



**Fredrick C. Kimei t/a Kiprungu Bar v Baringo North County
Alcoholic Beverage Control Agency (Miscellaneous Civil Application
E003 of 2023) [2024] KEHC 1800 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1800 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
MISCELLANEOUS CIVIL APPLICATION E003 OF 2023
RB NGETICH, J
FEBRUARY 22, 2024**

BETWEEN

FREDRICK C. KIMEI T/A KIPRUNGU BAR APPLICANT

AND

**BARINGO NORTH COUNTY ALCOHOLIC BEVERAGE CONTROL
AGENCY RESPONDENT**

RULING

1. Before me is the Notice of Motion application dated 20th September, 2023 filed by the applicant herein seeking the following orders against the respondent.
 - i. Spent;
 - ii. Spent
 - iii. Spent
 - iv. That an order of Prohibition be directed to the Respondent against themselves, their agents, workers, employees, servants and other Government officials or agencies barring them closing the Applicants business premises, from suspending, cancelling disapproving and/or revoking the general retail license of the Applicant pending the hearing of this appeal.
 - v. THAT this Honourable court be pleased to set aside the orders issued pursuant to a ruling/ decision of the alcoholic committee of Baringo north sub-county alcoholic beverage control agency Vide Letter dated 2nd April 2023.
 - vi. The Honourable Court be pleased to give further orders and directions as it may deem fit and just to grant.



- vii. The costs of this application be provided for.
2. The application is supported by an affidavit sworn by the applicant on the 20th September, 2023. He avers that he is the proprietor of Kiprungu Bar and has been legally operating the said bar in a premise known as Barwessa vide License No. 475263/2022.
 3. That the said business has been running smoothly and legally for the past 20 Years with a general retail type of license allowing it to operate between 2.00pm and 11.00 pm during weekdays and between 5.00pm and 11 pm during weekends.
 4. That the license was to expire on the 31st December 2023 and as required by law, he applied for a renewal of the same but was surprised when on the 15th day of May, 2023, he was served with the Respondent's letter dated 25th April 2023 listing all false and outrageous accusations against the business; that he was not aware of the allegations and falsehoods against himself and his business neither was he ever served with proof or evidence of the allegations listed in the Respondents letter dated 25th April 2023 neither was invited to attend any committee meeting to explain himself and was clearly denied a chance to be heard before his application for renewal of the licence was disapproved and an order of immediate closure made vide a letter dated 25th April 2023 by the Respondents.
 5. That the business premises having been ordered closed immediately, the only avenue for him is to seek justice and fairness as provided in Section 20 and 21 of the Baringo County Alcoholic Beverage control and management Act, 2014 which allows this appeal to the High Court.
 6. That if the said execution of the orders in the letter dated 25th April 2023 by the Respondents is allowed to proceed, he stands to suffer irreparable loss and damage as this is his only source of income for him and his family and he has a viable defence against the allegations made and raised in the letter dated 25th April 2023 if given a chance and duly served with proof and exhibits if any by the respondents.
 7. That it is only just and fair that the said execution of the orders of the Respondent be stayed pending the hearing and determination of this this appeal as the same was issued in bad faith and based on falsehoods.
 8. The Respondent filed Notice of Preliminary Objection dated 24th July, 2023 in response to the application on the following grounds: -
 - i. This court lacks jurisdiction to hear this matter in view of the doctrine of exhaustion of internal dispute resolution mechanisms.
 - ii. This claim is defective incompetent and bad in Law and does not disclose reasonable cause of action for misjoinder of parties.
 - iii. This claim offends the requirements of section 9(2) of the fair administration Act 2015
 - iv. The claim/petition has been brought under section 20 and 21 of the Bomet County Alcoholic Beverage control and Management Act ,2014 which does not govern the operations of the Respondents.
 9. The Respondent submit that despite the court giving directions that the application be canvassed by way of written submissions, only the Respondents filed their submissions dated 5th January,2025. The



