REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONSTITUTIONAL PETITION NO. 32 OF 2015

(ARTICLES 10,19,20,21,22,23(3),24,27,28,40(3), 47(1) & 47(1) & 47(2), 50, 73(1) (A(I)(IV) & (73(1) (B) & 76 OF THE OF THE CONSTITUTION

AND

IN THE MATTER OF: SECTION 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA, 2010 AND,

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURIDCITION & PROTECTION OF FUNDERMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006

BETWEEN

JANE MORAA MUSA…….....
…….PETITIONER

-VERSUS-

THE DEPUTY COUNTY COMMISSIONER, TRANSMARA WEST DISTRICT……1ST RESPONDENT

CABINET SECRETARY INTERIOR & JAMES OLE .....…….2ND RESPONDENT

HON. ATTORNEY GENERAL…….……..……..……..3RD RESPONDENT

RULING

1. The Petitioner/Applicant, **Jane Moraa Musa**, filed the petition dated **20th July, 2015**, praying for a declaration that the directive issued by the first respondent. The **Deputy County Commissioner**, **Trans-Mara West-District**, on **16th July 2015** directing the petitioner to close down her business known as **Wise Lady Mart and Wise Lady Wines & Spirits**, situated at Kilgoris Township is capricious and a nullity "*ab-initio*" together with an order prohibiting the respondents or either of them or any of their derivatives or such other persons acting under their directions or authority from entering upon (except for lawful purpose as by law prescribed) and/or, interfering with the management of the petitioner's business known as **Wise Lady Mart,** and **Wise Lady Wines & Spirits** situated within Kilgoris township whether by way of directives of closure and/or threats of or actual visitation of physical harm or by any other illegal means. The petitioner also prays for general damages for the illegal closure of her business as well

as costs of the petition.

2. A chamber summons dated **20th July 2015**, was filed contemporaneously with the petition seeking an interim order of prohibition in terms of prayer (c) of the summons pending the hearing and determination of the petition.

The grounds in support of the application are contained in the body of the summons and are fortified by the averments contained in the supplementary affidavit deponed by the applicant dated **20th July 2015**.

The first and third respondents opposed the application of the basis of the facts contained in their replying affidavit dated **6th August 2015**, deponed by the first respondent **Abdihakim Jubat.**

The second respondent, **James Ole Kipteng**, also opposed the application on grounds set out in his replying affidavit dated **28th October 2015.**

3. The application proceeded by way of written submissions and towards that end, submissions were filed on behalf of the applicant by the firm of **M/s. Nyamurongi & Co. Advocates**, and on behalf of the first and third respondents by the Attorney General through the Senior Principal litigation counsel **Mr. Eredi**

The second respondent filed his submissions through the firm of **McKay & Co. Advocates.**

This court has given due consideration to all the submissions in the light of the grounds in support of the application and those in opposition thereto and having done so was struck with the question as to whether the application is competent and proper before the court. This is because firstly what is being sought is a temporary injunctive order yet an order of prohibition is ideally a judicial review remedy which can always be pursued upon grant of leave to file a judicial review application for such orders pursuant to **Order 53** of the **Civil Procedure Rules, 2010**. Although the applicant brings the application under the provisions of the Constitution, it would have been appropriate if the relevant provisions of the Civil Procedure Rules were invoked and in particular **Orders 40** and **53** of the CPR.

4. Secondly, the facts giving rise to this dispute relate to a tenancy or lease agreement and the occupation by the applicant of premises situated on a portion of land belonging to the second respondent. In as much as the dispute relates to a landlord and tenant relationship and touching on business premises, it falls within the ambit of private civil law rather than public law and ought to have been filed at the Environment and Land court set up under **Article 162 (2)** of the Constitution. It is instructive to note that the application is silent on the notion of "*conservatory order*" which is available under the constitution (see Article 23).

For all the reasons foregoing, this court is in doubt as to whether this application is properly before the court.

5. Be that as it may, and regard being given to **Article 159 (2)** (**d**) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities, the application be allowed to stand on its feet rather than be struck out for being defective.

The issue for determination is whether the applicant will is entitled to an order of prohibition, hitherto temporarily, pending the hearing and determination of the petition.

