



**Maxam Ltd v County Government of Kajiado & 3 others; Kabara (Interested Party)  
(Judicial Review E007 of 2021) [2022] KEHC 10614 (KLR) (16 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 10614 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
JUDICIAL REVIEW E007 OF 2021  
SN MUTUKU, J  
FEBRUARY 16, 2022**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE  
PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF ARTICLES 10, 22, 23, 40(1), (3) AND 47(1),  
201 AND 209(5) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 PF THE  
LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ALCOHOLICS DRINKS CONTROL ACT, 2010**

**BETWEEN**

**MAXAM LTD ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF KAJIADO ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION ..... 2<sup>ND</sup> RESPONDENT**

**OCS KISERIAN POLICE STATION ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**DESMOND KABARA ..... INTERESTED PARTY**



## RULING

1. The Applicant herein seek leave to institute judicial review proceedings for the following prayers:
  1. An Order of Certiorari to remove into the Honourable Court and quash the decision of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to charge and prosecute the interested party herein in Ngong Criminal Case No. 1333 of 2021.
  2. An Order of Certiorari to remove and bring to this Honourable Court for the purposes of terminating, the prosecution of the Interested Party herein in Ngong Criminal Case No. 1333 of 2021.
  3. An Order of Prohibition do issue to prohibit the 1<sup>st</sup> Respondent from levying anu licence fee for delivery of alcoholic goods by the Applicant to its customers within Kajiado County.
  4. An Order of Prohibition do issue to prohibit the 3<sup>rd</sup> Respondent from impounding the Applicant's motor vehicle on account of lack of distribution Liquor Licence from the 1<sup>st</sup> Respondent.
  5. That the leave so granted do operate as stay of the proceedings in Ngong Criminal Case Number 1333 of 2021 and the Applicant be allowed to continue delivering its products to its customers without harassment by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents pending the hearing and determination of the substantive Motion.
  6. That Costs of this application be provided for.
2. The application is supported by a Statutory Statement and a Verifying Affidavit sworn on 7<sup>th</sup> December 2021 in compliance to Order 53 Rules 1 and 2 of the Civil Procedure Rules.
3. The brief facts are that the 3<sup>rd</sup> Respondent through its agents impounded the Applicant's vehicle ferrying alcoholic beverages to its customers within Kajiado County on the allegations that the Applicant had not taken out an alcoholic distributorship licence from Kajiado County; that the Applicant does not carry out business in Kajiado County and that following that action of impounding, the Interested Party who is the Applicant's driver was arrested and subsequently charged at Ngong Law Courts in Criminal Case No. 1333 of 2021 with the offence of distributing alcoholic drinks without distributors license contrary to Section 7(1) (b) as read with Section 62 of the *Alcoholic Drinks Control Act*.
4. The Applicant claims that he is not domiciled in Kajiado County and does not carry out business in Kajiado County and that he has the requisite permits from Nairobi County where he resides.
5. This matter was handled by the Presiding Judge at Machakos. He declined to certify the matter as urgent and referred the matter to this court for directions. On 2<sup>nd</sup> February 2022 this court allowed counsel for the 1<sup>st</sup> Respondent time to respond to the Application and placed the matter for mention on 14<sup>th</sup> February 2022. On that date this court was informed that counsel for the 1<sup>st</sup> Respondent was unable to file response due to failure by his client, the 1<sup>st</sup> Respondent to avail itself. This court allowed the Applicant to argue the application.
6. Counsel for the Applicant made brief submissions that they are only seeking leave to commence judicial review proceedings because the Applicant continues to be harassed by the Respondent's employees.



7. I have considered this matter and the brief submissions made in court. In *Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others*, Mombasa HCMCA No. 384 of 1996 the court rendered itself as follows:

"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".

8. I have read the application and the grounds in support of the same. I have also considered the reasons advanced for seeking leave to institute Judicial Review proceedings. Without delving deeply into the issues arising in this case at this stage, it is my considered view that the applicant has met the requirements imposed by Order 53 Rule 1 and 2 of the *Civil Procedure Rules* to justify for a grant of the orders sought. Order 53 of the Civil Procedure Rules provides that:

- (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
- (2) An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —
  - (a) a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and
  - (b) affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.

9. I am satisfied that this Order has been complied with and that the Applicant has met the threshold of an arguable case and therefore entitled to leave to commence judicial review proceedings.

10. Counsel also sought an order that the leave granted should operate as stay of the criminal matter pending and that the Applicant be allowed to continue delivering goods to its customers. Order 53 Rule (3) of the Civil Procedure Rules provides that:

- (3) The judge may, where leave denotes stay, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.



11. This court has discretion to order that the leave so granted should operate as stay. In this matter, this court is yet to hear both parties and make an informed decision based on the facts as shall be presented. In view of that I will and do hereby make the following orders:

1. That leave is hereby granted to the Applicant to commence judicial review proceedings as prayed in this application in Prayer 2 (a), (b), (c) and (d) of the Chamber Summons dated 7<sup>th</sup> December 2021.
2. That the leave granted in (1) above shall operate as stay of the proceedings in Ngong Criminal Case No. 1333 of 2021 pending the hearing and determination of the substantive Motion in this matter.
3. That I decline to allow the continued delivery of the products to the Applicant's customers pending the hearing and determination of the main suit. This is an issue that ought to be determined after hearing both parties.
4. That the Applicant shall file judicial review proceedings in the next 21 days and serve the same on the Respondents together with the orders of this court.
5. That this matter shall be mentioned on 17<sup>th</sup> March 2022 for compliance and directions.

Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 16<sup>TH</sup> DAY OF FEBRUARY 2022.**

**S. N. MUTUKU**

**JUDGE**

