REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO 19 OF 2019

IN THE MATTER OF NAKURU DISTRICT ALCOHOLIC DRINKS CONTROL ACT OF 2014

LEAH WAMBUI KAMAU T/A LEWAKA BAR.....1ST APPLICANT

EUNICE NJAMBI ODERA T/A REAL BUDGET BAR.....2ND APPLICANT

EUNICE NJAMBI ODERA T/A VISION BUDGET BAR.....3RD APPLICANT

ESTHER MUTHONI MANOAH T/A HIGHWAYS BAR & RESTAURANT.....4TH APPLICANT

SIMON MUNENE T/A CLUB OCEAN BAR.....5TH APPLICANT

VERSUS

COUNTY GOVERNMENT OF NAKURU.....RESPONDENT

JUDGEMENT

1. The applicant filed an amended **Notice of Motion** application dated 20th June 2020 under **Order 53 Rule 3 of the Civil Procedure Rules** seeking for orders;

> **i. THAT the decision of the respondents communicated through a letter dated 19th July 2019 be brought to this court and the same be quashed by way of an order of certiorari.**
>
> **ii. THAT an order of prohibition be issued to restrain the respondents from closing down the businesses operated by the applicants and based on the letters delivered to the applicants and dated 19th August 2019.**
>
> **iii. That an order of mandamus to compel the respondent to grant the subject licenses to operate their respective businesses.**
>
> **iv. That costs of this application and costs of the summons for leave be borne by the respondents.**

2. The application is premised on the following grounds;

> **a. THAT the applicants have operated their businesses for over ten years, in the entire period, the location of the business and the nature of the businesses has never changed. The applicants have all along been granted licenses based on the nature of the business and the location relative to the residential areas and schools.**
>
> **b. THAT the respondent made a decision which was communicated to the subjects vide a letter dated 19th July 2019. In the decision, the respondent ordered the applicants to close their businesses within a period of 90 days. Reason being that the businesses were located within 300 meters near a school.**
>
> **c. In arriving at that conclusion no measurements were done neither were the applicants involved in any survey work. The decision purported to have involved the applicants but there were no minutes showing the involvement of the applicants. The decision was therefore arrived at in breach of the applicants' right to be heard and right to fair administrative action.**
>
> **d. THAT further, the applicants have for over a period of 10 years obtained licenses on the basis of the nature and location of**

business. They have made investments in the businesses based on the legitimate expectation that they would continue to enjoy the licenses as long as the nature and location of the business remains the same.

e. THAT the applicants had a legitimate expectation that if they would be denied the licenses, the respondents would demonstrate the change of circumstances. Thus, the decision was made in breach of the applicants' legitimate expectation and it is therefore illegal and prejudicial to the interests of the applicants.

3. The respondent averred that **Section 9 of the Nakuru County Alcoholic Drinks Control Act of 2014** establishes the Sub-County Alcoholics Drinks Regulation Committee (hereinafter referred to as 'the Committee') and vests it with the power to issue licenses. **Section 10 of the said Act** also establishes the **County Alcoholics Drinks Regulations Administrative Review Committee** (hereinafter referred to as 'the Review Committee') which shall be responsible for reviewing on appeal decisions made by a **Sub-County Alcoholics Drinks Regulation Committee.**

4. The Act provides that in carrying out its functions the Committee shall ensure there is effective public participation in accordance with the framework for citizen participation established under the County Governments Act, the Urban Areas and Cities Act or any other relevant written law. **Section 11 of the Act** lays out the procedure for Application of license, which process commences by the applicant making an application in the prescribed form to the Committee in the Sub-County where the premise is to be situated and paying the prescribed fee and **Section 11(6)** provides that any person may lodge objection to an application.

5. THAT in the instant suit the Applicants made applications to the Committee and the same had been objected to by members of the public (hereinafter referred to as the Objectors). The said Applications and Objection were heard and deliberated upon by the Committee in the presence of both the Applicants and the Objectors in a meeting held on the 25th day of July, 2019.

6. Subsequently, the Committee embarked on a verification exercise where they physically visited the sites of the Applicant's premises. Both the applicants and the objectors were promptly notified of the Committee's decision.

