



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

JUDICIAL REVIEW NO.03 OF 2019

REPUBLIC.....APPLICANT

V E R S U S

THE SUB-COUNTY ADMINISTRATOR OL’KALOU SUB-COUNTY,

COUNTY GOVERNMENT OF NYANDARUA.....1ST RESPONDENT

THE CHIEF MAGISTRATE’S COURT AT NAKURU.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

THE O.C.S. MILANGINE POLICE STATION.....4TH RESPONDENT

EX-PARTE

FLORENCE NJERI KAMORE

T/A NYAKIO BAR.....APPLICANT

R U L I N G

1. By a Notice of Motion dated 4/6/2019, the Ex-parte applicant seeks orders:

i. An order of Certiorari to remove into the High Court for purpose of its being quashed the decision of the 1st respondent to close the applicant’s premises and the charge in Nakuru C.M. Cr. Case No.770 of 2019 Republic –versus- Florence Njeri Kamore.

ii. An order of Prohibition to remove into the High Court for the purposes of being prohibited the 4th respondent either by himself, his agents and/or anyone claiming under him from harassing, arresting the applicant and/or applicant’s employees and/or interfering with the smooth running of Nyakio Bar located at Kihuho Trading Centre, in Milangine Sub-County on account of the alcohol license for 2019.

iii. An order of Mandamus to remove in this court and compel the 4th respondent the to refund part of the applicant’s stock held by him as exhibits in Nakuru C.M. Cr. Case No.770 of 2019 Republic –versus- Florence Njeri Kamore as well as having been confiscated from the applicant.

iv. Costs of and incidental to the applicant be provided for and such further and other reliefs that the Court may deem just and expedient to grant.

2. The motion is supported by statutory statement dated 15/5/2019 and verifying affidavit of Florence Njeri Kamore sworn on 15/5/2019 and annexures thereto.

3. Upon service on the respondent, only respondent No.1 made an affidavit to oppose the application.

4. The Applicant and 1st Respondent agreed to converse the application via written submissions.

5. The applicant’s case is captured in his statutory statement dated 15/5/2019 page 13 listed as grounds upon which reliefs are sought:

6. The applicant has at all times material always operated Nyakio Bar Located at Kihuho Trading Centre in Milangine Sub-County

Nyandarua County as the proprietor.

7. The tenure of the Sub-County Committee tasked with the approval of applications for alcohol licenses and issuance of the same lapsed way in the year 2017 and no other Committee has been constituted in that regard.
8. Thus attempts to forward applications for 2019 licenses issuance has been met with rejection of the said applications by the 1st respondent on the same ground.
9. Thus the in the material date, there was no liquor licensing committee in place and therefore the reason as to why applicant did not have an alcohol license for the year 2019.
10. On or about 11th day of February, 2019, the applicant received a letter dated the same day from the 1st respondent suspending 'her license' with immediate effect pending the reconstitution of a liquor licensing Committee by the Governor, Nyandarua County Government.
11. The reasons for the said 'closure' were based on allegations that the applicant had continuously flouted the Nyandarua County Alcoholic Drinks Control Act, 2014 whereof the applicant was not given an opportunity to be heard either by way of a written response or personal attendance.
12. The said decision of the 1st respondent was made when there was no Sub-County Committee in place, and which committee is the only one with the power to make such a decision and hence the said decision of the 1st respondent was and is still ultra vires.
13. Thereafter, on the 6th day of March, 2019, the applicant was arrested and charged before the Nakuru Chief Magistrate's Court, in Criminal Case No.770 of 2019 Republic –versus- Florence Njeri Kamore for 'selling alcoholic drinks without a license Contrary to Section 37(1) of the Alcoholic Drinks Act to Section 20(1) of Alcoholic Drinks Control Act, No.4 of 2010.
14. The 4th respondent at the time of arrest collected assorted alcoholic drinks from the applicant's establishment as exhibits in the said criminal case and later confiscated a further part of the applicant's stock.
15. Ever since the date of the arrest, the applicant has not received any patrons for fear of their being arrested as they consume alcoholic drinks at her establishment.
16. The applicant also avers that she is also highly apprehensive that if she reopens her establishment, then a similar ordeal to that of the night of 6th March, 2019 may occur.
17. Failure by the County Government of Nyandarua to reconstitute Sub-County Liquor Licensing Committees and the 1st respondent's ultra vires decision would only be tantamount to slamming the doors of the applicant's establishment meaning no business for her this year and consequently no source of livelihood which would in effect subject her to hopelessness and/or financial embarrassment.
18. Subjecting the applicant to a prolonged trial on the said charge would, taking into account all the relevant factors and circumstances would be unjust, unreasonably expensive, and against the spirit and intentions of the administration of criminal law, justice, the Constitution of Kenya.
19. The 1st respondent rejoinder is captured in Replying Affidavit of Mungai K. Kiongo as summarized below: -
20. He depones that, his office received various complaints from the public that Area Chief and Assistant Chief of Milangine Area on the operation of the Applicant who operates a bar known as Nyakio.
21. That members of the public brought various complaints that the applicant was selling alcohol to underage children and despite the warning of the children's parents the applicant continued with the said activities.
22. That other complaints were that the applicant was harboring unscrupulous individuals who were carrying out crime and peddling drugs and that the applicant was selling alcohol in the morning hours contrary to the law.
23. That the applicant was duly warned by members of the public and the Local Administration in order to change its mode of operations to operate in a lawful manner but despite the several warnings the applicant chose not to heed to the said warnings.
24. That after the public outcry and the lack of change in behavior by the applicant my office decided to suspend the applicant's license in order to protect the interest of the public and carry out investigations on the allegations leveled against the applicant.
25. That the applicant's license was only suspended and not revoked and/or terminated in order to pave way for investigations to the allegations leveled by the members of the public and the local administration of the area against the applicant.
26. That the applicant was fully aware that after suspension she was entitled to write reasons to his office in order for his office to review the same.
27. That the applicant failed to appeal from the said decision by submitting her written reasons to explain the allegations leveled against her to his office as he is the chairman of the liquor licensing office by being the office holder of the 1st respondent.

