



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 47 OF 2015

Mary Wambura Nguru

T/A Double Bar & Restaurant and Cool Breeze.....Appellant/Applicant

Versus

Mathira East Alcoholic Drinks Regulation Committee.....1st Respondent

Nyeri County Alcoholic Drinks

Regulation & Management Committee.....2nd Respondent

CONSOLIDATED WITH

CIVIL APPEAL NO. 48 OF 2015

Charles Wachira Ngatia

T/A Iriuko Makuti Bar & Restaurant.....Appellant/Applicant

Versus

Mathira East Alcoholic Drinks Regulation Committee....1st Respondent

Nyeri County Alcoholic Drinks

Regulation & Management Committee.....2nd Respondent

RULING

On 8th December 2015, the applicants in these two consolidated appeals moved this court under certificate of urgency in separate but identical applications filed in the respective files seeking orders that:-

a. Spent.

*b. **That** this honourable court do order a stay of execution of the decision of Mathira East Alcoholic Drinks Committee upheld by the Nyeri County Committee on the 30th November 2015*

and the applicants be allowed to operate as usual pending the hearing and final determination of this application **inter partes**.

c. **That** this honourable court do order a stay of execution of the decision of Mathira East Alcoholic Drinks Committee upheld by the Nyeri County Committee on the 30th November 2015 and the applicants be allowed to operate pending the hearing and final determination of the appeal herein.

d. **That** costs of this application be in the cause.

The applications are expressed under the provisions of **Order 42 Rule 6** as read with **Section 20** of the Nyeri County Alcoholic Drinks Control and Management Act, 2013. The applications are premised on the grounds enumerated on the face of the applications and the annexed affidavits of the applicants **Mary Wambura Nguru** and **Charles Wachira Ngatia** respectively sworn on 8th day of December 2015. Essentially, the grounds relied upon are as follows:-

i. **That** the applicants exhausted the remedies on review as provided for in **Section 18 (1)** of the Nyeri County Alcoholic Drinks Control and Management Act, 2013.

ii. **That** the impugned decision is arbitrary and the applicants have appealed against it.

iii. **That** if execution proceeds, this application and the appeal will be rendered nugatory and the applicants will suffer irreparable loss and damage.

iv. **That** the application has been brought without delay and that the applicants have an arguable appeal.

The applicant in Civil Appeal No. **47** of **2015** avers in her affidavit *inter alia* that:-

i. **That** she has been a holder of a bar and restaurant license operating Double N Bar & Restaurant since 2005 and this has been her source of livelihood and that she also operated Cool Breeze Bar for 5 years.

ii. **That** she submitted her application for renewal of her license for 2015/2016 for her both business and as a consequence her premises was inspected and was asked to undertake some renovations which she did and wrote to the Respondents to re-inspect Double N Bar and Restaurant but they did not, only to later state that they had closed her premises even though at this point in time she had complied.

iii. **That** no results were rendered on Cool Breeze Bar and this has led to confusion and her request for a review of the decision elicited no response.

iv. **That** she has stock worth 400,000/= and a loan of Ksh. 90,000/= and that she is willing to abide by any conditions that may be imposed for the renewal of her license.

v. **That** her appeal has overwhelming chances of success and that the Respondent will not be prejudiced by the orders sought.

The applicant in Civil Appeal No. **48** of **2015** avers in his affidavit *inter alia* as follows:-

i. **That** he has been a holder of Bar & Restaurant License for 30 years and it has been his sole source of livelihood and that he submitted his application for the renewal of the license for 2015/2016, but the first Respondent reduced it from a Bar and Restaurant to a Bar only without any legal basis.

ii. **That** he has over the years generated goodwill and his business majored in selling food and

alcoholic drinks and that the license granted would not suit his business.

iii. ***That*** he has in store stock worth Ksh. 400,000/=, hence the closure has caused him substantial loss and that his plea for a review has been ignored.

iv. ***That*** he has filed an appeal against the said decision.

v. ***That*** the Respondent will not be prejudiced by the prayers sought in the application.

