



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW MISC. APPLICATION NO. 150 OF 2015

IN THE MATTER FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

IN THE MATTER THE KIAMBU COUNTY ALCOHOLIC DRINKS CONTROL ACT, OF 2013

AND

**IN THE MATTER OF THE KIAMBU COUNTY ALCOHOLIC DRINKS (LICENCING)
REGULATIONS, 2013**

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP 26 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KIAMBU RESPONDENT

EX PARTE RICHARD KAGIRI & 399 OTHERS

RULING

Introduction

1. By a Notice of Motion dated 23rd June, 2015, the ex parte Applicants herein sought the following orders:
 - a. An order of Certiorari do issue to remove into the High Court and quash the notices clandestinely issued by the Respondents to some selected liquor traders to apply for the 2015 Liquor Licenses.
 - b. That an order of Mandamus do issue compelling the Respondent to act in accordance with the provision of Section 16 & 68 of the Kiambu County Alcoholics Drinks Control Act 2013.

c. That an order of prohibition do issue prohibiting the Respondents, their agents, servants police officers or whomsoever from demanding liquor license fee for the year 2014, harassing, arresting, detaining or prosecuting any person holding a license under the Alcoholic Drinks Control Act 2010 until the Respondents complies with the law as stipulated in the Kiambu County Alcoholic Drinks Control Act 2013 (Section 16 & 68). On the renewal of licenses issued under the Alcoholic Drinks Control Act 2010 or until further orders of this honourable court.

d. That cost of this proceeding be provided for

Applicants' Case

2. According to the Applicants, there has been in force orders of this honourable court staying the actions of the Respondents in relation to the Kiambu County Alcoholic Drinks Control Act 2013 and the regulations made thereunder from 15th August, 2014 to 17th April, 2015.
3. However, even before this Court rendered its verdict in JR 122 of 2014 the Respondents and its allies in disobedience of the interim orders of this Court had always targeted those who chose to obey the orders of Further, between January and 14th April, 2015 before the orders aforesaid hereinabove lapsed on 17th April, 2015 the Respondents had clandestinely and in disobedience of the orders of this Court, selectively invited its allies in disobedience of this court's orders to apply for renewal of their licenses issued under the *Alcoholic Drinks Control Act 2010* and in transition to the *Kiambu County Alcoholic Drinks Control Act 2013* and the regulations made thereunder.
4. Furthermore in blatant disregard of this Court's interim orders, the Respondents contemptuously demanded that the Applicants pay for last year licenses notwithstanding that no inspection was conducted and or licenses issued in the aforesaid year not forgetting that the aforesaid liquor licensing application process was and is illegal.
5. It was disclosed that the interest party in JR 122 of 2014 has written to the Kiambu Sub County administrator, Limuru sub county administrator, Kiambaa Sub County Administrator and the Kabete Sub County Administrator all of the Respondents seeking a fresh and lawful notice to apply for licenses but to no avail.
6. According to the Applicants, in total disregard of the Applicant's right to own and operate business premises under the laid down legal procedure the Applicants' businesses have been paralyzed and have been subjected to further arbitrary arrests, detention and prosecution by the Respondent's.
7. It was therefore contended that unless this Court intervenes potently the rule of law and more so court orders will be taken for granted and impunity is bound to thrive unabated.
8. It was submitted that this application was prompted by the respondents' disobedience of the orders issued by this Court in JR No. 122 of 2014 which matter involved the same parties and in which the Court ordered the respondent to cease from further actions pending further orders which orders were dishonoured by the Respondent which called up and issued public notices calling for applications for licenses for the year 2015 during the pendency of the judgement.

Respondent's Case

9. According to the Respondent, it is not in dispute that there exists the *Kiambu County Alcoholic Drinks Control Act of 2013*, which is an Act duly passed by the County Assembly of Kiambu County. It is also not in dispute that the propriety and/or constitutionality of the said act has been the subject of two sets of separate proceedings before the High Court: that is Muranga Constitutional Petition No. 3 of 2013 between **John Kinyua Munyaka and 11 others –vs- the County Government of Kiambu and 3 others** (wherein the lead Applicant herein was the 7th Petitioner) and Nairobi JR Misc. Application No. 122 of 2014 between **Dr. Samuel Thinguri Waruathie and Another –vs- The County Government of Kiambu** with the Kiambu Liquor Welfare Group as an Interested Party (whose affidavits were deposed to by the lead Applicant herein).
10. It was deposed that in both sets of proceedings, final judgment have been issued by both courts and as such the issues therein can be said to have been finally determined. Further to the above,

