



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
JUDICIAL REVIEW NO. 3 OF 2016

**IN THE MATTER OF AN APPLICATION BY DICKSON MIRICHU KIHAGI T/A MUNYAKA
BAR & JOYCE MUCHIRI KIMANI T/A MUKIMS BAR FOR AN ORDER OF CERTIORARI**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT OF NYERI

BETWEEN

THE COUNTY ASSEMBLY OF NYERI.....1ST RESPONDENT

AND

EX-PARTE APPLICANTS

DICKSON MIRICHI KIHAGI T/A MUNYAKA BAR

JOYCE MUCHIRU KIMANI T/A MUKIMS BAR

RULING

1. The Applicants filed the application under a Certificate of Urgency on the 2nd February, 2016 seeking leave to apply for an order of Certiorari; the substantive Notice of Motion dated the February, 2016 was filed pursuant to leave granted by this court on the 2nd February, 2016; the Ex-parte Applicants seek the following orders:

(i) Spent

(ii) That an Order for Certiorari do issue to remove to the High Court for purposes of being quashed the decision by the 1st Respondent the County Government of Nyeri for closure of the applicants bars namely Munyaka Bar owned by Dickson Mirichu Kihagi and Mukims Bar owned by Joyce Muchiru Kimani.

(iii) That there be a stay of the decision by the 1st Respondent the County Government of Nyeri to close the applicants bars namely Munyaka Bar owned by Dickson Murichu Kihagi and Joyce Muchiru Kimani pending the hearing and determination of this application.

(iv) That costs be awarded to the Subject/ Applicants.

THE EX-PARTE APPLICANTS' SUBMISSIONS

2. The applicants rely on the grounds stated on the face of the application, the Verifying Affidavits and the Statement of Facts annexed thereto; the grounds are as set out hereunder;

- i. That the respondent has issued licenses to the subject applicants to operate upto 30th of June, 2016.
- ii. That on the 22nd January, 2016 the respondent ordered that the applicants do close down before 31st January, 2016.
- iii. That the decision to close down the bars on 31st January, 2016 is an arbitrary decision which is unlawful and illegal whose reasons have not been explained to the subject applicants thereby making it one against the rule of natural justice.
- iv. That the subject applicants face the imminent /closure of their bar businesses on the unlawful decision by the respondent.
- v. That the applicants upon being granted the licenses duly paid the license fees upto the period lapsing on 31st June, 2016.
- vi. That it is unfair by the respondent to secure licenses fees upto the period of 31st June, 2016 and to then issue an order for closure on 31st January, 2016.

3. Reference was made to the Nyeri County Alcoholic Drinks Management Act; its commencement date was the 30/07/2014; this piece of legislation guides the licensing of bars in Nyeri County.

4. That the applicants had gone through the elaborate process and had been issued with licenses by the Respondent upon having satisfactorily complied with said process; that the Temporary licenses clearly state that the expiry date as being 30/06/2016.

5. The application is based on the letters dated 7/12/2015 – 5/01/2016 and 22/01/2016 issued by the respondent and addressed to each of the applicants; the letters direct the applicants to surrender their licenses for cancellation as the licenses are said to be Temporary yet the Act does not provide for such Licenses

6. The respondent alleges that there is an error as to the date; but the applicants contention is that the fees charged by the Respondent was for that period; but this not cannot be an excuse for cancellation;

7. The decisions by the Respondents contained in the above letters did not adhere to the elaborate process that must be followed before cancellation; this process is as set out in Part III at Sections 8-31of the Act.

8. On jurisdiction the Applicants submit that they are rightfully before this Court; after the license has been issued there is no provision directing persons to go back to the Sub-County Committee.

9. That the respondent has unlawfully cancelled the license without following due process; Counsel prayed that the Court to quash the Notice and applicants be allowed to operate till 30/06/2016.