Respondents argue that in the celebrated case of *owners of the motor vessel "lilian s" versus caltex oil (kenya) limited* (1989) KLR 1, the court in asserting that "jurisdiction is everything" stated as follows:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

"By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon its self to exercise a jurisdiction which it does not possess, its decision amounts to Nothing. Jurisdiction must be acquired before judgement is given" See Words and Phrases Legally defined - Volume 3: I – N Page 113"

10. That the above position was restated, in [Samuel Kamau Macharia & Another Versus Kenya Commercial Bank Limited & 2 Others](#); S.c.application No. 2 OF 2012; [2012] eKLR where the Court observed that:

"A Court's jurisdiction flows from either [the Constitution](#) or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity."

11. That having established that is trite law that jurisdiction of courts and tribunals is conferred by [the Constitution](#) and statutes, the Respondent argue that it is vital to delve into the issue of jurisdiction first.
12. That a keen reading of the aforementioned cited authorities, Articles of [the Constitution](#) and specifically Section 17 of Baringo County [Alcoholic drinks Control Act](#) provide for review of refusal to grant licence to be filed before County review committee within 14 days of such refusal but the respondent failed to move the County review committee within the said period and argue that filing this application is an afterthought and an abuse of the Court process and urge this court not to entertain the Applicant herein.
13. The Respondent further submit that the Application is defective and bad in law as it has been filed under the wrong provisions of Law. The Respondent submits that the Application was brought under the provisions of section 1A,1B and 3A of the [civil procedure Act](#), Order 51 rule 1 and order 40 Rule 2 of the of the [civil procedure rules](#) and Section 20 and 21 of Baringo County Alcoholic Beverage Control and Management Act 2014 and all enabling provisions of the law.



14. That Section 19 of Baringo County *Alcoholic Drinks Control Act* provides that; Notwithstanding section 17, an Applicant whose Application for a new license, to renew or transfer a license has been refused may within 21 days of such refusal appeal against the refusal to court.
15. That the claimants herein brought the Application under Bomet County Alcoholic Beverage Control which does not apply to the Respondents/Applicant's and for that reason they cannot be entitled to the orders sought.
16. On whether the instant petition is fatally defective for misjoinder and non-joinder of parties, the Respondent submits that the Application herein was not against a body which is non-existent in law making the pleadings fatally defective for misjoinder of parties a keen look into the pleadings shows that the Respondent has been stated as Baringo North Sub-County Alcoholic beverage agency.
17. The Respondents prays this honourable court for the Application to be dismissed with cost for being defective and for failing to comply with the provisions of the law

Analysis And Determination

18. The Notice of Motion under consideration was brought pursuant to Articles 22(1), 23, 47 and 56 of *the Constitution* of Kenya, 2010. Section 4, 7, 8, 9 and 10 of the Fair Administrative Actions Act, 2015 and Order 51 of the Civil Procedure Rules.
19. Article 22(1) of *the Constitution* confers parties access to court for breach of any right or fundamental freedom. It provides as follows:-

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened.”
20. Article 23 of *the Constitution* confers on the High Court the jurisdiction to hear and determine applications for redress of denial, violation or infringement of rights under the Bill of Rights. This court has therefore unlimited jurisdiction to grant remedies for infringement of rights under the Bill of Rights. Under Article 23 of *the Constitution*, the court may grant appropriate relief including a declaration of rights, an injunction, an order of Judicial Review e.t.c.
21. I have considered grounds of the application and averments in the supporting affidavit plus submissions by Respondent. The issues that seem to arise are:-
 - i. Whether the application is premature and offends the doctrine of exhaustion.
 - ii. Who should bear costs.

Whether the application is premature and offends the doctrine of exhaustion:

22. I have perused Baringo County *Alcoholic Drinks Control Act* and note that it provides that any applicant whose application for new licence, to renew or transfer a licence has been refused or to renew a licence has been refused may within 14 days may request in writing the review of such refusal to the county review committee and upon receipt of the request, the county review committee shall within 21 days make a final determination on the request for review.
23. From the above, it is clear that the Act provide for internal mechanism for review of decision by the subcounty committee to the county review committee within 14 days. The applicant has not



demonstrated having taken any steps to appeal against the subcounty committee to the county review committee.