The applications are vehemently opposed. The Respondents in both files filed two identical Replying Affidavit of **Justus Munyiri**, the Chairman, Mathira East Alcoholic Drinks Regulation Committee sworn on 16th February 2016 in which he avers *inter alia* as follows:-

i. ***That*** his committee is charged with the responsibility of receiving, reviewing and recommending to the County Alcoholic Drinks Regulation Committee for approval or rejection of applications for licenses under the Nyeri County Alcoholic Drinks Management Act 2014 which Act provides various standards to be met before an applicant is issued with a license.

ii. ***That*** the act provides the procedure and mechanism through which applications and possible complaints with regard to decisions of the committee should be addressed.

iii. ***That*** the applicants licenses expired and application upon for renewal, the committee visited the premises for inspection and as for the applicant in No. 47 of 2015, the committee found that the Bar and Restaurant had no kitchen which is a mandatory requirement and that the applicant was utilizing a neighbours kitchen in total contravention of the set standards. Also the same applicant claims to be operating another Bar in the name and style of Cool Breeze, but upon inspection, this was found to be registered in the name of a one **Mary Wambura** and the same is located in a different shopping centre. In any event, Cool Breeze was closed after meeting with the area residents who raised serious complaints against the bar and the applicant ought to apply for review as required under the Act instead of moving to court.

iv. ***That*** with regard to the applicant in no. 48 of 2015, on 17th September 2015 a meeting involving public participation was held and members of the public raised serious complaints against the applicants bar among them selling illegal brew and 80 % of those present voted for its closure and that the public view was that at the particular shopping centre 2-3 bars would suffice, hence upon consultation with the public, the said applicant was issued with an only bar license instead of a bar and a restaurant and that the said recommendation was within their powers.

v. ***That*** the decision on the two applicants were taken after public participation and in public interest.

vi. ***That*** both applicants have not exhausted the dispute resolution mechanism provided for under the Act.

Both applicants filed supplementary affidavits in which they *inter alia* disputed that the public participation meetings were held as alleged. However, the Respondents have in the Replying affidavit annexed minutes of the said public participation meetings.

On 11th March 2016, the applicants counsels appeared before me for the hearing of the two applications. It was agreed by consent that the two files be consolidated and the applications be determined together.

Mr. Machira, learned Counsel for the applicants adopted the grounds in support of the applications and the supporting affidavits and added the applicants complied with the Act and that the applicants had established sufficient cause to warrant the court to grant the orders sought. Counsel also stated that the applicants stand to suffer substantial loss if the application is not allowed. Counsel also insisted that there was no public participation as alleged and that if the orders sought are not granted, the appeals will be

rendered nugatory.

Mr. Ngunjiri, counsel for the Respondents opposed the applications and relied on the Respondents Replying affidavits. Counsel also submitted that the letter dated 11th November 2015 was a communication to the general public and was not addressed to the applicants, that the Act particularly establishes structures for licensing at two levels, namely, at the County and Sub-County levels.

Counsel also submitted that the dispute Resolution mechanism laid down in the Act was not exhausted, that there is no evidence that the applicants requested for review as provided for under the Act which is a mandatory step under the Act, hence the applicants did not exhaust the laid down mechanism, thus there is no decision to appeal against. Counsel was clear that the Act rules out an appeal unless the laid down mechanism has been exhausted, hence the appeal before the court is pre-mature. In support of this position counsel cited the case of *Republic vs Susan Kihika & Others*^[1] where it was held *inter alia* as follows:-

"It is noteworthy to note that the orders sought are also discretionary and the court before exercising such discretion in favour of the subject must be satisfied that the subject has exhausted or followed the available legal procedures laid down by statute..... There is a wealth of decisions where the courts have been reluctant to invoke jurisdiction to assist a litigant who has chosen not to exhaust other available statutory procedures for the redress of grievances."

