



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

MISC. CIVIL CAUSE NO. 2 OF 2018 (JR)

JOHN KIPKOECH ROTICH AND 29 OTHERS.....APPLICANTS

VERSUS

ELDAMA RAVINE SUB COUNTY ALCOHOLIC

DRINKS REGULATION COMMITTEE.....RESPONDENT

=EX-PARTE=

JOHN KIPKOECH ROTICH t/a SILENT PUB & 29 OTHERS...APPLICANTS

JUDGMENT

Introduction

1. The pleadings in this suit were not altogether in a happy state as the ex-parte-applicant had upon grant of leave to file the Judicial Review proceedings purported to file a Notice of Motion dated 6/11/18 supported by a “statutory statement and a Verifying Affidavit of the same date. The Court needs to confirm that the correct position is that the Notice of Motion filed upon grant of leave may only be founded, save where with leave of court the statement is amended and further affidavit allowed, on the Statement and Verifying Affidavit filed together with the application for leave. See Order 53 Rule 4 of the Civil Procedure Rules.

2. In considering the prayer for the Judicial Review Order of Certiorari to “remove into the High Court and quash the decision of the Respondent listened verbally on 5/4/18 directing the ex-parte applicants to close down the bar business with effect from 12th April 2018 from the lawful on justifiable cause and without giving any written reasons for the said action,” shall be considered as founded on the statement filed with the application for leave dated 10/4/18 supported by the facts set out in the Verifying Affidavit thereof.

3. Relying on the relevant provisions of the County Alcoholic Drinks Control Act 2014, and Article 47 of the Constitution, the ex-parte Applicants’ contend as follows:

“(1) The Respondent is bound by the Act to give a hearing to the Applicants’ for a license before any decision whether to grant or deny a license is made.

(2) The Respondent is ordered a duty to disclose any objection before denying them a license.

(3) The provisions impose upon the Respondent the duty to act in a judicious and reasonable/rational manner, in utmost good faith, with fairness and without any malice towards all applicants before the decision is made.”

4. The ex-parte Applicants’, therefore, submitted as grounds of the relief sought that the Respondents decision to close down 30 bars in Eldama Ravine Sub-County without giving notice to the Applicants’ owners was arbitrary and unfair and in breach of the applicants’ legitimate expectation, ultra vires, unreasonable; taking into account extraneous considerations, offending the principle of proportionality for the intended purpose of trying to control the sale of that liquor; and biased for failure to take into account favourable evidence that the Applicants’ have been operating their businesses with valid licenses without any complaint from members of the public.

5. By their verifying Affidavit sworn by the 1-5 Applicants’ on behalf of themselves and the 6-30 Applicants’, the Applicants averred that they were operating as retailers of liquor product within Eldama Ravine Sub-County who had over the years applied for and been granted licenses to operate the said businesses and who had all applied for renewal for the year 2018 and paid all the requisite renewal charges without any objection by the respondent, and they attached some receipts for inspection of the premises before issuance of licenses.

6. The Applicants' grievances as set out in the Verifying Affidavit was that despite the provisions of Article 47 of the Constitution requiring fair Administrative action and the Baringo County Alcoholic Drinks Control Act 2014, setting out the procedure for the application and consideration of licenses "*the Respondent went ahead to purport to consider the application without giving us a hearing and have purported to make findings against us verbally at a meeting held on 5th April 2018 and without giving written reasons for the said steps*". They attached a copy of a newspaper (**Taifa Leo**) report of 7/4/18 on the same.

7. In Reply to the Notice of Motion, the Respondent filed Grounds of Opposition, a Notice of Preliminary Objection and a Replying Affidavit together with a list of authorities, all dated 19/11/2018.

8. The principal objections taken by the Respondent to the application are that:

1. "*No order or decision has been attached to the Verifying Affidavit to be brought to this Court to be quashed, consequently the Honourable Court cannot issue orders in vain i.e no verbal order can be removed to Court and be quashed.*"

2. *The applicants have failed to exhaust the internal mechanism as provided for in the Baringo County Alcoholic Drinks Control Act, 2014 and section 9 (2) and (3) of the Fair Administrative Action Act 2015 and equally did [not] comply with the provisions of section 9(4) of the Fair Administrative Action Act, 2015.*

3. *The applicants lack locus standi to institute the application against the Respondent, that the 3 applicants had no authority to plead for the other 27 applicants and that one of the applicant's signatures is forged i.e 30th Applicant meaning that the entire application is laced with an illegality hence the applicants have not come to court with clean hands."*

9. In the Replying Affidavit by chairperson of the Respondent Aengwo Daudi Luka, the Respondent, apart from setting out legal contentions on the advice of Counsel, averred that the Applicants had not "*exhibited any proof of making the respective application for renewal, payment receipts, the respective dates when they were lodged/ presented*", and had therefore failed to establish any connection or nexus between the Applicants and the respondent [and therefore] have no *locus standi*.

