



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 6 OF 2019

IN THE MATTER OF ARTICLES 1, 2, 10, 22, 27, 28, 31, 35, 36, 40, 41, 47, 48, 50, 73, 159(2)(D), 165(3)(B), 174, 185 AND 258(1)(2) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLES 10, 27, 41, 47, 73, 174, AND 185 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALCOHOL DRINKS CONTROL ACT NO. 4 OF 2010 LAWS OF KENYA AND THE FOURTH SCHEDULE OF THE ALCOHOLIC DRINKS CONTROL ACT

AND

IN THE MATTER OF UASIN GISHU COUNTY ALCOHOLIC DRINKS CONTROL ACT OF 2014

BETWEEN

TERESA CHERUIYOT T/A COOL SHADE BAR & 4 OTHERS.....PETITIONER

VERSUS

THE COUNTY CHAIRMAN LIQUOR LICENSING COMMITTEE –

UASIN GISHU COUNTY.....1ST RESPONDENT

THE DIRECTOR OF ALCOHOLIC DRINKS

COUNTY GOVERNMENT OF UASIN GISHU2ND RESPONDENT

THE MEDICAL OFFICER OF HEALTH

COUNTY GOVERNMENT OF UASIN GISHU.....3RD RESPONDENT

PUBLIC HEALTH OFFICER, UASIN GISHU

COUNTY GOVERNMENT4TH RESPONDENT

THE COUNTY GOVERNMENT OF UASIN GISHU.....5TH RESPONDENT

RULING

The applicants filed a preliminary objection challenging the jurisdiction of the court to handle the petition. The preliminary objection is founded on the grounds that the petitioners are in contravention of Sections 5,7 and 8 of the Fair Administrative Action Act No. 4 of 2015. Further, that Section 17 of the Uasin Gishu Alcoholic Drinks Control Act ousts the original jurisdiction of the court. The petitioner did not utilize and exhaust the provided internal mechanisms to lodge the complaint before the review/appeals committee.

APPLICANT'S CASE

The applicant contends that the petitioner's application and petition is untenable as it contravenes Sections 5,7 and 8 of the Fair Administrative Act No. 4 of 2015. They did not adhere to the review provisions therein. The petition should be struck out for want of jurisdiction of this court as it contravenes Section 17 of the Uasin Gishu Alcoholic Drinks Control Act.

The said provisions were not complied with by the applicants and they did not adhere to them. The matter is in court prematurely.

The applicant further averred that there are provisions for revision under the Uasin Gishu Alcoholic Drinks Control Act but the respondent has not stated why the provisions were not followed. When the court has no jurisdiction it should down its tools on the matter. The preliminary objection has merit and should be allowed.

RESPONDENT'S CASE

The respondent submitted that the cause of action is a constitutional petition before the court pursuant to Article 23(3) of the Constitution. The court has inherent jurisdiction to hear and determine a petition on constitutional issues regarding violations of rights. The Fair Administrative Action Act gave effect to Article 47 of the Constitution.

The Uasin Gishu Alcoholic Drinks Control Act cannot oust the jurisdiction given by the constitution. The quoted sections cannot override article 47 of the Constitution as read with article 28(3).

Section 9 of The Fair Administrative Action Act states that an aggrieved party may apply for a judicial review in the High Court or subordinate court pursuant to Article 23(3) of the Constitution. To that extent the preliminary objection is misconceived and should be dismissed.

Section 17 of the Uasin Gishu Alcoholic Drinks and Control Act arises from Section 12 of the said Act. It deals with applications by any applicant. After the application is considered communications should be given within 21 days. In case of an objection, the one raising it should lodge it and serve upon the applicant. It can be served personally within 7 days. The objection shall be considered by the county committee in presence of the applicant. The committee should then make a decision. If denied, recommendations should be made for the applicant to reapply within 30 days. Those issues need to be heard.

The internal mechanism could not be exhausted for the failure of the county to comply with the law pursuant to Sections 11 and 12. The Preliminary objection is unmerited.

ISSUES FOR DETERMINATION

1. Whether the court has jurisdiction to hear the petition.

The bone of contention of the applicant is that the petition contravenes sections 5,7 and 8 of the Fair Administrative Action Act No. 4 of 2015 and Section 17 of the Uasin Gishu Alcoholic Drinks Control Act.

Section 5 of the Fair Administrative Action Act provides;

5. (1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall-

(a) issue a public notice of the proposed administrative action inviting public views in that regard;

(b) consider all views submitted in relation to the matter before taking the administrative action;

(c) consider all relevant and materials facts; and

(d) where the administrator proceeds to take the administrative action proposed in the notice-

(i) give reasons for the decision of administrative action as taken;

(ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and

(iii) specify the manner and period within the which such appeal shall be lodged.

