REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MISC. CIVIL APPL. NO.39 OF 2019

JULIA WAIRIMU NJUGUNA.....APPLICANT

- V E R S U S –

MUNGAI KIONGO

COUNTY GOVERNMENT OF NYANDARUA...RESPONDENTS

R U L I N G

Before me is the Notice of Motion dated 3/4/2019 in which the applicant, Julia Wairimu Njuguna seeks the following orders against the respondents, Mungai Kiongo and County Government of Nyandarua.

1. Spent;

2. That an order of certiorari do issue to remove to this court and quash the 1st respondent's letter Ref.No.NYA/CNT.GOVT/OSC/LQ/19/07 dated 11/2/2019 ordering closure of the applicant's business known as ROCKERS BAR;

3. That the respondent be ordered to pay General Damages for breach of the applicant's contractual rights;

4. The costs of this application be met by the respondent.

The application is supported by an affidavit sworn by the applicant, Julia Wairimu Njuguna, on 3/4/2018 and a supplementary affidavit dated 8/5/2019. The applicant deponed that she has been operating a Liquor selling outlet known as Rockers Bar at Makara Shopping Centre in Milangine District since 2015. She has observed and adhered to all the laws and regulations pertaining to the said business which are set by Nyandarua County Alcoholic Drinks Control Act, 2014; that the term of office of Nyandarua County Alcoholic Drinks Control Board and Sub-County Alcohol Drinks Regulations Committees expired in 2017 and no new appointments have been made; that on 11/2/2019, the applicant received a letter Ref.No.NYA/CNT.GOVT/OSC/LQ/19/07 from the respondent directing that her business be closed (JWM1).

In the said letter, it was alleged that one James Mwangi Kamau had died after consuming alcohol in the said bar and that she had been operating the bar outside the stipulated times despite previous warnings. The applicant has denied the said allegations and is aggrieved by the said decision contending that the decision was made contrary to rules of natural justice; that the decision was made by the 1st respondent without the Alcoholic Drinks Control Board and Sub-County Alcoholic Drinks Regulations Committee which expired in 2017; that the decision was unlawful unreasonable and procedurally unfair as it did not comply with the Constitution and Fair Administrative Actions Act, 2015 and the Nyandarua County Alcohol Drinks Control Act 2014; that she was she given any notice of the nature and reasons for the impugned decision. Despite demand being made, the said letter has not been withdrawn.

In her supplementary affidavit, the applicant denied that the dead body was found at the door of her bar and questioned why she was not arrested and charged with a criminal offence if indeed that were true; that no postmortem report has been exhibited in proof of the cause of death of the said person.

The application was opposed and the 1st respondent filed a replying affidavit in which he admitted being the Sub-County Administrator, Ol Kalou Sub-County. He recalled that on 7/2/2019, he received information that two people had died after consuming alcohol at Makara Trading Centre in Milangine. He proceeded to the scene and found an irate mob threatening to burn the applicant's Bar and there was a dead body of a man at the door. They calmed the mob and to safeguard lives and property, made an administrative decision to close the bar immediately which was accepted by the public; that he told the applicant to go to his office to explain what took place but she did not go. He further deponed that a postmortem revealed that the deceased, James Mwangi had consumed a poisonous drink and that investigations are still ongoing; that it is in the public interest that the bar be closed pending conclusion of investigations and that in any case, the applicant does not have a liquor license for 2019 in any event. Lastly, it was contended that the applicant did not exhaust all remedies available in the Nyandarua County Alcoholic Drinks Act, 2019.

Mr. Gakuhi Chege, filed written submissions in support of the application. The gist of the submissions is that the 1st respondent made a unilateral decision to close the applicant's Bar without according the applicant a hearing or subjecting her to any proceedings before the Sub-County Alcoholics Control Committee created under Section 4(1) the Nyandarua Alcoholic Drinks Act. He submitted that at present, there is no Board or Committee at County the level, a fact that the respondent did not contact in its replying affidavit; that the applicant approached this court under the Fair Administrative Actions Act, 2015 because the 1st respondent contravened the applicant's right to justice and Fair Administration under Article 47 of the Constitution; that the applicant has adopted the procedure that Justice Ng'ugi canvassed and upheld in the case of ***James Gachau Kariuki and 22 others v Kiambu County Assembly and 3 others JR.App.2/2017*** where the Judge observed that the Chief Justice had not yet promulgated rules of practice under the FAA Act and that the FAA Act provides an alternative means of instituting proceedings instead of the rigid procedure under Order 53 of the Civil Procedure Rules. As a result the Judge allowed the application to be brought by way of a Notice of Motion and did not seek leave of the court to commence it.