28. That the applicant failed to exhaust all the internal remedies as provided for in the Nyandarua County Alcoholic Drinks Act, 2019 and filed this application prematurely in court.
29. That the decision to suspend the applicant was not beyond his powers as the applicant office holder of the 1st respondent as the Chairman of the Liquor Licensing Committee under Section 8(4) of the Nyandarua County Alcoholic Drinks Control Act.
30. The applicant and the respondent no 1 agreed to canvass the application via submissions which they filed and exchanged.
31. **Submissions by applicant:**
32. The applicant submits that, she was licensed as proprietor of her bar for the sale of alcoholic drinks by the County Government of Nyandarua.
33. That the closure notice issued by the 1st respondent and the suspension of the applicant's operating license thereof offended, mandatory provisions of the Nyandarua County Alcoholic Drinks Control Act No.1 of 2014 which provides that, upon receipt of the report against the applicant, the 1st respondent is obliged;
- “Send by registered post or other verifiable mode of dispatch a copy of the report to the applicant therewith, informing her that a meeting of the Sub-County Committee to be held on a date to be specified, but not more than thirty days therefrom, the report will be considered by the Sub-County Committee and there is evidence tabled before the Court to the contrary”*
34. Since as has been conceded by the 1st respondent in the said closure notice there was no Sub-County Committee constituted and/or reconstituted at the time as the case may have been then; No Sub-County Committee duly considered the report against the applicant or even heard the applicant and therefore thought fit to CANCEL the license of the applicant, or make such an order in respect of the applicant's license of the licensed premises as in its opinion necessary including the suspension of the applicant's license.
35. Therefore, the closure notice and suspension of the applicant's premises and license respectively having not been a decision of the Sub-County Alcoholic Drinks Regulation Committee was not appealable to the Nyandarua County Alcoholic Control Board whose term had actually lapsed and had not been reconstituted.
36. The actions of the 1st respondent of making a decision unilaterally amounted to assumption of authority that he did not have and therefore he usurped authority against the law.
37. Clearly, in view of Section 28(4) of the said Nyandarua Alcoholic Drinks Control Act No.1 of 2014, only decisions of the Sub-County Committee are appealable to the board.
38. The decision by the 1st respondent as a result of usurped authority can only be challenged before this Court which has a duty in law to tame overzealous public officers who usurp authority to the detriment of others.
39. The applicant urges Court to find that: the procedure as laid out in the Nyandarua County Alcoholic Drinks Control Act No.1 of 2014 as regards cancellation of a license such as the applicant's was not followed.
40. The 1st respondent usurped his authority by making a decision capable of being made only by a fully constituted Sub-County Alcoholic Drinks Regulations Committee.
41. A decision of the 1st respondent as a result of usurped authority was unlawful and hence the correct forum for the applicant to challenge the same is this Court.
42. Since the applicant was charged in Nakuru CM Criminal Case No.770 of 2019 Republic –vs- Florence Njeri Kamore as a result of the 1st respondent's said unlawful decision, and then the said charges were non-starter.
43. It is against the backdrop of submissions above that she urges the Court in exercise of its discretion, to QUASH the closure notice issued to the applicant by the 1st respondent dated the 11th February, 2019 and consequently QUASH the charge sheet in Nakuru CM Cr. Case No.770 of 2019, Republic –vs- Florence Njeri Kamore.
44. As a consequence of the above she also urges the Court to PROHIBIT the 4th respondent either by himself, his agents and/or anyone claiming under him from harassing, arresting the applicant and/or applicant's employees and/or interfering with the smooth running of Nyakio Bar located at Kihuho Trading Centre in Melangine Sub-County in account of the said alcohol license.
45. On Mandamus: the applicant at annexure 'FNK4' to her verifying affidavit has demonstrated what stock was taken away from her by way of an inventory duly signed by the applicant, the area chief, one inspector Julius Kiarie and another police officer Force No.87637.
46. The said inventory captures beers as well as wines and spirits and the same is not in dispute.
47. Thus she urges Court to grant the applicant an order of Mandamus compelling the 4th respondent to release the applicant's stock held by him as exhibits in Nakuru CM Cr. Case No.770 of 2019.

