



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

PETITION NO. E1 OF 2020

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

AND

IN THE MATTER OF ALLEGED THREAT OF CONTRAVENTION OF ARTICLES 19, 20, 21, 22, 24, 27, 33, 35, 40, 43, 47, 174 AND 186 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

ANTIPAS NYAMBU MANAMBO.....1STPETITIONER/APPLICANT

KENNETH MWILOLE MWADIME.....2ND PETITIONER/APPLICANT

LEAH MKAZALA MWACHARO.....3RD PETITIONER/APPLICANT

BRIGHTON MWIKAMBA WAMACHI.....4TH PETITIONER/APPLICANT

DAFTON MNYAMBO.....5TH PETITIONER/APPLICANT

VERSUS

COUNTY GOVERNOR OF TAITA TAVETA,

HON. GRANTON SAMBOJA.....1STRESPONDENT

COUNTY GOVERNMENT OF TAITA TAVETA.....2ND RESPONDENT

RULING

1. The petitioners/applicants herein filed a petition dated 9th October, 2020 to challenge the decision made by the respondents to close the petitioners/applicants' bars and restaurants within Werugha area. They averred that on 29th January, 2020 officers from the respondents' offices without notice stormed the petitioners/applicants' business premises namely, bars and restaurants, confiscated some of their licences and forcefully ordered closure of the businesses by placing padlocks on top of the petitioners/applicants' padlocks. They further averred that they petitioned the County Government of Taita Taveta but their issue has never been resolved to date.

2. They also stated that they were not a party to any discussions that led to the closure of their premises while the rest of the bars within Taita Taveta County were never closed. They also averred that in so doing, the officers did not give any reasons for their decision. That the respondents' actions had economically amputated them since they cannot transact in their businesses.

3. They further averred that they had been thrown into a state of hardship as a result of the respondents' unjustified action which amounted to a gross violation of their constitutional rights; and more particularly, their rights under Articles 2, 10, 19, 20, 21, 22, 24, 27, 33, 35, 40, 43, 47, 174 and 186 of the Constitution. It was in light of the foregoing that the petitioners/applicants pray for:

a) A declaration that the arbitrary closure of the petitioners' bars and restaurants within Werugha area by the respondents be declared unconstitutional null and void;

b) A declaration that the actions by the respondents are in violation of Articles 27, 43 and 47 of the Constitution of Kenya;

c) A Judicial Review order of Certiorari quashing the decision made by the respondents to close the petitioners' bars; and

d) Any other orders, writs and directions the Honourable Court considers appropriate and just to grant for purposes of the petitioners' constitutional rights.

4. The petition was filed together with an application under certificate of urgency dated 9th October, 2020 under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 rule 1 and Order 40 rule 2 of the Civil Procedure Rules, 2010 and any other enabling provisions of the law. In the application, the petitioners/applicants seek the following orders:-

1. Spent;

2. Spent;

3. That this Honourable Court be pleased to issue an order lifting the illegal closure of the petitioners' bars and restaurants within Werugha area in Taita Taveta County pending the hearing and determination of the petition;

4. Spent;

5. 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 and restaurants pending the hearing and determination of the petition filed herewith (sic);

6. That this Court be at liberty to make such further orders as it deems fit to meet the ends of justice; and

7. That the costs of this application be provided for.

5. The said application is premised on the grounds in support of it and the supporting affidavit sworn by Antipas Nyambu Manambo, the 1st petitioner/applicant on 9th October, 2020.

6. In response thereto, the respondents filed a replying affidavit sworn by Edwin Chahilu Ayiro, the County Attorney on 9th November, 2020 as well as a Notice of Preliminary Objection dated 9th November, 2020. The Preliminary Objection was premised on the following grounds-

a) That the suit is incurably defective and cannot stand in law;

b) That the prayers sought in the petition and application cannot issue for non-joinder;

c) That the Honourable Court lacks jurisdiction to hear and determine the application and petition;

d) That the petitioner did not exhaust all the remedies set out under Sections 5 and 22 of the Taita-Taveta County Alcoholic Drinks Control and Licensing Act, 2016; and

e) That the suit is premature under the doctrine of exhaustion.

7. The respondents prayed for the petition dated 10th October, 2020 to be struck out/dismissed with costs.

8. Directions were accordingly given that both the Preliminary Objection and the application would be canvassed by way of oral submissions.

