



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

PETITION NO. 8 OF 2019

STEPHEN MBALUKA MUTIE

(Trading as Villa Park Guest House).....APPLICANT/PETITIONER

-VERSUS-

CABINET SECRETARY, MINISTRY OF INTERIOR

& COORDINATION OF NATIONAL GOVERNMENT

OF NATIONAL GOVERNMENT.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Introduction:

1. The petitioner herein filed a petition dated 12th June, 2019 and filed on 13th June, 2019 against Cabinet Secretary, Ministry Of Interior & Coordination Of National Government Of National Government, the Inspector General of Police and the Attorney General, Respondents, seeking various orders, among them a declaration that the closure of Villapark Guest House by the 2nd Respondent violates his dignity as protected under Article 28, freedom from discrimination as guaranteed under Article 27 and Freedom of Conscience guaranteed under Article 32(1) of the Constitution and a permanent injunction restraining the Respondents from closing Villapark Guest House.

2. Together with the Petition, the petitioner filed a notice of motion of even dates under urgency, and sought the following orders: -

- 1) **THAT the honourable Court be pleased to certify this matter as urgent.**
- 2) **THAT service be dispensed with and the matter be heard ex parte in the first instance on account of the urgency, nature and circumstances of the case.**
- 3) **THAT the honourable court be pleased to issue interim injunction restraining the 1st and 2nd Respondents from closing villa park guest house pending hearing and determination of this application *interpartes*.**
- 4) **THAT the honourable court be pleased to issue interim injunction restraining the 1st and 2nd Respondents from closing villa park guest house pending hearing and determination of this petition**
- 5) **THAT the Honourable Court be pleased to make any further orders as it deems fit and just.**

3. In response to the application, the Respondents through the Attorney General filed grounds of opposition dated 17th June, 2019 and filed on 18th June, 2019 in opposition to the application.

4. Both parties agreed to dispense with the application vide written submissions, and both parties put in their written submissions.

BACKGROUND

Applicants Case:

5. The applicant alleges that he owns and operates a registered restaurant and accommodation business by the name Villa Park Guest House, which he registered on 1st July, 2016. He averred that he acquired all the necessary licenses from the Garissa County Government, which include single business permit, liquor license, private parking and public health all costing him a total of Kshs. 195,500/=. He alleges that the above payments are in accordance with the provisions of the Garissa County Finance Act of 2018/2019.
6. It is the applicant's averment that after acquiring all the licenses and establishing his business, he operated his business which grew with time and he realized profits. This was until the month of April, 2019, when officers from the 2nd Respondent began to frequently close his business without any lawful justification. He alleges that they closed his business at 9PM yet he has a license to carry on till morning. It is his case that the manner used to close his business is humiliating as it involves the said officers spilling client's drinks and pouring food and forcibly ejecting them and forcing them into their vehicle and dumping them at HASS Petrol station, the resultant effect being to discourage them from frequenting the joint.
7. He avers that the instructions to close his joint and humiliate him come from the Regional Coordinator who is answerable to the 1st Respondent, and that the officers who undertake the raids are usually of the local origin, who he alleges are targeting him for offering alcoholic beverages which products are normally shunned by the locals.
8. As a result of the said raids and closure, the applicant alleges that his business has incurred losses as he is unable to maintain his clientele and attract new ones due to the respondent's harassments and targeting of his business.
9. In sum he argues that unless this court issues the sought orders, his business will face imminent closure as a result of the unlawful closure and harassment, stating that attempt to reach the county commissioner over the same proved futile as he received no response.

