



Nest Lounge & Grill v Directorate of Liquor and Licensing (Judicial Review E030 of 2023) [2024] KEHC 2140 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEHC 2140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW E030 OF 2023
OA SEWE, J
FEBRUARY 29, 2024**

BETWEEN

NEST LOUNGE & GRILL APPLICANT

AND

DIRECTORATE OF LIQUOR AND LICENSING RESPONDENT

RULING

1. On the 19th January 2024, the Court delivered its ruling herein in respect of the applicant's Chamber Summons dated 21st September 2023. That application had been brought under Section 8(2) of the Law Reform Act, Chapter 26 of the Laws of Kenya, Order 53 Rule 1 of the Civil Procedure Rules and Part III of the Fair Administrative Action Act, No. 4 of 2015 for orders that:
 - (a) Spent
 - (b) The applicant be granted leave to commence judicial review proceedings for an order of Certiorari to quash the decision of the respondent as per the letter dated 18th September 2023.
 - (c) The applicant be granted leave to apply for an order of Injunction restraining the respondent whether by itself, servants, agents or howsoever otherwise from arresting, harassing or intimidating the applicant when operating its business.
 - (d) The applicant be granted leave to apply for an order of Prohibition to prohibit the respondent from closing the applicant's business.
 - (e) The applicant be granted leave to apply for an order of Prohibition to prohibit the County Commander, Mombasa County, OCPD Nyali Police Station and other police officers within the same jurisdiction from arresting, harassing or intimidating the applicant while operating the business.



- (f) The applicant be granted leave to apply for an order compelling the respondent to visit the applicant's business premises and measure the sound emanating from the business during business hours.
 - (g) The applicant be granted leave to apply for an order compelling National Environmental Management Authority (NEMA) and the applicant's neighbours to file a report on the conduct of the applicant's business affairs.
 - (h) Leave granted do operate as stay of enforcement of the decision of the respondent to intimidate the applicant.
 - (i) The costs of the application be provided for.
2. The Court found merit in the said application and granted the following orders:
- (a) Leave be and is hereby granted to the applicant to commence judicial review proceedings for an order of *Certiorari* to quash the decision of the respondent as per the letter dated 18th September 2023.
 - (b) Leave be and is hereby granted to the applicant to apply for an order of Injunction restraining the respondent whether by itself, servants, agents or howsoever otherwise from arresting, harassing or intimidating the applicant when operating its business.
 - (c) Leave be and is hereby granted to the applicant to apply for an order of Prohibition to prohibit the respondent from closing the applicant's business.
 - (d) The substantive application be filed within 14 days from the date hereof.
 - (e) The Leave granted to operate as stay of enforcement of the decision of the respondent as per the letter dated 18th September 2023.
 - (f) The costs of the application to be costs in the substantive application.
3. By the time the ruling was delivered, the applicant had filed a Notice of Withdrawal dated 17th December 2023 to the following effect:
- “Take notice that the Applicant hereby withdraws its Judicial Review Application(s) dated 21st September 2023...”
4. Moreover, an application dated 15th December 2023 had been filed by M/s P.A. Osino & Company Advocates seeking leave to be enjoined to the proceedings as an interested party. M/s P.A. Osino & Company Advocates also prayed for the following orders:
- (a) That the Court be pleased to arrest the delivery of the ruling scheduled for 21st December 2023 pending the hearing and determination of the interested party's application;
 - (b) That the intended interested party be granted leave to file a Preliminary Objection to the application as the Court lacks jurisdiction in the matter of environment and planning;
 - (c) That the costs of the application be provided for.



5. On the 19th January 2024, the Court gave directions, after hearing the parties in respect of Ms. Osino's application. Accordingly, the Court was of the view that:

“...The best way forward in the foregoing circumstances, in the face of Mrs. Osino's submissions, is for the Court to deliver its Ruling and thereafter give the parties an opportunity to agitate their respective viewpoints. I note that the application the subject of the pending ruling was urged ex parte and that the Court had the discretion to not hear the parties. Accordingly, the ruling of the Court in respect of the Notice of Motion dated 21/9/2023 is hereby delivered in the presence of counsel for the applicant in the 2nd application and in the absence of the ex parte applicant. Further directions on 5/2/2024. Notice to issue.”
6. On the 5th February 2024, counsel for the applicant, Mr. Imbugua pointed out that, since a Notice of Withdrawal had been filed by the applicant, the interested party's application had been overtaken by events. While counsel for the respondent, Ms. Omboga, had no objection to the Notice of Withdrawal, Ms. Osino was opposed thereto. She complained that she was never served with the Notice of Withdrawal; and pointed out that it was filed after her application for joinder. Ms. Osino further submitted that, since this is an application that touches on the aspect of public interest, leave of the Court is a prerequisite.
7. In his rejoinder, Mr. Imbugua urged the Court to note that the interested party is yet to have locus in this matter since her application is yet to be heard and determined. Mr. Imbugua further submitted that, if the interested party is aggrieved then she is at liberty to file her own suit against the respondent or whichever party she feels aggrieved against.
8. Thereafter, the applicant filed yet another application dated 15th February 2024 seeking the following orders:
 - (a) That the Court be pleased to issue a conservatory order in the nature of an injunction restraining the respondent, its agents, officers or any persons acting under its instructions from further visiting the applicant's business premises with the intention of closing it down;
 - (b) That the Court be pleased to issue a mandatory injunction directing the respondent to withdraw the letter dated 15th February 2024;
 - (c) That the Court be pleased to direct the National Environment Management Authority to conduct an assessment on noise pollution at the applicant's premises and thereafter file a report;
 - (d) That the Court be pleased to grant leave to the applicant to file the substantive application out of time since the 14 days granted on 19th January 2024 have lapsed.
9. It is plain therefore that the applicant's Notice of Withdrawal dated 17th December 2023 has since been overtaken by events. Indeed, the applicant explained, at paragraph 12 of its Supporting Affidavit sworn on 15th February 2024 that the Notice of Withdrawal was filed as a result of a meeting between the applicant and the respondent in which the respondent confirmed that his business was in compliance and that its liquor licence for 2024 was at the tail end of processing; and therefore that suit was unnecessary. The applicant further averred that its failure to file the substantive application within 14 days was on the basis of the understanding reached between the parties.
10. In the circumstances, the Notice of Withdrawal is hereby expunged from the record and directions given that the two pending applications be proceeded with to hearing and determination.



It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF
FEBRUARY 2024**

OLGA SEWE

JUDGE