As for case no. **48** of 2015, counsel gave the specific reasons why this bar was not licensed and referred to paragraphs **9, 8, 10 & 12** of the Replying affidavit and maintained that the Respondents acted as per the statute. Also, counsel submitted that the decisions complained of were undertaken due public interest and public good which overrides private interests.

Finally, counsel submitted that none of the principles for granting an application for stay pending appeal was established and urged the court to dismiss the applications.

Mr. Machira in reply maintained that substantial loss has been proved in that the applicants were paying loans, that good will is not developed in one day, that there was no public participation, and insisted that the applicant in no **48** of **2015** applied for review and that the applicants followed the laid down procedures. On public interest, counsel submitted that the public have a right to consume "**everything**" and urged the court to consider customers as it construes public interest.

Section **17** of the Nyeri County Alcoholic Drinks Control and Management Act, 2014 provides that:-

(1) An applicant whose application for a new licence, to renew or transfer a license has been refused may within fourteen days of such refusal, request in writing the review of such refusal to the Sub-County Committee.

(2) A person aggrieved by the decision of the sub-county committee to approve grant of a new licence or to renew a licence may request in writing the review of such decision by the Committee.

(3) The Sub-County Committee shall within twenty-one days consider and make a final determination on the request for review.

(4) The Sub-Committee may-

a. dismiss the request for review if in its opinion, the request is frivolous or vexatious;

b. uphold its decision of the sub-county committee;

c. annul the decision

d. make any other declaration as it may deem fit.

Section **18** provides that:-

No person shall appeal to Court under this Act on a matter related to Section 17 unless the person has exhausted the review mechanism provided therein.

Section **19** provides that:-

Subject to Section 17, an applicant whose application for a new license, to renew or transfer a licence has been refused or a person aggrieved by decision of the Sub-County Committee may within twenty one days of such refusal or decision appeal against such refusal or decision to the High Court.

Counsel for the applicants insisted that the applicants complied with the above provisions and that they exhausted the mechanisms laid down in the above section. As for the applicant in no. **47** of **2015**, the applicant has exhibited a letters dated 17th August 2015 and 12th November 2015 addressed to the Sub-County Committee and Mathira East Alcohol Control Committee respectively. Counsel insisted that the said letters were applications for review as provided for under the Act. However, there is nothing on record to show that the said letters were received at the at the offices in question and its difficult for the court to accept that they reached the intended destinations especially so when the Respondents insist that there was no application for review at all. In my view, it would have been more prudent for the applicant to ensure that delivery of the said letters is acknowledged if at all the letters were delivered.

Similarly the applicant in No. **48** of **2015** has exhibited two letters dated 12th August 2015 and 11th November 2015 addressed to Sub-County Committee and Mathira East Alcohol Control Committee respectively. Again, there is no receiving stamp or anything to show that the letters were received at the respective offices. Further the first letter does not mention a review at all.

Further, the alleged decision that triggered the appeal before this court is a letter dated 30th November 2015 addressed to all Sub-County Administrators, Nyeri County, communicating inspection Reports of Alcohol Selling Premises. It is not addressed or copied to the applicants before this court. A look at the letter and the contents confirms that it is not a decision as contemplated under Sections 17 to 19 cited above. The effect is that this raises doubts as to whether or not there is a decision to appeal against and whether the appeal before the court has arguable grounds and this is a legal issue and a fundamental issue which goes to the merits of the appeal. As pointed below, while determining an application for stay pending such as the application before me, it is a requirement that the applicant demonstrates that he or she has an arguable appeal. Thus, whether or not the applicants appeal offends Section **19** of the Act is a valid ground that goes to the root of the applicants appeal. I am afraid, I am not persuaded that the applicants have demonstrated that their appeal does offend the said Section.

Further, a look at the applicants letters referred to above also reveals more weaknesses in the application before the court. The applicant in no **47** of 2015 in her letter dated 17th August 2015 states *inter alia* that "I also noted that you didn't approve my application under conditions that I have no kitchen but there is one the next door" The Respondents case is that the reason why this license for a restaurant was declined is because the applicant did not have a kitchen and was using a neighbours kitchen. The applicants letter admits this fact. In my view, this license was validly rejected for not meeting the requirements, namely, the applicant did not have a kitchen. On this ground alone, her application fails.

