



Bett & 5 others v County Govt of Bomet & 4 others (Petition 1 of 2024) [2024] KEHC 7454 (KLR) (19 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7454 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
PETITION 1 OF 2024**

**RL KORIR, J
JUNE 19, 2024**

**IN THE MATTER OF THE ALLEGED THREAT OF CONTRAVENTION
OF ARTICLES 2 AND 10 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ARTICLES 1,2,3,19(2), (3), 21, 22, 23, 27, 28, 35,
41, 47, 159, 165 AND 258 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

**LEONARD KIPRONO BETT 1ST PETITIONER
CHEPKWONY EDWIN 2ND PETITIONER
STEPHEN KIPKOECH RONO 3RD PETITIONER
DAVID KIPLANGAT TONU 4TH PETITIONER
RONO KIPROTICH 5TH PETITIONER
TINEKA EVANS 6TH PETITIONER**

AND

**COUNTY GOVT OF BOMET 1ST RESPONDENT
OCS NDANAI POLICE STATION 2ND RESPONDENT
COUNTY COMMISSIONER BOMET 3RD RESPONDENT
RICHARD SOI 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**



RULING

Background

1. The Petitioners moved this court through the Petition dated 14th February 2024 where they sought declaratory orders against the Respondents. The Petitioners contended that the intended closure of their bars within Makutano Centre was unconstitutional and illegal and it was in violation of Articles 27, 28 and 47 of the *Constitution* of Kenya, 2010.
2. Alongside the Petition, the Petitioners filed a Notice of Motion Application dated 14th February 2024 where they sought the following Orders:-
 - I. Spent.
 - II. That this Honourable Court be pleased to issue a conservatory order of injunction restraining the Respondents together with their agents, servants and/or workers from interfering with the Petitioners' businesses being bars pending the hearing of the Petition filed herewith.
 - III. That this Honourable Court be pleased to direct the 1st Respondent to allow the Petitioners to apply for licenses for the year 2024 pending the hearing and determination of this Petition.
 - IV. That the Petitioners be restrained from harassing, arresting and/or detaining the Petitioner's property pending the hearing and determination of this matter.
 - V. That this court be at liberty to make such further orders as it deems fit to meet the ends of justice.
 - VI. That the costs of this Application be provided for.
3. In response to the Application, the 1st Respondent (County Government of Bomet) filed a Notice of Preliminary Objection dated 8th March 2024.

Preliminary Objection

4. The 1st Respondent filed the Preliminary Objection dated 8th March 2024 and relied on the following grounds:-
 - I. That the Petition and Application herein is premature for the reasons that;
 - a. The Application and Petition herein offend the doctrine of exhaustion. That the affected Petitioners have channels within Bomet County Alcoholic Beverages and Management Act.
 - b. That the Petition and Application offend the provisions of Section 9(1), (2), (3) and (4) of the *Fair Administrative Actions Act*, 2015.
 - c. That the Petitioners failed to follow the dispute resolution mechanisms provided under sections 11, 12, 19 and 21 of *Bomet County Alcoholic Beverages and Management Act*, 2014. This Honourable Court should be the last port of call.
 - II. That this Honourable Court lacks jurisdiction to hear and determine the Petition and Application filed herein.
 - III. That the prayers sought in the Petition and Application cannot issue for non-joinder and mis-joinder.



- IV. That the Petition and Application herein is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore is unsustainable in the obtaining circumstances.
- V. That the Petition and the Application be dismissed with costs.

