Case Number:	Petition E011 of 2021
Date Delivered:	28 Mar 2022
Case Class:	Civil
Court:	High Court at Nyahururu
Case Action:	Judgment
Judge:	Charles Kariuki Mutungi
Citation:	Josphat Muriu Ndegwa (suing on his own behalf, in the public interest and on behalf of other bar owners in Nyandarua County) v Nyandarua County Assembly & another [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Laikipia
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

PETITION NO. E011 OF 2021

IN THE MATTER OF ARTICLES 1,2,3,10,20,21,22,23,27,28,35,48,73,159,160,

165,174(c),196(1) (b), AND 258 OF THE CONSTITUTION OF KENYA,2010

-AND-

IN THE MATTER OF SECTIONS 2, 3(f) & 115 OF THE COUNTY GOVERNMENTS ACT, 2012

-AND-

IN THE MATTER OF THE SECTION 4(1) (e) AND 5(a) OF THE NYANDARUA

COUNTY ALCOHOLIC DRINKS CONTROL ACT, NO.4 OF 2019

-AND-

IN THE MATTER OF CONSTITUTION OF THE NYANDARUA COUNTY

ALCOHOLIC DRINKS MANAGEMENT & CONTROL COMMITTEE

-BETWEEN-

JOSPHAT MURIU NDEGWA (suing on his own behalf, in the public

interest and on behalf of other bar owners in Nyandarua County).....PETITIONER

-AND-

THE NYANDARUA COUNTY ASSEMBLY.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF NYANDARUA.....2ND RESPONDENT

JUDGEMENT

1. The Petitioner through the Amended Petition dated 7th October 2019 sought the following orders: -

i. Spent

ii. Spent

iii. That this honorable court be pleased to review its judgement delivered on the 16th day of November, 2021 by way of its said judgement and thereafter give its position on the continued arrest and prosecution of bar owns and/or traders in the alcohol business for operating without liquor licenses.

2. The application is supported by the affidavit of Josphat Muiru Ndegwa and the following principal grounds as laid out on the face of the application:

i. That this honorable court vide its judgment on the 16th day of November, 2021 issued a declaration that the Nyandarua County Alcoholic Drinks Control (Amendment) Act, 2020 is unconstitutional and therefore invalid.

ii. That the honorable court also issued a declaration that the current Nyandarua County Alcoholic Drinks Management and Control Committee is unlawfully constituted for including members that were appointed as a result of the Nyandarua County Alcoholic Drinks Control (Amendment) Act, 2020 which is unlawful.

iii. That the honorable court did however suspend the orders of invalidity above mentioned for a period of 12 months from the date of the judgement.

iv. That the honorable court went ahead to order the 1st and 2nd respondents may remedy the defect within the period and the Nyandarua County Alcoholic Drinks Control (Amendment) Act, 2020 shall stand invalidated at the expiry of the twelve (12) months or may be earlier repealed whichever comes first.

v. That as a result of the above decision the 2nd respondent had through the police continued to enforce the said invalid law by having traders in the alcohol business arrested for operating without licenses.

vi. That the understanding of the honorable court's judgement cannot be taken to be that the suspension of the order of invalidity of the said law and licensing committee was a leeway for the 2nd respondent to continue enforcing an unconstitutional law as well as to continue having a liquor licensing committee that is unconstitutional, in place.

vii. That in fact the said judgment paragraph 81 is clear beyond peradventure that the purpose of the suspension of the courts orders of invalidity captured herein before as to allow or transitional and corrective mechanisms.

viii. That the 1st and 2nd respondents have not put in place any transitional and corrective mechanisms in order to have the traders in the business of alcohol sale continue operating with minimal or no conflict with other authorities.

ix. That without any transitional and corrective mechanisms put in place by the 1st and 2nd respondents the traders in the alcohol sale business in Nyandarua county are left at the mercy of other law enforcement authorities who have chosen to arrest and prosecute them for operating bars without liquor licenses contrary to Section 7(1) as read with Section 62 of the Alcoholic Drinks Control Act No. 4 Of 2010 (National Legislation).

x. That alcoholic drinks control being a devolved function to be carried out by the 2nd respondent then the above captioned national legislation can only be enforced in tandem with county laws and not in isolation.

xi. That the continued arrest and prosecution of liquor traders in Nyandarua County without any transitional and corrective mechanisms in place would an infringement on their economic rights as provided for under the constitution.

xii. That alcoholic drinks control is no longer a function of the national government but one of the county governments.

xiii. That it is in the best interest of justice that the application be allowed as prayed.

xiv. The petitioner also filed a supporting affidavit and supplementary affidavit dated 22nd December 2021 and 2nd march 2022 respectively.

