



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION, MILIMANI**  
**Civil Case 263 of 2005 (1)**  
**SOFTA BOTTLING COMPANY LIMITED.....1ST PLAINTIFF**  
**KUNGURU COMPLEX LIMITED.....2ND PLAINTIFF**  
**VERSUS**  
**NAIROBI CITY COUNCIL.....DEFENDANT**  
**R U L I N G**

Delay in the preparation and delivery of this ruling has been occasioned by the last vacation of the court and my recent illness and hospitalization. The delay is regretted.

The Plaintiffs' herein filed this suit by plaint dated 6th May, 2005. They sought the following main reliefs:-

***(a) that the Defendant be ordered to renew all (trading) licenses issued to the 2nd Plaintiff; and***

***(b) that the Defendant be restrained from revoking any licenses issued to the 2nd Plaintiff.***

There are also claims for loss of earnings and general damages.

Together with the plaint the Plaintiffs' filed chamber summons dated 10th May, 2005 in which they seek the following main orders:-

***“(a) .....;”***

***(b) That an injunction do issue restraining the Defendant its servants, agents and or employees from closing, arresting detaining revoking the licenses or in any other manner whatsoever harassing and or interfering with the operations of the Plaintiffs' containers/depots and Softa Soda vendors pending the hearing and determination of this suit.***

***(c) That a mandatory injunction do issue to the Defendant ordering it to renew forthwith the 16 single business permits issued to the 2nd Plaintiff to trade at Uhuru Park and Central Park Nairobi pending the hearing and determination of this application.***

***(d) That a mandatory injunction do issue to the Defendant ordering it to renew forthwith the 16 single business permits issued to the 2nd Plaintiff to trade at Uhuru park and Central Park Nairobi pending the hearing and final determination of this suit.***

***(e) .....”***

The application is expressed to be brought under Order 39, Rules 1 and 2 of the Civil Procedure Rules. The grounds thereof as stated are:-

***“(i) The Defendant has without notice or any justification whatsoever failed to renew the 16 single business permits issued to the 2nd Plaintiff despite repeated demands and tender of permits fees. This has led to grounding of the only 16 selling points of the Plaintiff softa soda which have been operating since 1998.***

*(ii) The Defendant has failed refused and or neglected to give any reasons for the said refusal and has been systematically harassing and interfering with the 2nd Plaintiff's operations of its licenced containers/depots and vendors of softa soda.*

*(iii) The permits are annual and the Plaintiff is bound to pay for the full value irrespective of the date of issue and the Plaintiffs are suffering serious financial loss each day the permits are withheld.*

*(iv) The Plaintiffs are willing and able to undertake as to damages or offer a security for any injury the Defendant may suffer on account of issuance of the orders sought.*

*(v) The Defendant's actions are unlawful, discriminatory, without any justification and solely aimed to frustrate the Plaintiffs' operations as the Defendant has been giving the vendors of Coca Cola products undue preference with intent specifically targeting to eliminate 1st Plaintiffs' product from the market. Further the Defendant's acts and defaults indicate a well co-coordinated effort to frustrate the sales of 1st Plaintiff's softa soda thereby subjecting the 1st Plaintiff's sodas to relegation from the market."*

There is a supporting affidavit sworn by one **PETER KUGURU**, the managing director of both Plaintiffs. It elaborates those grounds.

