



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

MISC APPLICATION NO. 5 OF 2016 (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY NICHOLAS MUTUA,

JUSTIN GITARI, DOREEN MUTEGI KAWIRA AND EDWARD MWIRIGI

BEING CHAIRMAN, 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 LICENSES FOR 2017

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF THARAKA NITHI.....RESPONDENT

EX PARTE MWIRIGI MUTUA JUSTIN GITARI, DOREEN MUTEGI

KAWIRA AND EDWARD MWIRIGI BEING CHAIRMAN,

SECRETARY AND TREASURER OF THARAKA NITHI

BAR OWNERS SELF HELP GROUP

J U D G M E N T

1. NICHOLAS MUTUA, JUSTIN GITARI, DOREEN KAWIRA and EDWARD MWIRIGI (Tharaka Nithi Bar Owners Self Help Group), the ex parte applicants herein have moved this court through a Notice of Motion dated 1st February, 2017 brought under **Order 53 Rule 3 Civil Procedure Rules** and **Sections 8 and 9 of Law Reform Act** asking for the following prayers namely:-

- (i) That a prerogative order do issue to compel the Respondent herein (Tharaka Nithi County Government) to establish a Directorate of Alcoholic Drinks Control.
- (ii) That prerogative orders of certiorari do issue to remove into this court for purposes of quashing the Notices issued by County Director of Revenue dated 26th October, 2016 directing liquor dealers/bar owners to renew their licences and pay fees for licences and all committees and Notices be suspended and disbanded.
- (iii) Costs of this application.

2. The grounds upon which this application is made as listed in the face of it is as follows namely:-

- (i) That the Liquor Licensing was devolved from the National Government to County Government.*
- (ii) That the County Government was required to legislate a County Liquor Drinks Control Act to be able to carry out that function.*
- (iii) That the respondent passed Tharaka Nithi County Alcoholic Drinks Control Act 2015 but has not legislated any regulations to the Act.*
- (iv) That the Tharaka Nithi County Alcoholic Drinks Control Act 2015 has no provision for assessing the amount of fees chargeable per category of bars.*
- (v) That there has been no public participation in deciding the amount of fees chargeable and the same is arrived at arbitrarily.*
- (vi) That the Respondent has no Directorate of Alcoholic Drinks Control which is the relevant office to regulate liquor business and license liquor trade but have instead passed a Liquor Licensing Committee.*
- (vii) That the Respondent has been haphazardly charging the applicants levies with no standard format as charging is done through negotiations.*
- (viii) That there is no system of regulating liquor trade and the Respondent has no mandate to collect and require the ex parte applicants to deposit money in unknown accounts.*
- (ix) That the Respondent is not following laid down laws and procedures.*
- (x) That it is in the interest of justice that the illegal charging be stopped until the Directorate is established.*
- (xi) That the Respondent has failed to set up the Directorate of Alcoholic Drinks Control.*
- (xii) That the Respondents has passed regulations without involving the applicants who are stakeholders.*
- (xiii) That the Respondent has failed to make provisions for a representative of the applicants in the liquor Licensing Board and are passing resolutions without consultation.*
- (xiv) That the Respondent passed the Tharaka Nithi County Alcoholic Drinks Control Act 2015 without consulting or involving the ex parte applicants who are stake holders and are affected by the aforesaid Act and that the Respondent has no capacity to charge as that is the work of Directorate of Alcoholic Drinks Control which the Respondent has failed to establish.*
- (ix) That the Respondent passed the Tharaka Nithi County Alcoholic Drinks Control Act Regulations 2015 and breached the rules of natural justice by failing to give audience to the ex parte applicants.*

3. The ex parte applicants have supported the above grounds through an affidavit sworn by Abdan Munene Kanga sworn on 1st February 2017.

The ex parte Applicant's case

The ex parte applicants have deponed in an affidavit that they are registered group whose members deal in liquor business and are stakeholders in the liquor industry within Tharaka Nithi County.

4. They have faulted the Respondent for passing Tharaka Nithi County Alcoholic Drinks Control Act 2015 without granting them audience or involving them and thereby breached rules of natural justice. They have faulted the Respondents over an advertisement carried out in a newspaper inviting stakeholders for public hearing on 13th to 17th October, 2014. The ex parte applicants have submitted that the newspaper advertisement was not adequate notification of a public hearing.

