



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**MISC. APPLICATION NO. 216 OF 2014 (JR)**

**REVIEW ORDERS FO CERTIORARI IN THE MATTER OF AN APPLICATION BY  
JOHN IRERI, JOHNSON MUSYOKA, PETER NJAGI MUNYI BEING CHAIRMAN,  
SECRETARY AND TREASURER OF EMBU COUNTY LIQUAL DEALERS**

**ASSOCIATION FOR JUDICIAL & MANDAMUS**

**AND**

**IN THE MATTER OF EMBU COUNTY ALCOHOLIC DRINKS CONTROL ACT 2014**

**AND**

**IN THE MATTER OF EMBU COUNTY ALCOHOLIC DRINKS**

**CONTROL ACT REGULATIONS 2014 (NO. 1 OF 2014)**

**AND**

**IN THE MATTER CHARGES FOR TRADE LICENSES FOR 2014**

**AND**

**IN THE MATTER OF PACKAGING OF ALCOHOLIC DRINKS**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY GOVERNMENT OF EMBU Alias**

**EMBU COUNTY GOVERNMENT.....RESPONDENT**

**J U D G M E N T**

1. The exparte applicant in the notice of motion date 5/09/2014 seeks for prerogative orders of mandamus to issue compelling the respondent to establish a Directorate of Alcoholic Drinks Control. The motion also seeks for prerogative orders of certiorari to remove into the court and quash notices issued by the Embu County Executive for Trade and Tourism dated 9/10/2014 and 10/11/2014 directing liquor dealers/bar owners to renew their licences and pay fees for licences.

2. The exparte applicant in the notice of motion date 5/09/2014 seeks for prerogative orders of mandamus to issue compelling the respondent to establish a Directorate of Alcoholic Drinks Control. The motion also seeks for prerogative orders of certiorari to remove into the court and quash notices issued by the Embu County Executive for Trade and Tourism dated 9/10/2014 and 10/11/2014 directing liquor dealers/bar owners to renew their licences and pay fees for licences.

3. The grounds supporting the application contained in the face of the application and in the affidavit of John Ireri who describes himself as the Chairman of Embu County Liquor Dealers Association. It is stated that the respondent has failed to set up a Directorate of Alcoholic Drinks in accordance with Section 4 of the Embu County Alcoholic Drinks Control Act, 2014. The respondent has also passed regulations without involving the applicants who are stake holders. It is further claimed that the respondent failed to involve the applicant in the preparation for the enactment of the Embu County Alcoholic Drinks Control Act as required by the law.
4. In the absence of a directorate, it is argued that the respondent has no capacity to charge fees related to licences for alcohol dealers. The regulations are discriminative in that it charges all the local alcohol dealers similar fees. The respondent, by the acts complained of has breached the rules of natural justice.
5. The respondent opposed the application relying on the affidavit of one Timothy Kariuki, the County Attorney of Embu as he describes himself. He deposed that the application lacks merit, is frivolous and an abuse of the due process of the court and that it was filed as an afterthought because the applicants had already complied with the directive of the respondent.
6. It is further deposed that the respondent complied with the law before enacting the Embu County Alcoholic Drinks Act for it called several consultative meetings with stakeholders and members of the public. It is stated that the deponent of the supporting affidavit John Ireri and the rest of the applicants at least attended one session of the meeting. The respondent states that the rules of public participation were followed to the letter.
7. As for the office of the Directorate of Alcoholic Drinks Control, it is deposed that it was duly established and appointments made on interim basis for a period of six months' in order to fast-track the implementation of the Act. Ratification of the appointments was duly done by the County Assembly. At no time was there a gap in the operation of the Act due to non-existence of the Directorate.
8. The respondent further stated that proceedings have been overtaken by events since the notices calling for renewal of licences had a deadline of October 2014.
9. The respondent has since then enacted the Embu County Finance Act, 4 of 2016 which regulates taxes, imposition of fees and charges for services and revenue raising measures, including regulation of trade licence fees. The applicants have now complied with the Finance Act by making the requisite payments.
10. The issues for determination in this application are: -
- a) Whether the respondent had set up a Directorate of Alcoholic Drinks at the time the notices for payment for licences were issued.
  - b) Whether the notices for payment of licences of 9/10/2014 and on 10/11/2014 were lawfully issued.
  - c) Whether the orders sought should issue.
11. It is important to examine relevant provisions of the Constitution as well as the Embu County Alcoholic Drinks Act and the regulations made thereunder.
12. Article 10 of the Constitution contains national values and principles of governance in the following terms: -
- (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—*
- (a) applies or interprets this Constitution;*
  - (b) enacts, applies or [interprets](#) any law; or*
  - (c) makes or implements public policy decisions.*
- (2) The national values and principles of governance include—*
- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and*
  - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*
  - (c) good governance, integrity, transparency and accountability; and*
  - (d) sustainable development.*
13. This application is brought under Order 53 of the Civil Procedure Rules seeking orders of certiorari to quash notices for payment of licences issued by the respondent. It also seeks for prerogative orders of mandamus to compel the respondent to establish a Directorate of Alcoholic Drinks Control.