3. On the hand, the 2nd respondent filed a replying affidavit dated 10th February 2022.

PETITIONER'S SUBMISSIONS

4. The petitioner submitted that the main airing for determination from the said application are as follows:

i. Whether the firm of Manyonge Wanyama & Associates LLP is properly on record for the 2nd respondent"

ii. What happens to the documents filed by the said firm of advocates for and on behalf of the 2nd respondent"

iii. Whether the National Alcoholic Drinks Control Act No. of 2010 can be enforced against the petitioner in as far as liquor licensing is concerned"

iv. Whether the honorable court has the jurisdiction to entertain the subject application"

v. Whether the subject application is merited"

5. The petitioner submitted that the firm of Manyonge Wanyama & Associates LLP is improperly on record for the 2nd respondent for flouting the provisions of ***Order 9 Rule 9 of the Civil Procedure Rules, 2010***. They stated that the firm should have obtained an order of court before filing any documents for and on behalf of the 2nd Respondent. Reliance was placed on ***Willie Kiritu vs Barthlomew Muruli & 3 Others [2014] eKLR.*** In the circumstances, the petitioner submitted that all documents filed by the said firm are incompetently in the court's record and ought to be expunged from the said record any advocate emanating from the said firm be denied audience.

6. It was submitted that when the 2nd respondent resulted into causing the arrest of traders by police officers and their charging in court with operating bars without licenses contrary to ***Section 7(1) as read with Section 62 of the Alcoholic Drinks Act No.4*** was in violation of ***Schedule 4 Part 2 Paragraph 4 (c) of the Constitution***.

7. The petitioners contended that their concern is that there appears to be an ambiguity in the court's judgement. The petitioner feels that even though the court did suspend its order of invalidity, the same was purely for the purposes of effectively extending the reach of the impugned statute rather than to strike it down and/or harm the petitioner and other right bearers that he represents or to undermine the law.

8. It was submitted that what the petitioner sees an ambiguity in the judgement is the fact that the court in its judgement appeared to place a condition to the suspension of its order of invalidity by stating that the suspension was in order to allow for transitional and corrective mechanism (reading in) and at the same time and that it appeared to allow the respondents to continue with the enforcement of he already unconstitutional statute until the same is repealed and/or up to the lapse of 12 months from the date of judgment as they may wish.

9. The petitioner's view is that the court used the remedial discretion it ascribed to itself so as to weaken the fruits and/or gains of the Constitution of Kenya, 2010. That there is a serious need for the honorable court to clarify the apparent ambiguity in its judgement and/or clearly put everything into context.

10. Lastly, the petitioner urged that in order to protect and promote the purpose and principles of the constitution, this honorable court widen its discretion to hear and determine this application. Reliance was placed on ***Robert Tom Martins Kibisu vs Republic [2018] eKLR.***

2ND RESPONDENT'S SUBMISSIONS

11. The 2nd respondent submitted that the order suspending the invalidity of the Amendment Act for 12 months exists to allow the County Assembly of Nyandarua a chance to rectify the procedural irregularities identified by the Court particularly the public participation aspect. Further, the effect of the order suspending the invalidity of the Nyandarua County Alcoholic Drinks Control (Amendment) Act, 2020 is that the 'Amendment Act' continues being operational until 16th November 2022 when the 12 months' suspension period will lapse. However, if the County Assembly does not rectify the issues arising by then, the Amendment Act will stand nullified. Therefore, the County Government of Nyandarua can for the time being continue implementing the Amendment Act. Reliance was placed on **paragraphs 76, 77, 80, 81** of the Honourable Court's judgement of 16th November 2021.

12. It was stated that it is crystal clear that what the court meant is that the Nyandarua County Alcoholic Drinks Control (Amendment) Act, 2020 shall remain operation and functional for a further period until a new act rectifying the issues is enacted or the suspension period of 12 months lapses whichever comes earlier. This is mainly because of the rights that had already been created by the Amendment Act. It would be more harmful to parties with rights under the act if the suspension of the declaration of invalidity was not granted.

