



Serem & 106 others v Nandi County Government & another (Petition E002 of 2023) [2024] KEHC 2342 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
PETITION E002 OF 2023**

JR KARANJA, J

MARCH 7, 2024

BETWEEN

GEOFFREY KIPLAGAT SEREM & 106 OTHERS & 106 OTHERS & 106 OTHERS & 106 OTHERS & 106 OTHERS PETITIONER

AND

NANDI COUNTY GOVERNMENT 1ST RESPONDENT

NANDI COUNTY ALCOHOLIC DRINKS REGULATION COMMITTEE 2ND RESPONDENT

RULING

1. It is without doubt that the Constitution of Kenya, 2010 expresses its Transformative Nature in the form of Progressive Principles and Values of Governance inasmuch as it devotes its most elaborative chapter to the protection of Individual Rights and Freedom.

Thus, all persons aggrieved by governance action are given the necessary locus standi to bring legal action against any Public Governance and Administrative Organ perceived to be breaching or violating Individuals Fundamental Rights and Freedoms.

2. Public administration is nothing more than exercise of executive powers at both the National and County levels. It is therefore an aspect of public and constructional law and this precisely explains why the present petition by the one hundred and seven (107) residents of Nandi County who carry out the liquor trade within the County raise issues with the County Government of Nandi's and its Alcoholic Drinks Regulation Committee (Respondents), action of closing their business premises and refusing to renew their respective liquor licences for the year 2023 in what they contend was a clear violation of their Constitutional Rights under Article 47 of the Constitution.

3. The Petitioners therefore seek against the Respondents the following orders: -



- I. A declaratory order holding that the decision of the Respondents of shutting down the Petitioners' bar business is unconstitutional, null and void abinitio.
- II. Conservatory order be issued quashing the implementation and enforcement of the decision of the Respondents of shutting down the particulars bar business.
- III. A declaration that rights under Article 47 of the Constitution of Kenya, 2010, were violated by the Respondents.

In addition the Petitioner seek costs against the Respondents and any other order that the court may deem just and expedient.

4. The petition was filed together with the Notice of Motion dated 22nd June 2023 in which conservatory orders are sought against the Respondents pending inter-parties hearing and determination of the application and thereafter, pending hearing and determination of the petition on grounds that the Petitioners have a "prima-facie" case with probability of success and that damages shall not be an adequate remedy.

Further that the balance of probabilities tilts in favour of the Petitioner's and that the Petitioners legitimate expectation is to be given a licence to operate once compliance has been done.

5. When the motion was presented before this court "ex-parte" on the 22nd June 2023, interim orders in terms of prayer (b) of the application were granted to wit

"Pending the hearing and determination of the application inter-parties conservatory orders do issue staying the decision of the Respondents closing the Petitioners/Applicants bar business situated at Nandi County."

Thus, the "status quo" existing between the parties was maintained and is still maintained to date.

However, on the 10th July 2023, the Respondents filed the Notice of Preliminary Objection dated 6th July 2023, primarily against both the petition and the accompanying Notice of Motion.

6. The objection is anchored on grounds that: -
 - a. The entire petition and the application are defective, frivolous, incompetent and an abuse of the court process as this court has no jurisdiction to entertain the application in the first instance.
 - b. This honourable court lacks jurisdiction to hear and determine the petition and the application as the Applicants have failed to exhaust the available dispute resolution mechanisms provided for under Section 17 of the Nandi County Alcoholic, Drinks Control Act 2014.
 - c. This honourable court lacks jurisdiction to hear and determine the petition and the application as the Applicants have violated Provision of Section 9(2) of the Fair Administrative Actions Act.
7. Even though the objection is seemingly and/or ironically directed at eleven of the Petitioners i.e. Petitioners Numbers 35, 41, 79, 82, 84, 85, 90, 91, 98, 103 and 107, its end result would invariably affect all the Petitioners and the entire petition together with all that appertains to it including the impugned Notice of Motion dated 22nd June 2023 and the pending Notice of Motion dated 12th July 2023 for enjoinder of additional Petitioners.



8. Nonetheless, with regard to Preliminary Objections the legal position was clearly articulated in the famous case of *Mukisa Biscuit Manufacturing Limited v West End Distributors* (1969) EA 696 to the effect that: -

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”

9. The present objection is all facets turns on the jurisdiction of this court to deal with this matter wholesome. A question on the jurisdiction of a court raises a pure point of law thereby rendering the Objection proper and competent before the court.

