



**Zacharia Kipkoros t/a Riverside Bar v County Chairman Liquor  
Licencing Committee - Uasin Gishu County & 2 others (Petition  
9 of 2019) [2022] KEHC 11790 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11790 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
PETITION 9 OF 2019**

**OA SEWE, J**

**JULY 29, 2022**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 27, 28, 31, 35, 36, 40, 41, 43, 47, 48, 50, 73,  
159(2) (D), 165 (3) (B), 174, 185 & 258 (1) (2) OF THE CONSTITUTION OF KENYA, 2010  
AND IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION  
OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES,  
2013 AND IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER  
ARTICLES 10, 27, 41, 47, 73, 174 AND 185 OF THE CONSTITUTION OF KENYA, 2010  
AND IN THE MATTER OF THE ALCOHOLIC DRINKS CONTROL ACT NO. 4 OF 2010  
LAWS OF KENYA AND THE FOURTH SCHEDULE OF THE ALCOHOLIC DRINKS  
CONTROL ACT AND IN THE MATTER OF THE UASIN GISHU COUNTY ALCOHOLS  
DRINKS CONTROL ACT 2014 AND IN THE MATTER OF THE DECISION OF THE UASIN  
GISHU COUNTY ALCOHOLIC DRINKS CONTROL AND LICENSING COMMITTEE**

**BETWEEN**

**ZACHARIA KIPKOROS T/A RIVERSIDE BAR ..... PETITIONER**

**AND**

**COUNTY CHAIRMAN LIQUOR LICENCING COMMITTEE - UASIN GISHU  
COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF ALCOHOL DRINKS OF THE COUNTY GOVERNMENT OF  
UASIN GISHU ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF UASIN GISHU ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1.



- (1) The Petition dated 21<sup>st</sup> May 2019 was filed herein by the Petitioner, Zacharia Kipkoros trading as Riverside Bar, for the following reliefs:
  - (a) A declaration pursuant to Article 2(4) of *the Constitution* of Kenya, 2010, that the acts and/or omissions of the Respondents in interfering with the lawful activities of the Petitioner, destroying their property, barring access to the Petitioner's business establishments located at Ziwa Trading Centre in Uasin Gishu County, denying the Petitioner licences for the year 2019 to sell alcoholic drinks and rejecting the Petitioner's application for 2019 without any reason are a nullity, invalid, unfair, arbitrary, illegal and unconstitutional;
  - (b) An award in damages and/or compensation for the arbitrary raids by the Respondents on the Petitioner's premises, leading to closures, loss of business and damage;
  - (c) An order of prohibition directed against the Respondents barring them from annulling, revoking and rejecting the renewal of the Petitioner's application for Alcoholic Drinks Retail Licence in respect of the premises known as Riversid Bar, situated at Ziwa Trading Centre within Uasin Gishu County;
  - (d) An order of mandamus directed against the 1<sup>st</sup> Respondent compelling the 1<sup>st</sup> Respondent to renew the Petitioner's Alcoholic Drinks Retail Licence in respect of the premises known as Riverside Bar situated at Ziwa Trading Centre within Uasin Gishu County and issue the Petitioner with the Retail Licence for the year 2019.
  - (e) Costs of the Petition.
2. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners were sued in their capacity as the Chairman of the Liquor Licensing Committee, and director, respectively, of Uasin Gishu County, within whose jurisdiction the Petitioner carries on business of retailing alcoholic beverages; while the 3<sup>rd</sup> Respondent is a body corporate duly established as such pursuant to Section 6 of the County Government Act. The Petition was premised on the grounds that the Respondents denied the Petitioner his liquor licence for the year 2019 without any valid reason.
3. The Petitioner explained, at paragraphs 7, 8 and 9 of his Petition that he is involved in the business of wholesale and retail fo alcoholic drinks; and had engaged in the business for about 10 years as of 2019. He explained that he had employed about 7 employees and kept his premises in good order to meet the high standards of hygiene expected of such establishments and ensure the smooth-running of his business. He however complained that, when he applied for his 2019 licence in November 2018, the Respondents declined the same and had not processed it as of May 2019 when he filed the instant Petition; notwithstanding that his premises had been duly inspected in January 2019 and found to be compliant in all respects.
4. The Petitioner complained that, on 22<sup>nd</sup> February 2019, the officers of the 3<sup>rd</sup> Respondent, led by the 2<sup>nd</sup> Respondent, visited his premises in the company of police officers and disrupted his bar business, vandalized doors and blocked operations without prior notice; and that as a result he lost business stocks and incurred loss of business. He averred that his rights under Article 43 of *the Constitution* were thereby violated and that such interruptions thereafter became the norm. Thus, the Petitioner asserted that:
  - (a) The Respondents were out to evict him from his business premises without following the due process and without a decree of the Court; and therefore were in contravention of Article 1 of *the Constitution*;