5. It is contended that as at 2016 when the ex parte applicants moved to court, there were no regulations to act and the County Director of Revenue had no legal backing to issue the notice and charge fees without the aforesaid regulations which according to them made the industry run into chaos witnessed through haphazard manner in which licence fees are demanded. According to them charging standard figure for all businesses is oppressive as not all bars are of same size, class and locality.

6. The ex parte applicants have further submitted that as per **Section 9 (1)** of Tharaka Nithi County Alcoholic Drinks Control Act 2015, (hereinafter to be referred to as the Statue for ease of reference) the Respondent was required to establish Sub-county committee which is the body mandated with issuance of licence under the Statue (Tharaka Nithi County Alcoholic Drinks Control Act, 2015). It is also contended that the fees charged by the Respondent were not duly recommended by any Sub-committee which in their view violates the Statue. The ex parte applicants have faulted the use of the Tharaka Nithi Alcoholic Drinks Control (Licensing) Regulations 2018 contending that the same have not been passed to become law.

7. The ex parte applicants have further contended that the second schedule of the Statute the classification of bars according to size and locations did not have any figures on the amount charged for licenses but that the County Director later inserted figures without any regulation. In their view without the requisite regulations the County Director of Revenue had no legal backing to issue the impugned notice and charge fees for liquor businesses. They have pointed out that the fact that while one of the applicants is being charged 20,000/- for bar and restaurant the other one is being charged 10,000/- for the same business within the same locality and this in their view demonstrates that the respondent acts arbitrarily.

8. **The Respondent's case**

The respondent has opposed this application through a Replying Affidavit by Aggrey Karani Riungu, sworn on 28th June, 2018. The deponent states in his Replying Affidavit that he is the Chief Officer in the Department of Trade, Industry and Cooperative Development of the Respondent. He contends that the County Assembly of Tharaka Nithi issued a notice which appeared in the Daily Nation Newspaper of 9th October 2014 inviting members of the public to a public hearing and submissions of memoranda on the Tharaka Nithi County Alcoholic Drinks Control Bill 2014.

9. The Respondent further contends that a public hearing was afforded to the members of the public who appeared before the Planning, Trade and Cooperative Committees of the Tharaka Nithi County Assembly and that the people who appeared aired their views.

10. The Respondent also denies that **Section 4(1)** of Statute establishes a body known as Directorate of Alcoholic Drinks Control and avers that the cited statute establishes a body known as Tharaka Nithi Liquor Licensing Committee which in its view is the body corporate mandated with control of alcohol in the county. In the same breath the Respondent contends that **Section 9(1)** of the Statute establishes Sub-County Committee which in its contention is body corporate mandated with issuance of license in accordance with the Act.

11 Respondent contends that the body established under **Section 4(1)** of the cited Statute is carrying out its functions well. It denies that a body known as Directorate is required to be established terming the contention as unfounded in law.

12. The Respondent further denies the accusations that license fees in respect to liquor business is charged arbitrarily without necessary clarification stating that there are classifications and regulations which are for the year 2015 and for the year 2018. In its view there is no standard figure for licensing liquor business because bars are regulated according to size and locations and different fees are prescribed as per the regulations which are now in place.

13. The Respondent has also contended that prior to the enactment of the cited statute, it was using the national legislation on liquor licensing (Alcohol Control Act 2010 and its regulations) and that the same was in line with transitional provisions in the County Government Act 2012.

14. The Respondent further contends that the Executive member under the Statute (**Section 69(1)(c)**) is mandated to prescribe fees payable and that the work is not done by a directorate. The Respondent contends that the fees charged on liquor licenses was done through consultations and comparison with other counties in Kenya. It is further contended that the Statute was enacted through public participation and that the constitutional threshold was met.

15. The Respondent has cited the decision in **Republic -vs-Kenya National Examinations Council ex parte Gathenji & Others [1997] eKLR** and contended that because an order of mandamus is available only to compel a public body when it fails to perform a duty imposed on it by law, the remedy is unavailable here because in its view, the law does not require to establish a body known as Directorate of Alcoholic Drinks Control.

