



**Kisumu Bar Owners Association v Cabinet Secretary, Ministry of Interior
& Coordination of National Government & 2 others (Constitutional
Petition E002 of 2024) [2024] KEHC 6003 (KLR) (27 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6003 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION E002 OF 2024
RE ABURILI, J
MAY 27, 2024
IN THE MATTER OF AN APPLICATION BY KISUMU BAR OWNERS
ASSOCIATION
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015
AND
IN THE MATTER OF KISUMU COUNTY ALCOHOLIC DRINKS
CONTROL ACT
AND
IN THE MATTER OF CIVIL PROCEDURE RULES

BETWEEN
KISUMU BAR OWNERS ASSOCIATION PETITIONER

AND
THE CABINET SECRETARY, MINISTRY OF INTERIOR & COORDINATION
OF NATIONAL GOVERNMENT 1ST RESPONDENT
THE OFFICE OF THE ATTORNEY GENERAL 2ND RESPONDENT
THE COUNTY GOVERNMENT OF KISUMU 3RD RESPONDENT



RULING

1. The Petitioners who are also Applicants in the Petition and application for conservatory orders dated 8th March 2024 are Kisumu Bar Owners Association.
2. They describe themselves as a registered society whose members are traders and businessmen and women operating as retailers of liquor product and restaurant within Kisumu County.
3. The Association is then said to have given consent to Daniel Otieno Ouma to act on their behalf and sign any document on their behalf.
4. The Affidavit in support of the petition and the application for conservatory orders is sworn by the said Daniel Otieno Ouma, the Chairman of Kisumu Bar Owners Association and acting on behalf of the Association. He annexed copy of the Registration Certificate No. 44212 Registered on 21st February 2014.
5. In the application for conservatory orders dated 8th March 2024, the Association seeks orders:
 1. Spent
 2. Spent
 3. That there be a stay of the Respondents' directive issued by the Cabinet Secretary Ministry of Interior and Coordination of National Government on the 6th March 2024 for the closure of Bars in Kenya and Kisumu County without giving notice to the Applicants pending the hearing and determination of the Petition.
6. The application was opposed by the 1st and 2nd respondent who filed a replying affidavit and among the grounds of opposition are that the applicants have flouted the conditions of licenses issued to them by the County Government. The 3rd Respondent, County Government of Kisumu did not respond to the application for conservatory orders.
7. Without delving into the merits of the application, there is a serious issue which this court must determine which is whether the Petition as filed by an association registered under the Societies Act, and not being an incorporated entity, and therefore the application for conservatory orders, are competently before this court.
8. In other words, is a Society, being a 'person' under Article 260 the Constitution capacitated to sue or can even an amendment to the petition cure the defect?
9. This issue was never raised by the Respondents. However, this is a court of law and being the constitutional court in this county, is empowered by Article 165 (3) of the Constitution. It must therefore be cautious when hearing constitutional petitions and ensure that they are commenced on the right pedestal.
10. A similar question arose in Kipsiwo Community Self Help Group vs Attorney General & 6 Others [2013] eKLR where the Respondents raised a preliminary objection on whether a Society, a self-help group could sue and be sued in its own name. In that case, the Respondent argued in response that the petition was brought on behalf of over 300 families and was therefore a representative suit for which the provisions of Order 1 Rule 8 of the Civil Procedure Rules must be followed.



11. The cases of *Kituo Cha Sheria vs John Ndirangu Kariuki & Another*, Nairobi Election Petition No. 8 of 2013 [2013] eKLR and *Law Society of Kenya vs Commissioner of Lands & 2 Others* KLR 1 (E&L) 456 were relied on to support the objection.
12. Discussing whether the petition had been instituted by an entity capable of instituting such petition, the court cited Article 22 of *the Constitution* which provides that:
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 - (1) Every ‘person’ has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
 - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. ..
 - c. ...
 - d. an association acting in the interest of one or more of its members.
13. At paragraph 38 of the decision, the Learned Judge stated as follows and I concur.
“ 38 I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings...and to be sued.”
14. This was indeed the holding in the case of *Kituo Cha Sheria vs John Ndirangu Kariuki & Another*. In this case, a Petition was instituted by *Kituo Cha Sheria* (supra).
15. It should also be noted that the question is not whether the association can sue or be sued but how it should approach the court since it is also a ‘person’ under Article 260 of *the Constitution*, which term includes a company, association or other body of persons, whether incorporated or unincorporated. It is therefore not doubtful that an association can commence proceedings but the manner in which such unincorporated bodies can commence or institute proceedings and this is an issue that courts have settled through Judicial Constitutional interpretation.
16. In the *Kituo cha Sheria vs John Ndirangu Kariuki & Another* (Supra) case, a Petition was filed by the *Kituo cha Sheria* and an application was filed seeking to strike out the petition on account that the Petitioner lacked the legal standing to file and prosecute the petition. Kimondo J found that *Kituo cha Sheria* is not a legal entity capable of bringing an action in its own name and that it could only maintain an action through its officials or other person nominated by its Board.
17. Again in *Dennis Olooligero & 2 Others vs The Art of Ventures Limited & 2 Others* [2006] eKLR. Members of a Community Based Organization (CBO) registered under the Ministry of Gender, Sports, Culture and Social Services filed suit which the court held that the organization had no legal capacity to sue in its own name without its officials and struck out the suit.
18. It follows that a person recognized in law can only sue on behalf of members of the association or a group and such persons will then demonstrate that they have the consent of the other members to bring the action on their behalf.