THE RESPONDENTS' SUBMISSIONS

10. The Respondent relied on the Grounds of Opposition dated the 15th February, 2016 and the Replying Affidavit made on the 2nd March, 2016 and sworn by James Kiretai the Chairman of the Nyeri Town Sub-County Alcoholic Drinks Regulation Committee under the County Government of Nyeri.

11. The Respondents' Counsel relied on the written submissions filed on the 15th March, 2016. The Respondent humbly submit contends that the applicants are not entitled to the orders sought in their application and list four(4) grounds in support of their contention which are inter alia;

- The Respondent is empowered to regulate, manage and control liquor licensing;
- The applicants herein were issued with temporary licenses;
- This Honorable Court does not have the requisite jurisdiction to hear and determine this matter;

- It is in the public interest that the orders sought are not granted.

12. Hereunder is a brief summary of the Respondents submissions made under the above mentioned heads;

The Respondent is empowered to regulate, manage and control liquor licensing

13. Section 4 of the Fourth Schedule of the Constitution 2010 provides the devolved functions and powers of a County Government and liquor licensing is included therein; Section 9 of the Nyeri County Alcoholic Drinks Management Act (hereinafter referred to as “**the Act**”) establishes the Sub-County Alcoholic Drinks Regulation Committee.

14. The applicants’ were aware that their applications for a permanent licenses had been rejected as they had not met the standards set down in the Act; and they were also aware that approval was given for only two (2) months and the temporary licenses issued was to enable them to clear their stock by the 31st January, 2016.

15. That the Temporary Licenses issued had mistakes/errors in that they were not meant to run upto 30th June, 2016 as indicated but were to expire on the 31st January, 2016; and that the applicants were duly notified of the errors vide a letter dated 7th December, 2015.

Private rights vis-à-vis public interest;

16. It was submitted that Section 11 of the Act provides that the people of Nyeri County be served by bars that have complied with the standards set by the Act; that the Section also provides that Sub-County Committee must ensure that there is effective public participation when the committees carry out their duties; the applicants bars had not been issued with permanent licenses due to non-compliance with the standards set by the Act; that there was hue and cry from the members of the public who had participated at the committee hearing; the public complained that the applicants were not complying with the Temporary License and were restocking as opposed to clearing their stock.

17. That private rights must bow to public rights and to support this ground the respondents relied on the case of **Republic vs Kenya National Commission on Human Rights Ex-parte Uhuru Muigai Kenyatta** Misc. Civil Appeal No.86 of 2009, [2010] eKLR where Wendoh and Ali Aroni JJS held that;

“This court has the onerous task of maintaining the delicate balance between an individual right and those of the public. Sometimes private rights have to bow to public interest.

Putting all facts together, this court is of the view that in the circumstances of this case, public interest far outweighs the right of the ex-parte applicant and in considering all the above, balancing and putting all matters to scale this court in exercising its discretion declines to give an order for certiorari and the application therefore fails.”

18. It was therefore in the best interest of the public that the two bars do close down as it had become difficult to regulate them.

The High Court is not seized with the requisite jurisdiction to hear and determine this matter;

19. As permanent licenses had been declined under Sections 18 and 19 of the Act the applicants could only approach the High Court after having exhausted the review mechanisms. On want of jurisdiction reference was made to the case of **Republic vs Susan Kihika & 2 Others Exparte George Mwaura Njenga [2014] eKLR**. Where the jurisdiction of the court was challenged by the Respondents as the dispute resolution mechanism set out in the Political Parties Act had not been first exhausted. The court upheld the Preliminary Objection and struck out the application for having been brought prematurely.

20. The Respondents prayer was that the applicants had not exhausted the mechanisms provided by statute and prayed that the application be dismissed.