On whether the application has not exhausted the remedies provided under the Nyandarua County Alcoholic Drinks Act, counsel submitted that Section 4(2) provides for review on appeal of the decision made by the Sub-County Committee but that the impugned decision was not made by a Sub-Committee and that in any event it was not a decision made under Section 16(1) of the Nyandarua County Alcoholic Drinks Act which provides that the only decisions that are reviewable are decisions to refuse or cancel a license by an applicant to a Sub-Committee; that Section 17 of the Act does not prohibit a person from seeking other legal remedies under the National Laws.

Counsel was of the view that the doctrine of exhaustion does not apply to this case.

Counsel further urged that this being a Judicial Review application, the invitation by the respondent for the court to consider the merits of the decision should not be entertained; that the letter suspending the license gave reasons for suspension which was the finding of a dead body near the Rockers Bar who had consumed alcohol at the said bar, but not because of lack of the 2019 Liquor license; that the applicant has not been shown the postmortem report of the deceased nor has she been given an opportunity to explain whether the deceased took alcohol at her bar. According to the applicant, the decision was draconian and contrary to the law and should be quashed.

Mr. Karanja in opposing the application submitted that there is no competent application before the court because though Judicial Review orders are sought, no leave was obtained to commence Judicial Review proceedings under Order 53 Civil Procedure Rules; that if the applicant wanted to proceed under Article 22, then she should have come under Rule 10 of the Mutunga Rules by way of a petition; that a Notice of Motion is an interlocutory application upon which a substantive matter cannot be determined. Counsel urged that Article 159 of the Constitution should not be used to amend express rules of procedure as was led in the ***Raila Odinga case***.

Mr. Karanja further submitted that the applicants license was merely suspended upon the finding of a dead man at the applicant's Bar; that the suspension was necessary to pave way for investigation into the death; that the action to suspend the license was undertaken for the best interests of the public pursuant to Section 3 of the Act which sets out the objectives of the Act; counsel relied on the decision of Lord Denning in ***Lewis v Heffer & others*** where hard he stated:

> ***"where suspension is made as a holding operation pending enquiries, the rules of natural justice did not apply because the suspension was a matter of good administration."***

He argued that public interest supersedes individual interest that is to ensure that the people's health and safety is guaranteed.

It was also Mr. Karanja's submission that the Notice of Motion as presented is premature as the applicant has not exhausted the internal mechanism provided for under Section 4 of the Nyandarua Alcoholic Drinks Control Act, 2014 whereby Section 4(2)(m) provides for review of decisions of the Sub County Committees on appeal. It was counsel's view that the decision made by the 1st respondent was within his mandate by virtue of Section 8(3) of the Act and having failed to exhaust the said procedure, contravened the exhaustion doctrine.

Counsel relied on the decisions of:

> ***(1) Republic v Kenyatta University ex-parte Ochieng Orwa Dominic and others J.R.201/2018 (2018) eKLR;***
>
> ***(2) Speaker of National Assembly v Karume (1992) KLR 21; and***
>
> ***(3) Geoffrey Muthinja & 2 others v Samuel Mugana Henry & 17 others.***

Mr. Karanja also relied on Section 9(2) of FAA Act which bars the High Court or subordinate courts from reviewing Administrative Action unless the mechanisms for appeal or review under other written law are exhausted.

Mr. Karanja observed that the claim for general damages be dismissed as Mr. Chege did not submit on it and the same has no basis.

The Notice of Motion under consideration was brought pursuant to Articles 22(1), 23, 47 and 56 of the Constitution of Kenya, 2010. Section 4, 7, 8, 9 and 10 of the Fair Administrative Actions Act, 2015 and Order 51 of the Civil Procedure Rules.

