REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL. APPLICATION NO. 142 OF 2019

IN THE MATTER OF APPLICATION BY PETER ODOYO AND STANLEY KINYANJUI

AS THE CHAIRMAN AND SECRETARY RESPECTIVELY OF OUTDOOR ADVERTISING

ASSOCIATION OF KENYA FOR ORDERS OF *CERTIORARI, MANDAMUS*

AND *PROHIBITION* AND DECLARATION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010, THE CIVIL PROCEDURE ACT,

CAP 21, LAWS OF KENYA, THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND THE BETTING, LOTTERIES AND GAMING ACT, CAP 131, LAWS OF KENYA

AND

IN THE MATTER OF OUTDOOR ADVERTISING ASSOCIATION OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

NAIROBI COUNTY GOVERNMENT.....2ND RESPONDENT

AND

OUTDOOR ADVERTISING ASSOCIATION OF KENYA.....*EX PARTE* APPLICANT

JUDGMENT

The parties.

1. The *ex parte* applicant is an association registered under the Societies Act.[1] It is an umbrella body comprising of over twenty-five outdoor advertising companies and it's goal is to lobby for the best interests of its members involved in the outdoor advertising industry in Kenya.

2. The first Respondent is a Board established under section 3 of the Betting, Lotteries and Gaming Act[2] (herein after referred to as the

Act). It is responsible for regulating betting, lotteries and gaming activities through formulation and issuance of policy guidelines.

3. The second Respondent, the Nairobi County Government, within the meaning of Article 176 of the Constitution.

The prayers sought

4. By an application dated **14th** May 2019, the *ex parte* applicant seeks the following orders:-

> *a) An order of **certiorari,** to quash the first Respondent's directive made on 30th April 2019 and 2nd May 2019 banning outdoor advertising of gambling, and, stating that it must approve any form of advertisement of gambling; and, that, such an advertisement must contain a warning message about the consequence of gambling, and its addictiveness which must constitute a third of the actual advertisement and be of the same font.*
>
> *b) An order of prohibition, prohibiting the implementation of the first Respondent's directive made on 30th April 2019 and the communication made on 2nd May 2019 to the effect that the first Respondent had banned outdoor advertising of gambling and that any form of advertisement of gambling must contain a warning message about the consequences of gambling and its addictiveness, which must constitute a third of the actual advertisement and be of the same font.*
>
> *c) Costs of the application.*

Factual basis of the application.

5. The *ex parte* applicant states that on 30th April 2019, the first Respondent issued a directive to the effect that it had banned outdoor advertising of gambling, advertising of gambling on all social media platforms, advertising gambling between 6am and 10pm and endorsement of gambling operations by celebrities.

6. The *ex parte* applicant also states that the first Respondent also directed that it must approve any form of advertisement, and decreed that, any such advertisement must contain a warning message about the consequences of gambling and its addictiveness, which must constitute a third of the actual advertisement and be of the same font. In addition, it directed that the requirement is to be complied with on or before 30th May 2019.

7. The *ex parte* applicant states that on 2th May 2019, the Ministry of Interior and Coordination of National Government, under which the first Respondent operates, issued a press statement referring to unspecified regulations, which are to take effect immediately, banning outdoor advertisements of gambling.

8. The *ex parte* applicant's avers that betting companies contribute a substantial amount of revenue to the outdoor advertising industry, and that, some of its members have existing contracts and obligations to various betting companies, hence, they stand to suffer irreparable loss.

Legal foundation of the application.

9. The *ex parte* applicant argues that outdoor advertising is controlled by the County Governments, under Part 2 (3) of the Fourth Schedule to the Constitution, which exercises the said function under the Physical Planning Act[3] and the County laws enacted pursuant to section 5 (2) (c) of the County Governments Act.[4]

10. The *ex parte* applicant also states that Betting, Lotteries and Gaming is controlled by the first Respondent whose powers are set out under section 4 of the Act, which functions are limited to issuance of licenses and permits, variation and suspension or cancellation of licenses and permits and inquiry into complaints against licenses or permit holders.

