REPUBLIC OF KENYA

IN THE HIGH COURT OFKENYA AT CHUKA

JUDICIAL REVIEW MISC APPLICATION NO. 11 OF 2019

IN THE MATTER OF AN APPLICATION FOR LEAVE INSTITUTE

PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

AND

INT HE MATER OF ARTICLE 23 (3) (f) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTE OF FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF SECTIONS 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 OF APPLICATIONS FOR GRANT OF LICENCES AND

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

BETWEEN

THARAKA NITHI BAR OWNERS SELF HELP GROUP.....APPLICANT

AND

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

R U L I N G

1. Before me is an application dated 14th June 2019 brought in by way of Chamber Summons under **Order 53 Rule 1 & 2** of **Civil Procedure Rules,** 2010 by Tharaka Nithi Bar Owners Self-Help Group, the exparte applicants herein and seeks the following orders;

i. That this matter be certified urgent (spent).

ii. That leave do issue for the Applicants to apply for an order of prohibition directed towards prohibiting and restraining the Respondent from enforcing against the Applicants the decision emanating from the Notice on Application for Grant of Licences for the year 2019 which notice was issued on 10th June 2019 by the Respondent.

iii. That leave so granted do operate as say of any decision of the Respondent to enforce against the Applicants the Notice on Application for Grant of Licenses issued on 10th June 2019 by the County Executive Committee Member for Finance, Economic, Planning, Trade and Revenue.

2. The Applicants have sought leave to challenge a public notice issued by the Respondent on 10th June 2019 in regard to licenses for 2019 on grounds that the Notice is too short, vague, arbitrary, unfair and unreasonable. They have also faulted the Respondent for acting irresponsibly, maliciously and in bad faith.

3. The Applicants aver that Tharaka Nithi County Liquor Licensing Committee is an illegal body and in incapable of conducting any mandate. The Applicants are seeking to challenge the legality of the Notice dated 10th June 2019 in view of this court's judgment delivered on 16th May 2019 declaring that Tharaka Nithi County Liquor Licensing Committee was an unconstitutional body.

4. The Applicants have alternatively faulted the impugned notice for being irrational and too short and in their view is only meant to arbitrarily harass the Applicants.

5. The Applicants have further found fault in the impugned notice stating that there is no clarity on the amount of fees prescriptions to be paid by each of the Applicant's members as there are no regulations that have been stipulated over the same.

6. The Applicants have sworn an affidavit through Fredrick Mutwiri Kaburu who has sworn a verifying affidavit sworn on 14th June, 2019.

7. This court upon presentation of this application ex parte found it fit and just to entertain the application inter partes and directed that the Respondent be served which was done.

8. The Respondent (County Government of Tharaka Nithi) have opposed this application through a Preliminary Objection on two points of law and Replying Affidavit by its Principal Legal Officer, Lilian Kiruja sworn on 25th June 2019.

9. The Respondent contends that the Applicants have prematurely came to court as in its view **Section 17** of **Tharaka Nithi County Alcoholic Drinks Act 2015** provides an avenue for aggrieved parties or those that have been denied licenses to apply for review of such decision by a Review Committee and that **Section 10** of the said **Act** establishes a Review Committee.

10. Secondly the Respondent contends that a writ of prohibition cannot issue to stop a decision that has already been made arguing that various Sub-County Liquor Licensing Committee received applications for Licenses from Applicants and approved some while some were rejected. In its view the decision to issue and deny licenses has already been made and consequently an order of prohibition cannot issue. To that extent they have cited the decision in Kenya ***National Examination Council - vs- Republic Ex parte Geoffrey Gathenji Njoroge & 9 Others (Civil Appeal No.266 of 1996)*** to support the contention.

11. The Respondent has faulted the Applicants for not demonstrating how the decision they are complaining about is tainted with illegality, and procedural impropriety.

12. The Respondent has asserted that the general notice for application for license for the year 2019 was issued on 8th January, 2019 and has exhibited the said Notice dated 8th January, 2019. The legal officer has faulted some of the Applicant's members for failing to apply for licenses at all asserting that only 6 out of 32 applied and has annexed a copy of the persons who applied for the licenses.

13. The court has considered this application and the response made by the Respondent. It is important to note that at this stage of judicial Review, the court usually does not delve much into the merit of a case lodged. The court is only required to satisfy itself that a prima facie case has been established to warrant leave being issued or not. The court must also be satisfied that the acts or decisions complained of are amenable to Judicial Review Orders. The purpose for leave being sought under **Order 53** of the **Civil Procedure Rule** is to enable court weed out or sieve frivolous matters and only allow merited matters to proceed to the substantive stage. This view is embolded by the decision in the case of ***Lady Justice Joyce N. Khaminwa -vs- Judicial Service Commission & Another [2014] eKLR*** where the court observed the following:-

> ***"..... leave stage is therefore to filter whose purpose is to weed out hopeless cases at the earliest possible time thus saving on the courts and needless expense for the Applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out to be unmeritorious."***

