



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 9 OF 2019

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 27, 28, 31, 35, 36, 40, 41, 43, 47, 48, 50, 73,

159(2)(d), 165(3)(b), 174, 185 & 258(1) and (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS

AND FUNDAMENTA FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLES

10, 27, 41, 47, 73, 174 AND 185 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL ACT, NO. 4 OF 2010

AND

IN THE MATTER OF THE UASIN GISHU COUNTY ALCOHOLIC DRINKS CONTROL

AND LICENSING COMMITTEE

BETWEEN

ZACHARIAH KIPKOROS T/A RIVERSIDE BAR.....APPLICANT

AND

THE COUNTY CHAIRMAN LIQUOR LICENSING

COMMITTEE - UASIN GISHU COUNTY.....1ST RESPONDENT

THE DIRECTOR OF ALCOHOLIC DRINKS -UASIN GISHU COUNTY.....2ND RESPONDENT

THE COUNTY GOVERNMENT OF UASIN GISHU.....3RD RESPONDENT

RULING

Zachariah Kipkoros T/A Riverside Bar, for the following orders:

[a] Spent

[b] That interim conservatory orders do issue against the respondents to restrain them whether by themselves, servants and/or agents from unlawfully carrying out inspection, harassing, coercing, intimidating and/or in any other manner whatsoever interfering or closing, disrupting the bar business of the petitioner; and from interfering with the petitioner in the course of selling licensed alcoholic drinks pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the petition.

[b] That interim conservatory orders do issue against the respondents to preserve the petitioner's bar business located at Ziwa Trading Centre within Uasin Gishu County pending the hearing and determination of the application and thereafter pending the hearing and determination of the petition.

[c] That the costs of the application be costs in the petition.

[2] In support of the application, the petitioner relied on the averments set out in his affidavit, sworn on **21 May 2019** and the documents annexed thereto. He deposed that he is a businessman, engaged in the wholesale and retail trade of alcoholic drinks under the name **Riverside Bar**; and that the said business is located at Ziwa Trading Centre in Uasin Gishu County. He acknowledged that he was under obligation to maintain high standards of hygiene in the bar and to pay dues to the 3rd respondent as and when due; and asserted that he has always complied with all the liquor licensing and statutory requirements relevant to his sphere of trade. He thus contended that he had operated the business for over 10 years without any kind of complaint or disruption from the respondents.

[3] The petitioner averred that in **November 2018**, he applied for the 2019 licence as usual, but did not receive a response from the respondents by **January 2019**, despite having been assured that his bar had complied with all the requisite hygiene and other relevant conditions. He attached copies of the payment receipts, a letter from the Soy sub-county public health office and photographs of the bar as **Annexures ZK-2,3,4,5,6 and 7(a) and (b)** to his affidavit. He added that he had, in anticipation, signed a tenancy agreement for the premises for two years, ending 2020; and was therefore aggrieved that his application had not been favourably considered.

[4] The petitioner further complained that, on or about **22 February 2019**, the 3rd respondent's officers invaded his business premises, disrupted his business, vandalized doors and blocked the operation of his business by closing up the bar without any notice, reason or justifiable cause; thereby contravening his constitutional rights to engage in economic activities and acquire property. As a result, he lost stock and incurred loss of business earnings for which he seeks compensation from the respondents vide his petition dated **21 May 2019**.

[5] There appears to be no Replying Affidavit on record that responds specifically to the Notice of Motion dated **21 May 2019**. I note however that in the averments by **Sila Boit** in the Affidavit in Response to the Petition, the respondents conceded that the petitioner applied for and was granted a liquor licence for the year **2018**; and that, though he duly applied for renewal of the said licence for the year **2019**, the same was subjected to the process provided for in **Sections 11, 12 and 14** of the **Uasin Gishu County Alcoholic Drinks Control Act, No. 1 of 2014**, but was rejected by the 1st respondent on **17 June 2018** on the following grounds, among others:

[a] Sale of alcoholic drinks to minors and school-going children;

[b] High cases of insecurity within the area perpetuated by indiscipline on the part of the customers;

[c] Sale of adulterated alcohol and unlicensed brands, thus jeopardizing the lives of the residents;

[d] Sale of alcohol earlier than or beyond the stipulated working hours.

[6] It was further the contention of the respondents that the decision of the 1st respondent and the reasons therefor were effectively communicated to the petitioner; and that efforts by the 1st respondents' officers to have the petitioner comply with the Committee's resolution have been met with defiance, force and extreme hostility. **Mr. Sila Boit** denied that any property belonging to the petitioner was vandalized as alleged; and added that the officers of the 3rd respondent only visited the petitioner's premises for purposes of enforcing the resolutions made by the 1st respondent and in the best interest of the residents of the area in which the petitioner was conducting his business.