7. It was averred that the sprawling of bars in contravention of the law within Mang'u area has been a cause of great concern for the residents who have petitioned the authorities on the same. The ruinous surge in alcohol and drug abuse by Mang'u youth and the resultant breakdown of social order within the area has been attributed to the unabated sprawling of bars in contravention of the law to which the general public is vehemently opposed to and the same has been made known to the authorities.

8 The respondent averred that the instant suit is premature and an abuse of the court process and the Applicants are precluded from filing the same by reason of the doctrine of exhaustion.

9. The instant Application is also outside the purview of Judicial Review as decisions arrived at were as a result of deliberations and /or discussions within an adequate consultative process and/or public participation forums which have not been challenged by the Applicants. Additionally, the suit fails to meet the tenets of **Article 159(c) of the Constitution and Sections 88 and 89 of the County Government Act of 2012.**

10. The respondent urged this Court to dismiss the application with costs to the respondents.

11. Parties were directed to dispose of the application by way of written submissions.

Applicants' submissions

12.The applicants placed reliance in the case **of Republic v Non-Governmental Organizations Coordination Board Exparte Evans Kidero Foundation [2017] eKLR** and submitted that the right to fair hearing is inherent whether it is provided for in a statute or not. Where a decision is arrived at in breach of the right to fair hearing, it cannot be validated by reference to its merits.

13. The applicants averred that they were not present when the Chairman of Rongai Sub County Alcoholic Drinks and Liquor Committee purportedly visited the site to take measurements of the distance from the school to the bars. A hearing was conducted by the Committee to consider the issue on 25th July 2019. The list bears the names of the applicants as attendees, but the proceedings do not indicate whether the applicants were invited to challenge the evidence of the measurements which were taken. The person who took the measurements was not called as a witness.

14. Effectively, Rongai Sub County Alcoholic Drinks and Liquor Committee took the role of the investigator and the judge. The applicants were mere spectators and they were called solely for the communication of the results. It was submitted that right to fair hearing has both qualitative and procedural aspects.

15. It is not enough to invite a party to a hearing where his/her rights are likely to be affected adversely. That party must be permitted to effectively participate in the proceedings. He must be allowed to cross-examine witnesses and call evidence to controvert the evidence called by the adversary, hence the hearing leading to the impugned decision fell short of the core tenets of the right to fair hearing. The applicants thus urge this Court to issue an order of certiorari to quash the decision and an order of prohibition restraining the respondent from closing the applicant's business premises.

16. The applicants placed reliance in the case of **Council of Civil Service Unions & others v Minister for the Civil Service (1985 AC 374 (408-409) quoted with approval in the case of Joel Nyabuto Omwenga & 2 others v Independent Electoral and Boundaries Commission & Another [2013] eKLR and the case of Serah Mweru Muhu v Commissioner of Lands & 2 others [2014] eKLR** and submitted that once legitimate expectation is established, it creates an estoppel against the public body. The benefit enjoyed cannot be

withdrawn without due process or consultation.

17. It was submitted that the applicants were licensees of the respondent for over 10 years. It has not been disputed that over the same period, there has not been a change of position in respect to the location of the premises where the applicants conduct their business. By its conducts, the Rongai Sub County Alcoholic Drinks Committee created a legitimate expectation to the effect that as long as the applicant's operated within the same premises and within the ambit of the other provisions of the law, they will enjoy their licenses. The licenses, as a benefit accruing from the Rongai Sub County Alcoholic Drinks Committee could not be withdrawn without due process.

18. The process of denying the applicants the license was not consultative and it fell short of due process. The applicants were never invited to participate in the process of taking measurements to establish the distance from the applicants premises to the school. At the hearing of their application for the renewal of licenses, they were mere spectators. They were never invited to cross examine any witness who may have participated in taking the measurements. The decision is therefore in breach of the applicants legitimate expectation.

