



**Republic v County Government of Nyeri & another; Kegode t/
a Anabelle Guest House (Exparte Applicant) (Judicial Review
E003 of 2022) [2023] KEHC 21908 (KLR) (17 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21908 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
JUDICIAL REVIEW E003 OF 2022
FN MUCHEMI, J
AUGUST 17, 2023**

**IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF CERTIORARI
AND
IN THE MATTER OF: THE COUNTY GOVERNMENT OF NYERI**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF NYERI 1ST RESPONDENT

**DIRECTOR OF ALCOHOLIC DRINKS CONTROL &
MANAGEMENT 2ND RESPONDENT**

AND

**EDITH KALUHI KEGODE T/A ANABELLE GUEST HOUSE EXPARTE
APPLICANT**

JUDGMENT

Brief Facts

1. These judicial review proceedings are based on the Notice of Motion dated 17th May 2022, whereas the ex parte applicant seeks for orders that:-
 - a. An order of certiorari to remove into the High Court for purposes of being quashed the decision by the respondents for closure of the ex parte applicant’s guest house namely Anabelle Guest House.



- b. That the respondents be compelled to issue liquor licence for the current year to the ex parte applicant and be allowed to operate her business on payment of requisite fees due for the year 2022 and any other subsequent year thereafter.
2. In opposition to these proceedings, the respondents filed a Replying Affidavit dated 13th April 2023.

Ex parte Applicant's Case

3. The ex parte applicant deposes that she is the proprietor of Annabelle Guest House within Kamakwa Area in Nyeri County and that she has been in business since 2014. On 4th April 2022, the Director of Liquor Nyeri County declined to renew her licence and ordered the closure of her business without any valid reason. It is further stated that when she enquired on why the respondents decided to close her business, she was informed that she had to produce an approved P.P.2 Form.
4. The ex parte applicant states that although she produced an approved P.P.2 Form as required, her licence has not been renewed. It was further stated that she has been operating her business without interference with her neighbours in the area.

The Respondents' Case

5. It is the respondents' case that the 1st respondent licenced the ex parte applicant to operate her business in the name of Annabelle Guest house which has been running for several years until 4th April 2022 when a notice of closure of business was issued. The respondents state that their decision to close the ex parte applicant's business was neither unilateral nor arbitrary. The decision was made by the County Alcoholic Drinks Regulation Committee on the recommendation of the Sub County Alcoholic Drinks Regulations Committee. The Committee's recommendation was made pursuant to a public participation meeting held on 9th December 2020 following a petition lodged against the ex parte applicant's business made by members of Ring Road Residents Association.
6. The respondents further state that the ex parte applicant failed to produce the relevant form P.P.A.2 to prove change of user of her business' location which is in a residential estate. The respondents argue that the form marked EKK2 annexed by the ex parte applicant's affidavit dated 26th April 2022 indicating approval of change of user was disowned by the ex parte applicant in a letter dated 27th September 2021 where she cited that the approval was made under registration number 2013/282 and not 2013/120 as indicated in the form P.P.A.2. Moreover, the respondents state that the ex parte applicant's interests must be balanced against those of other citizens who lodged a complaint against her business which led to its eventual closure.
7. The ex parte applicant filed a Further Affidavit dated 20th April 2023 and states that she has never been involved in any public participation meeting and neither was she invited for the meeting that took place on 9th December 2020 which led to the closure of her business.
8. The ex parte applicant further states that before direction were issued in this case, the respondents requested her to pay the outstanding arrears, penalties and late application fee for the licences of 2021, 2022 and 2023. The tabulations on the invoice amounted to Kshs. 154,555/- which the ex parte applicant states that she paid the whole amount under the belief that the respondents would issue her a licence. The ex parte applicant further argues that by paying the liquor penalty and late application fee the respondents have compromised the instant application. She further adds that she has fulfilled all that is required by the respondents to issue her with a liquor license for her business. As such, she argues that the respondents are wasting precious judicial time and they ought to be compelled to issue her with the 2021/2022 and 2022/2023 licences as paid for.



9. Parties hereby disposed of the application by way of written submissions.

The Ex parte Applicant's Submissions

10. The ex parte applicant reiterates the averments of her affidavit and states that the respondents ought to issue her with a licence as she already paid a sum of Kshs. 154,555/- which comprised of liquor charges, liquor penalties and late application fee for the years 2021/2022 and 2022/2023. She argues that having paid the late application fee of Kshs. 2,000/- she is entitled to have her licence renewed.
11. The ex parte applicant further submits that she was never involved in any public participation and as such she has been condemned unheard and her business closed unilaterally. As such, the ex parte applicant prays that her application be allowed and that the sum of Kshs. 32,555/- be refunded to her as it was the respondents' fault initially in demanding payment of penalties when there was a court order for stay in existence.