11. The *ex parte* applicant challenges the legality of the impugned decision on grounds that:-

> *a) **That** it was made without and in excess of authority given to the first Respondent under the Act;*
>
> *b) **That** the power of control and regulation of outdoor advertising is a statutory power exercised on the basis of legislation and not ad hoc pronouncements;*
>
> *c) **That** the power of approval of outdoor advertising is given to and exercised by the County Government and not the first Respondent;*
>
> *d) **That** there has been no legislation either by Parliament or any County Assembly outlawing outdoor advertising of betting, lotteries and gaming;*
>
> *e) **That** the power of the Cabinet Secretary of the Ministry of Interior and Coordination of National Government to make regulations under section 70 of the Betting, Lotteries and Gaming Act is limited to procedural aspects under the act, manner of advertisement of an application for a licence or permit, manner and form of filing statements of accounts and securing the payment of any fee; and*
>
> *f) **That** the Cabinet Secretary does not have authority under the Betting, Lotteries and Gaming Act to make regulations in respect of outdoor advertising of betting, lotteries and gaming.*

12. The *ex parte* applicant also challenges the impugned decision on grounds of irrationality and unreasonableness stating that:-

> *a. The decision is intended to penalize a lawful activity;*
>
> *b. The decision prescribed the manner of placement of outdoor advertisements without justifying the reasons for the same;*
>
> *c. The decision prohibits outdoor advertising with immediate effect and yet it purports to invite views from stakeholders of the outdoor advertising industry, on a decision that has already been made.*

13. In addition, the *ex parte* applicant argues that the decision is flout with procedural impropriety because:-

> *a. The decision seeks to limit the right of advertisers in respect of betting, lotteries and gaming without reasonable justification; and*
>
> *b. That the decision seeks to limit the rights of outdoor advertisements in respect to betting, lotteries and gaming without affording them the right to be heard and participate as required by Article 10, 50(1) and 232 (d) of the Constitution and section 115 of the County Governments Act.*

The Respondents' failure to file Responses and/or attend hearing.

14. On 14th May 2017, when this matter came up in court *inter partes* for grant of leave, there was no appearance on behalf of the first Respondent despite, though despite having been served with court papers. Mr. Wanda, Advocate, represented the second Respondent. He informed the court that he was not ready to proceed, since he had been instructed the previous day. He requested time to file a response.

15. The court granted the *ex parte* applicant the leave sought to commence judicial review proceedings and directed that the substantive application once filed, be served upon all the Respondents, and, upon service, the respondents were required to file their responses within three days from the date of service. The court fixed the matter for 21st May 2019.

16. However, on 21st May 2019, there was no appearance on behalf of both Respondents. An affidavit of service dated 16th May 2019 confirmed that service had been effected upon the first Respondent and that the firm of Meritad Law Africa LLP on record for the second Respondent. In addition, the date was taken in the presence of counsel for the second Respondent Mr. Wanda, Advocate.

17. None of the Respondents filed a Response to the application; hence, the case was undefended.

Issues for determination

18. Upon analysing the material presented in court, I find that the following issues fall for determination:-

> ***a. Whether the impugned decision is tainted with illegality.***
>
> ***b. Whether the impugned decision is tainted with unreasonableness and irrationality***
>
> ***c. Whether the impugned decision is tainted with procedural impropriety.***

a. Whether the impugned decision is tainted with illegality.

19. Mr. Havi, learned counsel for the *ex parte* applicant argued that the first Respondent, an administrative body established pursuant to section 3 of the act must exercise its powers within the four corners of the enabling statute. He submitted that section 7 (2) (a) (ii) of the Fair Administrative Action Act[5] grants powers to the court to review an administrative action if the decision maker acts in excess of jurisdiction.