ISSUES FOR DETERMINATION

21. After hearing the presentations made on the 16th March, 2016 by both Counsels for the respective litigants the court has framed the following for determination:

Whether the application herein was premature as the Applicants had not exhausted the review mechanisms provided for by statute;

Whether the by the Sub- County Alcoholic Drinks Regulation Committees decision to close down the bars on 31st January, 2016 was unlawful and illegal as the reasons had not been explained to the subject applicants thereby making it one against the rule of natural justice.

Public interest viz-a-viz private rights.

Costs

ANALYSIS

Whether the application herein is premature

22. The Respondents contention is that the Applicants being aggrieved by the Sub-County Committees' decision in rejecting their applications for permanent licenses should have first utilized and exhausted the statutory mandated process of review before filing the instant application.

23. The applicants submitted that Section 30(1) is the appropriate section that sets out the process that then leads to the cancellation; that under the instant application they were seeking the courts intervention to determine whether the Respondents administrative decision making process of calling for the surrender and cancellation of the Temporary Licenses and the closing down of their bars was done in a proper manner and adhered to the law.

24. Upon perusal of the Section 30(1) this court has noted that the section indeed provides for an elaborate cancellation process and Section 30(4) provides that any person aggrieved by the decision of the Committee upon such report shall appeal to the High Court.

25. In this instant case the applicants contend that the process envisaged in Section 30(1) was not adhered to; therefore it is apparent that the applicants are interested in the process as opposed to the merits of the decision.

26. The major difference between an appeal and judicial review is aptly captured in the case **R vs Chief Justice of Kenya and others ex-parte Lady Justice Roselyn Naliaka Nambuye Misc. Civil Case No.764 of 2004** where the applicant had challenged a decision of a tribunal on its merits and it was held that;

“....Judicial Review jurisdiction does not attack a decision given on merit by a tribunal. The remedy lies on appeal.....”

27. Judicial review concerns itself only with the decision making process of a public body and whether the process was lawful or unlawful; it does not concern itself on the merits of the case; whereas an appellate court deals with merit and either affirms or disturbs a decision dependent on whether the basis of the decision was right or wrong in law or in fact.

28. It is this court's considered view that this instant application does not fall under the ambit of Section 30(4) of the Act as the applicants are aggrieved by the process as opposed to the merits of the decision as

envisaged by the Section.

29. The issue at hand is the decision making process and whether it was lawful or unlawful; in the light of the above this court is satisfied that the application is properly before this court; and finds this ground lacking in merit.

Whether the Nyeri Sub-County Committees decision to call for the cancellation of the License was illegal

30. The applicants contend that the decision to close down the bars on 31st January, 2016 is an arbitrary decision which is unlawful and illegal whose reasons have not been explained to the subject applicants thereby making it one against the rule of natural justice.

31. The rules of natural justice referred to hereinabove infer fair procedure and a duty to hear the other side; fair procedure promotes fairness and requires that the respondent give the applicants audience and an opportunity to be heard; this rule is also enshrined in Section 30(1) of the Act which requires that the respondent give notice and also furnish the applicants with a report thereafter accord them with a hearing before making the decision to cancel the license.

32. The rules of natural justice also contemplate that there must be disclosure of information; in this instance the respondents would be duty bound to disclose to the applicants any allegations or breaches in the form of a report; disclosure and notification in the form of a report is also captured under the provisions of Section 30(1) of the Act; thereafter and still on the issue of fairness the applicants are to be accorded a hearing before the decision is made.

33. Likewise the applicants who are also seeking this courts intervention are also under an obligation to the court to make the fullest possible and frank disclosure of all material facts especially on the circumstances of how the period of the Temporary License was extended from two (2) to six (6) months; particularly in the light of their annexures DNK and JMK which clearly indicate the names of all the bars that were issued with licenses for two month period; and their names are included therein.

34. At this juncture the court makes reference to the affidavit of the Chairman of the Sub-County Alcoholic Drinks Regulatory Committee; he states that the applicants' permanent licenses had expired; that they were required to apply for the renewal of the same; the Chair also alluded to public interest in that there was a public outcry on the declining levels of alcohol control and management therefore the standards had to be raised; and the applicants were found not to have complied with the standards set down in the Act and were therefore given a Temporary License for two (2) months.

