



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO.5 OF 2018

NYANDARUA NORTH BAR OWNERS WELFARE ASSOCIATION.....1ST APPLICANT
 SOUTH KINANGOP BAR OPERATORS SELF HELP GROUP.....2ND APPLICANT
 MAGUMU BAR OWNERS SELF HELP GROUP.....3RD APPLICANT
 KIPIPIRI BAR OWNERS WELFARE SELF HELP GROUP.....4TH APPLICANT
 KARAU ALCOHOL BUSINESS OPERATORS.....5TH APPLICANT
 OLJORO-OROK BAR OWNERS ASSOCIATION.....6TH APPLICANT
 NYANDARUA RECREATIONAL & ENTERTAINMENT SELF HELP GROUP.....7TH APPLICANT

- V E R S U S -

COUNTY COMMISSIONER, NYANDARUA.....1ST RESPONDENT
 COUNTY POLICE COMMANDER, NYANDARUA.....2ND RESPONDENT
 HON. ATTORNEY GENERAL.....3RD RESPONDENT
 COUNTY GOVERNMENT OF NYANDARUA.....4TH RESPONDENT
 DIRECTOR OF PUBLIC PROSECUTIONS.....5TH RESPONDENT

R U L I N G

Before me is the Notice of Motion dated 15/3/2018 filed by Nyandarua North Bar Owners Welfare Association 1st Petitioner, South Kinangop Bar Operators Self Help Group 2nd Applicant, Magumu Bar Owners Self Help Group 3rd Applicant, Kipipiri Bar Owners Welfare Self Help Group 4th Applicant, Karau Alcohol Business Operators 5th Applicant, Oljoro-Orok Bar Owners Association 6th Applicant and Nyandarua Recreational & Entertainment Self Help Group 7th Applicant against the County Commissioner, Nyandarua 1st Respondent, County Police Commander, Nyandarua 2nd Respondent, Hon. Attorney General 3rd Respondent, County Government of Nyandarua 4th Respondent and Director of Public Prosecutions 5th Respondent.

The applicants seek an order that pending the hearing and determination of the petition, there be a conservatory order restraining the 1st, 2nd and 3rd respondents by themselves or law enforcement officers under their authority from interfering with the lawful conduct of liquor business by members of the petitioners, within Nyandarua County on the basis of lack of liquor licenses issuable by the 4th respondent.

The application was based on the grounds on the face of the, application and the supporting affidavit of Josphat Muiro Ndegwa the Chairman of the 1st Petitioner. The applicants are societies registered under the Societies Act or Self Help Groups registered under the Ministry of Labour Social Security and Services who are bar operators and dealers in alcoholic drinks within Nyandarua County; they contend that pursuant to provisions of Nyandarua County Alcoholic Drinks Control Act, they applied for liquor licenses to the 4th respondent for the year 2018 and were assured that during the pendency of the said application, they would continue to operate their business without interference;

that they continued to operate till beginning of March, 2018 when the 1st and 2nd respondents, with the help from law enforcement officers descended on some members of the applicants, arrested them, ordered closure of their premises, impounded liquor and arrested employees and charged them for selling alcohol drinks without licenses in Engineer and Nyahururu Law Courts (attached charge sheets page 98 – 112 JMN4); that the 4th respondent has not made any communication to the applicants regarding issuance of the liquor licenses; that the respondents' actions have breached the applicants' legitimate expectation to equal protection of the law, right to own property and fair administrative action under the Kenya Constitution, 2010. The applicants therefore, complain that their rights to natural justice have been breached and the respondent's actions are unreasonable, unfair, unlawful and unconstitutional.

Mr. Chege counsel for the applicants submitted that liquor licensing was devolved to the County Governments under Section 4(c) of the 4th Schedule to the Constitution 2010; in reply to the allegations that the applicants are non suited, Counsel submitted that a person whose rights has been breached or is threatened with breach can move the court under Article 22(2) (b) for protection and under Article 260, a person, a company or association can move the court for enforcement of such rights and that the petitioners therefore have a right to come to this court on their behalf and others.

Counsel further submitted that Section 15(4) of the Nyandarua County Alcoholic Drink Control Act, 2014 provides that if by expiration of the license an application for renewal has been made but none has been issued, then the old license will remain in force until the decision of the sub county committee is made known; that the said provision is similar to Section 14(4) of the National Alcoholic Drinks Control Act 2010; that the respondents, without notice, started a crackdown on the applicants as a result of which some members of the applicants were arrested. The charge sheets were exhibited from page 99 – 113 of the application (JMM4).

