



**Republic of Kenya v County Government of Nyandarua & 2 others; Mbaria t/
a Que Bar and Job Kinyua Waruhiu t/a Westernne Inn Rest and Lodging (Exparte)
(Judicial Review E008 of 2023) [2024] KEHC 649 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
JUDICIAL REVIEW E008 OF 2023
CM KARIUKI, J
FEBRUARY 1, 2024**

BETWEEN

REPUBLIC OF KENYA APPLICANT

AND

**THE COUNTY GOVERNMENT OF NYANDARUA 1ST RESPONDENT
NYANDARUA COUNTY ALCOHOLIC DRINK MANAGEMENT CONTROL
COMMITTEE 2ND RESPONDENT
OLJOROOROK REGULATIONS AND CONTROL COMMITTEE 3RD
RESPONDENT**

AND

**THERESA WANJIKU MBARIA T/A QUE BAR AND JOB KINYUA WARUHIU
T/A WESTERNE INN REST AND LODGING EXPARTE**

RULING

1. The matter is commenced via Judicial Review Application to impugn Respondent Number 1 decision to deny applicants Retail Licences for Acholic Drinks Business via Operating Que Bar and Western Inn Rest & Lodging. Plus, costs.

The Applicant Case.

2. ...
3. The Application is supported by the grounds on the face of the application, the affidavits of verification by the applicants sworn on 3/7/2023, and their Supplementary Affidavits of 14th August, 2023, and the annexures thereto.



4. It is the exparte applicants' case that they operate bar businesses in Nyandarua County and they sought for renewal of their single business permits and Alcoholic Drink Licenses for the year 2023 and they paid for the requisite fees.
5. It was further their case that they had met all conditions stipulated in the law for the operation of a bar business and their businesses were indeed inspected and considered fit as no adverse comments were received from the respondents on the inspection.
6. On the 27th of June 2023, the applicants were informed verbally that their applications had been declined. They wrote to the 3rd respondent vide a letter dated 29th June 2023 demanding written grounds for the rejection but none were offered necessitating the filing of the suit.
7. The applicants have cited several violations of their Constitutional Rights in the entire process which include: denial of a right to be heard, a fair hearing, and administrative action Contrary to Article 47 of *the Constitution*, Section 4 of the Fair Administrative Actions Act and rules of natural justice, lack of public participation under Article 10 and failure to supply grounds for the rejection.
8. The Respondents vide a Replying Affidavit sworn on 31st July 2023 by JOSEPH GATORE allege that the exparte applicants were accorded the right to be heard, that the grounds were communicated to them, and that the prayers sort are highly prejudicial to the public.
9. It is against that background, that the court is invited to determine the following issue: -
 - a. Whether the leave granted by this Honourable Court should operate as a stay of the Respondent's decision to deny the applicants Alcoholic Drinks Retail licenses for the year 2023.

Submissions.

10. ...
11. It is submitted that the provisions of Order 53 Rule 1(4) of the Civil Procedure Rules grant discretion to this Honourable Court to issue stay orders pending the determination of the substantive motion in Judicial Review matters. The same is to the effect that, for the avoidance of doubt, it provides: -

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judges so direct, operate as a stay of proceedings in question until the determination of the application, or until the judge's orders otherwise.”
12. In considering the principles to be considered, reliance is made in the case of Republic -vs-baringo County Government & Another Ex Parte Stephen Cheptoo & 8 Others [2015] eKLR, where the court observed as follows: -
 - “10. Whether or not to grant a stay is at the discretion of the court granting leave. Order 52 Rule 1 (4) of the Civil Procedure Rules 2010 gives the court wide and unfettered discretion to grant a stay. That discretion must be exercised judiciously. The key consideration is whether the applicant has established an arguable case worth further investigation during the substantive hearing; whether the stay will be efficacious in the circumstances and whether the failure to grant stay would render the substantive motion nugatory...”



