



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS JUDICIAL REVIEW NO. 57 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

STEVEN KIRUBI KIMBO T/A HALF LONDON

BAR & 30 OTHERS.....APPLICANTS

VERSUS

NANDI HILLS SUB SUB-COUNTY ALCOHOLIC

DRINKS REGULATION COMMITTEE.....RESPONDENTS

RULING

1. By a notice of motion dated 7th June, 2018 the applicants sought to be granted leave to apply for an order of certiorari to quash the decision of the respondent issued vide letters dated 23rd May, 2018 directing the Applicants to close down their bar businesses within 14 days from effect from 24th May, 2018 for no justifiable cause and/or based on flimsy, unreasonable, whimsical and/or unlawful grounds.
 - a) They also prayed that grant of leave do operate as stay of the implementation of the impugned decision pending the hearing and determination of this application.
2. Which application was based on the grounds that the applicants are bar owners operating businesses within Nandi Hills Sub-county and have been obtaining licenses to carry out the businesses year in year out.
3. That the applicants have all applied for renewal of their licenses for the instant year and have paid the requisite renewal charges without objection from the respondents.
4. The respondents are accused of acting maliciously and in total disregard of the provisions of the county statute by purporting to close down the applicants business without giving and/or cogent and lawful reasons for the said actions.
5. That the decision was made in cross violation of the rules of justice as the applicants whose interests as traders in business were not afforded an opportunity to be heard.
6. The respondent misdirected itself by taking into account wholly irrelevant and extraneous considerations thereby arriving at an unlawful decision.
7. Lastly that the respondent breached the principle of proportionality by failing to maintain a balance between the adverse effects on the rights, liberties and interests of the person concerned and the respondents intention. They also acted with bias and treated the applicants unfairly without considering that they had been operating the business for the past three years without any complaint.
8. In opposing the application, the respondents filed their grounds of opposition that first, the applicants failed to exhaust all available redress under the Nandi County Alcoholic Drinks Control Act, 2015.

9. Secondly, that some of these bars are within 300 meters from schools, are within service lane and are not in good hygienic conditions hence in contravention with the Public Health Act, Physical Planning Act and the Building Code.

10. Lastly, that the applicants have not requested the County Alcoholic Drinks Regulation Administration Administrative Review Committee for a review of the said decisions and that the applicant would move this court if they are dissatisfied with the decision of the review committee.

11. Mr Magut for the Applicants submitted that the Respondents breached the law by not applying section 11 the Nandi County Alcoholic Drinks Control Act which gives the procedure on issuing of notices and Section 11(5) (9) requires a hearing in the presence of an advocate.

Counsel contends that under section 16 (4) of the County statute, where a decision has not been made, the licence shall remain in force until a decision by the committee.

12. He points out that in the present case there is an application and payment receipts by Monica Chebitok, Eliab Sang, Grace Chelimo where at it was initially indicated that their applications were successful only for the status to change after sometime without any valid reasons. For Philemon Kiptoo, he received a letter stating that his application was successful as he had met the requirements but the police were telling him to shut down the place. For Viola Koskei, she was told that her application was not successful without being given any valid explanation. He submits that even after some of the applicants rectified the shortcomings, their applications were not re-considered.

13. It is counsel's contention that under the Fair Administrative Action Act and Article 47 of the Constitution, everyone is entitled to fair proceedings and fair administrative action. That the law needs to be fair and a citizen should be given a fair hearing, none was called to explain the reason why the structure was as it was. It is argued that there was breach of the provisions of the Constitution as there was suspicion of foul play especially because most of the applicants have had licenses since the year 2015. Further that as a public body the respondent should be communicating to the applicants and give them time to comply with the law.

14. Mr Lel while opposing the application submitted that in this instance reasons why the applications were rejected were set out and communicated to each applicant. Further, Section 9 of the Nandi County Alcoholic Drinks Control Act establishes a Drinks Regulation Sub-county Committee which issues licences, but may also inspect premises. Further Section 10 provides for a Review Committee established to review appeals on decisions made-so once they rectified the shortcomings and made the conditions required by the respondents, then the applicants should have re-submitted their applications for consideration as contemplated under section 12(5) within 30 days.

15. This court was urged to consider that under Section 4(b) of the Act it is the public health officers to make recommendations for the good and health of the citizens and the environment should be clean and friendly as provided under section 14 (1) (b).

16. He also pointed out that Section 15(2) (e) provides that where the conditions of the premises are not satisfactory, then demand for license should not be granted.

Issue for determination

17. The main issue for determination is whether stay should be granted.

Order 53 Rule 1(4) of the Civil Procedure Rules stipulate:

The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.