Article 22(1) of the Constitution confers access to court for breach of any right or fundamental freedom. It reads ***"every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened."***

Article 23 of the Constitution confers on the High Court the jurisdiction to hear and determine applications for redress of denial, violation or infringement of rights under the Bill of Rights. This court has therefore unlimited jurisdiction to grant remedies for infringement of rights

under the Bill of Rights. Under Article 23 the court may grant appropriate relief including a declaration of rights, an injunction, an order of Judicial Review e.t.c.

I have given due consideration to the application and submissions by both counsel. I think that the issues that seem to arise are:

(1) Whether the application as filed is competent;

(2) Whether the application is premature and offends the doctrine of exhaustion;

(3) Whether the respondent's decision is unlawful, unreasonable or procedurally unfair;

(4) Whether the order sought can be issued;

(5) Who bears costs.

Whether the application is premature and offends the doctrine of exhaustion:

It was Mr. Karanja's submission that the application is premature having not exhausted remedies under Section 4 of the Nyandarua County Alcoholic Drinks Control Act. Section 4(1) of the Act establishes the County Alcoholic Drinks Control Board and Section 4(2) sets out the functions of the Board. They are inter alia

(a) Supervise and co-ordinate the functions of the Sub-County Alcoholic Control Committee including licensing;

(b) Support and facilitate Sub-County Committees in carrying out their functions;

(c) ….

(d) ….

(e) ….

(f) ..

(g) ….

(h) …

(i) ….

(j) …

(k) …

(l) …

(m) Reviewing on appeal decisions by the Sub-County Committees.

According to the respondent, the impugned decision of the Sub-County Administrator, the 1st respondent, was within his mandate under Section 8(3) of the Act.

"Section 8(1) provides as follows:

(1) There shall be for every Sub-County, a Committee to be known as the Sub-County Alcoholic Drinks Regulation Committee which shall:

(a) Issue licenses in accordance with this Act;

(b) Perform such other functions as may from time to time be assigned to it by the Governor;

(2) …….

(3) In carrying out its functions, the Sub-County Committee shall:

(a) ……..

(b) Collaborate with Ward Administrators and Councils appointed under the County Government Act, 2012 and the officers in charge of co-ordination of National Government functions in the wards and villages.

(c) Collaborate with similar committees in other counties for effective implementation of the Act."

The applicant contends that the term of office of Nyandarua County Alcoholic Drinks Control Board and Ol Kalou Sub-County Alcoholic Drinks. Regulations Committees had expired in 2017. However, that is a statement that is not backed by any evidence. The court cannot ascertain whether that is true. And if the terms of the committees have expired, would they still have a vacuum for solving disputes up to date in 2019? He who alleges must prove. The applicant having alleged that there was no County Board or Regulation Committees in place, should have demonstrated that fact which was not done. According to Mr. Karanja, the County Alcoholic Drinks Control Board is different from Sub-Committees which have different appointees and mandate.

It was the applicant's contention that the impugned decision was made by the Sub-County Administrator but not the Board or the Sub-County Alcoholic Drinks Regulations Committee. Section 8(2) of the Act provides ***"The Sub-County Committee may, in the discharge of its functions under this Act, make inspection or other visits to premises at such times as it may deem appropriate inspection."***

Section 8(4) then provides for the Constitution of the Sub-County Committee. The Chairman of the said Sub-Committee is the Sub-County Administrator. It therefore follows that the decision made by the respondent herein emanates from the Sub-County Committee Alcoholic Drinks Regulations Committee having been made by its Chairman. One of the functions of the Sub-Committee is to issue licenses and perform any other related functions.

Issuance of licenses goes hand in hand with monitoring of the use of licenses through inspection of the premises and suspension or cancellation thereof. The letter written to the applicant indicated that the closure of the business was pursuant of Section 14(2)(a) of the Act which provides for refusal to renew an existing license if the business for which the license was issued is conducted in a manner in breach of the Act or any other rules and Regulations made under the Act.

From an examination of the above provisions, it is clear that the 1st respondent issued the closure notice as Chairman of the Sub-County Committee Alcoholic Drinks Regulations Committee which was within his mandate and his decision was appealable to the County Alcoholic Drinks Control Board under Section 4(2)(m) of the Act.

