



Cheserek t/a Hustler Bar v Elgeyo Marakwet County Government & 3 others (Constitutional Petition E001 of 2025) [2025] KEHC 14791 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CONSTITUTIONAL PETITION E001 OF 2025**

JRA WANANDA, J

OCTOBER 3, 2025

IN THE MATTER OF ARTICLE 1(1), 1(3), 2(1), 2(4), 3(1), 3(2), 10, 19, 20, 21, 22, 23, 35, 40, 46, 47, 48, 75, 258, 259(1), 259(3) AND 259(11) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 35, 46, 47, 48, 49(1)(A), (F), (G) AND 50(1)(2)

AND

IN THE MATTER OF SECTION 3, 4 & 7 OF FAIR ADMINISTRATION ACT, 2015

AND

IN THE MATTER OF SECTION 4, 8, 9, 11, 12, 13, 14, 29 AND 30 OF ELGEYO MARAKWET COUNTY ALCOHOLIC DRINKS CONTROL ACT 2014

BETWEEN

ALEX KIPTARUS CHESEREK T/A HUSTLER BAR PETITIONER

AND

ELGEYO MARAKWET COUNTY GOVERNMENT 1ST RESPONDENT

ELGEYO MARAKWET COUNTY ALCOHOL DRINKS CONTROL DIRECTORATE 2ND RESPONDENT

ALCOHOL DRINKS CONTROL DIRECTORATE 3RD RESPONDENT

KENYA REVENUE AUTHORITY 4TH RESPONDENT

RULING

1. By the Petition dated 31/01/2025, the Petitioner, through Messrs Chumo Kibet & Associates Advocates, sought orders as follows:



- i. A Declaration that:
 - a. That the actions of the Respondents and decision are unconstitutional for violating the rights of the Petitioner by arriving at a prior decision action of revocation, cancellation of licences and or closure of the Petitioner’s establishment against the provisions of the Constitution under Articles 24, 25,27, 28, 35, 40, 46, 47, 48, 49(1)(f), (g), and 50(1)(2) of the Constitution, Fair Administrative Action Act and the provision and procedures laid down in the Elgeyo Marakwet County Alcoholics Drinks Control Act, 2014 and Regulations therein.
- ii. Judicial Review by way of: -
 - a. An order of Certiorari to remove into the Court and quash the decision contained in the letter dated 24th January 2025 initiating suspension, revocation, cancellation of licences and or closure of the Petitioner’s establishment.
 - iii. An order of Prohibition directed at the Respondents herein barring them from further action in the implementation of the letter dated 24th January 2025 and/or initiating the process of suspension, revocation, cancellation licences and/or closure of the Petitioner’s establishment.
 - iv. An order of general damages for the contravention of the fundamental rights and freedoms of the Petitioner to be assessed by the Court.
 - v. Costs of the Petition to be jointly borne by the Respondents.
 - vi. Any other order that this Honourable Court may deem just and fit in the circumstances.
2. Together with the Petition, the Petitioner also filed the Application the subject of this Ruling, namely, the Notice of Motion dated 31/01/2025. The prayers still pending therein are as follows:

“

 - (iii) That pending the hearing and determination of this Petition, this Honourable Court be pleased to issue a conservatory order staying, revoking and quashing the 1st, 2nd and 3rd Respondents’ decision contained in the letter dated 25th January cancelling and/or revoking the Petitioner/Applicant’s General Retail Alcoholic Drink Licence (Bar) herein and subsequently closing down Hustler Bar Premises.
 - (iv) That this Honourable Court be pleased to issue an order compelling the 1st, 2nd, 3rd and 4th Respondents to return the Plaintiff/Applicant’s stock and cash illegally confiscated on 24th January 2025.
 - (v) Any other order that this Honourable Court deems fit and just to grant in the circumstances.
 - (vi) That the costs of this Application be provide for.”
3. In his Affidavit in support of the Application, the Petitioner deponed that he is the proprietor of “Hustler Bar”, an entertainment establishment situated within Elgeyo Marakwet County duly licensed by the 1st Respondent and compliant with all the requisite laws and regulations, and that he conducts hospitality business of selling non-alcoholic and alcoholic beverages to patrons who frequent the establishment during stipulated hours. He deponed further that he has applied for all the respective