Submissions on the Preliminary Objection.

9. Mr. Bwire, the respondents' Counsel submitted that the petition and the application had been filed against the wrong parties. That under Section 4 of the Taita Taveta County Alcoholic Drinks Control and Licensing Act, 2016, the Taita Taveta County Alcoholic Control and Licensing Board was created. That the said Board has multi-agency representatives including the County Police Commander, the County Commissioner, the County Director of Health and 4 members of the public who have knowledge in trade and health matters.

10. He submitted that Section 5 of the Taita Taveta County Alcoholic Drinks Control and Licensing Act provides for the functions of the Board, which include implementation of National Government Policy on the control of alcoholic drinks within the County and reviewing decisions of sub-counties. He further submitted that the Sub-County Alcoholic Drinks Control and Licensing Committee was established under Section 6 of the said Act. He indicated that the Committee comprises the Officer Commanding the Police Division, Sub-County Medical Officer and 3 residents of the County in compliance with the 1/3 gender rule.

11. It was submitted that the functions of the Committee as found under Section 6(1)(a) of the said Act include issuing licenses in accordance with the Act. Counsel for the respondent submitted that the Governor does not sit in either the Board or the Committee and even if one was to assume that there was a violation of the law by the committee, it cannot be said to be a violation by the Governor but by the committee. He indicated that the County Assembly of Taita Taveta came up with the enactment of the Act in issue.

12. He further argued that the petition and the application are defective for non-joinder. That Section 5(b) of the Taita Taveta County Alcoholic Drinks Control and Licensing Act provides that the Board should hear appeals from the decisions of the Committees. That Section 22 of the Act give powers to the Sub-County Committee to assess the compliance of an entity and it may revoke a license in accordance with the said Section. That under Section, 20 (1) Mr. Bwire contended that under Section 20(2) of the Act, a person who is offended by the decision of the Sub-County Committee should appeal to the Board under Section 5(b) of the Act.

13. The Counsel for the respondents contended that the applicants had not exhausted all the mechanisms for dispute resolution. That until the applicants had complied with the Act, the petition and the application filed herein were premature. Counsel placed reliance in the High Court decision in **Muthama Muoki v The Ministry of Health and another** [2020] eKLR

14. In response to the respondents' preliminary objection, Mr. Mwazighe Counsel for the petitioners submitted that the petition and the application were in the right forum by virtue of Article 22 of the Constitution of Kenya since there was a violation of a right. He further submitted that the Act does not take away this Court's jurisdiction.

15. He also submitted that at first, the petitioners/applicants petitioned the County Government in the month of March, 2020 and on 12th March, 2020 deliberations were made. It was indicated that on 22nd May, 2020 the petitioners/applicants wrote to the respondents a follow up letter, but the said letter elicited no response.

16. Mr. Mwazighe contended that the multi-agencies referred to by the respondents in their submissions exist to ensure that everything runs well but the buck stops with the Governor of Taita Taveta County. He further submitted that in the respondents replying affidavit, there was no communication from the Sub-Committees or Committees. He argued that the respondents were working for gain but to some extent, there was selective discrimination since there are many businesses in Werugha area, but the officers only targeted the petitioners/applicants' businesses and locked them up. He submitted that there was oral communication on closure of the petitioners/applicants' business premises.

17. Counsel submitted that the petitioners/applicants opted to come to this Court as it has unlimited original jurisdiction under Article 165(3) (a) of the Constitution of Kenya, since their follow up letter elicited no response.

18. In response to the petitioners/applicants' submissions, Mr. Bwire stated that the petitioners/applicants are subject to the Act. He also stated that the petitioners/applicants were licensed by the Wundanyi Sub-County Alcoholic Drinks Control and Licensing Sub-Committee. Counsel further stated that the Governor of Taita Taveta County is not responsible for issuing and revoking licenses and that the petitioners/applicants could have gone to the Licensing Board.

Submissions on the Application.

19. Mr. Mwazighe submitted that on 29th January, 2020, the Taita Taveta County Enforcement Officers stormed the petitioners/applicants' premises within Werugha area and confiscated some of the licenses and locked up their bars and restaurants despite the fact that the petitioners/applicants had complied with the relevant laws. He submitted that some of the petitioners/ applicants had secured loans to boost their businesses, which they were now struggling to service, since they had no source of income.