16. On the remedy of certiorari, the Respondent has submitted that the remedy normally issues if a decision is reached by a body without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not complied with. The Respondent contends that all alcohol traders were well involved in formulation of regulations on fees licensing. The decision of **Bukoba Gymkhana Club (1963) EA 473** has been cited by the Respondent in its contention that judicial review remedy does not lie in the actions the ex parte applicants are complaining about. In that case the court held as follows:

" In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra-vires or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards..... procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision."

In the Respondent's view the above threshold has not been met by the exparte applicants and on that premise it is asking this court to disallow this motion.

17. This court has considered this motion and the submissions made. I have also considered the response and the submissions made on behalf of the Respondent and the authorities cited. In my considered view the issues for determination in this case are:-

(i) Whether there was sufficient public participation in the enactment of Tharaka Nithi County Alcoholic Drinks Control Act 2015 and in particular whether the exparte applicants as stakeholders in liquor industry were involved.

(ii) Whether the license fees charged for liquor business are regulated by the relevant law and whether certiorari should issue.

(iii) Whether the Notice issued by County Director Revenue dated 26th October, 2016 to bar operations was legal and procedural.

18. (i) Whether there was public participation the enactment of Tharaka Nithi County Alcoholic Drinks Control Act 2015 (Statute).

The ex parte applicants have faulted the Respondents for passing the Statute and Regulations to govern it without public participation. This court has looked at the grounds upon which the ex parte applicants have based their accusations and for starters the applicants' complaints in this regard appears convoluted because on one hand at ground 3 of this motion, the parte applicants are complaining that the Respondents "**have not legislated any regulations to the Act**" while on ground 12, they are complaining that the Respondent;

"Passed regulations without involving the applicants who are stakeholders."

A party who comes to court for a Judicial Review remedy of certiorari, mandamus or any other prerogative order must be certain and clear on what the complaint is all about to enable a court determine whether the complainant warrants court's intervention. I have nonetheless considered the nature of the complaint on the merits and find that the ex parte applicants' complaint is a bit misplaced.

19. The functions of a County Executive is well spelt out under the Constitution under **Article 183** of the **Constitution of Kenya 2010**. At the same time the legislative authority is vested on the County Assembly as provided under **Article 185** of the constitution which provide as follows:-

"The Legislative authority of a County is vested in, and exercised by, its County Assembly."

Under Subsection 2 thereof the constitution provides as follows:-

" A County Assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the County Government under the Fourth Schedule".

20. A cursory look at the second part of the Fourth Schedule of the Constitution reveals that liquor licensing is a function of the County Government which is divided into Legislative Arm (County Assembly) and the Executive Arm headed by the Governor. As observed above each arm of the County Government has its roles well spelt in the Constitution. The work of County Executive is to implement legislation passed by the County Assembly. Where a party or a resident of a County is aggrieved by any legislation or the process leading upto enactment of a Statute the first port of call is the County Assembly which in itself is a body corporate separate from the Executive Arm of the County Government. The ex parte applicants' complaint, much as it may be legitimate is bad for want of specificity. In this suit the County Assembly of Tharaka Nithi is the specific arm or body with the legislative authority from the people of Tharaka Nithi County in respect to enact of laws and regulations pursuant to the functions *inter alia* ascribed under the 4th schedule of the constitution. However the ex parte applicants omitted this crucial body in this suit. In my view suing the County Government of Tharaka Nithi is too general because the specific function of legislation is specifically carried out by the County Assembly of Tharaka Nithi.

21. In order to succeed in a Judicial Review proceedings and obtain a prerogative of mandamus as sought in this application, an applicant must demonstrate that a specific person or body is under a legal duty to act or make a decision in a certain way and has failed to do so or has refused to act reasonably. In the case of ***Kenya National Examinations Council -vs- Republic ex parte Geoffrey Njoroge & 9 Others [1997] eKLR*** the Court of Appeal rendered itself in the scope of the remedy of mandamus by turning to Halsbury's Law of England 4th Edition at page 111 thus,

" The order of mandamus is of most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the ends that justice is done, in all cases where there is a specific legal right..... the order must command no more than the party against whom the application is made is legally bound to perform where a general duty is imposed a mandamus cannot require it to be done at once....."

