



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CIVIL APPLICATION NO. 61 OF 2017 (JR)

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
BY WAY OF ORDERS OF CERTIORARI AGAINST THE EMBU COUNTY GOVERNMENT**

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
BY WAY OF ORDERS OF MANDAMUS AGAINST THE EMBU COUNTY GOVERNMENT**

AND

IN THE MATTER OF THE EMBU COUNTY ALCOHOLIC DRINKS CONTROL ACT 2014

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT OF 2015

AND

**IN THE MATTER OF RENEWAL OF EMBU COUNTY LIQUOR LICENCE FOR THE YEAR
2017**

BETWEEN

REPUBLIC.....APPLICANT

AND

EMBU COUNTY GOVERNMENT.....RESPONDENT

MOUNTAIN SLOPES

COMMERCIAL SERVICES LTD.....EX-PARTE APPLICANT

RULING

1. In his notice of motion dated 12/06/2017 the exparte applicant seeks orders of certiorari and mandamus against the respondent as follows:-

- *For this honourable court to call up and quash the letter dated 27/01/2017 by the respondent on the validity of a liquor licence which was never issued.*
- *For this honourable court to compel the respondent, its servants or agents to renew the exparte*

applicant's liquor licence for the year 2017.

2. The ex parte applicant states that he is a manufacturer of opaque beer of high quality standards namely "Kingmaster" at Siakago and Gaciari. The respondent is mandated by the Embu County Alcoholic drinks. The functions include issue and renewal of licences and to enforce the the provisions of the Act.
3. The ex parte applicant states that on 6/02/2016, he made an application to the respondent for renewal of liquor licence for 2016. In its letter dated 10/02/2016, the respondent declined to renew the licence on grounds that there was an ongoing case in court challenging the implementation of the Embu Alcoholic Drinks Act, 2014. It was further indicated in the letter that the ex parte applicant could continue operating its business until such a time that the licence would be granted. The ex parte applicant was informed that its past licence is valid and should be used for the continued operation.
4. It is contended that the respondent ought to have exercised his powers to issue, or to refuse the application. In case of refusal, the ex parte applicant argues that it was entitled to be given written reasons. In the event that no such reasons are provided, the respondent is obligated to issue the licence, without delay.
5. It is further argued that the failure to renew the licence was actuated by malice and other collateral considerations since the respondent has in the past severally raided the ex parte applicant's factory and destroyed property with the sole purpose of having the business close down. Following its letter dated 10/02/2016, the respondent shut down the factory even after giving him a green light to operate with the expired licence.
6. The ex parte applicant contends that he has suffered a huge financial loss which will take long to redeem due to the continued closure of the factory. It has been deprived of its only source of livelihood by the denial for renewal of licence.
7. The ex parte applicant in its submissions argued that the action of the respondent was illegal, *ultra vires*, null and void and in bad faith as well as discriminative to the ex parte applicant. That the provisions of Article 47 of the Constitution was violated in that the ex parte applicant was not given his right of administrative action and the right to a fair hearing under Article 50. Several authorities were cited in support of these arguments.
8. The respondent opposed the application relying on the affidavit of Wilson Gitonga the Acting County Secretary. The application is said to be incompetent and fatally defective for having been filed out of time. It is stated that there was a case pending in Embu court challenging the implementation of the Embu County Alcoholic Drinks Control Act, 2014 which prevented the respondent from dealing with the application for renewal of the ex parte applicant's licence. The respondent is aware that the ex parte applicant made the first application on 6/01/2017 while the second one was dated 16/01/2017. To the 2nd application the respondent responded vide its letter dated 27/01/2017.
9. It was further stated that Section 16(4) of the Embu County Alcoholic Drinks Control Act, 2014 provides that where the licencing committee has not reached a decision upon receiving an application for renewal, the existing licence continues to operate awaiting the decision of the Committee. For this reason, the respondent terms the ex parte application as premature.
10. In view of the fatalities caused by the illicit liquor menace, the licensing committee upon receiving licence applications must hear stakeholders before making a decision. The committee has a duty to protect the rights of a consumer under Article 46 of the Constitution. The respondent argued further that the threshold of granting the orders sought has not been met and that this justifies the dismissal of the application. The arguments were supported by the submissions filed by the respondent and some authorities were cited.
11. Before setting out the issues for determination, I wish to deal with the respondent's contention that the application is incompetent for being filed out of time given by the court. The record shows that the

