



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MERU
JUDICIAL REVIEW NO. 25 of 2015

IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL ACT 2014
IN THE MATTER OF ALCOHOLIC DRINK LICENCE

MORRIS MUTEMBEI T/a. SMALL VILLA BAR 1ST APPLICANT
LAWRENCE MUBICHI T/a. OASIS BAR 2ND APPLICANT
ROSELINE KINYA T/a. MIRIMANI BAR 3RD APPLICANT
CHARLES MUCHUI T/a. SILENT BAR 4TH APPLICANT

Versus

THE COUNTY COMMISSIONER– MERU COUNTY ... 1ST RESPONDENT
THE DEPUTY COUNTY COMMISSIONER2ND RESPONDENT
THE SUB-COUNTY ADMINISTRATOR3RD RESPONDENT
THE DISTRICT COMMISSIONER –
IMENTI NORTH DISTRICT4th RESPONDENT
THE CHIEF- NTHIMBIRI LOCATION5TH RESPONDENT
THE HON. ATTORNEY GENERAL6TH RESPONDENT

RULING

Leave to operate as stay

[1] Under Order 53 rule 1 of the Civil Procedure Rules, the court may direct that the request for leave to apply for judicial review orders to operate as stay shall be heard at a later date and *inter partes*. In this case, on 19th October, 2015 the court granted leave to the *Ex parte* Applicants to apply for judicial review orders in the nature of certiorari and prohibition against the Respondents but directed that the request that the leave do operate as stay of the order complained of should be heard *inter partes* on 22nd October, 2015. The hearing thereof did not take off on the

appointed date but was adjourned to 26th October 2015 by consent of counsels for the parties.

Ex parte Applicants' gravamen

[2] On 26th October, 2015, Mr. Mwanzia for the *Ex parte* Applicants argued that the leave granted herein should operate as stay of the order for closure of the Applicants' business premises. He started by stating that the application before court was extremely urgent and so was commenced under the cover of certificate of urgency. He said that the Applicants' businesses are licensed, i.e. to sell liquor. He referred the court to their respective licenses that have been annexed to the application. Mr. Mwanzia argued further that before the licenses were issued, the relevant county officials and inspectors carried out thorough scrutiny of the business premises. Therefore, the Respondents cannot just wake up and without due process close the applicants' business premises. He said that the action by the Respondents goes against the Applicants' legitimate expectation to protection of the law under the Constitution. According to him, the said action was a collective punishment of applicants who are licensed to carry out the business of selling liquor. Mr. Mwanzia said that despite their marks on the license for Mr. Muchui, the fact remains that the license was approved. He beseeched the court to take the view that Kenya is a democratic Society where the rule of law reigns and should so prevail in this case by staying the offending action complained of. On the basis of the foregoing, Mr. Mwanzia asked the court to stay the offending action by the respondent while this matter is pending.

[3] M/s. Kung'u for the Respondents opposed the request for stay. She gave three(3) grounds of opposition. One; that it is public knowledge that following the directive by the state all bars selling second generation alcoholic drinks should be shut down in public interest. She therefore urged the court to consider the wider public good being served by the said directive as opposed to individual private rights of the applicants, and refuse any stay. She stated that public interest is one of the considerations when the court is determining whether or not to issue conservatory orders. Second, the license for Charles Muchui was approved on two conditions indicates on the face of it those are; (1) not to pay awaiting directions from CEO; and (2) the community does not want bars in their location. Third; that the impugned decision which is the basis of the application is suspect, for, it is not signed and its origin is not shown. Mr. Mwanzia vehemently objected to this last submission and stated that the decision was made in a meeting presided over by the Deputy County Commissioner. He said it was authentic document and it has not been disclaimed by way of an affidavit. He said that the decision was taken without notice or participation of the applicants.

DETERMINATION

[4] Should I or should I not order that the leave to apply for judicial review orders shall operate as stay of the decision complained of herein? Or what appropriate orders are feasible in the circumstances of this case? This is my task for today. I take the view that the relief of stay in Order 53 of the Civil Procedure Rules is in the nature of a conservatory order for which the guiding principles are set out in the case of Supreme Court **Gitau Peter Munya vs Dickson Mwenda Githinji & 2 others** [2014] eKLR to be:

“Conservatory Orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions linked to such private party issues on the “prospects of irreparable harm occurring” during the pending of a case; or “high probability of success” in the applicants case for orders of stay. Conservatory orders consequently should be granted on the inherent merit of the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

I say so because judicial review orders are public law remedies applied for by the *Ex parte*

applicant at the instance of the Republic. As such, public interest is a consideration in determining whether to grant stay because; on one hand, there is the rights of the *Ex parte* applicants, and on the other the decision of a public entity or state organ-in this case counsel for the Respondents claim was made in public interest upon the state directive that all bars selling second generation alcoholic drinks must be shut down.