20. He contended that when the illegal closure happened, the applicants incurred a huge loss since they had perishable food stuffs in the premises, which got spoilt. It was submitted that the respondents' decision was unconstitutional and was calculated to promote private interest and that the oppression of a few individuals was selective discrimination. It was further submitted that some of the petitioners/applicants' children were going back to school and the petitioners/applicants were expected to pay school fees but they were economically amputated since they had no source of income.

21. The petitioners/applicants' Counsel submitted that at paragraph 12 of their replying affidavit, the respondents had deposed that the premises in issue were closed due to non-compliance with the Act. He went on to submit that nothing in writing was given to the petitioners/applicants on the nature of the non-compliance. He asked this Court to allow the application so that the applicants could exercise their socio-economic rights as provided under Article 43 of the Constitution.

22. Mr. Bwire when responding to the application stated that on the issue of conservatory orders, Mr. Bwire relied on the case of **Peter Munya v Dickson Mwenda Kithinji & others** [2014] eKLR, which states that conservatory orders bear a public law connotation to provide for orderly functioning of entities and public law entities but they are not like interlocutory injunctions and that conservatory orders should bear in mind public interest and constitutional values.

23. He further submitted that selling of liquor was for the larger public good and that quality and standards of alcohol is a continuous process. He indicated that a license can be revoked at any time depending on public health issues. It was further submitted that the respondents were not in charge of licensing of entities engaged in the sale of alcoholic drinks and that the County Government issued single business permits which were attached to the petitioners/applicants' affidavits.

24. Counsel for the respondents contended that there was no right which had been infringed by the respondents as the rights due to the applicants were not absolute rights as per Article 25 of the Constitution. He submitted that the Wundanyi Sub-County Committee and Licensing Board could not be condemned without being given an opportunity to defend itself. It was further submitted that from the respondents' replying affidavit, some of the bars in issue were within 300 meters of churches.

25. He submitted that under Section 5(f) of the Act, the County Assembly gave the Board the powers to collaborate with County Government Askaris in enforcement of the said Act. He opined that the petitioners/applicants' deposition that they had taken loans to boost their businesses did not give them the right to flout laws and that losses were quantifiable in damages, which they can be compensated in. He stated that conservatory orders deal with irreparable harm, therefore the threshold for issuance of conservatory orders had not been met. He urged this Court to dismiss the application.

26. In response to the respondents' submissions, Mr. Mwazighe stated that economic rights of the applicants must be protected. That none of the bars which were being operated by the petitioners/applicants had been specifically stated as being within 300 meters of schools and churches. He argued that there was no revocation of the petitioners/applicants' business permits and liquor licenses. He submitted that since their economic rights were violated then it would affect the wider public interest.

ANALYSIS AND DETERMINATION.

27. This court has considered the application, the preliminary objection as well as the respondents' replying affidavit and the oral arguments by Counsel in this matter. The issues which arise for determination are as follows-

(i) Whether the Preliminary Objection is merited;

(ii) Whether Constitutional freedoms of the petitioners/applicants were breached by the closure of their businesses by the respondents; and

(iii) Whether the petitioners/applicants have satisfied the court that they are entitled to conservatory orders of injunction to restrain the respondents from interfering with the petitioners/applicants' businesses.

Whether the Preliminary Objection is merited.

28. Jurisdiction is everything and without it the court has no power to make one more step. That was held in the case of the **Owners of Motor Vessel Lillian ("S") vs Caltex Oil (K) Limited** (1989) 1 KLR. The issue of jurisdiction is central in this matter and this court must consider the same from the outset.

29. The leading case on what constitutes a preliminary objection was decided in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors** [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."

