



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. APPLICATION NO. 216 OF 2014

REPUBLIC.....APPLICANT

VERSUS

EMBU COUNTY GOVERNMENT.....RESPONDENT

EMBU COUNTY LIQUOR DEALERS ASSOCIATION.....EXPARTE

R U L I N G

The Applicants/Respondents herein the County Government of Embu in their application dated 21/11/2014 brought under certificate of urgency seeks for the following orders:-

- 1. That this matter be certified as extreme urgent and service of this Application be dispensed with in the first instance.*
- 2. That the Honourable court be pleased to discharge, remove, do away and or vary the order for leave to operate as a stay of the Notice dated 9th October and 10th November 2014 levying of fees and staying operation of sub committees ex debito justitiae.*
- 3. That the Honourable Court be pleased to grant such orders and/or proceedings that are analogous and/or necessary adjuncts to the reliefs being sought herein above and/or issue any further directions, order, and/or directions in the application for Judicial Review proceedings that may deem fair and just to grant in the circumstances.*
- 4. That the costs of the application be borne by the Respondents.*

The grounds in support of the application are contained in the face of it and in the supporting affidavit sworn by Timothy James Gutettah on the 21st day of November 2014, the County Chief Officer for Trade and Embu County Government.

The Exparte applicant/Respondent filed a replying affidavit in opposition of the application sworn by John Ileri on 5th day of December, 2014. The parties agreed to have the application heard by way of written submissions which both parties filed. The exparte applicant filed supplementary submissions in answer to the applicant/respondent's submissions. For the purpose of this application the applicant/respondent will be referred to as "the applicant" while the exparte applicant/respondent will be referred to as "the respondent".

The main grounds advanced in support of the application are as follow:-

- (a) *That the application dated 18/11/2014 seeking leave to institute judicial review proceedings was brought under the wrong procedure contrary to Order 53 Rule 1(2);*
- (b) *That the application was brought without disclosing material facts;*
- (c) *That the applicant has fully complied with the two respective notices which the respondent seek to quash in these proceedings;*
- (d) *That the judicial review proceedings has been overtaken by events;*
- (e) *That the Embu County Government has not made any decision which can be challenged by way of medical review;*
- (f) *That the application does not include both prayers for certiorari and for mandamus.*

Regarding the procedure of the application dated 18/11/2014, the law requires that the application be brought by way of chamber summons while the respondent brought it under notice of motion.

Order 53 Rule 1(2) of the Civil Procedure Rules, 2010 provides that an application for leave to file judicial review proceedings shall be made *ex parte* to a judge in chambers. The provision further provides that the application was accompanied by a statement setting out the name and description of the applicant, setting out the relief sought and the grounds in support by way of an affidavit. These requirements were complied with except the presentation in way of chamber summons.

The applicant relied on the case of **REPUBLIC VS COMMUNICATIONS COMMISSION OF KENYA EX PARTE EA TELEVISION NETWORK LTD [2001]** where the Court of Appeal held that an application under Order 53 Rule 1(2) must be made by way of chamber summons.

This decision was made long before the Constitution of Kenya, 2010 was enacted when courts adopted very stringent procedure which led to dismissal of many proceedings on technicalities. Bringing an application by notice of motion instead of by chamber summons relates to form and does not affect the substance of the application.

In the more recent decision of **POLYCARP WATHUTA KANYUNGO & 2 OTHERS VS THE COUNTY GOVERNMENT OF KIRINYAGA** a case with similar facts, it was held that the irregularity is curable under Article 159(2)(d) of the Constitution which calls for courts to not to have undue regard to technicalities.

In the application before me, I agree with the judge in the **Polycarp** case that the form does not affect the substance and that the respondents application dated 18/11/2014 is curable under Article 159(2)(d).

The jurisdiction of this court to hear this application seeking to remove, review or set aside leave operating as stay is not in question in view of the provisions of Order 53 Rule 1(4) which provides:-

“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 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 parties before the grant of leave. Provided further that where the circumstances so require the judge may direct that the questions of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days”.