licences including General Retail Alcoholic Drink Licence, among others, which are granted upon fulfilling the conditions set out by the 1st, 2nd and 3rd Respondents, and that he has been compliant with the conditions of the licences and fully operating within the regulations and has never been cited for conducting any illegal activities. He stated that on 25/01/2025, he learnt that the business premises had been invaded by the Respondents in company of heavily armed police officers, illegal inspection conducted and entire stock and trading cash carted away, that subsequently on 24/01/2025, through a letter, the 3rd Respondent purportedly revoked and cancelled the license forthwith to allow for investigation and scrutiny of allegedly confiscated contraband goods. He contended that from the letter, he was surprised to learn that the breaking-in had culminated into the finding that the premises was in bad state of repair, poor sanitary conditions and availability of illegal and contraband goods, and which letter was addressed to various county and governmental entities. He further contended that the decision of cancellation/revocation and closure was made before even the initiation of the process of investigations by the sub-County Alcoholic Drinks Regulation Committee and which process is aimed at sanitizing a decision which has already been unilaterally determined. He also deponed that he had been reprimanded without being afforded any hearing, representation or even an opportunity to respond to the complaints as alleged. He stated that on 27/01/2025, he responded to the letter strongly objecting to the closure and seeking a rescission thereof pending determination of the matter by the relevant sub-committee but that he is apprehensive that the Respondents will arbitrarily proceed and implement the decision referred to. He contended that the ripple effect of the decision is that it has halted his business through a drastic drop of patrons who previously frequented the premises, that the same is now perceived as unlawful premises perpetuating and furthering illegalities, and that the 4th Respondent did not indicate the nature of the complaints against him but proceeded to confiscate his mercantile goods despite him having ETR receipts. He deponed further that he has recorded huge losses, loss of user and earnings due to the decision, that he is on the verge of running amok and eviction from his premises, and being faced with a plethora of suits due outstanding bills.

4. In opposition to the Application, the 1st, 2nd and 3rd Respondents filed the lengthy Replying Affidavit sworn on 28/02/2025 by one David Kandie, who described himself as the Director of the 2nd Respondent. He deponed that the inspection by officers of the Respondents' followed due process and procedures set by law. He cited Section 53(1) and 62(1) of the *Elgeyo Marakwet County Alcohol Drinks Control* 2014. He then stated that on 23/12/2024, he published a caution though the 2nd Respondent which was circulated to all outlets dispensing and distributing alcoholic drinks within the County, whose purpose was to warn the public of the dangers of consuming unregulated and unlicensed alcoholic drinks, and was a result of several reports made to his office with regard to illicit alcohol and other contraband products being dispensed and circulated within the County. He deponed further that on 13/01/2025, a notice for inspection was published and circulated through his office notifying alcoholic drinks dispensing outlets of the planned inspection of the outlets on specified dates, and advising all outlets to ensure that sanitation advisories were complied with, and which notice applied to all outlets, including those that had been cleared and issued with licences. He then pointed out that the licence produced by the Applicant expired on 31/12/2024 and thus at the time of carrying out the inspection on 23/01/2025, the Petitioner did not have a valid licence contrary to the provisions of Section 16(3) of the said *County Act*, and that despite suspension and revocation of the licence pending further investigations, the Petitioner has failed to comply with the directives given but instead, continues to carry out operations with the suspended and/or revoked licence. He deponed further that the premises was not in a proper state of repair and did not meet sanitary arrangements and was thus a health risk contrary to the provisions of Section 14(1)(b) of the said *Act*, and that the *Act* gives the 2nd Respondent the powers to revoke, cancel and/or suspend a licence which does not conform with the County laws. He stated further that during the inspection, second generation drinks, injection needles and cigarettes all of suspicious nature were discovered within the premises, and thus a health



risk and in contravention of Section 42(1)(a) of the said Act. He also deponed that by the letter dated 24/01/2024, the Petitioner was informed of the reasons for suspending the operations at the Bar, and that on 27/01/2024, he circulated a letter notifying all stakeholders of a scheduled meeting in which one of the agenda was the deliberation with the Petitioner of the multi-agency report on his Bar. He further contended that by his letter dated 24/01/2025, he summoned the Petitioner for a meeting with the relevant sub-County Committee scheduled for 28/01/2025 which meeting the Petitioner failed to attend but sent two representatives who however failed to answer the substantive questions raised. He further contended that although the Petitioner has alleged violation of his consumer rights under the Constitution, it is the Petitioner who, in fact, violated the consumer rights of the residents through the sale and distribution of the items referred to above, that the Petition is premature.