14. It was held in the case of **DAVID MUGO T/A MANYATTA AUCTIONEERS VS REPUBLIC Civil Appeal NO. 265 of 1977** that certiorari issued against public bodies having legal authority to determine questions affecting the rights of subjects and to act judicially but which act is done in excess of their legal authority. It is trite law that “certiorari” goes where there has been a breach of some principle of natural justice like receiving evidence from one party in the absence of another.

15. An order of “mandamus” is meant to compel performance of a public duty and not to perform duty in a certain manner. It was held in the case of **JOSEPH MWITALI WELAMONDI VS THE ELECTORAL COMMISSION OF KENYA High Court Misc. Application No. 81 of 2002** that an order for mandamus is the appropriate remedy for compelling a person to perform on him by statute which duty he has refused to perform to the detriment of the applicant.

16. Section 4 of the Embu County Alcoholic Drinks Act, 2014 provides for establishment of a Directorate of Alcoholic Drinks Control.

*4. (1) There is established in the county the Directorate of Alcoholic Drinks Control which shall be a directorate in the county public service.*

*(2) The functions of the Directorate shall be to—*

*(a) support and facilitate Sub-County Committees in carrying out their functions;*

*(b) carry out public education on alcoholic drinks control in the county directly and in collaboration with other public or private bodies and institutions;*

*(c) facilitate citizen participation in matters related to alcoholic drinks control in accordance to framework for citizen participation established under the County Governments Act, the Urban Areas and Cities Act or any other relevant written law;*

*(h) in collaboration with other relevant county departments, prepare and submit an alcoholic drinks status report bi-annually in the prescribed manner to the Executive Member which shall be transmitted to the county executive committee, the County Assembly and the Authority;*

*(j) Coordinating, monitoring and evaluating the implementation of this Act including the operations of the Sub-County Committees and advising the Executive Member on the necessary measures to be adopted;*

17. Section 5(d) of the Act provides that in preparation of the bi-annual alcoholic drinking status report, public participation and feedback from residents of the County in relation to appropriate processes for mitigating impact of alcoholic drinks use must be achieved.

18. Section 9 provides for establishment of sub-county Alcoholic Drinks Regulations Committees with power to issue licences, to enforce provisions of the Act and to perform such other duties as from time to time assigned by the Directorate.

19. The sub-county committees in the course of their duties are obligated to ensure that there is effective public participation of the county residents virtue of Section 9(4) of the Act.

20. The applicant is an association of County liquor dealers established in March 2014 in which is guided by a Constitution. As such the association is a stakeholder in all matters relating to regulation of alcoholic drinks.

21. The respondent argued that an Interim Directorate had been appointed at the time this suit was filed. A letter of appointment from the County Public Service Board dated 17/09/2014 was produced with names of five officers. It was contended by the applicant that the procedure laid down was not followed in that there was no public participation or feedback from stakeholders. The respondent annexed two letters dated 6/11/2014 and 7/11/2014 entitled “Feedback from Stakeholders”.

