



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

PETITION NO. 1 OF 2020

**IN THE MATTER OF ARTICLES 10, 27, 28, 40, 43, 47, 174, 175, 176,
183, 185, 196, 209 & 210 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF THE PRINCIPLE OF FAIR ADMINISTRATIVE ACTION

AND

IN THE MATTER OF BREACH AND OR NON-COMPLIANCE

WITH THE PRINCIPLE OF PUBLIC PARTICIPATION

BETWEEN

STEPHEN NJIHIA NDUMIA T/A SUNLIGHT BAR.....1ST PETITIONER/APPLICANT

SOLOMON RUIRU T/A STAGE BAR.....2ND PETITIONER/APPLICANT

VERSUS

BARINGO COUNTY GOVERNMENT.....1ST RESPONDENT

ELDAMA RAVINE SUB-COUNTY ALCOHOLIC DRINKS CONTROL COMMITTEE...2ND RESPONDENT

RULING

Introduction

1. Before the court are two applications. By Chamber Summons dated 28/2/2020 brought pursuant to Article 50 of the Constitution, Rules 11, 12, 20, 21, of the (Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 and sections 1A, 1B, and 3A of the Civil Procedure Act, the petitioner bar operators primarily seek a conservatory orders staying or suspending the implementation and/or operation of the directive, issued on 8/6/2016 by the respondents and that the petitioner be allowed to continue their operations and/or businesses being *Sunlight Bar* and *Stage Bar*, respectively.

The Petitioners' application

2. The application was supported by the affidavit of Stephen Njihia Ndumia who urged that the impugned directive by the respondents violates the rules of natural justice, the principle of fair administrative action and the principle of public participation by condemning the petitioners to a directive that is likely to deprive them of their source of income.

Response by the Respondents

3. Respondents nevertheless opposed the application by the Replying Affidavit of Daudi Luka Aengwo, Chairman of the 2nd respondent who deponed that the 2nd respondent had issued licenses to the petitioners for the year 2018 to carry on business selling liquor in their

establishments, and that during the validity of the said licenses the 2nd respondent issued to the applicants in advance with notices of non-renewal of their liquor licenses on grounds of proximity to public places. It was urged that in the discharge of their duties the 1st respondent issued notices that all liquor operators apply for licenses for the year 2019 where the petitioners made their applications, notwithstanding the notice of non-renewal.

4. The 2nd respondent then issued notices of invitation to the members of the public, interested parties and stakeholders as required under the Act to raise their concerns plus inspection programme to all liquor operators, stakeholders, interested parties and members of the public giving various specific dates and time of the scheduled inspection and public hearings. Indeed, the respondents conducted public hearings and in fact the petitioners herein attended in their personal capacities and all parties were accorded the opportunity to ventilate their issues (see DLA7).

5. The deponent further stated that the 2nd respondent upon considering the application for licenses on merit refused to renew the petitioners' licenses on grounds that their liquor businesses are located within prohibited zones being the bus stage and public market and for the reason that the petitioners liquor business did not meet the requirement of public health (see annexure 7a-b).

6. He added further that being dissatisfied with the decision, the petitioners moved this court through Judicial Review No. 1 of 2019 seeking to quash the decision by the respondents. The deponent urged that the said suit was heard on its merit and judgement delivered on 19/12/2019 and to date has not been challenged nor appealed. Finally, it was stated that the 1st respondent immediately closed down the suit premises upon the delivery of the said judgement and the same has remained closed up to date.

Notice of Motion dated 9/3/2020

7. In the second application 9/3/2020, the respondents filed a Notice of Motion brought under section 7 of the Civil Procedure Code seeking for orders that the petition herein be struck out with costs. The application was supported by the Supporting Affidavit of Julius Tarus, the county attorney of the 1st respondent who contended that the entire suit herein is an abuse of court process. It was his averment that the petitioners having been dissatisfied by the non-renewal of their liquor license moved this court in Judicial Review No. 1 of 2019 seeking to quash the decision of the respondents. The said suit was heard on its merits and a judgement was delivered on 19/12/2019 where this court found that the matter was not merited. The said judgement has not yet been challenged or appealed and the issues that are raised in this petition are substantially the issues that were raised in Judicial Review 1 of 2019, the parties and the subject matter are also the same.