application was filed on 18/05/2017 and taken before the judge on 28/06/2017 but no substantive orders were made.

12. On 22/05/2017, the Judge Hon. L. Gitari granted the leave to file the substantive motion within 21 days and directed that service be effected eight (8) days before the date of hearing. This motion was filed on 15/06/2017 which was 24 days after the orders of the judge. The motion was therefore filed three days from the date twenty one days expired. The application was therefore filed out of time.

13. The *ex parte* applicant in its further affidavit paragraph 19-23 argues that the late filing is a procedural technicality curable under Article 159 of the Constitution. The relevant part of the article provides:-

159(2)(d) – *Justice shall be administered without undue regard to procedural technicalities*

14. The time limit of twenty one days is contained in Order 53 Rule 3 and the court adopted that period in its orders made on 22/05/2017.

15. The law requires that in the event of expiry of time donated by the rules or given by the court, the applicant should apply for leave of the court for extension of time. In this application, the applicant did not approach the court for leave. Its application was filed without leave and he now seeks protection of the court relying on the provisions of Article 159(2)(d).

16. the respondent in asking the court to strike out the motion relied on the case of ***Nairobi J.R. No. 270 of 2016 CABINET SECRETARY, INFORMATION COMMUNICATION & TECHNOLOGY & 3 OTHERS EX PARTE CELESTINE OKUTA & OTHERS*** where it was held:-

*...Whereas this Court has the jurisdiction to extend time within which a substantive Motion may be filed where leave has been granted, **it is upon the applicant to apply for the extension of the time for doing so** and being an exercise of discretion, the same must be exercised on sound judicial principles. As was held in **JOHN ONGERI MARIARIA & 2 OTHERS VS PAUL MATUNDURA Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163:-***

... legal business can no longer be handed in such sloppy and careless manner. Some clients must learn t their cost that the consequences of careless and leisurely approach to work .. must fall on their shoulders... Whereas it is true that the Court has unfettered discretion, like all judicial discretion must be exercised upon reason to capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent....

17. In the above case which had similar facts, the court appreciated its jurisdiction to extend time but emphasized on that it was the duty of the defaulting party to seek that leave where the court must exercise its discretion on sound judicial principles. It was also observed that the rules of procedure were made for a purpose which can only be served by the parties doing their duty of compliance.

18. In the matter before me, the applicant was represented by a counsel who understood the law and the implications of non-compliance. The counsel was duty bound to apply for extension if for any reason he was unable to comply. In the further affidavit, the reason for failure to comply was not given or even mentioned.

19. Once an application is filed late, it follows that that application does not exist at all and the court has nothing to deal with.

20. I disagree with the *ex parte* applicant that the filing of the motion out of time is a procedural technicality curable by Article 159. This is taking a casual approach to serious legal issues that the court must discourage. The rules of procedure were meant to serve a specific purpose that must be served rather than seeking refuge under Article 159 of the Constitution.

21. I reach the conclusion that this application is incompetent and cannot be sustained.

22. I hereby order that it be and it is hereby struck out. Considering the facts of this case, I direct that each party meets its own costs.

23. It is hereby so ordered.

DATED, DELIVERED AND SIGNED THIS 19TH DAY OF SEPTEMBER, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. M. Otieno for B. Otieno for exparte applicant

Mr. Nabutete for Ashitiva for respondent