13. It is submitted that, as to the issue of there being an arguable case the court same as obtaining it granted leave to lodge the substantive motion which has already been granted according to the orders issued by this Court on 6th July 2023. The order has not been set aside, varied, and/or challenged. The court is urged to be persuaded by the case of Republic-vs-principal Secretary Agriculture, Livestock, And Fisheries & 3 Others Ex-parte Douglas M. Barasa & 2 Others (2015] eKLR where the Court held as follows: -

“ 13. Whereas the strength or weakness of the applicant’s case is a factor to be taken into consideration since it would not be right to stay proceedings where the Court is clear in its mind that the chances of the judicial review proceeding being successful are slim, in granting leave the Court is under an obligation to determine whether a prima facie case has been made out and ought not to be granted as a matter of course...

14. Therefore, as leave had been granted in these proceedings and as no application has been made to set aside leave, it is my view that it would be an exercise in futility for this Court to embark on an investigation at this stage whether or not the applicants’ case is arguable since to arrive at a decision in the negative would impact negatively on the leave already granted. Consequently, I do not intend to embark on that futile absurd, and potentially embarrassing exercise. I will therefore ignore the issues raised which go to the merits of the orders intended to be sought at the substantive motion.”

14. As to the issue of the Efficacy of the stay and whether failure to grant it will render the substantive motion nugatory, the court referred to the case of Republic-vs -city Council Of Nairobi Exparte Inderpal Sing & 2 Others [2012] eKLR where the Court observed:-

“The purpose of stay in judicial review proceedings is to suspend the validity and implementation of the impugned decision to avoid the possibility of actions or decisions by public bodies which are suspected to be illegal or irregularly made being implemented to the detriment of parties affected by the said decisions before a final determination is made by the court on the illegality or otherwise of the impugned decision after hearing all parties to the dispute in the substantive motion.

This is the reason why in considering applications such as the present one, the court should ensure that the Applicant’s substantive motion is not rendered nugatory by the acts of the Respondent and other interested parties during the pendency of the main application.”

15. In the present case, the exparte applicants deponed in their affidavits that they had complied with the requirements as per the law required. The Respondents, however, failed to grant them licenses on unjustified allegations contained in their replying affidavit that they were selling counterfeit alcohol.

16. Court is urged to take great caution not to delve into the substantive issues at this stage, thus submitted that, the letters dated 12/7/2023 marked as annexure JG-2 a and b were prepared purely for purposes of being used in this suit. The letters purportedly communicating the decision to decline the licenses are dated 12/7/2023 after the suit herein was filed on 4/7/2023.

17. The 0B Nos mentioned in the letters were not attached to confirm that indeed such reports & were made and the particulars of the complainant if any. Of importance to note is that the grounds for rejection are similar whereas the applicants are operating different entities.



18. The applicants have denied receiving the notices. In the Court Of Appeal Decision Of Nyangilo Ochieng & Another Vs Fanuel B. Ochieng & 2 Others [1996] eKLR the Court held that;

“Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was sent.”

19. It is worth mentioning that the exparte applicants have been operating their bar businesses since the year 2016 without any incidences from the National and County Governments. The crackdown on counterfeit alcoholic drinks did not start with the current government regime but was in place in the former Government and there is nothing unique now that would result in genuine hardworking responsible Kenyans like the applicants being denied their source of livelihood. Why demonize the sale of alcohol?

20. It is submitted that it should not be lost that failure to grant a stay, shall only mean that the exparte applicants will not operate their business pending the determination of the main motion which shall render the motion nugatory as their businesses shall remain shut down and they shall lose their regular clientele and lose an income. No vacuum shall be created as the applicants shall continue operating under the old licenses which is always the case before renewal of licenses. Reliance is made on the case of Ex Parte Fredrick Githu Kmau Vs Kandara Sub County Alcoholic Drinks Regulations Committee & 2 Others [2015] eKLR where the Court held that: -

“10. In these circumstances, I hold that the dictates of justice demand that the status quo be maintained pending the hearing and determination of the substantive motion, or until his license expires, whichever comes earlier. The status quo is the Ex Parte applicant shall continue to trade pending hearing and determination of the substantive motion or the expiry of his license. I will therefore grant prayer 4 of the application. The leave granted on 06/ 10/ 2015 to apply for judicial review shall operate as a stay of the challenged notice. However, and for the avoidance of doubt, it is hereby declared that nothing in this order shall authorize the Ex parte Applicant to sell in his premises any illicit liquor howsoever described. This clarification shall be part of the order of stay. now granted. It is so ordered. Costs shall be in the substantive motion.”