By providing that leave may operate as stay until the application is determined, or until the judge orders otherwise, the provision confirms the jurisdiction of this court. This position was illustrated in the case of **REPUBLIC VS CAPITAL MARKETS AUTHORITY EX PARTE JOSEPH MUMO KIVAI &**

ANOTHER [2012] eKLR. In addition to the provisions of Order 53 Rule 1(4) the Court held that the High Court has inherent jurisdiction to set aside or to review *ex parte* orders to do justice and to prevent an abuse of the court process.

I have perused the application dated 18/11/2014, the statement and the supporting affidavit and I find that the respondent herein included the prayer of certiorari and also that of mandamus. The prayers are supported by paragraph 12 and 13 of the affidavit of John Ileri. This overrules the contention of the applicant that one of the prayers was not included.

The applicant contends that Embu County Government does not fall under the bodies which this court can supervise in way of judicial reviews. There was no legal provision or a decision which was cited in support. However, the Government through its established administrative departments makes decisions which can be challenged in judicial review proceedings. The *ex parte* applicant has a right to seek the orders of certiorari and mandamus against the County Government.

The applicant has raised several issues regarding the validity of the judicial review proceedings. These are issues which should be determined between the parties in the hearing of the judicial review proceedings. I rely on the case of **ABERCOMBIE & KENT LIMITED & ANOTHER VS REPUBLIC Nairobi Civil Appeal No. 195 of 1994** where the Court of Appeal upheld the High Court decision that the issues raised could only be determined during the hearing of the substantive application.

On the issue of non-disclosure of material facts, the applicant contends that the deponent John Ileri as follows:-

- i. That he had complied with the directive applying for the licence by submitting the application form and paying the requisite fees thus submitting himself to the requirements of Embu County Alcoholic Drinks Control Act No. 3 of 2014.*
- ii. That John Ileri attended the public participation bill at Embu Cultural Centre where he signed a memorandum.*
- iii. That the Embu County Government has already established a directorate in acting capacity.*

The document annexed in proof of the non-disclosure in regard to the compliance by John Ileri is an application form dated 17/10/2014. The form was submitted before the application was filed. The receipt for payment of the requisite fee was not annexed. I do not find the act of the submission of the application form to renew the licence amounting to non-disclosure of material fact.

There was not a single annexure to prove that the said John Ileri participated in the making of the law or that he signed a memorandum. It is trite law that he who alleges the existence of a fact bears the burden of proof. The applicant has not proved the fact of public participation by the representative of the *ex parte* applicant.

As for establishment of the Directorate in acting capacity, I agree with the respondent that the applicant did not cite the law which empowers it to establish a directorate in acting capacity. It was also not established that the Ag. County Secretary has authority to establish the Directorate and neither was the approval of the County Assembly produced. The application for judicial review cannot be said to have been overtaken by events as alleged.

I am in agreement with the applicant that failure to disclose material facts dis-entitle the applicant (*ex parte* applicant) from the orders sought. However, in the application before me has not been shown that there was non-disclosure of any material facts.

In the case of **REPUBLIC VS LAND REGISTRAR, KAJIADO & ANOTHER EX PARTE KIRSEK INVESTMENTS LTD [2004]** the court explained the nature of the *ex parte* order for leave as follows:-

“As I have said ex parte orders are essentially provisional in nature. They are made by the Judge on the basis of the evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his application, this is no basis for making a definitive order and every Judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of the evidence”.

The applicant will have an opportunity to raise the issues in support of his case during the hearing of the judicial review application which the parties need to fast track by taking a date in the registry on priority basis.

I find no merit in the application dated 21/11/2014 and it is hereby dismissed. Costs to be in the cause.

DATED, SIGNED AND DELIVERED AT EMBU THIS 10TH DAY OF FEBRUARY, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Thungu for the respondents/Ex parte Applicant

Mr. Ithiga for Mungai for the Applicant

F. MUCHEMI

JUDGE