In my view when a party has a complaint which need to be directed to a specific arm of the government mandated by law to deal with that specific issue, and fails to specify the specific arm of the Government, Judicial Review order cannot issue because as I have observed above for a prerogative order to issue it must be specifically pleaded and directed at a specific body that is mandated by law to act in a particular way but has acted unlawfully or illegally. If a party for example is aggrieved by any national legislation by parliament (either National Assembly or the Senate) he cannot succeed if he/she sues or challenges the Republic of Kenya or the State for the legislation passed. For an order to issue, he or she must direct the challenge to parliament (in our case either the National Assembly or the Senate depending on who carried out the legislation) either faulting the process of legislation or the legality of the legislation.

22. In this matter, the ex parte applicant has also challenged the cited Statute stating that the statue did not provide a seat for a representative from liquor traders. This again is clearly outside the mandate of a court and Judicial Review because Judicial Review is about the decision making process not the decision itself. The role of the court is supervisory. Judicial Review is a review by a Judge of the High Court of a decision, proposed decision or refusal to exercise a power to decide in order to determine whether the same is valid, or authorized. It now well settled that Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the decision itself. As long as the processes followed by the decision maker are proper and the decision is within the confines of the law, the court will not intervene (see ***Republic -vs- Attorney General and 4 others ex parte Daimond Hashim Lalji & Ahmed Hosham Lalji [2014] eKLR.***

23. The ex parte applicants should have sued the County Assembly of Tharaka Nithi if they felt that their views regarding representation in the County or Sub-county Committee in regard to the Alcoholic Licensing Committee was not factored in the legislation of the Statute. Failing to bring/include the relevant body in this proceeding is fatal in their quest for an order of mandamus because this court cannot fault a body or a person without giving an opportunity to that person to be heard otherwise this court would be breaching the very rules of natural justice that the ex parte applicants have accused the Respondent for breaching.

24. The ex parte applicants have also sought for mandamus to compel the Respondent to **“establish a Directorate of Alcoholic Drinks Control.”** However going by the provisions of **Section 4(1)** of the cited Statute, the body required to be established is **Tharaka Nithi County Liquor Licensing Committee** and not a **Directorate of Alcoholic Drinks Control**. An order of mandamus can only issue to compel a public body to do an act as provided for by the law but mandamus cannot issue to compel a public authority or a person to establish or do an act that is not provided by the law. Secondly and more importantly, a party cannot impugn or challenge a law or an omission in legislation without suing the legislative body and give it a chance to defend itself on the omission if any. The question of whether the enactment of the Statute (Tharaka Nithi County Alcoholic Drinks Control Act, 2015) involved the ex parte applicants as stakeholders is improperly before this court because the legislative body vested with the mandate to carry legislative functions is not a party in this proceedings. This court is unable to make a finding either way for or against them without according them an opportunity of being heard.

25. (ii) Whether the liquor licence fees charged by the Respondent are regulated by the relevant law and whether certiorari should issue.

The ex parte applicant has contended that the license fees charged by the Respondent for liquor business are unlawful, unregulated and arbitrary. This has been denied by the Respondent. The provisions of **Section 69(1)** of the cited Statute gives the mandate to Executive member (Trade, Industry and Cooperative Development) on recommendation of the committee to make regulations regarding liquor trade and connected purposes in Tharaka Nithi County. The regulations provide as follows;

“The Executive member may on recommendation of the committee make regulations generally for the better carrying out of the objects of this Act”. (Emphasis added).

Under **Subsection 2** of the same section the Regulations provide that the Executive member may prescribe fees payable for trade licenses. Under **Section 4(1)** of the Statute the Executive member in charge of Trade, Industry and Cooperative Development is given the mandate in consultation with the County Governor to appoint members to constitute County Liquor Licensing Committee to carry out the functions as provided in the cited statute.