13. The 2nd respondent asserted that Courts commonly issue suspended declarations of invalidity to avert a harm that would be consequent upon the immediate invalidation of a law. That rendering the Amendment Act invalid immediately would leave a legal vacuum with dire consequences. Reliance was placed on ***Law Society of Kenya v Kenya Revenue Authority & Another [2017] eKLR***

14. It was averred that ***Article 258 of the Constitution*** does not limit the court's jurisdiction to fashion an appropriate remedy to deal with a finding of invalidity or violation of the law. It is accepted that the court may suspend the declaration of invalidity in order to deal with the consequences of such invalidity. Reliance was placed on the case of ***Suleiman Shahbal v Independent Electoral and Boundaries Commission and 3 Others Petition No. 3 of 2014 [2014] eKLR***.

15. The 2nd respondent contended that the remedy of suspension of a declaration of invalidity is aimed at mitigating the time-span effect of the declaration. It is generally granted where the matters in question are complex or where the declaration of invalidity would disrupt law enforcement process. In essence, it is meant to grant parliament time to enact the appropriate legislation. On that front, they submitted that the Petitioner/ Applicant should await for the County Assembly to correct the legislation. In the meantime, the amendment Act continues to operate.

16. They stated that the Petitioner/ Applicant has totally misunderstood the Judgement of this Honourable Court and is on a futile mission to review the same. That the Application does not raise any sufficient ground for review of the Judgment. The Applicant has not shown that there is any error on the face of the record or established any discovery of new evidence. Reliance was placed on ***Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd (2014) eKLR*** and ***Equity Bank v West Link MBO Limited (Civil Application No. 78 of 2011), [2013] eKLR.***

17. The 2nd respondent argued that The Petitioner/ Applicant has not shown that the bar owners of Nyandarua County will suffer any prejudice if the compliance period is allowed to run its course to allow the County Assembly complete the remaining phase of the process. In fact, it is our humble submission that the people of Nyandarua County stand to suffer more if bar owners are allowed to continue operating without liquor licenses due to the risk of illicit alcohol in the market.

18. They pointed out that the Respondents have initiated the process of incorporating transitional and corrective mechanisms into the Amendment Act in a bid to have traders in business of alcohol sale continue operating without being in conflict with laws and the authorities.

19. The respondents relied on the doctrine of *functus officio* to assert that the court's jurisdiction in the case has been "fully and finally exercised" and its authority over the subject matter has ended. This principle is essential for certainty and the rule of law.

20. In conclusion, they stated that there is no doubt that the application is frivolous, abuse of court process and intended to undermine the spirit of devolution which is one of the key national values and principles of governance anchored in ***Article 10 of the Constitution of Kenya, 2010***.

ANALYSIS AND DETERMINATION

21. Upon consideration of the application and parties' rival submissions, the issue that arises for consideration is centrally on the interpretation of the court's orders in the judgement dated 16th November 2021 and particularly the meaning and/or effect of the suspension of the order of invalidity of the Nyandarua County Alcoholic Drinks Control (Amendment) Act, 2020.

22. That being the case, there are, preliminary points raised by the parties and which, by their very nature, should be determined at the first instance. The petitioner submitted that the firm of Manyonge Wanyama & Associates LLP is improperly on record for the 2nd respondent for flouting the provisions of ***Order 9 Rule 9 of the Civil Procedure Rules, 2010***. They stated that the firm should have obtained an order of court before filing any documents for and on behalf of the 2nd Respondent.

23. That provision states as follows:

"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) ***upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."***

24. In ***Republic v Principal Secretary, State Department for Housing and Urban Development; Ex-Parte Kenyatta Peter & 3 others; Tom Ndeche & another (Interested Parties) [2020] eKLR,*** it was held that:

"I need note, however, that by its very nature, the application for leave to come on record ought to be heard and determined first before a party's new counsel can file and have audience on any application his client intends to make. The application for leave to come on record is obviously made to pave way for a party's newly found counsel to act on behalf of his client; it is only after such counsel has been given the greenlight to act and is properly on record that he can take any further action on his client's behalf; this would include the filing of any necessary application for any other order or, generally, to prosecute his client's course, one way or the other. It follows that an application where, on the one hand counsel is praying to come on record and, on the other hand, he proceeds as if he is already on record and even seeks substantive prayers on behalf of his client, in the same application he is seeking to come one record, is an untidy application, to say the least; it is the kind of practice that I would discourage."

