



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 1 OF 2018

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF ARTICLE 10 AND ARTICLE 165 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW FOR ORDERS OF MANDAMUS, INHIBITION AND CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF THARAKA NITHI.....1ST RESPONDENT

THE THARAKA NITHI

COUNTY COMMANDER OF POLICE.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

RAHAB GACHERI.....1ST EX PARTE APPLICANT

FAITH NJUKI.....3RD EX PARTE APPLICANT

AND ABOUT 150 OTHERS

R U L I N G

1. Before this court is a Notice of Motion dated 8th October, 2018 brought by ex parte applicants namely; Kelvin Njue Miriti, Terry Wawira Njeru and Benard Raibu suing on behalf of Maara Liquor Dealers Self Help Group brought under **Order 53** asking for the following prayers, namely:-

a) That leave be granted to the ex parte applicants to apply for prerogative orders of certiorari to remove into this court and quash the notices issued by County Executive Committee member Finance, Economic Planning, Trade and Revenue directing liquor dealers/bar owners to renew their licences and pay fees for licences.

b) That the grant of the orders for leave do operate as a stay of the Notice dated 26th September 2018 until the hearing and

determination of the substantive application.

2. The grounds upon which the leave is being sought are listed on the face of the said application and are as follows namely:

(i) That liquor licensing is a devolved function under the County Government.

(ii) That the Notice dated 26th September, 2018 calling for parties to apply for licences has been issued by a wrong party.

(iii) That the Notice dated 29th September, 2018 was not gazetted and has no addressee.

(iv) That the Notice dated 26th September, 2018 is vague as to whether it applies for 2017, 2018 or both.

(v) That the Liquor Licencing Committee of Tharaka Nithi County is not properly constituted as one M'Turuchiu Murungi is not qualified to sit 'in the Committee' because of conflict of interest.

(vi) That the Liquor Licences Committee was formed in contravention of court orders issued vide Judicial Review Application No. 5 of 2016 which in their view had suspended the operations of committees and that the orders were in force when the committee was appointed on 17th May, 2018.

(vii) That the Respondent passed Tharaka Nithi County Alcoholic Drinks Control Act 2015 but have not legislated any regulations to the Act as the same are under debate and have not been passed.

(viii) That in the absence of any legislation as to classification of bars the parties do not know what charges are due and basis for arriving at such charges on the Statute (Tharaka Nithi County Alcoholic Drinks Control Act 2015) has not provision for assessing the amount of fee charged per category of bars.

(ix) That it is fair for illegal charging to be stopped until proper procedures are followed.

3. The ex parte applicants have supported the above grounds with the affidavit of Kelvin Njue Miriti sworn on 8th October, 2018 where he has reiterated the above grounds adding that the respondent has been acting haphazardly charging ex parte applicants levies and license fees with no standard format. He has exhibited the certificate of registration of the Self - Help Group indicating that Maara Liquor Dealers is registered with the department of Social Development having been registered on 18th July, 2017 with the renewal being effected on 27th September 2018. He has also exhibited the impugned Notice dated 26th September, 2018 which Notice was asking the general public interested in liquor business to apply for licenses.

4. In their written submissions made through Anne Thungu & Co. Advocates, the ex parte applicants have contended that the Notice dated 26th September 2018 (hereinafter to be referred to as the impugned notice for ease of reference) was issued by a wrong party and besides that they also contend that the same was not published through the Kenya Gazette, Newspapers or Websites. they also fault the impugned notice for not clearly stating the period for which the licences was required for operation. They have also faulted the formation of Liquor Committee which operationalized the statute (Tharaka Nithi County Alcoholic Drinks Control Act, 2015 No. 6 of 2015). They have also submitted that the Committee is not properly constituted faulting presence of a member in the said Committee whom they accuse for having a conflict of interest as he is a bar operator.

5. The ex parte applicants have cited the decision in the case of **Republic -vs- Land Disputes Tribunal Central Division and Another Ex Parte Nzioka (2006) 1 EA** where the court held that leave should be granted where the material available shows there is an arguable case without delving deeper into the matter. The court further held that the leave stage in Judicial Review matters is meant to weed out malicious or hopeless cases. The ex parte applicants have further cited the decision in **TAIB A TAIB -VS- MINISTER FOR LOCAL GOVERNMENT (Mombasa High Court Misc. Application No. 158 of 2006)** where they contend that the court held that the purpose of a stay order in Judicial Review proceedings to prevent implementing a decision that has been made but has not been implemented.

6. The ex parte applicants contend that their rights are likely to be infringed if the stay is not granted holding that they are already being harassed with arrest and arraignment for failure to take out licenses yet in their view, they have challenged the process through which the notice were issued requiring them to take out the licenses.

