



Mwaura & 6 others v County Government of Nakuru & 2 others (Judicial Review Application E017 of 2023) [2023] KEHC 27025 (KLR) (22 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
JUDICIAL REVIEW APPLICATION E017 OF 2023**

HM NYAGA, J

DECEMBER 22, 2023

BETWEEN

SAMUEL KINGORI MWAURA 1ST EXPARTE APPLICANT
SHEM DENNIS 2ND EXPARTE APPLICANT
MIRRIAM WANJIKU 3RD EXPARTE APPLICANT
KENNEDY MAINA 4TH EXPARTE APPLICANT
LUCAS MAINA 5TH EXPARTE APPLICANT
HARRISON SIMIYU 6TH EXPARTE APPLICANT
FRANCIS NJUGUNA 7TH EXPARTE APPLICANT

AND

COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT
CHAIRPERSON SUB – COUNTY ALCOHOLIC DRINKS REGULATION
COMMITTEE NAKURU 2ND RESPONDENT
XAVIER LUGAGA, IN-CHARGE ALCOHOLIC DRINKS AND CONTROL
NAKURU 3RD RESPONDENT

JUDGMENT

1. Before me is an application dated 21st September, 2023,
2. The application is Judicial Review application seeking the following orders;-
 1. Spent.
 2. Spent.



3. That there be issued an order of certiorari to remove into this honourable Court for the purpose of quashing County Government of Nakuru notices and/or orders of the in-charge Alcoholic Drinks and Control, Nakuru County issued on 8th September, 2023 for closure of the Applicants' bars, wines and spirits.
 4. That an order for Judicial Review of Mandamus be issued by the honourable court to compel Nakuru County through the in charge Alcoholic Drinks and Control, Nakuru County re-open the Applicants' bars, wines and spirits as well as reinstate their licences.
 5. THAT cost of the Application for leave of this Notice of Motion be borne by the Respondents.
3. The application is propped by the grounds set on its face and is supported by the Affidavit of Samwel Kingori Mwaira, on behalf of the applicants.
 4. In a nutshell, the applicants state that they were all duly licensed by the 1st Respondent to operate businesses of selling alcoholic drinks.
 5. The applicants further aver that on 8th September 2023, a notice was issued by the in-charge, Alcoholic Drinks and Control, Nakuru County for closure of bars and wines and spirits businesses owned by the applicants around Kiratina area of Nakuru County. That the execution of the said notice was set to take place immediately and the area officer commanding the police station was ordered to aid in the execution.
 6. To the applicants, the closure notice is unfair, issued in bad faith and does not show any sufficient cause.
 7. The applicants further aver that while they hold valid licences, they were condemned unheard, contrary to the principles of natural justice. It is for this reason they came to court. I will delve into the details of their case later in this Ruling.
 8. The 1st and 3rd Respondents opposed the application. In an affidavit sworn by the 3rd Respondent they state that a Petition was presented by area residents, citing the applicant's premises as being located within residential plots and were near schools and churches. That the said outlets created avenues for the sale of illegal liquor and drugs, in contravention of the law. Further there were complaints that some outlets operated outside the time set in their licences.
 9. The 3rd Respondent states further that upon receipt of the complaint/petition, he ordered the closure of the listed outlets, pending the decision by the review committees.
 10. The 3rd Respondent further states that the Nakuru Sub County Commissioner wrote to the County Secretary, urging the County Government not to facilitate the grant of licences to the Applicants and others for failing to conform to the Liquor Licensing Act. The commissioner provided the reasons for his opinion.
 11. It is further averred that the applicants were subsequently invited to a meeting with the Review Committee. That the committees set down conditions for the Applicants to abide by in order to be allowed to operate their outlets, but these are yet to be complied with, hence their continued closure.
 12. The 1st and 3rd Respondents urged the court to dismiss the Application.
 13. The parties filed their respective submissions, which I have duly considered and will address hereafter.



Analysis and Determination

14. The issues for determination is whether first, the decision to revoke the licences issued to the applicants can be reviewed and secondly, whether there are sufficient grounds adduced to review the same.
15. This being a Judicial Review Application, the court is being asked to look at the propriety of the decision of the 3rd Respondent, on behalf of the 1st Respondent, to revoke the licences for the outlets belonging to the Applicants.
16. As has been well stated by the parties this court is not being asked and cannot purport to look at the merits of the case and supplant its decision in place of that of the administrative body. That is only possible where the High Court is clothed with jurisdiction to hear appeals from the Review Committee. Such is the case under the Act in question, but the applicants have not lodged an appeal. They have come by way of judicial review. Sitting on judicial review, the court has powers to determine whether the decision arrived at was unreasonable, excessive, lawful or fair.
17. Previously, the parameters of the court's powers in judicial review applications was said to be confined to looking at the process leading to the decision and not the decision itself. These parameters were set out in the *Municipal Council of Mombasa vs Republic & Another* [2002] eKLR where the court stated as follows;-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power i.e jurisdiction to make it? Were the parties affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did it take into account irrelevant matters?”