The law is long settled, that where a procedure for redress of a grievance is prescribed by a statute or Constitution, that procedure must be followed.

The above proposition is buttressed by Section 9(2) of the FAA Act.

Section 9(2) of the FAA Act provides ***"The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision vide this Act unless the mechanisms including internal mechanisms as for appeal or review and all remedies is available under any other written law are first exhausted."***

The above provision is supported by a host of decisions on the same issue.

In ***Geoffrey Muthinja Kabiru & 2 others v Samuel Munga & 1756 others (2015) eKLR***, the court said:

> ***"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be for a of last resort and not the first port of call the moment a storm brews… The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts….. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."***

The above decision echoes the celebrated decision in Speaker of ***National Assembly v Karume (1992) KLR 21*** where the court succinctly stated:

> ***"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly follows. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."***

I do agree with Mr. Karanja that the Notice of Motion offends the doctrine of exhaustion in that the appellant failed to pursue the procedure of appeal provided under the Act.

Whether the application is competent:

The application before the court was brought by way of Notice of Motion and Mr. Karanja contended that it is incompetent because no leave of the court was sought nor is it brought under the Rule 10 of the Mutunga Rules. In filing the Notice of Motion, Mr. Chege relied on the decision of J. Ngugi in ***James Gacheru Kariuki & 22 others v Kiambu County Assembly J.R.2/2017*** a matter under the Fair Administrative Actions Act. The Judge held:

> ***"My express holding is that I find no requirement that a party seeking to commence a suit under the FAA Act must first obtain***

the leave of the court. I also expressly find that in the absence of Rules promulgated by the Honourable Chief Justice under Section 10(2) of the FAA act, bringing a suit under the Act by way of Notice of Motion does not render such a suit fatally defective and liable to be struck out."

In the above case, the court rejected the preliminary objection that the suit was incompetent because no leave of court had been obtained to commence Judicial Review proceedings.

Counsel in adopting the above decision, urged that since the Chief Justice is yet to promulgate rules in the FAA Act, the procedure under FAA Act is an alternative means of instituting proceedings. ***"Uncumbered by the original procedural requirements of Order 53."***

As pointed out by counsel, Sections 4, 7, 8, 9 & 10 of the FAA Act, 2015 are founded on Articles 23 and 47 of the Constitution. Article 47 provides for the right to a Fair Administrative Action. To give effect to the said Articles, parliament enacted the FAA Act where Section 2 defines an Administrative Action to include ***"the powers, functions and duties exercised by authorities and quasi-judicial tribunals or any act or omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates."***

Judicial review is now entrenched in the Constitution 2010, so that the remedies that were only available under Order 53 of Civil Procedure Rules can now be issued under Article 23 of the Constitution so that one is no longer confined to the limited remedies available under Order 53 Civil Procedure Code, that is, certiorari, prohibition and mandamus. The procedure of commencing Judicial Review was seen as cumbersome in that one needs leave of the court to commence Judicial Review proceedings.

Under FAA Act, the remedy is supposed to be expeditious, efficient, lawful and fair, et cetera. In my considered view, even in absence of Rules made by the Chief Justice under the Act, there is no vacuum on how an application under the FAA Act should be instituted in court. If one finds the procedure under Order 53 Civil Procedure Rule to be cumbersome, then nothing stops the applicant from proceeding under the Constitutional provisions. A Notice of Motion in my view is generally an interlocutory application unless specifically provided for in a special jurisdiction like that under Order 53 Civil Procedure Rules that the suit may be determined on a Notice of Motion.

The applicant clearly invoked the Constitutional provisions and should have come by way of a petition under Rule 10 of the Rules made under the Constitution, that is, Mutunga Rules, where both Judicial Review orders and damages can be awarded. For the above reason, I am of a different view from the decision in the ***James Gacheru case (Supra)***.

Having found as above, I do not think it is necessary to delve into the merits of the application. The application is premature and incompetent I hereby strike it out.

Costs to the respondent.

Dated, Signed and Delivered at *NYAHURURU* this *28th* day of *June, 2019*.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Ndegwa holding brief for Mr. Chege for applicant

Soi – Court Assistant