Counsel urged that the applicants have demonstrated that they have a prima facie case and that they will suffer real danger if the orders are not granted. Counsel relied on the decision in *Kevin K. Mwiti and others v Kenya School of Law & others Pet.377/2015, 395/2015* and *JR 295/2015* where J. Odunga considered the principles applicable in the grant of conservatory orders. Counsel further urged that Article 40 of the Constitution granted the applicants right to own property; Article 29 protects them from arbitrary arrests and that under Articles 23(3)(2) this court has jurisdiction to grant the orders sought; in response to the replies by the respondents' counsel urged that Sections 43 – 59 of the Nyandarua County Alcoholic Drinks Act, deals with enforcement of the Act by the Nyandarua County Government but it has abdicated that role to the National Government and the County Government is therefore a necessary party to these proceedings.

The application was opposed by the 4th and 5th respondents. The Attorney General was served but there was no representation at the hearing save that the litigation counsel filed a Preliminary Objection that the 1st to 3rd respondents were improperly joined to these proceedings; that the application does not disclose a reasonable cause of action against the 1st to 3rd respondents and that no wrong has been alleged against the 1st to 3rd respondents.

The 4th respondent opposed the application by filing a Preliminary Objection to the effect that 4th respondent in non suited, that petition does not disclose any cause of action against the 4th respondent and it is scandalous and vexatious.

Beatrice Nyambura Macharia, the Director Legal Affairs County Government of Nyandarua, the 4th respondent swore a replying affidavit in which she deponed that the application is bad in law, premature and an abuse of the court process and does not disclose any cause of action; that the application is omnibus and does not disclose specific applicants whose rights have been violated; she admitted that the application for renewal of liquor licenses is are governed by Section 15(4) of the Act and that the 4th respondent has not done anything to prejudice the operation of the above section; that the 1st, 2nd 3rd and 5th respondents are National Government Institutions with different mandates and there is no proof that it is the 4th respondent which ordered, executed or threatened the alleged arrests and or prosecution or impounding of the applicant's properties.

Mr. Martin Oduor, counsel for the 4th respondent urged that no orders have been sought against the 4th respondent and that impugned acts were carried out by the National Government agencies represented by 1st, 2nd, 3rd and 5th respondents; that the 4th respondents will have nothing to respond to in the petition; that in a Constitutional Petition, one is required to plead specifically; that in view of Section 15(4) of the Act, the prayer for mandamus cannot lie against the 4th respondent because the said section did not provide the time limit for issuance of the licenses was not limited. According to Mr. Oduor, the National Government Agencies went on a frolic without consulting the 4th respondent.

George Mong'are, Assistant Director of Public Prosecution in charge of Nyandarua County swore an affidavit on behalf of the 8th respondent in which he deposed that the 5th respondent has no power to consider or approve applications for liquor licenses that were tendered by the applicants; that the 5th respondent under Article 157 of the Constitution, is mandated to order for investigations, institute criminal proceedings against any person or discontinue such proceedings; that if there are any criminal proceedings, they were a result of investigations; that the 5th respondent did not order any crack down on the applicants and that any sought against the 5th respondent should be declined by the court.

Whether conservatory order can issue:

In *Centre for Rights Education and Awareness (CREAW) and 7 others v the Hon. The Attorney General Pet.16/2011*, the court held that at an interlocutory stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the conservatory order is granted, there is real danger that he will suffer prejudice as a result of violation of threatened breach or breach.

In the case cited by the applicants' counsel *Kevin Mwiti and others (Supra)*, J. Odunga held that a prima facie case is not one which must succeed, but it must not be frivolous or that, the applicant must disclose an arguable case. At this stage, the court is not required to make any final findings or orders as the petition is yet to be heard.

This application under consideration is expressed to be brought pursuant to Articles 10, 19(2) (2) (3) and 21(1), 22, 23 40, 47(1) and (2); 165 3(b) and (d)(iii) of the Constitution. The applicants claim that their rights guaranteed under the Constitution have been breached or threatened with breach. Article 23(3) of the Constitution empowers this court (High Court) to uphold and enforce the bill of rights and may grant relief inter alia, declaration of rights injunction, conservatory order, Judicial Review Order among others. This court has, therefore, the jurisdiction to consider the allegations made by the applicants.

Whether the applicants are properly before this court: Under Article 22 of the Constitution, every person has a right to institute proceedings claiming breach of a right. Article 22(2) provides that a person acting in their own interest may bring proceedings or on behalf of another of a group of or a class of persons. The Article 22 (1) & (2) provides:

1. 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.