7. The Respondent has opposed this application vide a Replying Affidavit by one Dorothy K. Naivasha sworn on 25th October, 2018. The deponent states that she is County Executive Committee Member for Finance, Economic Planning Trade and Revenue in the County Government of Tharaka Nithi.

8. The Respondent avers that this court vacated stay orders issued vide Judicial Review No. 6 of 2016 on 14th June, 2018 and that it was only after 14th June, 2018 when the Respondent embarked on the process of setting up the relevant Alcoholic Licensing Committees as required under Tharaka Nithi County Alcoholic Drinks Control Act, 2015. She has further averred that the process took three months from June to August, 2018 owing to the need for members to apply, process of short listing interviews, vetting before the appraisals were done for the appointment to the respective Committees.

9. The Respondent also alleges that upon swearing in of the Committee Members they embarked on licencing of manufacturers, wholesalers and retailers of alcoholic drinks in the County which it claims commenced in September, 2018 and came to an end in mid November, 2018 as per the timelines provided by the statute (Tharaka Nithi County Alcoholic Drinks Control Act 2015).

10. The Respondent through Dorothy Naivasha County Executive Committee Member of County Government has justified the impugned Notice stating that the law (Tharaka Nithi County Alcoholic Drinks Act 2015) empowers her to issue the said Notice calling on interested traders to apply for licenses. She has further insisted that the law does not require her to gazette the impugned Notice and that the Notice was addressed to the general public. She has averred that there is no legal requirements that the impugned Notice issued by the Committee should be gazetted.

11. The Respondent has in response to the applicants' contention that the impugned notice is vague in terms of period for which it is applicable, insisted that contended under **Section 16(2)(6)** of the Tharaka Nithi County Alcoholic Drinks Control Act, 2015, all liquor licenses expire on 31st December of each year and that each year liquor licenses are issued and that for 2018 licenses were issued from 14th June 2018 after this court vacated the orders which has suspended liquor licences.

12. The Respondent has justified its action of regulating liquor business stating that the alcoholic sector in this County has been unregulated for the last two years which has caused a lot of harm to the youth as a result of proliferation of fake alcoholic drinks and uncontrolled drinking hours.

13. The Respondent through Dennis Muthomi Advocate has submitted under **Section 69 (2)** of the Tharaka Nithi Alcoholic Drinks and Control Act 2015, Notices in regard to liquor regulations are issued by the Executive member and contends that **Section 2** of the said Act provides for who the holder of that office and that the impugned notice was properly issued by Dorothy K. Naivasha who is the Executive member in charge of Finance, Trade Industry and Cooperative Development in County Government of Tharaka Nithi.

14. It is also submitted that there is no legal requirement to gazette the impugned notice in the Kenya Gazette. It is contended that the impugned Notice was duly address to the general public in order to reach all those who may have been interested to venture into the business of dealing in liquor business and also invite those who may have objections against issuance of license to some outlets.

15. On the challenge by the ex parte applicants that the Alcohol Committee was not properly constituted, the respondent has answered that the committee was set up with due regard and compliance with the law. It has conceded that under **Section 8(4)** of the Act, a holder of liquor licence should not be a member of Liquor Licencing Committee and that it was on that account that M'Turuchiu Muriungi was allegedly denied a licence and therefore in its view the issue of conflict of interest cannot arise because he is not a current holder of liquor license.

16. The Respondents have further submitted the appointment of Sub-County Committees was done the orders issued on 16th January, 2017 were vacated by this court.

17. The Respondent has contended that the regulations under debate in the Tharaka Nithi County Assembly relate to the financial year 2018/19 and that the basis of the debate is that the Finance bill keeps changing each year which has to be reflected in various acts relating to collection of revenue in the County.

18. The Respondent has submitted that the ex parte applicants are not entitled to the leave sought and has cited a decision in **REPUBLIC - VS- KENYA NATIONAL EXAMINATION COUNCIL EX- PARTE GATHENJI & OTHERS [1997] eKLR** where the court held inter alia that an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons. The Respondent contends that the impugned notice which is the main basis of this application was issued properly by a person legally mandated under the relevant law to do so. It has asserted that no one has raised an issue of breach of natural justice and therefore in its view there is no basis to grant the ex parte applicants leave or other reliefs sought.

19. This court has considered this application and the response made. The gist of this application in my considered view rests on the impugned Notice dated 26th September 2018. The ex parte applicants are aggrieved by that Notice and seek leave to challenge it and have it quashed probably.

20. It is important to note that at this stage of Judicial Review proceedings (leave stage) this court is not required to dig deep into issues of controversy. What is relevant at this stage is to determine whether the issue or issues raised in this application demonstrates a prima facie case or arguable case fit to be allowed leave to go into the substantive stage where the issue or issues can be deeply interrogated.