The Response

5. The 2nd Respondent (Chepkwony Edwin) filed a Replying Affidavit dated 8th March 2024. He stated that the Preliminary Objection was fatally defective and without merit. That he filed the present Application and Petition after the Applicant issued verbal directives to him and his fellow bar owners within Makutano Junction to close down their businesses. The 2nd Respondent further stated that the directives were discriminatory as they only targeted a section of bar owners within Makutano Junction.
6. It was the 2nd Respondent's case that the Applicant later closed down their businesses and threatened to arrest anyone operating a liquor business within Makutano Junction.
7. The 2nd Respondent stated that his rights under Article 27 of the *Constitution* of Kenya were infringed upon. That this court had the jurisdiction to hear and determine the questions on human rights violations as envisioned in Article 23 of the *Constitution* of Kenya.
8. It was the 2nd Respondent's case that the Applicant failed to issue written reasons for their decision and were unwilling to discuss the issue outside court. That they instead issued threats of arrest to all bar owners. It was the 2nd Respondent's further submission that they had pursued alternative dispute resolution mechanisms but they had not been successful.
9. The 2nd Respondent stated that the instant suit did not offend provisions of Sections 11, 12, 19 and 21 of the Bomet County Alcoholic Beverages and Management Act, 2014.
10. On 30th April 2024, I directed that the Preliminary Objection be canvassed through written submissions.

The Applicants' submissions

11. The County Government of Bomet (1st Respondent/Applicant) through its submissions dated 7th May 2024 submitted that the Respondents/Petitioners did not follow the procedure provided in the Bomet Alcoholic Beverage Control and Management Act, 2014 and hence offended the doctrine of exhaustion. That the doctrine ensured that there would be a postponement of judicial consideration to ensure that parties used dispute resolution mechanisms outside the court system. That where a dispute resolution mechanism existed outside court, courts should be the last resort and not the first port of call and they should exercise restraint in exercising their jurisdiction. It relied on *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR, *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 156 others* [2015] eKLR and Sections 9 (1), (2), (3) and 4 of the Fair Administrative Actions Act, 2015.
12. It was the 1st Respondent/Applicant's submission that this court lacked jurisdiction to hear and determine the Application and the Petition. That the Bomet Alcoholic Beverage Control and Management Act, 2014 aimed at having any disputes adjudicated upon by the Sub County Committee with an appeal of any decision to the Appeals Board. That the Petitioners/Respondents prematurely



invoked this court's jurisdiction as the dispute resolution mechanism was provided for under Section 19(1) of the *Bomet Alcoholic Beverage Control And Management Act*, 2014. It relied on *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR and *Mary Wambui Munene v Peter Gichuki Kingara & 6 others* [2014] eKLR.

13. The 1st Respondent/Applicant submitted that the Application and Petition could not issue for non-joinder of parties. That the Petitioners failed to include the Sub County Alcoholic Beverage Control Committee as a party to the Petition and Application. It relied on *Apex Finance International Limited & another v Kenya Anti-Corruption Commission* [2012] eKLR.
14. It was the Applicant's submission that the Application was an abuse of the court process as the Petitioners' grievances were subject to the resolution procedure as provided by the *Bomet Alcoholic Beverage Control And Management Act*, 2014. It further relied on *Teresa Cheruiyot t/a Cool Shade Bar & 4 others v County Chairman Liquor Licensing Committee- Uasin Gishu County & 4 others* [2019] eKLR where the court held that the Applicants had to follow the processes in law and exhaust them before filing for a Judicial Review.
15. The Applicant prayed that the Petition and the Application be struck out with costs.