25. In ***Florence Hare Mkaha v Pani Tawakal Mini Coach & another [2014] eKLR Mombasa H.C.C.C. No.85 of 2010*** Hon. Mary Kasango, J held that:

"The question is; was the execution validly carried out on behalf of the Plaintiff" There are glaring anomalies in respect of the representation of the Plaintiff. As clearly set out above the Plaintiff was represented by Pandya & Talati Advocate up and until judgment was entered in her favour on 31st July 2012. Once judgment was entered the provisions of Order 9 Rule 9 had to be complied with if the Plaintiff required to change the advocates representing her. This was not the case. She was variously represented by Shikely Advocate, who field the submission in support of the Plaintiff's Bill of Costs, and was represented by Kinyua Njagi & Co. Advocates through the execution of the decree stage. In both those occasions the two advocates did not obtain an order of the court to take over the conduct of Plaintiff's case. Much more Shikely Advocate was not properly on record to enable him consent for Kinyua Njagi & Co. Advocates to conduct the Plaintiff's case."

26. I have carefully perused the proceedings so far taken in this matter and I note that judgement was entered on 16th November 2021. The 2nd defendant was being represented by the county attorney up until when judgement was entered. Subsequently, the petitioner filed the instant application on 22nd December 2021. The firm of Manyonge Wanyama & Associates LLP then filed a notice of appointment of advocates on 24th January 2022 then proceeded to file a replying affidavit as well as written submissions. This clearly offends the express provisions of ***Order 9 Rule 9 of the Civil Procedure Rules***.

27. As per the provision of aforesaid order, the correct procedure that was to be followed in the present case, was that counsel coming on record ought to have sought leave of the court to come on record, then file and serve the notice before filing the replying affidavit and written submissions. A party so wishing to change his counsel must notify the court and other parties.

28. ***Order 9 Rule 9*** is clear that no new advocate and no person acting in person can take over the conduct of a suit which has finally been determined while any proceedings or related proceedings are continuing before the same court in continuation of the determined matter through notice of change of advocate or notice of intention to act in person without the leave of the court through a formal application or by consent of the outgoing advocate, or person acting in person.

29. The provisions of **Order 9** are not intended to curtail the constitutional rights of a party to be represented by an advocate of his/her choice but lays out the procedure to be followed when a party wants to change counsel in order to avert any undercutting and/or disorder. It has been well established that the procedure set out under the order is mandatory and thus cannot be termed as a mere technicality.

30. I find that the procedure laid out in Order 9 was not followed in the slightest by the firm of Manyonge Wanyama & Associates LLP. Therefore, the said firm is not properly on record, and has no legal standing to move the court on behalf of the 2nd respondent.

31. Having dealt with the preliminary issue, the outstanding issue of concern is the proper interpretation of the court's orders of suspension as contained in the judgement dated 16th November 2021.

32. **Articles 2 & 3 of The Constitution of Kenya, 2010** imposes upon every person and state organ in Kenya the obligation to be bound by, to respect, uphold, protect and defend the Constitution. The national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them makes or implements public policy decisions. Article 10 sets out these national values and principles of governance which include patriotism, national unity sharing and devolution of power, the rule of law, democracy and participation of the people, good governance integrity transparency and accountability. ***Article 2 of the Constitution*** not only asserts the supremacy of the Constitution but it also, in the same vein, removes any doubt on constitutionality of a law enacted contrary to the Constitution.

33. Further, 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, (Articles 22(1)) and where the Constitution has been contravened or is threatened with contravention (Article 258 (1) (2)).

34. ***Article 165 (3) (d) (i) of the Constitution of Kenya, 2010*** provides that the High court has jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution. Courts are tasked with interpreting the law during their day to day administration of justice. During this interpretive process, they encounter sections of legislation which are contrary to the letter and spirit of the Constitution of Kenya, 2010 therefore declaring them to be unconstitutional.

35. Increasingly, emerging jurisprudence in Kenyan constitutional law, has seen the courts issuing suspended declarations to the orders of invalidity. Simply defined, to suspend is to temporarily prevent from continuing or being in force or effect. Therefore, a suspended declaration to an order of invalidity of a law temporarily prevents the order or invalidity from taking force. It is important to note that court do not and cannot purport to lend their authority so as to give an invalid law life however in cases where suspended declarations of invalidity are prescribed, the same is employed as a remedial device under carefully considered circumstances. It is my view that although a suspended declaration to an order of invalidity is a discretionary tool, courts should not always be in a rush to offer this exceptional remedial device as the constitutional remedies doctrine in nature does not permit discretion on the part of judges to depart from the binding nature of remedies under ***Article 2 of the Constitution of Kenya***.