- (b) The Respondents were seeking to close his bar business without consultations by outrightly harassing him and vandalizing his goods and tools of trade; thereby breaching Article 10 of *the Constitution*;
  - (c) The Respondents' actions in constantly closing his bar and denying him the licence for the year 2019, the Respondents contravened Article 47 of *the Constitution*;
  - (d) The Respondents' actions of denying him access to his bar premises militate against Article 10(1), (2)(a), (b), (c) and (d) of *the Constitution* since the same is contrary to the rule of law, the objects of devolution, human dignity, social justice, human rights, good governance and sustainable development.
  - (e) The Respondents' actions amount to arbitrary deprivation of property or economic interest, contrary to Articles 40, 43, 55 and 57 of *the Constitution*;
  - (f) He also asserted that his rights under Articles 28, 50 and 186 of *the Constitution* were violated by the Respondents as he was discriminated against and denied fair hearing before his application for licence renewal was declined.
5. The Petitioner relied on the averments set out in his Supporting Affidavit as well as its annexures in urging the Court to allow his Petition with costs.
  6. In response to the Petition, the Respondents stated that County Assembly of Uasin Gishu passed the Uasin Gishu *Alcoholic Drinks Control Act*, 2014 after intensive public participation and therein set out an elaborate procedure for processing applications for licence; and that it was therefore imperative for the Petitioner to ensure full compliance with the provisions which set out the following requirements:
    - (a) Inspection visit to the premises by the Regulation Committee;
    - (b) Scrutiny of the application;
    - (c) Confirmation of suitability by Public Health and Physical Planning departments;
    - (d) Conducting effective public participation within the locality of the establishment;
    - (e) Interview of the applicant by the Committee.
  7. Thus, according to the Respondents, the Petitioner's application for 2019 licence was subjected to the above mentioned process as provided for in Sections 11, 12 and 14 of the Uasin Gishu County *Alcoholic Drinks Control Act* and was rejected based on the resolution of the public participation meeting conducted on 17<sup>th</sup> June 2018. They explained that the resolution for closure of three liquor premises, among them the Petitioner's bar, was based on the following concerns, among others:
    - (a) Sale of alcoholic drinks to minors and school going children;
    - (b) High cases of insecurity within the area perpetuated by indisciplined customers operating from the bars;
    - (c) Sale of adulterated alcohol and unlicensed brands, thus jeopardizing the lives of the residents;
    - (d) Sale of alcohol outside the stipulated hours.
  8. At paragraph 16 of their Response to the Petition, the Respondents denied that the Petitioner's goods were vandalized, destroyed or interfered with in any way; and added that inspection of liquor premises is a routine exercise intended to streamline operations in the sector for compliance purposes. They thus, concluded their Response by stating that:



- (a) A mere statement of a violation of a right under *the Constitution* cannot be sufficient to warrant a declaration of an infringement; and that it must be stated with precision how each right was violated;
  - (b) Article 1 of *the Constitution* delegates sovereign power to the National and County Governments through the National Assembly and County Assemblies, respectively, and that every citizen and entity is expected to abide;
  - (c) Article 24 of *the Constitution* limits any right in so far as it does not prejudice the rights of others; and hence, illegal and irregular manner of operating business of any nature by private entities in total disregard of the law infringes on public interest and the rights of others to a safe and secure environment;
  - (d) That the Petitioner cannot operate his business without a valid licence;
  - (e) The Petitioner's business was never disrupted; but that an effort was made to inform him, his agents and servants to stop his illegal business.
9. In the premises, the Respondents prayed the Petition be dismissed with costs because the Petitioner contravened the provisions of *the Constitution* and the Uasin Gishu County *Alcoholic Drinks Control Act* by failing to adhere to the procedure and processes for approval of such businesses. It was further contended that the Petitioner contravened the *Fair Administrative Action Act*, No. 4 of 2015, by failing to adhere to the dispute resolution mechanisms set out therein and in Sections 5, 7, 8 and 17 of the Uasin Gishu County *Alcoholic Drinks Control Act*; and hence the Petition was prematurely filed in abuse of the law and the court process.
10. The Respondents also relied on the Affidavit in Response to the Petition, sworn by Mr. Sila Boit on 30<sup>th</sup> May 2019 which is, in essence a reiteration under oath of the assertions made in their Response to Petition. They annexed a copy of the pertinent provisions of the Uasin Gishu County *Alcoholic Drinks Control Act* as well as the Minutes of a Meeting held on 17<sup>th</sup> June 2018 at Sisyobei Village in which a resolution was made to close down the Petitioner's bar, among others, for insecurity in the village.
11. In response to the Respondents' Replying Affidavit, the Petitioner filed a Supplementary Affidavit on 24<sup>th</sup> June 2019 pointing out that the said Replying Affidavit is fatally defective and ought to be struck out for want of authority of the County Government. He reiterated his assertion that he was neither involved in the alleged public participation conducted by the Respondents nor was he given reasons in writing as to why his application for 2019 licence was declined by the Respondents. The Petitioner also explained that he could not have exhausted the procedure of appeal as provided for in the Uasin Gishu *Alcoholic Drinks Control Act* because he was never informed that his application had been declined or the reason for the decision. He added that the letters of his lawyers inquiring about the outcome of his application all went unanswered.
12. In addition to the foregoing, the Petitioner endeavoured to demonstrate that the Respondents' actions are malicious, thereby warranting the intervention of this Court to ameliorate the damage and loss he has had to suffer following the closure of his business. In particular, the Petitioner averred that closure of his business exposed him to recovery actions by suppliers, financiers, his landlord and other third party commercial obligations exceeding Kshs. 1,000,000/= per month. He annexed a bundle of documents as Annexure ZK-1,2 and 3, respectively, in proof of the total sales and daily stock sheets. He thereby endeavoured to prove his average daily income before closure of his business. He therefore prayed that his Petition be allowed and the orders sought therein granted as prayed.



13. The Petition was canvassed by way of written submissions, pursuant to the directions dated 9<sup>th</sup> March 2021. Mr. Kagunza for the Petitioner filed his submissions dated 12<sup>th</sup> May 2021 and proposed the following issues for determination:
  - (a) Whether the Respondents' Replying Affidavit is fatally defective;
  - (b) Whether the Respondents acted in breach of Article 47 of *the Constitution*; and if so, whether the Petitioner is entitled to the reliefs sought;
  - (c) Whether the Petitioner is entitled to costs of the Petition.
14. With regard to the Respondents' Replying Affidavit, it was the submission of Mr. Kagunza that the Replying Affidavit filed by Mr. Boit contravenes Order 19 Rule 3 of the Civil Procedure Rules in so far as it is not confined to such facts as the deponent was able of his own knowledge to prove. In addition, he submitted that the said affidavit was filed without the authority of the 3<sup>rd</sup> Respondent. On whether the Petition is merited, Mr. Kagunza urged the Court to find that the Petitioner's application was not treated with the fairness that it deserved, in that he was not notified in writing of the reasons for rejection of his application, as required by Section 12(1) of the Uasin Gishu County *Alcoholic Drinks Control Act*.
15. Mr. Kagunza relied on *Erick Okongo Omogeni v Independent Electoral and Boundaries Commission & 2 Others* and *Republic v County Government of Mombasa, Ex Parte Outdoor Advertising Association of Kenya* to support his submission that, where a party is not granted an opportunity to be heard, as was the case with the Petitioner, it cannot be said that the process was fair. According to counsel, the Respondents acted with impunity and thereby destroyed the Petitioner's business for which they ought to be held to account. He also relied on *Kalpana H. Rawal v Judicial Service Commission & Others* [2015] eKLR and *Onyango Oloo v Attorney General* [1986-89] EA 456 to underscore the principle that those holding public offices are expected to act fairly and to apply the rules of natural justice in making decisions that ultimately end up affecting others.
16. On quantum of damages, Mr. Kagunza submitted that the Petitioner having demonstrated that he suffered financial reversals as a direct result of the actions of the Respondents, he is entitled to damages. He made reference to *Fose v Minister for Safety and Security* [1997] (3) SA 786 (CC) in urging the Court to award an appropriate amount to the Petitioner as compensation for his loss. He mentioned that, in *Peter M. Kariuki v Attorney General* [2014] eKLR, the Court of Appeal awarded Kshs. 15,000,000/= for breach of constitutional rights. He also urged the Court to find that the exhibits annexed as Annexures ZK-1, 2 and 3 sufficiently prove the special damages claimed by the Petitioner; and therefore that an award ought to be made in his favour under that head as well.
17. Counsel for the Respondents, on his part, proposed the following two issues for determination in his written submissions dated 12<sup>th</sup> July 2021:
  - (a) Whether due process was followed in denying the Petitioner liquor licence for the year 2019; and,
  - (b) Whether the Respondents' actions are justifiable;
18. While conceding that the Petitioner's application for 2019 was declined by the Respondents, counsel urged the Court to find that the decision was made in accordance with the law and in the public interest. He urged the Court to find that the Respondents took into account the resolutions made at a public participation meeting held at Sisoyobei Village and a letter from the Ziwa Trading Centre



Community Committee; and that the decision was effectively communicated to the Petitioner and the others whose applications had been declined.