20. He argued that the first Respondent does not have powers under the act to control, regulate or ban outdoor advertising of gambling, which power is expressly donated to County Governments under Part 2(3) of the Fourth Schedule to the Constitution. To buttress his argument, he cited a paragraph in Halsbury's Laws of England,[6] which reads as follows:-

> *"the duty of the court is to confine itself to the question of legality. Its concern is with whether a decision making authority exceeded its powers, committed an errors of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached or abused its powers."*

21. In addition, he relied on *Republic v National Hospital Fund Board of Management & Another ex parte Law Society of Kenya*[7] where the court held *inter alia* that "the most obvious example of illegality is where a body or a government official acts beyond the powers which are prescribed for it. In other words, it acts *ultra vires."* Citing *David Kimani Karogo v Thika Land Disputes Tribunal & 2 Others*,[8] counsel argued that a decision made in excess of jurisdiction is not only illegal, but it is null and void *ab initio*.

22. He submitted that on 2nd May 2019, the Ministry of Interior and Co-ordination of National Government issued a press statement communicating the making of unspecified regulations by the first Respondent, taking effect immediately banning outdoor advertising of

gambling. He contended that the Ministry has power to make regulations, but section 70 of the act limits the scope and extent of the regulations to procedural aspects under the act, manner of advertisement of an application for a license or permit, manner and form of filing statements of accounts and securing payment of any fee. It was his position that the Respondent has no power to make unspecified regulations referred to in the press statement of 2nd May 2019; hence, the Regulations are patently illegal.

23. In addition, counsel submitted that the unspecified Regulations do not comply with the provisions of sections 5 and 11(4) of the Statutory Instruments Act[9]. Citing *Cabinet Secretary for Transport & Infrastructure & 5 Others ex parte Kenya Country Bus Owners Assocostion & 8 Others*[10] and *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 Others ex parte Council of County Governors & Another**[11]* counsel submitted that absence of Parliamentary scrutiny renders a statutory instrument null and void.

24. The *ex parte* applicant's argument on the illegality of the impugned decision as I discern it understand is twofold. *First*, he argued that the first Respondent acted outside its statutory mandate. *Second,* which the Regulations were enacted in manner that offends the provisions of the Statutory Instruments Act.[12] I will address these two grounds sequentially.

25. *First,* public bodies, no matter how well intentioned, can only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decisions to stand, it must be grounded on the law.

26. As such, the Respondents actions must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle, which, is inextricably linked to the rule of law. Guidance can be obtained from *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another**[13]* where the court held as follows:-

> *"(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law"*

27. The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, the first Respondent is constrained by that doctrine to enforce the law by ensuring that its decisions conform to the enabling provisions of the law.

28. The Constitution is the point of reference in any determination. Article 186(1) of the Constitution provides that except as otherwise provided by the Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule. Section **4**, part **2** of the fourth schedule to the Constitution provides that the functions and powers of the county are- **(4)** Cultural activities, public entertainment and amenities including- **(a)** betting, casinos and other forms of gambling;

29. The above section expressly confers betting, casinos and other forms of gambling to the County governments. A clear reading of the provision leaves me with no doubt that the function in question has not been conferred upon the Ministry of Interior and Co-ordination of National Government.

30. Section 70 of the Act which confers powers to the Minister to make Regulations reads as follows:-

> ***70. Regulations***
>
> *The Minister may, after consultation with the Board, make regulations generally for the better carrying out of the purposes and provisions of this Act, and, without prejudice to the foregoing generality, any such regulations may provide for—*
>
> *a. the procedure to be followed by the Board in exercising any powers conferred upon it by this Act;*
>
> *b. the procedure to be followed in the making of an application for the issue, renewal or variation of a licence or permit issued under this Act;*
>
> *c. the advertisement of an application for a licence or permit under this Act and of proceedings of the Board to consider and determine any such application;*
>
> *d. the right of a person interested to object to an application for the issue, renewal or variation of a licence or permit under this Act, and for the form and manner of any such objection;*
>
> *e. the form and manner in which returns or statements of accounts shall be furnished to the Board;*
>
> *f. securing the payment of any fee.*

31. Two consequences flow from the provisions of the Sixth Schedule to the Constitution and section 70 cited above. *One,* the Constitution confers the function in question upon the County Governments. Differently stated, it is a devolved function. Two, section 70 of the Act cited above does not provide for outdoor advertisements of gambling, or advertisements in the social media nor does is provide for the form or manner of advertising. The only relevant provision is section 70 (c) of the Act, which provides for "*the advertisement of an application for a licence or permit under this Act and of proceedings of the Board to consider and determine any such application."* As this provision suggests, it only relates to advertisement of an application for a license or permit under the act.