[5] It is in the public domain that the government has resolved to fight manufacture, sale, distribution and consumption of illicit and lethal alcoholic drinks that have left in their path many deaths and maims to health of its victims. And as the aftermath, many children have been left without parents and bread-winners; homes and marriages have been deprived of spouse or spouses with the effects of home-breaks and routing of family unit. The mischief and ravages of illicit and lethal alcoholic drinks are visible, and if manufacture, sale, distribution and consumption of illicit and lethal alcoholic drinks is not stopped, it will continue with its holocaust on the people of Kenya. I need not over-emphasize these adverse effects of consumption of illicit and lethal alcoholic drinks in our society today. However, the enthusiasm with which the members of the public responded in the fight against illicit and lethal alcoholic drinks has attained the status of hooliganism, mob-justice and total disregard for the rule of law; invariably persons suspected to be trading in illicit and lethal liquor are harmed without being given an opportunity of due process. Therefore, despite the brutal reality of the ravages of illicit and lethal liquor, the rule of law must always guide any action towards fighting illicit and lethal liquor. That is why my decision will turn on the facts and merits of this case. Is stay merited?

[6] The 1st, 2nd and 3rd Applicants are licensed by the County Government of Meru under the County of Meru Alcoholic Drinks Control Act as well as the relevant National Legislation to carry out the business of selling alcoholic drinks in the premises designated in the licenses. I have perused their respective licenses attached to the application. Except I should state that the application for grant or renewal of an alcoholic Drinks Merchants' License for Charles Muchui, the 4th Applicant, was approved subject to two conditions: (1) *That the community has said they do not want bars in the location;* (2) *and that he was not allowed to pay awaiting direction from CEO.* I wish to deal with his request for stay independent of the other applicants since his case presents different factual situation. There is nothing to show that these conditions were fulfilled. A cloud of doubt on whether he is licensed lingers and I will straight away decline his request for stay of the action complained of herein. I will, however, make appropriate orders at the tail end of this ruling.

[7] Back to the arguments on the other applicants. On *prima facie* basis, there is no doubt that the businesses for the 1st to 3rd *Ex parte* Applicants were licensed but were closed down, hence, these proceedings. Although counsel for the Respondents discredited the minutes of the meeting in which the decision to close down all bars in Nthimbiri Location was made, it is apparent the National Government administration used that occasion to shut down the Applicants' business premises. Counsel for the Respondent did not say that the premises were not closed, in which case my work would have been made easier. The court has also not been told that the licences which were issued to the 1st to 3rd *Ex parte* Applicants were revoked in accordance with the relevant procedure and law. This recapitulation brings me to the point where I must state that in a democratic state such as Kenya, the rule of law reigns supreme and the Constitution of Kenya, 2010 clearly places the rule of law as one of the major pillars of justice and national values in article 10. Therefore all decisions by a public entity or state organ must be founded upon these pillars erected by the Constitution; adhere to due process of the law; respect individual rights and freedoms; involve the people including those to be affected by those decisions (fair administrative action) and be orderly. Any enforcement of a noble public objective as the fight against illicit and lethal alcoholic drinks must be done within the rule of law, and if it is done in a manner that defies order or one that embraces hooliganism it must not be countenanced by the law. I agree the objective of fighting manufacture, sale, distribution and consumption of illicit liquor is a noble one, and it is indeed a matter of national interest. But it is inconsistent with the said noble objective and exercise of public power when the officials of government entrusted with maintaining law and order seek to enforce such causes other than as provided in law. I have not

been shown any evidence that inspections were done or further inquiry was carried out which led to the closure of the business premises where the 1st to 3rd Applicants were carrying out their businesses. Nothing shows they were even involved on the matter or in the decision-making process to close their business premises. In these circumstances, a stay may be deserved. However, from the papers before court, the court must fashion appropriate orders which will fully recognize public good and concern in this matter and at the same time vindicate the Applicants' rights. Accordingly, I make the following orders:

- a. **I am aware the County Government of Meru is not a party in these proceedings. However, they are invariably the relevant person who will be affected by any orders made by this court. Therefore, I order that the Liquor Licensing Board of County Government of Meru shall file in court within seven (7) days a report on the type of liquor being sold in the bars in question and whether the liquor being sold therein is the one for which the licenses were issued. The relevant personnel to be involved in this exercise shall involve the Applicants in ascertaining the type of liquor being sold in these bars. If any inspection is necessary it shall be in the presence of the applicants. Based on the report to be provided in accordance with this ruling, I will give my final order on the stay of the order closing the bars in question.**
- b. **The above orders will not apply to Charles Muchui as I stated earlier that his application for grant or renewal of an alcoholic Drinks Merchants' Licence was approved subject to two conditions: (i) That the community has said they do not want bars in the location; (2) and that he was not allowed to pay as it was awaiting direction from CEO. In that case I decline any orders of stay of the order under review in respect of Charles Muchui.**

Dated, Signed and Delivered in Court at Meru this 28th day of

October, 2015.

F. GIKONYO

JUDGE

28.10.2015

In the presence of:

Mr. Kieti for 1st, 2nd, 4th, 5th and 6th Respondent.

Mr. Kieti for Mr. Mwanzia for applicants.

Non appearance for 3rd Respondent

Court clerks – Mwenda/Mark.

F. GIKONYO

JUDGE

28.10.2015