26. The law as seen above provides how the fees payable in respect to liquor trade are prescribed and by whom. The question posed is whether the fees imposed on the ex parte applicants were regular and lawful. Did the Executive member act in accordance with **Section 69(1)** of the cited statute? The answer to this crucial question is apparently negative. In the first place, the Executive member Mr. Aggrey Karani Riungu has not demonstrated to this court that when fixing the amount of liquor license fees payable in various categories of bars and restaurants he did it upon **“recommendation from the committee as provided by law”**. The Respondent was required to show that he did not act arbitrarily as he is being accused by showing that look these are the recommendations (by way of either memoranda or minutes from committee) and that he acted upon them when making the regulations pursuant to **Section 69(1)** of the cited law.

27. Secondly, the Respondent has defended himself that he did not act arbitrarily in fixing the fees payable and that they made consultation by going out and looking at what other counties were charging for liquor license fees. That type of consultation is however insufficient in so far as the cited law and indeed Constitution of Kenya 2010 is concerned. **Section 4 (3) (b)** provides that the License Committee shall;

“facilitate citizen participation in matter related to alcohol control in accordance to framework for citizen participation under the County Government Act, the Urban Areas and cities Act and any other relevant written law.”

The Respondent through the Executive member appears to have erroneously thought that public participation and engagement involves travelling to other counties to benchmark and determine how much fees was chargeable for liquor business. That was wrong because one of the major pillars of the Constitution of Kenya 2010 is public participation of the people in decision making process **Article 10** of the Constitution, public participation of the people is a national value and one of the principles of good governance. The Respondent therefore is required to involve the people of Tharaka Nithi County in decision making processes because every decision made affects them directly and is made on behalf of the people of Tharaka Nithi in the spirit of **Article 1** of the Constitution of Kenya. The sovereign power rests on the people and is exercised only in accordance with the Constitution and in the manner provided by the constitution and the law.

28. Thirdly, there is the allegation by the ex parte applicant that by the time they moved this court for the orders of certiorari, the Respondent had not established the Tharaka Nithi County Liquor Licensing Committee. Looking at exhibit **‘LK2’**, it is clear that the appointment of County Licensing Committee was wide recommendation of a letter dated 17th May, 2018. The recommendation was subject to the approval by the County Assembly and even if the County Assembly of Tharaka Nithi was to approve, the approval cannot act retrospectively. This would only mean that as at October, 2016 when the impugned notice dated 26th October, 2016 regarding liquor license fee for the year 2017 was issued, there is no committee established pursuant to **Section 4 (1)** of the cited statute. The Executive member presumably acting through the county Revenue Officer acted on his own and therefore unilaterally in issuing the said notice. To that extent that Notice was unprocedural, unlawful and issued without the requisite legal backing. It was ultra vires and in the absence of the regulations to guide the notice, the same was illegal, null and void.

29. This court further finds that the law does not give power to a County Director of Revenue to issue any Notice under the cited statute. Such a notice could only be issued as provided by **Section 69(1)** of the cited statute. In answer to the last issue for determination in this motion, this court finds that the County Revenue officer Tharaka Nithi County acted in excess of his powers. He had no legal authority to

issue such an important notice. **Section 7(2) (b)** of the **Fair Administrative Act No. 4 of 2015** provides that a court may review an administrative decision if a mandatory and material procedure or condition prescribed by an empowering provision has not been complied with. This court finds that the provisions of **Section 69(1)** of the cited statute was not adhered to when the notice to liquor traders Tharaka Nithi to pay for liquor license fees was issued. The Executive member in charge of Trade, Industry and Cooperative Development and County Director Revenue acted beyond their powers and their actions were ultra vires.

In the premises this application partly succeeds to the extent that a prerogative order of certiorari shall and is hereby issued to remove into this court the Notice dated 26th October, 2016 by County Director of Revenue for purposes of quashing it. The Notice is invalid and irregular. It is hereby quashed and set aside. The Respondent directs the Respondent through the relevant department to adhere to the law and issue a fresh notice in line with **Section 69** of the Tharaka Nithi Alcoholic Drinks Control Act 2015. Given that the ex parte applicants have partly succeeded, they shall have half costs of this application.

Dated, signed and delivered at Chuka this 11th day of December, 2018.

R.K LIMO

JUDGE

11/12/2018

Judgment dated, signed and delivered in the open court in the presence of Muthomi for Respondent and Kirimi holding brief for ex parte applicants.

R.K. LIMO

JUDGE

11/12/18