18. The purpose of granting stay is to prohibit the continuation of the decision making process where the process is still ongoing. Where however the decision has been made, the implementation thereof can still be stayed where the same is yet to be implemented.

22. However where the decision has been implemented, to grant the stay would be meaningless where the effect is to maintain the *status quo* if the *status quo* would be that the decision remains in force. On the other hand where a stay is granted after the decision has taken effect, its upshot may well be to reverse the decision made by the Respondent. Orders of stay in judicial review as opposed to conservatory orders in Constitutional Petitions are not to be granted if the result would be in the nature of mandatory injunctions.

23. In certain cases a stay may be granted even where its effect may be to temporarily reverse the decision, that remedy may only be resorted to in exceptional cases and the onus is upon the applicant to prove that such exceptional circumstances exist. The decision of **Gladwell L J in Republic vs. Secretary of State for Education and Science, ex parte Avon County Council (No. 2) CA (1991) 1 All ER 282** where he said that:

“An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay.”

24. Whether or not to grant stay in Judicial Review proceedings is an exercise of judicial discretion by the court, based on the circumstances of each case.

25. Stay is not a matter of course. The party seeking for a stay must demonstrate to the satisfaction of the court that unless stay is granted, then the applicant shall, at the end of the day, if successful in his main motion, be rendered a mere pious explorer in the judicial process.

26. In the case of **Taib A. Taib vs Minister for Local Government & Others Mombasa HC Miscellaneous Application 158 of 2006** Maraga J (as he then was) stated:

“.....it is only where the imminent outcome of the decision challenged is likely to render the success of the Judicial Review nugatory or an academic exercise that the court would stay the said proceedings the strength or otherwise of the applicant’s case notwithstanding. It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.”

27. In **R.H. V Ashworth Hospital Authority [2003] WLR 127 at 138** Lord Dyson LJ stated, inter alia that:

“.....The purpose of a stay in a Judicial Review proceedings is clear. It is to suspend the proceedings that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the Judicial Review process and make it more effective. It will ensure that so far as possible, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success.....

The administrative court routinely grants stay to prevent the implementation of a decision that has been made but not yet carried out into effect or fully carried into effect.”

28. From the above decisions, it is clear that it is not in every case that there is a prima facie arguable case that the court will grant stay in Judicial Review proceedings.

29. Stay is only appropriate to restrain a public body or administrator from acting and to prohibit further decision making process if it has not yet been completed, being taken by a public body; and the implementation of the decision of such body if it has been taken. This is what Order 53 Rule 1(4) of the Civil Procedure Rules stipulate.

30. In the instant case the applicants do not deny that their premises fell short of certain standards required by the respondent, and the same was communicated to them, save for Philemon Keter who had initially received a positive response, and Viola Koskei who says no reasons were given for rejecting her application. They say they have rectified the situation, although nothing has been presented before this court to confirm that. They opted not to resubmit their applications within 30 days of the notification despite a clear provision giving such an opportunity under section 12 (5). How does this court satisfy that the applicants have now met the conditions set out in the communication as set out in section 14 (1) (b) and (c) of the Nandi County Alcoholic Drinks Control Act? Section 16(4) which has been referred to applies in instances where the Sub-County Committee has not reached a decision regarding the application for licence-that is not the case here.

31. In my considered view, to allow the leave granted to operate as a stay will be exposing the residents of Nandi County to possible health risks without confirmation that the premises and environment occupied by the applicants are clean, wholesome and meet proper sanitary conditions, and are not near the institutions of learning.

32. Further if the leave granted were to operate as stay, it will have the effect of a mandatory injunction because it will in effect be telling the respondents to allow the applicants to carry on with their operations, which goes against the spirit that orders of stay in judicial review (as opposed to conservatory orders in Constitutional Petitions) are not to be granted if the result would be in the nature of mandatory injunctions.

33. Finally the effect of the stay orders will have determined the very substance of what is sought to be quashed in the judicial review proceedings. Even where leave is granted to apply for Judicial Review orders, the law is clear that in considering whether the said leave ought to operate as a stay of proceedings the court has to be careful in what it states lest it touch on the merits of the main application for Judicial Review and that where the application raises important points deserving determination by way of Judicial Review it cannot be said to be frivolous. This is the principle espoused in **Jared Benson Kangwana V Attorney General Nairobi HCC 446/95**.

The upshot is that the leave granted shall not operate as stay.

DELIVERED and DATED this 2nd day of July 2018 at ELDORET.

H. A. OMONDI

JUDGE