Secondly, a close look at all the letters by the applicants discussed above show that none raises grounds for review as to why the decision complained about ought to be reconsidered. For example the letter dated 12th November 2015 by the applicant in No 57 of 2015 talks of neighbouring bars and restaurants offering her competition. To me, review contemplated under Sections **17** to **19** of the Act should be based on sufficient cause.

What does the term "sufficient cause" mean.? The Court of Appeal of Tanzania in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others*^[2] discussing what constitutes sufficient cause had this to say:-

"It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)

In *Daphene Parry vs Murray Alexander Carson*^[3] the court had the following to say:-

'Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy,"(Emphasis added)

As earlier mentioned, the application is expressed under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and Section 20 of the Nyeri County Alcoholic Drinks Control and Management Act 2013. Order 42 Rule 6 (1) & (2) provides as follows:-

1. *No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

2. *No order of stay shall be made under sub rule (1) unless-*

a. *The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and*

b. *Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant*

The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. However, it is necessary to consider the considerations for granting applications for stay pending hearing and determination of an appeal. The Court of appeal in the case of *Butt vs Rent Restriction Tribunal*^[4] (**Madan, Miller and Porter JJA**) while considering an application of this nature stated inter alia as that "The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements."

It is clear from the wording of Order 42 Rule 6 (1), for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely; (a) Substantial loss may result to the applicant unless the order is made; (b) The application has been made without undue delay; (c) such security as to costs has been given by the applicant.

The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted.^[5]What constitutes substantial loss was broadly discussed by **Gikonyo J** in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto*^[6] where it was held inter alia that:-

"....Substantial loss is what has to be prevented by preserving the status quo because such loss

would render the appeal nugatory”(Emphasis added)

In *Elena D.Korir vs Kenyatta University*[7]Justice Nzioki Wamakau had this to say:-

“..... The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.(Emphasis added)

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo vs Straman EA Ltd[8](2013) as follows:-

“These twin principles go hand in hand and failure to prove one dislodges the other”.
(Emphasis added)

Apart from proof of substantial loss the applicant is enjoined to provide security.[9] It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay.[10]

In *Equity Bank Ltd vs Taiga Adams Company Ltd*[11]it was held that:-

“.....let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...”

I am fortified by the following excerpt from *Halsburys Laws of England*[12] wherein the learned writers observe that:-

“The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue.”

In the case of *Global Tours and Travels Ltd*[13] it was held that:-

“.....Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”
(Underlining provided)

Even though I am not determining the appeal, it is important to note that the applicant must demonstrate that he/she has an arguable appeal. I am fully aware that I cannot go into the merits of the appeal at this stage but for purposes of the application before me, it is necessary to satisfy myself that the applicant has arguable grounds. From the facts before me and for reasons outlined above, I am not persuaded the applicant has an arguable appeal.

The upshot is that the applications before me have no merits. I hereby dismiss the two consolidated applications with costs to the Respondents.

Right of appeal 30 days

Signed, delivered and dated at **Nyeri** this 1st day of April 2016

John M. Mativo

Judge

[1] J.R. No. 20 of 2014

[2] Civil Appeal No. 147 of 2006 (Munuo JA, Msoffe JA and Kileo JJA)

[3] {1963} E.A. 546

[4] Civil App No. NAI 6 of 1979

[5] See Gikonyo J in HCC NO. 28 of 2014, Trans world & Accessories (K) Ltd vs Commissioner of Investigations & Enforcement

[6] HC Misc No. 42 of 2012 OR {2012} eKLR

[7] {2012}eKLR

[8] {2013}eKLR

[9] See judgement in Republic vs Commissioner for Investigations & Enforcement, Misc App no 51 of 2015 (NBI),

[10] Ibid

[11] Supra note 6

[12] 4th Edition, Vol 37 pages 330-332

[13] WC No. 43 of 200 (UR)