19. It was submitted on the doctrine of exhaustion that where a party pleads that there are alternative forums available and that they ought to be exhausted first, the evidential incidence of proof falls upon him to demonstrate that the alternative forum is available, accessible, timely and effective. Once this has been proved the burden shifts to the adverse party to demonstrate that the matter falls within the exceptions. **See the National Gender and Equality Commission V Majority Leader County Assembly of Nakuru & others** on the exceptions to the applicability of the principle of exhaustion.

20. It was submitted that the County Alcoholic Drinks Regulation Administrative Review committee is the alternative forum which ought to deal with matters of this nature in the first instance. For this forum to be available as an alternative, it has to be operationalized through the formulation of its regulations and gazettement of its members. An alternative dispute resolution forum cannot be said to exist solely on the ground that there is a statutory framework providing for its existence. The party who pleads the existence of such a forum must demonstrate that the mechanism has been operationalized.

21. The applicant has failed to demonstrate that the alternative dispute resolution mechanism is available, timely accessible and effective. Therefore, the applicant cannot be called to demonstrate that the case falls within the recognized exceptions. The applicants pray that this court dismisses the plea for an alternative mechanism as a bar to the consideration of this matter.

Respondent's written submissions

22. The respondent submitted that in arriving at its decision of whether the applicants are entitled to the prerogative orders of certiorari, prohibition and mandamus, the court must satisfy itself that the applicants have demonstrated that the respondent's actions were marred with illegality, irrationality and procedural impropriety as restated in the case of **Ernest B.M Oranga v Kakamega County Commissioner of Cooperatives & 6 others [2016] eKLR** where the Court cited with approval the case of **the Council of Civil Servants Union v Minister for the Civil Service [1985] 2 AC.**

23. It was submitted that the ex parte applicants have not demonstrated that the Respondent acted outside the confines of the law. Guided by the attendant law and assisted by the glaring inconsistencies/gaps on the part of the ex parte applicants' case, the instant application miserably fails the test and/or definition set out in the **ex parte Geoffrey Gathenji Njoroge.**

24. It was submitted that the instant suit is premature and an abuse of the court process as it offends **section 9 of the Fair Administrative Action Act 2015 and fails to meet the tenets of Article 159 (2) (c) of the Constitution and S. 88 of the County Government Act 2012.** The applicants have deliberately disregarded all dispute resolution mechanisms provided in law and opted to prematurely approach this Honourable Court.

25. This being a dispute arising from a County Government function pursuant to **part 2 of the 4th Schedule of the Constitution, the provisions of section 88 of the County Government Act** which grants citizens the right to petition and challenge the county Government on any matter under the responsibility of the County Government are applicable. **Section 89 of the Act** also obliges the County Government to respond to citizen's petitions and challenges.

26. The applicants ought to and should have raised any concerns with the Respondent first prior to moving the Court. This court should not be the forum of first instance for the instant application. The applicants failed to refer an appeal to the review committee as established by **Section 10 of the Act** and they have also not demonstrated the exceptional circumstances nor made a formal application as provided for under **Section 9 (3) of the Fair Administrative Action Act.** The inexorability nature of the doctrine of exhaustion was confirmed in the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** where the appellate court held;

> **"Where a dispute mechanism is provided for in a statute, and where there is a clear procedure for the redress of any particular grievance by the constitution or statute that provision ought to be strictly followed."**

27. It was submitted that pursuant to the doctrine of exhaustion, the honourable court is precluded from entertaining the instant application. Claims made bythe applicants cannot be the subject of judicial review since the decision made by the respondent was arrived at pursuant to adequate and extensive public participation forums which have not been challenged by the applicants.

28. The respondent cited the case of **Republic v Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others [2013] eKLR** and submitted that upon attainment of public participation the decision arrived thereupon cannot be the subject of judicial review. The Mang'u residents have spoken, the respondent has demonstrated the steps that were taken with respect to the attainment of public participation which informed its decision. The applicants have not presented any evidence to challenge the adequacy and extent of the participation of the public in the said forums. This honourable court should then heed to the voices of the masses and dismiss the applicant's application.

