



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW NO. E2 OF 2020

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF NAKURU.....RESPONDENT

AND

COUNTY ASSEMBLY OF NAKURU.....INTERESTED PARTY

EXPARTE EDWARD MWANGI

GICHARU & 19 OTHERS.....EXPARTE APPLICANTS

RULING

1. This is a ruling on application dated **27th November 2020**. It seeks to restrain the respondent from harassing or arresting the exparte; applicants pending hearing and determination of the application dated **23rd October 2020**; that the applicants are challenging the respondent’s action of demanding payment of trade license. Counsel for the applicants submitted that the applicants have been having businesses for periods of 5 to 10 years and they have been applying for trade licenses and in 2020 they applied for license.

2. **Mr. Manera** Counsel for the Applicants submitted that, the act of demanding two licenses is unconstitutional as it amounts to double charging and it has affected their businesses; counsel submitted that the respondent has refused to issue licenses to the applicants for the year 2020 until they pay the two licenses despite of them having applied for the same. He submitted that respondent’s acts are oppressive and contrary to the constitution. He submitted that several applicants have been harassed, intimidated and arrested by County Government officials despite them having applied for the license. He urged Court to allow prayer 2 of the application pending hearing of the application dated 23rd October 2020.

3. **Mr. Kinuthia** for the respondent submitted that they are opposed to the application and relied on replying affidavit dated 11th December 2020. Counsel submitted that it is settled law that in application such as this one, the applicant must demonstrate that a right has been violated or infringed by the respondent and submitted that that is not the case in the instant case. He further submitted that the applicants are being double taxed contrary to the constitution and **Fair Administrative Actions Act** but they have not given specific provisions because there are no such provisions

4. Counsel for the respondent submitted that **Article 209** of the **constitution** does allow the respondent to impose various taxes as authorized by way of legislation and that is what the respondent has been doing at all times; that all taxes and monies payable at all times are guided by relevant laws and in respect to trade license, the respondent has taken time to educate the applicants on the difference between trade license and liquor license ;that trade license is a general license that allow conduct of trade generally whereas the other forms of license are for purposes of control and regulations. He further state that the liquor license is a control license which is necessary for the safety of the public and this has been captured in the **Alcoholic Drinks and Control Act**; that the section explain the object and purpose of imposing the liquor license.

5. Counsel for the respondent submitted that the allegation that the respondent has refused to issue license for 2020 is neither here nor there as the applicants have not demonstrated whether they applied and the process of making the application; that it is unjust to expect the respondents to act on what is not there.

6. Counsel for the respondents further submitted that this application has come by way of judicial review and it is their argument that the entire suit and even this application is misplaced as they do not fall within the purview of judicial review; that for judicial review application to succeed, it must demonstrate that the respondent has acted with illegality, irrationality and procedural impropriety which has not been demonstrated by this application and there is no reason for this Court to intervene; that the respondent has been acting within the Act -

Liquor Licensing Act, Alcoholic drinks Act and Public Health Act; he submitted that everything about this suit and this application is misconceived.

7. That the specific nature of mandamus seeks to compel an authority to perform a statutory act and it is not comprehensible in this suit what the applicants are seeking; which public duty they want the Court to direct the respondents to respond and there is no reason why this Court should intervene. That it is also worth noting that the application seeks to challenge the action of respondents to demand payment of licenses making it misplaced as that is not function of judicial review.

8. He further submitted that judicial review does not deal with merit of action but decision-making process; that the applicants have not demonstrated that they were subjected to decision making process and for that process, they were treated unfairly. Counsel for the respondent annexed an authority to guide the Court that where the respondent acts within the law, the Court does not have a reason to intervene and all actions of the respondent have been guided by the law beginning with **Article 185 of the Constitution** giving respondent powers to enact laws for performance of its functions as provided by **Article 186 of the constitution as read with part 2 of 4th schedule of the constitution and Article 209 Sub-Section 3** empowers the respondent to impose various forms of taxes as long as they are supported by legislation and they have legislation in place among them being Finance Act which allows imposing of various licenses; that The applicants have challenged these laws that create the amounts payable and that's why they argue that this application should not be before this Court and urged this Court to dismiss it with costs.

9. In a rejoinder, counsel for the applicants submitted that the applicants have come to court with clean hands as several have been arrested and fines imposed; that the application seeks stay of harassment and arrest pending hearing of application dated 23rd October 2020. He submitted that they have annexed several applications for licenses to the application dated 23rd October 2020. He submitted that they seek orders in terms of prayer 2 and they shall address the other issues in the application dated 23rd October 2020 reason being that this is a festive season and the applicants are apprehensive that the respondent may take advantage and arrest the applicant.

ANALYSIS AND DETERMINATION

10. I have considered arguments by counsels herein. The applicants are apprehensive that they may be harassed and arrested during the pendency of the application dated 23rd October 2020 and more so during this festive season. The applicants' argument is that, payment of trade license and liquor license amount to double payment and it is affecting their business. On the other hand, the respondent argues that the payments are legal as they have charged as per legislation which authorizes them to demand for the 2 licenses; that the applicants have failed to understand the differences between the two licenses despite the respondent offering training.

11. Counsel for the respondent submitted that this suit cannot be classified as a judicial review matter as what the applicants are challenging are not issues of procedure but want to stop the respondent from demanding payments which have been sanctioned by legislation. I do not wish to go into that at this stage but let those issuing be argued in the application dated 23rd October 2020.

12. I however note that the applicants have not demonstrated that they are likely to suffer any irreparable harm or difficulty by making payments for the license awaiting determination on issues that they have raised in the main application.

13. We are now in December 2020, the last month of the year; the applicants have been operating without the license they are challenging for 11 months; they have not demonstrated that in the event they succeed with this suit, the respondent will not be in a position to refund monies paid in respect of one of the licenses. They have not demonstrated any prejudice they are likely to suffer if the said payments are made as the matter is being processed in Court. From the foregoing, I see no merit in the application.

14. FINAL ORDERS

1. Application is dismissed.
2. Costs to abide by the outcome of this suit.

Ruling dated, signed and delivered via zoom at Nakuru This 18th day of December, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

.....**for Applicant**

.....**for Respondent**

.....**for Interested party exparte**

.....for Applicant Exparte