The Respondents'/Petitioners' submissions

16. Through their submissions dated 21st May 2024, the Respondents submitted that the *Fair Administrative Action Act* was established to ensure that every citizen was entitled to administrative action that was expeditious, efficient and procedurally fair. That section 9(4) of the *Fair Administrative Action Act* provided a way out of exhausting the alternative dispute resolution remedies. They relied on *Chief Justice and President of the Supreme Court of Kenya & another vs Khaemba (Civil Appeal 522 of 2019)* [2021] KECA 322 (KLR) (17 December 2021) (Judgment) and *Fleur Investments Limited vs Commissioner of Domestic Taxes and another* (2018) eKLR.
17. It was the Respondents' submission that they had raised exceptional circumstances in line with section 9(4) of the *Fair Administrative Action Act*. That the County Government of Bomet (Applicant) had not lived up to the aspirations of the *Bomet Alcoholic Beverage Control and Management Act*, 2014 but instead the internal process was unfair as it was run as a one man show. It was their further submission that the Applicant had not acted on their letter dated 13th December 2023. That in the absence of a clear procedure, the said letter be deemed to have been filed in the Appeal's Board.
18. The Respondents submitted that this court had original jurisdiction and the remedies in the *Bomet Alcoholic Beverage Control and Management Act*, 2014 did not oust this court's jurisdiction.
19. It was the Respondents' submission that by virtue of Order 1 Rule 9 of the Civil Procedure Rules, a suit could not be defeated by reason of misjoinder or non-joinder of parties. That courts have a duty to sustain suits rather than terminate them. They relied on *DT Dobie Company (Kenya) Ltd v Joseph Muchina & another* [1980] eKLR and *Deported Asians Custodian Board v Jaffer Brothers Ltd* [1999] 1 E.A 55 (SCU).
20. The Respondents submitted that the Petition and Application did not offend the doctrine of exhaustion. That the Preliminary Objection was misconceived, without merit and was an abuse of the court process. The Respondents further submitted that the Preliminary Objection should be dismissed with costs.



Analysis And Determination.

21. I have considered the Preliminary Objection dated 8th March 2024, the Replying Affidavit dated 8th March 2024, the Applicant's written submissions dated 7th May 2024 and the Respondents' written submissions dated 21st May 2024. The only issue for my determination was whether the Preliminary Objection is merited.
22. What constitutes a Preliminary Objection was set out in the oft cited case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, where it was held 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 the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”
23. In *Daqare Transporters Limited v Zainab Hashi* [2021] eKLR, Mogeni J. held:-

“In the case of *Ahmed Noorani & another v Rajendra Ratilal Sanghani* [2020] eKLR the Court of Appeal held that: “For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.”
24. Likewise in *Karata Ernest & others v Attorney General* (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010), the Tanzanian Court of Appeal stated: -

“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.”
25. The Applicant contended that the Respondents' grievances ought to have been ventilated through the dispute resolution mechanisms provided in the Bomet Alcoholic Beverage Control and Management Act, 2014 before approaching this court. That the Respondents had offended the doctrine of exhaustion hence making the present Application and Petition premature. On the other hand, the Respondents stated that the Applicant ran its affairs on the alcoholic beverage sector as a one man



show. That the process was unfair and that was why they had approached this court. They further stated that they had proved exceptional circumstances as provided for under section 9(4) of the *Fair Administrative Action Act*.

26. This court is keenly aware of its jurisdiction. the *Constitution* of Kenya grants this court unlimited jurisdiction as stated by the Respondents/Petitioners. Article 165 (3) (a) of the *Constitution* of Kenya provides:-

Subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters.

It was however trite that not every claim of violation of the law or procedure could be entertained in the first instance as a constitutional violation. This was particularly so where there existed a mechanism or statutory provisions for redress.

27. It was clear that the dispute between the Applicant and the Respondents was in regards to the closure of their bar businesses within Makutano Junction. The Respondents had been denied licenses or were apprehensive that they would be stopped from selling alcoholic beverages within the County.

28. The governing law on the licensing and sale of alcohol within the County was the Bomet Alcoholic Beverage Control and Management Act, 2014. In the event a party is denied a license as in the present case, Section 19 of the *Bomet Alcoholic Beverage Control and Management Act*, 2014 provides the procedure to be followed by an aggrieved party. The aforementioned Section 19 provides:-

- (1) An applicant whose application for a new licence, to renew or 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 Appeals Board.
- (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 Appeals Board shall notify the sub-county committee of the pending review.
- (4) The Appeals Board shall within twenty-one days consider and make a final determination on the request for review.
- (5) The Appeals Board may-
 - (a) dismiss the request for review if in its opinion, the request is frivolous or vexatious;
 - (b) uphold the decision of the committee;
 - (c) annul the decision of the committee
 - (d) give directions to the sub-county committee with respect to any action to be taken;
 - (e) make any other declaration as it may deem fit.