19. On whether the Respondents' impugned actions were justified, counsel submitted that the actions complained of are routine exercises intended to regulate rogue traders operating without licences. He added that, since the Petitioner did not exhaust the appeal procedure set out in Sections 5, 7 and 8 of the *Fair Administrative Action Act* and Section 17 of the Uasin Gishu *Alcoholic Drinks Control Act*, his Petition amounts to an abuse of the Court process. Counsel relied on Eldoret High Court Constitutional and Human Rights Petition No. 6 of 2019: *Teresia Cheruiyot T/A Cool Shade Bar & 4 Others v the County Chairman Liquor Licensing Committee, Uasin Gishu County, & 4 Others* in support of his arguments on the doctrine of exhaustion. He consequently urged for the dismissal of the Petition.
20. I have carefully considered the Petition, the averments set out in the Supporting and Replying Affidavits as well as the written submissions filed by learned counsel, and there is no dispute that, at all times material to this Petition, the Petitioner was carrying on the business of selling alcoholic drinks at Ziwa Trading Centre in Uasin Gishu District under the name Riverside Bar. His contention that, by November 2018 when he submitted his application to the Respondents for renewal of his liquor licence for the year 2019, he had conducted the said business for about 10 years was unrebutted. The parties are also in agreement that the application was declined by the Respondents; and that it was that decision that precipitated this Petition.
21. Before setting out the issues for determination, it is imperative that I deal with two technical issues raised herein by learned counsel. The first objection was raised by counsel for the Respondents; namely, that the Petitioner did not exhaust the dispute resolution mechanism provided for in the Section 17 of the Uasin Gishu *Alcoholic Drinks Control Act*. I have no hesitation in rejecting the argument, noting that a preliminary objection was taken by the Respondents and a ruling delivered by the Court on the issue dated 8<sup>th</sup> November 2019 overruling the said objection. I therefore need not belabour the point.
22. The second technical point was raised by counsel for the Petitioner, in connection with the Affidavit of Mr. Boit, filed herein on 31<sup>st</sup> May 2019 in response to the Petition. Counsel urged this court to strike out that affidavit on the ground that it was filed without the authority of the County Government of Uasin Gishu, the 3<sup>rd</sup> Respondent herein. He argued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are distinct and separate from the 3<sup>rd</sup> Respondent; and that their mandate under the Uasin Gishu County *Alcoholic Drinks Control Act* is only to manage and supervise funds and therefore the affidavit offends the provisions of Order 19 Rule 3 of the *Civil Procedure Act* that requires an affidavit to be confined to such facts that the deponent is able of his own knowledge to prove.
23. I note however that the impugned Affidavit was sworn by Mr. Silas Boit who described himself as the Director, of the 3<sup>rd</sup> Respondent's Alcoholic Drinks Control Board. He indicated in his said affidavit that he was competent to swear the said affidavit on behalf of the other Respondents because he was well versed with the subject matter. He also mentioned that he is the 2<sup>nd</sup> Respondent in this Petition and therefore is a necessary party. Indeed, at paragraph 18 of the Petition, the Petitioner pointed out that the activities of 22<sup>nd</sup> February 2019 were spearheaded by none other than the 2<sup>nd</sup> Respondent. It is therefore incongruous for the Petitioner to contend that Mr. Boit's affidavit contravened Order 19 Rule 3(1) of the Civil Procedure Rules.



24. Moreover, the Court of Appeal in *Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another* [2015] eKLR, was explicit that:

“...In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorised by it. It was therefore sufficient for the deponents to state that “they were duly authorised.” It was then upto the appellants to demonstrate by evidence that they were not so authorised...”