21. The ex parte applicants have contended that the impugned Notice is offensive to the law on several grounds.

On the first ground, they allege that the Notice was not addressed to anyone in particular. It is true looking at the impugned Notice that it was addressed to the general public and the reason for that is given by the respondent that it was meant to reach to wider public in order to give everyone a chance to participate either as a trader or as an objector to the issuance of particular licences. I have noted that the Notice may appear to have been placed on Notice Boards because the ex parte applicants must have come across them to be aware of it in the first place. If they got it in the public Notice Board (because they have not stated where they got it) then I fail to see what prejudice they suffered by having the Notice published for the general public to view. The ex parte applicants are not saying that the said Notice was not visible to members of the public. They have not cited the legal provisions providing that the said Notice should have been gazetted. In my view they cannot fault the Respondent for not doing an act that is not provided in law. I do not see any basis for such grievance and find none.

22. Secondly, on the issue of author of the Notice, the ex parte applicants have asserted that the Notice was issued by the wrong person. However I have looked at the impugned Notice and it indicates that it is signed by County Executive Committee Member for **"Finance, Economic Planning, Trade and Revenue"** and **Section 2** of the Tharaka Nithi Alcoholic Drinks Control Act, 2015 (No.6 of 2015) provides that an Executive Member means the County Executive Member at the time in charge of Trade, Industry and Co- operative Development. The Respondent filed a Replying Affidavit vide Dorothy K. Naivasha who deposed that she was County Executive Committee Member in charge of Finance, Trade, Industry and Cooperative Development the office that issued and signed the impugned Notice. The applicants

have not demonstrated that the person who signed the impugned Notice is an imposter or a person not authorized by law to issue the impugned Notice. As observed above a party can apply for leave to apply for an order of certiorari if he can demonstrate on a prima facie basis that the action complained of was done either in excess of jurisdiction (*ultra vires*) or was illegitimate or illegal or infringed the rules of natural justice. Under the provisions of **Section 69(1)** of Tharaka Nithi Alcoholic Drinks Control Act, 2015, the law provides as follows.

“ The executive member may, on recommendation of the committee make regulations generally for the better carrying out of the objects of this Act..... the regulations may;

- a) Prescribe anything required by this Act to be prescribed or prohibit anything required by this Act to be prohibited.**
- b) Prescribe the forms of applications, notices, licences and other documents for use under this Act.**
- c) Prescribe the fees payable under this Act.”**

The provisions of **Section 2** of the **Act** defines who the “**Executive member**” is and from the description, it is clear that the person who appended the signature on the impugned notice is a holder of that office and holder of the office is mandated by law to issue notices such as the notice dated 26th September, 2018 impugned by the ex parte applicants. This court also finds that under **Section 46** of the County Government Act No. 17 of 2012, the County Executive may recognize various departments and even change a name of any department to align them with their set goals/objectives. The impugned notice, on the face of it cannot be challenged on the ground of the person who signed it *per se* because the law allows the holder of that office to sign. The only issue that can be raised is the legitimacy of the notice and this takes us back to the provisions of **Section 69(1)** of Tharaka Nithi County Alcoholic Drinks Control Act 2015. 23. This question is better addressed by reference to the constitution of the County Liquor Licensing Committee. The applicants have argued that the liquor is improperly constituted because firstly it was created while there was a court order barring formation of the same and secondly because there is a gentleman named M’Turuchiu Murungi who owns a business operating a bar and therefore cannot be a member of the Committee.

24. I have looked at the court order issued on 16th January 2017 vide **Chuka High Court Judicial Review No. 5 of 2016** and I am of the view that the order did not stop formation of new committees to be in charge of Liquor Trade. The applicants in Judicial Review 5/16 were challenging the legality of the committees that had been formed without strict adherence to the law and this court at the time agreed with the applicants that the formation for the committee contravened the law and therefore stayed and/or disbanded it. However the order did not stop formation of new Committee so long as the relevant law was adhered to and the Judgment of this court on that issue was well stated. Furthermore the said orders were vacated on 14th June, 2018 and the Respondent has stated that that is when they began the process of setting up the relevant Alcoholic Licensing Committee as required by law. This court finds that the actions undertaken by the Respondents were not tied by the orders of this court in any way and that may explain why no one took action against the Respondent for contempt of court.