22. The correspondence was addressed to five hotels in the County with dates of the meetings indicated as 24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup>, 28<sup>th</sup>, 30<sup>th</sup> October 2014 and 5/11/2014.

23. A list of attendance from Kiritiri bore the names of various bars and hotels including phone numbers but no signatures. The respondent did not attach minutes of any of the meetings said to be held.

24. The initial application seeking leave was filed in court on 8/11/2014 which the substantive application was filed on 4/12/2014.

25. The respondent issued two public notices for renewal of alcoholic drinks licences on 9/10/2014 and on 10/11/2014.

26. The notice was undated but stamped on 9/10/2014 was worded as follows: -

***PUBLIC NOTICE: RENEWAL OF ALCOHOLIC DRINKS LICENSE***

*Applications for RENEWAL of Alcoholic drinks licenses can now be collected at the Sub-County Administrators office and at Trade Office, Emco House, Office No. 110. The closing date for **Submission** of the applications is **17<sup>th</sup> October, 2014 at 5:00 p.m.***

In order to get the application form, the applicant **must first** produce a banking slip for **Kshs. One thousand (1000/=)** application fees from Co-operative **bank branch**.

27. The notice had the letter head of Embu County Government and did not indicate which department of the County Government had issued the notice. The traders were directed to collect application forms for renewal of licences from Embu Sub-County Administrators office and at Trade Office, EMCO House. The notice referred any new applicant to the Directorate's Head office a EMCO House.

28. The second notice as contained in the Daily Nation of November 10, 2014 and it read: -

*Bar owners in Embu County have three weeks to renew their licences or face closure. County Executive for Trade and Tourism David Gitonga said licences issued by National Authority for Campaign against Alcohol and Drug Abuse are set to expire on November 24 and no one will be allowed to trade after that. "They must stick to the new directive in the Alcohol Act and Regulations gazette last week," Mr. Gitonga said. The new rules impose heavy taxes on owners.*

29. The closing date for submission of the application forms in the notice of 9/10/2014 was 17/10/2014 at 5.00 p.m. The local daily article gave 24/11/2014 as the date for expiry of the licences issued by National Authority for Campaign Against Alcohol and Drug Abuse (NACADA) as 24/11/2018.

30. The respondent did not produce any document or minutes of the County Assembly to show that ratifications of the members of the Directorate was done which is a legal requirement. The only attendance list produced was of Kiritiri Sub-County giving an indication that other counties were not involved. The list was not authentic since it did not indicate who attended the meeting on behalf of the hotel o the bar named.

31. It is my considered view that the scanty information presented by the respondent was not sufficient to prove that the County had had formed a Directorate of Alcoholic Drinks Control at the time the notices were issued.

32. It follows that notices in question were not lawfully issued since there was no legally established Directorate.

33. The dates of the notices were short lived and have by now expired. In other words, the notices have been overtaken by events. If this court was to issue orders of certiorari to quash the said notices, the orders would be of no effect. It is trite law that a court of law shall not issue orders in vain.

34. I therefore decline to issue any orders of certiorari to quash the expired notices issued by the respondent.

35. As for the orders of mandamus, I note that no information or evidence was availed by the applicant on the state of affairs of the operations of the respondent since this JR application was filed.

36. In this scenario, I find that issuing orders of mandamus may not serve the interests of justice in this case.

37. It is my view that these proceedings would not have been filed in court had the respondent complied with the law.

38. The applicants have incurred costs in this case which would have been avoided.

39. I take judicial notice that this case is a public interest litigation that was intended to benefit not only the applicants but other stake holders as well as the general public.

40. For this reason, I order that the respondent meets the costs of these proceedings.

41. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 9<sup>TH</sup> DAY OF OCTOBER, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Ndorongo for Ireri for Respondent**

**Mr. Nabutete for Anne Thungu for Applicants**