32. An administrative decision is flawed if it is illegal. A decision is illegal if it: - **(a)** contravenes or exceeds the terms of the power which

authorizes the making of the decision; **(b)** pursues an objective other than that for which the power to make the decision was conferred; **(c)** is not authorized by any power; **(d)** contravenes or fails to implement a public duty.

33. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies and tribunals to act within the ‘‘four corners’’ of their powers or duties. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

34. Safeguarding legality is the most important purpose for the judicial review of administrative actions. Thus, in most administrative law systems, a person seeking judicial review of an administrative decision must be able to persuade the court that there are grounds for review in order for the legality of the administrative decision to be judicially challenged. In one sense, there must always be the premise of “want of legality.” This is because any administrative decision-making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures.

35. The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as administrators comply with these two rules, their decisions are safe. From the perspective of administrators and statutory bodies, this fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision or decisions rendered by government Ministers can be judicially challenged on grounds that the administrative decision does not comply with the basic requirements of legality.

36. The most obvious example of illegality is where a body acts beyond the powers, which are prescribed for it. In other words, it acts *ultra vires*. Decisions taken for improper purposes may also be illegal. Illegality also extends to circumstances where the decision-maker misdirects itself in law. When exercising a discretionary power, a decision-maker may take into account a range of lawful considerations. If the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court will normally find that the power had been exercised illegally.

37. The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second issue that can be argued under illegality is fettering discretion. This heading for judicial review entails considering whether an administrative body actually exercised the power it has, or whether because of some policy it has adopted, it has in effect failed to exercise its powers as required. In general terms the courts accept that it is legitimate for public authorities to formulate policies that are ‘legally relevant of their powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust.’ An illegality can also occur where a body exercised a power, which was within its functions but exceeded the scope of power that is legally conferred to it. Also relevant is the concept ‘error of law’ that is mainly concerned with the erroneous applications of the law.

38. Two critical issues flow from the foregoing section. *First,* whether the impugned decision can be read in a manner consistent with the provisions of law conferring the power to the Ministry of Interior and Co-ordination of National Government. *Second,* judicial oversight is necessary to ensure that decisions are taken in a manner, which is lawful, reasonable, rational and procedurally fair.[14] What matters is to establish whether the decision was taken in a manner, which is lawful, reasonable, rational and procedurally fair.

39. The power of the court to review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. The action or decision complained of must conform to the statutory provisions and must pass the Constitutional muster.***[15]***

40. A clear reading of the provisions of the section 4 of the sixth Schedule, and the entire section 70 the Act leave me with no doubt that the function in question is vested upon the second Respondent and not the Ministry. It follows that the impugned decision(s) contained in the letter dated 30th April 2019 signed by a one Liti Wambua and the communication dated Thursday May 2nd 2019 lack legal basis, hence, it is *ultra vires* and therefore null and void. It is tainted with illegality. It cannot stand court scrutiny.

41. *Second,* the other ground of assault propounded by the applicant under the question of illegality is that the Regulations were enacted in a manner that was inconsistent with the provisions of the Statutory Instruments Act.[16]

42. The first issue is to establish whether the “directive” communicated in the letter dated 30th April 2019 and the “Regulations” referred to in the press release dated Thursday May 2nd, 2019 are statutory instruments within the ambit of the Statutory Instruments Act.[17]

43. Section **2** of the Statutory Instruments Act[18] and the Standing Orders of the both houses of Parliament define Statutory Instrument as:-

> *any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.*

44. The letter dated 30th April 2019 is a directive as the last sentence suggests. The first paragraph of the letter confirms that the Board is a Regulator. Simply put, the communication is a Regulation. In addition, the press release dated 2nd May 2019 refers to Regulations. It is evident that the impugned decision communicated in the said documents falls squarely within the above definition, hence, it is a statutory intrument.