18. Similarly in *Zacharia Wanginya & Another vs Office of Registrar, Academic, Kenyatta University* [2013] eKLR it was held that:-

“In *Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England* 4th Edition Vol (1)(1) Para 60.”

19. Therefore, previously, the court sitting on Judicial Review was primarily concerned with the lawfulness of the decision, rather than the merits of the said decision.
20. However, with the enactment of the *Fair Administrative Action Act*, 2015 the law has set out expanded parameters within which any administrative action must conform to. Section 4 of the Act states;-
 4. Administrative action to be taken expeditiously, efficiently, lawfully etc
 - (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.



- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to–
 - (a) attend proceedings, in person or in the company of an expert of his choice;
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

21. The said Act, at Section 7, has provided for the grounds upon which this court may review any administrative action. The Section provides as follows;–

Institution of proceedings

- (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to–
 - (a) a court in accordance with section 8; or
 - (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.
- (2) A court or tribunal under subsection (1) may review an administrative action or decision, if–
 - (a) the person who made the decision–
 - (i) was not authorized to do so by the empowering provision;
 - (ii) acted in excess of jurisdiction or power conferred under any written law;
 - (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;



- (iv) was biased or may reasonably be suspected of bias; or
- (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;
- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- (c) the action or decision was procedurally unfair;
- (d) the action or decision was materially influenced by an error of law;
- (e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
- (f) the administrator failed to take into account relevant considerations;
- (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
- (h) the administrative action or decision was made in bad faith;
- (i) the administrative action or decision is not rationally connected to–
 - (i) the purpose for which it was taken;
 - (ii) the purpose of the empowering provision;
 - (iii) the information before the administrator; or
 - (iv) the reasons given for it by the administrator;
- (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
- (k) the administrative action or decision is unreasonable;
- (l) the administrative action or decision is not proportionate to the interests or rights affected;
- (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;
- (n) the administrative action or decision is unfair; or
- (o) the administrative action or decision is taken or made in abuse of power.

22. Clearly, the said section gives the court power to look at a decision not only in the manner it was made, but also the decision itself and satisfy that the same was fair, lawful reasonable or not. Thus the law has now empowered the court to examine any administrative decision and then determine its propriety in a broader perspective and not just how it was arrived at.

23. This position was emphasized In the case of Suchan Investment Limited–vs- Ministry of National Heritage & Culture and 3 Others (2016) eKLR where the Court of Appeal observed at Paragraph 55 of the Judgment thus:-

“Traditionally Judicial Review is not concerned with the merits of the Case. However, Section 7(2) of the [Fair Administrative Action Act](#) provides proportionality as a ground for



statutory Judicial Review. Proportionality was first adopted in England as an independent ground of Judicial Review in *R v Home Secretary, ex parte Daly* (2001) 2 AC 352. The test of proportionality leads to a “greater intensity of review” than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the Court to evaluate the merits of the decision; First, proportionality may require the Court to assess the balance which the decision maker has struck, not merely whether it is within the range of the rational or reasonable decisions: Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24(1)(b) and (e) of *the Constitution* to wit that the Limitation of the Right is necessary in an open and democratic Society, in the sense of meeting a pressing social need and whether interference vide Administrative Action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory Judicial Review applications.”

12. Similarly, in the case of *Republic –vs- Dedan Kimathi University of Techonlogy Case (2022) KEH 358 (KLR)*, Njagi, J. stated thus:-

“It is now recognised that one of the grounds for grant of Judicial Review Relief – is unreasonableness of the decision being challenged. This is clearly a deviation from the traditional common law approach that what is to be considered is the process by which the decision is arrived at rather than the decision itself. An examination of whether or not a decision is unreasonable clearly calls for some measure of consideration of the merits of the decision itself though not in the manner contemplated by an Appellate process.”

