



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

JUDICIAL REVIEW NO. 11 OF 2015

REPUBLIC.....APPLICANT

VERSUS

BARINGO COUNTY GOVERNMENT.....1ST RESPONDENT

BARINGO CENTRAL SUBCOUNTY ALCOHOLIC

DRINKS REGULATION COMMITTEE.....2ND RESPONDENT

***EX PARTE* STEPHEN CHEPTOO & 8 OTHERS.**

RULING

1. The *ex parte* applicants are aggrieved by the order of court made on 28th July 2015. The court had granted leave to the *ex parte* applicants to bring judicial review proceedings against the respondents. The court however ordered that the leave granted was *not* to operate as a stay.
2. The *ex parte* applicants have now presented a notice of motion dated 21st August 2015. They pray for review of the order to the intent that the leave granted acts as a stay of the respondents' decision denying the *ex parte* applicants liquor trading licences for the year 2015 or closing their businesses.
3. The application is supported by the affidavit of Solomon Bowet sworn on even date. The pith of the matter is found in paragraphs 7 to 17 of the deposition. He avers as follows-

“7. That the respondents upon expiry of the closure notice issued closed our premises and thus we are unable to operate or carry out business despite the proceedings herein.

8. *That we still have stocks in our premises and the same may expire if our application is not granted since our premises were closed abruptly by the respondents as they had not given us sufficient time to clear available stock.*
9. *That we rely on the business as our main economic activity and the closure of our premises by the Respondents will subject us to financial difficulties since some of us are retirees and rely on the business for a source of living.*
10. *That the decision by the 2nd respondent has subjected us to untold suffering since we are still paying salaries for employees who were working in our various establishments since the thirty days given to us was [sic] not enough to terminate their employment under the various labour laws.*
11. *That despite the proceedings herein the respondents descended upon the 4th applicant, arrested him and charged him for operating a bar without a liquor license.*
12. *That we have taken loans from various banking and micro finance institutions on the projection of*

- income to be obtained from the business and the closure of the business without adequate notice has already occasioned difficulties to our lives.
13. That I invested my retirement benefits on the business together with loans which I took upon projection of the income from the business but the closure of the business will subject me to financial embarrassment since the respondents never gave me adequate period to organize my activities.
 14. That I have invested about two million shillings in the restaurant since I was operating a bar and lodging business but the lodging business has plummeted and this has caused financial strain on myself leading to my failure to honour loan installments.
 15. That due to the closure of business I have been unable to service my loan since I took a loan of one million and used the stock as security and was relying on profits from the business to service the loan.
 16. That my co-applicants re-operating on rented premises and despite the closure of the business by the respondents the applicants are still bound by Leases they executed and have to honour their part by paying rent or in alternative issue notice of not less than six months.
 17. That in the event the applicants are to continue paying rent on premises which they are not carrying on business until next year when the application shall be heard and determined the same shall be detrimental to them.”
4. The motion is contested by the respondents. In a nutshell, the respondents’ case is that the impugned order is not capable of review at this stage; that the businesses conducted by the *ex parte* applicants contravene public health and safety regulations; that a grant of stay would prejudice the rights of the public and cripple the functions of the respondents; and, that the application for stay is devoid of merit.
 5. Those matters are buttressed by a replying affidavit sworn by Julius Bolei on 3rd September 2015. He deposes to the following matters-

“9. That the 2nd respondent upon considering the said applications refused to renew the applicant's licenses since their liquor business are located within prohibited zones being within learning institutions, offices of the County Assembly, banks and residential homes.
 10. That equally the applicants' liquor business are inaccessible and do not meet the requirements of public health. (Annexed and marked “JKB5a, b, c and d” are copies of notices of inspection, individual and general sanitary inspection reports and physical planning report showing the location of the applicant's premises and their proximity to important public institutions and residential places)
 11. That the applicant's liquor business premises contravened and violated county Alcoholics Drinks Control Act whose intent and purpose is to protect consumers under Article 46 of the Constitution specifically vulnerable children under article 57(d) and persons below 18 years from abuse and the general members of the public and the 2nd respondents issued closure notices (Annexed and marked “JKB7 a and b” are copies of list of all bars not meeting the requirements under the act and notices of closure thereto).
 12. That implementation of the said Act is extremely of [sic] importance and crucial as the measures taken by the 1st respondent in enforcing it are meant to safeguard the interest of the members of the public, important public institutions including safety of banks and its customers, markets and vulnerable children who accessed alcohol from the applicants' business premises.”
6. On 9th September 2015, I heard learned counsel for both parties. I have considered the notice of motion, depositions, list of authorities and rival submissions.
 7. The substantive notice of motion for judicial review is still pending for determination. I will thus refrain from commenting or deciding on the merits of the matter. That may include some of the contested positions in the depositions that I set out at length earlier. The key matter for decision at this occasion is whether there are sufficient grounds to review the impugned order; or, whether the court has jurisdiction to do so.
 8. The procedure in judicial review proceedings is primarily found in Order 53 of the Civil Procedure Rules 2010. The procedure is *sui generis*; it is a self-contained code. See generally *Republic v*