The Respondents' Submissions

12. The respondents submit that although the ex parte applicant alleges that she was not involved in the public participation meeting, one Benson was present and he identified himself as the investor. The respondents further submit that the 2nd respondent issued a notice of closure of business to the ex parte applicant and she was given a chance to be heard. However, the ex parte applicant failed to produce the relevant form P.P.A.2 to prove change of user of her business location which the respondents argue raised a question as to the legality of the business in the first place. The respondents further contend that the ex parte applicant has not brought any evidence before the court to prove authenticity of the business.
13. The respondents further argue that the amounts paid by the ex parte applicant were not a compromise to this cause but were amounts owing to the 1st respondent seeing that she was operating her business courtesy of stay orders issued by the court without paying the statutory licence fees.
14. The respondents rely on Section 10 of the Nyeri County Alcoholic Drinks Control and Management Act and submit that the provision governed the decisions of both the Sub County and the County Committee where the public was accorded a chance to air their grievances to the Sub county committee. The respondents further submit that the decision of the subcommittee to refuse to renew the ex parte applicant's liquor licence met the test under Section 15(2) as she failed to prove change of ownership which she later disowned.
15. The respondents urge the court to exercise its discretion and take into consideration the rights of the residents who channeled their views to have the guest house shut down.
16. The respondent further rely on the case of *Republic vs County Government of Mombasa & Another ex parte Clement Muturi Kigani* [2018] eKLR and submit that judicial review is concerned with the procedures and in the instant suit, the same were followed to the latter.
17. On the allegation made by the ex parte applicant that the residents who held the meeting were not residents of Ring Road, the respondents rely on the decision in *Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua* [2015] eKLR and submit that the onus of proof lies with the ex parte applicant.

Issue for determination

18. The main issue for determination is whether the respondents' decision to cancel the ex parte applicant's licence should be quashed.



Whether the respondents' decision to cancel the ex parte applicant's licence should be quashed

19. The three traditional grounds for judicial review being illegality, irrationality and procedural impropriety were explained in the case of *Council of Civil Service Unions vs Minister for the Civil Service* (1985) AC 374, 410 where Lord Diplock spoke of these grounds as follows:-

My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality' the second 'irrationality' and the third 'procedural impropriety.' That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (*Associated Provincial Picture Houses Ltd vs Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards vs Bairstow* [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision maker. 'Irrationality' by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.

In cases where a person's rights or fundamental freedoms are likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or



internal appeal against where applicable; a statement of reason; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action.

20. In the instant case, the ex parte applicant states that her business was shut down following a public participation meeting held on 9th December 2020 where the residents of Ring Road complained about the ex parte applicant's business. It is the respondents' case that following complaints by the residents of ring road, the Sub County Alcoholic Drinks Regulation Committee held a public participation meeting on 9th December 2020 and after careful deliberations, the Sub County Alcoholic Drinks Regulation Committee recommended to the County Alcoholic Drinks Regulation Committee that the ex parte applicant be denied a liquor licence. I have perused the minutes of the public participation meeting held on 9th December 2020 and I have noted that the ex parte applicant was not among the people in attendance. I have further noted that one Mr. Benson Muriuki was present who was listed as an investor.
21. Following that meeting, the Sub County Alcoholic Drinks Regulation Committee held a meeting on 10th December 2020 and resolved that the ex parte applicant's business be denied a liquor licence. On 15th March 2022, the County Alcoholic Drinks Regulation Committee held a meeting and resolved that following the recommendation by the Sub County Alcoholic Drinks Regulations Committee and pursuant to the meeting held on 10th December 2020, the ex parte applicant be denied a liquor licence. It was also recommended that the business ought to be closed.
22. The respondents argue that they declined to renew the ex parte applicant's licence as she did not adhere to Section 15(2) of the Nyeri County Alcoholic Drinks Control and Management Act 2014. Section 15(2) provides:-
 - (2) The County Committee shall not grant a licence for the sale of an alcoholic drink in:-
 - a. A supermarket or such other related retail chain store unless it is satisfied that the applicant has taken measures to ensure that the area in which the sale is to take place is not accessible to persons under the age of eighteen years;
 - b. In an outlet or premises located within a fuel station or a fast food restaurant.
23. The respondents have argued that the ex parte applicant ought to have furnished them with an approved P.P.2 Form which indicates a change of user of her business location. The minutes by the County Alcoholic Drinks Regulation Committee for the meeting held on 15th March 2022 indicate that the Director reported that the ex parte applicant had submitted P.P.A.2 Forms but thereafter withdrew them after they were invalidated by the Physical Planning Department.
24. The respondents have further annexed a letter by the ex parte applicant dated 27th September 2021 where she states that the change of user was processed under registration number 2013/282 and not 2013/120 as she had earlier indicated. She further indicated that she paid Kshs. 7,000/- for the same and a receipt was issued to her on 7th October 2013. Upon perusal of the documents of both parties it is noted that the change of user the respondents are referring to was one of 2013 from residential premises to a guest house. As far as the exparte applicant is concerned, her licence was revoked on 4th April 2022. The ex parte applicant was issued with a certificate by the registration of business names on 20th April 2015. The county government has since been issuing the ex parte applicant liquor licences without any problem. Thus, it is my considered view that the issue of change of user is something that was long deliberated before the respondent revoked the exparte applicant's licence.



