



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

JUDICIAL REVIEW APPLICATION NO E001 OF 2021

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI, IN THE MATTER OF SECTION 7 OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO 4 OF 2015 AND IN THE MATTER OF ORDER 53 RULE 3 OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

BARINGO NORTH SUB-COUNTY

ALCOHOLIC DRINKS REGULATION COMMITTEE....RESPONDENT

AND

DANIEL CHELAGAT T/A

CHEMCHEM DISTRIBUTORS.....1ST EX PARTE APPLICANT

SHARON CHEBII T/A KABURWO BAR...2ND EX PARTE APPLICANT

RULING

1. During the pendency of the hearing *inter partes* of this judicial review application the Respondent raised a preliminary objection to the effect that the application of the ex parte applicants is an abuse of the court process for it failed to exhaust the internal dispute resolution mechanism that is provided for in section 9 (2) and (3) of the Fair Administrative Actions Act No. 4 of 2015. Additionally, the Respondent has stated that the entire judicial review application is defective, frivolous, incompetent and an abuse of the court process as this court has no jurisdiction to entertain the application in the first instance.

The Respondent’s submissions in support of the preliminary objection dated 18/03/2021.

2. Messrs Kiptoon & Co. advocates for the Respondent has submitted that the judicial review application offends the provisions of section 9 (1) (2) (3) (4) and (5) of the Fair Administrative Actions Act (herein after referred to as the FAAA); whose provisions read as follows:

“(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

3. Counsel for the Respondent has submitted that the ex parte applicants have not exhausted the provisions of section 17, 18 and 19 of the Baringo County Alcoholic Drinks Control Act 2014; which provides for resolution of disputes contemplated under section 9(2) of the Fair Administrative of Actions Act 2015, through review, application and appeal. Section 17 of the Baringo County Alcoholic Drinks Control Act 2014 reads as follows: “17. (1) An applicant whose application for a new licence, to renew or transfer a licence has been refused or cancelled may within fourteen days of such refusal, request in writing the review of such refusal to the County Review Committee.

(2) A person aggrieved by the decision of the Sub County Committee to grant a new licence or to renew a licence may request in writing the review of such decision.

(3) Upon receipt of a request under this section, the County Review Committee shall notify the Sub-County Committee of the pending review.

(4) The County Review Committee shall within twenty-one days consider and make a final determination on the request for review.

(5) The County Review Committee may-

(a) dismiss the request for review in its opinion, if the request is frivolous or vexatious;

(b) uphold the decision of the Sub-County committee;

(c) annul the decision of the sub-County committee

(d) give directions to the sub-County committee with respect to any action to be taken;

(e) make any other declaration as it may deem fit.”

4. It is clear from the foregoing provisions that they provide for a review mechanism for an applicant whose application for renewal of a licence has not been refused or cancelled. Such an applicant may within 14 days of such refusal request in writing for the review of such refusal to the Sub-County Review Committee. If an applicant is not satisfied with the decision of the Sub-County Review Committee, the said applicant may request the County Review Committee for a review of the refusal by the Sub-County Review Committee.

5. Furthermore, in terms of section 18 Baringo County Alcoholic Drinks Control Act 2014, the right to request for a review under section 17 does not prohibit a person from seeking any other legal remedy a person may have.

6. Additionally, the ex-applicants had a right to appeal to the High Court within 21 days of the refusal of their application for renewal.

7. Counsel has submitted that the ex parte applicants rushed to court seeking remedies without exhausting the laid down procedures; which is contrary to section 17 of the Baringo County Alcoholic Drinks Control Act 2014 and section 9 (2) of the FAAA 2015.

8. Furthermore, counsel cited Evans *Chelagat Yatich v. Baringo North Sub-County Alcoholic Drinks & Another* [2019] eKLR, in which the High Court outlined the procedure for correcting the decision of the respondent and stated that the applicant in that case could not complain of a breach of his right to fair administrative action yet he had declined to subject himself to the statutory mechanisms for resolving disputes. Counsel also relied on the case of *Teresa Cheruiyot T/A Cool Shade Bar & 4 Others v. County Chairman Liquor Licensing Committee-Uasin Gishu & 4 Others* [2019] eKLR and *Moses Kuria Njuguna v. County Government of Kiambu* [2018] eKLR in support of their position that all available internal dispute resolution mechanisms must be exhausted prior to an applicant approaching the court for review orders.

9. Counsel therefore urged the court to uphold the preliminary objection and dismiss the application with costs to the Respondent.

