



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 9 OF 2019

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 27, 28, 31, 35, 36, 40, 41, 43, 47, 48, 50, 73,
159(2)(d), 165(3)(b), 174, 185 & 258(1) and (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTA 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

AND

IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL ACT, NO. 4 OF 2010

AND

IN THE MATTER OF THE UASIN GISHU COUNTY ALCOHOLIC

DRINKS CONTROL AND LICENSING COMMITTEE

BETWEEN

ZACHARIAH KIPKOROS T/A RIVERSIDE BAR.....APPLICANT

AND

THE COUNTY CHAIRMAN LIQUOR LICENSING

COMMITTEE-UASIN GISHU COUNTY.....1ST RESPONDENT

THE DIRECTOR OF ALCOHOLIC DRINKS

- UASIN GISHU COUNTY.....2ND RESPONDENT

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

RULING

[1] The Petition dated **21 May 2019** was filed herein by **Zachariah Kipkoros T/A Riverside Bar** to challenge the decision of Respondents in denying him a liquor licence for the year **2019**. He averred that he is involved in the wholesale and retail business of selling alcoholic drinks at Ziwa Trading Centre within Uasin Gishu County; a business he has operated for about 10 years now without any disruption of any kind. He further stated that he has always complied with all the legal requirements pertaining to the trade, including obtaining annual trade licences; and that it was in that spirit that on or about **November 2018**, he applied for the **2019** trade licences.

[2] The Petitioner complained that, while awaiting renewal of his trade licence, his premises were inspected in **January 2019** and no adverse report was brought to his attention. He accordingly proceeded to secure the premises on which the bar is situated for the year **2019**, with the legitimate expectation that his licence would be renewed; which was not to be. He further averred that, on or about **22 February 2019**, the 3rd Respondent's officers led by the Director of Alcoholic Drinks (the 2nd Respondent) and the Sub-County police officers invaded his premises, disrupted the business, blocked operations and arrested his employees for no apparent reason. He averred that he needlessly lost business, stock and incurred loss as a result of the Respondents' unjustified action; and therefore, that the said actions amounted to a gross violation of his constitutional rights; and more particularly his rights under Articles 10, 47, 40, 43, 50 and 55 of the Constitution. It was in the light thereof that the Petitioner prayed for:

[a] A Declaration that the acts and/or omissions of the Respondents in interfering with his lawful business activities; in destroying his property; and in denying him his alcoholic drinks retail licence for the year 2019 are unconstitutional;

[b] An order that the Respondents do pay damages and/or compensation for the arbitrary raids on the Petitioner's premises leading to subsequent closures of the Petitioner's business premises;

[c] An order of Prohibition barring the Respondents from annulling, revoking and rejecting the application for renewal of the Petitioner's alcoholic drinks retail licence in respect of the premises known as Riverside Bar situated at Ziwa Trading Centre within Uasin Gishu County; and from interfering with the Petitioner's bar business activities;

[d] An order of Mandamus directed against the 1st Respondent compelling the Chairman of Uasin Gishu County Alcoholic Drinks Committee to renew the Petitioner's alcoholic drinks retail licence in respect of the premises known as Riverside Bar situated at Ziwa Trading Centre within Uasin Gishu County and to issue the Petitioner with the retail licence for the Year 2019;

[e] That the costs of the Petition be awarded to the Petitioner.

[3] Filed contemporaneously with the Petition was an application under Certificate of Urgency dated **21 May 2019** for conservatory orders to restrain the Respondents from continuing with the violations complained of pending the hearing and determination of the Petition; and in response thereto, the Respondents filed Grounds of Opposition as well as a Notice of Preliminary Objection dated **26 June 2019**. The Preliminary Objection was premised on the following grounds:

[a] That the Petition and the application are misconceived, untenable and bad in law and an abuse of the court process for lack of jurisdiction.

