



**Gachege & 3 others (Maragua Bar Operators Self Help Group) v  
Murang'a County Government & 2 others (Constitutional Petition  
E003 of 2023) [2024] KEHC 4305 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4305 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CONSTITUTIONAL PETITION E003 OF 2023**

**CW GITHUA, J**

**APRIL 30, 2024**

**BETWEEN**

**STEPHEN WANJAU GACHEGE ..... 1<sup>ST</sup> APPLICANT**  
**STEVEN MWANGI ..... 2<sup>ND</sup> APPLICANT**  
**JOYCE NYAMBURA ..... 3<sup>RD</sup> APPLICANT**  
**JAMES KARANJA WAITHAKA ..... 4<sup>TH</sup> APPLICANT**  
**MARAGUA BAR OPERATORS SELF HELP GROUP**

**AND**

**MURANG'A COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**  
**MURANG'A COUNTY ALCOHOLIC DRINKS BOARD ..... 2<sup>ND</sup> RESPONDENT**  
**MARAGUA SUB-COUNTY ALCOHOLIC DRINKS CONTROL  
COMMITTEE ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. By a petition dated 8<sup>th</sup> June 2023, the Applicant, Maragua Bar Operator's Self-help group through four of its officials ( hereinafter the Applicants) approached this Court seeking declarations that the decision of the Alcoholic Drinks Control Directorate which is under the Murang'a County Government refusing to renew bar operating licences previously issued to its members was unconstitutional and that in rejecting renewal of the licenses, the Respondents violated the relevant provisions of the *Muranga County Alcoholic Drinks Control Act 2014* and Section 4 and 7 of the *Fair Administrative Action Act* of 2015.



2. In addition to seeking various declarations, the Applicants sought the judicial review remedies of Certiorari to quash the impugned decision and an order of Mandamus to compel the Respondents to issue them with renewed liquor operating licenses as sought in the rejected applications.
3. Contemporaneous to filing of the petition, the Applicants presented a Notice of Motion dated 8<sup>th</sup> June 2023 whose first two prayers are already spent. The prayers sought certification of the application as urgent and orders of injunction restraining the Respondents from interfering or stopping them from operating their bar businesses pending hearing of the application inter parties. The only prayers pending this Court's determination are prayers 3 and 4. In Prayer 3, the Applicants seek an interlocutory injunction to restrain the Respondents either by themselves or through their agents from interfering and or stopping them from carrying out or operating their liquor businesses while in prayer 4, they seek for provision of costs for the application.
4. The application is anchored on the grounds stated on its face and the depositions made in the supporting affidavit sworn on 8<sup>th</sup> June 2023 by Stephen Wanjau Gachege, the chairman of the bar owners Association. In a nutshell, the Applicants contend that they operate bar businesses within Maragua sub-county; that they applied for renewal of their respective bar operating licences for the year 2023 electronically on the Murang'a County Public Portal and supplied all the required documentation; that the Murang'a County Government (hereinafter the 1st respondent) through its Alcoholic Drinks Control Directorate vide a letter dated 31<sup>st</sup> May 2023 rejected their applications without giving them an opportunity to defend their applications and without a valid reason.
5. The Applicants also asserted that the letter disapproving renewal of their licenses only mentioned that the rejection was due to the reports and remarks of the Public health and physical planning officers which report was made without their input and participation.
6. The Applicants however conceded that prior to receiving the letter dated 31<sup>st</sup> May 2023, they had received inspection remarks from Public Health and Physical Planning Officers directing them to make structural and other improvements to their premises to conform to the requirements of the [Public Health Act](#) and the [Physical and Land Use Planning Act](#) which in their view, they had already complied with by the time the decision rejecting their applications was made.
7. According to the Applicants, the impugned decision was made unprocedurally in breach of their right to fair administrative action guaranteed under Article 47 of [the Constitution](#) and several provisions of the [Fair Administrative Action Act](#) . Further, the Applicants claimed that the decision was made in breach of their right to a fair hearing which is enshrined under Article 50 of [the Constitution](#) as well as Section 11 (5) of the *Murang'a County Alcoholic Drinks Act 2014*.
8. The application is contested by the Respondents through a replying affidavit sworn on 3<sup>rd</sup> July 2023 by Mr. Bernard Wanyoike Kariuki, the Head of Murang'a Alcoholic Drinks Control Directorate. Mr. Kariuki deposed that the application was misplaced and amounted to an abuse of the Court process as it amounted to an invitation to this Court to interfere with the 1<sup>st</sup> respondent's constitutional mandate of regulating the advertising, production and sale of alcohol in the County; that the Applicants were existing licensees and not new Applicants and as such, their application was grounded under Sections 24, 25 and 26 of the *Murang'a County Alcoholic Drinks Control Act* ( hereinafter the Act) and not under Section 17 and 18 of the said Act as indicated in the application.
9. The deponent further averred that the Respondents were justified in refusing to renew the subject licenses since the Applicants business premises were not in a proper state of repair and did not meet the required sanitary conditions for operation of bars which state of affairs was previously communicated