Respondents Response:

10. Vide their hereinabove grounds of opposition; the Respondents opposed the instant application on several grounds. The respondents argue that the applicant has not established a prima facie case as he has not demonstrated likelihood of success or that there is real danger that they would suffer as a result of the alleged or threatened violation. They argue that the same has not met the threshold for grant of conservatory orders as established by the Supreme Court in *Gatirau Peter Munya vs Dickson Mwenda Githinji & Others (SCK Petition No. 2 of 2013)*.
11. It is their argument that public interest lies with the Respondents or the state and therefore the sought orders ought not to be issued.
12. In addition, the Respondents argue that section 9 of the Alcoholic Drinks Control Act, 2010 gives the respondents the right to access any premises selling alcoholic drinks for purposes of ascertaining compliance with the law and that under section 8 of the same Act the police play a key role in the regulation of alcoholic drinks. And the remedies should be sought under the normal process and not through a petition.
13. It is their contention that the orders sought would inhibit the exercise of police power provided for under section 57 of the National Police Service Act, and that the same is an attempt to pre-empt or thwart all legal process provided in the law for alcoholic drinks control and will leave the authorities in a straightjacket, unable to act in accordance with their legal mandate at a time when there is concerted effort for the verification of the sources of illicit alcohol which has deleterious consequences on the health of the citizens.
14. They argue that the instant petition and application are fatally defective, flawed, frivolous and vexatious and an abuse of the Court process and ought to be struck out summarily.

SUBMISSIONS

Applicant submissions:

15. The applicants through their written submissions addressed two issues. The first issue is as to whether the petitioner is licensed to carry on a restaurant, night club and accommodation business. In this regard they submitted that the issue of contention is whether they have a license to sell alcohol beyond 9pm time, which time the Respondent comes in and closes his establishment. He submits that the County Government of Garissa is mandated under the Constitution to control and license sale of alcohol. This is in line with Article 185(1) of the Constitution which vests the Counties with authority to legislate on matters including control of alcohol sales, which is also supported by Part II of the Fourth Schedule, which gives counties the power to issue liquor licenses.
16. They submitted that pursuant to the above provisions of the Constitution, the Garissa County passed the Garissa County Finance Act 2018/2019 which act provides for licensing of alcohol sale upon payment of Ksh. 100,000/=. which sum he submits he paid and was issued with a receipt to that effect.
17. They contested the Respondents' submissions that there is no legislation for alcohol sale and control arguing that the above provisions of the Garissa County Finance Act are sufficient and that being the case the Alcoholic Drinks Control Act No. 4 of 2010 does not apply, arguing that even if it applies it does not give the Respondents authority to harass persons who have complied with the law and secured the necessary licenses. It is their position that they are duly licensed.
18. The second issue addressed by the applicant is as to whether the 1st and 2nd Respondents are justified in closing his business. In this they submitted that no section of the law allows the respondents to shut down lawfully operating business, even though they have a right to enter

and inspect the same under the law. In this they relied in the case of *Republic vs Kombo and 3 others Ex parte Waweru 2005 3 KLR 478*.

19. In sum they submitted that the instant suit is meritorious and ought to be allowed as prayed.

Respondents Submission:

20. Through their filed submissions, the Respondents addressed three issues. The first issue is as to whether the applicant has the requisite license to sell alcohol in Garissa. In this regard they argued that the licensing of alcohol is not within the scope of the Garissa County Finance Act 2018/2019 and that in any event the applicant has only produced a receipt of payment of license but not the actual license.

21. The second issue addressed by the Respondent is as to whether the Garissa County Assembly has enacted the requisite legislation under Article 185(2) of the Constitution to enable the Garissa County Government to license sale of Alcohol. In this regard they submitted that the Garissa County Assembly has not legislated on the control and consumption of alcohol, and that being the case they argued that they have duty to ensure that the public is protected from harm resulting from alcohol consumption. In this rely in the case of **John Kinyua Munyaka & 11 Others vs County Government of Kiambu & 3 Others (2014) eKLR** and **Muranga bar operators Association Self Help Group vs Minister for State for Provincial Administration and Internal Security & 2 Others**.

22. The third issue addressed by the Respondents is in respect to the applicable law in the absence of a county legislation. In this respect the Respondents submitted that the applicable law in the circumstances is the Alcoholic Drinks Control Act No. 4 of 2010, which they argue takes precedence in the absence of a county legislation on alcohol control and that the Act gives the respondent the power and authority to monitor compliance in the business of alcohol sale.

