



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
JUDICIAL REVIEW NO. 117 OF 2015

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF UASIN GISHU.....
.....RESPONDENT

SIRIBA ONTITA.....EX PARTE
APPLICANT

RULING

1. The *ex parte* applicant is the proprietor of a business styled *Eldo Curtains Materials Tailoring* in Eldoret Township. He claims to have operated the business lawfully since 1st October 2014 under a licence issued by the respondent. On 30th April 2015, the respondent's agents served him with a notice revoking the trading licence. The *ex parte* applicant is aggrieved by that decision. On 27th May 2015, the court granted him leave, *ex parte*, to bring proceedings for an order of *certiorari* to quash the decision.
2. The *ex parte* applicant had also prayed that the leave does operate as a stay of the decision. I ordered that the prayer for stay be canvassed *interparties*. The respondent has filed a replying affidavit sworn by Peter Leley, the County Secretary, on 4th June 2015. On 5th June 2015, I heard learned counsel for both parties. I have considered the pleadings, depositions and rival submissions.
3. The substantive notice of motion is still pending for hearing. It would be prejudicial at this stage to make conclusive findings on the matter. That will be the true province of the trial judge. The only live issue is whether the *ex parte* applicant deserves a stay pending hearing of the substantive motion. Order 53 Rule 1 (4) of the Civil Procedure Rules 2010 gives the court wide and unfettered *discretion* to grant a stay. That discretion must be exercised judiciously. The key considerations are whether the applicant has established an arguable case worth of further investigation during the substantive hearing; whether the stay would be efficacious in the circumstances; and whether failure to grant the stay would render the substantive motion nugatory. See *R v Registrar of Companies ex parte Githongo* [2001] KLR 299 at 306, *Oil Com Kenya Limited v PS Ministry of Roads & Public Works & another* [2008] KLR 104 at 110, *Jared Benson Kangwana v Attorney General*, Nairobi, High Court No. 446 of 1995 (unreported), *R v Clerk County Assembly of Baringo Ex Parte Kamket*, Eldoret, High Court, J.R. 8B of 2014 (unreported).
4. Applying those principles to the matter at hand, I find as follows. From the verifying affidavit of the *ex parte* applicant sworn on 20th May 2015, he has operated the business since 1st October 2014. A copy of a valid *single business permit* number 2015/72459 is exhibited. The licence is issued by the respondent. On 30th April 2015, the respondent's agents served him with a notice revoking the permit. The impugned notice is marked *SO1*. It required the *ex parte* applicant to

- “upon the date and time of receipt of [the] notice and with immediate effect to close [the] business and cease any undertaking in the premises...”. The *ex parte* applicant contends that he was *not* afforded a hearing.
5. On the other hand, the respondent avers that the business was being operated in a *basement* of the building contrary to section 151 of the Public Health Act; and that the permit was obtained without a *full disclosure* of all relevant information. It is also contended that the respondent has a statutory duty to maintain a clean and healthy environment in the county. The *ex parte* applicant counters that by issuing the permit, the respondent was deemed to have been *satisfied* that all the conditions precedent to the grant of the licence, including public health regulations, were complied with.
 6. There is also an allegation that the *ex parte* applicant had brought other proceedings in Eldoret HCCC 13 of 2015, *Siriba Ontita & 13 others v County Government of Uasin Gishu*. Learned counsel for the *ex parte* applicant submitted that it did not amount to an abuse of court process. When I called for the record in that other suit, it was clear that the cause of action relates to the same notice for revocation of the licence. It will be for the trial judge on the substantive motion to make a conclusive finding on the matter.
 7. Suffice to say that it is common ground that the impugned notice was served on 30th April 2015. The respondent has not said that it granted the *ex parte* applicant a hearing before delivery of the notice. For the time being, I note that the *ex parte* applicant has *not* seriously contested that his business is located in a *basement*. Certainly, there is no supplementary deposition controverting the averments by Peter Leley. If that be the case, then the single business permit may have been issued in contravention of section 151 of the Public Health Act. I say that carefully and without a final finding.
 8. Granted those circumstances, I cannot say with confidence that the *ex parte* applicant has made out an *arguable* case. The alleged breach of section 151 of the Public Health Act *prejudices* the application for stay. The stay would not be *efficacious* in the circumstances. I am alive that the notice has the effect of stopping the business of the *ex parte* applicant in the current premises. There are costs that go with it. But that has to be *weighed* against the wider public interests of health and safety. If the *ex parte* applicant prevails at the hearing, his losses are clearly *quantifiable*; and, his licence may be *restored*. The business has been in operation in the building for *less* than a year; to be precise from 1st October 2014. I cannot then say that failure to grant the stay will render the substantive motion *nugatory*.
 9. The upshot is that the leave granted on 27th May 2015 to bring proceedings for the writ of *certiorari* shall *not* operate as a stay of the impugned decision. Costs shall abide the substantive motion.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 25th day of June 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open Court in the presence of:-

Mr. Momanyi for the *ex parte* applicant instructed by Anassi Momanyi & Company Advocates.

Mr. Kenei for the respondent instructed by Gumbo & Associates Advocates.

Mr. J. Kemboi, Court clerk.