10. The ex parte applicants’ submissions in opposition to the preliminary objection dated 18/03/2021.

11. Messrs Bitok & Sambu advocates for the ex parte applicants have submitted that they were alive to the need to exhaust the internal dispute resolution mechanism as directed by the section 9 (4) of the FAAA 2015; but the conduct of the Respondent forced them to seek leave of the court to institute an application for judicial review. They further submitted that the ex parte applicants sought to be exempted from the exhaustion of the internal dispute mechanism from the outset of the application.

12. The ex parte applicants have submitted that the decision refusing the renewal of their licences was communicated to them through a letter dated 14th September 2020; but this letter was served upon them on 24th December 2020, which was after a lapse of 40 days. This according to their counsel was meant to defeat the requirement to exhaust the internal dispute resolution mechanism set out in section 17 (1) of the Baringo County Alcoholic Drinks Control Act 2014.

13. Counsel also submitted that the alternative forum should be accessible, affordable, timely and effective in support of which they cited *Mohamed Ali Baadi & Others v. Attorney General & 11 Others* [2018] e-KLR.

14. Furthermore, counsel cited *Republic v. Kenya Revenue Authority, Commissioner Ex parte Keycorp Real Advisory Limited* (2019) e-

KLR, in which the court observed that the internal remedy must be exhausted prior to making an application for judicial review, unless the ex parte applicant can show exceptional circumstances to exempt it from this requirement. That court further observed that factors taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate.

15. The ex parte applicants have therefore urged the court to dismiss the preliminary objection for lacking in merit with costs to them.

Findings on the Preliminary Objection

16. It is crystal clear that a point of law has arisen which is whether the internal resolution mechanism that is provided for in section 17 (1) of the Baringo County Alcoholic Drinks Control Act 2014 was available and effective. It is undisputed that the decision refusing to renew the licences of the ex parte applicants was communicated to them through a letter dated 14th September 2020; which letter was served upon them on 24th December 2020. This was after the lapse of the 14 days within which the ex parte applicants would have challenged the said decision by way of filing a review application before the Baringo North Sub-County Review Committee. Stated differently, the ex parte applicants were time barred. It therefore follows that the review process was not available to them.

17. It also follows that the ex parte applicants rightly sought and were granted leave by this court to challenge the refusal to renew their licences.

1. I find as persuasive the decision of the court in *Mohamed Ali Baadi & Others v. Attorney General & 11 Others* [2018] eKLR a four-judge bench of the high court (Nyamweya, Ngugi, taden & Mativo, JJ.) stated as follows:

“94. While our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute (See the Speaker of National Assembly vs James Njenga Karume [41]), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of Dawda K. Jawara vs Gambia [42] it was held that:

"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

18. The submissions of counsel for the Respondent that the ex parte applicants did not exhaust the internal dispute resolution mechanism that is provided for under section 17 (1) of the Baringo County Alcoholic Drinks Control Act 2014 and that it also offends the provisions of section 9 (2) and (3) of the FAAA is devoid of merit for the following reasons. First, the respondent cannot rely on their wrong doing that is failing to communicate and serve upon the ex parte applicants the refusal decision of Baringo North Sub-County Review Committee within the stipulated time of 14 days from the time it was made. Second, the respondent was acting contrary to section 18 of the Baringo County Alcoholic Drinks Control Act 2014; which allows grants an aggrieved person the right to seek any other legal remedy. Section 18 of the said act reads:

“The right to request for review under section 17 does not prohibit a person from seeking any other legal remedy a person may have.”

19. Third, it is a cardinal rule of law that no person should be allowed to benefit from his wrong doing. Fourth, it is contrary to public policy for the respondent being the Government to adopt a litigation strategy that has the effect of unnecessarily increasing the monetary costs and other resources; which is contrary to the oxygen principle that is embodied in section 1A and 1B of the Civil Procedure Act (Cap 21) Laws of Kenya.

20. In short, the raising of the preliminary objection by the Respondent based on its ineffective enforcement of its laws and contrary to the provisions of its laws is repugnant to the common sense of a reasonable villager in Baringo County. It also has the effect of commercially crippling litigants by increasing litigation costs.

21. In the premises, I find that the raising of the preliminary objection was unwarranted with the result that it hereby fails and is dismissed with costs to the ex parte applicants in any event.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT KABARNET THIS 28TH DAY OF SEPTEMBER 2021 THROUGH VIDEO CONFERENCE.

J M BWONWONG’A

JUDGE

IN THE PRESENCE OF:

MR. SITIENEI AND MR. KEMBOI, COURT ASSISTANTS.

MR. SAMBU FOR THE EX PARTE APPLICANTS.

MR. KIPTON FOR THE RESPONDENT.