In other words, is the applicant entitled to a conservatory order pending the hearing and determination of the petition? This notion of a conservatory order should apply herein for the simple reason that public agencies represented herein by the first and third respondents have been co-opted into the whole dispute which essentially is between two private citizens i.e. the petitioner and the second respondents. A public interest element has also been brought into focus in this application and indeed the entire petition. Also, **Article 23 (3)** of the Constitution is herein invoked. It provides for conservators orders.

6. The scope and efficiency of an Order of prohibition was clearly set out in the case of **Kenya National Examination Council .vs. Republic ex-parte Geoffrey Gathenji Njoroge & Others [1997]e KLR**, where the Court of Appeal stated that an order of prohibition is an order from the high court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It does not however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.

The Court of Appeal pointed out that prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making a decision:

Further, where a decision has been made whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made. it can only prevent the making of a contemplated decision. Thus, prohibition looks to the future.

7. In the instant application there is indication that through acts, threats and orders made by the first respondent, the business premises subject of this petition is already closed down such that the business operations which were taking place therein have since stalled. On one hand, it would appear that the closure order was given by the first respondent on the **16th July 2015**, and on the other hand, the closure was voluntaily undertaken by the petitioner due to what she termed mortal fear.

Whatever the case the act/or order complained of has already been effected. In the circumstances, it is doubtful whether an order of prohibition would be a suitable remedy even on a temporary basis. Perhaps, an order of certiorari would have been most suitable to quash orders and/or decisions/directives already issued by a public organ and/or officer.

8. Both prohibition and certiorari are judicial review remedies. Judicial Review is itself a mechanism whereby the excesses of public officers and bodies in performance of their administrative duties are checked. It provides exclusive means by which public matters can be challenged in the courts. A decision of any public agency made in excess of its legal mandate or its legal jurisdiction would attract a quashing order from the courts. Indeed, the rule of law presupposes that everything must be done according to the law and therefore, every government authority which does some act which would otherwise be wrong or which infringes an individual's liberty must be able to justify its action as authorized by law either directly or indirectly by an Act of Parliament.

Every act of government power which affects the legal rights duties and liberties of any person must be shown to be compatible with legal mandate.

9. In the English decision of **Council of Civil Service Unions & Others .vs. Ministry for Civil Service [1984] 3 All E.R 935**, it was stated that the act or decision complained of must be shown to be tainted with illegality, irrationality and procedural improperly.

Although judicial review is not concerned with private rights on the merits of the decision, its purpose is to ensure that an individual is given fair treatment by the authority to which he has been subjected.

Herein, the petitioner indicates that she has been treated quite unfairly by government officials acting at the behest of a private individual i.e. the second respondent. However, such allegation can only be credibly and cogently established by way of a full hearing of the petition rather than by way of an interlocutory application such as the present one which has the potential of compromising the main petition and undermining the ultimate findings after full hearing.

10. With regard to conservatory orders, these denote injunctive or stay orders aimed at non- private parties who are in the course of discharging their respective mandates based on the constitution or on statute law.

This present application effectively seeks a suspension of the mandate conferred to the first respondent in

relation to business premises from which the business of selling alcoholic drinks to members of the public is carried out. Such businesses are controlled by the government through the liquor licensing board normally chaired by the likes of the first respondents. Invariably, such control is done in the interest of the public. Therefore, this matter bears a public interest connotalion and anything to do with public interest is weighty given that public interest is the general welfare of the public that warrants recognition and protection. It is something in which the public as a whole has a stake, especially an interest that justifies governmental regulation (**see, Black's Law Dictionary, 8th Ed).**

11. It would not be in the public interest nor would it be consistent with constitutional principle, for courts to readily issue conservatory orders such as would have the effect of staying lawful functions which are conceived and intended to serve the public good or interest. Such functions merit special protection over private interests or rights. Since interlocutory orders may have the potential to disposel of the main suit or petition they are not for granting where the effect is to stay the due discharge of lawful functions by public bodies and officials. For all the foregoing reasons, this application is devoid of merit and is hereby dismissed with costs to the respondents.

J.R. KARANJA

JUDGE

[Delivered and signed this **17th** day of **March 2016**].