19. The rationale behind this requirement was aptly captured by the court (Sila Munyao J in the Kipsiwo Community Self Help Group vs Attorney General & 6 Others [2013]e KLR as follows:

“The importance of this, is so as to recognize the persons who seek legal redress, and so that orders are not issued in favour of or against people who cannot be precisely identified. This may look minor, but it is extremely significant. In litigation, rights and duties will be imposed on the litigants. If the court does not know who the litigants are, then it becomes impossible for the court to enforce its own orders, for it will never be clear who the beneficiary of the order was, or who had the obligation to obey or enforce the order.”

20. On whether such suit or Constitutional Petition could be amended to cure the petition, the court in the above petition held that no amendment could cure such defect and relying on the Kituo cha Sheria case (supra), struck out the petition on account that the legal capacity of a party to institute proceedings in court is not a technical matter, or one of form, and that failure to bring an action by a recognized juridical person is one of law and substance which cannot be accommodated within the latitude of Article 159(2) (d) of *the Constitution*.

21. The court in the Kituo cha Sheria case (supra) further stated as follows:

“In the end, I have reached the conclusion that ‘Kituo cha Sheria’ is not a competent legal person known under Article 258 of *the Constitution*. Its capacity to bring an action in its own name and a petition to challenge an election does not find in law or precedent. In the result, there is no petitioner in court or a valid petition. It follows as a corollary that the petition is incurably defective. It has no legs to stand on. It is hereby struck out and dismissed.”

22. Just as was in the case of Kipsiwo Community Self Help Group vs Attorney General & 6 Others (supra), in this petition, it is impossible to substitute the Petitioner as the persons who are members of the Association, other than the Chairman who swore the affidavit in support are unknown.

23. The so-called Businessmen and women retailers of alcohol in Kisumu county are unknown. They are shadowy persons hiding behind the veil of the name of the Association. Even the deponent of the Affidavits in support did not bring the petition as a party. That is not permitted in law and if the court was to order for payment of costs, for example, who will pay those costs?

24. Quite recently in ELC Petition No. 15 of 2021 [2023] eKLR 9th February 2023 Ruling in *Naka Residents Associates vs Ease Ltd & 33 Others. Ombwayo J in a Petition No. 15 of 2021* held as follows and I have no reason to depart therefrom.

“5 A perusal of the Petition and annexures confirms that the Petition is a Society registered under the Society Act. Being a Society under the *Societies Act*, the issue being raised in the Preliminary Objection is whether the Petitioner can sue in its own name, as it has done.

This to me is a noble legal question which goes to the root of the matter herein. It is a point of law which could dispose of the case depending on how it goes.”

25. The court relied on Trustees Kenya Redeemed Church & Another vs Samuel M’Obiya & 5 Others [2011] eKLR where it was held:

“It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A Society can only sue or be sued through its due officers. It has not been pleaded



that the 2nd Defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity.”

26. Further in *African Orthodox Church of Kenya vs Rev. Charles Omuroka & Another* [2014] eKLR, E.C. Mwita J held:

“The Plaintiff has pleaded in paragraph 1 of its Complaint that it is a duly registered church. At paragraph 3 of the complaint, the plaintiff has described the 2nd Defendant as a duly registered church or organization. Obviously, churches are societies under the *Societies Act*. Societies do not have capacity to sue or be sued in their own names.”

27. The above holdings must be distinguished from cases of the Public Benefit Organizations (PBOs) formerly known as NGOs, under the Public Benefit Organizations Act No. 18 of 2013 where the Public Benefits Organizations have been found to have legal standing to institute suits/petitions and to be sued in their own name, in view of Section 10(3) of PBO Act, which provides that:

10. Certificate of registration

- (1) Upon registering a public benefit organization, the Authority shall issue a certificate of registration in the prescribed form.
- (2) A certificate of registration shall be a conclusive evidence of the authority to operate throughout Kenya as specified in *the constitution* of the public benefit organization or in the certificate of registration.
- (3) A registered public benefit organization shall by virtue of such registration be a body corporate with perpetual succession capable, in its name, of—
 - (a) suing and being sued;
 - (b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;
 - (c) entering into contracts; and
 - (d) doing or performing all such other things or acts necessary for proper performance of its functions under this Act, which may lawfully be done or performed by a body corporate.

28. There is no such corresponding provision under the *Societies Act*. Furthermore, the petition herein is not brought in the public interest but for the commercial benefit of the members of the association. This point was emphasised in the Supreme Court SC Civil Application No. 29 of 2014 [2014] eKLR *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others* [2014] eKLR.

29. For all the above reasons, and without determining the merits of the application and petition herein filed, I find and hold that the applicants/ petitioners could sue but in the names of their officials. without that, as it is now, the petition and the application is found to be incompetent and therefore both the petition and the application are hereby struck out with no orders as to costs.

30. This file is closed.



31. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF MAY, 2024

R. E. ABURILI

JUDGE

