



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. APPLICATION NO. 9 OF 2015**

**IN THE MATTER OF: THE COUNTY GOVERNMENT ACT NO. 17 OF THE LAWS OF KENYA**

**IN THE MATTER OF: THE LAW REFORM ACT, CAP 26 OF THE LAWS OF KENYA**

**IN THE MATTER OF: CRIMINAL PROCEDURE CODE CAP 75 OF THE LAWS OF KENYA**

**IN THE MATTER OF: THE MOMBASA COUNTY LIQUOR LICENSING ACT 2014**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE OF COURT TO INSTITUTE JUDICIAL**

**REVIEW PROCEEDINGS AGAINST THE GOVERNOR MOMBASA COUNTY/COUNTY**

**GOVERNMENT OF MOMBASA/DIRECTOR OF PUBLIC PROSECUTION AND**

**RESIDENT MAGISTRATES COURT MOMBASA REGISTRY BY WAY OF**

**ORDERS OF CERTIORARI AND PROHIBITION**

**BETWEEN**

**PATRICK MUKIRI KABUNDU.....APPLICANT**

**AND**

**1. THE EXECUTIVE IN CHARGE OF TOURISM**

**DEVELOPMENT AND CULTURE MOMBASA COUNTY**

**2. THE GOVERNOR MOMBASA COUNTY**

**3. THE COUNTY GOVERNMENT OF MOMBASA**

**4. THE DIRECTOR OF PUBLIC PROSECUTION**

## 5. RESIDENT MAGISTRATE'S COURT MOMBASA REGISTRY.....RESPONDENTS

### RULING

1. **PATRICK MUIRURI KABUNDU** the Applicant is a resident of Mombasa City, in the Country of Mombasa. He carries on business of a Bar and Restaurant Operator. He has always applied for and obtained a Bar Operator's Licence from the defunct Municipal Council of Mombasa, and duly paid the requisite licence fees.

2. However, in the year 2015 he failed to apply for and take out such licence. His excuse was that the Mombasa County Liquor Licensing Act had not come into operation, and that if it had the Liquor Licensing Directorate provided for under the Act had not been constituted, and that there was no body to which he would make an application for such a Liquor Licence.

3. He was consequently most disturbed and surprised when he along with his employees were arrested and charged before the Mombasa Resident Magistrate's Court with the offence of operating a Club/Bar for sale of Alcoholic Drinks without first making an Application on a prescribed Form contrary to section 40 of the Mombasa County Liquor Licensing Act, 2014.

4. The Applicant has consequently wasted no time in coming to this court. By a Chamber Summons dated and filed on 19<sup>th</sup> April, 2015, the Applicant seeks leave of court to commence judicial review proceedings for orders of:-

**(a) certiorari to bring before this court and quash proceedings in Mombasa RM Criminal Case No. 1133 of 2015.**

**(b) an order of prohibition restraining and/or prohibiting the continuance of the proceedings in the court in Criminal Case No. 212 of 2015 and Criminal Case No. 1133 of 2015.**

**(c) an order of prohibition prohibiting the Respondents from initiating any prosecution based upon the Mombasa County Liquor Licensing Act 2014, or before the establishment of the Directorate under section 4 of the said Act, and before the Respondents cure breaches of sections 10 and 12 of the County Government Act 2012.**

**(d) that the leave granted shall operate as a stay.**

**(e) that costs be in the cause.**

5. The Application was supported by the Affidavit Verifying the Facts (not Verifying Affidavit), of the Applicant sworn on 19<sup>th</sup> March, 2015, and the grounds on the face of the Application.

6. The Application was however opposed, **firstly**, on behalf of the First Respondent by the Replying Affidavit of Jimmy Waliaula, the Director of Legal Services of the 3<sup>rd</sup> Respondent sworn on 13<sup>th</sup> May, 2015, **secondly** the Grounds of Opposition also dated 13<sup>th</sup> May, 2015 filed by counsel for the said Third Respondent, **thirdly**, the Grounds of Opposition dated 5<sup>th</sup> May, 2015, and filed on 6<sup>th</sup> May, 2015 on behalf of the Fourth Respondent.

