REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JR APPLICATION NO. E116 OF 2021

REPUBLIC.....APPLICANT

-VERSUS-

NAIROBI CITY COUNCIL ALCOHOLIC

DRINKS CONTROL AND LICENSING BOARD.....1ST RESPONDENT

DAGORETTI NORTH SUB-COUNTY

ALCOHOLIC DRINK CONTROL AND LICENSING COIMMITTEE.....2ND RESPONDENT

-AND-

DLUX LIMITED T/A UPTOWN LOCAL.....EX PARTE APPLICANT

JUDGMENT

1. The ex-parte Applicant (hereinafter "the Applicant") moved this court vide an application dated 10th September, 2021 seeking **ORDERS THAT**:

> *1) An order of Certiorari to remove into this Honourable Court and quash the decision of the 1st Respondent to suspend liquor License No. 17594 issued in activity of alcoholic drinks license belonging to the Applicant.*
>
> *2) An order of Prohibition directed to the 2nd Respondent against themselves, their agents, workers, employees, servants and other National Government or County Government officials or agencies barring them from suspending, cancelling and/or revoking License No. 17594 issued to the Ex parte Applicant*
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> *3) The Honourable Court be pleased to give further orders and directions as it may deem fit and just to grant.*
>
> *4) The costs of this application be provided for.*

2. The application is supported by the grounds set out on the face of the application together with the Statement of Facts and Verifying Affidavit of **Bernard Ondari Ratemo** of even date. The main grounds for the application is that on 7th September, 2021, the 1st Respondent herein arbitrarily made a decision to revoke the liquor License No. 17594 of the Applicant vide a letter from the 1st Respondent signed by one Mr. Hesbon A. Agwena. That the decision to revoke liquor License No. 17594 is alleged to have been arrived at following a series of complaints from area residents against the Applicant for operating beyond Government stipulated curfew hours.

3. It was contended that the complaints alluded to above have never been brought to the attention of the Applicant's management and/or employees yet their business has strictly been operating in strict compliance with Government stipulated opening hours and obediently adhered to the laid down Covid-19 protocols. Indeed, it was contended that in making the impugned decision, the 1st Respondent's acted *ultra vires* and did not give the Applicant an opportunity to be heard and or respond to the complaints levelled against them.

Response

4. The Respondents opposed the motion through the Replying Affidavit of **Erick Odhiambo Abwao** sworn on 19th October, 2021. The deponent is the County Solicitor with the 1st Respondent. He deponed that on several occasions, officers from the 1st and 2nd Respondents visited the Applicant's premises and gave warning about their operation beyond curfew hours as per the presidential directive for Covid-19 containment measures and that there were several complaints from neighbours of the Applicant who swore affidavits to that effect. He also accused the Applicant of non-disclosure of material facts leading to the cancellation of the license as alleged. Indeed, he deponed that the Applicant has not come to this court with clean hands as they blatantly flaunted the presidential directives.

5. It was further his deposition that the action by the 1st and 2nd Respondent was triggered by the public and **Section 8 subsection 7 of the Nairobi City Council Gazette Supplement Act No. 8 (Act No. 3)** dated 19th May, 2014 gives the 1st and 2nd Respondents authority to take notice of any matter or thing which in the opinion of the committee constitutes an objection to an application whether or not any objection has been lodged. Accordingly, the Applicant's allegation that nobody raised an objection is a misconception of the law and the presidential directives.

Parties Submissions

6. The Applicant filed written submissions dated 28th October, 2021 in support of the motion. On the issue whether the 1st Respondent was in breach of **Article 47 of the Constitution** and **Section 21 of the Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014**, counsel cited the case of **Municipal Council of Mombasa v Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001 (2002) eKLR** for the proposition that the court would only be concerned with the process leading to the making of the decision. Counsel also cited the case of **Republic v Nairobi City County Alcoholic Drinks Control and Licensing Board & Another Ex parte Space Lounge Bar & Grill Limited (2017) eKLR** on procedural fairness. It was also submitted that the 1st Respondent's actions to revoke the Applicant's license was in blatant disregard of the procedure set out under **Section 35 of the Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014** and as such their actions were not only marred with procedural impropriety but were also unfair, null and void.

7. On whether the 1st Respondent usurped the powers conferred by the Nairobi City County Alcoholic Drinks and Licensing Act, 2014, counsel submitted that the 1st Respondent's functions with respect to license revocation is only at an appeal stage and Section 21 of the Act gives the Sub-county committee the power to revoke a license. Accordingly, it was submitted that the 1st Respondent's actions of revoking the Applicant's license were *ultra vires* and usurped the powers of the 2nd Respondent. To that end, counsel cited the case of **Eric Ng'ang'a & Another v Nairobi Liquor Board-Dagoretti North Sub County Alcoholic Drinks and Licensing Committee & Another (2017) eKLR** where the court interpreted the role of the Board. It was therefore urged that the Committee and the Board have separate functions and that the Board was acting in vain in revoking the Applicant's licence. As such, the application should be allowed.

