued members of the applicant with invoices demanding payment for both Alcoholic Control Licenses and Single Business Permit (trade license) which if levied would not only amount to double taxation but will also be discriminatory as no other class of business people within the County have received similar treatment.
4. In addition, the applicant asserted that the respondent’s decision to charge its members for both licenses amounted to selective application of the law, was an abuse of power, arbitrary, vague and unreasonable; that by charging for the two licenses, the respondent was acting ultra vires its powers. Finally, the applicant invited me to grant the orders sought in order to uphold its members right to fair administrative action.
5. The application is only contested by the respondent as the interested party despite being served with the motion, all mention and hearing notices did not file any response nor did it participate in the proceedings.
6. The respondent opposed the application through a replying affidavit sworn on its behalf on 21st August, 2023 by Mr. Bernard Wanyoike Kariuki, the head of its Alcoholic Drinks Control Directorate.



Mr. Kariuki attacked the motion on grounds that it was an abuse of the court process as it was misplaced and frivolous; that under Article 210 of *the Constitution*, County Governments were mandated to impose any license or levy, if such imposition was guided by legislation with the aim of providing services to the people.

7. The respondent further contended that under Part 2 of the Fourth Schedule to *the Constitution*, County Governments have the devolved function of liquor licensing under paragraph 4 (c) and control of drugs and pornography under paragraph 13; that the issuance of both a liquor license and a single business permit does not amount to double taxation as each levy is provided for under a separate statute of the County Government.
8. It was also the respondent's case that whereas a single business permit is a trade license issued under the Finance Act 2018 which was enacted to enable the County collect revenue to finance provision of services, for example, garbage collection to its residents, liquor licenses were issued under the Murang'a County Alcoholics Drinks Control Act, 2022 and proceeds from license fees were ploughed back to the Alcoholic Drinks Fund for the purpose of facilitating objectives of the Act; that therefore the two licenses served different purposes and were charged under different legislations and cannot amount to double taxation.
9. Lastly, the respondent advanced the view that the application was unfounded as it sought to prevent it from lawfully exercising its mandate through which it collected revenue used to offer services to the people of Murang'a County; that the application lacked merit and ought to be dismissed with costs.
10. By consent of the parties, the motion was canvassed by way of written submissions. The written submissions were duly filed by the parties' advocates on record namely, Messrs. R.M Kimani & Company Advocates for the applicant and Messrs. Gachie Mwanza & Company Advocates for the respondent.
11. In their submissions, learned counsel for both parties expounded on the positions taken by their respective clients in support and in opposition to the motion.

In addition, the applicant emphasized that the respondent's decision to invoice its members for an Alcoholic Control license was illegal as it was not supported by any legislation given that the Murang'a County *Alcoholic Drinks Control Act* does not provide for how licenses were to be issued under Section 20 (2) of the Act and Section 13 as read with the Ninth Schedule of the Murang'a County Finance Act, 2018 did not require members of the Applicant to pay for both Alcoholic control licenses and business permits.

12. Relying on the persuasive authority of Republic V County Government of Nyandarua; County Assembly of Nyandarua (Interested Party); Nyandarua Recreation & Entertainment Self Help Group & 12 Others (Exparte) [2019] eKLR in which the court held that charging of licenses under the Nyandarua Finance Act and the Nyandarua County *Alcoholic Drinks Control Act* amounted to double taxation, the applicant urged this court to find merit in its application and allow it as prayed.
13. The respondent on its part maintained that levying of both licenses was not only lawful but was also constitutional as trade and liquor licensing was a devolved function under paragraph 7(b) and Part 2 of the Fourth Schedule of *the Constitution* of Kenya 2010 ; that the single business permit was issued to all traders within the County without exemption including tomatoes sellers and other small scale traders for the purpose of raising revenue to pay for services rendered by the County Government to the citizenry in Murang'a County.
14. Further, the respondent submitted that its decision to impose the two licenses was lawful as it was grounded on legislations which were both constitutional and operational; that separation of the fees



in the invoices did not amount to double taxation as the fees were meant for different services and the tax heads were different. For this proposition, reliance was placed on the authorities of Kenya Pharmaceutical Association & Another V Nairobi City Council & 46 Other County Governments & Another [2017] eKLR and Okiiya Omtata Okoiti V County Government of Kiambu [2018] eKLR.

15. After carefully considering the application, the rival submissions filed by both parties and the authorities cited, I find that three key issues emerge for my determination, namely;
 - i. Whether the respondent's impugned decision was lawful
 - ii. Whether the applicant has demonstrated that it was entitled to the orders sought.
 - iii. Who bears costs of the application?