to the Applicants but they failed to make the necessary adjustments or repairs to align their premises to the standards set in the Act.

10. The Respondents also asserted that by letter dated 31<sup>st</sup> May 2023, they communicated reasons for refusing to renew the Applicants liquor licenses and invited them to apply to the Murang'a County Alcoholic Drinks Board ( the Board) for review of their decision if they were aggrieved by it but instead of doing so, they rushed to this Court; that this Court should refuse to entertain the application as it was filed before exhausting the available remedy under the Act of applying for review to the Board which was the entity which would have given them a hearing.

For the above reasons, the Respondents urged this Court to dismiss the application with costs for being baseless and unmerited.

11. The application was prosecuted by way of written submissions. The Respondents were the first to file their submissions dated 10<sup>th</sup> August 2023 through their advocates on record Ms. Gachie Mwanza & Co. Advocates while those of the Applicants though dated 15<sup>th</sup> September 2023 were filed on 4<sup>th</sup> April 2024 well beyond the timelines which had been set by this Court. However, in the interest of dispensing substantive justice, rather than rejecting the submissions considering that they were filed out of time, I will admit them into the Court record and deem them as properly filed to ensure that both parties have equality of arms in so far as prosecution of the application is concerned.

12. In their written submissions, learned counsel for the parties re-iterated and expounded on the positions taken by their respective clients in support and in opposition to the application as summarised above.

13. After considering the application, the affidavits on record, the rival written submissions filed by counsel on record on behalf of the parties and all the authorities cited, I find that the key issue that arises for my determination is whether or not the Applicants have sufficiently made out a case for grant of orders of a temporary injunction on terms sought in the application.

14. I wish to state at the outset that a temporary injunction is an equitable and discretionary remedy that is aimed at preserving the subject matter of a suit by maintenance of the status quo pending final disposal of the suit. The principles that guide a Court in the exercise of its discretion in deciding whether or not a party was deserving of orders of injunction have been enunciated in many authorities but for purposes of this application, it will suffice to cite the Court of Appeal decision in [\*Nguruman Limited v Jan Bonde Nielsen & 2 others\*](#) (2014) eKLR in which the Court, alluding to precedents on the subject including the celebrated case of *Giella v Cassman Brown* (1973) EA 358 expressed itself as follows;

" ... In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to;

- (a) establish his case only at a *prima facie* level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially.....if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit



“leap-frogging by the Applicant to an injunction directly without crossing the other hurdles in between...”

15. From the above, it is clear that to succeed in an application such as the one before me, an Applicant must demonstrate that he has a *prima facie* case and secondly, that if the injunction sought was not granted, he would suffer irreparable injury which cannot be adequately compensated by an award of damages. But if the Court was in doubt whether damages would be an adequate remedy if the injunction sought was not granted, it would then decide the application depending on which party was favoured by the balance of convenience.

16. That said, what then constitutes a *prima facie* case?

To answer this question, I will do no more than to replicate the definition given by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR as follows:

“...So what is a *prima facie* case” I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

17. In this case, the gravamen of the Applicant’s case is that they were entitled to an injunction to restrain the Respondents from stopping or otherwise interfering with their liquor businesses pending determination of the petition because firstly, they were denied an opportunity to be heard before their applications for renewal of their licences were rejected and secondly, they were not given reasons for the decision not to renew their licenses; that therefore, the Respondents decision violated their constitutional and statutory rights guaranteed under Article 27 (1) ; Article 47 and Article 50 (1) of *the Constitution* as read with Section 11 (5) of the *Murang’a County Alcoholic Drinks Control Act* and several provisions of the *Fair Administrative Action Act*.