2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:-

- a. A person acting on behalf of another person who cannot act in their own name;**
- b. A person acting as a member of, or in the interest of, a group or class of persons;**
- c. A person acting in the public interest; or**
- d. An association acting in the interest of one or more of its members.**

Under Article 260, on definitions, a '*person*' includes *a company, association or other body of persons whether incorporated or unincorporated*. The applicant's counsel exhibited a list of persons who claim to deal in liquor and are applicants for licenses and that list bears the stamp of the District Gender and Social Development Officer, Nyandarua South (page 60 – 98). The list gives the particulars of names, the business names, type of license, the 2017 license and whether or not it was operational. The person who swore an affidavit on the applicants' behalf confirmed that they trade in Alcoholic Drinks. They have a common interest in this matter and can therefore come together to file a suit. They have attached copies of charge sheets where some of them are charged in C.M.'s Courts Nyahururu and Engineer for trading without a liquor license. They have a common grievance and have a right to file an application representing all of them.

There is no dispute that the issue of liquor licensing is a function of the devolved government by dint of Section 4(c) of the 4th schedule of the Kenya Constitution 2010. As a result the Nyandarua County has enacted the Nyandarua County Alcoholic Drinks Control Act, 2014. Section 15 of the Act provides for validity and renewal of licenses. Section 15(4) provides.

“(4) Where an application for the renewal of a license has been made and the Sub County Committee has not by the date of expiration of the licenses reached a decision thereon, such license shall continue in force until the decision of the Sub County Committee is made known.”

The above provisions regulate the renewal of licenses. It means that as long as there is a pending application with the Sub County Committee, the previous license is deemed to be valid. The applicants claim to have applied for renewal of their licenses and it therefore means that before they get communication from the County Sub Committee, the previous licenses of 2017 are deemed to be valid. The applicants have annexed a list (JMN4) of the applicants. The list is said to have originated from the District Gender and Social Development Officer Nyandarua South and bears the stamp. Indeed the 4th respondent has admitted that the liquor licenses are pending approval and they did not cause anybody to be arrested or charged as they still deem the licenses to be valid.

The question then, can the orders sought by the applicant's issue. Apart from the Attorney General (for 1, 2, & 3 respondents) filing a preliminary objection, counsel never appeared to argue the said objection. The 1st to 3rd respondent have not filed any affidavit to explain why some of the applicant members have been arrested and charged for want of liquor license when their applications are still pending with the 4th respondent. Further, there is no explanation why the 1st – 3rd respondent which are National Government Agencies have arrested or impounded the applicants' property when enforcement is the mandate of the 4th respondent under Section 15(4) of the Alcoholic Drinks Control Act.

The 5th respondent's contention is that their mandate is to investigate, institute proceedings or withdraw. The proceedings before the court are instituted by the 5th respondent and there is no evidence of investigations having been carried out by the 5th respondents to prove that the applicants had not tendered their liquor licenses applications for 2018 or that their applications were not approved.

The applicants have alleged that impounding of their property has breached the right to property and livelihood under Article 40; the arbitrary arrests have led to breach of their rights to legitimate expectation to equal protection of the law.

In this case the 4th and 5th respondents as much as admit that the applicant's liquor licenses are valid by virtue of Section 15(4) of the Act. There is no doubt that some of the applicants members have been arrested for trading in liquor without licenses.

I am satisfied that the applicants have demonstrated that they have an arguable case or prima facie case.

Whether the applicants will suffer prejudice:

Impounding the applicants' implements or liquor has deprived the applicants of their livelihood; arbitrary arrest and charging of the applicants seriously prejudiced them because they expected to be protected by Section 15(4) of the Act. Arbitrary arrest is prejudicial to the applicants' legitimate expectation to protection of the law. If the prosecutions were to continue the applicants will suffer because they will lose a livelihood and their property.

Whether the 4th respondent is non suited:

As already observed, it is the 4th respondent which has the mandate control liquor licensing and sale in Nyandarua County. The question is how come the National Government would come to Nyandarua carry out arrests and carry out a crackdown in Nyandarua County whereas enforcement of the Act is given to the 4th respondent under Section 43 and 44 of the Act.

Section 44 of the Act creates an enforcement committee comprised of inter alia – Chief Officer responsible for legal and public service, officer responsible for co-ordination of National Government functions in the County, Public Health Officer, Officer in Charge of Police in the County, Chairperson of County Alcoholic Drinks Control Board e.t.c.

From the composition of the enforcement committee, it is clear that the National Government consults with the County Government and therefore the 4th respondent must be a necessary party to these proceedings.

In the end, I find that the applicants have demonstrated that they are deserving of a conservatory order to restrain the 1st, 2nd and 3rd respondents from interfering with the lawful conduct of liquor business by the members of the petitioner within Nyandarua County on the basis of lack of licenses issuable by the 4th respondent till this petition is heard and determined.

Dated, Signed and Delivered at NYAHURURU this 24th day of July, 2018.

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R.P.V. Wendoh

JUDGE

Present:

Mr.Chege for applicant

N/A for the 1st, 2nd & 3rd respondents

N/A for the 4th respondent

N/A for the 5th respondent

Soi – Court Assistant