10. The Respondent also relied on the facts on alleged "*hue and cry from members of the public who have even staged demonstration to protest against increase in operationalization of illegal bars and brewers that erodes morality*" attaching copies of letters and petition to the Respondent dated 7th, 12th and 14th March 2018 "*against the moral decadence associated with consumption of alcohol and illicit brew*". The Respondent also attached copies of minutes of Public Barazas and public participation reports and other documentation on adverse effect of alcoholism in the area.

Issues for Determination

11. Upon considering the pleadings, affidavits and submissions by counsel in this matter, the issues that arise for determination in this application are as follows:

1. *Whether the applicants have locus standi*

2. *Whether a verbal decision is an order capable of being quashed by Certiorari*

3. *Whether the applicant's constitutional right to fair administrative action have been breached and*

4. *Whether the decision of the Respondent is ultra vires, the Act, and if so what remedy exist for the aggrieved party*

Preliminary

Locus standi of the applicants

12. The Court considered the question of **locus standi** at paragraph 20 of the ruling of 16/10/18 herein as follows:

*20. The objection as to standing of the Applicants to bring the Judicial Review proceedings while properly a preliminary point must be considered in the conventional legal philosophy of expanded scope of **locus standi** established by the Constitution of Kenya 2010 which includes standing in public interest. See Article 22 thereof. However, the Applicants herein, as Applicants for licences who possess previous year's licence and who have applied for renewal of the licences in terms of section 16 (4) of the Baringo County Alcoholic Drinks Control Act, 2014, are entitled to approach the Court for relevant relief. Without making a final decision on the matter, the Court notes that the Applicants have attached some licences for the years 2017 and receipts for inspection of bars for 2018 as exhibits **ERB 1** and **ERB 2** demonstrating their standing in the matter.*

13. Having considered the matter further, it appears to me that the Applicants who have attached the licences and permits for previous years up to 2017 and the payment of Alcoholic Drinks license and payment of fees for inspection of Bars ahead of 2018 licences establishes necessary nexus being mindful of the expectation by the Applicants that the application forms for new license are submitted to the Respondent and could not therefore have been exhibited. Moreover, if only some of the applicants exhibited their licenses and payment of fees, their case would still be valid even if brought along with that of persons whose licences had not been exhibited because, the complaint is that the Respondent dealt with the Applicants globally rather than individually in accordance with the Act and the order against one affect all of them. In any event the new Constitution dispensation on the enforcement of the Bill of rights as sought by the applicants with respect to Article 47 is for expanded locus standi pursuant to Article 22 of the Constitution.

Authority to sue on behalf of applicants

14. I am not able to find *mala fides* in the application by reason of joinder. Of course, the Judicial Review Court cannot determine that the signature of the 30th applicant giving consent to sue is forged as that is the duty of a Criminal Court upon investigation of the alleged report at Eldama Ravine police. I have noted the authority to sue given to the 1-5 ex-parte Applicants by the 6-30 Applicants duly signed and filed in Court on the same date as the application for leave to commence the Judicial Review proceedings. I do not find merit in the objection as to lack of authority to plead for the Applicants. The authority filed herein authorizes the 1-5 Applicants “*to execute all pleadings, affidavits, statements, and other necessary documents towards the filing of this cause and any other subsequent or further document as may be required on our behalf.*”

Determination

Verbal decision may be quashed

15. The Court has already overruled the objection at leave stage as to the “*verbal*” see paragraph 14 of Ruling of 16/10/18 reasoning that the issue is one of jurisprudential importance fit to go the full trial.

16. By the inherent jurisdiction of the Court, section 3A of the Civil Procedure Act under which the Order 53 rules are made saves “*the inherent powers of the Court make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court*”. To defeat a Judicial Review claim on the ground merely that the decision was verbal and therefore not capable of being attached to the Verifying Affidavit is unjust. An injustice may be occasioned on a party by the verbal direction of an administrative body or person in authority, which because of its unwritten nature may not in accordance with the rule for attachment under order 53 rule 7 (1) of the Civil Procedure Rules, be capable of being attached.

17. Should such an aggrieved party be left without a remedy? I do not agree. If the aApplicant can show that the decision has been made by a report hereof in newspaper or regardless of being verbal, may be quashed by Certiorari if it is made ultra vires, or otherwise offends the rules of natural justice or fair Administrative Action. The verbal decision herein is capable of being quashed. Moreover, the requirement for lodging a copy of the decision under order 53 rule 7 (1) of the Civil Procedure Rules is not fatal. The Bar to the Applicant questioning the validity of the decision is subject to an important exceptions that “*unless before the hearing of the motion he has lodged a copy thereof verified by Affidavit with the registrar or accounts for the failure to do so to the satisfaction of the High Court.*”

18. Needless to state, this Court is satisfied with the explanation by the Applicants that the order to close the bars, which was reported in the newspaper, was **verbal** and, therefore, incapable being lodged before the Court by Verifying Affidavit.

