



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 420 OF 2013

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY ORDERS OF CERTIORARI AND PROHIBITION (JUDICIAL REVIEW)

AND

IN THE MATTER OF: PUBLIC HEALTH ACT, CAP 16 LAWS OF KENYA

IN THE MATTER OF: JAMES MBURU GITAU T/A JAMBO

BETWEEN

JAMES MBURU GITAU T/A JAMBO MERCHANT.....APPLICANT

AND

THE SUBCOUNTY PUBLIC HEALTH OFFICER

KIAMBU COUNTY.....RESPONDENT

RULING

1. On 26th November 2013, I granted the *ex parte* applicant leave to commence judicial review proceedings seeking to quash the decision made by the respondent condemning in its letter dated 29th October 2013. I also granted leave to apply for order of prohibition restraining the Respondent from taking adverse actions against the applicant as well as leave to apply for mandamus compelling the Respondent to reverse its decision under challenge.
2. I however directed pursuant to the proviso to provisions of Order 53 rule 1(4) of the Civil Procedure Rules that with respect to the prayer seeking directions that the leave so granted to operate as a stay of the said decision, the application be heard for hearing inter partes.
3. It is that prayer that is the subject of the present ruling.
4. By the letter under reference, the respondent ordered the closure of the applicant's premises and barred the applicant from further production of the liquor in the applicant's premises until the contraventions mentioned in the said letter were rectified to the satisfaction of the Respondent. According to the Respondent, the conditions under which the applicant was manufacturing the liquor were not in accordance with the required health standards.
5. In his submissions, **Mr Maina**, learned counsel for the applicant contended that the applicant's business in question is the only business the applicant is engaged in and by closing the same without proper inspection and making its findings known to the applicant, the respondent is

crippling the applicant's said business despite the fact that the applicant had renewed its licence on 8th October 13 and has been in business for the last three years. It was further submitted that at the time of the last renewal of the licence the conditions mentioned in the report existed and that the applicant has secured an area in which the manufacturing is done. Further, it was contended that the decision is likely to render the applicant's 50 employees jobless yet there has been no complaint from the neighbourhood or the customers. If there was any complaint, it was submitted, the Respondent ought to have served the applicant with such complaint hence the leave granted herein ought to operate as a stay pending the hearing and determination of the Motion which has been filed.

6. In response to the said prayer, **Ms Chimau**, learned counsel for the Respondent submitted that the premises were closed on reason of human health and based on the said reasons the court ought to balance the competing interests as between the individual and the State. Whereas the applicant's interests are purely financial in terms of loss of profits, the State on the other hand is concerned about possible loss of life. In her view the applicant's loss can be quantified and necessary compensation made while the loss of life cannot.
7. I have considered the application and the rivalling contentions by the parties herein.
8. The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallised over a period of time in this jurisdiction and some of them are that the decision sought to be quashed has been implemented leave ought not to operate as a stay; that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review; that the objective of granting stay is to ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application; that the purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken; that it is however not appropriate to compel a public body to act and that a stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005; Jared Benson Kangwana Vs. Attorney General Nairobi HCCC No. 446 of 1995; Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006.**
9. As I held in Miscellaneous Application No. 363 of 2013 **In Re: Meridian Medical Centre;**

“...it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.....It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.”

10. In this case, the Court takes into account the fact that the Respondent had already ordered the closure of the applicant's premises. Whether rightly or wrongly, that decision would have to await the hearing of the pending Motion. The stay in the manner sought by the applicant would be to allow the applicant continue with his operations of the liquor business. In other words it would in effect reverse the decision made by the Respondent. Ordinarily as stated above orders of stay in judicial review as opposed to conservatory orders in Constitutional Petitions are not to be granted if the result would be in the nature of mandatory injunctions. This is not however to say that a stay can never be granted where the challenged decision has been taken. However in my view there ought to be exceptional circumstances before such orders are granted since.
11. In this case the applicant bases its decision for seeking stay on the ground that it stands to lose financially in terms of its business outlay as well as in terms of the livelihood of his employees.

The Respondent on the other hand contends that to grant the stay sought would expose the members of the public to loss of lives. Clearly, here are competing interests. On the one hand is the interest of the applicant to earn a living while on the other is the interests and obligation on the part of the State to protect its citizens from unwarranted loss of lives. In such circumstances the Court ought to balance the said competing interest make a decision based on the lower risk of injustice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.

12. In Karua Vs. Radio Africa Limited T/A Kiss Fm Station and Others Nairobi HCCC No. 288 of 2004 (HCK) [2006] 2 EA 117; [2006] 2 KLR 375.

“The fundamental rights and freedoms in Kenya although dearly cherished are not absolute and they are subject to the rights and freedoms of others since the freedoms and rights of others are equally protected by the Constitution and guaranteed to every person. In addition the freedoms and rights are subject to public interest. It is therefore quite evident that as far as other people are concerned the fundamental rights and freedoms are on an equal footing and that there is no hierarchy of rights and all must enjoy the same rights and freedoms. It is therefore a serious contradiction for a litigant to want to muzzle, stifle or extinguish other person’s rights and freedoms in the name of enforcing theirs. Nothing could more unconstitutional. The reason why the fundamental rights and freedoms are subject to the rights of others and the public interest as per the constitution of Kenya is that they create a mutuality in terms of their enjoyment and responsibility. They are subjected to the public interest because it is absolutely necessary to achieve the common good for all.... Thus, the limitations are aimed at ensuring that the rights and freedoms are equally enjoyed and the enjoyment achieves common good and also exercised responsibly so as to achieve the equilibrium and an orderly society.”

13. It is clear that the applicant’s loss is mainly financial in nature. This is a loss which in my view is quantifiable. This must be balance against the risk to which the public consuming the applicant’s products may be exposed to if at the end of the day it turned out that the Respondents were after all justified in taking the action they took. It is trite that in giving effect to the rights the courts must balance fundamental rights of individual against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions. See Bell vs. DPP [1988] 2 WLR 73.
14. Accordingly doing the best I can in the circumstances of this case, it is my view and I hold that the lesser injustice would be to decline to direct that the leave granted herein operates as a stay which I hereby do and instead direct the parties to expedite the hearing and determination of the substantive Motion.
15. The costs of this application will be in the cause.

Dated at Nairobi this day 19th of December 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Wageni for Maina for the applicant