25. The ex parte applicant was served with a letter dated 4th April 2022 informing her of closure of her business. In *R vs County Government of Mombasa ex parte Outdoor Advertising Association* [2014] eKLR the court held that the duty of a public body is to provide a forum in accordance with the law where the ex parte applicant or their members are granted an opportunity to be heard. The respondents had a duty to give a hearing to the ex parte applicant as provided by the rules of natural justice. Article 47 of the *Constitution* provides:-
1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
26. The ex parte applicant has a constitutional right to be accorded fair administrative action by the respondents. There is no evidence that the ex parte applicant was accorded the right and as such the respondents failed to comply with Article 47 of *the Constitution*. The rules of natural justice were clearly flouted in the instant case and blatantly trampled upon.
27. The other issue to consider is whether the respondent’s decision to revoke the ex parte applicant’s licence was taken through public participation and whether the said public participation met the threshold set by *the Constitution* and the statutes as interpreted by superior courts. Article 10 of *the Constitution* spells out the national values and principles of governance which “bind all State organs, state officers, public officers and all persons”. In particular, Article 10(2)(a) provides for participation of the people as one of the national values:
- 10(2) “ The national values include:-
- a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;”
- Article 8 of the County government Act provides for public participation and the principles to be applied thereto.
28. The applicant states that there was no public participation that was conducted by the respondent. It is argued by the respondent that public participation that was conducted by the respondent on 9th December 2020 and a list of names with accompanying signatures was produced in evidence through the replying affidavit. I have perused the minutes and the list of participants. The name of the applicant is missing from the list. The respondent says that one Benson to represented the ex parte applicant in the meeting. However, no letter of authority for the said Benson represent the ex parte applicant in the meeting was produced by the respondent. The respondent produced no evidence of invitation to the meeting addressed to the ex parte applicant or even to the other participants.
29. In the case of *Minister of Health vs New Clicks South Africa (PTY) Ltd & Others* (2006) 2 SA 311 it was held:-
- The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.



30. In the case of *Nairobi metropolitan PSV Sacco Union Ltd & 25 others Vs Nairobi County government & 3 others* eKLR[2013], it was held:-

“it does not matter how public participation was effected. In my view, is that the public was accorded some reasonable level of participation....”

In the same case, it was emphasized that a reasonable opportunity is afforded to the public and all interested parties to air their views. In this case, the respondent said that the residents of Ring Road Estate held diverse views and were given time to go discuss and agree on the way forward. Further that they failed to agree and the Sub County Committee went ahead and revoked the licence of the ex-parte applicant’s business. There is no evidence that the residents were called for another meeting in order to communicate their decision. As such, the fact that they failed to agree cannot be verified. If the residents failed to agree on the way forward the issue that arises is what influenced the committee’s decision to revoke the licence?

31. The ex parte applicant has established that she was not accorded an opportunity to be heard and that public participation did not meet the standards established by the law. As such, the decision to revoke the business licence of the ex parte applicant was tainted with illegality, it was unlawful and unprocedural. By not granting the applicant an opportunity to be heard, the respondent violated the rules of natural justice. The Court of Appeal in *Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji Njoroge* (1997) eKLR court stated:-

Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.

32. During the pendency of this case and in existence of the order of leave to operate as stay, the respondent demanded the ex parte applicant to pay Kshs.15,555/- which was paid. The amount was said to be for liquor charges Kshs.120,000/-, penalties of Kshs.32,555/- and for late application Kshs.2,000/- for the 2021 liquor licence. It is not in dispute that such licence for the year 2021 was not issued to the ex parte applicant despite making the said payments. The respondent is a service provider and ought to provide services for which it has received payment. In my view, the demand of the said funds and the failure to render services which was done during the pendency of these proceedings was improper and unprocedural.

33. I am of the considered view that the ex parte applicant has established her case and in regard to the issue of the orders sought. I hereby find these proceedings successful and issue the following orders:-

- a. That an order of certiorari to remove to the High court and quash the respondents decision to close and revoke the ex parte applicant’s business namely Annabelle Guest House is hereby issued.
- b. That the respondent shall issue the licence of the said business for the current year upon payment of the required fees.
- c. That the respondent shall refund the amounts of Kshs.154,555/- paid by the ex parte applicant during the pendency of the case.
- d. That the respondents shall meet the costs of these proceedings.

34. It is hereby ordered.



DATED AND SIGNED AT NYERI THIS 17TH DAY OF AUGUST, 2023.

F. MUCHEMI

JUDGE

JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 17TH DAY OF AUGUST , 2023