[7] The petitioner filed a Supplementary Affidavit and refuted the assertions that due process was followed in connection with his application for licence renewal. He averred that no evidence was tendered in proof of any of the grounds for refusal set out in Paragraph 16 of **Mr. Boit's** affidavit. He reiterated his assertions that his constitutional rights were violated; and stated, in paragraph 30, that the respondents' opposition to the conservatory orders sought through the instant application **"...is driven by the 3rd Respondent's own personal gains and ill motives aimed at subverting the cause of justice..."**

[8] Pursuant to the directions given on **5 February 2020**, the application was to be urged by way of written submissions. These have not been forthcoming however. Instead, the firm of **Mukabane & Kagunza Advocates** filed written submissions, dated **24 June 2020**, in respect of the main petition. Likewise, the written submissions filed by the County Attorney on behalf of the respondents; and which were forwarded to me in soft copy **11 December 2020** by the e-filing team, Eldoret Law Courts; also speak to the petition as opposed to the subject application, notwithstanding that the said submissions are expressed to have been filed in respect of the application dated **21 May 2019**. Hence, counsel thereby proposed the following issues for determination:

[a] Whether due process was followed in denying the applicant liquor licence for the year **2019**; and,

[b] Whether the actions carried out by the respondents are justifiable.

[9] Counsel then proceeded to develop his arguments around the doctrine of exhaustion and cited **Eldoret High Court Petition No. 6 of 2019: Teresia Cheruiyot T/A Cool Shade Bar & 4 Others vs. The County Chairman, Liquor Licensing Committee, Uasin Gishu & 3 Others** to buttress his arguments; which appear to me to be somewhat premature. The need for caution, in such matters, to not delve into the merits prematurely was aptly expressed thus by **Hon. Ibrahim, J.** (as he then was) in the **Muslim for Human Rights & 2 Others vs. Attorney General & 2 Others** [2011] eKLR:

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either party. The principle is similar to that in temporary or interlocutory injunctions in civil matters...”

[10] Similarly, in **Nairobi High Court Petition No. 16 of 2011: Centre for Rights Education & Awareness (CREAW) & 7 Others vs. Attorney General**, the view taken was that:

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

[11] And in **Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 Others**, the Supreme Court had the following to say:

“Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case or “high probability of success” in the Applicant’s case for order of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cases.”

[12] Hence, it is now settled that an applicant for conservatory orders, for purposes of **Articles 22 and 23(3)(c)** of the **Constitution**, must satisfy the Court as to the following three considerations:

[a] That he/she has a *prima facie* case with a high likelihood of success;

[b] That the Petition will be rendered nugatory;

[c] That public interest weighs in his/her favour.

[13] In the instant application, there is no dispute that the petitioner who had been operating his bar business for about 10 years prior thereto, applied for a liquor licence for the year **2019**; and that, while waiting for renewal, the respondents visited his premises on **22 February 2019** and closed it down. The respondents, on their part, contended that the application was subjected to the procedure set out in **Sections 11, 12 and 14** of the **Uasin Gishu Liquor Alcoholic Drinks Control Act**; and that it failed the test. It was further the contention of the respondents that the decision was duly communicated to the petitioner; and therefore that the petitioner ought to have exhausted the appeal process embedded in **Section 17** of the Act before approaching the Court for relief.

[14] The Court has however already ruled, vide its ruling herein dated **8 November 2019**, that there appears to be some merit in the petitioner’s stance that he had no knowledge that his application had been declined until he was served with a response to the petition herein; and that he filed this petition out of desperation. I am still of the same persuasion; and therefore find that the petitioner has a *prima facie* case. I am however far from convinced that the petition will be rendered nugatory if the orders sought are not granted at this stage. The petitioner conceded that his business was closed down by the respondents on **22 February 2019**; and among the prayers he seeks in his petition dated **21 May 2019** is an award in general damages for his loss. To that end, he pleaded, at paragraph 18 of the Petition that:

“...on or about 22nd February, 2019 the officers from the County Government of Uasin Gishu led by the director of alcoholic drinks and the sub-county police officers invaded the Petitioner’s bar business premises, disrupted Petitioner’s bar businesses, vandalized doors and blocked the operation of the Petitioner’s bar business by ordering locking up...without any notice or reason nor justifiable cause...”

[15] The said averments were reiterated at paragraph 21 of the Affidavit in Support of the Petition and paragraph 14 of the Supporting Affidavit filed with the instant application. It is explicit therefore that there is nothing to conserve pending the hearing of the petition.

[16] With regard to the element of public interest, the application appears to have been overshadowed by the assertions at paragraph 16 of the respondents’ Replying Affidavit, wherein it was averred that the denial of licence and closure of the bar was effected for the purpose of protecting the residents from the harmful effects of the petitioner’s business. The respondent’s alleged that the petitioner was selling alcoholic drinks to minors and school-going children; that he was selling adulterated alcohol thus jeopardizing the lives of the residents; and that the business perpetuated insecurity in the area. While these allegations are yet to be proved, that they have been raised herein would militate against the grant of conservatory orders. In any event, the bar had already been closed by the time the instant application was filed.

[17] In the result, my considered finding is that no justifiable cause has been shown by the petitioner for the issuance of the conservatory

orders prayed for in the Notice of Motion dated **21 May 2019**. The same is accordingly dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF DECEMBER, 2020

OLGA SEWE

JUDGE