7. The Application was argued substantially before me on 14<sup>th</sup> May, 2015 by the Applicant, and counsel Miss Oyier for the Third Respondent, and Mr. Wamotsa for the Fourth Respondent, and at the end of which the Applicant sought and was granted leave to file a Further Affidavit within five days, and the matter was fixed for further hearing on 28<sup>th</sup> May, 2015, when the matter was by consent of the Applicant and the Respondents that the matter be mentioned on 2<sup>nd</sup> June, 2015.

8. On 2<sup>nd</sup> June, 2015, the Applicant applied to withdraw, and the Amended Chamber Summons dated

21<sup>st</sup> May, 2015 was marked as withdrawn. The Applicant consequently rehearsed his previous arguments and cited several cases, including **NDARUA VS. REPUBLIC [2002] 1 EA 205** (the Court of Appeal for Uganda held *inter alia* that under section 155 of the Evidence Act of Uganda a former statement by a witness was provable as corroboration provided that it was made before any authority legally competent to investigate the fact (**REX VS. SHABAN BIN DONALD [1940] 7 EA 60** approved).

9. The Applicant also placed reliance on **TUMAINI VS. REPUBLIC [1972] EA 441** “**that in considering bias, it is not the mind of the Judge which is considered but the impression given to reasonable persons and that there was a likelihood of bias in the present case**”. That was a case where there was alleged friendship between the trial magistrate and the Applicant’s superior officer the court found (as above), there was a likelihood of bias and that the applicant would not receive a fair trial.

10. The Applicant also found support in the case of **PASTOLI VS. KABALE DISTRICT LOCAL GOVERNMENT COUNCIL [2008] E.A. 300** on the question of what an applicant for Judicial Review should establish –

**(1) An application for Judicial Review the Affidavits filed in court by the respective parties to the application constitute the record with regard to the decision or act complained of and subject of review – Republic vs. Southampton Justices, ex parte Greed [1976] QB 22 and John Jet Tumuizabe vs. Makerere University & Others (adopted).**

**(2) 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.**

### **DETERMINATION**

11. The application herein is for leave to commence judicial review proceedings for orders of certiorari, and prohibition, to quash the decision of the County Government of Mombasa the Second Respondent, through its Executive In Charge of Tourism Development and Culture (the First Respondent), and to prohibit the Applicant’s prosecution. In order to succeed in application for such leave, the Applicant must establish a **prima facie** case that the Applicant’s prosecution was either –

(i) illegal or

(ii) irrational or

(iii) procedurally improper

12. Illegality, is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or **ultra vires**, or contrary to the provisions of the law on its principles are instances of illegality.

13. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the fact and the law before it would have made such a decision. Such a decision is said to be in defiance of logic and acceptable moral standards.

### **[Re an Application by Bukobu Gymkhana Club [1963] E.A. 478]**

14. On the other hand procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in the non-observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decisions. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision. **AHMEDAW VS. SECRETARY OF STATE FOR THE HOME DEPARTMENT [1990] AC 876.**

15. The Applicant has raised many issues in his application, such as that the Mombasa County Liquor Licensing Act, 2014 (No. 12 of 2014) is inconsistent with the County Governments Act 2012, (17 of 2012) (Revised in 2013), that it is unconstitutional because it was allegedly passed by a County Assembly comprised of members of one party only. The gravamen of the Applicant's case however is that he was prosecuted under a law which had not yet come into force.

16. The Applicant contends that the Mombasa County Licensing Act came into force on 1<sup>st</sup> April, 2015, while he was prosecuted on 14<sup>th</sup> March, 2015. He contends therefore that there was no law upon which he could be prosecuted, and that consequently his prosecution was not only illegal, but it was also irrational and procedurally irregular.

17. The question to be answered by the court at this leave stage is whether the Applicant has established any of these grounds to enable the court grant leave to commence judicial review proceedings.

18. Though the Applicant argued his application with much verve and vigour, I do not find that he established any of the grounds for the grant of leave. I set out in the following paragraphs of this Ruling the reasons by reference to which I come to that conclusion.

19. **Firstly**, Liquor Licensing is a function of the County Governments. The authority for this statement is to be found in Article 186(1) of the Constitution of Kenya 2010, and Part 2 paragraph 4 (c) of the Fourth Schedule of the Constitution. The Mombasa County Liquor Licensing Act was enacted pursuant to the provisions of 186 (1) of the Constitution of Kenya 2010 Part 2, paragraph 4 (1) of the Fourth Schedule to the Constitution.