In response to the application the Defendant filed a notice of preliminary objection dated 30th May, 2005. That objection is that these proceedings, meaning the Plaintiffs' suit and application, are fundamentally misconceived and/or legally untenable as the court lacks the primary jurisdiction over the subject matter by virtue of Section 165 of the Local Government Act, Cap 265, and should therefore be struck out. That preliminary objection was argued before me on the 6th July, 2005. Mr. Njage, learned counsel for the Defendant submitted that Section 165 aforesaid sets out the procedure to be followed by an aggrieved party who wishes to challenge the refusal by a licensing authority to grant or renew a trading license. He further submitted that sub-section 3 thereof provides for appeals to a subordinate court of the 1st class against such refusal, and that therefore the Plaintiffs should have so appealed. He further pointed out that the High Court is granted appellate jurisdiction under sub-section (5) of the said section against the decision of the subordinate court. The primary jurisdiction therefore to determine disputes as to licenses granted by local authorities is thus not conferred to the High Court. The High Court cannot have both primary and appellate jurisdictions. He cited one case, **FOUR ACES LIMITED vs NAIROBI CITY COUNCIL & ANOTHER, HCCC No. 337 of 2004 (unreported)**, a case of this division. That case is similar to the present one except that it deals with the planning powers of local authorities under the Physical Planning Act, Cap 286. Emukule J., held that the procedure laid down in that Act regarding planning disputes must be exhausted first before an aggrieved party can have recourse to court.

Mr. Njuguna, learned counsel for the Plaintiffs, responded that under sub-section 1 of Section 165 the Defendant may refuse to grant or renew a license for reasons given in that sub-section. There must be a formal refusal by the Respondent to enable the trader to appeal to the subordinate court, and the formal refusal must contain the grounds of such refusal. Mr. Njuguna further contended that there was no such formal refusal by the Defendant and that, therefore, the Plaintiffs could not appeal to the subordinate court as provided under sub-section (3) of section 165. Mr. Njuguna further submitted that there are other reliefs sought in the plaint which can only be canvassed in a suit commenced by way of plaint. In his view, therefore, the present suit and application are properly before the court.

I have carefully considered the submissions of the learned counsels. As already noted the reliefs sought by the Plaintiffs in the plaint are essentially a complaint that the Defendant has refused to renew their trading licenses or permits. Sub-section (3) of section 165 of the Local Government Act provides as follows:-

***“(3) Any applicant for the grant or renewal of a license or a business permit whose application has been refused, and any person whose license or business permit has been cancelled, by a local authority under this section may appeal against such refusal or cancellation to a subordinate court of the 1st class within whose jurisdiction the premises in or at which the applicant intended to conduct or was conducting his trade, business, or occupation is situate, and in the event of the appellant satisfying the court that the license or renewal thereof was refused or, as the case may be, that the license was cancelled, on insufficient grounds, the court may order such local authority to grant such license or a renewal thereof, or as the case may be, the court may declare that the cancellation was invalid.”***

Subsection (5) of the same section provides:-

***“(5) the appellant or the local authority concerned in any appeal under subsection (3) may appeal to the High Court against any such order or declaration of the subordinate court and the decision of the High Court therein shall be final.”***

Under sub-section (1) of section 165 a local authority may refuse to grant or renew any license which it is empowered under the Act or any other written law to grant on any such grounds as it may by by-law specify in addition to any of the grounds set out under the sub-section.

It is pleaded in paragraph 4 of the plaint, inter alia, that the Defendant is the sole licensing authority under the Local Government Act to issue and renew single business permits within the City of Nairobi. It is further pleaded in paragraph 5 that since January 2005 the Defendant has **“systematically and continuously breached”** its aforesaid obligation to grant or renew single business permits to the detriment of the Plaintiffs. It is therefore clear that the Plaintiffs’ complaint in this suit is that the Defendant has refused to grant or renew their trading permits. The proper course for the Plaintiffs to follow in the face of such refusal is to appeal to a subordinate court as provided under sub-section (3) of section 165. This court has only appellate jurisdiction under sub-section (5) against the decision of the subordinate court. The primary jurisdiction is reposed in the subordinate court. The High Court cannot have both primary and appellate jurisdictions in the same matter. If, as learned counsel for the Plaintiffs has stated, the Plaintiffs are unable to so appeal because they have not been provided with a formal written refusal with reasons for the refusal stated therein, then the Plaintiffs ought to seek an appropriate order in judicial review proceedings.

For the above reasons I will uphold the preliminary objection. The Plaintiffs suit is clearly misconceived and incompetent. It is hereby struck out with costs to the Defendant. Order accordingly.

**DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF NOVEMBER, 2005.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 2ND DAY OF DECEMBER, 2005.**