18. From the material placed before me, it is clear that the Applicants’ complaint that they were not given a hearing before the Respondents made the impugned decision was not disputed by the Respondents. In their response to the application and in their submissions, the Respondents conceded that indeed the Applicants were not given an opportunity to defend their applications since their applications automatically failed the test of approval as they had failed to comply with directions in a notice served on them earlier requiring them to undertake repairs in their premises to align them with structural and other conditions required under the Act for operation of bars. Further, the Respondents claimed that the Applicants would have been given an opportunity to be heard if they had utilized the option of applying for review to the board which they failed to do.

19. On my part, after considering the positions articulated by the parties on this point, I find that the issue whether the Applicants were denied or were given an opportunity to be heard is a substantive issue which ought to be determined at the hearing of the main petition. But I can safely observe at this preliminary stage without making any finding that given the concession by the respondent, it is apparent that the Applicants were not given an opportunity to be heard before the decision rejecting their applications was taken.

Being persons who were bound to be adversely affected by the respondent’s decision, they had a right to be heard before the decision on their application was made.

20. Regarding the complaint that the Respondents did not communicate reasons for their decision, I find that although the letter marked as annexure Swg-3 dated 31<sup>st</sup> May 2023 which was cited by the Applicants as proof for this claim , the letter was completely illegible and it was impossible to tell what



was contained therein. It is however important to note that the Applicants in the grounds supporting the application and in their submissions tacitly admitted that they were in fact given reasons for the respondent's decision only that they considered them to be invalid or insufficient. Their claim that they were not given reasons for the respondent's decision cannot therefore be true.

21. Having found as I have above, I have arrived at the conclusion that although I am not persuaded that the Applicants have, prima facie, established that they were not given reasons for the Respondents decision, they have demonstrated, prima facie, that they were denied an opportunity to be heard before the said decision was made which may have amounted to a violation of their rights under Article 47 of *the Constitution* as operationalized by the *Fair Administrative Action Act*.
22. Having found that the Applicants have managed to overcome the first hurdle by establishing one aspect of their case on a prima facie basis, I now turn to examine whether the Applicants have satisfied the second prerequisite to grant of orders of an injunction, which is, whether they were likely to suffer irreparable injury which cannot be adequately compensated by an award of damages if the injunction sought was not granted.
23. After going through the application and the Applicant's submissions, I find that the Applicants did not claim or even suggest that they would suffer irreparable injury in the event that the Court declined to accede to their prayer for grant of an injunction. This notwithstanding, it would be remiss of me not to consider whether, on the material placed before me, the Applicants were likely to suffer irreparable harm that cannot be compensated by an award of damages if I declined to grant them an injunction on terms sought,.
24. I will start by observing that it is common ground that all the Applicants were in the liquor business which means that if their prayer for an injunction was not granted, they would be forced to close down their businesses which means that the only loss they were likely to suffer was financial loss. In my view, this loss being solely financial is one which can be easily ascertained and quantified in monetary terms. In the premises, it is my finding that if the application was not successful, the Applicants are not likely to suffer any loss which cannot be adequately compensated by an award of damages.
25. In any event, the applications subject matter of the petition sought for renewal of operating licenses for the year 2023 which has already passed. We have now crossed over to the year 2024 which presents another licensing cycle for all traders in Murang'a County including the Applicants. This means that the Applicants are eligible to apply for renewal of their licenses from this year onwards. Granting an injunction in such circumstances would in my opinion be counter productive as it would enable the Applicants to continue operating their businesses without seeking to have their licenses renewed for the current year which would interfere with the 1<sup>st</sup> Respondents constitutional and statutory mandate of regulating liquor business in its area of jurisdiction.
26. In view of the foregoing, I am satisfied that the Applicants have failed to demonstrate that they have met the threshold for grant of orders of injunction as sought. It is thus my finding that the Notice of Motion dated 8<sup>th</sup> June 2023 lacks merit and it is hereby dismissed with costs to the Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 30<sup>TH</sup> DAY OF APRIL 2024.**

**C. W. GITHUA**

**JUDGE**

In the presence of :



Ms. Wangari holding brief for Mr. Gachie for the Respondents

Ms. Susan Waiganjo, Court Assistant

No appearance for the Applicants