19. It is moreover a cardinal principle of law that no person may benefit from his own wrong doing, as codified in the maxim, ***Nullus commodum capere potest de injuria sua propria*** (no man can take advantage of his own wrong) see ***Broom’s Legal Maxims***, 10th Edition (1939), at pages 191 - 200. The Respondent having failed, in breach of the Act 47 Constitutional right to fair administrative action, to give written reasons for the decision to close the Applicants’ bars cannot rely on the unwritten state of the decision to oppose its capability of being quashed by being ***removed to the High Court*** from quashing, in the terminology of Order 53 Rule 7 (1) of the Civil Procedure Rules. The requirement of lodging a copy of decision on proceedings, which is subject to the saving clause of section 3 of the Civil Procedure Act, could take away the power of the Court to quash a decision which through unwritten as capable of being enforced as in this case the order to close the bar operation being enforced by the Administration Police. To remedy the threatened injury of closure of the bars without due process, the Court must be able quash the *unwritten* decision of the Respondent.

Exhaustion of internal dispute resolution mechanism

20. For the same reason that a party cannot benefit from its own wrong doing, the Respondent cannot be heard to object that the Applicants have not exhausted the intended dispute resolution mechanism. To uphold the objection would be to permit the breach of statutory provisions as the hearing and due process with impunity, the aggrieved party not being able to approach the Court but being required to exhaust the internal machinery of the very Act that the Respondent has flagrantly breached in taking the action subject of Judicial Review. If the Respondent does not itself follow the procedure of dealing with the provisions of the Act, it would be a strange sense of justice as would restrict the aggrieved party to statutory machinery before recourse to the High Court for redress. The Respondent could always bluntly disregard the provisions of the Act in the licensing and require the aggrieved parties to pursue this relief through the same Act.

21. In my respectful view, the Respondent may only rely on the provisions for internal dispute resolution when it has itself made its decision within the regular framework of the Act. An irregularly made decision cannot protect the Respondent from challenge in a Judicial Review Court.

Blanket order of closure of applicants’ bar businesses

22. The consideration of application for liquor license is personal and individual to the Applicants. Section 11 of the Baringo County Alcoholic Drinks Control Act, 2014 is clear that the application for a license is personal to the Applicant as follows:

“11. (1) A person intending to produce, manufacture, import, distribute any alcoholic drink in the County or operate an established for the sale of an alcoholic drink shall make an application in the prescribed form to the Sub-County Committee in the Sub-County where the premise is situated and shall pay a prescribed fee as per operation regulation by the County Executive Committee with a County Committee restrictions and gazettelement before application.”

23. The Sub-County Committee is required to consider the application under section 11 and grant the license under section 12; if there is no

objection to the grant of the application under section 11.

24. The Respondent by its Sub-County Committee could not off-hand and without considering an application for license refuse an application and make a blanket decision affecting numerous Applicants without considering each application individually in terms of the provision of section 11 of the Baringo County Alcoholic Drinks Control Act, 2014.

25. No valid refusal of a license may result from a procedure in violation of the provisions for consideration of application for licence set out in section 11 of the Act. In terms of section 16 (4) and (5) of the Act, however, where an application for a license renewal has not been determined by the date of expiry thereof such license shall continue in force until the decision of the Sub-Committee has made known, and where an application has been refused or cancelled, a new application may be considered after six months thereof.

26. The Court finds that the Respondent could not validly cancel license or refuse to grant application for renewal of licenses by a blanket decision affecting all the bar operations in the area subject of this suit as it is required by the Baringo County Alcoholic Drinks Control Act to consider each application for license on renewal of a license, or even a cancellation of a license individually. See section 11 and 12 of the Act.

27. The Applicants herein were not notified of any objection to their respective applications and no objection proceedings heard before the purported refusal of their applications and decision to close the bars was reached. The Respondent's decision was wholly *ultra vires* its own statute.

28. The Respondent was in further breach of the Applicants' Constitutional right to fair administrative action under Article 47 of the Constitution which required that the decision declining the license, terminating to existing license as the case may be, being one that affects the Applicants' right to property in the bar operation, be rendered in writing. The oral or verbal or rebuttal decision to close all bar operation, apart from violating the statutory provisions for individual Constitution under section 11 and 12 of the relevant Act, also breached the fair administrative right to written decision; and was consequently unconstitutional.

