



Republic v County Government of Kisumu; Ouma & another (Exparte); Kisumu County Assembly Of Kisumu (SIC) (Interested Party) (Miscellaneous Civil Application E097 of 2021) [2023] KEHC 342 (KLR) (25 January 2023) (Ruling)

Neutral citation: [2023] KEHC 342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E097 OF 2021**

JN KAMAU, J

JANUARY 25, 2023

N THE MATTER OF AN APPLICATION BY KISUMU BAR OWNERS ASSOCIATION FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF KISUMU RESPONDENT

AND

DAN OTEINO OUMA EXPARTE

KISUMU BAR OWNERS ASSOCIATION EXPARTE

AND

THE KISUMU COUNTY ASSEMBLY OF KISUMU (SIC) .. INTERESTED PARTY

RULING

Introduction

1. In its notice of motion dated June 29, 2021 and filed on July 5, 2021, the *ex parte* Applicant sought for orders in the nature of *certiorari* to quash the Respondent’s and Interested Party’s decision to charge separately for Single Business Permits and Alcoholic Drinks Control Licenses in respect of the same business in contravention of the *Constitution of Kenya, 2010*, the *Fair Administrative Action Act, 2015* and the Kisumu County Finance Act, 2021.



2. It also sought orders for prohibition directed at the Respondents (sic) prohibiting it from charging separately for Single Business Permits and Alcoholic Drinks Control Licenses in respect of the same business in contravention of the [Constitution of Kenya, 2010](#), the [Fair Administrative Action Act, 2015](#) and the Kisumu County Finance Act, 2021.
3. Its application was supported by the affidavit of its Chairman, Dan Otieno Ouma, that was sworn on June 29, 2021.
4. The Respondent's Liquor Director, Collins Peter Okoth, swore a Replying Affidavit on December 8, 2012. The same was sworn on even date.
5. The *ex parte* Applicant's Written Submissions were dated February 12, 2022 and filed on February 14, 2022 while the Respondent's Written Submissions were dated July 25, 2022 and filed on July 26, 2022. Despite having been served with all the mention notices, the Interested Party did not file any response to the said Ex parte Notice of Motion application or file any Written Submissions. This Judgment is therefore based on the aforesaid Written Submissions which both the *ex parte* Applicant and the Respondent herein relied upon in their entirety.

Legal Analysis

6. On June 16, 2021, the *ex parte* applicant filed a notice of motion application dated May 28, 2021 seeking leave to apply for judicial review for an order of *certiorari* to quash the Respondent's and Interested Party's decision to charge separately for Single Business Permits and Alcoholic Drinks Control Licenses in respect of the same business in contravention of the [Constitution of Kenya, 2010](#), the [Fair Administrative Action Act, 2015](#) and the Kisumu County Finance Act, 2021.
7. It also sought leave to apply for judicial review for an order of Prohibition directed at the Respondent prohibiting it from charging separately for Single Business Permits and Alcoholic Drinks Control Licenses in respect of the same business in contravention of the [Constitution of Kenya, 2010](#), the [Fair Administrative Action Act, 2015](#) and the Kisumu County Finance Act, 2021.
8. On June 16, 2021, the court granted the *ex parte* Applicant leave to proceed as aforesaid. It directed that the prayer for the leave to operate as stay prohibiting the Respondents (sic) from implementing the decision to charge separately for Single Business Permits and Alcoholic Drinks Control Licenses in respect of the same business operated by the *ex parte* applicant and its members be heard together with the substantive notice of motion application.
9. The court directed the *ex parte* applicant to serve the respondent and the Interested Party with the *ex parte* Notice of Motion application dated May 28, 2021 and filed on June 16, 2021.
10. Notably, Order 53 of the [Civil Procedure Rules, 2010](#) provides as follows:-

“The grant of leave under this rule to apply for an order of prohibition or an order of *certiorari* shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately (emphasis court) within seven days.”



11. The *ex parte* Applicant ought to have a substantive Notice of Motion application in a separate file for Judicial Review. The substantive orders could not be granted in the Miscellaneous application in which leave to seeks orders for *certiorari* and Prohibition had been sought and obtained. Indeed, separate filing fees are chargeable in the two (2) proceedings. Proceeding with the substantive Notice of Motion application in a Miscellaneous file would be tantamount to denying the Government revenue.
12. This court had the option of dismissing the said substantive Notice of Motion for having been incompetent and/or defective ab initio. However, it had at the back of its mind the provisions of Article 159(2)(d) of the [Constitution of Kenya](#) that mandates courts to administer justice without undue regard as to procedural technicalities.
13. It was for this reason that this court found it prudent not to consider the merits or otherwise of the present Notice of Motion application and dismiss it but rather to strike it out to give the *ex parte* Applicant an opportunity to institute proceedings in the correct file.

Disposition

14. For the foregoing reasons, the upshot of this court's decision was that the *ex parte* applicant's notice of motion application dated June 29, 2021 and filed on July 5, 2021 be and is hereby struck out.
15. The *ex parte* applicant be and is hereby directed to file a substantive notice of motion application in the proper file within seven (7) days from the date of this Ruling.
16. As the respondent and the interested party are government entities and it would be unjust to grant costs against its citizen, each party will bear its own costs of this cause.
17. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY 2023

J. KAMAU

JUDGE