8. The Respondents on the other hand filed written submission dated 8th November, 2021 in opposing the application. Counsel submitted that the court should take judicial notice that when the **Alcoholic Drinks Control Act No. 4 of 2010** and the **Nairobi City County Alcoholic Drinks Control and Licensing Act** were enacted, the corona virus was not in existence. Furthermore, counsel submitted that the cancellation was purely for reasons of operating beyond Government stipulated curfew hours and the Applicant has not disputed any facts alluded to in the letter dated 7th September, 2021.

9. Indeed, counsel submitted that the Applicant has not established any illegality, irrationality or procedural impropriety in the procedure followed by the Respondents. To that end, counsel relied on the cases of **Peninah Nadako Kilishwa v Independent Electoral Boundaries Commission (IEBC) & 2 Others (2015) eKLR**, **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** and **Pastoli v Kabale District Local Government Council & Others (2008) 2EA 300-301**. Counsel submitted that, Certainly, the Respondents had reason to act as they did and having given warnings to the Applicant to no success. Accordingly, they urged that the application be dismissed.

Analysis and Determination

10. I have considered the application and response thereto as well as the arguments advanced by the parties herein and the main issue for determination is whether the 1st Respondent's decision to suspend liquor License No. 17594 was marred with procedural impropriety and if so, whether the orders sought should be granted.

11. The crux of the Applicant's case is that the 1st Respondent's decision was in breach of **Article 47 of the Constitution and Section 21 of the Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014**. The Respondents on the other hand argued that the Applicant's license was revoked following several warnings and pursuant to Section 8(7) of the said Act and the presidential directive on containment measures.

12. The three traditional grounds for judicial review being illegality, irrationality and procedural impropriety were explained in the case of **Council of Civil Service Unions v Minister for the Civil Service (1985) A.C. 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 to 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 recognised 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. v. Wednesbury Corporation [1948] 1 K.B. 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 v. Bairstow [1956] A.C. 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."

13. Section 21 of the Nairobi City County Alcohol Drinks Control and Licensing Act provides that the sub-county committee may revoke a license in accordance with the Act and any person aggrieved by the sub-county committee's decision may appeal in accordance with the Act. The role of the 1st Respondent is however provided for under Section 5 of the said Act and amongst its functions is entertaining appeals from the decisions of the sub-county committees. **Section 18** of the Act on the other hand provides that the sub-county committee may specify the terms and conditions of a licence consistent with the provisions of this Act and any regulations made under this Act. The Act is however silent on the circumstances that may lead to revocation of a license.

14. I have perused the letter dated 7th September, 2021 suspending the Applicant's liquor license No. 17594 and in the said letter, the 1st Respondent is purporting to revoke the Applicant's license as provided under the **Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014.** While the Act may be silent on the procedure and circumstances which may lead to revocation of a license, **Section 4 of the Fair Administrative Action Act** re-echoes **Article 47** of the Constitution and reiterates the entitlement of every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

15. In all 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 the decision where applicable; a statement of reasons; 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. It is however important to note that some of these elements are mandatory while some are only required where applicable.

16. While the 1st Respondent claims that several warnings were given to the Applicant after several complaints from the neighbours, there is no evidence on record to support this assertion. There is no evidence at all that the respondent was notified of the charges levelled against it and neither is there evidence that the applicant was given an opportunity to be heard. I am mindful of the fact that while this court's role remains strictly supervisory, it is concerned with determining whether there has been a lawful exercise of power having regard to the terms, scope and purpose of the statute conferring the power.

17. 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 an administrative action, the person has right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and the legislation shall –

a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

b) promote efficient administration."

18. In exercise of its powers under the Constitution or under legislation, public officers, state officers, state organs and independent bodies or tribunals may make decisions which may be characterized as judicial, quasi-judicial or administrative depending on the empowering provision of the Constitution or the law. The landmark decision of the **House of Lords** in **Ridge v. Baldwin [1964] AC 40** clarified the law, that the rules of natural justice, in particular right to fair hearing, (***audi alteram partem rule***) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:

i. the right to be heard by an unbiased tribunal.

ii. the right to have notice of charges of misconduct

iii. the right to be heard in answer to those charges.

19. In our instant suit, these rights were blatantly trampled upon. The 1st Respondent's decision to revoke the Applicant's liquor license was marred with procedural impropriety.

20. The last issue is as regards the relief sought and whether same are available to the applicant. The applicant sought judicial review orders of certiorari and prohibition. A useful guide on the appropriate reliefs is found in the decision of the Court of Appeal in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge (1997) eKLR** *inter alia* stated as follows in regard to judicial review orders:

> ***"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform.***
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> ***Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way… These principles mean that an order of mandamus compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done…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. In the present appeal the respondents did not apply for an order of certiorari and that is all the court wants to say on that aspect of the matter."***

21. From the foregoing, it is clear that the order of prohibition would not be efficacious in the circumstances of this case. An order of certiorari to quash the decision of the 1st Respondent to revoke liquor license No. 17594 is appropriate and deserved.

22. The upshot is that the Notice of Motion herein is successful to the extent that an order of certiorari to remove to this court and quash the decision of the 1st respondent suspending liquor licence No. 17594 is hereby issued. The applicant shall have costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY 2022.

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A. K. NDUNG'U

JUDGE