



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

MISC APPLICATION NO. 5 OF 2017 (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY NICHOLUS MUTUA JUSTIN

GITARI, DOREEN KAWIRA & EDWARD MWIRIGI BEING CHARMAN,

SECRETARY AND TREASURER OF THARAKA NITHI BAR

OWNERS SELF HELP GROUP FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THARAKA NITHI COUNTY

ALCOHOLIC DRINKS CONTROL ACT 2015.

AND

IN THE MATTER OF CHARGES FOR TRADE LICENCES FOR 2017

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF THARAKA NITHI....RESPONDENT

Exparte NICHOLUS MUTUA JUSTIN GITARI, DOREEN

KAWIRA & EDWARD MWIRIGI BEING CHAIRMAN

SECRETARY AND TREASURER OF THARAK

NITHI BAR OWNERS SELF HELP GROUP

R U L I N G

1. The ex- parte applicants have vide a Notice of Motion dated 10th July, 2018 moved this court for the following orders namely;

(i) Prayer 1 spent

(ii) That this court do grant the exparte applicants a stay of proceedings in this case pending the hearing and determination of application for stay of proceeding in the Court of Appeal.

(iii) That this court do deem that the further affidavit filed by ex parte applicants sworn on 10th July, 2018 is properly filed.

(iv) That this court do grant leave to the ex parte applicants to amend their substantive motion to substitute the word directorate with the word Tharaka Nithi Liquor licencing Committee and the draft amended application be deemed properly filed upon payment of requisite court fees.

(v) Costs be provided for.

2. The grounds upon which this application is made are as follows namely:-

a) That the respondent herein filed a response to their substantive application served them through counsel on 2nd February, 2018 which gave them 7 days to respond and by the time they were able to gather and instruct counsel time had lapsed and managed to file the supplementary affidavit on 10th July 2018 which was one day late.

b) That the ex parte have also applied for stay of proceedings in the Court of Appeal after they were denied by this court.

c) That the date fixed for hearing of the main motion is so close that the application pending in the Court of Appeal will be overtaken by events.

d) That the respondents will suffer no prejudice.

e) That when they drafted the substantive motion they misdescribed the liquor Licencing Committee with the word directorate and that the two bodies perform the same functions and now seek to amend the pleadings to reflect Tharaka Nithi Licencing Committee.

f) That the application is not vexatious and has been brought without delay.

3. The ex parte applicants have invoked the provisions of **Section 1, 1A, 3 and 3A** of the **Civil Procedure Act** and orders **8 Rule 3** and **50 Rule 5** of the **Civil Procedure Rules** in seeking the above prayers and have supported the grounds listed above with an affidavit of Nicholas Mutua Justin Gitari sworn on 10th July, 2018 which have reiterated the grounds listed above.

4. In their written submissions filed through Anne Thungu and Co. Advocates, the ex parte applicants have submitted though the respondent filed a response to their substantive application dated 1st February, 2017, they served the applicants' counsel on 2nd July, 2018 when the 7 days granted to them to file Supplementary Affidavit started to run and that by 9th July, 2018 they had not managed to file Supplementary Affidavit but managed to do it the following day. They have urged this court to accept the explanation for delay as reasonable and allow them to rely on the Supplementary Affidavit by deeming it duly filed.

5. On stay of proceedings the applicants have contended that they have filed for stay of proceedings herein in the Court of Appeal and that the Court of Appeal is set to entertain the matter on 8th November, 2018. They have further contended that unless stay is granted their application in the Court of Appeal will be rendered nugatory.

6. On amendment, the applicants have submitted the amendment will not prejudice the respondents as the two bodies perform the same function. They have cited the provisions of **Order 8 Rule 1** of the **Civil Procedure Rule** contending that the rules allow them to amend their pleadings in order to bring all issues of controversy before court.

