



Nest Lounge & Grill v Directorate of Liquor Control and Licensing (Judicial Review E030 of 2023) [2024] KEHC 218 (KLR) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW E030 OF 2023
OA SEWE, J
JANUARY 19, 2024
IN THE MATTER OF AN APPLICATION FOR LEAVE TO
COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL
REVIEW
AND
IN THE MATTER OF SECTIONS 4(1), 4(3), 4(4) OF THE FAIR
ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015
AND
IN THE MATTER OF ARTICLES 10(1), 10(2)(B) AND 47(1) OF
THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF MOMBASA COUNTY LIQUOR LICENSING
ACT, 2014
BETWEEN
NEST LOUNGE & GRILL APPLICANT
AND
DIRECTORATE OF LIQUOR CONTROL AND LICENSING RESPONDENT**

RULING

1. Before the Court for determination is the Chamber Summons dated 21st September 2023. It was filed by Nest Lounge & Grill (hereinafter, “the applicant”) under Section 8(2) of the [Law Reform Act](#),



Chapter 26 of the Laws of Kenya, Order 53 Rule 1 of the Civil Procedure Rules and Part III of the *Fair Administrative Action Act*, No. 4 of 2015 for orders that:

- (a) Spent
 - (b) The applicant be granted leave to commence judicial review proceedings for an order of Certiorari to quash the decision of the respondent as per the letter dated 18th September 2023.
 - (c) The applicant be granted leave to apply for an order of Injunction restraining the respondent whether by itself, servants, agents or howsoever otherwise from arresting, harassing or intimidating the applicant when operating its business.
 - (d) The applicant be granted leave to apply for an order of Prohibition to prohibit the respondent from closing the applicant's business.
 - (e) The applicant be granted leave to apply for an order of Prohibition to prohibit the County Commander, Mombasa County, OCPD Nyali Police Station and other police officers within the same jurisdiction from arresting, harassing or intimidating the applicant while operating the business.
 - (f) The applicant be granted leave to apply for an order compelling the respondent to visit the applicant's business premises and measure the sound emanating from the business during business hours.
 - (g) The applicant be granted leave to apply for an order compelling NEMA and neighbours to file a report on the conduct of the applicant's business affairs.
 - (h) Leave granted do operate as stay of enforcement of the decision of the respondent to intimidate the applicant.
 - (i) The costs of the application be provided for.
2. In the Supporting Affidavit filed therewith, sworn on behalf of the applicant by Francis Waichoya, it was averred that the applicant is a legally registered and compliant business operating in Mombasa County within the Republic of Kenya; that it has been in operation for the past 7 years; and that in all the 7 years the respondent has been issuing the applicant with Alcoholic Drinks License on an annual basis, after confirming compliance with the applicable requirements; including the payment of the necessary fees. It was further averred that it is public knowledge that the property of the applicant is located in an area that has private residences such as Royal Apartment, and has always been used as business premises.
 3. The applicant deposed that it has been proceeding with business in the normal style and fashion when it received a letter dated 18th September 2023 from the respondent citing non-compliance with liquor licensing regulations. It further explained that, through its advocates on record, it has had to deal with all manner of accusations from all quarters in the recent past. Accordingly, the applicant expressed its apprehension that the recent developments by the respondent are aimed at driving it out of business since there are more than seven business entities of a similar nature within close proximity to the applicant. It was on account of the foregoing that the applicant approached the Court for leave to commence judicial review proceedings.
 4. To augment the applicant's averments, several documents were annexed to the Supporting Affidavit, including the respondent's impugned letter dated 18th September 2023. The applicant also relied on the Statutory Statement dated 21st September 2023 in which it set out in detail the grounds upon which it proposes to seek judicial review orders.



5. Since the application was expressed to have been filed pursuant to Sections 8 and 9 of the [Law Reform Act](#) and Order 53 Rule 1 of the Civil Procedure Rules, directions were given that the application be served on the respondent. The application was accordingly duly served and directions given as to the filing of a response, if any. In the same vein, the Court issued directions that the application be canvassed by way of written submissions. As of 16th October 2023 when this matter was reserved for ruling the respondent had not complied.
6. Order 53 Rule 1 of the Civil Procedure Rules, provides:
 - (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
 - (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.
 - (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.
 - (4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise...”
7. The purpose for leave was well explicated in Mombasa HCMCA No. 384 of 1996: [Republic v County Council of Kwale & Another, Ex Parte Kondo and 57 others](#) thus:

“The purpose of application for leave to apply for Judicial Review is firstly to eliminate at an early stage any applications for Judicial Review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial Review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with the administrative action while proceedings for Judicial Review of it were actually pending even though misconceived...Leave may only be granted therefore if on the material available before the court the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised Judicially”.
- (8) Accordingly, having carefully considered the application for leave, the accompanying Statutory Statement and Verifying Affidavit sworn by the applicant with a view of ascertaining compliance with the strictures of Order 53 Rules 1 and 2 of the [Civil Procedure Rules](#), it cannot be said that the applicant’s complaint is trivial, granted the averment that it has been in operation for 7 years now. It contends that it has all along complied with the law and conditions applicable to its area of business and that it was on that basis that it was licensed to operate from year to year. The applicant also averred, which averment is uncontroverted that its business is not the only one of its kind in the area. It has



also been shown that the application was brought within the 6 months' period stipulated in Rule 2 of Order 53. Thus, I am satisfied that the applicant has demonstrated that he has an arguable case; a case that is fit for further investigation by the Court, and is consequently entitled to leave. I nevertheless find that some of the proposed orders may not be appropriate in so far as entities/persons targeted are not part of these proceedings.

- (9) As to whether an order of stay of proceedings before the 4th respondent ought to issue pending the hearing and determination of the substantive application, the position articulated in *Taib A. Taib v The Minister for Local Government & Others* Mombasa HCMISCA. No. 158 of 2006 was 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...”

10. Thus, having granted the applicant leave to file his substantive application, it is only fair and just that the impugned decision and the proceedings ensuing therefrom be stayed, as otherwise the substantive application will be rendered ineffectual. The rest of the applicant's prayers are declined for being premature.
11. In the result, the application dated 21st September 2023 is hereby allowed and orders granted as hereunder:
- (a) Leave be and is hereby granted to the applicant to commence judicial review proceedings for an order of Certiorari to quash the decision of the respondent as per the letter dated 18th September 2023.
 - (b) Leave be and is hereby granted to the applicant to apply for an order of Injunction restraining the respondent whether by itself, servants, agents or howsoever otherwise from arresting, harassing or intimidating the applicant when operating its business.
 - (c) Leave be and is hereby granted to the applicant to apply for an order of Prohibition to prohibit the respondent from closing the applicant's business.
 - (d) The substantive application be filed within 14 days from the date hereof.
 - (e) The Leave granted to operate as stay of enforcement of the decision of the respondent as per the letter dated 18th September 2023.
 - (f) The costs of the application to be costs in the substantive application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF JANUARY 2024

OLGA SEWE

JUDGE