48. 1st Respondent Submissions:

49. The respondent submits that, the application herein has been filed prematurely and the same offends the doctrine of Exhaustion as the Ex-Parte Applicant has failed to Exhaust all available avenues provided under the Nyandarua County Alcoholic Drinks Control Act, 2014.

50. It is urged that, where there is an alternative remedy provided a litigant should not approach this Court for a remedy of Judicial Review without pursuing the remedies available under the statute.

51. This doctrine was recognized by the Court of Appeal in Speaker of National Assembly –vs- Karume

52. Section 8(4) Nyandarua County Alcoholic Drinks Control Act, 2014 provides:

53. The Sub-County Committee shall consist of – (a) Sub-County Administrator appointed under the County Government’s Act who shall be the Chairperson.

54. The Decision by the Sub-County Administrator, the 1st Respondent herein was made as the Chairman of the Sub-County Committee thus a decision of the Sub-County Committee and within the mandate provided for under Section 8(4) of the Nyandarua County Alcoholic Drinks Control Act, 2014.

55. This Court in Julia Wairimu Njuguna –vs- Mugai Kiongo & another [2019] eKLR when faced with the same predicament of the Sub-County Administrator making a decision in the absence of a Sub-County Committee held thus;

“Section 8(4) then provides for the Constitution of the Sub-County Administrator. It therefore follows that the decision made by the Respondent herein emanates from the Sub-County Committee Alcoholic Drinks Regulations Committee having been made by its Chairman. One of the functions of the Sub-Committee is to issue licenses and perform any other related functions”

56. From an examination of the above provisions, it is clear that the 1st respondent issued the closure notice as Chairman of the Sub-County Committee Alcoholic Drinks Regulations Committee which was within his mandate and his decision was appealable to the County Alcoholic Drinks Control Board under Section 4(2)(m) of the Act.

57. The Ex-parte Applicant ought to have approached the Nyandarua County Alcoholic Drinks Control Board to review the decision of the 1st respondent before pursuing this Court for a remedy. The Ex-parte applicant clearly by passed procedures of redress provided for by the Act and the same should not be allowed by this court

58. The Court of Appeal in Geoffrey Muthinja Kabiru & 2 others –vs- Samuel Munga Henry & 1756 others [2015] eKLR also rendered itself thus; “*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 for a 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.... This accords with Articles 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.*”

59. Also Section 9(2) of the Fair Administrations Act which provides:

” The High Court of a Subordinate court under sub-section (1) shall not review and all remedies is available under any other written law are first exhausted”

60. It is 1st respondent submissions that exparte applicant is not entitled to an order of certiorari for suspension of her license and the closure of her bar as the said decision by the 1st respondent was within its mandate and no principles of natural justice were breached.

61. 1st respondent is the Chairman of the Sub-County Committee and the decision was not ultra vires as alleged by the ex-parte applicant as extensively discussed in paragraphs 4, 5 and 6 above.

62. It is the 1st respondent’s submissions that the decision to suspend the Exparte applicant’s license of operations was not contrary to rules of natural justice and her rights to a fair hearing were not violated.

63. It is important for the court to note that the Sub-County Administrator the 1st respondent herein only suspended the exparte applicant’s license in order to pave way for investigations to the allegations leveled by the members of the public and the local administration of the area against the Ex-parte applicant. The ex-parte applicant’s license was not revoked and/or terminated. Reference is also made to annexure FNK 2 in the Ex-parte applicant’s affidavit.

64. The ex-parte applicant is the sole proprietor of an establishment known as Nyakio Bar, under which the office of the Sub-County Administrator Ol’Kalous Sub-County received various complainants from the Citizenry, the Area Chief and Assistant Chief of Milangine area of its operation.

65. That members of the pubic brought forth complaints of the applicant selling alcohol to underage children despite warning from the children’s parents, harboring unscrupulous individual who were carrying out criminal activities and drug peddling and that the applicant was selling alcohol contrary to legal provisions.

66. That despite several warnings from the public and the local administration to change their modus operandi to one of a lawful manner, the applicant chose to not take heed.