21. The respondent replied via affidavit sworn by Joseph Gatore on 31/7/2023. But no submissions were filed as directed by the Court.

22. That the Fourth Schedule Part 2 paragraph 4 of *the Constitution* and Section 3 of the Nyandarua County *Alcoholic Drinks Control Act*, 2019 entrusts the County Government of Nyandarua with the function of issuing liquor licenses to bars operating within Nyandarua County.

23. That the Respondents issued licenses to the ex-parte applicants in 2022 to carry on the business of selling liquor in their establishments known as Que Bar and Western Inn Rest and Lodging whose licenses expired at the end of 2022.

24. That the 3rd Respondent received applications from the ex-parte applicants seeking to renew their licenses for the year 2023.

25. In the discharge of its statutory mandate under Section 8(3) of the Nyandarua County *Alcoholic Drinks Control Act*, 2019, the 3rd Respondent considered the ex-parte Applicants applications and inspected Que Bar and Western Inn Rest and Lodging premises.

Annexed hereto and marked JG-I is a copy of the inspection report.



26. That the 3rd Respondent upon considering the ex-parte applicants' applications for licenses on merit refused to renew ex-parte applicants' licenses since they had not complied with the provisions of the Nyandarua County *Alcoholic Drinks Control Act*, 2019.
27. That on 12th July 2023, the Respondents communicated in writing and informed the ex-parte applicants of their reasons for refusing to renew the licenses. In addition, the ex-parte applicants were accorded the right to appeal the decision of the Respondents, failure to which they were to close their bars within 7 days.

Annexed hereto and marked JG-2(a) and JG-2(b) are copies of the letters addressed to Mbaria Theresa Wanjiku and Kinyua Job Waruhiu.
28. That the Respondents received various appeals from aggrieved applicants who were advised to either close their bars, commit to complying with the provisions of the Nyandarua County Alcoholic Drink Control Act, 2019, or have their premises reinspected.

Annexed hereto and marked JG-3(a), and (b) are copies of letters and a list of appeals received by the Respondents and resolutions by the Respondents on Appeals lodged.
29. That the ex-parte applicants were accorded the right to be heard. However, the ex-parte applicants did not lodge any appeal with the Respondents. Consequently, ex-parte applicants neglected and/ or failed to exercise their right to be heard.
30. Furthermore, Section II(3)(b) of the Nyandarua County Alcoholic Drinks Act, 2019, provides that the Chief Officer responsible for matters of social services shall only issue or renew a license upon evidence of receipt that the applicant has paid the fee applicable to the license.
31. That the ex-parte applicants have not adduced any evidence of payment of the requisite license renewal fee.
32. That the ex-parte applicants intend to claw back the tremendous efforts to protect members of the public by the Respondents in enforcing the Nyandarua County *Alcoholic Drinks Control Act*, 2019.
33. That the implementation of the Nyandarua County *Alcoholic Drinks Control Act*, 2019 is extremely important and crucial as a measure taken by the Respondents to safeguard the interest of the members of the public who accessed alcohol from the ex-parte applicants' business premises.
34. The Applicant replied via Supplementary Affidavit sworn by Teresia Wanjiku Mbaria and Job Kinyua Waruhiu on 14/8/2023.
35. That the replying affidavit is founded on falsehoods and fabricated documents and thus the Honourable Court is turged to disregard the same.

Applicant Rejoinder

36. ...
37. That respondent aver that they are not aware that the applications for Liquor Licences were ever considered by the 3rd Respondent and no such proceedings and or minutes have been supplied in proof.
38. That it is not true that they had not complied with the provisions of the Nyandarua County *Alcoholic Drinks Control Act*, 2019, they deny receiving communication of rejection of the applications for renewal of the liquor licenses.



