



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**PETITION NO. 1 OF 2014**

**In The Matter Of Articles 22, 23, 159, 258 & 259 Of Hte Constitution In The Matter Of Alleged  
Contravention Of Fundamental Rights And Freedoms Under Articles 10, 20, 27 & 47 Of The  
Constitution Of Kenya**

**Between**

**ESTHER LODENYI ADORI ..... PETITIONER**

**V E R S U S**

**THE SABATIA DISTRICT ALCOHOLIC**

**DRINKS REGULATION COMMITTEE..... 1<sup>ST</sup> RESPONDENT**

**THE SABASIA DISTRICT**

**COMMISSIONER ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**NATIONAL AUTHORITY FOR THE CAMPAIGN**

**AGAINST ALCOHOL AND DRUG ABUSE**

**(NACADA) ..... INTERESTED PARTY**

**R U L I N G**

The Petitioner filed a Constitutional Petition on 13th February 2013. On the same date, she filed a Notice of Motion. It is the Notice of Motion that is subject to this ruling. The Notice of Motion was filed under Articles 2, 10, 20, 21, 22, 27, 50, 159, 165, 258 & 259 of the Constitution of Kenya 2010. The prayers sought are as follows -

1. that the application/petition be certified as urgent and heard ex-parte in the first instance with respect to prayer 2 of the application.
2. That pending hearing and determination of the petition, the Honourable court do order that the respondents and anyone acting on their behalf do issue a provisional liquor licence to the petitioner/applicant.
3. That a date of the inter-partes hearing be given.
4. The costs of the petition be provided for.

The application has grounds on the face of the Notice of Motion. In brief, the grounds are that the applicant had acquired a bar business which was in operation since 2007; that the predecessor had been issued with liquor licences the last which had expired at the end of November 2013; that the respondents had failed to formally communicate to the applicant on her request for a renewal of her licence and had denied her a right to be heard contrary to the rules of natural justice; that the respondents had acted in a discriminative manner by issuing licences to other similar applicants; that the action amounted to discrimination contrary to the provisions protecting fundamental rights of individuals enshrined in the Constitution of Kenya 2010; and that the applicant was consequently suffering great loss and damage.

The application was filed with a supporting affidavit sworn by the applicant. It was deponed *inter alia* that the applicant was the proprietor of Club Skoll situated along Majengo-Kakamega road which had operated from 2007; that upon expiry of the liquor licence in 2013; the applicant applied for renewal of the same but the respondents had not given any form of response; that the applicant was instead verbally informed that the premises were near a public school; that the applicant had secured a loan from Kenya Women Finance Trust Ltd. for Kshs. 2 million to set up the business; and that the applicant was not able to service the loan due to the action of the respondents. That several bars had been licenced within comparable distance from schools.

On 13th of February 2014, the court ordered that the application be served for inter-partes hearing on 20/2/14. After service, the respondents did not enter appearance nor file any other documents in response. Instead, the interested party, NACADA applied to be joint as a party to the proceedings, which the court allowed by consent of the parties.

The Interested Party then filed a replying affidavit to the application raising several issues. It stated that it was the agency mandated to implement the Alcoholic Drinks Act 2010. It was deponed in the affidavit also, *inter alia*, that the applicant had never obtained a licence or permit to operate business of selling alcoholic drinks. That the applicant did not merit the grant of such a licence to sell alcoholic drinks next to a densely populated area and learning institutions such as Hekima Academy and Mbale Primary School. That the previous owner was denied a licence on the strength of minutes dated 20/11/13 and July 2013 by the Sabatia District Alcoholic Drinks Committee. That the power to approve licences under the Act were conferred on the 1st respondent. That the applicant's hands were tainted with illegality, having operated the liquor business without a licence. That the application is not merited.

Mr. Nyamweya for the applicant and Mr. Mukabane for the respondents made extensive oral submissions in respect of their respective clients' position.

I have considered the application, documents filed as well as the submissions. The first issue is whether the applicant was justified in coming to this court through a Constitutional application rather than a Judicial Review application. The interested party considers that the applicant could only come to this court through a judicial review application. The applicant has argued that she could not come to this court under judicial review application as no written communication was given to her by the 1st respondent. In my view, the applicant/petitioner had a right to approach this court through a Constitutional reference. The Constitution of Kenya 2010 allows the constitutional court to issue a wide range of reliefs including Judicial Review order under Article 23. That was not by accident.

It is not disputed that the 1st respondent has chosen not to communicate its decision to the applicant. Even after being served with this application, they have not bothered to come to court. I find and hold that the applicant/petitioner has approached this court in the proper way.

The second issue is whether the applicant has come to this court with unclean hands. It is the position of the interested party that this application should not be entertained because the applicant has operated the bar without a licence, and has been taken to court and charged in a criminal court. My view is that the pending charge in the subordinate court is an allegation. It has to be proved to the standards required by the law. It is not an impediment for a person coming to the Constitutional court for resolution of an alleged contravention of his Constitutional rights.

The third issue is whether the application is fatally defective because it cites wrong sections of the law. There is no allegation that the law prohibits the filing of such an application. In my view, merely citing a non-existent or a wrong section of the law is not fatal to an application. In addition, **Article 159(2) (d)** of the Constitution of Kenya 2010 enjoins courts to administer justice without undue regard to technicalities. In my view, so long as the main body of the application and the prayers raise an actionable issue, the court can and should adjudicate on the matter. After all, wrong pleadings can still be amended in the course of proceedings. I find and hold that the application herein is not fatally defective.

The 1st respondent, who is the alleged offending party, has not bothered to enter appearance or file any documents in response to the application. Though the interested party has been joined as a party herein, they have not stated that they have any legal capacity to act in the shoes or on behalf of the 1st respondent, which is a statutory institution. The documents relied upon by the interested party are said to emanate from the 1st respondent. There is however no evidence to support that. There is not even an affidavit filed from any member of the 1st respondent to authenticate the said documents. The facts relied upon by the interested party in opposing the application cannot therefore be verified. They cannot be a basis for this court refusing to grant orders sought against the action or failure to act by the 1st respondent.

The application is not opposed by the party to defend, who by law is the 1st respondent. That is the party whose action or inactions are challenged. They were served. The 2<sup>nd</sup> respondent is a member of the 1<sup>st</sup> respondent. It follows therefore that the justice of the case will require that the prayers sought herein by the applicant/petitioner be granted, even if it is to a limited extent, as the application is not opposed by the alleged transgressors.

In the result, I allow the Notice of Motion dated 13/2/14 and order as follows -

1. Pending the hearing of the petition herein, the respondents and anyone acting on their behalf are ordered to issue a provisional liquor licence to the petitioner/applicant.
2. The petition will be heard on 15<sup>th</sup> May, 2014.
3. Costs in the cause.
4. This order should be served on both respondents.

***Dated and delivered this 13<sup>th</sup> day of March, 2014***

**George Dulu**

**J U D G E**