



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 1 OF 2019

IN THE MATTER OF ORDER 53 RULE OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF ARTICLE 10 AND ARTICLE 165 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW FOR ORDERS OF MANDAMUS, INHIBITION AND CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF

THARAKA NITHI.....1ST RESPONDENT

THE THARAKA NITHI COUNTY

COMMANDER OF POLICE.....2ND RESPONDENT

THE OFFICE OF THE PUBLIC PROSECUTION

DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

RAHAB GACHERI.....1ST EX-PARTE APPLICANT

JUSTINE MUTEMBEI.....2ND EX-PARTE APPLICANT

FAITH NJUKI AND ABOUT 150 OTHERS....3RD EX-PARTE APPLICANT

R U L I N G

1. RAHAB GACHERI, JUSTINE MUTEMBEI and FAITH NJUKI, the ex parte applicants herein have moved this court under **Order 53 Rules 1(1), 2, and 4 of the Civil Procedure Rules and Law Reform Act** through a Judicial Review application dated 22nd January 2019 for the following orders, namely:-

- (i) That leave be granted to the ex-parte applicants to apply for Judicial Review orders of mandamus, prohibition and certiorari against The County Government of Tharaka Nithi (1st Respondent) and The Tharaka Nithi County Commander of Police (2nd Respondent) and Director of Public Prosecution (3rd Respondent).

(ii) That this court be pleased to remove into the this court for purposes of being quashed the decision made by the 1st Respondent's Department of Finance, Economic Planning, Trade and Revenue on the 11th December, under an illegitimate legislation to wit Tharaka Nithi Alcoholic Drinks Control Act, 2015 (No.6 of 2015).

(iii) That this honourable court be pleased to issue an order of Mandamus compelling the 1st Respondent to publish in the Kenya gazette the purported Tharaka Nithi County Alcoholic Drinks Control Act 2015.

(iv) That the grant of leave to operate as a stay of proceedings in Chuka Criminal Cases No. 59, 60 and 63 and all other criminal cases concerning the Petitioners based on conducting Alcoholic bar business without licenses.

(v) That costs be provided for.

2. This application is based on the affidavit of Justine Mutembei sworn on 22nd January, 2019 and in the said affidavit the 2nd ex-parte applicant states that he is a member of Thachuma Bar Owners Self Help Group. He further avers that he was arrested on 18th January, 2019 while doing his business of selling beer in his bar within Chuka Town and arraigned on 21st January 2019 for the offence of;

"operating a bar without a license contrary to Section 7 as read with Section 62 of the Alcoholic Drinks Act 2010".

3. The 2nd ex-parte applicant contends that the license referred to in the charge sheet is the subject matter of the Constitutional Petition No. 3 of 2018 which is pending in this court. He further avers that he has been forced to close down his bar business and that other members from his group have suffered similar fates.

4. Mr. Riungu learned counsel for the ex parte applicants, submitted that the law being imposed on the applicants has not been published to become law. He further contended that there is a matter pending in this court through Constitutional Petition No. 3 of 2018 where the legitimacy or the legality of that law is being challenged. He faulted the Respondents for effecting the law despite pendency of the said constitutional matter. In his view a stay should be issued in order to protect the ex parte applicants who eke out a living from the business and would otherwise suffer unless a stay order is granted.

5. The Respondents have both opposed this application. On its part the 1st Respondent through a Replying Affidavit sworn by Lilian Kiruja on 29th January 2019 has opposed the application insisting that there is no nexus between the arrest of the applicants under Alcoholic Control Drinks Act 2010 and Constitutional Petition No. 3 of 2018. She has deposed that the ex-parte applicants have been charged under the Alcoholic Drinks Act 2010, which is a National Legislation and not the Tharaka Nithi Alcoholic Drinks Control Act No. 6 of 2015 which is a County Legislation and which is the subject matter in Constitutional Petition No. 3 of 2018. Miss Muthoni for the 1st Respondent has faulted the ex parte applicants for not demonstrating any evidence of illegality, irrationality or any procedural impropriety in the statute under which they have been charged in court. In her view this application is frivolous and the 1st Respondent has nothing to do with the charges the applicants are facing in the lower court.

6. On their part the 2nd and 3rd Respondents have through a Replying Affidavit sworn on 28th January, 2019 by Yussuf Khalif opposes this application on the ground that there is no connection between the arrest and prosecution of the ex-parte applicants and Constitutional Petition No 3 of 2018. They aver that no orders barring arrest or prosecution of anyone was issued in the Constitutional Petition No. 3 of 2018 and that there is no order staying the operations of Alcoholic Drinks Control Act 2010 under which the ex-parte applicants have been charged.