36. In ***Law Society of Kenya v Kenya Revenue Authority & Another [2017] eKLR***, the issue of suspended declarations was widely discussed. The court stated as follows: -

It's trite that an unconstitutional law is not law and actions or decisions taken pursuant to the unconstitutional law would out rightly be illegal. It follows that once a law has been declared unconstitutional it has no business remaining in the law books. The fundamental issue that follows is under what circumstances if at all a court can suspend an order declaring a legislation to be invalid.

Suspended declaration is a remedial device by which a court strikes down a constitutionally invalid law, but suspends the effect of its order such that the law retains force for a temporary period.

Suspended declarations of invalidity have become a familiar feature of Canadian constitutional jurisprudence. Having originated as an exceptional remedy, enabling courts to temporarily suspend the effect of a declaration invalidating a law on constitutional grounds, a suspended declaration is now included in the majority of Supreme Court of Canada decisions in which the power of statutory invalidation is utilized. As the usage of suspended declarations has grown, the justifications for their use have evolved. No longer are they reserved for instances of "emergency", in which the invalidation of an unconstitutional law would result in imminent danger to the public. Rather, suspended declarations are now used to instantiate a particular conception of the proper roles of legislatures and courts.

Suspended declarations engage real consequences for individual litigants and others affected by judicial decisions, as laws found to violate the Constitution are permitted to have continued, temporary effect. A suspended declaration occurs when courts choose to delay the effect of invalidating a law. A court may declare a law to be invalid, but "suspend" the effect of the declaration until a future date. During the interim period, the law continues to apply. At the expiry of the period, the court's declaration takes full effect: unless the law has been replaced or amended to comply with the constitution, it is rendered null.

37. The court in the aforementioned decision also considered comparative jurisprudence as set in Canada. In Canada, when the court declares a law to be unconstitutional it is 'struck down' and thus, is no longer enforceable. As that law no longer exists, an intolerable gap in the law can sometimes be created. To prevent this 'intolerable gap', the courts may suspend a declaration for a short period of time: typically, six months to a year[11]. This allows the law to remain in force while the government works to create a constitutionally valid replacement.

38. The general trend is for courts to respect the legislative role of government, by suspending their declarations. When there is a range of policy options that the government needs to consider in order to draft a replacement law. This means, however that courts frequently suspend declarations where a declaration taking effect immediately would not harm the rule of law. This is controversial. By suspending a declaration, a court declares that even though a law violates the supreme law of Canada – the *Constitution* – it will nevertheless allow it to be enforced for a period of time. It is unclear what gives the courts legal authority to do this.

39. ***Re Manitoba Language Rights*** was the first case in which the Supreme Court of Canada suspended a declaration. In that case, the Court held that the *Manitoba Act* of 1870 required all Manitoba laws to be translated into French. Since few of the province's laws had actually been translated, the Court declared most of Manitoba's laws to be invalid, but suspended the declaration, as an emergency measure, so that the government would have time to translate them.

40. Furthermore, the Canadian Supreme Court prescribed guidelines for suspending a declaration in cases where having it take effect immediately would:

i. Pose a danger to the public

ii. Threaten the rule of law, or

iii. Result in the deprivation of benefits from deserving persons.

41. In ***Law Society of Kenya v Kenya Revenue Authority & Another [supra],*** the court with reference to Canada stated that:

"Suspended declarations of invalidity were thus introduced to Canadian law for the purpose of averting a constitutional crisis. Recognizing the extremity of this remedial measure, the Court emphasized both the "emergency" circumstances that necessitated it, and circumscribed the duration of the suspended declaration to only the "minimum period necessary" for the legislature to correct the constitutional defect.

Thus, in Canada, suspended declarations of invalidity were utilized to avert a harm that would be consequent upon the immediate invalidation of a law.

.....

Although these guidelines were not intended to be "hard and fast rules," the Court nevertheless stressed that suspended declarations were to remain an exceptional remedy. Lamer C.J's reasons warrant quotation at length:-

"While delayed declarations are appropriate in some cases, they are not a panacea for the problem of interference with the legislature…....