[b] That the Petitioners are in contravention of **Sections 5, 7 and 8** of the **Fair Administrative Action Act, No. 4 of 2015** by failing to adhere to the procedure set out therein;

[c] That **Section 17** of the **Uasin Gishu Alcoholic Drinks Control Act** ousts the original jurisdiction of the Court; and that the Petitioner did not utilize and exhaust the internal complaints resolution mechanisms for review/appeals provided for before filing this Petition;

[4] Accordingly, the Respondents prayed that the Petition, including the application dated **21 May 2019**, be struck out. Directions were accordingly given that the Preliminary Objection be disposed of first; and that the same be canvassed by way of written submissions. However, by **24 September 2019** when the matter was reserved for ruling, only the Petitioner had complied and filed written submissions. In his written submissions dated **24 September 2019**, **Mr. Kagunza** reiterated the Petitioner's assertions that he applied for **2019** licences in accordance with **Section 11** of the **Uasin Gishu County Alcoholic Drinks Control Act, 2014** (hereinafter, "the Act"); and that the licence has never been issued to him and that no communication in writing was ever made to the Petitioner. That he was in the circumstances constrained to file this Petition for redress; and that it was thereafter that the Respondents purported to give reasons for their decisions and actions.

[5] Counsel then set out the applicable procedure for liquor licence application as set out in **Sections 11 and 12** of the Act and submitted that the Petitioner duly complied with that procedure and that his premises were accordingly inspected by agents of the Respondents, with no adverse report being brought to his attention that would warrant denial of licence. It was therefore the submission of **Mr. Kagunza** that, since there were no proceedings in respect of which a review or appeal could be filed, the Petitioner had no option, in the circumstances, but to seek redress pursuant to the relevant provisions of the Constitution. He particularly urged the Court to note that no communication or response of any kind was given to the Petitioner by the Respondents; and therefore that the doctrine of exhaustion would not lie under the circumstances.

[6] In determining what is the proper subject of a Preliminary Objection, the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696** is pertinent, wherein it was held that:

"... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer

the dispute to arbitration."

[7] Moreover, as was opined by **Sir Charles Newbold, P.** in the **Mukisa Biscuits Manufacturing Co. Ltd Case:**

"...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."

[8] The same position was adopted by **Hon. Ojwang, J.** (as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141**, thus:

"...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed... Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

[9] A careful perusal of the documents filed herein by the parties shows that there is no controversy that the Petitioner held a valid licence issued by the Respondents for 2018 for the sale and/or distribution of alcohol at his Riverside Bar in **Ziwa Trading Centre**. A copy thereof was exhibited as an annexure to the Petitioner's Supporting Affidavit in respect of his application dated **21 May 2019** and marked **Annexure ZK 1**. Indeed, at paragraph 9 of the Affidavit in Response to the Petition, sworn by **Mr. Sila Boit** on **30 May 2019**, it is explicitly conceded that that was the case. It was further conceded that the Petitioner applied for renewal of his licence for the year 2019. At paragraphs 11 and 12 of the said affidavit, the Respondent asserted that the Petitioner's application for 2019 was subjected to the process provided for in the Act and that the same was rejected by the Regulation Committee on **17 June 2018**.

[10] Of course, it is now trite that where there is a clear procedure for the redress of a grievance provided for by either the Constitution or an applicable statute, it would be inappropriate for the Court to entertain that dispute notwithstanding that it has the jurisdiction so to do. In the **Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR** for instance, it was held thus by the Court of Appeal:

"...in our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed..."

[11] Likewise, in **Republic vs. National Environment Management Authority (NEMA) [2011] eKLR** the Court of Appeal restated this principle thus after reviewing the authorities on the point:

"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it - see for example **R vs. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD. Case**. The learned trial judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect we agree with the Judge."

[12] I therefore find merit in the argument by the Respondents that, in the circumstances aforementioned, the Petitioner ought to have exhausted the review/appeals procedure provided for in **Section 17** of the Act. Accordingly, the only issue that presents itself for the Court's determination is whether this Court has the jurisdiction to entertain the application in the circumstances, granted that the Petitioner sought the intervention of this Court before exhausting the redress mechanism provided for in **Section 17** of the **Uasin Gishu County Alcoholic Drinks Control Act**. That provision states as follows in subsection (1) and (2):

(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 appeal against such decision.

[13] However, the contention of the Petitioner is that no communication at all has been forthcoming from the Respondents ever since he submitted his application for licence renewal in **November 2018**. He therefore did not know that his application had been declined until the response aforementioned was filed herein; and that was after he filed this Petition out of desperation. It is instructive that, for purposes of **Section 17** aforesaid, time is reckoned from the date of refusal; and without any communication of its decision, if any, it cannot lie in the mouth of the Respondents to plead the doctrine of exhaustion as a defence.

[14] In the premises, I find the Preliminary Objection dated **26 June 2019** to be completely devoid of merits. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF NOVEMBER, 2019

OLGA SEWE

JUDGE