(2) Nothing in this section shall limit the power of any person to-

(a) challenge any administrative action or decision in accordance with the procedure set out under the Commission on Administrative Justice Act, 2011 or any successor to the Commission on Administrative Justice under section 55 of the Commission on Administrative Justice Act;

(b) apply for review of an administrative action or decision by a court of competent jurisdiction in exercise of his or her right under the Constitution or any written law; or

(c) institute such legal proceedings for such remedies as may be available under any written law.

Section 7 states, with regards to grievances with administrative action;

7, (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to

(a) a court in accordance with section 8; or

(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

Section 8 states;

8. An application for the review of an administrative action or an appeal under this Act shall be determined within ninety days of filing the application.

Section 17 of the Uasin Gishu Alcoholic Drinks Control Act provides;

17. (1) An applicant whose application for a new licence, to renew or transfer a licence has been refused or cancelled may within fourteen (14) days of such refusal, request in writing the review of such refusal to the Appeals Committee.

(2). A person aggrieved by the decision of the sub county committee to grant a new licence or to renew a licence may request in writing to appeal against such decision.

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

(4). The Appeals Committee shall within twenty-one days consider and make a final determination on the request for review.

(5). The Appeals Committee may

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

(b) uphold the decision of the County committee;

(c) annul the decision of the County committee

(d) give directions to the County committee with respect to any action to be taken;

(e) make any other declaration as it may deem fit.

In a nutshell, the applicants' position is that the respondent failed to follow the process set down in the Act to review a decision on failure to grant a new or renew a licence.

The respondents position is that the cause of action is a violation of constitutional rights and that this court has inherent jurisdiction over such issues pursuant to Article 23(3) of the Constitution which provides;

3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the

Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

Article 47 of the Fair Administrative Action Act provides;

47. Fair administrative action;-

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

The respondent, in urging the court to dismiss the Preliminary objection, submitted that the aggrieved party was at liberty to apply for Judicial Review as per Section 9 of the Fair Administrative Action Act which provided that;

9. (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

The respondent has, by citing this section, acknowledged that the option of a Judicial Review is what the law provides. In light of this submission, doesn't it therefore emerge that there was a process provided in law that should have preceded the filing of the current petition? The petitioner had the option of Judicial review as per Section 9 of the Fair Administrative Action Act. He has placed reliance on Article 23(3) of the Constitution which gives provisions on the authority of the court to enforce the bill of rights. However, what is being challenged essentially is the process of denial of the licenses and not the infringement of rights.

Section 5(2) of the Fair Administrative Action Act is clear in its provisions on the challenging of an administrative action. The law on challenging a decision of the liquor licensing committee is Section 9 of the Fair Administrative Action Act and Section 17 of the Uasin Gishu Alcoholic Drinks Control Act. The aggrieved party is supposed to apply for review to the appeals committee. If still aggrieved by that decision the party is entitled to Judicial Review under Section 9 of the Fair Administrative Action Act.

In terms of Judicial Review, Section 9(2) of The Fair Administrative Action Act bars the court from reviewing administrative actions where internal mechanisms have not been exhausted as follows;

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

The Applicants cannot hide under the guise of constitutional provisions to circumvent the process in law to challenge the decision by the committee. They must follow the processes provided in written law and exhaust the same before filing for judicial review and eventually, a petition. If at all the county did not comply with Sections 11 and 12 of the Uasin Gishu Alcoholic Drinks Control Act, the petitioners' next step should have been Judicial Review.

The question that remains is whether the applicants were notified of the cancellation of the licenses. The respondents submitted that the reasons were communicated through a template notice that is available at the Alcoholic Drinks Control Board Offices, County Security & Sub-County Security Committee teams, Sub county administrator's offices and ward administrators' offices who communicated to the applicants. The respondents provided a copy of the notice as proof of the same. Further, they contended that the petitioner visited their office to enquire on the application and were given the reasons for rejection. I find it probable that the petitioner was made aware of the reasons for rejection.

In the absence of proof that any of these avenues have been exhausted let alone attempted (e.g. an appeal in writing as per the Uasin Gishu Alcoholic Drinks Control Act or a request in writing to review the decisions), I find that the petition is premature and the Preliminary objection is merited.

Given that the petition is incompetent, it follows that the issue of the application is also determined. In the absence of a valid suit the court is reluctant to grant conservatory orders which may circumvent adherence to the county regulations. If there was a pending suit there would be an assurance that the issue would be resolved. However, there is none therefore the conservatory orders cannot issue.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 13th day of June, 2019.

In the presence of:-

Mr. Kipruto holding brief for Mr. Kagunza for the Petitioner

And in absence of Mr. Mutai for the respondents

Ms Sarah - Court Assistant