30. A careful perusal of the supporting affidavit by the petitioners/applicants shows that they had valid alcoholic licenses issued by the Taita Taveta County Alcoholic Drinks Control and Licensing Board. Section 5 of the Act provides as follows

"The functions of the Board shall be to—

(a) To ensure the implementation of the national government policy on the control and regulation of alcoholic drinks within the county;

(b) Entertain appeals from the decisions of the sub county committees under this Act;

(c) On its own motion, or on, application by any person review any action or decision of the sub county committee under this Act;

(d) Advise the county government generally on the control and licensing policy on alcoholic drinks within the county;

(e) Regulate the conduct of the sub-county licensing committees and ensure the full implementation of both the national and county governments policies on alcohol control and licensing;

(f) Liaise with the National Police Service and the directorate of the county inspectorate to ensure the enforcement of the law as contained in this Act and the national Alcoholic Drinks Control Act, 2010;

(g) in collaboration with other relevant county and national government agencies establish a county treatment and rehabilitation facility and Ward programs for persons dependent on alcoholic drinks;

(h) Generally administer this Act and, as appropriate, any relevant provision of the national Alcoholic Drinks Control Act 2010;

(i) Perform any other function as may be assigned by the Governor or the County Executive Committee Member."

31. Section 20 of the Act provides as follows-

"(1) The sub-county committee may revoke a licence in accordance with the Act.

(2) Any person who is aggrieved by the decision of the sub-county committee made under this section may appeal in accordance

with the Act. (emphasis added).

32. That in line with the provisions of Section 22 of the Act, the Sub-County Committee may inspect or investigate matters relating to the quality of service of a licensee from time to time to ensure compliance or carry out any other visits or inspections pursuant to the Act. The respondents in their replying affidavit and submissions stated that some of the bars in issue were within 300m of schools and churches, and that the foregoing was in contravention of the law.

33. The petitioners/applicants averred that nothing in writing was given to them by the respondents informing them of their non-compliance but that the Taita Taveta County Government Enforcement Officers informed them orally of their non-compliance and confiscated some of their licenses and shut down their business premises. It is clear that there was communication about the reasons behind the confiscation of licenses and closure of the business premises, even though it was not in writing.

34. From the pleadings and submissions made before this court, it is clear that the respondents are not involved in the issuance and revocation of licenses since the said function has been delegated to the Sub-County Committee. The foregoing is evident in Section 20 of the Act. I therefore find that there was a misjoinder of the Governor of Taita Taveta County and the County Government of Taita Taveta in the petition and the application herein and non-joinder of the relevant Sub-County Committee.

35. This court notes that non-joinder of parties is not fatal under *Rule 5(b)* of the **Constitution of Kenya (Practice of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (commonly referred to as '*the Mutunga Rules*'). It states as follows-

“A Petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every proceeding deal with the matter in dispute.”

36. In this instance, however, the finding of this court is that the Act has an elaborate laid down procedure to be followed in case one is aggrieved by the decision of a Sub-Committee. Where there is a clear procedure for the redress of a grievance as in this case, it would be inappropriate for this Court to entertain the dispute. In **Republic v National Environment Management Authority (NEMA)** [2011] eKLR, the Court of Appeal held thus-

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it - see for example R vs. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD. Case. The learned trial judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect we agree with the Judge.”

37. The petitioners/applicants submitted and averred that in March, 2020 they petitioned the Taita Taveta County Government on closure of their business premises. That they did a follow up letter to the County Government thereafter, however the said letter elicited no response. As such, they opted to come to this Court to protect their constitutional rights. I find that the letter and the petition were addressed to the wrong forum as they were at first required to petition the Sub-Committee and upon dismissal of their petition, they were to appeal to the Board. It was only after all the avenues had been exhausted and if the petitioners were still dissatisfied with the outcome, that they would move to the High Court seeking Judicial Review orders.

38. The court in **Republic v Firearms Licensing Board & another Ex parte Boniface Mwaura** [2019] eKLR observed that-

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly vs Karume in the following words-

“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.”

39. Further, in **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others** [2015] eKLR, it was stated that-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts 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 that there is 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 courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

40. In this matter, I find that the petitioners/applicants have not demonstrated and/or shown exceptional circumstances to exempt them from being subjected to the doctrine of exhaustion. I therefore find that the Preliminary Objection raised is well merited and I uphold the same. I hold that at this juncture, I have no jurisdiction to hear and determine the application and the petition. Having so found, this court cannot go into the merits of the application.

41. The dispute herein is referred to the Wundanyi Sub-County Alcoholic Drinks Control & Licensing Sub- Committee for hearing and determination. The application and petition dated 9th October, 2020 are hereby struck out.

42. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at VOI in open court on this 13th day of May, 2021.

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the applicants/petitioners

Ms Muyoka holding brief for Mr. Bwire for the respondents.