



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. E3 OF 2020

JOHN MACHARIA GICHOCHO T/A KIOO HOTEL, JOBIS DITRIBUTORS, THINGIRA

BAR AND RESTAURANT AND ZAMBEZI BAR AND RESTAURANT.....APPELLANT

VERSUS

NYERI COUNTY ALCHOLIC DRINKS REGULATIONS COMMITTEE..1STRESPONDENT

COUNTY GOVERNMENT OF NYERI.....2ND RESPONDENT

RULING

1. The appellant filed an appeal against the decision of the County Alcoholic Drinks Committee and also filed a Notice of Motion dated the 9th of October, 2020 brought under a Certificate of Urgency and under the provisions of Order 42 Rule (6) of the Civil Procedure Code seeking a stay of execution of the committee's directives of 23/09/2020 pending the hearing of the application or the Appeal;
2. In response to the instant application the respondent raised a Preliminary Objection dated the 21/10/2020 on the issue of whether this court is seized of jurisdiction to hear the appeal and make a determination;
3. The parties were directed to canvass the Preliminary Objection by way of filing and exchanging Written submissions; hereunder is a summary of the parties' respective submissions;

RESPONDENTS' SUBMISSIONS

4. The respondents rely on the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) [1989]eKLR** where it was held that jurisdiction is everything and without it a court must down its tools;
5. Section 18 of the Nyeri County Alcoholic Drinks Control Management Act, 2014 provides for the procedure for a review of refusal of a licence to the County Committee; Section 19 of the same Act prohibits any appeal to the High Court unless a party has exhausted the review mechanism provided;
6. The appellant herein has not exhausted the dispute resolution mechanism under the said Act; he sought review from the Mukurwe-ini Sub-County Committee and instead of approaching the County Committee he rushed to this court;
7. In any event the appellant does not deserve the prayer for stay of execution of the directives dated 23rd September 2020 by the Nyeri County Alcoholic Drinks Regulations Committee; his application does not satisfy the requirements of Order 42 Rule 6 of the Civil Procedure Rules, 2010; there is no proof of substantial loss to the appellant; if he will suffer any loss it would be of the appellant's own making; he was allowed to apply for licences for his businesses and was only denied licences for those business which have active court cases;
8. Further the appellant is guilty of inordinate delay since the decision sought to be appealed against were made on 15th January 2020; it is long after the fourteen days period limit provided under the Act; he has also not provided any security as required by law; the respondents relied on **Mary WamburaNguru t/a Double Bar & Restaurant and Cool Breeze & Another v Mathira East Alcoholic Drinks Regulation Committee & Another [2016]eKLR**.

APPELLANT'S SUBMISSIONS

9. On the jurisdiction of this court, the appellant relied on Section 20 of the Nyeri County Alcoholic Drinks Control and Management Act

which provides as follows;-

“Subject to Section 18, an applicant whose application for a new licence, to renew or transfer a licence has been refused or a person aggrieved by decision of the County Committee may within twenty one days of such refusal or decision appeal against such refusal or decision to the High Court.”

10. The appellant submitted that he has indeed appealed the decision of the Sub-County Committee to the County Committee as required by the Act; The County Committee made its decision on 23rd September 2020 and the same was communicated to the appellant through a letter dated 6th October 2020;

11. Counsel urged the Court to dismiss the preliminary objection for lack of merits.

ISSUES FOR DETERMINATION

12. After reading the submissions filed herein this court finds only one issue for determination which is whether the appellant has exhausted the dispute resolution mechanisms before approaching this court;

ANALYSIS

13. The applicable test on whether to uphold the Preliminary Objection is found in the renowned case of **Mukisa Biscuits manufacturing Co.Ltd vs West End Distributors Ltd [1969] EA 696**; where it was held as follows;

“No preliminary objection can be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion...”

14. In the above cited case if an objection admits of an inquiry into evidence then it cannot be properly called a preliminary objection;

15. In the instant application the applicable law in ascertaining whether the applicants have adhered to the set down procedures for redress of their grievances is found at Sections 18, 19 and 20 of the Nyeri Alcoholic Drinks Control and Management Act;

16. Section 18 of the Act reads as follows;

“18. (1) An applicant whose application for a new licence, to renew or transfer a licence has been refused may within fourteen days of such refusal, request in writing the review of such refusal to the County Committee.

(2) A person aggrieved by the decision of the sub— county committee to approve grant of a new licence or to renew a licence may request in writing the review of such decision by the County Committee.

(3) Upon receipt of a request under this section, the County Committee shall notify the sub—county committee of the pending review.

The county committee shall within twenty- one days consider and make a final determination on the request for review.

(5) The County Committee may —

(a) dismiss the request for review if in its opinion, the request is frivolous or vexatious;

(b) uphold the decision of the sub—county committee;

(c) annul the decision of the sub—county 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.”

17. The first port of call provided by the Act for any party or entity aggrieved with the decision of the committee is the Sub-County Committee thereafter to the County Committee and from there the next step would be to file an appeal to this court;

18. Section 19 of the Act clearly stipulates that a person must exhaust the dispute review mechanisms before it can file an appeal to the court of law; the section reads as follows;

“19. No person shall appeal to Court under this Act on a matter related to section 18 unless the person has exhausted the review mechanism provided therein.”

19. Section 20 of the Act provides the timelines in which to approach the court; and defines the court as the High Court; the section reads as follows;

“20. Subject to section 18, an applicant whose application for a new licence, to renew or transfer a licence has been refused or a person aggrieved by decision of the County Committee may within twenty— one days of such refusal or decision appeal against such refusal or decision to the High Court.”

20. The appellant’s annexures demonstrate that the appellant being aggrieved with the decision had approached the Mukurweini Sub- County Committee and then moved to the County Committee; which upon rendering its decision forwarded its decision vide a letter dated 6/10/2020 by the Mukurweini Sub-County Administrator;

21. This court notes that the appellant filed this instant appeal on the 13/10/2020 which translates to seven (7) days which was well within time prescribed of twenty-one (21) days as set down in Section 20 of the Act;

22. It is this court’s considered opinion that the analysis requires some evidence to answer the question as to whether the appellant exhausted the procedural dispute resolution mechanisms; this admits of an inquiry into evidence or a closer look at the record and for this reason the objection cannot be properly called a Preliminary Objection.

23. Nonetheless this court is satisfied that the appellant had exhausted the laid down dispute resolution before approaching this court with an appeal;

FINDINGS AND DETERMINATION

24. In the light of the foregoing this court makes the following findings and determinations;

- i. The Preliminary Objection is hereby overruled; this court is seized of jurisdiction to hear and determine the matter.
- ii. The appellant is at liberty to set down the application dated 9th October, 2020 for hearing and determination;
- iii. Costs shall be in the cause.

Orders Accordingly.

Dated, Signed and Delivered Electronically due to the Pandemic (Covid19) at Nyeri this 5th day of November, 2020.

HON. A. MSHILA

JUDGE