45. Statutory Instruments are prepared by the Cabinet Secretary, or a body with powers to make them, e.g. a Commission, authority or a

Board. The law is that Statutory Instruments must conform to the Constitution, Interpretation and General Provisions Act,[19] The Parent Act, The Statutory Instruments Act.[20] The Statutory Instruments Act[21] requires:- **(a)** consultation with stakeholders, **(b)** preparation of regulatory Impact Statement,[22] preparation of explanation memorandum, tabling of statutory instrument in the House,[23] consideration of the statutory instrument by the National Assembly,[24] Committee on Delegated Legislation.

46. Section **13** of the Act provides for guidelines for the committee. These guidelines focus on the principles of good governance and the Rule of Law. The Committee considers whether the Statutory Instrument conforms with the Constitution, the parent Act or other written laws. It considers whether it infringes the Bill of Rights or contains a matter that ought to be dealt with by an act of Parliament. It also considers whether it contains taxation, directly or indirectly bars the jurisdiction of the courts. The Committee also considers whether the instrument gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power. It is required to consider whether it involves expenditure from the Consolidated Fund or other public revenues. The Committee must consider whether the instrument is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation or appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made.

47. In addition, the Committee considers whether the instrument appears to have had unjustifiable delay in its publication, or laying before Parliament. It also considers whether it makes rights, liberties or obligations unduly dependent upon non-reviewable decisions; or makes rights liberties or obligations unduly dependent insufficiently defined administrative powers. It also considers whether it inappropriately delegates legislative powers; or imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation. Further, the Committee is required to consider if it appears for any reason to infringe on the rule of law; inadequately subjects the exercise of legislative power to parliamentary scrutiny; and accords to any other reason that the Committee considers fit to examine. The criteria set out in Section **13** is replicated in Parliamentary Standing Order number **210 (3)** on the procedure for considering statutory instruments.

48. Also relevant is section **15 (2)** of the act provides that where the Committee of Delegated Legislation does not table its report within **28** days following the date of referral of the Statutory Instrument or such other period as the House may, by a resolution approve, the statutory instrument shall be deemed to have fully met the relevant considerations referred to in Section **13.**

49. As stated above, the impugned decision(s) fall within the ambit of the definition of Statutory Instruments contemplated in section 3 of the act cited above. It is a constitutional and statutory imperative that the above requirements must be complied with before the decision is operationalized.

50. It is trite that a Regulation must conform to the Constitution in terms of both its content and the manner in which it is adopted. Failure to comply with manner and form requirements in enacting Regulations renders the decision invalid. Courts have the power to declare such Regulations invalid. This court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. In addition, if the conditions for law-making processes have not been complied with, it is the duty of the court to say so and declare the resulting statute, Regulations, or Rules invalid.[25] Accordingly, I find and hold that the impugned decision was adopted in a manner inconsistent with the constitutional and statutory requirements. The moment violation of the Constitution or breach of a statutory requirement becomes evident as in this case, the rebuttable presumption of constitutionality of a statute or a Regulation ceases to operate.

b. Whether the impugned decision is tainted with unreasonableness and irrationality

51. The *ex parte* applicant's counsel cited three reasons and argued that the impugned decision is irrational and unreasonable. *First*, he argued that the decision intends to penalize a lawful activity. *Second*, it prescribes the manner of placement of outdoor advertisement of gambling without justifying the reasons for the same. *Third*, it prohibits outdoor advertising of gambling with immediate effect and yet it purports to invite views from stakeholders on a decision that has already been made. Counsel cited *Republic v National Hospital Insurance Fund Board*[26]for the proposition that the standard of reasonableness must be the standard indicated by the true construction of the statute. He argued that no reasonable decision maker could arrive at the impugned decision, and, that, the decision falls outside the possible justifiable outcomes a decision maker properly directing his mind to the law and facts can reasonably arrive.