- the lead Applicant herein and/or his associates and/or the Ex-Parte Applicants in JR Misc. Application No. 122 of 2014 have further filed a Notice of Appeal against the decision of the learned judge in that matter.
11. According to the Respondent, since both judgments have disposed of the issues of the propriety of the ***Kiambu County Alcoholic Drinks Control Act, 2013*** and the regulations made thereunder, no challenge can therefore issue on the same except by way of an appeal to the court of appeal: which avenue the ex parte applicants in those proceedings have decided to avail themselves of.
 12. It was averred that it is also not in dispute that the Applicant herein participated in both sets of proceedings as determined by the High Court.
 13. To the Respondent, the general nature of this application and the orders the lead Ex-Parte Applicant seeks therein are orders that are tantamount to obtaining orders of stay affecting the ***Kiambu County Alcoholic Drinks Control Act***; (which act was found to be constitutional and lawful) which stay orders can, if at all, be issued by the court of appeal, in the appeal that is now in existence over JR Misc. Application No. 122 of 2014. Further, the lead Applicant's application is an attempt to stain the Respondent with failing to obey various court orders which acts are allegedly contemptuous to the Court; which proceedings should in any event issue in the proceedings where the alleged orders are said to have been disobeyed.
 14. The respondent averred that pursuant to the court order issued on the 15th of August, 2014, a temporary order did issue restraining the Respondent's actions until further orders of the honourable court. However, the action that was stayed was in respect of the ***Kiambu County Alcoholic Drinks Control Act, 2013*** and the regulations made thereunder, and not any other law. However, the Respondent herein has a supervening mandate issued by both the Constitution (Part 2 of Schedule 4 to the Constitution) and the ***Alcoholic Drinks Control Act***, Cap 121A of the Laws of Kenya, which mandate has not been contested at all as the mandate was not affected by the orders of stay issued in respect of Nairobi JR Misc. Application No. 122 of 2014.
 15. It was therefore the Respondent's case that the proceedings herein and/or and contempt proceedings contemplated by the Applicants herein cannot issue as the Respondent was discharging powers, duties and functions it is empowered to discharge under both the Constitution (Part 2 of Schedule 4 to the Constitution) and the ***Alcoholic Drinks Control Act***, Cap 121A of the Laws of Kenya and that in the absence of the ***Kiambu County Alcoholic Drinks Control Act, 2013*** and the regulations made thereunder, the operative legal regime is the ***Alcoholic Drinks Control Act***, Cap 121A of the Laws of Kenya.
 16. It was disclosed that neither the lead Applicant and/or the people he allegedly represents have presented an Application to the Respondent herein under the provisions of Section 8 to 14 of the ***Alcoholic Drinks Control Act***, Cap 121A of the Laws of Kenya hence it is not proper for the Applicants to allege that the Respondent herein has targeted and/or selectively issued notices for renewal of the liquor licences, as this was done pursuant to Sections 8 to 14 of the ***Alcoholic Drinks Control Act***, Cap 121A of the Laws of Kenya.
 17. According to the Respondent, the Applicant and/or his representatives have been charged with offences committed contrary to the ***Alcoholic Drinks Control Act***, Cap 121A of the Laws of Kenya, and not the stayed ***Kiambu County Alcoholic Drinks Control Act, 2013*** and the regulations made thereunder and as such, it cannot be said that the Respondent has acted in an arbitrary manner in enforcing provisions of the ***Alcoholic Drinks Control Act***, Cap 121A of the Laws of Kenya, which Act was not stayed at all and which the Respondent herein has a responsibility to enforce. The Respondent's view was therefore that the Applicants' rights to own and operate businesses are not absolute and are subject to the reasonable regulations imposed by national legislation for the performance of and carrying out of businesses generally and the reasonable regulations imposed on the Applicants by virtue of Sections 8 to 14 of the ***Alcoholic Drinks Control Act***, Cap 121A of the Laws of Kenya. Further, no evidence whatsoever has been adduced by the Applicants of any Application to the county made under Sections 8 to 14 of the ***Alcoholic Drinks Control Act***, Cap 121A of the Laws of Kenya.
 18. According to the Respondents the letters exhibited and referred to by the Applicants were all written, dispatched and/or acknowledged as received on the same day, that is the 30th of April, 2015, a full 13 days after final judgment and determination of JR Misc. Application No. 122 of 2014; which finally determined the issues raised in that Application. Since the said judgment above found the ***Kiambu County Alcoholic Drinks Control Act, 2013*** and the regulations made

thereunder, as valid and proper law, by that determination, any and all orders issued staying the Respondent's action under the said Act ceased to have effect and/or were effectively discharged when the said judgment was duly delivered. As such, the said letters are merely an attempt to extend through the back door what the court has not extended and/or found worthy of extension. Further to the above, since a notice of appeal in JR Misc. Application No. 122 of 2014 has already been filed, the proper venue for seeking to stay the **Kiambu County Alcoholic Drinks Control Act** and the regulations made thereunder, is the Court of Appeal pursuant to what is known as a Rule 5(2) (b) Application to that Court.

19. To the Respondent, this further proves the fact that the Applicants herein are in fact abusing the court process even further, and as such should not be allowed to continue this said abuse as it is contrary to the rule of law and is grossly unfair to the Respondent herein. One of the cardinal principles of law is the finality of litigation: which finality the lead Applicant herein does not want to achieve by taking the Respondent herein through the rigours of defending various suits touching on the same subject matter.

