



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HIGH COURT MISC. CIVIL CAUSE NO. 2 OF 2018

JOHN KIPKOECH ROTICH AND 29 OTHERS.....APPLICANTS

VERSUS

ELDAMA RAVINE SUB COUNTY ALCOHOLIC

DRINKS REGULATION COMMITTEE.....RESPONDENT

RULING

The application

1. This is a ruling on an application under Order 53 of the Civil Procedure Rules for leave of court to commence judicial review proceedings for “an order of certiorari to remove into the High Court and quash the decision of the Respondents issued verbally on the 5th April 2018 directing the applicants to close down their bar businesses with effect from 12th April 2018 for no lawful or justifiable cause and without giving any written reasons for the said action” and for such “grant of leave do operate as stay of the implementation of the impugned decision pending the hearing and determination of the application”.

2. Order 53 Rule 1 of the Civil Procedure Rules is in the following terms:

“[Order 53, rule 1.] Applications for mandamus, prohibition and certiorari to be made only with leave.

1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

(4) 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:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

Inter Partes hearing

3. The court directed, pursuant to Order 53 Rule 1 (4) Proviso of the Civil Procedure Rules that the application for leave and question of leave, if granted, operating as a stay be heard *inter partes* after service upon the respondents. The court considered that the issue of abuse of alcoholic drinks in the region and the efforts of the county administration in combating it may only be interfered with for good cause shown by the applicants, with an opportunity to be heard thereon being granted to the Respondent.

4. The Court has considered the application for leave herein by ex parte Chamber Summons dated 10th April 2018 together with supporting affidavits thereto; the Replying Affidavit and Further Affidavit of the Respondent’s chairperson Aengwo Daudi Luka respectively of 20th April and 25th July 2018, and the Preliminary Objection dated 20th April 2018; and the submissions and the authorities relied on by Counsel

for the parties.

Principles for the Grant of Leave

5. The Court of Appeal decision in *Meixner v. R* (2005) 2 KLR 189 held that -

“The leave of the Court is a prerequisite to making a substantive application for judicial review. The purpose of the leave is to filter out frivolous applications. The granting of leave or otherwise involves an exercise of judicial discretion....”

The test to be applied in deciding whether or not to grant leave is whether the applicant has an arguable case.”

6. The Court cannot at this stage get into contested matters of fact, or detailed examination of the merits of the applicants’ complaint, which must remain the proper subject of the main judicial review application, if leave is granted. As held by the Court of Appeal in *Njuguna v. Ministry of Agriculture* [2001] 1 EA 184, 186, cited in *Meixner*, supra –

“[L]eave should be granted, if on the material available the Court considers without going into the matter in depth that there is an arguable case for granting leave.”

This court, therefore, need only establish that there is an arguable case or serious questions of law as to the validity of the impugned administrative action decision such as would upon hearing on its merits justify the grant of the judicial review orders sought.

Determination

7. Upon considering the application by the *ex parte* applicants and the Preliminary Objection taken by the respondents, I consider that three issues would arise for consideration by the judicial review court:

- a. Whether judicial review order of certiorari is available to quash an *oral* decision;
- b. Whether the liquor licencing committee are required to give a hearing to an applicant before making a decision to grant or decline a licence; and
- c. A person aggrieved by the decision of the respondent is obliged to exhaust the internal dispute resolution mechanism before approaching the judicial review court for redress.

8. Of most significance is whether an administrative body, which is enjoined by Article 47 (2) of the Constitution to give written reasons for the action “*if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action.*” give an oral directive upon which administrative agencies may act upon without giving written reasons. There is the related question whether an applicant for a liquor licence under the relevant Act is entitled to a hearing before a decision to grant or withhold a licence is made by the licensing authority.

9. Without making a concluded view of the matter it would appear that the applicants have a right to property in their bar businesses capable of protection in accordance with Articles 40 and 47 of the Constitution, and a legitimate expectation to fair treatment arising from previous licences and investment in the bar trade.

10. The Preliminary Objection dated 20th April 2018 taken by the Respondent that the *ex parte* applicants have not annexed to their application as required by the rules, a copy of the decision of the respondent under challenge is partially answered in the terms of the applicable rule itself. Order 53 rule 7 (1) of the Civil Procedure rules is relevant as follows:

“Order 53 Rule 7 of the Civil Procedure Rules

7. (1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.”

11. There is room for explanation as to the default in attaching a copy of the impugned decision by accounting for the failure to do so to the court’s satisfaction. Instructively, such accounting may be done at any time “*before the hearing of the motion*”, which means that the *ex parte* applicants herein are well within time to explain the failure to attach the copy of the decision. Indeed, the reason for the default is implicit in the application which challenges the *verbal* directive to close their bar business. What is *verbal* cannot be a written document, a copy whereof may be lodged with the Court.