29. The Act then provides an appeal process to a party that is dissatisfied with the decision of the Appeals Board. Section 21 of the *Bomet Alcoholic Beverage Control and Management Act*, 2014 provides:-

An applicant under section 17 who is not satisfied with the decision of the Appeals Board may within twenty-one days appeal to the High Court.

30. It has often been held in various authorities that where there exists an alternative mode of dispute resolution, a party should exhaust such processes before approaching a court of law. In the case of



Joseph C. Kiptoo & Another v Kericho Water And Sewerage Company [2016] eKLR, Mumbi J. (as she then was) held:-

“It has been stated time and again that where an Act of Parliament provides for a mechanism for resolution of disputes, that mechanism must be strictly followed.”

31. Similarly, in the case of *The Speaker of the National Assembly v Karume* [2008] 1KLR (E.P) 425, the Court of Appeal held that:-

“In our view there is considerable merit that where there is a clear procedure for the redress of any particular grievance prescribed in the Constitution or an Act of Parliament, the procedure should be strictly followed.”

32. The Petitioners/Respondents stated that section 9 (4) of the Fair Administrative Action Act provided an exception to the doctrine of exhaustion. For purposes of clarity, section 9 of the Fair Administrative Action Act provides:-

- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.
- (2) The High Court or a subordinate court under subsection (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 subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1).
- (4) Notwithstanding subsection (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.
- (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

33. The exceptional circumstance that the Petitioners/Respondents stated that they demonstrated was the letter dated 13th December 2023 to the 1st Respondent/Applicant which elicited no response from the 1st Respondent/Applicant. I have looked at the Replying Affidavit dated 8th March 2024 sworn by the 2nd Petitioner/Respondent and he did not attach the said letter. The letter was only referred to in the Petitioners/Respondents' submissions dated 7th May 2024.

34. The place of submissions was stated by the Court of Appeal in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR where it held:-

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed



there are many cases decided without hearing submissions but based only on evidence presented.” (Emphasis mine)

35. Similarly, I find persuasion in *Kenya Alliance Insurance Co. Ltd v Thomas Ochieng Apopa (suing as Administrator of the Estate of Pamela Agola Apopa)* deceased [2020] eKLR, where Aburili J. held:-

“My finding is that submissions are not evidence and cannot be substitute of pleadings or evidence adduced before a trial court. Before the trial court, the parties are expected to adduce credible evidence to establish/prove their respective assertions or contentions and the court is expected to analyze that evidence and arrive at a conclusion. Submissions however well-choreographed cannot take the place of evidence in a trial court, unlike before an appellate court where submissions take the place of arguments for or against the respective grounds of appeal.” (Emphasis mine).

36. Flowing from the above, it is my finding that the Petitioners/Respondents failed to demonstrate the exceptional circumstance that would create an exception to the doctrine of exhaustion.

37. In the final analysis, the Bomet Alcoholic Beverage Control and Management Act, 2014 provided a dispute resolution mechanism as illustrated earlier in this Ruling. This court’s jurisdiction is to be invoked if a disgruntled party wishes to appeal the decision of the Appeals Board as envisioned under section 21 of the Bomet Alcoholic Beverage Control and Management Act, 2014.

38. It is my finding therefore that the Notice of Motion Application and Petition both dated 14th February 2024 are premature.

39. In the end, the Preliminary Objection dated 8th March 2024 has merit. Accordingly, the Notice of Motion Application and Petition both dated 14th February 2024 are struck out.

40. I make no orders as to costs

41. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 19TH DAY OF JUNE 2024.

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R.LAGAT-KORIR

JUDGE

Ruling delivered in the absence of the parties. Mr Siele (Court Assistant).