As was held by the Court of Appeal in *Owners of the motor vessel “Lilions” v Caltex Oil (K) Limited* (1989) KLR 1: -

“..... it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.

Jurisdiction is everything, without it, a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.

A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

10. The Supreme Court of Kenya in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited and Others* (2012) eKLR, stated that: -

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. The issues as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”

11. In the Publication “*words and phrases legally defined*” Vol. 3 I – N at Page 113, jurisdiction is defined thus: -

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matter presented in a formal way for its decision.....

The limits of this authority are imposed by the stature, charter or commission under which the court is constituted, and may be extended or restricted by the like means. If no restrictions or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake of both these circumstances’ Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”



It was this definition which most likely inspired and informed the decision in the owners of the motor vessel “Lilian S” case (*supra*)

12. The High Court is established under Article 165(1) of the Constitution and its jurisdiction is set out in Sub-Section (3) of the Article to include “*inter-alia*” unlimited original jurisdiction in Criminal and Civil Matters, Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and other jurisdiction, original or appellate, conferred on it by legislation.
13. The gravamen of this petition is the alleged violation of the Petitioners’ constitutional right under Article 47 of the Constitution by the Respondents.

In that regard, this court does have the necessary jurisdiction to deal with this petition and all that which accrues from it unless of course, the exercise of such jurisdiction is limited or restrained in any manner by the existence of other provisions of the law within or even without the constitution.

14. As for the impugned Notice of Motion, the Petitioners seek conservatory orders against the Respondents. This prayer is also part of the prayers sought by the Petitioners in the petition. Such remedies are provided for under the Constitution and are intended to keep the subject matter of the dispute in place as opposed to injunctive orders which attach or relate to a particular individual. They fall within the realm of public law being orders to facilitate ordered functioning within public agencies as well as to uphold the adjudicatory authority of the court in the public interest (see, Judicial Service Commission v Speaker of the National Assembly and Another (2013) eKLR and Gatirau Peter Munya v Dickson Mwenda Kithinya and two others (2014) eKLR).
15. Having considered the Respondents’ objection on the basis of the supporting grounds and the rival submission by the disputants it became clear to this court that the real question here or the main issue for determination is whether at this stage the court ought to divest itself of the jurisdiction to deal with this matter on the strength of the Constitutional Principles Under Article 159(2)(c) of the Constitution on which the doctrine of exhaustion is founded and which provides for alternative forms of dispute resolution for which the objection is anchored on account of Section 17 of the Nandi County Alcoholic Drink Control Act, 2014 and Section 9(2) of the Fair Administrative Action Act.
16. In principal, it is not the work of courts to interfere with the discharge of duty by other public organs or agencies unless it is shown that they acted in violation of the constitution.

As was held in Dr. Alfred Mutua v The Ethics and Anti Corruption Commission (EACC) and others (2016) eKLR, it is the duty of the courts to protect not only the administrative and operational independence, of public organs but also to protect citizens in ensuring that such functions have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.
17. A party failing to find satisfaction with the decision of a public organ has an avenue of redress within the framework of judicial review in the High Court, followed by appellate procedures which in a proper case may lead up to the Supreme Court. A shortened procedure would therefore be lacking in merit.
18. Under Article 165 (6) of the Constitution, the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi – judicial function. Judicial review jurisdiction in the Constitution is traceable to the provision. Thus, Article 47 of the Constitution specifically deals with judicial review of administrative action and it is pursuant to the provision that parliament enacted the Fair Administrative Act, 2015. Section 2 of the Act defines “Administrative action” to include: -



- i. The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
 - ii. Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;
19. The doctrine of exhaustion is captured in the Act under Section 9(2) (3) and (4) and its applicability is essentially based on the principles that “where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures “(See, *Speaker of the National Assembly v James Njenga Karume* (1992) KLR 21).
20. In *Geoffrey Muthiga Kabiru & Others v Samuel Munya and Others* (2015) eKLR, the Court of Appeal held that: -
- “It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked. Courts ought to be fora of last resort and not the first port of call, the moment a storm brews.....
- The exhaustion doctrine is a sound one and serves the purpose of ensuring a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the court.”
21. Indeed, Section 9(2), (3) and (4) of the *Fair Administrative Action Act*; provides that: -
- “(2) The High Court or a Subordinate Court Under Sub-Section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
 - (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in Sub-Section (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under Sub-Section (1).
 - (4) Notwithstanding Sub-Section (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the Applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”
22. The *Act* under Section 3, applies to all state and non-state agencies, including any person exercising administrative authority or performing a judicial or quasi-judicial function under the Constitution or any written law or whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates. Both Respondents herein fall within the purview of the Act for the actions they took against the Petitioners leading to this petition and their objection thereto.
23. They (Respondents) imply and contend that the Petitioners invoked the jurisdiction of this court rather pre-maturely having failed to exhaust the available internal mechanisms for dispute resolution



under Section 17 of the [Nandi County Alcoholic Drinks Control Act](#), 2014, which provides for review of a refusal to issue or renew a licence in the following terms: -