29. The Respondent could be permitted to take advantage of their own wrong doing by opposing these proceedings by requirement that the aggrieved party first takes out proceedings under the Fair Administrative Action Act, 2015. An irregular decision made *ultra vires* the enabling statute statement must be liable of challenge immediately it is made because it is a nullity, and should not be left to stand awaiting administrative review by internal dispute resolution mechanism. It ought to be quashed at once by a Judicial Review Court. Indeed, requirement for exhaustion of internal remedies is subject to leave of the Court in proper cases. For the reason herein that the Respondent chose to disregard express provisions on the procedure for considering application for license renewal and made a blanket order for closure of the Applicant's businesses, the Court does not allow it to take advantage of the clause of the Fair Administrative Action Act, 2015 requiring prior exhaustion of internal remedies, and consequently pursuant to section 9 (4) of the Act "*exempts the applicants from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice*"

No merit consideration

30. The Court does not go into the merits of the application so as to justify the action taken by the Respondents or to invalidate the same. The discretion to grant licenses lies with the Respondent which must consider each application in accordance with the law.

31. It is trite that the Judicial Review court does determine the merits of the case but with the process of the decision making to ensure that the applicant is given a fair treatment, as held in ***Commissioner of Lands v. Kunste Hotel Limited [1997] eKLR*** :

"But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected."

32. This Judicial Review Court shall not, in accordance with the principle in ***Kunste*** (supra), delve in the merits of the case. Suffice it to observe that those Applicants who had licenses expiring and had made applications for renewal could only have their licenses terminated consistently with section 16 (4) of the Act upon a decision on their application. They clearly had a legitimate expectation based on the provision that their licenses would continue to be valid until there applications for renewal were considered. The verbal decision terminating their licenses and ordering closure of the operations violated this legitimate expectation and is liable to being quashed.

Control of Alcoholism and illicit brews in the County.

33. The quashing of the Respondents' decision to close all the bars operated by the Applicants in Eldama Ravine Sub-County does not operate as a prohibition on the Respondent considering any application, objection and or renewal of license under the provisions of the Act, and the Respondent is at liberty to consider and determine such application of licenses for the year 2019, in accordance with the Act. The County Government is not powerless to deal with any objections to grant of licences under the Baringo County Alcoholic Drinks Control Act, 2014. Of course, the County Government has through the Respondent Sub-Committees, the authority to consider and act on any objection to an application for a licence and may in terms of section 11 (7) of the Act "***of its own motion take notice of any matter or thing which, in the opinion of the Committee, constitutes an objection to an application, whether or not any objection has been otherwise lodged.***"

34. In addition, the County Government may, as regards the person holding the licence, refuse to renew a licence under section 15(2) of the Act and as regards the business itself may under section 16 (1) "grant, renew, transfer or remove a licence, and may embody therein such conditions as it may deem appropriate, or it may refuse to grant, renew, transfer, withdraw or cancel a licence." The only qualification to the exercise of these powers is that it must be done ***intra vires***, within the due process of the Act.

35. Accordingly, the Respondent shall remain at liberty in accordance with its mandate to consider any application for license, renewal of license or objections thereto as may arise for the licenses for the present year 2019 and thereafter, and this Court does not determine that any of the Applicants is entitled to the grant or renewal of licence or cancellation of licence.

36. Of course, this Court as an agent of social justice, law and order is sympathetic of the situation with regard to adverse effects of alcohol abuse on the social fabric and must play its role in stemming the vice. However, in its efforts to control the preparation, sale and consumption of alcoholic and illicit brews in its area of jurisdiction, the Respondent must act in accordance with the law which has been promulgated for that purpose under Baringo Alcoholic Drinks Control Act, 2014.

Orders

37. Accordingly, for the reasons set out above, the Court makes the following orders:

(1) An Order of Certiorari is issued to quash the **verbal** decision of the Respondent made on 5/4/2018 directing the applicants to close down their bar businesses with effect from 12th April 2018.

(2) For avoidance of doubt, the quashing of the said decision of 5/4/2018 is no bar to the consideration and determination of subsequent applications for licence or renewal thereof, or objection to such applications in accordance with the Baringo County Alcoholic Drinks Control Act, 2014 or its equivalent.

(3) For clarity and in terms of section 16 (4) of the Baringo County Alcoholic Drinks Control Act, 2014, the applicants' licences expiring before consideration of their applications for renewal shall remain in force until the decision of the Respondent is made known.

(4) There shall be no Order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 4TH DAY OF JANUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Magut instructed by Magut & Sang Associates, Advocates for the Applicants.

Mr. Kipkulei instructed by Mwaita & Company, Advocates for the Respondent.