29. It was submitted that the respondent has demonstrated fidelity to the law and by strictly adhering to and applying the relevant provisions of the Nakuru County Alcoholic Drinks Control Act and the applicants have not controverted the same. With regard to the allegation that there was no measurement and/or survey conducted to confirm the proximity of the applicant's businesses to the schools and/or residences, there is no legal for strict empiricism in establishing the distance. It is the public which have in a long time decried the offending proximity and the same was formally brought to the respondent's committee by the objectors. The committee's role was just to confirm the same on the ground as it did.

30. It was submitted that the court can only interfere where an entity acts outside the law and/or fails to act as required by law. See the case of **Metropolitan PSV Sacco's Limited Union & 25 others v County of Nairobi Government & 2 others [2013] eKLR (upheld in Civil Appeal No. 42 of 2014).**

31. The applicants are seeking to interfere with the constitutional mandate of the Respondent. The respondent's decision emanating from the said mandate was made for the greater good of the entire society hence the court has no role in the matter. The respondent's constitutional mandate is to safeguard the interests of the general public and not gratifying the whims and wants of a few.

32. The instant suit is a deliberate attempt by the applicants to circumvent the law and defeat the ends of justice and the same should not be entertained by this honorable court.

Issues for determination

33. I have considered the application, the respondent's replying affidavit, the evidence attached therein, and both parties' submissions. The only issues for determination include;

i. Whether the applicants were afforded a fair hearing before the impugned decision was arrived at.

ii. Whether the doctrine of exhaustion applies in circumstances.

iii. Whether the applicants should be granted the reliefs sought.

Whether the applicants were afforded a fair hearing before the impugned decision was arrived at.

34.The applicants contended that they were not accorded fair hearing before the decision to close their businesses was arrived at. They admitted to have attended the hearing that took place on **25th July 2019** to consider the objection by the members of the public, but they submitted that they were mere spectators as they were not allowed to challenge the evidence that was adduced. They also submitted that they were not allowed to challenge the evidence of the measurements which were taken as the person who took the measurements was not called as a witness.

35. **Section 11 of the Nakuru County Alcoholic Drinks Act** lays out the procedure for application of a license and also lays down the procedure to be followed where an objection to the application has been made. I have heard an opportunity of looking at the minutes of the meeting that was held on 25th July 2019 and indeed the applicants were not given an opportunity to be heard. It is only the decision to close their businesses that was communicated to them during the meeting. There is no evidence of proceedings that took place before the decision to close the applicant's business was arrived at. This therefore violated the applicants' right to fair administrative action under **Article 47 of the Constitution.**

36. In **Republic v Baringo County Government & another; Stephen K. Cheptoo & 8 others (Ex Parte Applicants) [2018] eKLR** the court held**;**

> **"The court finds that in taking its decision to close the bar operations of the applicants in the judicial review application and the petition herein without giving them notice and or an opportunity to be heard, the respondent County acted in violation of the applicants'constitutional right to fair administrative action under Article 47 of the Constitution and ultra vires *its own statute, the Baringo County Alcoholic Drinks Control Act, 2014, Section 11 thereof, and the said decision was, consequently, unconstitutional, illegal, null and void."***

37. The respondent has attached the petitions by the members of the public but there is no evidence that the applicants were heard on the petitions before the impugned decision was arrived at. I place reliance in **Republic v Eldama Ravine Alcoholic Drinks Control Committee & another Exparte Solomon Chuchu Ruiru & 4 others [2019] eKLR where the court held;**

> **"There is no evidence that the operators affected by the zoning decision made on 27th March 2018 were heard on the petitions before the decision was reached. Had it not been for their delay in presenting their challenge of the said decision until it was implemented by the rejection of their license renewal applications, the court may have considered granting the relief sought on the ground of want of right to be heard**."

38. In **Erick Okongo Omogeni v. Independent Electoral Boundary Commission & 2 Others**, **Nairobi H.C Misc. Civil App No. 40 of 2013** the court held that where a person is not granted an opportunity to be heard, it cannot be said the process was fair.

Whether the doctrine of exhaustion applies in circumstances.