25. Hence, the burden of proof was on the Petitioner to show that Mr. Boit did not have the authority of the 3<sup>rd</sup> Respondent to swear the said affidavit; which evidence was not presented by the Petitioner. Additionally, it is significant to note that the Respondents are not the initiators of the Petition. In *Saraf Limited vs. Augusto Arduin* [2016] eKLR the Court of Appeal held that:

“...We know of no law that makes it a requirement for a limited liability company that has been sued to furnish proof or to demonstrate that its Board of Directors or its shareholders have authorized it to defend the suit. If this were the law, logistical reasons would render it difficult or near impossible for companies to defend suits having regard to the strict time-lines within which appearance and defence must be filed. A limited liability company is a legal person with capacity to sue and be sued (see *Solomon & Solomon* [1897] AC 22 (H. L.)) Because it has no blood and tissue, a limited liability company acts through its Board of Directors. The directors are invested with management and superintendence of its affairs and may lawfully exercise all its powers subject to the Articles of Association and to the law.”

26. Needless to underscore the fact that, the 3<sup>rd</sup> Respondent, as a juridical entity capable of suing and being sued in its name, can only do so through its directors such as the 2<sup>nd</sup> Respondent. It is therefore my finding that as the Director of the 3<sup>rd</sup> Respondent’s Alcoholic Drinks Control Board, Mr. Boit was competent to depose to the facts adverted to in his affidavit which he stated was sworn not only on his own behalf, but also on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. It is therefore my finding that the affidavit of Mr. Boit is therefore properly before this court and that it is in accord with Order 19 Rule 3 of the Civil Procedure Rules, 2010.

27. Thus, the issues that arise from the Petition for determination are as follows:

- (a) Whether the Respondents violated the Petitioner’s right enshrined under Article 47 of *the Constitution*;
- (b) Whether the reliefs prayed for by the Petitioner are deserved in the circumstances;
- (a) Whether the Respondents violated the Petitioner’s right enshrined under Article 47 of *the Constitution*;

28. The thrust of the Petitioner’s case is that he applied for a licence in accordance with Section 11 of the Uasin Gishu County *Alcoholic Drinks Control Act* for year 2019 which was never issued despite inspection of his premises having been done and the same having been found compliant with the requisite hygiene standards. The Petitioner further asserted that the reasons for the decision was never communicated to him in writing as required under the Uasin Gishu County *Alcoholic Drinks Control Act* or at all. He pointed out that correspondence from his advocates solicited no response from the the Respondents; and therefore that he was, in the circumstances, constrained to file the Petition herein.

29. The Petitioner further contended that he was denied a 2019 liquor licence without being accorded a hearing. He denied any knowledge of the stakeholders meeting alluded to by the Respondents and



posited that he ought to have been invited to the said meeting and given the opportunity to respond to any adverse allegations that may have been made in connection with the propriety of his business and its location. Hence, according to the Petitioner, due process was not followed when the decision to decline his application for a liquor licence for 2019 was made. He therefore urged the Court to find that the Respondents' decision was not only unreasonable but also arbitrary.

30. Section 11 of the Uasin Gishu County Alcoholics Drink Control Act provides for the procedure for applying for a licence as hereunder:
- (1) A person intending to produce, manufacture, import, distribute any alcoholic drink in the county or to operate an establishment for the sale of an alcoholic drink shall make an application in a prescribed form to the County Committee in the County where the premise is to be situated and shall pay a prescribed fee.
  - (2) The application under subsection (1) shall contain-
    - (a) a comprehensive information on the nature, orientation and other justification for the establishment of the manufacturing plant or establishment for sale;
    - (b) an indication as to whether the manufacture or sale of the alcoholic drink is licensed in another county and if so the evidence of such licensing;
    - (c) for a manufacturer's licence, certification from Kenya Bureau of Standards;
    - (d) such other matters as may be prescribed.
31. While conceding that they received the Petitioner's application for a liquor licence for purposes of Section 11 of the Uasin Gishu County *Alcoholic Drinks Control Act*, it was the assertion of the Respondents that the application was subjected to the process provided under Section 11 (3) to (7) of Uasin Gishu County Alcoholics Drink Control Act and found deficient and was rejected based on public participation conducted on 17<sup>th</sup> June, 2018 and the objection raised by residents of Ziwa Trading Center Community Committee vide a letter dated 25<sup>th</sup> June, 2018.
32. I have perused the Minutes of the public participation meeting held at Sisoyobei Village and noted that indeed concerns were raised about insecurity, loud music and about bars that were operating beyond hours, among others. The Minutes also confirm that a resolution was made to close three bars, including the Petitioner's Riverside Bar. The letter marked Annexure SB3 also shows tht the Ziwa Trading Centre Community Committee did complain to the 2<sup>nd</sup> Respondent about the three bars and required that they be closed for the following reasons:
- (a) Selling of unlicensed brands which had occasioned fatalities and serious adverse health conditions to some of the residents;
  - (b) Retailing outside hours;
  - (c) Entertaining indisciplined customers, hence compromising security; and
  - (d) Playing loud music the whole night.
33. It is manifest therefore that the Respondents may have had valid reasons for declining the Petitioner's application. However, the merits of the decision is not the concern of the Court in this instant application; the concern being whether the Petitioner was accorded his right to fair administrative action as required by Article 47 of *the Constitution*. That provision reads:



