



**Nest Lounge & Grill v Directorate of Liquor Control and Licensing; Osino (Interested Party)
(Miscellaneous Application E030 of 2023) [2024] KEHC 7536 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7536 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E030 OF 2023**

OA SEWE, J

JUNE 13, 2024

**IN THE MATTER OF AN APPLICATION BY FRANCIS WAICHOYA TRADING
AS NEST LOUNGE & GRILL FORMERLY ABADARE BAR & RESTAURANT 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

AND

**IN THE MATTER OF UNLAWFUL HARASSMENT & INTIMIDATION
BY THE DIRECTORATE OF LIQUOR CONTROL AND LICENSING**

BETWEEN

NEST LOUNGE & GRILL APPLICANT

AND

DIRECTORATE OF LIQUOR CONTROL AND LICENSING RESPONDENT

AND

PAULINE AWINO OSINO INTERESTED PARTY



RULING

1. Before the Court for determination is the Notice of Motion dated 15th February 2024. It was filed by the applicant, Nest Lounge & Grill, under Sections 1A, 2A, 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya for the following orders:
 - (a) Spent
 - (b) That pending the hearing and determination of the application, the Court be pleased to grant the following orders:
 - (i) a conservatory order in the nature of injunction restraining the respondent, its agents, officers or any other persons acting under its instructions from further visiting the applicant's business with the intention of closing it down.
 - (ii) a mandatory injunction directing the respondent to withdraw the letter dated 15th February 2024.
 - (iii) an order to direct the National Environment Management Authority to conduct an assessment on noise pollution at the applicant's premises and thereafter file a report.
 - (iv) Leave to file the substantive judicial review application out of time since the 14 days earlier granted has lapsed.
 - (c) Such further or other orders as the Court may deem fit and just to grant.
 - (d) that costs of the application be in the cause.
2. The application was premised on the grounds that, on 15th February 2024, the respondent issued the applicant with a letter instructing the applicant to stop the sale of alcoholic drinks in its premises with immediate effect. The applicant averred that its business has all the necessary licences which were issued by the respondent and therefore the business is in compliance with the applicable law and regulations. It further explained that it filed a Notice of Withdrawal on 17th December 2023 which it later withdrew since the respondent had reneged on their agreement which was the basis of the said notice.
3. The applicant further averred that the delay in filing the judicial review application was occasioned by the mutual understanding between the parties that the suit be withdrawn so as to fast track the applicant's 2024 liquor licence application. Accordingly, the applicant averred that it is only just and equitable in the circumstances for it to be granted extension of time to present its grievance. It contended that it stands to suffer irreparable damage unless the orders sought are granted.
4. The application was supported by the affidavit of Francis Waichoya, to which were annexed a copy of the letter dated 15th February 2024, copies of the previous licences issued to the applicant, a copy of the Police Report and a copy of the Notice of Withdrawal dated 17th December 2023.
5. In response to the application, the respondent filed Grounds of Opposition date 25th March 2024, contending that:
 - (a) The ex parte applicant is a non-existent entity and therefore lacks the capacity to file this the suit.
 - (b) There is no substantive motion on record, the applicant having failed to file the same within the prescribed period of 21 days.



6. The application was also opposed by the interested party vide the Replying Affidavit sworn on 17th April 2024. The interested party averred that the deponent of the supporting affidavit has not disclosed his relationship with the applicant and therefore the nexus between the two has not been established. She further deposed that the Court allowed the applicant's application dated 21st September 2023 on terms; one of which was that the substantive application be filed within 14 days of the date of the ruling. That, having failed to comply with those terms, the applicant is not entitled to the Court's discretion.
7. The interested party further deposed that, since the leave granted on 11th April 2024 was restricted to the letter dated 18th September 2023, the current application is untenable because it concerns the letter dated 15th February 2024. She further averred that the applicant has not explained the delay in filing a substantive application. Accordingly, the applicant prayed for the dismissal of the application.
8. Pursuant to the directions given herein on 18th April 2024, the application was canvassed by way of written submissions. In the applicant's written submissions dated 4th March 2024, the following issues were proposed for determination:
 - (a) Whether the applicant is an existing legally recognized business entity.
 - (b) Whether the applicant is compliant in respect of County Government licences.
 - (c) Whether the interested party has locus standi.
 - (d) Whether the applicant colluded with County officials in an effort to deceive the Court.
9. Counsel for the applicant submitted that the company, initially known as Aberdare Bar & Restaurant, changed its name to Nest Lounge & Grill and has been in operation for the last 7 years. It was therefore the contention of the applicant that it is an existing legal entity as recognized in the case of *Salomon v Salomon* [1879] AC 78. The applicant further submitted that, although the interested party made serious allegations that the documents annexed to the supporting affidavit are forged, she failed to prove her allegations of fraud. Reliance was placed on Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya and the cases of *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR and *Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others*, Nairobi Civil Appeal No. 215 of 1996, to buttress the applicant's submissions.
10. The applicant made reference to Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, to support the assertion that the interested party is a busy body intent only on frustrating its business operations. The applicant further submitted that, having availed documents to prove its compliance with the applicable laws, it is entitled to the orders sought.
11. The respondent relied on the written submissions dated 27th May 2024 by which its counsel proposed the following issues for determination:
 - (a) Whether the applicant is a registered business.
 - (b) Whether the applicant filed a certificate for change of name before the Court to prove that Aberdares Mega changed its name to Nest Lounge & Grill.
 - (c) Whether Nest Lounge & Grill is using the permit of Aberdares Mega to conduct its business.
 - (d) Whether the applicant has locus standi to file the suit as Nest Lounge & Grill.
 - (e) Whether a non-existent party can file a suit.



