



REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 130 of 2011

**(Appeal against the decision of the Sabatia District Alcoholic
Drinks Committee delivered on 27.7.2011)**

KEN VITISHA T/A ENZOGU SPORTS CLUB APPELLANT

V E R S U S

SABATIA DISTRICT ALCOHOLIC DRINKS

REGULATION COMMITTEE RESPONDENT

J U D G M E N T

This is an appeal from the decision of the Sabatia District Alcoholic Drinks Regulation Committee delivered on the 27.7.2011. The grounds of appeal as stated in the amended memorandum of appeal filed on the 29.8.2011 are that the Committee erred in law by failing to give any reasons of its decision, that Committee did not keep any record of its proceedings, that the Committee erred in law by failing to give the applicant an opportunity to be heard thereby violating the rules of natural justice, that the Committee failed to conduct a hearing and the order was made orally stopping the appellant from continuing with his business and finally that the Committee treated the appellant as a new applicant for a license whereas the appellant was only seeking renewal of his license.

Parties agreed to argue the appeal by way of written submissions. The appellant in his submissions maintains that the Committee did not give any reason for its decision to reject the appellant's application for a license and it completely refused to avail proceedings of its meeting that deliberated on the application for renewal of license. It is further submitted that Section 9 of the Alcoholic Drinks Control Act 2010 requires that both the applicant and any objector be heard and what they say be recorded. There are no such proceedings that were conducted by the Committee. The appellant was not given an opportunity to be heard yet he had been operating his business for a period of over five years. The appellant's application fell under the provisions of Sections 15 and 19 of the Act but the appellant was not given time to wind up his business and was treated as a new applicant. The Act requires that any objection received against an applicant should be availed to the applicant but in this case the appellant was not aware of any objection. Counsel for the appellant maintains that there were no proceedings and all the documents have been availed after the appeal was filed and would like the court to ignore those documents.

On the part of the respondent it is submitted that the Committee heard several application and kept a record of its deliberations. The appellant's application was rejected on the ground that his bar was located to close to Mbale Shalom Academy and the director of that Academy had lodged an objection. The denial of the license falls within the provisions of **Section 3 (c)** and **12(1)** of the Alcoholic Drinks Control Act. It is further submitted the Committee falls within the definition of a Tribunal and its

procedure is not expected to be cumbersome. If the Committee was to allow all the applicants to make oral submissions then its work would be complicated. The appellant's right to be heard is granted in the application form for the renewal of the license.

The record herein shows that no proper record of appeal was filed by the appellant. The appellant filed his memorandum of appeal on the 17.8.2011 and the same was amended on the 29.8.2011. Thereafter an application dated 1st September 2011 was filed by the appellant seeking to be supplied with copies of the minutes/proceedings or ruling of the Committee. That application annexed several documents including the appellant's application for the renewal of his license, his single business permit form the Vihiga Municipal Council and his license issued by the Public Health office Chavakali Division for the year 2010. The Interested party was ordered to file a formal application to be enjoined in the proceedings and did comply with that court directive and filed its application on the 21.11.2011. The respondent filed its list of documents on the 9.2.2012 which contains three items namely – minutes of the Committee's meeting held on 27.7.2011, one photograph showing the Shalom Academy School and a letter from the District education Board dated 10.5.2010.

The matter has gone through the hands of different judges as well as the deputy registrar. There is no record that the interested party's application to be enjoined was heard and parties proceeded to list the appeal for hearing. The interested party did not file any written submissions. I will therefore treat all the documents in the file as forming part of the record of appeal. By so doing I will be falling within the ambit of **Article 159 (d)** of the Constitution which stipulates that justice shall be administered without undue regard to procedural technicalities.

The essence of the appellant's contention is that he was not given the right to be heard. The Committee reached its decision without according the appellant the right to be heard and that is contrary to the principles of natural justice. The appellant was not given an opportunity to know if there was any objection against his application and that was contrary to the provisions of **Section 9(8)** of the Alcoholic Drinks Act. The appellant also contends that the Committee did keep any records of its proceedings. On its part the respondent maintains that the Committee kept a record of its proceedings and that is contained in the minutes that were filed in court and that the reasons for the denial of the license is contained in those minutes.

The background of the matter is that the interested party is operating a school known as Mbale Shalom Academy. According to the record the school started its operation in 1998. The appellant leased some premises known as Ndugu House located along the Kakamega – Kisumu road specifically at Mbale Town. From the available records the appellant started his business from July 2005. The gist of the dispute is that the school complained to the Committee that the appellant's business known as Enzogu Bar and Restaurant is located to close to the school and has made learning difficult for the students. The business is just located at the entrance of the school and loud music is played at night when the students are on preps. On his part the appellant maintains that the business has been operating for over five years and there has been no complaint.

Turning to the grounds of appeal the contention that the Committee did not keep any record or give any reasons for its decision was answered by the minutes filed in court. The minutes indicate that they are for the Sabatia District Alcoholic Drinks Committee meeting held on the 27.7.2011 in the District Commissioner's board room from 9.50 a.m. Those minutes give a table of all the applications which run up to 50 in number, the type of license applied for, where the premises are located and the decision of the Committee. The appellant's application is given as number 40 and the type of license applied for is general retail. The remarks are that the application was not approved as the premises situated to close to Mbale Shalom Academy and that the director of that Academy had lodged an objection. Section 9(8) of the Alcoholic Drinks Act requires that any objection to an application should be notified to the applicant and the Committee is empowered to adjourn the proceedings for a period of not less than 7 days so as to enable the applicant reply to the objection. **Section 7** of the Act empowers the District Committee on its own motion to take notice of any matter or thing which in its opinion constitutes an objection to an application whether or not any objection has been otherwise lodged.

It is clear from the proceedings that the appellant was not aware of the objection. It is further clear that the appellant was not heard before the Committee. The main issue for determination would be whether the appellant's appearance and submissions before the Committee would have made any difference. The documents filed herein show that indeed Enzogu Spot Club which operates a bar and restaurant is located right at the entrance of Mbale Shalom Academy. **Section 12 (1)(c)** of the Act states that no license shall be granted to sell alcoholic drinks where the premises in which the application is made are located at least 300 metres from any Nursery, Primary, Secondary or other learning institutions for persons under the age of 18 years. Even if the appellant was to appear before the Committee the fact that his business is located less than 5 metres from Mbale Shalom Academy would not have changed. The essence of the Alcoholic Drinks Act is to regulate businesses that are controlled by the Act and by so doing enhance public interest. The appellant's individual rights should give way to the rights of the public. It is clear that the appellant's business deals with the sell of alcohol whether or not there is loud music played in the business is immaterial. The law disallows the sell of alcoholic drinks near education institutions. The appellant's right to operate his business and earn his living does not override the rights of the students of Mbale Shalom Academy to undertake their learning in a conducive atmosphere. The limitation of the appellant's rights is both reasonable and justifiable in an open democratic society taking into account all the relevant factors. The appellant is free to relocate his business far from any academic institution that deals with students below the age of 18 years. The limitation does not shut out the appellant from conducting his business but simply regulates the location of that business.

In the end, I do find that the Committee lawfully reached at the correct decision. The Committee's decision is guided by the interest of the public which interest supersedes the appellant's interest. The appeal lacks merit and the same is disallowed with no orders as to costs.

Delivered, dated and signed at Kakamega this 2nd day of May 2013

SAID J. CHITEMBWE
J U D G E