



Republic v Kimathi Njeru C.E.O. Liquor Licencing Board Tharaka Nithi County & another; Michael Mwenda t/a Club Members Weru Market & Think Twice Restaurant & 3 others (Applicant) (Judicial Review E004 of 2024) [2024] KEHC 12272 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEHC 12272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
JUDICIAL REVIEW E004 OF 2024**

**LW GITARI, J
SEPTEMBER 30, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

KIMATHI NJERU C.E.O. LIQUOR LICENCING BOARD THARAKA NITHI COUNTY 1ST RESPONDENT

CHAIRMAN LIQUOR LICENCING BOARD THARAKA NITHI COUNTY 2ND RESPONDENT

AND

MICHAEL MWENDA T/A CLUB MEMBERS WERU MARKET & THINK TWICE RESTAURANT APPLICANT

JOSEPH MARUKI T/A STAGE BAR MUKOTHIMA APPLICANT

JOHN MARUKA T/A COUNTY VIEW MUKOTHIMA APPLICANT

MUNENE ROBERT KIMORO T/A KIMORO BAR KARUTINE MARKET APPLICANT

RULING

1. The applicants filed an ex-parte notice of motion seeking leave to institute Judicial Review Proceedings against the respondents for orders of mandamus compelling the respondents (sic) with liquor licence to continue operating their bars. That leave granted to act as a stay until the main motion is heard and determined. The motion is based on the grounds that the applicants were not given an opportunity



to be heard and their names were arbitrary removed from the list of those qualified to be licenced to continue operating a bar.

2. The motion was supported by the affidavit sworn by Samuel Gaichura. The court granted the applicants leave to file Judicial Review Proceedings.
 1. The applicant filed a Notice of Motion seeking orders that the court be pleased to issue orders of mandamus to compel the respondents to issue the applicants liquor licences for the year 2024.
 2. The respondents filed a Preliminary Objection on the grounds that the court lacks jurisdiction to entertain the application as the applicants have not exhausted the appeals mechanism set out in the county and National Laws.
3. That the applicants have not disclosed a valid cause of action against a legally recognized entity as stipulated under Tharaka Nithi County *Alcoholic Drinks Control Act* 2021.
4. That the documents relied on by the Petitioners offend the evidentially thresh-hold set out under Article 50 (4) of Constitution of Kenya and Section 35 of the *Evidence Act* as they are obtained illegally, are uncertified and ultimately non-existent and do not belong to any organ of the County, party to this suit. The Preliminary Objection (to be referred to as ‘P.O’) was canvassed by way of written submissions. The court ordered the respondent to file written submissions.
5. I have perused the record and noted that the respondent did not file the submissions in open court or in the CTS. The submissions are not in the CTS.
6. The applicant opposed the Preliminary Objection and submits that the Preliminary Objection has no merits and is an abuse of court process. It is submitted that leave to file the Judicial Review has already been granted. The applicant further submits that the allegation that the supporting documents were wrongly obtained in baseless. That this is because the Sub-County Liquor Licencing after assessing the bars, issued a list of names of approved and those not approved and release the names to the ex-parte applicants. That it cannot be alleged that such knowledge is obtained illegally. It is further submitted that the applicants had gone through the entire process provided under the Law and no Justice was given. The applicant prays that the application be dismissed.
7. I have considered the Pre-liminary Objection. The issue for determination is whether the Preliminary Objection has merits. The leading authority on Pre-liminary Objection is the case of Mukisa Bisquits –v- West End Distributors Ltd where it was stated:

So far as I am aware, a Pre-liminary Objection consists of a point of law which has been pleaded or which arises by clean implications out of the pleadings and which if argued as a pre-liminary point may dispose off the suit. Examples are objection to the jurisdiction of the court or a plea of limitation or a submissions that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

Sir Charles Newbold P. stated in the case-

the 1st matter related to the increasing practice of raising points which should be argued in the normal manner quite improperly by way of Pre-liminary Objection. A Pre-liminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of a judicial discretion. The improper raising of points by way of Preliminary Objection does nothing



but unnecessarily increase costs and on occasions confuse issues. This improper practice must stop.”

8. In this case, the respondents has not filed submissions and has therefore not argued the Pre-liminary Objection. The applicant has opposed the Preliminary Objection and contends that the application for leave which is being challenged has already been granted. This is not in dispute. They also contend that documents relied on were not obtained illegally. This is not a pure point of law as it requires evidence to determine how the documents were obtained.
9. In view of these clear facts I find that the Preliminary Objection is not on a pure point of law and fails to meet the threshold of what constitutes a Pre-liminary Objection as defined in the case of Mukisa Biscuits –v- West End Distributors Ltd (supra) and Oraro-Mbaja (2995) 1 KLR 141. The issues raised in the Pre-liminary Objection require probing the evidence thus requiring this court to look into matters of fact in order to determine them.
10. I find that the Pre-liminary Objection lacks merits and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 30TH DAY OF SEPTEMBER 2024.

L.W. GITARI

JUDGE