20. **Secondly**, the Applicant gave no particulars showing how the Mombasa County Liquor Licensing Act, 2014 offends either the provisions of the Constitution or the Alcoholic Drinks and Control Act, 2010 to enable the Respondents to respond to the contention. The case of **REPUBLIC VS. TRUTH JUSTICE AND RECONCILIATION COMMISSION & ANOTHER ex parte Njeru Gathanga & Others [2011] e KLR** is of no aid to the Applicant.

21. **Thirdly**, the Mombasa County Liquor Licensing Act executes or gives effect to the provisions of Article 175(b), 209 and 210 of the Constitution of Kenya 2010 on taxation, and other revenue raising measures for purposes of enabling the County Government to govern and deliver services effectively in accordance with its mandate and functions under the Constitution.

22. **Fourth**, the Mombasa County Liquor Licensing Act is not subject to the Alcoholic Drinks and Control Act, 2010. The primary purpose of the Alcoholic Drinks Control Act is the regulation of the production, sale and consumption of alcoholic drinks as more particularly described in section 3 of the Act. The Mombasa County Liquor Licensing Act and similar counties legislation set out provisions for licensing and give effect to paragraph 4 of Part II of the Fourth Schedule to the Constitution. The Fourth Schedule of the Constitution sets out the distribution of functions between the National Government and the County Governments. Part 2, paragraph 4 (c) confers upon the County Governments the function of liquor licensing among other "**cultural, public entertainment and public amenities**". The Applicant's contention otherwise is a gross misinterpretation and misapplication of both the Chapter II of the provisions of the Constitution on Devolved Government and functions of Government at the National and County levels.

23. **Fifth**, the presumption of law generally is that legislation and regulations thereunder are constitutional, and in order to determine the constitutionality of a statute, its overall object and purpose must be considered. There are many cases in support of that proposition –

(1) **NDYANABO VS. A.G. [2001] E.A. 495,**

(2) **RICHARD DICKSON OGENDA & 2 OTHERS VS. AG & 4 OTHERS, NAIROBI H.C. PETITIN NO. 70 OF 2014,**

(3) MURANG'A BAR OWNERS OPERATIONS & ANOTHER VS. MINISTER OF STATE FOR PROVINCIAL ADMINISTRATION & INTERNAL SECURITY & OTHERS [2011] e KLR (Nairobi HC PETITION NO. 341 OF 2011,

(4) HON. CHIRAU MAKWERE VS. ROBERT MABERA & 4 OTHERS (NAIROBI HC PETITION NO. 6 OF 2012).

24. The Applicant bears the burden of establishing that the Constitution has been violated. He failed to disclose any provision and how such provision of the Constitution and the Alcoholic Drinks Control Act have been infringed.

25. **Sixth**, considering the foregoing reasons, a statute such as the Mombasa County Liquor Licensing Act cannot be stayed at an interlocutory stage owing to serious implications it would have on the County's revenue and discharge of its constitutional mandate.

26. **Seventh**, it is a universal legal principle that other government revenue raising measures provide for penal consequences for defaulters. The charges the Applicant faces are known to the law and the Constitution. The charge sheet brought under section 24 (1) (2) as read with section 4 of the Mombasa County Liquor Licensing Act as well as By-Law 18(1) and 19(1) as read with section 22(a) (b) of the Mombasa County By-Laws disclose offences and the penalty, and also contain sufficient particulars to enable the Applicant to know and understand the offences with which he is charged, and be able to defend himself.

27. **Eighth**, it is correct that the penalty provided for under the said Licensing Act may appear punitive, but that cannot be the subject of judicial review. The Applicant is at this stage only subject to prosecution. He has not been convicted and sentenced and there is therefore no penalty or sentence to review. The legislative intent informs the penalty, a legislative function. Whether or not the sentence or penalty is punitive, or exorbitant, the court is not a proper forum to determine the appropriateness of such policy and legislative measures. The Applicant is inviting the court to determine the merits and suitability of the fines and thereby descend into the arena of policy and law making, a matter which is purely a function for the Executive and Legislative Branches of Government. The court will as necessary avoid that path.

28. **Ninth**, the Applicant claimed that he as well as his employees were charged. There was however no illegality in his, and his employees being charged. Under the provisions of section 41(3) and (4) of the Mombasa County Liquor Licensing Act, the owner, employer, employee, principal agent or any one of them or all, may be charged with the offences under the Act. It is not a defence for the Applicant to claim that an employee cannot be charged if his employer has been charged with the same offence. The Applicant's argument ignores the provisions of sections 20 and 23 of the Penal Code.