35. This court is of the view that the applicants are being economical with the truth and that there is an element of non-disclosure of material facts; it is not disputed that upon the expiration of their licenses the applicants applied for a renewal of the license; they also attended a committee hearing where their applications for Permanent Licenses was rejected and Temporary Licenses were given to them.

36. The applicants' annexures "DMK" and "JNK5" which are Liquor Licensing Approval Forms for the years 2015/2016 clearly indicate that the licenses were for two (2) months; the receipts annexed as "DMK 5(b) and "JNK5(b) also indicate that the temporary licenses are for two (2) months.

37. The question that begs an answer is ***what was the legitimate expectation of the applicants?*** Was there any express representation made to them that the license was extended for a period of six (6) months; was there a promise expressed or implied by the Committee that gave room to the expectation of six (6) months.

38. This court reiterates that it is incumbent upon the applicants to make full disclosure of material facts and this court notes that they did not make any averments in their affidavits in answer to the issues mentioned hereinabove; and as to what may have transpired after the outcome of the Committee meeting where they had made their presentations for renewal.

39. The Respondents have averred that the six (6) months indicated in the Licenses was an error; can this error be taken to be a representation or a promise conveyed to the applicants; must the respondent now be compelled to abide by this representation and would it be unjust for it to negate on it; the courts answer to this is in the negative;

40. This court is of the opinion that the applicants knew all along that the License was for a period of two months; they were duly notified of the errors vide the letters they seek to quash; the respondents cannot be compelled to abide by the error and the applicants cannot seek an advantage or benefit from the error.

41. This court finds that the applicants have no justifiable interest that warrants protection; that there was procedural fairness by the respondent in that it gave the applicants written notice of their intention; there was disclosure of information on the error and reasons given for the decision for cancellation of the license.

Public interest viz-a-viz private rights.

42. The Act prescribes that only bars that have complied with its standards shall be allowed to serve the public and shall be issued with permanent licenses; this court has judicial notice of the public's outcry on the declining levels of alcohol control and management in the country and the resulting deaths of many Kenyans; there is therefore a need to protect the public; at the sittings and functions of the Sub-County Committee there is also the element of public participation; in this instance the people of the Nyeri County saw it fit to award the applicants with a period of two (2) months to operate; as was held in the case of **Republic vs Kenya National Commission on Human Rights Ex-Parte Uhuru Muigai Kenyatta Misc Civil Appeal 86of 2009** where the court observed that

“Sometimes private rights have to bow to public interest”

43. In this instance the rights of the public outweigh that of the applicants in that the applicants were given only a limited period of two (2) months to operate to dispose of their stock and no other period can be inferred.

Which party should bear the costs;

44. The error was noted by the Respondents and it proceeded to duly notify the applicants in writing; but the letters dated 7th December, 2015 (Annexures “DNK3” and “JMK3”) are devoid of an apology and also omit to indicate that the respondent would pro-rate and refund any monies that had been paid in excess; the court therefore finds that the errors were emanated from the respondents side and thus applicants are entitled to costs.

FINDINGS AND DETERMINATION

47. For the reasons stated above this court makes the following findings;

48. This court has jurisdiction to hear and determine this matter.

49. That the Sub-County Alcoholic Drinks Committee did not act unfairly as the applicants had no legitimate expectation that they would be permitted to operate their bars for a period of six (6) month; the decisions are therefore not found to be unlawful or ultra vires.

50. The rights of the public outweigh that of the applicants.

51. Accordingly, the Application dated 9th February, 2016 seeking the orders of certiorari in terms of prayers (2) and (3) is found to be lacking in merit and is hereby dismissed.

52. The Respondent shall bear the costs of this application.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 28th day April, 2016.

A.MSHILA

JUDGE