5. The parties were then directed to file written Submissions within specified timelines. However, only the 1st, 2nd and 3rd Respondents seem to have filed such Submissions. I have not come across any Submissions filed by any other party, either in the physical Court file or in the Judiciary Case Tracking System (CTS) online portal. Further, as regards the 4th Respondent, Kenya Revenue Authority, despite there being a Return of Service on record indicating service upon it, the 4th Respondent has, so far, not all participated in this matter.

Petitioner's Submissions

6. Counsel for the 1st, 2nd and 3rd Respondents, in his, again, lengthy 19-page Submissions, basically, repeated and recited the facts and matters already contained in his client's Replying Affidavit already recounted above. He then cited the case of Board Management of Uburu Secondary School v City County Director of Education & 2 Others [2015] eKLR regarding the principles applicable in determining an application seeking "conservatory orders". On the first principle, establishment of a *prima facie* case, he also cited the case of Centre for Rights Education and Awareness and 7 Others v The Attorney General [HCCP No. 16 of 2011] eKLR, and submitted that in this case, the Petitioner is seeking "conservatory orders" based on assumptions and possibilities and not true facts, that the Petitioner was notified that there would be an inspection conducted by the Respondents, a fact which he has not rebutted or denied. According to Counsel the allegations that the Petitioner's right to information was violated in contravention of Article 35 of the Constitution is ill-founded. He contended further that by the letter dated 24/01/2025, the Petitioner was invited for a meeting as part of the investigations but which he failed to attend or ignored, and that therefore, the allegations that the Petitioner was not given an opportunity to be heard in contravention of Article 50 of the Constitution are false. He averred further that the Petitioner is also required to show that in the absence of the "conservatory orders", he is likely to suffer prejudice but however, the Respondents conducted the inspections and investigations in line with the laid down law and procedures, and that considering the poor state of repair and items found in the premises, the Petitioner was selling contraband goods and the operations at the Bar was a potential health risk to residents. He urged that "he who comes to equity must come with clean hands", and that it is the Petitioner who has been in violation of the law to the point of continuing with operations despite the suspension and cancellation of his licence, thus the Petitioner cannot claim to suffer prejudice. He cited the second principle for grant of "conservatory orders", namely, that the Petitioner is required to prove that his rights and fundamental freedoms were violated during the inspection and investigations, and that if the orders are not granted, the Respondents will continue with the infringement and violations. He cited the case of Martin Nyaga Wambora v Speaker of the Assembly of Embu & 3 Others [2014] KEHC 7498 (KLR). For the reasons already set out, Counsel submitted that the Respondents did not infringe or violate the rights of the Petitioner, nor did he show that the Petition will be rendered nugatory if the "conservatory orders" sought are not granted. He also cited the case of Anarita Karimi Njeru v Republic [1979]



eKLR, and urged that in this case, the Petitioner has not set out the violation alleged or infringement to a reasonable degree of precision. He also submitted that in view of the discoveries made in the Petitioner's premises as outlined above, the public interest also outweighed granting the orders. He contended further that the orders sought by the Petitioner are mandatory orders which can only be issued in very clear and plain cases, which is not the case in this matter.

Determination

7. The issue for determination in this matter is

“whether conservatory orders should be issued staying, revoking or quashing the Respondent's decision cancelling or revoking the Petitioner's licence to operate an alcoholic drinks outlet, and/or closing the business”.
8. “Conservatory orders” as sought herein by the Petitioner, I refer to the definition given in the case of Nairobi Civil Appeal 151 of 2011 *Invesco Assurance Co. Ltd v. MW (Minor suing thro' next friend and mother) (HW)* [2016] eKLR where Mulwa J expressed herself as follows: -

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter”
9. Regarding the nature and application of conservatory orders, the Supreme Court, in Civil Application No. 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR, pronounced itself as follows: -

“(86) “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 Applicant's case for orders of stay.”
10. Further, in *Judicial Service Commission v. Speaker of the National Assembly & Another* [2013] eKLR, Odunga G.V. (as he then was), expressed himself in the following terms:

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the *Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”
11. “Conservatory orders” are therefore basically aimed at preserving the substratum of majorly public law matter pending the determination of the main issues in dispute (see also the Ruling of Mrima J, in the case of *Damour Florian Emmeric v Director of Immigration Services* [2022] eKLR.