16. I wish to begin my consideration of the first issue by noting that the applicant has not contested the legal validity or constitutionality of the Murang'a County Alcoholic Drinks Act 2022 and the Murang'a County Finance Act 2018 under which the multiple licenses subject matter of these proceedings were levied. It is not disputed that both legislations were properly enacted by the County Assembly of Murang'a in accordance with its constitutional mandate articulated in Article 185 of *the Constitution* of Kenya 2010.

17. The applicant's grievance as I understand it is that the respondent's decision to charge its members for both an alcoholic drinks control license and a single business permit was illegal as Section 13 of the Murang'a County Finance Act 2018 as read with Schedule Nine thereof which deals with licensing of liquor outlets and fees payable for such licenses does not provide for payment of both licenses and moreover, the Murang'a County *Alcoholic Drinks Control Act* 2022 does not provide for how payment of licenses issued under it was to be made.

18. Under Article 209 (3) of *the Constitution*, County Governments are empowered to collect revenue through the imposition of taxes which are expressed as property rates; entertainment taxes and any other tax they are authorized to impose by an Act of Parliament. The reference to Acts of parliament in this Sub Article in my view includes legislation passed by County Assemblies given that County Assemblies are the equivalent of Parliament in the National Government in view of the legislative authority vested in them by Article 185 (1) of *the Constitution*.

19. The Murang'a County *Alcoholic Drinks Control Act* was enacted on 22nd June, 2022 and came into force on 4th April 2023. Its objective as stated in its preamble was to provide for regulation of the production, sale, consumption and outdoor advertising of alcoholic drinks, creation of offences and connected purposes.

The objectives of the aforesaid regulation as set out in Section 4 were inter alia, to safeguard the health of citizens resident in Murang'a County by preventing their consumption of illegal and uncertified alcoholic drinks; to prevent access to alcoholic drinks by persons under the age of 18 years; offering rehabilitation programmes for alcoholic addicts and ensuring fair and ethical business practices related to production, distribution, promotion and sale of alcohol.

20. It is clear from Section 16 of the Act that the aforesaid regulation and control of the liquor industry in the County was to be done through licensing. Section 16 declares as follows;

“No person shall manufacture or otherwise produce, promote, sell, distribute or deal with any alcohol in the county except and in accordance with a license issued under this act.”

Under Section 17, any person intending to trade in the alcohol beverage business was required to make an application in the prescribed form and after completion of the vetting process established under the



Act, successful applicants were under Section 20(2) supposed to be issued with a license upon payment of the prescribed fee.

21. I entirely agree with the applicant's submission that the Murang'a County *Alcoholic Drinks Control Act* is silent on the amount to be charged as fees for the license but these fees are spelt out in the Ninth Schedule of the Murang'a County Finance Act 2018 which provides for the imposition of taxes, fees and other revenue collection measures for the County.

As submitted by the respondent and this was not contested by the applicant, such revenue was used to finance provision of essential services to the people of Murang'a.

22. A reading of the Ninth Schedule shows that it provides for fees payable by different categories of establishments involved in the sale of alcoholic drinks for issuance of an alcoholic drinks control license levied under Section 13 of the Finance Act. Section 13 makes it clear that no person was allowed to carry out any business or provide services specified in the Ninth Schedule without a valid license issued by the respondent.

23. Although it is true that the Ninth Schedule does not provide for payment of business permit or other fees in addition to the fees for an alcoholic control license, the schedule cannot be read in isolation. It must be read together with other provisions of the Finance Act and other schedules contained therein.

24. To that end, Section 14 of the Finance Act deals with the issuance of trade licenses and Section 14 (1) thereof provides that :

"A person shall not carry out any business or provide the services specified in the Tenth Schedule without a valid license or permit issued by the County'.

My perusal of the tenth Schedule shows that it contains fees payable by various businesses for issuance of trade licenses. Among the businesses for which trade licenses were to be issued were bars, hotels, restaurants and other liquor outlets. The fees payable for the trade license or business permit varied according to the size and nature of business carried out in the various establishments.

25. In view of the foregoing, I have no doubt in my mind that the respondent was perfectly in order to demand payment of the two licenses since it was mandated to do so by both the Murang'a County Alcoholic Drinks Control Act and the Murang'a Finance Act.