52. 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.

53. A power is exercised fraudulently if its repository intends 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.

54. Reasonableness, within the context administrative law cannot be imbued with a single meaning.[27] Pillay states that the first element of a reasonable administrative action is rationality, and the second is proportionality. Rationality means that evidence and information must support a decision an administrator takes.[28] Hoexter explains that the purpose of rationality is to avoid an imbalance between the adverse and beneficial effects and to consider using less drastic means to achieve the desired goal.[29]

55. It is common ground that unreasonableness and irrationality are grounds for Judicial Review. Rationality, as a ground for the Review of an administrative action is dealt with in Section **7(2) (i)** of Fair Administrative Action[30] which provides that:-" *A court or tribunal under subsection (1) may review an administrative action or decision, if- (i) the administrative action or decision is not rationally connected to- a) the purpose for which it was taken; (b) the purpose of the empowering provision;(c) the information before the administrator; or (d) the reasons given for it by the administrator*."

56. The test for rationality was stated by Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* as follows:-***[31]***

> "*The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."*

57. In the application of that test, the reviewing court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at.[32]

58. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the Fair Administrative Action Act.[33] A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout was whether the decision in question was one, which a reasonable authority could reach. The converse was described by Lord Diplock[34] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.' Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the decision maker has struck a balance fairly and reasonably open to him.[35]

59. The court notes the contents of the press release dated 2nd May 2019 stating that the regulations take effect immediately, yet, the meeting scheduled for 20th May 2019 was meant to discuss "Regulations" that would have taken effect, which counsel for the ex parte applicant said it was unreasonable.

60. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *"objectively so devoid of any plausible justification that no reasonable body of persons could have reached it****[36]*** and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[37]This stringent test has been applied in Australia[38] where the Court held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt and when "looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them." Given the facts of this case, I am not persuaded that a different person properly addressing himself to the same facts and circumstances could have arrived at the same decision.

61. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law.

62. The following propositions can offer guidance on what constitutes unreasonableness:-

> *i. Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;*
>
> *ii. This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ;*
>
> *iii. The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it;*

63. If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

64. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[39]

65. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference, or where the decision maker failed to apply his mind to the matter.

66. Contextualizing the impugned decision with the circumstances under which it was made leads me to the irresistible conclusion this is a proper case for judicial interference.

c. Whether the impugned decision is tainted with procedural impropriety.

67. Citing *Republic v National Hospital Insurance Fund Board*,[40] counsel faulted the decision on grounds of procedural impropriety. He argued that the procedure prescribed in the statute was not followed. He argued that they were not afforded the opportunity to be heard as

stipulated in Articles 10, 50 (1) and 232(d) and section 115 of the County Governments Act.[41] He also cited section 7(2) (c) of the Fair Administrative Action Act[42] which grants the court power to review a decision on grounds of procedural unfairness.

68. A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not followed or if the "rules of natural justice' are not adhered to. Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.

69. There are three broad bases on which a decision maker may owe a duty to exercise its functions in accordance with fair procedures. *First*, legislation or another legal instrument which gives a decision making power may impose a duty to follow specific procedures. The requirements relating to procedure contained in the statute or other instrument must be complied with. However, failure to comply with required procedures does not automatically mean that the decision which follows is invalid. The courts take a range of factors into account in deciding whether or not to nullify a decision.