8. He further contended that the matter now before court was directly and substantially heard and determined in a former suit and, therefore, *res judicata* and the petitioner cannot therefore open it afresh through these proceedings.

Response by the Petitioners

9. This application was opposed by the replying affidavit of Stephen Njihia Ndumia who stated that judicial review proceedings are so distinct and unique in nature. It is a process which the courts are granted powers to examine the actions of the legislative, executive and administrative arms of government and to determine whether such actions and/or omissions are consistent with the Constitution and other relevant laws. It, therefore, involves the process of challenging the lawfulness of decisions of public authorities usually local or central government and that if a judicial review claim is successful, the usual result is that the decision is quashed or nullified. It was contended that the petition herein raises several issues which were not canvassed during the hearing of the Judicial Review cause and the remedies sought are different and distinct.

Issues for Determination

10. Upon consideration of the applications, affidavits, submissions and the record in its entirety the following issues arise for determination:

a. Whether the petitioners are entitled to the orders sought in their application dated 28/2/2020? or

b. Whether the matter herein is *res judicata*?

11. On the application dated 28/2/2020 the petitioners argued in their Submissions that the Alcoholic Free Zones" and/or the "Zoning of markets and bus stages as Alcoholic Free Zones" policy that was implemented by the respondents violated their rights and have remained unaddressed and un-remedied.

12. The respondents contended their submissions that the petitioners' application dated 28/2/2020 was devoid of merit and amounted to abuse of the court process as they sought conservatory orders which have been overtaken by events as they had closed the petitioners' premises after the dismissal of Kabarnet Judicial Review 1 of 2019.

13. In their application, the petitioners are seeking to stay orders issued by the respondents dated 8/6/2016 but the respondents have stated that the application has been overtaken by events as they closed the petitioners' business premises soon after dismissal of Kabarnet Judicial Review 1 of 2019. Even if there were an intention to appeal the Court's decision in Judicial Review No. 1 of 2019 and no stay of execution of the orders thereon was obtained. In any event, an appeal does not result in the automatic stay of a judgment or order of the court in terms of Order 42 Rule 6 of the Civil Procedure Rules.

"(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such

application and to make such order thereof as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside..."

14. In *Jane Jeptoo Sawe v Estate of Sylvester Kimagut Sang Represented by Jennifer Chebet Sang*, Civil App No. 49 of 2015, the Court of Appeal held that:-

"The order of stay of execution that the Applicant seeks has been overtaken by events and cannot in the present circumstances be granted as it would serve no useful purpose".

In light of the above, I would agree with the respondent that the matter has been overtaken by events and, therefore, this court finds that the reliefs sought in application dated 28/2/2020 are unavailable.

Res Judicata

15. On the second issue petitioners in their submissions argued that the respondents' actions of implementing the "Alcoholic Free Zones" and/or the "Zoning of markets and bus stages as Alcoholic Free Zones" policy acted in breach of the express and mandatory provisions of the law which mandates the respondents prior to implementing a regulation or policy to obtain the public's views and have the same passed by the county assembly which was not done in this case. It was their submission that public participation occurred way after the regulation was implemented which in turn exposed the petitioners to economic losses, hardship and breach of their constitutional rights by denying them a source of income.

16. The respondents on the other hand argued in their submissions that the orders that were sought in Kabarnet Judicial Review No. 1 of 2019 are very similar to the prayers sought herein. The parties of the former suit are the same in the matter herein and the subject in contention in both suits remain the same, violating section 7 of the Civil Procedure Act and in support cited **Nairobi High Court Judicial Review No. 27 of 2018 Charles Kanyi Njagua v Nairobi County Government & Another** and **Malindi Constitutional Petition No. 27 of 2016 County Government of Lamu v. National Land Commission & Another** [2017] eKLR.

17. It was the respondents' submission that additionally, in an attempt to avoid the principle of res judicata the petitioners omitted some parties whom were ex parte applicants who included Solomon Chuchu Ruiru and 4 others whereas in this suit it reads Stephen Njahia Ndumia and Solomon Ruiru.

