



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D.K. Kemei - J

JUDICIAL REVIEW NO. 226 OF 2017

IN THE MATTER OF AN APPLICATION BY FRANCIS MWANIKI NGUNGA FOR LEAVE TO APPLY FOR AN ORDER OF JUDICIAL REVIEW IN THE NATURE OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE ALCOHOLIC DRINKS AND CONTROL ACT, 2015

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015 SECTION 6

AND

IN THE MATTER OF ARTICLE 23(f) OF THE CONSTITUTION OF KENYA

BETWEEN

FRANCIS MWANIKI NGUNGA T/A

EUREKA NIGHT CLUB..... APPLICANT

VERSUS

MACHAKOS SUB-COUNTY

REGULATING COMMITTEE.....1ST RESPONDENT

COUNTY GOVERNMENT OF MACHAKOS2ND RESPONDENT

RULING

1. Pursuant to leave granted to the applicant by this court on 6.9.2017, the applicant moved this honourable court seeking 3 primary orders; **Firstly** of mandamus directed to the respondents and/ or their agents compelling them to grant the applicant, Francis Mwaniki Ngunga t/a Eureka Night Club herein an Alcoholic Drinks License in accordance with the Alcoholic Drinks Control Act; **Secondly** prohibition restraining the respondents and/ or her officials and/ or agents from refusing to accept cess fee from the applicant herein for purposes of obtaining a license for selling alcoholic drinks; and **Thirdly** an order of certiorari quashing the decision of the respondents denying to issue/ renew the applicants Alcoholic Drinks License for the year 2017 issued on 20.3.2017.

2. The grounds relied upon by the applicant are inter alia: that he was denied renewal of his alcoholic drinks license and no reason was given. The applicant laments that on 19.8.2017, police officers attached to Machakos Police station raided his place of business and arrested a bar tender who was later charged with an offence of operating a bar without a license; and that the night club was closed. The applicant averred that the 2nd respondent had issued him a license as per the Food, Drugs and Chemical Substances Act for the year, 2017.

3. The applicant also states that the actions of the 1st respondent fall short of the requirements of the Fair Administrative Action Act for

failing to give reasons upon which their decision was founded on.

4. The applicant avers in his supporting affidavit that he obtained a single business permit for the year 2017(FN1); he was issued with a licence under the Food, Drugs and Chemical Substance Act (FN2). However, a decision not to issue him with an alcoholic drinks licence was later issued to him but he was not afforded an opportunity to be heard. He averred that he had been operating the business since 2011 to date and incurred losses because the business was shut down. Vide further affidavit, the applicant deponed that he had complied with the National Environment Management Authority regulations and was issued with a letter of compliance (FM1). He annexed copies of the licenses he had been issued for the year 2016.

5. The application is not opposed as there is no affidavit in reply or otherwise any reply to the application.

6. The applicant's counsel filed submissions in support of the application. Learned counsel cited the provisions of Section 10(4) of the Alcoholic Drinks Control Act, 2010 which I have reproduced herein as follows:

“10. (1) The District Committee shall, after considering the application under section 9, indicate in writing whether it objects to the grant of the licence applied for.

(2) Where the District Committee has no objection to the application under section 9, it shall grant a licence to the applicant upon payment of the prescribed fee.

(3) The licence issued shall be in such form as may be prescribed and subject to such conditions as the District Committee may consider fit.

(4) Where the District 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 thirty days.

7. Counsel placed reliance on the provisions of Section 7 (2) (b) and (c) of the Fair Administrative Actions Act that gave the court power to review a decision if:

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

8. It was counsel's argument that the 1st respondent gave no reason for the rejection of the applicant's application for renewal of the 2017 license and that the letter dated 20.3.2017 manifested a flawed decision making process. Counsel cited the case of **Municipal Council of Mombasa v Republic & Another (2002) eKLR** and urged the court to grant the orders sought in the application.

9. Having considered the application, and the fact that the court was satisfied that service was effected on the respondents, the issue for determination is whether the court may grant the orders sought.

