



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 84 OF 2012

ALFAYO MUJIVANE AGUFANA.....1ST APPELLANT/APPLICANT
EBRAHIM O. AMBWERE 2ND APPELLANT/APPLICANT
SAMUEL MUDANYA ANONDA 3RD APPELLANT/APPLICANT
NEBERT MWIKA LUMIRE 4TH APPELLANT/APPLICANT
EZINA E. AKIBAYA 5TH APPELLANT/APPLICANT
ROBAI KADILI AGUFA 6TH APPELLANT/APPLICANT
IRENE MMBOGA 7TH APPELLANT/APPLICANT
FRANCIS ANDANYI LUYALI 8TH APPELLANT/APPLICANT
CUM PAUL MUTIVA 9TH APPELLANT/APPLICANT

VERSUS

SABATIA DISTRICT ALCOHOLIC DRINKS

REGULATION COMMITTEE 1ST RESPONDENT VIHIGA DISTRICT
ALCOHOLIC DRINKS
REGULATION COMMITTEE 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT

R U L I N G

After filing an appeal on 4/9/2012, the nine appellants filed a Notice of Motion on 14/11/2012, against the same three respondents. This ruling relates to the Notice of Motion.

The Notice of Motion was filed under **Section 1A & B** and **Section 3A** of the Civil Procedure Act (Cap. 21), as well as **Article 159 (2) (d)** of the Constitution of Kenya 2010 and **Section 19 (2)** of the Alcoholic Drinks Control Act No. 4 of 2010. Prayers 1 2 & 3 of the application have already been spent. The prayers that are now for consideration are 4 and 5 as follows -

1. (spent)
2. (spent)
3. (spent)
4. That Pending hearing and determination of the appeal, the respondents be compelled to comply with the provision of Section 169 of the Alcoholic Drinks Control Act and do issue licences to the appellants/appellant upon payment of the requisite fees.
5. Costs of this application be recovered from the respondents.

The application was filed with an affidavit sworn by the 1st appellant, Alfayo Mujivane Agufana. The affidavit annexes a number of documents relating to the several business premises affected, and the decision of the Sabatia and Vihiga Alcoholic Drinks Regulation Committees. It was deponed in the affidavit that the Committee refused to renew the trading licences of the appellants and ordered the closure of the various premises without any legal authority to that effect. It was deponed that the appellants had operated the subject businesses for many years. It was also deponed that the Committee wrongly relied on the recommendations made by Parliament. The applicant's counsel, A. B. L. Musienga & Co. Advocates also filed submissions in support of the application.

The Attorney General on behalf of all the respondents opposed the application. He filed grounds of opposition. The grounds are as follows –

1. Public interest militates against the orders sought.
2. Public Policy is against the orders sought.
3. No law sanctions the orders sought.
4. The intended appeal raises no arguable point.
5. The applicants are before court with unclean hands.

The Attorney-General for the respondents also filed documents annexing a report of Parliament directing that bars which were within close proximity of learning institutions should not be given licences. Also filed were letters from the officers from the Office of the President, directing that bars should not be licensed within a radius of 300 metres from schools.

In addition to the above, the Attorney General filed written submissions in opposition to the application. The gist of the written submissions was that the appellants erroneously came to court through an appeal, while they should have approached this court through an ordinary plaint or through Judicial Review Proceedings. In the Attorney General's view, the factual issues herein such as distances between the bars and schools could only be established through formal evidence to be tendered, not through an appeal.

Mr. Kundu, who appeared on the hearing day for the appellants and Mr. Onyiso who appeared for the respondents relied on the written submissions filed.

This is an inter-locutory application. The appeal is yet to be heard. The appellants, relied on Section 19 (2) of the Alcoholic Drinks Control Act No. 4 of 2010 to file the appeal and this application. The respondents through the Attorney-General contend that the appellants should have approached this court through a plaint or judicial review proceedings not through an appeal.

Section 19 (2) of the Act provides as follows -

“If a renewal of a licence is refused and the licensee appeals against the decision, the licensee shall on payment of the fee for the appropriate licence, be entitled unless the Minister directs otherwise to the renewal of the licence which is the subject of the appeal to be valid only until the appeal has been determined, such licence to commence on the day after termination of the existing licence.”

Under Section 15 of the Act, an applicant for a new licence, a renewal of licence or transfer of the same, has a right within 21 days of refusal or cancellation, to appeal to the High Court for appropriate orders.

Therefore, in my view, the applicants have approached this court in the proper manner after an adverse decision was made against them when they applied for renewal of existing licences. The objection of the Attorney General that these proceedings should have been commenced by way of Plaint or Judicial Review has no legal basis. I dismiss the objection.

On the merits of the application, the considerations taken by the Alcoholic Drinks Committee in their decision not to renew the licences appear to have come from a debate in Parliament, not through legislation. The Attorney General did not shed any light on whether those deliberations by Parliament which were captured in the Hansard, had acquired the force of law. Ordinarily, discussions and decisions by Parliament do not become law unless a Bill is tabled and taken through the three readings and then assented to by the President.

Secondly, **Section 19 (2)** of the Act, which I have referred to above, states that once an appeal is filed, unless the Minister directs otherwise, a renewal of the said licence will or should be granted pending appeal. I have not been informed that the Minister has given such an otherwise directive. The adverse correspondence relied upon by the Committee herein are from Civil Servants, who are not the Minister.

In those circumstances, I find that the application has merits. I allow the application and grant prayer 4. Costs will be in the cause.

Dated and delivered at Kakamega this 11th day of February, 2014

George Dulu

J U D G E