



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

JUDICIAL REVIEW NO. 1 OF 2019

**IN THE MATTER OF AN APPLICATION BY THACHUMA BAR OWNERS SELF HELP GROUP FOR JUDICIAL REVIEW
ORDERS OF MANDAMUS AND INJUNCTION**

AND

IN THE MATTER OF ARTICLE 23(3) (f) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THARAKA NITHI COUNTY ALCOHOLIC DRINKS CONTROL ACT, 2015

AND

IN THE MATTER OF THE NOTICE ON APPLICATIONS FOR GRANT OF LICENCES

AND

IN THE MATTER OF CHARGES FOR TRADE LICENCES FOR THE YEAR 2019

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF THARAKA NITHI.....RESPONDENT

Ex parte BY THACHUMA BAR OWNERS SELF HELP GROUP

J U D G E M E N T

1. Before this court is a judicial Review dated 5th August 2019 brought under **Order 53 Rule 3(1)** of the **Civil Procedure Rule** and **Sections 8 & 9** of **Law Reform Act** by Thachuma Bar Owners Self Help Group, the ex parte applicant herein seeking for the following reliefs namely;

- i) An order of Mandamus compelling the Respondent to issue the Applicant's members with liquor licences for the year 2019 on account of payments made for licences in 2019.*
- ii) An order of injunction directed towards prohibiting and restraining the Respondent from arbitrary harassment by arresting the said members and/or impounding/confiscating business equipment/tools belonging to the applicants' members.*
- iii) Costs of this application.*

2. The reliefs above are sought on the grounds set out in the statutory statement and the affidavit of Mercy Kainda sworn on 5th August 2019.
3. In brief the ex-applicants aver that they are members of Thachuma Bar Owners Self help group who engage in liquor business. They aver that they have come to court to challenge the Respondent for what they term as irregular and arbitrary acts in levying business fees.
4. The ex parte applicants are also accusing the Respondents for illegally impounding/confiscating their business equipments and charging them illegal storage fees.
5. They have faulted the manner in which the Respondents are collecting liquor licences terming it unorthodox, illegal, arbitrary, unprocedural and unaccountable.
6. The exparte applicants claim that they have approached this court to address the arbitrary, excessive, unreasonable and unfair acts of the Respondents. They want them stopped from the alleged acts stating that efforts to resolve them through engagements have been futile.
7. The ex parte applicants in their written submissions through Waklaw Advocates have faulted the Respondent for failing to comply with the court orders issued on 16th May 2019 by publishing in the Kenya Gazette the Law and Regulations to give effect to the law passed by the Respondent to regulate liquor industry in Tharaka Nithi County. They have contended that the Respondents have not tendered evidence of the Gazette Notice.
8. The ex parte applicants Submit that in the absence of Tharaka Nithi County Alcoholic Drinks Control Act, any acts founded on such are illegal null and void. They have further faulted the constitution of Tharaka Nithi County Liquor License Committee.
9. The ex parte applicants have asked this court to protect them against illegal acts perpetrated by the Respondent.
10. The Respondent has opposed this application though a Replying Affidavit of Phineas Kimathi, the chief officer Trade Industry and cooperative Development of the Respondent.
11. The Respondent has termed the exparte applicants allegations as falsehoods stating that any person who applies for a licence from the Respondent is issued with a receipt and that there is no way a person can pay for a government service and fail to get an official receipt.
12. The Respondent has denied the allegations that it has not complied with the judgment of this court dated 16th May 2019. It contends that Tharaka Nithi County Alcoholic Drinks Control Act, 2015 has been gazetted and that 3 Sub-County Liquor Licensing Committees (Chuka-Igambang'ombe, Maara and Tharaka) have been established and faulted the ex parte applicants for not specifying which sub-committee failed to discharge its function.
13. The Respondent avers that the successful Applicants for liquor licences are aware and were informed of the fee required as per the regulations to the County Liquor Act.
14. The Respondent contends that an Act of Mandamus cannot issue to compel the issuance of licence where it has not been shown by evidence that the exparte applicants applied for the license and that it would amount to abeting illegality if it was compelled to do so in the absence of requisite applications.
15. The Respondent further contend that issuance of a licence is a preserve of Sub-County Liquor licencing Committee under **Section 9 (1) of Tharaka Nithi County Alcoholic Drinks Control Act 2015** and that the said Committees are better placed to answer the concerns expressed by the ex parte applicants.
16. This court has considered this application and the grounds raised. I have also considered the response made through replying affidavit. For the record, the Respondent through counsel clearly stated that they would only rely on Replying Affidavit and made no submissions on the same.
17. The main issues in this application are basically two which are;
 - a) **Whether the ex-applicants have established a case/cause against the Respondent.**
 - b) **Whether the Respondent have gazetted Tharaka Nithi County Alcoholic Drinks Control Act, 2015 to operationize the said county law.**
- (a) **Whether the ex-parte applicants have established a case against the Respondents.**
18. The ex parte applicants have accused the Respondents for arbitrariness, harassment and confiscation of their goods of trade. The same has been denied by the Respondent in equal measure and the question posed is whether the ex parte applicants have proved their allegations to the required standard in law. I have considered the evidence tendered by the ex parte applicants and noted some inconsistencies in their allegations.
19. For one, the persons alleging that these goods were impounded are Kariuki Murithi and Kaari Terris. The list of members exhibited by Mercy Kainda as belonging to Thachuma Bar Owners Self Help Group, do not contain neither Kariuki Murithi's name or the name of Kaari Terris