24. Section 9(2) of the [FAA Act](#). Section 9(2) of the [FAA Act](#) provides as follows:-

“The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision vide this Act unless the mechanisms including internal mechanisms as for appeal or review and all remedies is available under any other written law are first exhausted.”

25. Where a procedure for redress of a grievance is prescribed by a statute or Constitution, that procedure must be followed and failure to exhaust all the available dispute resolution mechanisms ousts the jurisdiction of this court to handle this matter.

26. The above provision was held in the case *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga & 1756 others* (2015) eKLR, the court said:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be for of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts..... This accords with Article 159 of [the Constitution](#) which commands Courts to encourage alternative means of dispute resolution.”

27. Further in the case of [Speaker of National Assembly v Karume](#) (1992) KLR 21 the court succinctly stated:

“Where there is a clear procedure for redress of any particular grievance prescribed by [the Constitution](#) or an Act of Parliament that procedure should be strictly follows. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

28. I do agree with the Respondent’s argument that the Notice of Motion offends the doctrine of exhaustion in that the appellant failed to pursue the procedure of review provided under Baringo County [Alcoholic Drinks Control Act](#).

29. On argument that the application is defective, Sections 4, 7, 8, 9 & 10 of the FAA Act, 2015 are founded on Articles 23 and 47 of [the Constitution](#). Article 47 provides for the right to a Fair Administrative Action. To give effect to the said Articles, parliament enacted the FAA Act where Section 2 defines an Administrative Action to include

“The powers, functions and duties exercised by authorities and quasi-judicial tribunals or any act or omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.”

30. Judicial review is now entrenched in [the Constitution](#) 2010, so that the remedies that were only available under Order 53 of Civil Procedure Rules can now be issued under Article 23 of [the Constitution](#) so that one is no longer confined to the limited remedies available under Order 53 [Civil Procedure Code](#), that



is, certiorari, prohibition and mandamus. The procedure of commencing Judicial Review was seen as cumbersome in that one needs leave of the court to commence Judicial Review proceedings.

31. Under FAA Act, the remedy is supposed to be expeditious, efficient, lawful and fair, et cetera. In my considered view, even in absence of Rules made under the Act, there is no vacuum on how an application under the FAA Act should be instituted in court. If one finds the procedure under Order 53 Civil Procedure Rule to be cumbersome, then nothing stops the applicant from proceeding under the Constitutional provisions. A Notice of Motion in my view is generally an interlocutory application unless specifically provided for in a special jurisdiction like that under Order 53 Civil Procedure Rules that the suit may be determined on a Notice of Motion.
32. The applicant clearly invoked the Constitutional provisions and should have come by way of a petition under Rule 10 of the Rules made under the Constitution, that is, Mutunga Rules, where both Judicial Review orders and damages can be awarded.
33. I however note that the applicant filed memorandum of appeal in this miscellaneous application and the same orders sought in the appeal are sought in the application. It seems the applicant was not sure whether to approach court through appeal or application because prayer 5 of the application seek to set aside the ruling of Baringo north subcounty Alcoholic Beverage control Act Agency and in paragraph 13 of the supporting affidavit quote section 20 and 21 of Bomet county Alcoholic Beverage control and management Act 2014, a clear mix-up of the legal provisions.
34. That aside, having found that the applicant has not exhausted internal mechanism of dispute resolution, I am of the view that the application herein is premature and amount to abuse of court process.

Final Orders: -

35. ...
 1. Preliminary objection is hereby upheld. Application dated 22nd may 2023 is hereby dismissed.
 2. Costs to the Respondent.

RULING DELIVERED, DATED AND SIGNED IN VIRTUALLY AT ELDAMA RAVINE HIGH COURT SUB-REGISTRY THIS 22ND DAY OF FEBRUARY 2024.

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RACHEL NGETICH
JUDGE

In the presence of:

Njoroge - Court Assistant.

No appearance for parties.