12. It was the contention of the respondent that Nest Lounge & Grill is not a registered entity and therefore has no locus standi to file the instant suit. Among the authorities relied on by the applicant to buttress its submissions in this regard is *Law Society of Kenya v Commissioner of Land & Others*, Nakuru High Court Civil Case No. 464 of 2000. The respondent therefore prayed that the suit be struck out with costs.
13. The interested party relied on her submissions dated 29th May 2024. She argued that, since this is a judicial review matter in which leave was granted for a specific purpose on the basis of the letter dated 18th September 2023, the orders sought in the instant application in connection with the letter dated 15th February 2024 are misconceived. She relied on *Republic v Insurance Regulatory Agency; Ex Parte Xplico Insurance Co. Ltd & 2 Others* [2023] KEHC 27161 (KLR) (Judicial Review) (28 December 2023) (Judgment).
14. In the same vein, the interested party submitted that the prayers for temporary restraining and mandatory injunctions cannot stand. She submitted that the applicant failed to prove the requisite elements for such orders to issue, namely, a prima facie case, irreparable damage or a compelling reason to warrant the issuance of the orders. The interested party also pointed out that by asking for orders directed at NEMA to prepare a report on the noise levels at the facility, the applicant chose to ignore the ruling of the Court in which leave for the said prayer was specifically declined. She therefore posited that the prayer is superfluous.
15. On extension of time to file a substantive judicial review application, the interested party submitted that this discretion ought to be exercised sparingly. She relied on *Nicholas Kiptoo Arap Koris Salat v the Independent Electoral and Boundaries Commission & Others*, Supreme Court Application No. 16 of 2014 for the applicable principles. The interested party submitted that not even one of those principles was met by the applicant. She therefore urged for the dismissal of the application.
16. Arising from the foregoing, the issues for determination are:
 - (a) Whether the court can issue prayers 2(i), (ii) and (iii) of the application herein; and
 - (b) Whether, in the circumstances, the applicant is entitled to extension of time to file its substantive motion.

A. On prayers [i], [ii] and [iii] of the Notice of Motion:
17. In the application before the court the Applicant has sought conservatory orders to restrain the respondent from closing their establishment; a mandatory injunction directing the respondent to withdraw the letter dated 15th February 2024; and that the court be pleased to direct the National Environment Management Authority to conduct an assessment on noise pollution at the Applicant's premises and, thereafter, file its report before the Court.
18. It is plain from the foregoing summary that the instant application is convoluted in so far as it merged merit aspects with an application for judicial review. It has often been pointed out that judicial review is sui generis with its focus trained on process rather than merit. Accordingly, in *Emfil Limited v The Registrar of Titles Mombasa & 2 Others* (2014) eKLR and which was cited with approval in *Republic v County Government of Mombasa, Ex parte Outdoor Advertising Association of Kenya* [2018] eKLR, the court stated:

“Judicial Review proceedings, are proceedings of a sui generis nature subject to its own peculiar rules. While we appreciate Article 159 of the *Constitution* and the need to apply substantive justice, that article provides no justification for a court to ignore a specific



procedure provided by law and deliberately chosen by a litigant, nor does it allow a court to bend backwards to accommodate persons who have deliberately failed to protect or assert their interest.”