Determination

20. I have considered the issues raised herein. It is clear that the Applicants' case is hinged on the purported actions taken by the Respondent during the pendency of JR No. 122 of 2014. In the Applicants' view the actions taken by the Respondent were taken in disregard of the Court orders therein.

21. It is however clear that on 17th April, 2015, this Court delivered a judgement in the said matter in which it dismissed the Application therein but with no order as to costs. In the said application the applicants were seeking orders to quash the 2nd Schedule of Part I-IX of the **Kiambu Finance Act, 2013** as well as the **Kiambu County Alcoholic Drinks Control (Licensing) Regulations, 2013**, and in particular the 3rd Schedule thereto. There was also a prayer seeking orders prohibiting the enforcement of the said instrument and an order compelling the said County to enact a proper legislation.

22. The Applicants contend that the Respondents took actions whose effect was the disobedience of the orders which were issued in the said matter pending the hearing of the petition.

23. The procedure where a party has disobeyed a Court order was set out in details by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the **Judicature Act**.

24. The High Court of Justice in England comprises three (3) divisions – the Chancery, the Queens Bench and the Family Divisions. It is true that following the implementation of **Lord Woolf's "Access to Justice Report, 1996"**, the **Rules of the Supreme Court** of England are being replaced with the **Civil Procedure Rules, 1999** and pursuant thereto the Court of Appeal in the above decision recognised that on 1st October, 2012 the **Civil Procedure (Amendment No. 2) Rules, 2012**, came into force and Part 81 thereof effectively replaced Order 52 of the **Rules of the Supreme Court** which was the Order dealing with the procedure for seeking contempt of Court orders in the High Court of Justice in England, in its entirety. Under Rule 81.4 which deals with breach of judgement, order or undertaking, referred to as "application notice", the application is made in the proceedings in which the judgement or order was made or undertaking given and the application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. The Court of Appeal held that leave or permission is no longer required in such proceedings (relating to a breach of a judgement, order or undertaking) as opposed to committal for interference with the due administration of justice or in committal for making a false statement of Truth or disclosure statement.

25. What comes out clearly is that the application for contempt must be made in the proceedings in which the judgement or order was made or undertaking given. In my view a party ought not to institute fresh proceedings whose effect would be to determine issues arising from an alleged disobedience of a Court order especially where the substantive matter has been determined as is in

this case. To do so would amount to an abuse of the Court process if by granting the orders sought the Court would in effect be staying the decision in the earlier suit through the backdoor. As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229:**

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in *bona fides* and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

- i. **Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.**
- ii. **Instituting different actions between the same parties simultaneously in different courts even though on different grounds.**
- iii. **Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.**
- iv. **Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.**

[Emphasis mine].

26. This however does not mean that the mere fact that a final decision has been made in a matter precludes the Court from entertaining contempt of Court proceedings in respect of the disobedience of an interim or an interlocutory order. Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly. As was held in **Teacher’s Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013:**

“The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

27. Therefore the mere fact that the dispute has been finally decided does not preclude the Court from taking actions meant to preserve and safeguard the rule of law and that is a duty which the Court is obligated to perform at any stage of the proceedings. Where it has been brought to the Court’s attention that its orders were abrogated or abridged by brazen or subtle schemes and manoeuvres the Court cannot turn a blind eye to the same simply because the substance of the dispute had already been determined.

28. It therefore matters not if the case has been determined either way if at the time of the action alleged to be in contempt the proceedings were alive. As was held in **Commercial Exchange Limited and Another vs. Barclays Bank of Kenya Ltd. Civil Appeal No. 136 of 1996,** the

discontinuance of a suit does not affect consent orders already made in that suit. It is similarly my view that the determination of a matter does not affect the orders made therein whether interim or otherwise in so far as contempt of Court is concerned.

29. As was held by this Court in **Gachoni Enterprises Limited vs. D.N. Nyaga t/a Njeru, Nyaga & Co. Advocates & another [2012] eKLR**:

“...even if the suit had abated, would that affect the orders made therein? In my considered view, Court orders are not made in vain and are meant to be complied with and therefore a party should not take it upon himself to decide on the validity or otherwise of Court orders. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. The validity or otherwise of the suit may constitute a ground for purging the contempt but cannot, in my view, constitute a passport for disobeying an order made by a Court of competent jurisdiction. If parties and their counsel were given a blank cheque to decide on the validity of court orders, the dignity of the courts would be severely eroded. It must always be remembered that contempt of court proceedings are meant to maintain the dignity of the Courts and therefore the validity or otherwise of the suit in which the orders are granted cannot sanitise contemptuous actions by a party or his legal adviser.”

30. Accordingly the Applicants were at liberty to institute appropriate contempt proceedings rather than opening another front in litigation in the circumstances of this case. Having arrived at this finding I do not have at this stage to determine the other issues raised in the application.

31. It follows that these proceedings are incompetent and are hereby struck out but with no order as to costs.

32. It is so ordered.

Dated at Nairobi this 20th day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nganga for the Applicant

Mr Ngatia for the Respondent

Cc Patricia