- (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.
  - (3) Parliament shall enact legislation to give effect to the rights in Clause (1) and that 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.
34. The legislation passed for purposes of Article 47 is the *Fair Administrative Action Act*; and while it essentially sets the tone for redress as being by way of judicial review, Article 23 of *the Constitution* is explicit that the available remedies include a declaration of rights.
35. With the foregoing in mind I need to now ascertain whether, in accordance with the Uasin Gishu County *Alcoholic Drinks Control Act*, the Petitioner was accorded administrative action that passes muster in terms of fairness. Section 11 of that Act states:
- (3) The County Committee shall, within twenty-one days after the submission of application for a licence, prepare a notice setting forth the names of all applicants, the types of licences applied for, the premises in respect of which the licences are applied for and the time, date and place of the meeting, and shall forthwith cause a copy of the notice to be—
    - (a) published at the office of the County administrator for a period of not less than twenty-one consecutive days;
    - (b) posted in some conspicuous place at or near the applicant's premises;
    - (c) sent to the Inspector-General of Police, or to such police officer as the Inspector-General may have notified the Governor that he has appointed to receive it on his behalf;
    - (d) sent to the County public health officer in the County in which the premises in respect of which the licences are applied for are situated; and
    - (e) sent to the County physical planning officer.
  - (4) The Inspector-General of Police or, as the case may be, the police officer appointed by him for that purpose; the County public health officer; and the County physical planning officer shall, before the hearing of: any application under this section, report as fully as possible to the County Committee on all matters which may be relevant to the consideration of the application.
  - (5) Any person may lodge an objection to an application.
  - (6) Every objection to an application shall be made in writing to the Secretary to the County Committee, and the objector shall serve notice of the grounds of the objection on the applicant, personally or by post, at least seven days before the hearing of the application and the onus of proof of such service shall be on the objector.



- (7) A County Committee may of its own motion 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 otherwise lodged.
- (8) Where in respect of an application a Sub-County Committee acts in pursuance of subsection (7), the Committee shall inform the applicant of the nature of the objection, and shall, if the applicant so requests, adjourn the hearing for such period, not being less than seven days, as the County Committee considers necessary to enable, the applicant to reply thereto
- (9) Every person making an application shall, save as otherwise provided, appear in person or by an advocate before the County Committee, and shall satisfy the County Committee that there is need for the grant of a licence of the type applied for in the particular locality in respect of which the application is made.
- (10) A County Committee may require the personal appearance before it of the applicant, or of the manager of the premises to which the application relates, or of both of them and of any other person whose attendance is considered by the committee to be necessary.
36. In this instance, there is not evidence to demonstrate that the 1<sup>st</sup> Respondent prepared a notice for purposes of Section 11(3) aforesaid, setting forth the names of all applicants, the types of licences applied for, the premises in respect of which the licences are applied for and the time, date and place of the meeting for the transparent processing of applications for licenses; or that it caused a copy of such notice to be published at the office of the County administrator for a period of not less than twenty-one consecutive days or posted in some conspicuous place at or near the Petitioner’s premises. There is likewise no indication that any such notice of meeting was sent to the Inspector-General of Police, or to such police officer as the Inspector-General may have notified the Governor of; the County public health officer in the County in which the premises in respect of which the licences are applied for are situated; or to the County physical planning officer. The purpose of notifying the aforementioned offices is obvious; they are required by dint of Section 11(4) of the Uasin Gishu County *Alcoholic Drinks Control Act* to prepare and submit reports to inform decision-making by the Committee.
37. Where, as in this case, an objection was raised to the issuance of a licence, the Respondents were required by Section 11(6) of the Uasin Gishu County Alcoholic Drinks Act to serve notice of the objection and the grounds therefor on the applicant either personally or by post, at least seven days before the hearing of the application. In fact, the provision states that “...the onus of proof of such service shall be on the objector...”
38. No attempt was made by the Respondents to demonstrate that the the objection raised by members of the public at the public participation meeting held at Sisyobei Village or the objection by Ziwa Trading Centre Committee were brought to the attention of the Petitioner, either verbally or otherwise. Even assuming that this was a matter that the Respondents took up for action suo motu under Section 11(7) of the Uasin Gishu County Alcoholic Drinks Act, they were still required under Section 11(8) of the Act to inform the Petitioner of the nature of the objection, and if need be adjourn the hearing for such period as necessary to enable the Petitioner to make a reply to the objection.
39. Again, there is no indication that the Respondents complied with these requirements of the applicable law. In fact, there is no evidence at all that any meeting was held to consider the Petitioner’s application for licence for 2019. I say so because the two documents relied on by the Respondents, namely the Minutes of the public participating meeting held at Sisyobei Village dated 17<sup>th</sup> June 2018 and the letter of objection by Ziwa Trading Centre Committee dated 25<sup>th</sup> June 2018 both preceded the Petitioner’s application.