7. The 2nd and 3rd Respondents contend that the issues raised by the ex parte applicants should be raised through the pending Constitutional Petition instead of filing a fresh suit which action in their view amounts to abuse of court process.

8. In their oral submission made through Mr. Momanyi learned counsel from Office of the Director of Public Prosecution, the 2nd and 3rd Respondents have asserted that this application has not met the threshold for granting leave or even stay. It is their contention that the basis for a Judicial Review resides in Constitutional Petition No. 3 of 2018 and the same cannot form a basis for a similar motion in this proceedings. Mr. Momanyi further insisted that the prayers/relief being sought are not against them contending that prayer 1 is vague while prayer 4 is too broad to be granted and that the same is open to abuse if granted.

9. The 2nd and 3rd Respondent have further submitted that the ex parte applicants have not demonstrated any administrative action that was not carried out in accordance with the law and that Judicial Review remedy should only be granted where there is no other remedy available. In their view, if the applicants have issues with the law under which they were charged, they can challenge the same at the trial court. It is contended that the sections of the law under which the ex parte applicants have been charged are valid and have not been invalidated.

10. Analysis and Determination:

This court has considered this application and it is clear looking at the application that the prayers being sought are somewhat convoluted. This is because the prayers sought are a mixture of leave sought and substantive prayers.

11. Beginning with prayer 1, the ex parte applicants are seeking leave to apply for Judicial Review orders of mandamus, prohibition and certiorari against the respondents but it does not specify for what wrong, illegality or impropriety on their part. The 2nd and 3rd respondents are therefore justified to terms the prayer vague because it is actually unclear looking at the prayer what the grievance is all about.

12. Now turning to prayers 2 and 3, the ex parte applicants are seeking substantive orders of certiorari and mandamus straight away in clear

violations of provisions of order **53 Rules 1 of Civil Procedure Rule** which requires that before one seeks for orders of mandamus, prohibition and certiorari, leave of court is a prerequisite. The prayers 2 and 3 as drafted are therefore incompetent and bad in law.

13. Turning to prayer 4, the 2nd and 3rd Respondent have pointed out that the prayer is too broad and vague which appears to be true because the ex parte applicants are seeking stay of Criminal Cases Nos. 59, 60, 63 and **"all other criminal cases concerning the petitioners based on conducting alcoholic bar business without licenses."** Such an order if it was to be granted would obviously likely open a Pandora's box of disorder, and mischief given that the ex parte applicants has stated in the face of the application that they are suing on behalf of 150 other members whose names are not given. The questions posed is what would prevent anyone in Tharaka Nithi from dealing with all sorts of illicit brews and using the stay order as cover for the illegal business? What would that portend to the society?

14. I have looked at the statement of facts and the remedies/reliefs sought and it is clear that the ex parte applicants are seeking leave for purposes or seeking an order of inhibition against the 1st and 2nd respondents to restrain them from harassing, arresting and interfering with their trade in liquor business. They are also seeking to stop prosecution of the ex parte applicants and/or further arrests. They are also seeking leave to apply for mandamus to force the 1st Respondent to publish the Tharaka Nithi Alcoholic Drinks Control Act, 2015 in the Kenya Gazette.

15. It has to be noted that at this stage (leave stage) this court is not required to delve deep into matters in controversy but the party seeking leave to apply for any/all the prerogative orders is required to establish a prima facie or arguable case revealing that the administrative action of a public body is tainted with an illegality, impropriety, irrationality or that there is an element of infringement on the rules of natural justice. It is at the leave stage that courts use their discretion to weed out frivolous or vexatious cases and only grant leave on deserving cases to go to the next level and the test applicable is what I have observed above.

16. The application before me besides the technical flaws pointed out above appear to be wanting as well on the merits front. In the first place, the applicants in their application have pointed out that they have issues with the legality Tharaka Nithi Alcoholic Drinks Act 2015. They have pointed out that there is a pending Constitutional Petition No.3 of 2018 where the legality of that statute is the subject matter. Though the applicants have not annexed pleadings or documents in that Constitutional Petition, this court takes Judicial Notice based on institutional memory as the matter is actually pending in this court. The question posed is why would the ex- parte applicants institute a similar suit vide this proceedings when they know that the issue raised is the same subject matter in Constitutional Petition No. 3 of 2018?