24. Having dealt with the extent of the court’s powers, I will now go to the details of the application, which is the directive by the 3rd respondent. On behalf of the 1st respondent, to close down the applicants’ premises through his notice issued on 8th September 2023.
25. The Applicants state that the Petition by the residents of Kiratina regarding several establishments, including those of the applicants, was first made in February 2023. The Applicants were then summoned by the Liquor Committee, which after hearing them, denied them the Liquor licences. That they then appealed to the County Administrative Review Committee, which after hearing them and visiting the premises, gave a greenlight to them to operate their businesses, subject to their observance of the terms of their licences. They therefore fault the decision by the 3rd respondent to rely on the same Petition to close their businesses in the month of September 2023. To them, the decision by the Respondent was unilateral, unfair as no reasons were given, and was made without giving them a chance to respond.
26. The gist of the applicants’ case is that they were condemned unheard, contrary to the rule of natural justice.
27. I have looked at the 3rd Respondent’s Replying Affidavit. He has referred to the Petition by the area residents, dated 3rd February 2023. Annexed to the Affidavit are minutes of the County Alcohol Administrative Review Committee meeting of 28/6/2023.
28. What is clear is that the Applicants were, on appeal, subsequently issued with their licences some time in June 2023. This was confirmed by the following letters from the County Review Committee;



- a. Seasons Pub dated 29th June 2023
 - b. Destination Pun dated 29th June 2023
 - c. Shrek Wines dated 29th June 2023
 - d. Gives Bar & Restaurant dated 30th June 2023
 - e. Man Man Bar dated 30th June 2023
29. I was unable to see any letter for Ground Zero Pub and Cool Shade Pub, though I did note that the 2 outlets were also subsequently issued with licences around the same time. It is thus presumed that they were also allowed to operate.
30. There is no dispute that the 3rd Respondent did proceed to order the closure of the Applicants' outlets through notices issued on 8th September 2023.
31. The 3rd Respondent's case is that although the outlets had received their licences, the same could be revoked for non-observance of the terms and the law.
32. It is apparent that prior to the notice of the closure dated 8th September, 2023 no notice was served upon the Applicants. The 3rd Respondent, by his own admission, acted on a letter from the County Commissioner dated 19th June 2023 which was done before the outlets were cleared by the Review Committee to do business. I don't think that the 3rd Respondent could rely on the letter by the County Commissioner to back his closure of the outlets in September 2023, since the letter was duly considered by the Review Committee before it cleared the applicants to operate their businesses.
33. It is also noted that no reasons were given for the closure notices issued on 8th September 2023. As I have stated it cannot be pursuant to the letter from the County Commissioner dated 15th June 2023, which referred to the Petition by Residents dated 3rd February 2023. That issue was effectively dealt with when the Review Committee allowed the applicants to continue to operate, but on condition that they adhered to the law.
34. Therefore, and in agreement with the applicants, the notice of 8th September, 2023, ended up condemning them unheard and without giving any of them the reasons for the closure of their respective outlets. This is contrary to the rules of natural justice.
35. While I agree with the Respondents that a licence, once issued, can be revoked if there is non-compliance of the terms of the licence or the law, it is important that notice of such revocation be accompanied reasons be given to each Applicant. The notices in question have no such details and may rightly be deemed to be arbitrary and unlawful.
36. Having looked at the material before me, I am of the opinion that the applicants were not subjected to due process before the notices of 8th September 2023 were issued.
37. Consequently, I am persuaded to proceed to quash the said notices and I hereby do so. The position shall revert to that issued by the County Review Committee on 29th and 30th June 2023 and the subsequent licences issued.
38. If the Respondents find that there are grounds to hold that the Applicants have not complied with the licences, then they ought to be informed of the same and be given a right to be heard.
39. In the course of the matter, the Deputy Registrar visited the affected outlets. Her report was dated 24th November, 2023. She noted that all the Applicants outlets were duly licenced for the year 2023. The



Respondent did not attend the scene visit to point out any issues that may have led to the revocation of the licences. Therefore, the Applicants' position was unchallenged.

40. In conclusion, I proceed to quash the 3rd Respondents notices o closure dated 8th September 2023 in respect to the Applicants for the following outlets;-
- a. Ground Zero Pub
 - b. Ques Bar
 - c. Shrek Wines and Spirits
 - d. Seasons Pub & Restaurant
 - e. Cool Shade Bar & Restaurant
 - f. Destination Bar
 - g. Man Man Pub
41. For the avoidance of doubt, I also hold that these orders do not authorize the Applicants to operate without conforming to the terms of their licences and the law. Failure to adhere to the same shall result in any of the actions authorized against them, with the procedure being followed.
42. There shall be no orders as to costs, since the 3rd Respondent was purporting to act on the complaint/ direction by the County Commissioner, Nakuru who is not a party herein.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF DECEMBER, 2023.

H. M. NYAGA

JUDGE.

In the presence of;

C/A Kipsugut

Mr. Kairu Maina for Applicants

N/A for Respondents