40. The Petitioner’s evidence, which was not controverted by the Respondents, was that he made his application in November 2018. He annexed a copy of the deposit slip for the licence fee paid as Annexure “SK-6” to his Supporting Affidavit. That document confirms that it was issued by the 3<sup>rd</sup> Respondent on 22<sup>nd</sup> November 2018. The Petitioner also exhibited a copy of the report dated 24<sup>th</sup> April 2019 prepared by Soy Subcounty Public Health Office confirming that the Petitioner’s premises had been inspected and found to have met the basic public health requirements.
41. As pointed out herein above, Article 47(2) of *the Constitution* is explicit that:
- “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.”
42. The same provision is reiterated at Section 4(2) of the Fair Administrative Actions Act as well as Section 12(1) of the Uasin Gishu County *Alcoholic Drinks Control Act*. It is plain, therefore, that under Section 12 of the Uasin Gishu County Alcoholics Drink Control Act, the Committee was obliged to communicate the objections to the Petitioner’s application in writing. The said section provides: -
- (1) The County Committee shall, after considering the application under section 11, indicate in writing whether it objects to the grant of the licence applied for;
  - (2) .....
  - (3) .....
  - (4) Where the County Committee is not satisfied with the application under subsection (1), it may-
    - (a) ) reject the application giving reasons and notify the applicant accordingly within thirty days of the decision to reject; or
    - (b) make comments and recommendations thereon and return it to the applicant within fourteen days
43. There is no evidence at all that the decision to decline the Petitioner’s application was ever communicated to him in writing or otherwise. No such written communication was availed by the Respondents. Even the assertion by the 2<sup>nd</sup> Respondent that the reasons for rejecting the 2019 liquor licences were served on the applicants by way of a template notice at the Alcoholic Drinks Control Board Offices, County Security & Sub-County Security Committee, Sub-county Administrators Offices and the Ward Administrators Offices was not backed by evidence as no such template was shown to the Court.
44. The essence of this requirement was underscored by the Court of Appeal in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [2016] eKLR where it was stated: -
- “...Article 47 (2) of *the Constitution* as read with Sections 4 (3) (d) and 5 (d) (i) and 6 (2) (a) and 6 (4) of the *Fair Administrative Action Act* require written reasons for administrative decision...”
45. It is therefore manifest that the Petitioner was never given an opportunity to be heard as required under Section 11 of the Uasin Gishu County Alcoholics Drink Control Act, before his application for 2019 licence was declined. It is also manifest that he was never served with written reasons for the denial of the licence as required under Section 12 of the Uasin Gishu County Alcoholics Drink Control Act.



It is consequently my finding that his right to fair administrative action, as enshrined under Article 47 of *the Constitution* was thereby infringed.

46. Having found that no meeting was ever called by the Respondents to consider the Petitioner's application; that no notice of the objection was ever given to the Petitioner; and that the Respondents purportedly relied on documents prepared before the application was made and in the absence of critical reports from the Inspector General of Police, and the Public Health Office, among other offices, the inference to draw is that the decision was actuated by malice; and I so find. In this respect I adopt the expressions of Hon. Mativo, J. in *Pevans East Africalimited v Betting Control and Licensing Board & 2 others; Safaricom Limited & another (Interested Parties)* [2019] eKLR, that:

“...Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest. These motives, which have the effect of distorting or unfairly biasing the decision-maker's approach to the subject of the decision, automatically cause the decision to be taken for an improper purpose and thus take it outside the permissible parameters of the power.

A power is exercised fraudulently if its repository intends it for an improper purpose, for example dishonestly, to achieve an object other than that which he claims to be seeking. The intention may be to promote another public interest or private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise...”