12. On the need to observe boundaries when handling Applications for conservatory orders, in the case of *Muslim for Human Rights (Milimani) & 2 Others v Attorney General & 2 Others* (2011) eKLR, Ibrahim J, (as he then was) expressed himself as follows:
- “The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.”
13. The principles to be considered when determining whether to grant conservatory orders have been therefore developed by the Courts over time. These principles were summarized in *Wilson Kaberia Nkunja v. The Magistrate and Judges Vetting Board and Other* Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR in which Lenaola J (as he then was) summarized the three principles for consideration as follows:
- (a) An applicant must demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.
 - (b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - (c) The public interest must be considered before grant of a conservatory order.
14. Regarding the definition of “a *prima facie* case”, the same was explained in the case of *Mrao v. First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 where, in quoting the *locus classicus* case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358, the Court of Appeal defined the term to mean:
- “..... In a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”
15. Additionally, *In Re Bivac International SA (Bureau Veritas)* (2005) 2 EA 43, the Court while expounding on what a prima-facie case or arguable case was, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.
16. Applying the above principles to the facts of this matter, I observe that the Petitioner challenges the 1st Respondents’ decision to charge the Petitioner and leave out the 5th Respondent. The mandate to prosecute rests with the 1st Respondent, Office of the Director of Public Prosecutions (ODPP) as enshrined under Article 157 of the *Constitution*. In exercising this mandate, the Director of Public Prosecutions (DPP) is required to review and determine the “prosecutability” of matters forwarded for his action. Needless to state, the same should be exercised judiciously.



17. In his Affidavit in support of the Application, the Petitioner deponed that he is duly licensed by the 1st Respondent and has complied with all the requisite laws and regulations. He urged further that he conducts the business only during stipulated hours, and operates fully within the regulations and has never been cited for conducting any illegal activities. He stated that on 25/01/2025, he learnt that the business premises had been invaded by the Respondents in company of heavily armed police officers, and entire stock and trading cash carted away, and that subsequently on 24/01/2025, through a letter, the 3rd Respondent purportedly revoked and cancelled the license. I have perused the Replying Affidavit filed by the Respondents and note that nowhere in it do the Respondents deny this act of revoking of the Petitioner's licence and closing the business before hearing the Petitioner. To this extent, the Petitioner's complaint that the decision cancelling or revoking of his licence and closure was made before even the initiation of the process of investigations by the sub-County Alcoholic Drinks Regulation Committee. His grievance that the decision was made before he had been afforded any hearing, representation or an opportunity to respond to the accusations alleged. As aforesaid, this far, the Petitioner's prayer for grant of "conservatory orders" appears quite strong.
18. There are however other issues that arise and which require consideration. First, the Petitioner acknowledges his awareness that after the raid conducted at the premises on 23/12/2024, he learnt, from the Respondent's letter of the next day, 24/01/2024, that according to the Respondents, the break-in and inspection had culminated into the discovery that the premises was in bad state of repair, poor sanitary conditions and stocked of illegal and contraband goods, and which letter was addressed to various county and governmental entities.
19. Further, in the Replying Affidavit sworn by David Kandie, Director of the 2nd Respondent, he deponed that before the raid, his office, had on 23/12/2024, published a caution and circulated it to all outlets dispensing and distributing alcoholic drinks within the County, and whose purpose was to warn the public of the dangers of consuming unregulated and unlicensed alcoholic drinks. According to him, this was a result of several reports received by his office complaining about illicit alcohol and contraband products being dispensed and circulated within the County. He deponed further that on 13/01/2025, his office published and circulated a notice informing alcoholic drinks dispensing outlets of the planned inspection of the outlets on specified dates, and advising them to ensure that sanitation advisories were complied with before then. The Petitioner never sought leave to file a Further or Supplementary Affidavit and did also not also not comply with the Court's directions to file Submissions. He thus, has not controverted the above allegations.
20. David Kandie further pointed out that the relied upon produced by the Applicant expired on 31/12/2024 and thus at the time of the inspection on 23/01/2025, the Petitioner did not hold a valid licence. I have looked at the copy of the licence exhibited by the Petitioner and note that indeed, the same was issued on 30/08/2024 and it is expressly dated on the face thereof that the same was to expire on 31/12/2024. The Petitioner has also not responded to this damning allegation. In the absence of such response, it appears that, indeed, the Petitioner, contrary to his claims, was operating the business with an expired licence.
21. The Petitioner has also not responded to the Petitioner's allegations that he has failed to comply with the directives given but instead, continues to carry out operations without a licence or with the suspended and/or revoked licence.
22. Another serious allegation that the Petitioner has not responded to is that the premises was not in a proper state of repair and did not meet sanitary arrangements, and was thus a health risk and that during the inspection, second generation drinks, injection needles and cigarettes of suspicious nature were discovered within the premises.