- “(1) An Applicant whose application for a new licence, to renew on transfer a licence has been refused or cancelled may within fourteen days of such refusal, request in writing the review of such refusal to the Review Committee.
- (2) A person aggrieved by the decision of the Sub-County Committee to grant a new licence or to renew a licence may request in writing the review of such decision.
- (3) Upon receipt of a request under this Section the Review Committee shall notify the Sub-County Committee of the pending review, be issued in the name of the body corporate.
- (4) The Review Committee shall within twenty – one days consider and make a final determination on the request for review.
- (5)

24. However, under Section 18 of the Act, the right to request for review under Section 17 does not prejudice an aggrieved person’s right to seek any other legal remedy. Perhaps this was the reason why the Petitioners decided to invoke this courts jurisdiction rather than exhaust the Respondents’ dispute resolution mechanisms under the [Nandi County Alcoholic Drinks Control Act](#), 2014 whose objective is to provide for the licensing and regulation of the production, sale, distribution, consumption and outdoor advertising, of alcoholic drinks and connected purposes.

25. Having invoked the jurisdiction of this court on the basis of the relevant provisions of the [Nandi County Alcoholic Drinks Control Act](#) and the relevant provisions of the Kenya Constitution, 2010, the petitioners placed themselves in a pole position of a conflict with the doctrine of exhaustion which requires that alternative procedures be exhausted prior to a party invoking the jurisdiction of the court by way of constitutional petitions such as the present petition.

26. In the English Case of [Re-Preston](#) (1985) AC 835, it was observed that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. And in [Republic v National Environmental Management Authority](#) (2011) eKLR, it was held that: -

“The principle running through these cases is where there was an alternative remedy and specially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.”

27. The onus was on the Petitioners to satisfy this court that they ought to be exempted from resorting to the available remedies under the [Nandi County Alcoholic Drinks Control Act](#), 2014 on account of exceptional circumstances. They would in that way also show that they are exempted from the applicability of the doctrine of exhaustion upon them.

28. This court is not so satisfied for the reasons that the Petitioners have failed to demonstrate exceptional circumstances which shields them from the doctrine of exhaustion such as inadequacy of audience before the Respondents’ appeals or review committee, unsuitability of the internal review process in the context of this case or that the remedy provided under the applicable statute is less convenient or less appropriate.



29. Much as the Petitioners were required to exhaust the Respondents' dispute resolution mechanisms before invoking the jurisdiction of this court, the Respondents were also required to strictly comply with the provisions of their *Alcoholic Drinks Control Act* prior to taking any drastic administrative action against the Petitioners including closing down their respective business premises in total disregard to their right to operate their lawful business and earn a living.

30. In particular, the Respondents must strictly adhere to the provisions of Section 16(4) of the *Alcoholic Drinks Control Act* which provides that: -

“Where an application for the renewal of a licence has been made and the Sub-County Committee has not by the date of expiration of the licence reached a decision thereon, such licence shall continue in force until the decision of the Sub-County Committee is made known”

The provision, would in the opinion of this court, apply with equal force or “mutatis – mutandis” to the pending decisions of the Respondents' Review Committee.

31. In sum, for all the reasons forgoing it is the finding of this court that the present objected is merited and is hereby sustained. Further, that the jurisdiction of this court to deal with this matter was prematurely invoked by the Petitioners and is hereby divested from this court for them to exhaust the Respondents' internal dispute resolution mechanisms.

32. This court, having divested itself of the jurisdiction to deal with this matter at this stage must now down its tools with orders that both the impugned Notice of Motion and Petition dated 22nd June 2023 be and are hereby struck out and dismissed in their entirety. The parties shall bear their own costs of the application and petition.

Orders accordingly.

DELIVERED AND DATED THIS 7TH DAY OF MARCH, 2024

J. R. KARANJAH,

JUDGE