70. The term *procedural impropriety* was used by Lord Diplock in the House of Lords decision *Council of Civil Service Unions v. Minister for the Civil Service**[43]*** to explain that a public authority could be acting *ultra vires* (that is, beyond the power given to it by statute) if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of judicial review, the other two being illegality and irrationality.[44]

71. Procedural impropriety generally encompasses two things: procedural *ultra vires*, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness.[45] Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice," is a form of procedural impropriety.[46]

72. The common law rules of natural justice consist of two pillars: impartiality (the rule against bias, or *nemo judex in causa sua* – "no one should be a judge in his own cause") and fair hearing (the right to be heard, or *audi alteram partem* – "hear the other side").[47] The rule against bias divides bias into three categories: actual bias, imputed bias and apparent bias. More recent case law from the UK tends to refer to a duty of public authorities to act fairly rather than to natural justice. One aspect of such a duty is the obligation on authorities in some cases to give effect to procedural legitimate expectations. These are underpinned by the notion that a party that is or will be affected by a decision can expect that he or she will be consulted by the decision-maker before the decision is taken.[48]

73. In recent years, the common law relating to Judicial Review of administrative action based on procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness", have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.[49] That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such a one that the person appealing has not had his case properly considered by the decision maker.

74. Article **47** of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[50]Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[51]Each of these prescriptions fit the recognized grounds for judicial review of administrative actions.

75. In *Local Government Board v. Arlidge,**[52]*** Viscount Haldane observed, *"...those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal (or body) whose duty it is to meet out justice."*

76. The constitution recognizes a duty to accord a person procedural fairness when a decision is made that affects a person's rights, interests or legitimate expectations.[53] *Review power of the court is no longer grounded in the common law, and therefore susceptible to being restricted or ousted by legislation. Instead, the Constitution itself has conferred fundamental rights to administrative justice and through the doctrine of constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of 'constitutionalizing' what had previously been common law grounds of Judicial Review of administrative action. This means that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action or adjudication of a refusal of a request to provide reasons for administrative actions involves the direct application of the constitution.**[54]***

77. Procedural fairness contemplated by Article **47** and the Fair Administrative Action Act[55] demands a right to be heard before a decision affecting ones right is made. Whether or not a person was given a fair hearing of his case will depend on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. In the most recent edition of De Smith's Judicial Review of Administrative Action, it is asserted:- "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."[56]

78. Upon applying the legal principles discussed above to the facts and circumstances of this case, I find that the impugned decision was adopted in a manner that was procedurally unfair. I find no difficulty in concluding that the *ex parte* applicant has demonstrated the existence procedural impropriety in the manner in which the decision was arrived at.

Disposition

79. The grant of the orders of *Certiorari*, *Mandamus* and *Prohibition* is discretionary. The court is entitled to take into account the nature of the process against which Judicial Review is sought, and satisfy itself that there is reasonable basis to justify the orders sought.

80. *Certiorari* is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed – that is to say, it is declared invalid. The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers, and, must be kept within their legal bounds.[57]

81. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation.

82. Applying the above tests to the facts and circumstances of this case, and in view of my findings herein above, I hold that the *ex parte* applicant has satisfied the conditions for granting the orders sought. It follows that there is sound basis for the court to grant the Judicial Review orders of *Certiorari* and *Prohibition.*

83. Accordingly, I find and hold that the *ex parte* applicant's application succeeds. The upshot is that the *ex parte* applicant's Notice of Motion dated **14th** May 2019 succeeds. I find that the appropriate orders to grant in the circumstances of this case are as follows:-

> *a) A **declaration** be and is hereby issued declaring that the first Respondent's directive dated 30th April 2019 and the communication made on 2th May 2019 are null and void on grounds that they are tainted with illegality, irrationality, unreasonableness and procedural impropriety.*
>
> *b) A **declaration** is issued declaring that the Regulations and or policy communicated in the first Respondent's letter dated 30th April 2019 and the communication made on 2th May 2019 are null and void on grounds that the purported Regulations and or policy were adopted and or promulgated in a manner that is inconsistent with the Constitution and the Statutory Instruments Act.*
>
> *c) An order of **certiorari** be and is hereby issued quashing the first Respondent's directive made on 30th April 2019 and the communication made on 2nd May 2019 banning outdoor advertising of gambling, and, stating it must approve form of advertisement of gambling; and, that, such an advertisement must contain a warning message about the consequence of gambling, and, its addictiveness, which must constitute a third of the actual advertisement and be of the same font.*
>
> *g) An order of prohibition, be and is hereby issued prohibiting the implementation of the first Respondent's directive made on 30th April 2019 and the communication made on 2nd May 2019 to the effect that the first Respondent had banned outdoor advertising of gambling and that any form of advertisement of gambling must contain a warning message about the consequences of gambling and its addictiveness, which must constitute a third of the actual advertisement and be of the same font.*
>
> *h) Costs of the application.*