23. Yet another allegation made by David Kandie but which the Petitioner has not responded to is that by the Respondents' letter dated 24/01/2024, the day after the raid, the Petitioner was informed of the reasons for suspending the operations at the Bar, and that on 27/01/2024, he circulated a letter notifying all stakeholders of a scheduled meeting in which one of the agenda was the deliberation with the Petitioner of the multi-agency report on his Bar. He further contended that by the said letter dated 24/01/2025, he summoned the Petitioner for a meeting with the relevant sub-County Committee scheduled for 28/01/2025 which meeting the Petitioner failed to attend but sent two representatives who however failed to answer the substantive questions raised.
24. Applying the above facts to the principles enunciated in the authorities cited above, it is my considered view that the Petitioner has failed to establish to this Court, on a *prima facie* basis, that the Respondents have generally acted in bad faith or that they abused the process in exercising their powers thus warranting grant of "conservatory orders". In regard thereto, in the case of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR, the Court of Appeal stated that:
- "With reference to the establishment of a *prima facie* case, Lord Diplock in the case of *American Cyanamid v Ethicon Limited* [1975] AC 396 stated thus,
- "If there is no *prima facie* case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief."
25. In the absence of a *prima facie* case, it follows that the Application fails in its entirety. The Petitioner has not demonstrated that there will be a violation of his constitutional rights if he is denied the "conservatory orders".
26. In determining whether or not to grant "conservatory orders", the Court is enjoined to consider what has become known as the principle of proportionality. In my view the circumstances of this case weigh in favour of leaving the matters to stand as they are for now, as, in my view, that would be the lower risk as opposed to halting the suspension of the Respondent's licence at this stage (see sentiments of Odunga G.V. (as he then was) in *Judicial Service Commission v. Speaker of the National Assembly* (*supra*).
27. Weighing the material on record, it is my view that it is not appropriate for the Court to intervene at this stage. The evidence discloses possible serious breach of the conditions of the licence issued to the Petitioner, which acts merit investigations. There is also the real possibility that the Petitioner is operating under an expired licence, and also that there is sale of illicit alcohol drinks and contraband items in the premises. If true, allowing the business to continue with operations while awaiting this Court's determination of the Petition, will in my view, go against the public interest. No selective or biased investigations and no "exceptional circumstances" has been demonstrated at this stage to warrant grant of "conservatory orders".
28. Although I have therefore found that the Petitioner may not have been afforded a hearing before his licence was revoked and the business closed, contrary to the *audi alteram* principle, I find that, at this stage, this irregularity seems to have been quickly mitigated by the Respondents when on the very next day, they informed the Petitioner, in writing, of the findings allegedly made in the premises and the accusations against him and thus, the reasons and justification for the Respondents' decision. The letter was also invited him for a meeting for a deliberation on the matter. The Petitioner did not also make these disclosures to the Court, and had it not been for the Respondent's Affidavit, the Court would



not have known about these facts. The Petitioner is also therefore guilty of material non-disclosure of material facts.

Final Orders

29. In the premises, the Notice of Motion dated 31/01/2025 seeking conservatory orders is hereby dismissed. Determination of costs shall await determination of the Petition.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 3RD DAY OF OCTOBER 2025

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:-

All parties absent

Court Assistant: Brian Kimathi