18. When faced with a similar issue the high court in *Charles Kanyi Njagua v Nairobi County Government & another* [2018] eKLR held

"Case law has tended to suggest that Res judicata does not apply to judicial review proceedings. This is what was held in Re National Hospital Insurance Fund and Central Organization of Trade Unions (K) [2006] 1 EA. However, the courts have over time made it clear that this does not mean that the court is powerless where it is clear that by bringing proceedings, a party is clearly abusing the court process.

Thus, whereas Res judicata may not be invoked in Judicial Review, the courts remain with the inherent jurisdiction to terminate proceedings where the same amount to an abuse of its process. This is so because one of the cardinal principles of law is that litigation must come to an end and that therefore where a court of competent jurisdiction has pronounced a final decision on a matter which decision has not been challenged or upset by a superior court, to bring fresh proceedings whether as Judicial Review or constitutional petition or otherwise would no doubt amount to an abuse of the court process and therefore the court would not hesitate to decline sitting on appeal of decisions that have concluded such former disputes, by invoking its inherent power, as long as that inherent power is consistent with the Constitution or any other written law.

Inherent jurisdiction as stated by Kimaru J in *Stephen Somek Takwenyi vs David Mbutia Githare & 2 Others HCC (Milimani) 363/2009* is "the power inherent in the court but which should only be used in cases which bring conviction to the mind of the court that it has been deceived."

It follows that this court may in appropriate cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process and this may be done where the doctrine of Resjudicata would be applicable."

19. In *Republic v Commissioner of Domestic Taxes; Panalpina Airflo Limited (Ex-parte)* [2019] eKLR John M. Mativo J held as follows:

"I have severally stated that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as everything, which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use. The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

- (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right.
- (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
- (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- (g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
- (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first.

Abuse of court process creates a factual scenario where a party is pursuing the same matter by two-court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process. A litigant has no right to pursue paripasua two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process. Thus, the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.”

20. Section 7 of the Civil Procedure Act on the principles of *res judicata* provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

21. Speaking for myself, I do not see why the provisions of section 7 of the Civil Procedure Act, *being a “procedure provided in this Act in regard to suits”*, in terms of section 89 thereof, *“shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction”* cannot be brought to bear upon subsequent proceedings commenced under the Constitution on a matter previously decided by a competent court in a former **suit** instituted by *judicial review* procedure, which is one of the procedures for institution of suits within the meaning of section 2 of the Civil Procedure Act providing that **“suit” means all civil proceedings commenced in any manner prescribed.**”

22. It cannot be right that the judicial process may be used through different procedures to litigate over the same issue between the same parties. Once an issue is determined on its merits through one or the other procedure of Civil Procedure Act, by a civil suit, judicial review or constitutional application or other suit suitable process as the case may be and the merit on the applicable law and evidence is determined the same is barred by the principle of ***res judicata*** and is also an abuse of the process of the court.

23. Omitting some of the applicant’s bar operators from this suit does not make this suit different from the previous one in terms of *res judicata*; it only reduces the number of parties to the present suit but the former suit is exactly a **“suit between the same parties”** as the present petitioners were parties in the previous suit.

24. The suit before the court filed by way of a constitutional petition is *res judicata* by virtue of the judgment of the court in Judicial Review No. 1 of 2019 notwithstanding that some of the parties in the judicial review were omitted in the present suit between some of the parties in the judicial review suing and being sued in the same capacity. Any other interpretation would be artificial and erroneous. On the record, Kabarnet High Court Judicial Review No. 1 of 2019, **Solomon Chuchu Ruiru & 4 Ors. v. Eldama Ravine Alcoholic Drinks Control Committee & Anor.** and the matter herein have same parties and raise the issues, and the previous suit Judicial Review No. 1 of 2019 was heard by this Court on its merit where similar issues were conclusively determined.

Orders

25. Accordingly, for the reasons set out above, the court finds that the Petition herein is barred by *res judicata* and an abuse of court process; and, consequently, the Notice of Motion dated 9th March 2020 is granted and the entire Petition and the interlocutory application for conservatory orders made thereunder are struck out with costs to the Respondents.

Order accordingly.

DATED AND DELIVERED THIS 21ST DAY OF DECEMBER 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Nyagaka S. M & Co. Advocates for the Petitioners.

M/S Limo R. K. & Co. Advocates for the Prosecution.