Orders accordingly

Signed, Dated and Delivered at Nairobi this 28th day of May 2019.

John M. Mativo

Judge.

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[1] Cap 108, Laws of Kenya.

[2] Cap 131, Laws of Kenya.

[3] Act No. 6 of 1996.

[4] Act No. 17 of 2012.

[5] Act No. 4 of 2015.

[6] 4th Edition, 2001, Re-issue.

[7] {2019} e KLR.

[8] {2017} e KLR at page 41.

[9] Act No. 23 of 2013.

[10] {2014} e KLR.

[11] {2017} e KLR.

[12] Act No. 23 of 2013.

[13] (CCT51/05) [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) (28 July 2006).

[14] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others* {2011} JOL 28061 (ECG) para 11

[15] See *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano* JR No 17 B of 2015.

[16] Act No. 23 of 2013.

[17] Act No. 23 of 2013.

[18]Supra

[19]Cap 2, Laws of Kenya

[20] Supra

[21] Act No. 23 of 2013.

[22]Sections **6,7,** & **8** of the Act

[23] Section 11.

[24] Standing Order number 210.

[25]See *Doctors for life International v Speaker of the National Assembly & Others* (CCT12/05) {2006}.

[26]Supra.

[27] Hoexter, C. 2007. *Administrative law in South Africa.* Cape Town: Juta.

[28] Pillay, A. 2005. Reviewing reasonableness: an appropriate standard for evaluating state action and inaction? *South African Law Journal*, 122(2): 419-439.

[29] Supra Note 62.

[30] Act No. 4 of 2015.

[31] 2000 (4) SA 674 *(CC)* at page 708; paragraph 86.

[32] In *Trinity Broadcasting (Ciskei) v ICA of* SA, 2004(3) SA 346 (SCA) at 354H- 355A, Howie P

[33] Act No. 4 of 2015.

[34] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

[35]Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd,* {1995} 1 All ER 129 (HL) at 157.

[36] See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821].

[37] *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.

[38] In *Prasad v Minister for Immigration* {1985} 6 FCR 155.

[39] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.

[40] Ibid.

[41] Act No. 17 of 2012.

[42] Act No. 4 of 2015.

[43] *Council of Civil Service Unions v. Minister for the Civil Service* [1984] UKHL 9, [1985] 1 A.C. 374, House of Lords (UK).

[44] Ibid.

[45] *Peter Leyland; Gordon Anthony (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness", Textbook on Administrative Law (6th ed.), Oxford: Oxford University Press, pp. 342–360 at 331, ISBN 978-0-19-921776-2*.

[46] Supra, note 18.

[47] Supra, Note 20, at p 342.

[48] Ibid, page 313.

[49] David J. Mullan, *Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?* http://www.lawjournal.mcgill.ca/userfiles/other/6927003-mullan.pdf.

[50] Article 47(1) of the Constitution.

[51] Article 47(2) of the Constitution.

[52] {1915} AC 120 (138) HL.

[53] *Kioa v West* (1985), Mason J.

[54] *I*n the South African Case *Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others, Chaskalson, J (CCT) 31/99) [2000] ZACC 1; 2000 (2) ZA 674.*

[55] Act No. 4 of 2015.

[56] See S. De Smith, *Judicial Review ofAdministrativeAction*,4th ed. J. Evans (1980), 352- 4.

[57] H.W.R. Wade & C.F. Forsyth, *Administrative Law*, Eighth Edition, p. 591.