



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 241 OF 2015

DORIS GACHERI NDEGE & OTHERS.....APPLICANTS

AND

COUNTY COMMISSIONER KIAMBU COUNTY....1ST RESPONDENT

LIQUOR COMMITTEE GITARU LOCATION.....2ND RESPONDENT

RULING

1. On 23rd July, 2015, I granted to the applicant leave to apply for judicial review orders as sought in this application and directed that the grant thereof would operate as a stay of the impugned decision in so far as the applicants with valid licences were concerned and on condition that the applicants in carrying out their businesses strictly comply with the relevant laws regulating their businesses.

2. By applications dated 30th July, 2015, **Hon. Ferdinand Ndung'u Waititu** has sought to be joined to these proceedings as an interested party and that these proceedings be struck out.

3. As the first application was not opposed, the said **Ferdinand Ndung'u Waititu** is hereby joined to these proceedings as an interested party.

4. The second prayer seeking the striking out of these proceedings was based on three grounds. The first ground was that in so far as the application was expressed to be brought under Order 51 of the **Civil Procedure Rules**, this

Court lacked the jurisdiction to grant the orders sought herein. In response to this ground it was contended on behalf of the applicant that this objection was a mere technicality which ought not to defeat the rights of the applicants.

5. The second ground for seeking the said order was that in so far as only one applicant was named in the application, the grant of orders in favour of "others" was not in compliance with the provisions of Order 53 of the **Civil Procedure Rules**. To this objection it was contended on behalf of the applicants that there was nothing wrong with the named applicant seeking the orders herein on behalf of other persons as the applicant was entitled to even seek the same on behalf of other Kenyans.

6. The third ground was that even if it was to be deemed that the named applicant was the only one in whose favour the orders could be granted there was no evidence that the said applicant was duly licensed. The applicants' response to this was that the application was brought by the applicants some of whom had

applied for licences but were yet to receive the same though their applications had been approved.

7. With respect to the first ground, whereas ordinarily an applicant is expected to state with precision the provision upon which an application is based, where it is clear to the Court and the parties the particular provision upon which the application is founded and where there is no allegation of prejudice occasioned to the other party it would be too harsh and contrary to the letter and spirit of Article 159(2)(d) of the Constitution to drive a party from the seat of justice merely on the ground of failure to cite the correct provision. Procedural lapses which neither go to the jurisdiction of the Court nor prejudice the adversary in any material respect, it has been held, should not be good grounds for defeating applications. See **Sankale Ole Kantai T/A Kantai & Co. Advocates vs. John Nganga Njenga Nairobi (Milimani) HCCC No. 102 of 2001.**

8. On the second ground, Order 53 rule 1(2) of the *Civil Procedure Rules* provides:

An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

9. Therefore it is a mandatory requirement that an application for leave must be accompanied by a statement setting out inter alia the description of the applicant. In this case, only one person was named, **Doris Gacheri Ndege**. The other applicants were not named at all. In fact their names do not exist anywhere in the body of the application or the statement. In the title to the application they are merely described as “others”. With due respect this cannot do. The court in granting leave ought to be certain that the applicants before it are named and described. Whereas the applicants contend that under the Constitution a person is entitled to bring proceedings on behalf of others, suffice it to say that the matter before me is not a constitutional petition but a judicial review application hence reliance on that provision is of little, if any, assistance to the applicants.

10. The Court of Appeal has held that a notice of appeal lodged without all the names of the Appellants but with the words “and others” is not proper and is to be rejected as “and others” means nothing. See **Joseph Kamau Musa & 35 Others vs. Eleri Co. Ltd. & 3 Others Civil Application No. Nai. 156 Of 1999.**

11. However, that defect, the Court held would only affect the proceedings in so far as they relate to “others” but not to the named appellant. It follows that in these proceedings, this Court has no option but to set aside the leave granted to “others” as named in the application for leave which leave is hereby set aside. As those “others” were not identified, an order for costs would be in vain.

12. It was however contended that even if the leave granted to the said “others” is set aside, the proceedings initiated by **Doris Gacheri Ndege** must themselves be set aside as there is no evidence that the said person was duly licensed.

13. The applicant however contends that she is yet to be given the said licence which she has applied for and the application approved.

14. That this Court has jurisdiction to set aside leave and/or stay granted in judicial review proceedings is not in doubt. The Court of Appeal made this clear in **R vs. Communications Commission of Kenya & 2 Others ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** where it held:

“Leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the Court, to the Judge who granted leave to set it aside.”

See also **Njuguna vs. Minister for Agriculture Civil Appeal No. 144 of 2000 [2000] 1 EA 184.**

15. However as was expressed in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR:**

“Although leave granted *ex parte* can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear cut cases unless it be contended that judges of the Superior Court grant leave as a matter of course which is not correct. Unless the case is an obvious one, such as where an order of *certiorari* is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the application coming to court and there is, therefore, no prospects at all of success, the court would discourage practitioners from routinely following the grant of leave with application to set aside. Fortunately such applications are rare and like the Judges in the United Kingdom, the court would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted.”

16. Similar sentiments were expressed by the same Court in **Aga Khan Education Service Kenya vs. Republic & Others Civil Appeal Number 257 of 2003** where the court pointed out that:

“We would, however, caution practitioners that even though leave granted *ex parte* can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of *certiorari* is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted.”

17. Save for the issue of licences, it is my view that the grounds relied upon by the applicant are grounds which merit the grant of leave. As to whether the application will succeed in the absence of the licences is a matter to be dealt with at the hearing of the substantive motion. Accordingly I decline to set aside the leave.

18. However, it is my view that it would be imprudent to keep the stay in place when as of now there is no evidence that the applicant is carrying out a duly licenced business. If it turns out that the applicant was not entitled to the licence the damage occasioned may well be incapable of being restored.

19. Accordingly I set aside the direction that the leave granted herein operates as a stay.

20. The costs will be in the cause.

Dated at Nairobi this 31st day July, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kiragu for the Applicants

Mr Kinyanjui for the Interested Party

C Patricia