26. Having established that the respondents decision to charge members of the applicant for the dual licenses was mandated by two separate county legislations whose validity has not been challenged, the next question i must now answer is whether the impugned decision amounted to double taxation as claimed by the applicant.

27. Before answering that question, it is important to understand the meaning of a license and whether fees levied for issuance of licenses amount to tax. A license is defined in Black's Law Dictionary, 10th Edition at page 1089 as follows:

"A privilege granted by a state or city upon payment of a fee, the recipient of the privilege then being authorized to do some act or a series of acts that would otherwise be impermissible"

A license fee on the other hand is defined at page 1061 as;

" A monetary charge imposed by a governmental authority for the privilege of pursuing occupation, business or activity also termed as license tax."



28. Noting that imposition of license fees amounts to taxation, what then is double taxation?

Double taxation is defined by the Blacks Law Dictionary 9th Edition at page 1598 and 10th Edition page 1689 as “the imposition of two taxes, on the same property during the same period and for the same taxing purpose.”

29. In this case, a wholesome reading of the Murang’a County *Alcoholic Drinks Control Act* makes it clear that the license issued under the Act was basically a control instrument used to regulate the liquor industry in the County to ensure that persons who intended to carry out businesses involving the manufacture, sale and consumption of alcoholic drinks did so in a manner that aligned with the objectives of the Act. According to the respondent, money generated by the licenses was deposited in an Alcoholic Drinks Control fund to facilitate objectives of the Act. This contention by the respondent was not disputed by the applicant.
30. The trade license, on the other hand, was a revenue generating tool and was issued to all traders without exception including those in the informal sector like hawkers, street vendors and other small traders – See the Tenth Schedule. Members of the applicant after being licensed to venture into the liquor business became traders in alcoholic drinks and were therefore subject to payment of trade licenses.
31. Given the foregoing, I agree with the respondent that although the two licenses were imposed on the same businesses in the same financial year, they were levied under different tax heads for different purposes and the respondents decision did not therefore amount to double taxation.
32. Another complaint advanced by the applicant is that imposition of the dual licenses amounted to selective application of the law and was discriminatory against members of the applicant as no other class of persons was subjected to the same treatment. The applicant did not however avail any evidence to substantiate this claim.
33. The above notwithstanding, with all due respect to learned counsel for the applicant Ms. Kimani, it is my view that this argument is not well founded and lacks substance. I say so because members of the applicant were involved in businesses whose commodity of trade was liquor whose consumption has the potential of adversely affecting the health and well-being of its consumers hence the need for regulation. A trader in farm produce like tomatoes or potatoes in a county market or a trader in a retail or wholesale shop, for example, cannot in all fairness be treated in the same way as a trader in the manufacture, sale, distribution or consumption of alcoholic beverages since their businesses did not require regulation.
34. Given the prevalence of alcohol abuse in Murang’a County and indeed many areas of our country which is a matter of common notoriety and for which I take judicial notice, County Governments need to take their constitutionally mandated function of liquor licensing seriously and doing so cannot amount to discrimination of investors in the liquor industry.
35. Having found as I have above, I have come to the conclusion that the respondents decision to impose the two licenses was proper and lawful as it was done in accordance with *the Constitution* and the law.
36. Turning to the second issue, it is trite that Judicial review is concerned with the decision making process and not the merits of the impugned decision.

In order to be entitled to judicial review remedies, an applicant must establish that the decision complained of was tainted with illegality in the sense that it was taken without jurisdiction or was contrary to the law or that it was irrational or extremely unreasonable or that it was fraught with procedural improprieties.



See: Municipal Council of Mombasa V Republic & Another (2002) eKLR; Pastoli V Kabala District Local Government Council & others (2008) 2 EA 300.

37. In this case, the applicant has not demonstrated that the decision subject matter of these proceedings was taken by the respondent illegally or was ultra vires its mandate. In the circumstances, I am satisfied that the applicant has failed to demonstrate that its members were entitled to the orders sought.
38. For all the foregoing reasons, I have come to the conclusion that the applicants Notice of Motion dated 4th July 2023 lacks merit and it is accordingly dismissed.
39. Costs follow the event and are at the courts discretion. Since the applicant's motion has been unsuccessful, costs of the motion are awarded to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 30TH DAY OF JANUARY, 2024.

C. W. GITHUA

JUDGE

In the presence of:

Ms. Kimani for the Exparte Applicant

Mr. Omondi holding brief for Mr. Gachie Mwanza for the Respondent

Ms. Susan Waiganjo Court Assistant

No Appearance for the Interested Party.