A delayed declaration is a serious matter from the point of view of enforcement of the Charter. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the Charter to persist for a time despite the violation. There may be good pragmatic reasons to allow this in particular cases. However, reading in is much preferable where it is appropriate, since it immediately reconciles the legislation in question with the requirements of the Charter.

Furthermore, the fact that the court's declaration is delayed is not really relevant to the question of which course of action, reading in or nullification, is less intrusive upon the institution of the legislature. By deciding upon nullification or reading in, the court has already chosen the less intrusive path. If reading in is less intrusive than nullification in a particular case, then there is no reason to think that delayed nullification would be any better. To delay nullification forces the matter back onto the legislative agenda at a time not of the choosing of the legislature, and within time limits under which the legislature would not normally be forced to act. This is a serious interference itself with the institution of the legislature. Where reading in is appropriate, the legislature may consider the issue in its own good time and take whatever action it wishes. Thus delayed declarations of nullity should not be seen as preferable to reading in cases where reading in is appropriate.

The decision whether to delay the application of a declaration of nullity should therefore turn not on considerations of the role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public."

42. In the South African context, suspended declarations of invalidity are allowed under the constitutional parameters particularly ***Section 172 (1) (b) (ii) of the Constitution of the Republic of South Africa, 1996*** because of historical reasons. The section contemplates that the judges may make 'an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

43. Consequently, courts are faced with the question of the implications of a declaration of invalidity on all stakeholders including the citizenry. My learned brother Mativo J in the aforementioned case skillfully pointed out the same by stating that:

"In every case, the courts are forced to contemplate the potential effects of an immediate declaration of invalidity, not just on the parties to a dispute but on broader society, and by association, the courts must consider the limits of their own jurisdiction and abilities to craft comprehensive responses to these challenges. Sometimes, those potential effects will weigh in favour of a suspended declaration, as the case law demonstrates. However, the courts should also give express attention to the prejudicial effects of a suspended declaration, balancing these against the prejudice inflicted by an immediate declaration. That is, the mere presence of a problem or inconvenience arising from an immediate declaration should not create an automatic assumption favoring suspension."

44. *Mativo J* went on to outline that in determining whether or not to issue a suspended declaration, the court should ask:

i. Would issuance of a suspended declaration of invalidity serve a pressing and substantial purpose"

ii. Is there a rational connection between the purpose and a suspended declaration"

iii. What impact on constitutional rights will arise from the issuance of a suspended declaration,

iv. Is a suspended declaration the most minimally impairing measure that can be employed to achieve its objective"

v. Will the specific benefits achieved by the suspended declaration outweigh any adversity it inflicts on constitutional rights bearing in mind the supremacy of the constitution"

It is an established principle of law that the relief sought ought to be granted cautiously and sparingly, most judiciously and ensuring the supremacy of the constitution is not eroded, and that the remedy of suspension of a declaration is aimed at mitigating the time-span effect of the declaration. Also, suspension of invalidity is generally granted where the matters in question are complex or where the declaration of invalidity would disrupt law enforcement process. In short, it is granted to grant parliament time to enact the appropriate legislation.

45. In the present case, the court considering the law and jurisprudence laid out above, found it fit to issue a suspended declaration of invalidity in its judgement dated 16th November 2021 to give the County Government of Nyandarua an opportunity to cure the constitutional defects identified in ***Nyandarua County Alcoholic Drinks Control (Amendment) Act, 2020***. The same does not have the effect of validating the aforesaid act but purely a discretionary remedial device applied carefully and very delicately by the court to allow the county a chance to cure the constitutional effects in the act in the interests of justice. (Refer to paragraphs 68 – 81 of this court's judgement dated 16th November 2021: ***Ndegwa (suing on his own behalf, in the public interest and on behalf of other bar owners' in Nyandarua County) v Nyandarua County Assembly & another (Petition E011 of 2021) [2021] KEHC 299 (KLR) (16 November 2021) (Judgement)*** **)** [2])

46. Accordingly, with the invalidity order relating to ***Nyandarua County Alcoholic Drinks Control (Amendment) Act, 2020*** suspended, it shall retain its force and operation as the county remedies its defects to align with the Constitution of Kenya. The court was clear that if the same is not done with 12months from the date of the judgment the act shall remain invalid.

(i) Thus application is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 28TH DAY OF MARCH, 2022.

.....

CHARLES KARIUKI

JUDGE