Commissioner of Cooperatives Exparte Kirinyaga Tea Growers [1999] 1 EA 245. I am persuaded by the views of Ang’ote J in Republic v Kahindi Nyafula ex parte Kilifi South East Farmers Cooperative, High Court, Malindi, Jud. Rev. 3 of 2013 [2014] eKLR. The learned judge had this to say-

“Judicial Review proceedings under Order 53 of the Civil Procedure Rules are a special procedure. A party, other than invoking the provisions of Order 53 cannot invoke the provisions of the civil Procedure Act and the Rules made thereunder.”

9. The application for leave to bring proceedings in judicial review is a separate proceeding; it is brought in chambers *ex parte*. Those were the genre of proceedings before the court on 28th July 2015. Where leave for example is not granted, the intended substantive proceedings come a cropper.
10. Whether or not to grant stay is at the *discretion* of the court granting leave. 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 however 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).
11. It is thus clear beyond peradventure that the court found that it was not efficacious to grant a stay on the basis of the materials before it on 28th July 2015. That is why the *ex parte* applicants have brought additional materials to sway the court to depart from its position. In a synopsis, the *ex parte* applicants are saying that their businesses have been shut down; that their stocks will expire; that their landlords may throw them out of their premises; that their economic livelihood and that of their employees is in jeopardy; that they will lose their goodwill; that some of the *ex parte* applicants had taken out loans and at peril of losing their collateral; that the 4th respondent was arrested and charged in a criminal court for matters relating to this dispute; and, that the substantive motion will be rendered nugatory.
12. Those are powerful arguments. But I regret that the court lacks jurisdiction to review the order of 28th July 2015. I began by stating that the procedure in judicial review is *sui generis*; and, that Order 53 of the Civil Procedure Rules 2010 is a self-contained code. Republic v Commissioner of Cooperatives Exparte Kirinyaga Tea Growers [1999] 1 EA 245, Republic v Kahindi Nyafula ex parte Kilifi South East Farmers Cooperative, High Court, Malindi Jud. Rev. 3 of 2013 [2014] eKLR. I also said that the application for leave to bring proceedings in judicial review is a *separate proceeding*; it is brought in chambers *ex parte*. It is not thus open to the *ex parte* applicants to file a fresh notice of motion to canvass the grant of stay *interparties*. Leave having been granted, and the substantive application for judicial review filed, the orders are *spent*. The question of stay cannot be *resurrected*. The remedy for the *ex parte* applicants was an *appeal*.
13. I am fortified in that finding by the decision of Okwengu J in Kenya Association of Air Operators v Director General Kenya Civil Aviation Authority & another, High Court, Nairobi Misc. Civ. Appl. 258 of 2008 [2008] eKLR. The learned judge delivered herself as follows-

“An order granting or refusing leave to operate as a stay is made under Order LIII pursuant to an application for leave to file an application for Judicial Review at the *ex parte* hearing of the application for leave. A limited power to vary such an order is implied under Order LIII Rule 4 (above quoted). In my understanding such power is limited to cases where leave has been ordered to operate as a stay of the proceedings or act in question, in which case, the Judge may intervene at any stage and order otherwise. In this case, no stay was granted and no power to review that order would arise. Moreover, leave having been granted, and the application for judicial review having been filed, the orders are *spent* and cannot be revisited or reviewed. Further if the applicant

was aggrieved by the order refusing to allow leave to operate as a stay, the applicant had the option to appeal against the said order. Having failed to adopt this avenue the applicant cannot now purport to invoke the inherent jurisdiction of this court to review the said order.”

14. I have said enough to demonstrate that the notice of motion dated 21st August 2015 is highly irregular and devoid of merit. I decline the invitation to review the orders made on 28th July 2015. The upshot is that the application is dismissed. Considering the predicament the *ex parte* applicants find themselves in; and, that the substantive motion for judicial review is still pending, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 29th day of September 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open Court in the presence of:-

Mr. Kenei for Mr. Ngigi for the *ex parte* applicants instructed by Ngaywa Ngigi & Kibet Advocates.

Mrs. Khayo for Mr. Kibii for the respondents instructed by Limo R. K. & Company Advocates.

Mr. J. Kemboi, Court clerk.