17. I have also looked at the charge sheets in respect to charges facing the ex parte applicants in the lower court as it is exhibited by the 2nd and 3rd Respondents in their response and it is clear that the ex parte applicants are charged with the offence of **"operating Bar without a license contrary to Section 7 as read with Section 62 of the Alcoholic Drinks Act 2010."** The applicants have not pointed out any illegality in that statute and I find that there is no basis for them to say that because they are challenging a County Legislation (read Tharaka Nithi Alcoholic Drinks Control Act, 2015 (6 of 2015)), the operation of a National Legislation (Alcoholic Drinks Act 2010) should be stayed.

In my view, the two legislations are distinct and separate though they deal with the same industry. They should be treated differently which appears not to be the case in this application.

18. I am also persuaded by the Respondents' contention that there is no stay granted in the in the Constitutional Petition No. 3 of 2018 that stops operations of Tharaka Nithi County Nithi Alcoholic Drinks Control Act 2015 or any other statute for that matter dealing with liquor activities.

19. Secondly and more importantly is that as I have observed above only prayer 1 and 4 are capable of consideration at this stage and this court finds that the prayers on merit also fall short of the threshold required to be granted. In the case of **Republic -vs- National Employment Authority and 3 Others Ex parte Middle East Consultancy Services Ltd [2012] eKLR**, The court held as follows:

"An administrative or quasi judicial decision can only be challenged for illegality, irrationality and procedural impropriety. An administrative decision is flawed if it is illegal. A decision is illegal if it;

- a. Contravenes or exceeds the terms of the power which authorises the making of the decision.**
- b. Pursues an objective other than that for which the power to make the decision was conferred,**
- c. Is not authorized by any power**
- d. Contravenes or fails to implement a public duty."**

A cursory look at the grievances the ex parte applicants have against the Respondents reveals that they have not impugned the law under which they have been charged in the lower court in any way. They have not placed before me any evidence to show that the respondents collectively or separately are harassing them unfairly or in any irrational way to justify a grant of leave to challenge their actions. An applicant must present evidence of say a decision reached by the Respondents to harass them or drive them out of town in order to stop them from operating their bar businesses. As it is there, is no decision capable of being challenged vide a Judicial Review. If the complainant is based on any tort, the forum would be different and not through Judicial Review. The ex parte applicants have not faulted any of the Respondents for acting beyond their statutory or Constitutional powers or acting illegally or irregularly to warrant intervention by this court through Judicial Review.

20. The basis for seeking leave, even if this court was to assume that applicants have properly sought the same (which is not the case here) involves an interpretation of the law to determine its legality or legitimacy of the Alcoholic Drinks Control Act 2010. At this point, the ex

parte applicants seem confused as to whether they are litigating over the County Legislation which is the one passed in 2015 or the National Legislation passed in 2010 under which the ex parte applicants have been charged. Be that as it may, the issues of Constitutionality or otherwise of the County Legislation should be determined in the Constitutional Petition No. 3 of 2018 to avoid duplicity. I have also noted that contrary to what the ex parte applicants have advanced in this application, Tharaka Nithi County Alcoholic Drinks Control Act 2015 on the face of it appears to have been published and printed by the Government Printer at Nairobi via County Legislation Gazette Supplement No. 3 (Act No. 6 of 2015) on the 25th August, 2015. In the premises I find no basis or any arguable case by the ex parte applicants on the ground that the County Legislation is illegal for want of publication or gazettelement.

21. Thirdly as I have observed above prayer 4 cannot simply be granted because it is too vague. Where no basis has been revealed to grant leave, a stay order is untenable. Besides this, the Certificate of Registration of Thachuma Bar Owners Self Help Group and the list of the alleged 150 members was not availed to this court to know who the parties are against whom an order of stay of any prosecution should be issued. A blanket order to protect unknown persons cannot issue as the same would be a recipe for chaos.

In sum the prayer 1 fails because the ex parte applicants have not met the threshold to show that they have a prima facie case against the Respondents. The prayer is also vague for the aforesaid reasons. Prayer 2 and 3 are incompetent and bad in law. They are not tenable at this stage because of their substantive nature. Prayer 4 cannot be granted because it is vague and has the potential to bring chaos in the alcohol sector that contravene the law and is against public policy.

In conclusion the application dated 22nd January, 2019 is disallowed with costs to the Respondents.

Dated, signed and delivered at Chuka this 26th day of February 2019.

R.K. LIMO

JUDGE

26/2/2019

Ruling date, signed and delivered in the open court in presence of Kijaru holding brief for 2nd and 3rd Respondent and Muthomi for the 1st Respondent.

R.K. LIMO

JUDGE

26/2/2019