12. In addition, I am unable to find anything in the administrative law principles that would limit the judicial review remedies to written as distinguished from verbal or oral decisions which have equal binding effect upon the persons against whom they are made. As I understand the subject, Administrative Law is a branch of law dealing with challenges of administrative *action* - decisions, directives or instructions - for their legal validity, principally, in terms of legality for breach of the rules of natural justice, *ultra vires*, impropriety or unreasonableness. There is no provision that *oral* decisions are not subject to the judicial review procedure. Indeed, Article 47 on constitutional right to fair administrative action prescribes a standard of review that -

“(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given **written** reasons for the action.”

13. I respectfully agree with the Court of Appeal decision in **Republic v. Mwangi S. Kimenyi ex p. Institute for Public Policy and research Analysis (KIPPRA)** [2013] eKLR and followed in the High Court decisions of **Republic v. Registrar of Societies & 2 Ors ex p. Samuel Maina & 3 Ors** [2013] eKLR and **Zachary Onsongo v. National Police Service Commission & Another** (2015) eKLR that –

“29. The learned judge in his judgment was correct in stating that the court cannot act in vain against a non-existent decision. **There was no decision or letter dated 24th August 2004 that could be called and removed into the High Court to be quashed. This being so, the learned judge erred in quashing the alleged decision of 24th August 2004 when the said decision is non-existent.** Further, the learned judge erred in issuing orders to quash the letter of 16th December 2004 when the court had not determined that the decision made on 3rd December 2004 was in existence. A court of law should not descend into the realm of speculation. **The decision to be quashed must first be ascertained and determined to be in existence.** This is the rationale for calling and removing into court a decision to be quashed. We hold that the learned judge erred and it was not appropriate to issue the judicial review orders in this matter.”

With respect, however, the Court did not determine that there can never exist an oral decision or that an oral decision cannot be a decision for purposes of judicial review order of certiorari.

See also **Justus Makhande Itoli & Anor. V. Loice Alili Omboto & 3 Ors.** (2013) eKLR interpreting Order 53 Rule 7 (1) of the Civil Procedure Rules.

14. The question whether an **oral** decision may be subject of judicial review proceedings is a serious enough matter to be presented to the judicial review court for consideration and determination, I daresay, is a matter of novel jurisprudential value and great public importance in view of many such decisions made by persons exercising public authority or public bodies in the exercise of their mandate, because unfortunately such decisions are often implemented to the detriment of the persons affected.

15. There is a collateral question whether the respondent may lawfully give a blanket condemnation and order closure of multiple businesses without considering the case of each applicant on a case by case basis on its merits through a fair hearing granted to the applicants for that purpose.

16. With respect, I take the view that these are serious issues of administrative action, law and procedure as to afford to the applicants an **arguable case** capable of founding a cause of action for judicial review application; it is not a frivolous application.

17. The points of objection of failure to exhaust ‘existing requisite administrative remedies and avenues before instituting this action in court’ taken as a Preliminary Objection is really a response to the substantive judicial review proceedings because it only points to the exercise of the discretion, and not want of jurisdiction, of the judicial review court: while the court has jurisdiction to determine the matter, it may withhold remedy owing to failure by the applicants to exhaust internal dispute resolution mechanism. As seen in authorities cited by the applicant – **R v. Nairobi City County Government ex p. Ndiara Enterprises Ltd** (2017) eKLR and **R v. Senior Resident Magistrate Mombasa ex p. H.L. & Anor.** (2016) eKLR - an objection in such circumstances only calls for the exercise of discretion upon hearing of the Notice of Motion and is not the proper subject of a Preliminary Objection within the meaning of the decision of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd.** (1969) EA 696.

18. Section 9 of the Fair Administration Act 2015 sets out the procedure for mounting a judicial review of an administrative action as follows:

“9. (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.”

19. With respect, a finding that a party has not exhausted internal mechanism or the exemption under section 9 (4) of the Fair Administrative Act, 2015 is a matter for determination upon hearing of the application for judicial review and not at the stage of leave where the court cannot undertake an in-depth consideration of the matter to determine whether interests of justice warrant the exemption. I respectfully disagree with the Court in **Registered Trustees Kenya Railways Retirement benefits Scheme v. Chairman, Rent restriction Tribunal & 99**

Ors. (2018) eKLR declining leave to commence judicial review proceedings on the ground of non exhaustion of internal remedies, at the leave application stage.