12. In the above decision **Hon. Odunga J** cited in approval the case of ***Republic - vs- County Council of Kwale and Another Ex parte Kondo & 57 Others (Mombasa High Court Misc Application No. 384 of 1996)*** where **Waki J** (as he then was) gave a clear perspective when he held as follows:-

> ***" The purpose of application for leave to apply for Judicial Review is firstly to eliminate at early stage any applications for Judicial Review which are either frivolous, vexatious, or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial Review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial Review if it were actually pending even though misconceived.... leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant to test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for Judicial Review . It is an exercise of the court's discretion but as always it has to be exercise judiciously."***

13. The Respondent has faulted this application on two main grounds namely;

i. Availability of alternative remedy.

ii. That the writ of prohibition cannot issue to stop a decision already made.

14. To begin with existence of an alternative remedy, the Respondent's contention that the existence of an alternative dispute resolution provided under **Section 17** of **Tharaka Nithi County Alcoholic Drinks Act 2015** renders this application incompetent in my view does not hold any water for two reasons:-

i. In the first place Judicial Review does not concern itself with the merits of a decision but the process itself. A statute providing for appeal or review mechanism may be dealing with the merits of an impugned decision but Judicial Review as a remedy addresses the process. In ***Republic -vs- National Environment Management Authority (2006) KLR***, that issue cropped up when the Respondent raised an objection to the Judicial Review arguing that **Section 125** of EMCA provided an avenue for appeal to those aggrieved by the decision of National Environment Management Authority. The court was not persuaded and held as follows:-

"***Regarding the availability of an alternative remedy, such as an appeal, whereas these are occasions when the court will require exhaustion of other remedies of procedure..... the availability of such alternative remedy is no bar to proceedings by way of Judicial Review. The reason for this is explained by the foregoing paragraphs of this ruling is to be found in the nature of the remedies of Judicial Review they have no concern with the merits of either of the applicant's case or Respondent's case. This court concerns itself with the review of the decision of the decision making process not whether National Environment Management Authority had authority to issue a stop order or notice or whether there is an appeal mechanism.....***"

ii. Secondly the legality of the Tharaka Nithi County Alcoholic Drinks Act and all bodies formed thereunder including appeals committee under Section 17 is questionable given the fact that this court found the said Act unconstitutional through its decision delivered vide Constitutional Petition No.3 of 2018. The applicants in my view are in order to challenge any decision made by the Respondent and cannot be barred from accessing Justice via Judicial Review simply because the Statute, which has been impugned successfully in a court of law, provides an alternative remedy or mechanism of review or appeal. They have every reason as I have observed to question the legality of those bodies.

15. On the 2nd ground of objection, which is the contention that prohibition cannot issue to prevent what has already taken place, is that this court has considered the reliefs sought in this application and it is true that the applicants have actually sought leave to apply for only a writ of prohibition which in my view is limited in scope because the remedy unlike *certiorary* is prospective rather than retrospective so while c*ertiorari* will look at the part of an action or a decision taken, with a view to quashing if situation demands, prohibition will apply to the future to prevent future acts or decisions made *ultra vires* (excess of jurisdiction) or for any other reason. The Applicants' major complaint in this matter is hinged on a Notice dated 10th June 2018. They aver that the notice is too short, vague, arbitrary, unfair and unreasonable. While the applicants' complaint may be well grounded because I have looked at the impugned, notice, the Respondent alleges that the notice has already taken effect meaning that even if the Applicant's were to successfully challenge the legality of the said notice, the exercise will be futile. I have scrutinized the impugned notice and though it is not very clear, it is apparent that the liquor traders were required to make some unspecified payments by 21st June 2019 which means that the decision has already taken effect and the remedy of prohibition in my view is not sufficient to address the concerns raised by the Applicant because the remedy cannot apply retrospectively due to its nature. That is why it is always safe for an aggrieved party to seek for a combination of the two writs, *certiorary* (a quashing order) and prohibition to prevent future implementation of a directive or decision. It is true that a party cannot apply for any Judicial Review itself without leave and to that extent the applicants really tied the hands and sought to go for war.

In the end much as I may appreciate the concerns raised by the Applicant, I have to agree with the Respondent's contention that an order of prohibition is powerless against a decision which has already been made. Prohibition can only prevent the making of the decision and/or implementing it. But where the decision has been made and implemented the appropriate remedy is a writ of certiorari to quash the order and render it ineffective. The Applicants for unknown reason chose to come to court and failed to apply for an appropriate remedy and instead applied for a remedy that will really not assist them.

In the premises I find that the application dated 14th June 2019 lacks in merit because in my view a writ of prohibition on its own does not reveal that the Applicants have an arguable case and it is hopeless in my view to let the Applicants pursue a remedy which in the end will not be of much or any assistance. The application is therefore for those reasons disallowed but I shall not make any order as to costs.

Dated, signed and delivered at Chuka this 1st day of July, 2019.

R. K. LIMO

JUDGE

1/7/2019

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

R.K. LIMO

JUDGE