67. That the action taken by the Sub-County Administrator, the 1st respondent herein, was in the interim and in the best interest of the general public as well as the mandate provided for under Section 3(h) of the Act.

68. The 1st respondent place reliance on the case of *Eliud Nyauma Omwoyo & 2 others Kenyatta University [2014] eKLR* where Lenaola J. stated:

“As I understand it, under this principle, a decision to suspend investigation need not necessarily be made after formal hearing and that the rules of natural justice do not therefore apply. This argument has been backed up by various judicial decisions and in *Lewis –vs- Heffer and others [1978] 3 ALL ER 354*, Lord Denning observed thus;

When suspension was made as a holding operation pending inquiries the rules of natural justice did not apply because the suspension was a matter of good administration”

69. Respondent no 1 concludes that, it is evidently clear that the 1st respondent decision to suspend the exparte applicant’s license and close her establishment was within its powers and the same was only to pave way for investigations and the same was not final. No principles of natural justice were contravened thus the ex-parte applicant is not entitled to the orders of certiorari as sought.

70. Issues analysis and determination:

71. After going through the record, pleadings, affidavits and parties’ submissions, I find the issues are:

72. *Whether the application is premature for failure to exploit the doctrine of exhaustion prior to lodging matters in court?*

i. Whether orders sought are merited?

ii. What is the order as to the costs?

On the issue of doctrine for exhaustion, section 9 (2) of Fair Administrative Action Act, states that; High court or subordinate courts “..... Shall not review Administrative action or decision, unless mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

73. In a letter dated 11/2/2019, the 1st respondent stated that “..... your operating license is hereby suspended with immediate effect pending re-constitution of Liquor Licensing Committee.” This means there was no Sub-County Alcoholic Drinks Regulations Committee as provided by Section 8(1) of Nyandarua County Drinks Control Act of 2014 (NCDCA) which was mandated to issue licenses in accordance with the said act and may perform other functions as may from time to time be assigned to it by the Governor.

74. Section 8(1) a & b under Section 28(4) of the said Act, a person aggrieved by the decision of the committee decision appeals to the board.

75. 2) There is no provision in the said act where the respondent is mandated to act the way he did in furtherance of the provisions of the Act herein.

76. There is no provision of law where the acts of the 1st respondent are shown to be subject to the County Alcoholic Drinks Control Board.

77. The 1st respondent does concede that the said committee had not been re-constituted as at the time of the closure of applicant bar thus he was not the committee nor was there provisions for delegation of committees’ mandate to the 1st respondent.

78. The applicant raised issues that the board aforesaid was also not constituted thus there was no existence of mode of statutory institutions prescribed by the act herein to activate the redress the applicant complaint other than via judicial process as preferred by the applicant. Thus, the doctrine of Exhaustion was not available in the instant matter.

In the matter of *Services for the Development of Bachelor of Laws (LLB) curriculum – Applicant Vs Public Procurement Administrative Review Exparte – South Eastern Kenya University and Another – I.P*

The court held that ultra vires principle is based on the assumption that Judicial Review is legitimated on the grounds that the courts are applying the intent of the legislature.....

The courts function is to police the boundaries stipulated by the parliament. Ultra vires principle is used to achieve this.....

Certiorari is issued to Quash a decision that is ultra vires.

79. The acts of the 1st respondent were clearly not provided by the act herein thus the 1st respondent acted without legal authority to so act on behalf of the un-constituted committee.

80. Thus the acts of the 1st respondent were ultra vires.

81. Under Section 15(3)(b) of the act a license under the Act a license under the Act expires every 31st December of the year. The applicant concedes in her affidavit that she did not have a license for the year 2019, which would have allowed the operation of the bar.

82. Thus she faces the charges under the provisions of Section 37(1) of the Alcoholic Drinks Control Act No.4 of 2010 (Selling Alcoholic Drinks without license), section 20(1) of the same act (Failure to Display Liquor License) as an alternative charge.

83.. The reasons given for that omission are supposed to be adduced in the course of the trial. Thus this court does not find any justification for interfering with the criminal proceedings instituted in *Nakuru Cr.No.770/2019 – Republic –vs- herself*.

84. In the premise, the only limb which succeeds is that the 1st respondent decision of 11/2/2019 is ultra vires and thus null and void and the court thus quashes the same.

85. All the other sought reliefs are unmerited.

86. The court thus makes the following orders;

i. The 1st respondent decision of 11/2/2019 is ultra vires and thus null and void and the court thus quashes the same.

ii. All the other sought reliefs are denied.

iii. No orders as to costs

Dated, Signed and Delivered at NYAHURURU this 24th day of November, 2020.

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CHARLES KARIUKI

JUDGE

PRESENT:

Henry: Court Assistant

Maina K. holding brief for Mathea for applicant

Khomu for 1st Respondent

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