



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MISC. CIVIL APPL. NO.1 OF 2018

ANTHONY MAINA MBUGUA

T/A SPANISH LODGE HOTEL.....APPLICANT

- V E R S U S -

SUB-COUNTY ADMINISTRATOR

LAIKIPIA COUNTY1ST RESPONDENT

CHIEF MAGISTRATE NYAHURURU.....2ND RESPONDENT

D.P.P. NYAHURURU.....3RD RESPONDENT

OCS NYAHURURU P/STATION.....4TH RESPONDENT

R U L I N G

The ex parte applicant Anthony Maina Mbugua T/A Spanish Lodge Hotel filed the Chamber Summons dated 14/6/2018 against the Sub County Administrator, Laikipia County 1st respondent, the Chief Magistrate's Court at Nyahururu 2nd, Director of Public Prosecutions 3rd respondent and the OCS Nyahururu Police Station, 4th respondent seeking leave to commence Judicial Review proceedings for the orders of prohibition, certiorari and mandamus and an order that the leave granted do operate as stay of the proceedings of the ***C.M.'s Court at Nyahururu in Cr.C.1351/2018 Republic v Magdaline Wanjiru Kibui*** and any other intended charges against the applicant or his employees on account of the alcohol license issued to the applicant on 17/4/2018.

On 14/6/2018, J. Ngugi granted prayer 3 of the application, that is leave to commence Judicial Review proceedings for orders of certiorari, prohibition and mandamus. The applicant was directed to serve the application on the respondents for inter partes hearing of prayer 4 seeking leave to operate as stay. That is what is before the court today.

The applicant was represented by Mr. Mathea Advocate who relied on the statutory statement and verifying affidavit of Anthony Maina Mbugua. In opposing the application Ms. Rugut appearing for the 3rd and 4th respondents relied on the replying affidavit of Nahashon Kipsoi, the OCS Nyahururu Police Station. I will limit this decision to the issue of stay is alone. It is the applicant's contention that being the proprietor of Spanish Lodge Hotel, he applied for alcohol license in respect of the year 2018 and paid kshs.48,500/= as evidenced by the receipts AMMI(a)-(e).

He was issued with an alcohol license which indicates the commencement date to be 1/1/2017 instead of 1/1/2018 and that expiry date is 31/12/2017 instead of 31/12/2018 (AMM2); that on 11/6/2018, the 4th respondent caused the applicant's employee and guests at the hotel to be arrested; that the employee was charged with the offence of selling Alcoholic drinks after Hours contrary to section 34(1) of the Alcoholic Drinks Control Act No.4 of 2010 in Nyahururu CMCR.1351/2018. A preliminary objection was raised before the court on the basis that there existed a valid license but the same was rejected by the court; that the employee denied the offence and the case is still pending for hearing; that all these problems have been caused by the 1st respondent's failure to indicate the correct dates of the license and that since the date of arrest, there have been no lodgers visiting the hotel for fear of arrest thus resulting in the applicant suffering severe losses; that the arrests have affected his livelihood and that failure by the 1st respondent to explain what it means by the dates on the license or failure to issue the correct license for 2018 will negatively affect the appellant's business and hence the need for a stay order.

In his replying affidavit, the OCS Nyahururu Police Station who is the Investigating Officer in the case confirmed having gone to the applicant's hotel and on request for the 2018 license, was shown one of 2017 (NKI) which indicates that it expires on 31/12/2017 whereas the stamp of the Sub County Public Health Officer is dated 17/4/2018; that the anomalies on the license could not be explained and hence the arrest of the employee who was then charged. The 4th respondent therefore argues that he was merely carrying out his duties and it was the

duty of the applicant to go back to the Sub County Health Officer to be issued with a valid license. He urged the court to decline to grant the stay and allow the case in the Chief Magistrate's Court to proceed to hearing. The 1st and 2nd respondents did not file any replies to the application.

I have considered the application, affidavits and arguments of counsel. Grant of an order of stay is an exercise of the court's discretion. It is not automatic that where leave to commence Judicial Review proceedings has been granted, that stay will follow. The applicant has to demonstrate that the possibility of the court making a determination in the case are high and that the outcome of the challenged decision may be rendered nugatory if stay is not granted. The court considered when an order of stay may be granted in the case Meridian Medical Centre Misc.Appl.363/2013, when the court said:

“...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.”

In the above case, the other consideration is that stay may be granted where the subject matter may be destroyed.

In the instant case, the applicant contends that he did apply and paid for the alcohol license for the 2018. The receipts which are annexed AMM.1 were issued on 21/3/2018. The license itself is dated 17/4/2018. It means that these documents were issued by the 1st respondent in 2018.

Having noticed that the wrong license was issued, it was of course the duty of the applicant to raise the issue with the 1st respondent to correct the anomaly. Though there is no evidence on record to demonstrate that the applicant raised the issue with the 1st respondent, the applicant deponed that he has indeed raised the issue with the 1st respondent but the 1st respondent has failed to correct the anomaly.

So far the 1st respondent has been silent and has not appeared or filed any reply to this application. In my view, since there seems to be evidence that the applicant has paid for the 2018 Alcohol license, unless the contrary is shown, he stands to suffer irreparable loss and herein if an order of stay is not granted at this stage.

For the above reason, I allow the application and order that the leave granted to commence Judicial Review proceedings for orders of certiorari, mandamus and prohibition do operate as stay of the charges that the applicant and or his employees are facing in terms of prayer 4 of the Chamber Summons application dated 14/6/2018. Costs to be in the cause.

Dated, Signed and Delivered at NYAHURURU this 16th day of October, 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Kihoro holding brief for Mr. Mathea for applicant

Ms. Rugut for respondent

Soi – Court Assistant