

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO 30 OF 2012

WAINAINA MUIRURI KAHOGAAPPLICANT

VERSUS

THE CHAIRMAN RUIRU LIQUOR LICENCING COMMITTEE.....RESPONDENT

NATIONAL CAMPAIGN AGAINST DRUG ABUSE AUTHORITY.....INTEREST PARTY

JUDGMENT

Wainaina Muiruri Kahoaga who is the ex-parte applicant herein operates a liquor business by the name Buster Pub in Ruiru. Through a letter dated 7th November, 2011 E.M. Mbui the District Commissioner, Ruiru informed him that his liquor Licence No. 2778 issued on 1st September, 2011 had been cancelled due to public interest and because the pub was situated very near a school. On 25th January, 2012 the applicant sought and obtained the leave of this court to commence judicial review proceedings. By way of the notice of motion application dated 13th February, 2012 he now seeks an order of certiorari quashing the decision of the respondent (the Chairman, Ruiru Liquor Licensing Committee).

The respondent opposed the application by way of a replying affidavit sworn by Erastus Mwenda Mbui on 20th April, 2012. Erastus Mwenda Mbui introduced himself as the District Commissioner, Ruiru District as well as the Chairman of Ruiru District Liquor Licensing Committee (the Committee). He averred that following complaints from three schools concerning the applicant's pub, the Committee met on 3rd November, 2011 and resolved to cancel the applicant's licence. This information was communicated to the applicant through a letter dated 7th November, 2011. However, the Committee later realized that it had not accorded the applicant a hearing and it decided to rescind its decision. The applicant was subsequently informed through a letter dated 23rd December, 2011 that the Committee would be meeting on 25th January, 2012 to decide whether to cancel his licence. On 25th January, 2012 the applicant failed to appear before the Committee. The Committee nevertheless sat and after deliberations decided to cancel the licence and the applicant was informed of this development vide letter dated 7th February, 2012. It is the respondent's case that there is no decision to be quashed since the decision referred to by the applicant in his application had been rescinded.

Through a notice of motion application dated 9th March, 2012 the National Campaign Against Drug Abuse Authority (NACADAA) applied and was subsequently allowed to join these proceedings as an interested party. NACADAA opposed the applicant's application by way of a replying affidavit sworn on 19th June, 2012 by Ms Florina Mwikali Mutua. The affidavit gives a detailed account of what led to the cancellation of the applicant's licence.

The applicant responded to the issues raised by the respondent and interested party by swearing a further affidavit on 19th July, 2012. The applicant argues that the letter dated 23rd December, 2011 did not indicate that the letter dated 7th November, 2012 had been rescinded. He accuses the respondent of having predetermined to cancel his licence.

Looking at the pleadings, I find that the applicant has raised one issue against the respondent namely that he was never given a hearing before his licence was cancelled. His counsel did submit on the issue of procedure but as per order 53 Rule 4(1) of the Civil Procedure Rules, a party can only rely on the grounds and relief set out in the statement. The issue of the procedure leading to the cancellation of the licence was never raised in the statutory statement and the verifying affidavit. The applicant cannot be allowed to introduce the same through written submissions. The applicant only complained of not having been given a hearing before his licence was cancelled.

The respondent and interested party submits that the applicant was given an opportunity to be heard but he never took advantage of the same. Looking at the correspondences produced by the respondent and interested party, it is clear that the initial cancellation of the applicant's permit was rescinded. The applicant was then notified of the allegations against him and invited to attend a hearing on 25th January, 2012. The letter dated 23rd December, 2011 contains the allegations and it concludes thus:-

“Due to the above reasons the District Liquor Licensing Committee will on 25th January, 2012 discuss the above issues. This may lead to cancellation of your licence. You are therefore invited to appear before the committee to defend yourself on issues raised.”

It is quite clear from the above conclusion that the earlier cancellation had been rescinded and the applicant was now being given in opportunity to be heard. He did not take advantage of the opportunity but instead came to court to challenge the decision of 7th November, 2011 which had already been rescinded. This application is therefore directed at a non-existent decision. For that reason alone, the application should fail.

However, even if the applicant was to challenge the decision of 25th January, 2012, I do not think he would still succeed since he refused to attend before the respondent. You cannot force a hearing upon a person. You can only give such a person an opportunity to be heard and it is up to the person to decide whether to appear for the hearing. The applicant was notified to appear for a hearing before the respondent but he failed or refused to do so. The respondent cannot therefore be accused of breaching the rules of natural justice. As such the application is dismissed with costs to the respondent. Since the interested party invited itself to these proceedings, it will meet its costs.

Dated, signed and delivered at Nairobi this 16th day of April , 2013

**W K KORIR,
JUDGE**