39. **Under section 9(2) of the Fair Administrative Action Act 2015** the *exparte* Applicants are mandated to exhaust all internal remedies of

the Respondent before initiating judicial review proceedings. The section states;

> **"The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**
>
> **(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).**
>
> **(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."**

40. Exhaustion of alternative remedies is now a constitutional imperative under **Article 159 (2)(c) of the Constitution**, and is exemplified by emerging jurisdiction on the subject, as explained by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (supra)** as follows:

> **"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews….. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."**

41. Since the respondent did not follow the statutory procedure in arriving at the impugned decision, they should not be heard saying that the applicants' failed to make use of its internal mechanisms before coming to this court. In any event the applicants have submitted that the review committee has not been operationalized and the respondent has not taken any pains to rebut the applicant's sentiments. No material evidence and or Gazette has been adduced in this court to help the court come to an informed conclusion of whether or not the committee has been operationalized.

42. I place reliance in the case of **John Kipkoech Rotich & 29 others v Drinks Regulation Committee Ex parte John Kipkoech Rotich t/a Silent Pub & 29 others [2019] eKLR where the court held;**

> **"For the same reason that a party cannot benefit from its own wrong doing, the Respondent cannot be heard to object that the Applicants have not exhausted the intended dispute resolution mechanism. To uphold the objection would be to permit the breach of statutory provisions as the hearing and due process with impunity, the aggrieved party not being able to approach the Court but being required to exhaust the internal machinery of the very Act that the Respondent has flagrantly breached in taking the action subject of Judicial Review. If the Respondent does not itself follow the procedure of dealing with the provisions of the Act, it would be a strange sense of justice as would restrict the aggrieved party to statutory machinery before recourse to the High Court for redress. The Respondent could always bluntly disregard the provisions of the Act in the licensing and require the aggrieved parties to pursue this relief through the same Act.**
>
> **In my respectful view, the Respondent may only rely on the provisions for internal dispute resolution when it has itself made its decision within the regular framework of the Act. An irregularly made decision cannot protect the Respondent from challenge in a Judicial Review Court."**

43. The court proceeded to state;

> **"An irregular decision made ultra vires the enabling statute statement must be liable of challenge immediately it is made because it is a nullity, and should not be left to stand awaiting administrative review by internal dispute resolution mechanism. It ought to be quashed at once by a Judicial Review Court. Indeed, requirement for exhaustion of internal remedies is subject to leave of the Court in proper cases. For the reason herein that the Respondent chose to disregard express provisions on the procedure for considering application for license renewal and made a blanket order for closure of the Applicant's businesses, the Court does not allow it to take advantage of the clause of the Fair Administrative Action Act, 2015 requiring prior exhaustion of internal remedies, and consequently pursuant to section 9 (4) of the Act "exempts the applicants <u>from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice"</u>**

44. In view of the foregoing authority, the doctrine of exhaustion does not lie.

<u>Whether the applicants should be granted the reliefs sought.</u>

45. It is trite that the Judicial Review court does not determine the merits of the case but it is only concerned with the process of the decision making to ensure that the applicants are given a fair treatment, as held in **Commissioner of Lands v. Kunste Hotel Limited *[1997] eKLR*:**

> **"But it must be remembered that judicial review is concerned not with private rights <u>or the merits of the decision being challenged but with</u> the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected."**

46. The applicants had a legitimate expectation that their licenses would continue to be valid since they still operate in the same premises and location in which they have operated for the last 10 years, and that if there was any change in circumstances they would be involved in the process. Failure to be involved in the decision making process and in essence being deprived of their right to fair hearing violated this legitimate expectation.

47. In as much as the respondents and the complainants find the applicants businesses to be a menace, an area which is not for this court to venture into as it is not permitted for now, they should comply with the laid down procedures. They should follow the laid down rules and regulations concerning dispute resolutions and if the County Alcoholic Drinks Review Committee was up and running, that ought to have been the applicants port of call before approaching this court.

48. For now, it is not as stated earlier the purview for this court to consider whether the applicants breached the by-laws or not but the court is dissatisfied with the procedure adopted by the respondent in arriving at the impugned decision.

49. In the premises the application is hereby allowed in terms of prayers (a) and (b) thereof. Costs shall be in the cause.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 16TH DAY OF DECEMBER, 2021

H K CHEMITEI.

JUDGE.