39. That the letters marked as annexures "JG-2(a) and "JG-2(b) were manufactured with this suit in mind and we say so because: -
 - a. The letters are dated 12/7/2023 whereas the application for leave was filed on 4/7/2023.
 - b. There is no proof that the letters were ever served upon us or our advocates on record.
 - c. The letters dated 12/7/2023 purported to give us 7 days to file appeals whereas appeals by dissatisfied applicants were heard on the 14/7/2023 as per annexure marked "JG -3(b).
 - d. The respondents have not attached copies of similar letters written to the aggrieved applicants mentioned in the documents marked as annexure "JG -3(b).
 - e. The reasons given for rejection are surprisingly similar despite us operating different entities.
40. That that they deny committing the acts referred to in the fabricated letters dated 12/7/2023 and marked as annexure "JG-2)a)and 2(b)" and had they been accorded a hearing as required under *the Constitution*, they would have demonstrated that the allegations are false and applied to cross-examine the source of the false allegations.
41. That if they had been informed of the reasons for the rejection of their applications, they would have filed appeals and the request for the grounds made vide their letter dated 29/6/2023 annexure "TWM3" but none was provided.
42. That they are more than willing to pay the Liquor license charges and any other levies that are applicable for the operation of their businesses as they have done in other years but their attempts to pay are declined by the Respondents on grounds that their applications for licenses were declined.
43. That they are Law abiding citizens operating legal/lawful businesses and selling products authorized by the Law and they operate very decent establishments as seen in the photographs marked as annexures "TWM3" and "JKW3" and they have never been involved in the sale of illicit or counterfeit goods.

Issues, Analysis And Determination

44. After going through the pleadings submissions filed, I find the issues are; Whether the leave granted by this Honourable Court should operate as a stay of the Respondent's decision to deny the applicants' Alcoholic Drinks Retail licenses for the year 2023 and costs.
45. The threshold of grant of stay pending application for judicial review was enunciated in the case of Republic-vs -city Council Of Nairobi Exparte Inderpal Sing & 2 Others [2012] e KLR where the Court observed:-

“The purpose of stay in judicial review proceedings is to suspend the validity and implementation of the impugned decision to avoid the possibility of actions or decisions by public bodies which are suspected to be illegal or irregularly made being implemented to the detriment of parties affected by the said decisions before a final determination is made by the court on the illegality or otherwise of the impugned decision after hearing all parties to the dispute in the substantive motion”.
46. This is the reason why in considering applications such as the present one, the court should ensure that the Applicant's substantive motion is not rendered nugatory by the acts of the Respondent and other interested parties during the pendency of the main application.



47. Issue as to non-consideration of the application of licences has been raised and so is the none-provision of grounds for rejection of the applications. The respondent's replying affidavit is said to be founded on falsehoods and fabricated documents which persuades this court to have the matter interrogated on merit.

48. The granting leave to the lodging of judicial review motion the found that there was prima facie arguable case as was held in the case of Republic-vs-principal Secretary Agriculture, Livestock, And Fisheries & 3 Others Ex-parte Douglas M. Barasa & 2 Others (2015] eKLR where the Court held as follows:-

“Whereas the strength or weakness of the applicant's case is a factor to be taken into consideration since it would not be right to stay proceedings where the Court is clear in its mind that the chances of the judicial review proceeding being successful are slim, in granting leave the Court is under an obligation to determine whether a prima facie case has been made out and ought not to be granted as a matter of course...”

49. I am persuaded by holding that, the reason why in considering applications such as the present one, the court should ensure that the Applicant's substantive motion is not rendered nugatory by the acts of the Respondent and other interested parties during the pendency of the main application. See Republic-vs-principal Secretary Agriculture, Livestock, And Fisheries & 3 Others Ex-parte Douglas M. Barasa & 2 Others supra.

50. Thus, the court grants the orders; as follow:

- i. That the leave granted herein shall operate as a stay of the Implementation of the impugned decision until the motion herein is heard and determined or until further orders of the court.
- ii. The Respondents are at liberty to re-invite applicants for application for a license under the Nyandarua County [Alcoholic Drinks Control Act, 2024](#) and if the decision is made in compliance with the provisions of the same Act, the stay herein shall lapse notwithstanding that the instant matter (JR Motion) may be pending.
- iii. Costs in the main cause.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 1ST DAY OF FEBRUARY 2024

.....

C KARIUKI

JUDGE