23. In sum they urged the court to dismiss the application and the petition with costs.

Issues and Analysis:

24. The Applicant is seeking a temporary injunction to restrain the Respondents from interfering or shutting down his business pending the hearing and determination of this petition. The established legal principles for grant of a temporary injunction in Kenya is set out in the case of *Giella .vs. Cassman Brown & Co. Ltd. [1973] EA 358* where it was held by the East African Court of Appeal that:-

“The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a “prima-facie” case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

25. In the public law arena, such as the instant case where a petition is involved, the notion of ‘Conservatory orders’ exists, with the main aim being to target non private entities or parties who exercise their powers as established under the Constitution or the statute as is the case with respect to the 1st and 2nd Respondents. In this application, what the applicant is basically seeking extends to realms of the orders so called conservatory orders.

26. It is important to note that at this stage the court is not required to make definite and conclusive findings of either fact or law, although the parties herein seem to have addressed so many issues. This is well elaborated in the case of *Kenya Association of Manufacturers & 2 others vs Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR* where the court in regard to grant of conservatory orders noted:

“In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.”

27. In addition, the Supreme Court in regard to conservatory orders, noted as follows in the case of *Petition No. 2 of 2014, Gatirau Peter Munya .vs. Dickson Mwenda Kithinji & 3 Others*, that:-

“Conservatory orders bear a decided public law commutation for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the courts, in the public interest. Conservatory orders therefore, are not unlike interlocutory injunctions linked to such private party issues as the prospects of irreparable harm occurring during the pendency of case or high probability of success in the applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant cases.”

28. In order for the court to issue a conservatory order, the applicant has to first establish a prima facie as was well elaborated by *Odunga J - Kevin K. Mwiti Others v Kenya School of Law & Others* where he held:

“The first issue for determination is whether the Petitioner has established a prima facie case. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other

words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success.”

29. Considering the applicant case on whether he has established a prima facie case, it is apparent to the court that the applicant business in the name of Villa Park has been in operation for quite some time a fact not challenged by the Respondents. He has produced registration documents and relevant licenses and for the liquor license a payment receipt confirming payments made to the County pursuant to the Garissa County Finance Bill 2018/2019 which he has also produced in court. Therefore at this stage of the proceedings, it is my finding that the applicant has established an arguable case, as he alleges that the respondents’ action herein is an infringement on his rights protected under the Constitution, which action is perpetuated despite him having all the necessary documents to carry on with his business past 9pm.

30. The next hurdle after having established an arguable case is as to whether there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. In this regard **Mwongo, J** in **Martin Nyaga Wambora vs. Speaker of The County of Assembly of Embu & 3 Others [2014] eKLR**, expressed himself as follows:-

“To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.”

31. The applicant herein has submitted that the Respondents action, which entails harassing his clients has affected his business negatively and if the same is not stopped in the interim he stand to close shop due to lose of existing clientele who tend to shun the premises based on discouraging Respondents action and that on the same note he also alleges that he has failed to attract new clients and as a result he has experienced loses. It is his position that if the said action is not stopped his business faces imminent danger of closure. This in my view further satisfies the second hurdle.

32. As it is trite that the decision whether or not to grant conservatory orders is a discretionary remedy to the court, a party seeking them must move the Court with alacrity and ought not to be guilty of laches. Therefore a claim for conservatory orders ought to be made promptly, timeously and without delay. The applicant herein in my view deserves the sought orders and in the circumstances this court finds favour in the instant application and allows the same.

CONCLUSION

33. Accordingly, it is my finding that the Petitioner/Applicant has satisfied all the conditions necessary for the grant of conservatory orders and the instant motion is allowed. Thus court makes the following orders;

i) An order of interim injunction is hereby issued restraining the 1st and 2nd Respondents from closing Villa Park guest house pending hearing and determination of this petition.

ii) Costs in the main cause.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT GARISSA THIS 13TH DAY OF NOVEMBER, 2019.

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C. KARIUKI

JUDGE