19. In the case of *R v Attorney General & 4 Others, Ex Parte Diamond Hashim Lalji and Ahmed Lalji* [2014] eKLR the court observed that:

“Judicial review applications do not deal with merits of a case but only with the process. In other words, judicial review only determines whether the decision maker had jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision-maker took into account relevant matters or did take into account irrelevant matters.”

20. It is therefore not appropriate for a party to seek conservatory or injunctive orders by way of judicial review. The Court of Appeal made the point in *Cortec Mining Kenya Ltd v Cabinet Secretary Attorney General and 8 Others* [2015] eKLR as hereunder:

“It is plain to see that in judicial review; the Court is concerned with public law remedies. An injunction is a private law remedy, and it can also serve as a public law remedy. However, in the context of judicial review, it is not available either in the High Court or in this Court on appeal under the Law Reform Act.”

(also see *Republic v Cabinet Secretary Lands & another; Orwa Group Ranch Representatives (Interested party) Ex-Parte Patrick Pkiach & 6 others* [2019] eKLR.)

21. It is also notable that the letter relied on herein dated 15th February 2024 has nothing to do with the leave that was granted herein on 11th April 2024; and therefore comprises a totally new cause of action that was not envisaged by the Order of 11th April 2024. In addition, the applicant seeks an order directing the National Environment Management Authority to conduct an assessment before the filing of a substantive application for hearing and determination. In the court’s Ruling dated 19th January 2024, the court found a similar prayer to be premature. That decision subsists and has not been set aside. The prayer is clearly untenable.

22. More importantly, since the substantive application is yet to be filed, there is absolutely no basis for the prayers now sought by the applicant at paragraphs 2 [i], [ii], and [iii]. It was therefore in vain that the Court was addressed on those aspects of the application, including the issues of *locus standi*. In *Republic v Communications Commission of Kenya, Ex Parte East Africa Television Network Limited* [2001] eKLR the Court of Appeal held:

“In our view, the fallacy in Dr. Kiplagat’s contention lies principally in his assuming that it is the chamber summons application for leave to apply for the orders which originates the proceedings under Order 53. The proceedings under that order can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted.”

23. I therefore have no hesitation in holding that prayers [i], [ii] and [iii] of the applicant’s Notice of Motion are misconceived and are for dismissal.



B. On extension of time:

24. The Applicant has sought for extension of time to file their substantive motion. The reason for the delay has been stated to be that the parties herein had agreed to withdraw the suit. The question to pose therefore is whether, in the circumstances, the applicant has made out a good case for extension of time to file a substantive motion.

25. There is no settled position as to whether the period of filing a substantive motion can be enlarged. There are two schools of thought on whether Order 53 allows for the enlargement of time for filing of a substantive motion. Under Order 53 Rule 3 of the *Civil Procedure Act*, the time stipulated to file a substantive motion has been indicated to be 21 days, which some courts have found, cannot be enlarged. For instance, in *Wilson Osolo v John Ojiambo Ochola & the Attorney General* CA No. 6 Nairobi of 1995 the Court of Appeal held:

“As can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under Order 49 of the Civil Procedure Rules, the procedure cannot be availed of the extension of time limited by statute, in this case, the Law Reform Act.”

26. The Court of Appeal further stated;

“It was a mandatory requirement of Order 53 Rule 3 (1) of the Civil Procedure Rules then (and it is now again so) that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days on 15th February 1985 there was no proper application before the Superior court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules.”

27. It is noteworthy however that the above decision was made in 1996. The current thinking, to which I subscribe, is as was applied in *Republic v Speaker of Nairobi City County Assembly & another, Ex Parte Evans Kidero* [2017] eKLR and *Republic v Public Procurement Administrative Review Board, Ex Parte Syner - Chemie Limited* [2016] eKLL, namely, that the court has power to enlarge the time stipulated in Order 53 Rule 3 of the *Civil Procedure Rules* by virtue of Articles 47, 48 and 159 of the *Constitution* regarding fair administrative action, access to justice and substantive justice.

28. The applicant herein explained that the delay was occasioned by the mutual understanding between the parties herein to withdraw the suit. The court has seen the Notice of Withdrawal dated 17th December 2023 that was filed for adoption, but which has since been retracted as acknowledged vide the Ruling of the Court dated 29th February 2024. In the premises, I find the explanation of the applicant plausible.

29. In view of the above, the application dated 15th February 2024 is partially allowed in the following terms:

- (a) Leave be and is hereby granted to the applicant to file the substantive judicial review application out of time.
- (b) The same be filed within 14 days from the date hereof.
- (c) Costs of the application to be borne by the applicant.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 13TH DAY OF JUNE
2024

OLGA SEWE

JUDGE