20. The objection as to standing of the applicants to bring the judicial review proceedings while properly a preliminary point must be considered in the conventional legal philosophy of expanded scope of *locus standi* established by the Constitution of Kenya 2010 which includes standing in public interest. See Article 22 thereof. However, the applicants herein, as applicants for licences who possess previous year's licence and who have applied for renewal of the licences in terms of section 16 (4) of the Baringo County Alcoholic Drinks Control Act, 2014, are entitled to approach the court for relevant relief. Without making a final decision on the matter, the court notes that the applicants have attached some licences for the years 2017 and receipts for inspection of bars for 2018 as exhibits **ERB 1** and **ERB 2** demonstrating their standing in the matter.

21. On the question of non-joinder of enforcement agencies of the Police, the Provincial administration and the County enforcement officers in the suit, the Court notes that the issue may lawfully be addressed by an order pursuant to the obligation of the Court under Order 53 Rule 3 (4) of the Civil Procedure Rules that –

*“(4) If on the hearing of the motion **the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.**”*

22. All in all the Court must keep in mind that it is not required at the stage of leave to undertake an in-depth consideration of the dispute and make final determination on the respective cases of the parties and rights and liabilities accruing thereto. The Court need only find a serious question, an arguable case not a prima facie case as held in *Meixner*, supra, for presentation to the judicial review court. The issue presented need not be one that must succeed at the trial.

Provision of Security

23. The court is empowered to order security as a condition for grant of leave, and I consider that this is a fitting matter for the imposition of an order for security in view of the obvious public security concerns, of which the court must take judicial notice, in the issue of alcoholic drinks.

24. The apparent concern of the Respondent is the control of illicit liquor; the excessive indulgence of the people of the County in drinking; adverse effects on schooling, economic productivity, security; and upsurge in drink-driven crime. The respondent's replying affidavit referred to 'moral decadence associated with consumption of alcohol and illicit brews', and public outrage over 'abuse of alcohol particularly among the youth and the need to rid society against obvious danger posed through sale of illegal controlled and harmful consumption of dangerous illicit brews'. The collection of revenue from the properly licenced alcoholic drinks operators must also be of concern to the County which needs the revenue for purposes of providing social services.

25. The security appropriate for this case, in my view, must take into account the need to raise revenue and to prevent social problems associated with over indulgence in alcoholic consumption. Accordingly, the court will require as condition for leave operating as a stay that the applicants do pay all necessary fees for the lawful operation of their businesses and that each applicant executes an undertaking to be lodged with the Respondent and filed in court for the scrupulous compliance with the Regulations relating to the operation of the businesses in terms of hours of operation, environment compliance and other law and order requirements.

26. The stay herein granted shall remain valid for the licencing year ending the 30th November 2018 by which time the court shall have heard and finally determined the dispute herein.

Orders

27. Accordingly, for the reasons set out above, the court grant the applicant leave to commence judicial review proceedings for certiorari as prayed and directs that the leave so granted shall operate as a stay of the decision requiring the applicants to cease or close their business operations such stay remaining in force only upto the **30th November 2018 when the Court shall have heard and determined the judicial review application.**

28. The grant of leave is conditional upon, and shall cease to be of any effect in default of, the payment of full licence fees for the relevant years of revenue applicable to each applicant and an undertaking by each applicant to abide and fully comply with all relevant regulations for the operation of bar business in the County in accordance with the Baringo County Alcoholic Drinks Control Act, 2014, such undertakings being lodged with the Respondent and filed in Court within seven (7) days from the date hereof.

29. Given the social and commercial nature of the dispute, and the need for expeditious disposal of cases and the obligation of the court to promote alternative dispute resolution pursuant to Article 159 of the Constitution, the parties are at liberty to engage in any out of court settlement as they may be advised by their advocates.

30. In default of settlement, the applicants shall in accordance with Order 53 Rule 3 (1) of the Civil Procedure Rules within 21 days file the Notice of Motion for the order of Certiorari for hearing, giving at least eight clear days between the service of the Notice of Motion and the hearing date to be fixed in consultation with the Counsel for the parties, in accordance with Order 53 rule 3 (1) of the Civil Procedure Rules.

31. For avoidance of doubt, the stay herein granted does not bar any pending or future prosecution of any applicant for any offences under the Baringo County or the national Alcoholic Drinks Control Act or any other law relating to operation of bar business, or any related Penal

Code offences, save for breach of the licencing law the subject of this application.

32. Costs in the Cause.

DATED AND DELIVERED THIS 16TH DAY OF OCTOBER 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Magut & Sang Associates, Advocates for the Applicants.

M/S Mwaita & Company, Advocates for the Respondent.