20. Secondly the daily stock sheets provided by Elijah Rugendo and Kaari Terris simply shows some opening stocks and in the case of Terris the opening and closing stocks. The same does not show whether the stocks were sold out or impounded by Respondent or whoever. It is merely speculative for the ex parte Applicants to state that they were confiscated by the Respondent for whatever reason. This court has not been furnished with evidence to show that the Respondent illegal or arbitrarily impounded or confiscated anything from the exparte applicants to warrant intervention by this court through prerogative orders/reliefs. It is trite that the onus is always on the party alleging to some state of facts. In this instance the onus was on the ex parte applicant and in that regard they have failed.

(b) Whether the Respondent has caused the Tharaka Nithi County Alcoholic Drinks Control Act to be published in the Kenya Gazette.

21. It is not contested that this court vide Constitutional Petition No. 3 of 2018 involving the same parties herein directed the Respondent to regularize the Tharaka Nithi Alcohol Drinks and Control Act, 2015 by publishing it in the Kenya Gazette pursuant to **Article 199(1)** of the **Constitution of Kenya** in order to operationalize the said statute. The Respondent was given 90 days to do so from 16th May 2019 failure to which the statute would be rendered a nullity.

22. The Respondent has claimed that the said statute has duly been gazetted but the evidence presented to this court on the gazettement is wanting. As I have observed above, whoever alleges in law has the burden of prove (Section 107 of the Evidence Act). The ex parte applicants have challenged the Respondent that they have not complied with the law and the directive from this court. The Respondent alleges compliance but in my considered view, they have not discharged the burden because what they have exhibited to this court is a letter dated 17th May 2019 authored by one Lilian Kiruja addressed to Government Printer requesting it to publish the said statute in the Kenya Gazette. The Respondent have also exhibited an invoice and a receipt No.6335579 acknowledge Kshs.36,540/-. However there is no Gazette notice indicating that the said statute has been gazetted to operationalize it. The provision of **Article 199(1)** of the Constitution clearly states as follows:

“ County legislation does not take effect unless published in the Gazette.”

Article 260 of the **Laws of Kenya** defines **“Gazette”** as

“ The Kenya Gazette published by the authority of the National Government or supplementary of the Kenya Gazette.”

Further to the above **Section 25(2)** of the **County Government** provide that County Legislation shall come into force 7 days after publication in the County Gazette and Kenya Gazette. Although this court and other courts have held that part of the Section particularly the part that provide **“whichever comes earlier”** is unconstitutional there is no hiding from the fact that the law clearly provide that a County Assembly Legislation and indeed any other legislation from parliament after assent (from either the Governor in the case of County Legislation and the President in the case of National Legislation) will have the force of law upon gazettement in the Kenya Gazette that clearly state when the law shall come into operation. In this instance, the Respondent has failed to show to the Respondent and indeed this court when the said County Legislation was gazetted and when it came, if at all. The only conclusion that this court can deduce is that the said County legislation has not been gazetted. The Respondent has not stated or complained that the Government Printer has failed it because if that was the case it would have taken necessary action to address it.

In the absence of any legislation to support their actions/function, in so far as constituting Liquour Licensing Committees, and levying fees etc, the actions of the Respondent in that regard is illegal null and void. This court does agree with the Applicants that in the absence of legislation to regularize their operations in the liquor industry in Tharaka Nithi, the Respondents action is arbitrary and futile. To that extent this court finds that the ex parte applicant’s application for an order of injunction to prohibit and restrain the Respondent from arbitrary harassment is merited. The long and short of this is that this application partly succeeds. I am not persuaded that an order of mandamus is justified because as observed above the applicants have not established a basis for the said relief. Furthermore as I have found out the capacity for the Respondent to issue licence or deal with liquor business is wanting because of absence of proper legal backing. The Respondent either by itself or by servants or agents acting on their behalf are hereby restrained from arbitrary harassment or arresting the ex parte applicants in liquor business until the Tharaka Nithi Alcoholic Drinks Control Act, 2015 is duly gazetted as directed by this court. The applicants will have costs of this application.

Dated, signed and delivered at Chuka this 11th day of May 2020.

R.K. LIMO

JUDGE

11/5/2020

Judgment dated signed and delivered in the open court in presence of Muthomi for Respondent and Kirimi for Applicant.

R.K. LIMO

JUDGE

11/5/2020.