10. In judicial review proceedings the court is called to examine the circumstances under which the impugned act was done to determine whether it was fair, rational and or arrived at in accordance with rules of natural justice. The purpose of Judicial Review is concerned not with the decision but with the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made and it is not an appeal and further that the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. In the case of **R vs Secretary of State for Education and Science exparte Avon County Council (1991)** which was referred to in the case of the **Commissioner of Lands vs Kunste Hotel Limited CA No 234/95**, the Court held:

“...judicial review is not concerned with private rights or the merits of the decision being challenged, but with 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.”

11. The applicant has sought orders of mandamus, prohibition and certiorari.

12. The circumstances to be established by the Applicant to obtain a writ of mandamus have been repeatedly stated by the courts. They are:

a) A clear legal right and a corresponding duty in the Respondent.

b) A specific act or thing which the law requires that particular officer to do has been omitted to be done by him.

c) Lack of any alternative remedy.

d) Whether the alternative remedy exists but is inconvenient, less beneficial or less effective or totally ineffective. See **Republic v**

Principal Secretary State Department of Interior, Ministry of Interior & Coordination of National Government & Principal Secretary ex parte Salim Awadh Salim & 12 others [2018] eKLR.

13. Certiorari and prohibition are designed to make the machinery of government operate according to law and public interest. While certiorari issues to quash decisions, which are ultra vires, arbitrary or oppressive, prohibition prohibits the happening of an act or the taking of some decision, which would be ultra vires. Certiorari thus is a remedy for something done in the past. Prohibition on the other hand is preventive as it prevents a future decision. A word about mandamus. Simply put the writ would issue to compel a statutory body such as the respondent to fulfil its statutory obligation. **(See Administrative Law, 5th Edition, HWR Wade).**

14. It is noted that the respondents did not file a rejoinder to the applicant's substantive notice of motion application. Even though no opposition was presented by the respondents, the applicant still bore the burden of proving the claims. The applicant vide his affidavit stated that the respondent had been duly issuing him with licenses right from the year 2011 up to 2016 and that it was only in 2017 that the respondent rejected the applicant's application for license and failed to accord him an opportunity to be heard before the rejection was made. As the application had been made in regard to the Alcoholic Drinks Control Act 2010, it was incumbent upon the 1st respondent to comply with the provisions of section 10(4) of the said Act namely to give reasons for rejection and notify the applicant or make comments and recommendations and return to the applicant within thirty days. It seems this was not done as can be seen from the 1st respondent's letter dated 20.3.2017 which directed the applicant to close his premises immediately. As the applicant was not invited to appear before the 1st respondent then it is clear that there was no fairness in the 1st respondent's process leading to the decision now challenged. This was against the clear provisions of the Fair Administrative Actions Act which requires that persons to be affected by administrative actions should be accorded the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. Under section 7(2) (b)&(c) of the said Act a court or tribunal may review and administrative action or decision if certain procedures prescribed were not complied with or if the action was procedurally unfair. Looking at the actions of the respondents it is clear that the applicant was not given a fair hearing. The respondents being public entities exercising public powers were expected to act in accordance with basic standards of legality, fairness and rationality. The applicant had faithfully submitted his application only to be informed vide a letter that his application was unsuccessful and on top of that he was ordered to close the premises forthwith. This was quite draconian in that the applicant had not even been accorded an opportunity to present his case and was thus condemned unheard. There was thus an abuse of discretion for denying the applicant an opportunity to defend himself and for failing to give reasons for the rejection of the applicant's application. If the respondents had been granting the applicant licenses since 2011 to 2016 then the sudden change of heart by the respondents speaks volumes and leaves no doubt that the actions of the respondents were laced by ulterior motives warranting this court to come to the aid of the applicant. It is noted that the respondents opted not to oppose the applicant's application which remains unopposed. I find that the application lodged by the applicant has met the threshold for grant of orders of mandamus, prohibition and certiorari. This only applies to the year in question namely 2017.

15. In the result it is my finding that the applicant's notice of motion dated 27.9.2017 has merit. The same is allowed as prayed and to be applicable to the year in question namely 2017.

It is so ordered.

Dated and delivered at **Machakos** this **29th** day of **July, 2020**.

D. K. Kemei

Judge