47. On the facts placed before the Court, it is my finding that the Respondents' acted capriciously in this instance.

(b) Whether the Petitioner is entitled to the prerogative orders of prohibition and mandamus:

48. One of the Petitioner's prayers was that the Respondents be stopped from annulling, revoking and rejecting the renewal of the his Alcoholic Drinks Retail Licence and from interfering with his bar activities. Further, the Petitioner sought for an order of Mandamus to compel the 1<sup>st</sup> Respondent to renew his licence; and that he be issued with the Retail Licence in respect of the year 2019. Needless to say that these prayers have been overtaken by events and are therefore not available to the Petitioner.

49. In its ruling dated 15<sup>th</sup> December 2020, the Court pronounced itself on an application for conservatory orders and mentioned that by the time the Petition was filed the Petitioner's business had been closed down; and therefore that there was nothing to conserve. Indeed, in *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR the Court of Appeal made it clear that: -

“...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...”

50. With regard to the remedy of Mandamus, the Court of Appeal had the following to say:

“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. 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 compels 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...”

51. It is plain then that neither prohibition nor mandamus would be appropriate remedies in the Petitioner’s case.

52. The Petitioner asked for an award in damages as compensation for his loss and damage resulting from the closure of his bar. His counsel asked the court to be guided by the decision of the Court of Appeal in *Peter M. Kariuki v Attorney General* [2014] eKLR wherein the court awarded the appellant the sum of Kshs. 15,000,000.00/= for the breach of his constitutional rights for being tortured by the government. He however did not address the question of the quantum payable in the instant circumstances.

53. The burden to prove that an award of damages ought to ensue was on the Petitioner. The Court of Appeal in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR held that:

“...The fact that the respondent admitted liability ab initio does not in any way shift the burden of proof from the appellants. It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed.



The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side. see Mwangi Muriithi (supra) and *Mumbi M'Nabea v. David Wachira Civil Appeal No. 299 of 2012*.

In *Romauld James v. AGT* [2010] UKPC Lord Kerr at paragraph 13 cited a passage from the judgment of Kangaloo JA in the same case. It has some bearing both on the present issue and the next, to which we will turn directly. Kangaloo JA said:

[28]. In my view, it does not lie in the mouth of the appellant to say that he is not obliged to place evidence of damage suffered before the constitutional court before liability is determined. I say so because it must first be shown that there has been damage suffered as a result of the breach of the constitutional right before the court can exercise its discretion to award damages in the nature of compensatory damages to be assessed. If there is damage shown, the second stage of the award is not available as a matter of course. It is only if some damage has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice has developed in constitutional matters in this jurisdiction of having a separate hearing for the assessment of the damages, but it cannot be overemphasized that this is after there is evidence of the damage. In the instant case there is no evidence of damage suffered as a result of the breaches for which the appellant can be compensated....”

54. In this case, in addition to general damages, the Petitioner purported to seek special damages which were neither specifically pleaded nor proved. He opted to rely on a bundle of documents annexed to his Supplementary Affidavit filed on 24<sup>th</sup> June 2019. The purport of the said documents is, in essence, that for the period January to December 2018, the Petitioner realized a total sales turnover of Kshs. 4,439,190/=. They further purport that the Petitioner’s business operated all the days of that year without any closure. There is also no indication as to what component represented working capital or the profits made, if any. It would therefore be unrealistic to rely on those figures for purposes of assessing the damages payable, bearing in mind the decision of the Court of Appeal in *Jogoo Kimakia Bus Services LTD v Electrocom International LTD* [1992] eKLR that:

“...The law on damages stipulates various types of damages.

The distinction between general damages and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded...”

55. In the circumstances, I would award the Petitioner a nominal amount of Kshs. 200,000/= for the infringement of his constitutional rights noting that no special damages were specifically pleaded or proved.
56. In the result, Judgment is hereby entered for the Petitioner against the Respondents as hereunder:
- (a) A declaration be and is hereby issued that the acts and/or omissions of the Respondents in denying the Petitioner a licence for the year 2019 to sell alcoholic drinks and in rejecting the Petitioner’s application for 2019 without any reason are unconstitutional;
  - (b) An award in damages in the sum of Kshs. 200,000/= for the aforementioned infringement of the Petitioner’s constitutional rights;



(c) Costs of the Petition together with interest on the aforestated sum from the date hereof.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 29TH DAY OF JULY 2022.**

**OLGA SEWE**

**JUDGE**