29. Under section 20 of the Penal Code, principal offenders includes:-

**(a) every person who actually does the act or makes the omission which constitutes the offence;**

**(b) any person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**

**(c) every person who aids and abets another person in committing the offence;**

**(d) any person who counsels any other person to commit the offence.**

30. And section 23 provides that where the offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be penalized accordingly,

unless it is proved by such person that, through no act or omission on his part he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent the commission.

31. It is thus a false argument and not a defence to argue that an employee of the Applicant could not be charged under the provisions of section 41 (3) and (4) of the Mombasa Liquor Licensing Act, 2015.

32. Equally, the Applicants argument that the Directorate which is mandated to make regulations providing for Prescribed Forms for Licence Applications and provide for licence fees, is yet to be constituted is based on both misinterpretation and misapplication of the Mombasa Liquor Licensing Act, and equal lack of diligence. It is clear from section 32, and Third Schedule of the Act, the forms and fees are already prescribed for various types of licences. Section 42(1) of the Act giving powers to the Directorate to make Regulations is only triggered for purposes of either amending the forms or the fees provided for under the Third Schedule, or for additional forms, fees or for other objects and purposes of the Act as set out in section 3 of the Act.

33. The Mombasa Liquor Licensing Act is a self-executing piece of legislation. It contains the application for licence fees. It does not require Regulations to be made first to implement its licence provisions. The Directorate charged with the implementation of the Act was already in place, formed long before the Applicant was charged with the offences, the subject of the Application.

34. Newspaper cutting Exhibit "PMK 5" attached to the Applicant's affidavit is not evidence. It is hearsay and offends the provisions of the Evidence Act regarding documentary evidence. Its authorship is unknown, its authenticity is in question. It is not authoritative.

35. Section 24 of the Mombasa Liquor Licensing Act makes it mandatory for the Applicant to apply for a licence in the prescribed form provided for in the Third Schedule to the Act. Section 23(1) of the Act makes it mandatory for the Applicant to secure a liquor licence before engaging in the selling of alcoholic drinks. None of these provisions has been complied with the Applicant. Ignorance of the law is no defence.

36. Lastly, the Applicant's own annexures to the Affidavit Verifying the Facts do not support his application.

(1) There is no evidence presented by the Applicant to show that he applied for a liquor licence for the year 2015 in the prescribed form under the Third Schedule, or that he was issued or refused to be issued with a licence after paying the fees prescribed under the Schedule.

(2) Annexures "PMK 10" Application forms are for the year 2014. There is no indication that the Forms were received by the Government of the County of Mombasa. There is no indication that the prescribed fees were paid.

(3) From the Applicant's own application form the licence applied for was the year 2014. The Act provides for issue of licences annually. The date of the offence is material, that is the year 2015. No application for the 2015 has been displayed and/or payment for the year 2015 licence fees for the year 2015 are shown by the Applicant.

(4) Annexure "PMK 10" deposit voucher does not indicate what the payment made on 4<sup>th</sup> July, 2014 was for. The sum of Kshs. 1,000/= cannot be the licence fees as it is way below the amount prescribed under the Third Schedule of the Mombasa Liquor Licensing Act.

37. From the above it is clear in my mind that the application does not disclose any grounds or a prima facie case for the grant of leave to apply for the judicial review of certiorari and prohibition sought. The application is an abuse of the process of court and is clearly intended to circumvent, thwart and obstruct the enforcement of the penal provisions of the Mombasa County Liquor Licensing Act, through the criminal proceedings against the Applicant.

38. The Chamber Summons dated 19<sup>th</sup> March, 2015 and filed on 20<sup>th</sup> March, 2015 is therefore dismissed with costs to the Respondents.

39. It is so ordered.

**Dated, Signed and Delivered in Mombasa this 10<sup>th</sup> day of July, 2015.**

**M. J. ANYARA EMUKULE**

**JUDGE**

In the presence of:

Mr. Kabundu the Applicant

Miss Lutta holding brief Wamotsa for 4<sup>th</sup> and 5<sup>th</sup> Respondent

Miss Oyier for 1<sup>st</sup> – 3<sup>rd</sup> Respondents

Mr. Kaunda Court Assistant