25. On the issue of M’Turuchiu Murungi, an exhibit shown in the Supplementary Affidavit by Kelvin Njue Miriti seemingly shows the said individual was among a list of persons who have applied for licenses. This application is marked as being a renewal though the last year paid is not indicated. The Respondent in its submissions did not deny the fact. It has however contended that the said individual did applied for renewal but because he had become a member of the Committee, his application did not get approval. The Respondents have however not tendered any evidence to show who applied for the liquor licence and who got the nod from the Committee to renew their licenses. There is therefore a dark cloud hanging over the composition of the License Committee because under **Section 8(4)** of the Tharaka Nithi County Alcoholic Drinks Control Act 2015 the law provides as follows:-

“ A person shall not be a member of the committee if such person is;

- a) the holder of a licence in the County under this Act;**
- b) a partner in a firm or director or share holder of a company or other body which is a holder of a licence in that County under this Act.**
- c) directly or indirectly employed as an agent of a person, firm or company which is the holder of a licence in the County under this Act.....”**

26. The court has been shown a list of applicants who had applied for Trade License in relation to liquor business and from that list which is exhibited by Supplementary Affidavit sworn on 16th November, 2018, the name of Murungi M’Turuchiu as proprietor of Club Eagles Valley night club features as an applicant seeking a renewal of licence which could suggest that he was a holder of licence which required renewal. Though the Respondent has responded through written submissions that the said individual is not a current holder of a licence, this court finds that in the absence of an affidavit by the said individual denying the allegations made on oath against him, the ex parte applicants have demonstrated that they have an arguable case or a *prima facie* case to warrant the leave sought to enable them challenge the legality of the composition of Liquor Licence Committee of Tharaka Nithi County. It is important to find out really if the Liquor Licensing Committee was properly constituted in compliance with **Section 4** of Tharaka Nithi County Alcoholic Drinks Control Act or whether the law was contravened as alleged.

27. This is a crucial issue because under **Section 69(1)** of the **Act** the Executive member does not act unilaterally but on “**recommendation of the Committee**” and so if the committee lacks legitimacy to “**recommend**” then it follows that any recommendation made in terms of making regulations to govern this very important and critical industry is flawed for want of legitimacy. In the case of **Republic –vs- National Employment Authority & 3 others Ex parte Middle East Consultancy Services Ltd [2018] eKLR**, the court stated as follows:-

“An administrative or quasi-judicial decision can only be challenged for “illegality,” “irrationality” and “procedural impropriety

“ An administrative decision is flawed it is illegal.....”

28. From the above decision I am persuaded that the ex parte applicants have made out a case to warrant leave being granted to them in order to facilitate access to justice for them if at all the Respondent actually infringed the law when constituting the Liquour Licensing Committee for Tharaka Nithi County.

29. On the question of stay of the Notice dated 26th September, 2018, I am persuaded that a grant of stay at this stage may impede the Respondent’s ability to regulate the alcoholic industry and lead to undesirable consequences which may harm the society. This court finds that it is in the interest of justice to balance both the interests of the exp arte applicants with that of the general public in order to ensure that justice to all is served.

30. Finally there is a point which though was not addressed in this application is important for purposes of clarity. The ex parte applicants have brought this application on their behalf and a group that calls itself **“Maara Liquor Dealers Self Help Group”**. However the certificate of registration exhibited really do not contain any names. The list that is annexed to the certificate is not authenticated by the relevant authority issuing the certificate and the question is posed is whether all individuals therein authorized the three named applicants to sue on their behalf? I pose the question in view of a letter dated 3rd January 2019 by one Daisy D. Mukami, who indicated that her name should not have been in that list. This therefore shows the ex parte applicants may have listed individuals without their approval or even their prior knowledge. This court has noted that only two persons namely;

(i) Terry Wawira Njeru &

(ii) Benard Raibu

gave written authority to Kevin Njue Miriti applicants to plead on their behalf as provided under the provisions of **Order 1 Rule 13 Civil Procedure Rules**. It is always good practice to know who the parties in a particular case are to enable the Respondent or the defendant respond appropriately but in situations where you have an amorphous group whose membership is difficult to discern the Respondent can be embarrassed because of not knowing exactly who the adversaries are and the magnitude of the problem. Courts also have to be persuaded that the orders sought are specific and for specific people named to avoid possibilities of blanket order that can be manipulated for purposes of attaining mischievous ends.

In the premises and for the reasons advanced I am persuaded to exercise my discretion and grant leave to the following namely:-

(i) Kelvin Njue Miriti

(ii) Terry Wawira Njeru

(iii) Benard Raibu

to apply for certiorari to remove into this court and quash the Notices issued by the County Executive Committee Member, Finance, Economic Planning Trade and Revenue purely on the question of the legality of the Liquor Licencing Committee formed to offer advice and recommendation to the said County Executive Member. I direct that the ex parte applicants do move this court substantially within 21 days from the date of this ruling. Costs of this application shall be in the main cause.

Dated, signed and delivered at Chuka this 12th day of February, 2019.

R.K. LIMO

JUDGE

12/2/2019

Ruling dated, signed and delivered in the open court in presence of Dr. Kamau Kuria holding brief for Ann Thungu for ex parte applicant and Muthoni for Respondent.

R.K. LIMO

JUDGE

12/2/2019