7. The respondent has opposed this application through a Replying Affidavit sworn by Aggrey Karani Riungu the respondents Chief officer in the Department of Trade Industry & Cooperative Development, on 3rd October, 2018. The respondent has faulted the ex parte applicants for trying to change goal posts and resurrecting issues which have been determined by this court. The respondent further contends that the applicants want to substantially change the main issues to be decided in the substantive motion dated 1st February, 2017.

8. On stay of proceedings the respondents through learned counsel Mr. Muthomi has contended that the issue is res judicata as this court vide a ruling dated 3rd July, 2018 dealt with the issue and rendered a decision. The respondents have further submitted that the amendments sought will alter the nature and character of the suit pending and that they would be prejudiced as the respondents have already responded to the accusation levelled against them in the main substantive application dated 1st July, 2017.

9. This court has considered this application and the response made. To begin with the prayer for stay of proceedings is that this court delved at length on that issue vide the ruling delivered on 3rd July, 2018. The ex parte applicants had vide their application dated 18th June, 2018 sought among other prayers stay of proceedings pending an intended appeal. Under the provisions of **Order 42 Rule 6 (4)** of the **Civil Procedure Rule** an intended appeal demonstrated by a Notice of Appeal is treated like an appeal and so when this court made a determination on whether a stay of proceedings was merited or not on the strength of a Notice of Appeal it rendered itself with finality. The decision by this court is now a subject in the Court of Appeal and it would be improper for me again to sit on my decision and render a verdict. This court agrees with the respondent that the issue of stay of proceedings pending determination of an appeal is now res judicata and **Section 7** of **Civil Procedure Act** does not allow this court to determine the issue again.

10. On the question of leave to deem a further affidavit sworn on 10th July, 2018 as properly filed, is that this court finds the explanation given for the delay reasonable. The delay of one day is also not inordinate and to that extent prayer 3 of this application is merited and is allowed.

11. On leave to amend the pleadings, though the ex parte applicants have invoked the provisions of **Order 8 (3)** of the **Civil Procedure**

Rule which deals with amendments of pleadings in Civil Suits generally, the procedure for provided for Civil Procedure Rule proceedings is *sui generis*. Judicial Review proceedings are special proceedings governed under the provisions of **Order 53** of the Judicial Review. The rules thereunder provides for its own unique procedures and regulations on conduct of proceedings before court. In particular the issue of amendments is provided under **Rule 4** and a party can move the court to either amend statements or file further affidavits. Amendments in Judicial Review matters are therefore limited to statements and affidavits. A party seeking a judicial review order under **order 53(1) Civil Procedure Rule** cannot do so without leave and once leave is granted for a specific relief a party cannot competently seek to alter the nature of the relief sought through an amendment. I have noted that what the ex parte applicants seek to amend will alter the nature of the relief sought completely and that is perhaps why the respondent feel that the applicants want to change the goal posts of their substantive motion when the match has already started. The respondent's concern is legitimate in view of the clear provision of the law I have cited above. The ex parte applicants sought leave to apply for orders of *mandamus* to compel the respondent to establish a Directorate of Alcoholic Drinks Control and this court granted them leave pursuant to the provisions of **Order 53 Rule 1** of the **Civil Procedure Rule** to apply for the said prerogative order. Once leave was obtained and the application filed pursuant to that leave, the ex parte applicant's cannot competently seek to amend the relief upon which leave was sought and granted. The prayer for leave to amend the pleadings by the applicants therefore is incompetent and untenable.

In the premises the application dated 10th July, 2018 is only allowed in terms of prayer 3. Prayers 2 and 4 for the aforesaid reasons are disallowed. The issue of costs shall abide by the outcome of the main Motion dated 1st February, 2017.

Dated, signed and delivered at Chuka this 12th day of November, 2018.

R.K. LIMO

JUDGE

12/11/2018

Ruling, signed dated and delivered in the presence of Thungu for the applicant and Muthomi for Respondent.

R.K. LIMO

JUDGE

12/11/2018