



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

PETITION NO. 2 OF 2019

IN THE MATTER OF ARTICLES 22 (1), 23 AND 165 (3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULES 4, 8, 10 AND 11 OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF CONTRAVENTION AND OR ALLEGED CONTRAVENTION

OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLE 47 OF THE

CONSTITUTION OF KENYA

AND IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT NO. 4 OF 2015

AND

IN THE MATTER OF BARINGO COUNTY ALCOHOLIC DRINKS CONTROL ACT, 2014

BETWEEN

EVANS CHELAGAT YATICH.....PETITIONER

VERSUS

BARINGO NORTH SUB-COUNTY

ALCOHOLIC DRINKS COMMITTEE.....1ST RESPONDENT

BARINGO COUNTY GOVERNMENT.....2ND RESPONDENT

RULING

1. This is a ruling on a Preliminary Objection taken by the respondents to the Petition dated 7th June 2019 and Notice of Motion of the same date made there-under seeking orders as follows:

“ORDERS:

1. **THAT** this application be certified urgent and service thereof be dispensed with in the first instance as the object of this application will be defeated unless the application is heard expeditiously.

2. **THAT** the Respondents be restrained jointly and severally, either acting on their own and or through its agents, employees, servants, National Police Service and or any other person acting and purporting to act under their instructions from closing and/or interfering with Petitioner's 'Sokee bar' situated in Kabartonjo and 'Temwe bar' situated at Kureshun, pending the hearing and determination of this application.

3. **THAT** the Respondents be restrained jointly and severally, either acting on their own and or through its agents, employees, servants, National Police Service and or any other person acting or purporting to act under their instructions from closing and/or interfering with Petitioner's 'Sokee bar' situated in Kabartonjo and 'Temwe bar' situated in Kabartonjo and 'Temwe bar' situated at Kureshun, pending the hearing and determination of the present Petition.

4. The costs of this Application be awarded to the Applicant.”

2. The petitioner set out his cause of action at paragraphs 4-12 of the Petition dated 7th June 2019 as follows:

4. **THAT** the Petitioner met all the statutory conditions required for issuance of a liquor license during the entire period for which he has operated his bars.

5. **THAT** the Petitioner further met all conditions set forth by the new liquor licensing regime introduced in the County in 2010 vide the Alcoholic Drinks Control Act 2010 and the Alcoholic Drinks Control (Licensing) Regulations 2010 and was issued with liquor licenses for the period between 2010 to 2018.

6. **THAT** upon expiry of the liquor license on 31st December 2018, the Petitioner applied to the 1st Respondent for renewal of the same but his applications did not elicit any sought of response from the 1st Respondent until 21st February 2019 when the petitioner abruptly received closure notices from the 1st Respondent.

7. **THAT** the Petitioner received closure notice from officers of the 2nd respondent and that notice stated that, following inspection and vetting by the 1st Respondent, the Petitioner's application for liquor licensing for the year 2019 had been disallowed for having not met the requirements and further stated that his bars were due for closure within 3 months of the notice.

8. **THAT** though the Baringo County Alcoholic Drinks Control Act, 2014 requires the 1st Respondent to afford an applicant for liquor licensing, a hearing, the petitioner was not afforded any hearing contrary to the provisions of the Act and rules of natural justice, particularly, when the 1st Respondent on its own motion objected to his applications for liquor licensing and disallowed the same.

9. **THAT** the Respondents failed to carry out their duties as stipulated under the Baringo Alcohol Drinks Control Act, 2014 and more specifically if failed and or refused to:

i. Establish the Sub County Alcoholic Drinks Regulation Committee as stipulated under Section 9 (3) of Baringo Alcoholic Drinks Control Act, 2014.

ii. Constitute the County Alcoholic Drinks Regulation Administrative Review Committee as stipulated in Section 10 of Baringo Alcoholic Drinks Control Act, 2014.

iii. Publish the names of the Applicants within twenty one (21) days as stipulated in Section 11 (3) of Baringo Alcoholic Drinks Control Act, 2014.

iv. Publish the names of the Applicants at the Sub County Administrator's office.

v. Post the names of the applicants at a conspicuous place at or near the Applicant's premises.

vi. Sent the list of applicants to the Inspector General of Police, Sub County Public Health Officer, Sub County Physical Planning Officer, Deputy County Commissioner or County Executive Committee.

vii. **THAT** the Sub County Administrator arrogated himself powers and sat as an appellate body of his decision to refuse to grant licence.

viii. **THAT** furthermore, the 1st Respondent did not give sufficient reasons for disallowing the Petitioner's applications for liquor licensing.

ix. **THAT** the Petitioner avers that the acts by the 1st Respondent infringed his Constitutional right to Fair Administrative Action as enshrined in Article 47 of the Constitution of Kenya.”

3. The Petitioner supported his case by an Affidavit sworn on 7th June 2019 as follows:

3. **THAT** I own and operate Sokee bar at Kabartonjo town and Temwee bar in Kureshun within Baringo North Sub-County, Baringo County.

4. **THAT** I have business permits issued by the 2nd Respondent to engage in the business of selling alcohol. Annexed hereto and marked **ECY 1a and b** is a copy of Baringo County Single Business permit for the year 2018 issued to the petitioner.
5. **THAT** further to obtaining business permits from the 2nd Respondent, I have since 2010, when the new alcohol licensing regime changed in the Country, complied with all the statutory requirements of the Alcoholic Drinks Control Act, 2010. Annexed and marked **ECY2 – 6** copies of Alcoholic Drink Licence for the year 2010 to date issued to the Petitioner.
6. **THAT** I applied for liquor licences for the year 2019 under the Baringo County Alcoholic Drinks Control Act, 2014.
7. **THAT** I verily believe that I fully met the conditions for issuance of liquor licence as set out in the Baringo County Alcoholic Drinks Control Act, 2014 and moreover my respective premises are fit for the storage and sale of alcohol having been certified so, vide the respective licences I hold issued pursuant to the Food, Drugs and Chemical Substances Act (Food Hygiene) Regulations. Annexed and marked **ECY7** is a copy of the said licence.
8. **THAT** I received closure notice on 21st February 2019 from officers of the 2nd respondent and that notice stated that, following inspection and vetting by the 1st Respondent my application for liquor licensing for the year 2019 had been disallowed for having not met the statutory requirements and further stated that my bars were due for closure within 90 days of the notice.
9. **THAT** I am advised by my advocates on record, which advice I verily believe to be true, that though the Baringo County Alcoholic Drinks Control Act, 2014 requires the 1st Respondent to afford an applicant for liquor licensing, a hearing, I was not afforded any hearing contrary to the provisions of the Act and rules of natural justice, particularly, when the 1st Respondent on its own motion objected to my applications for liquor licensing and disallowed the same. Annexed and marked **ECY8 a and b** is a copy of the Closure Notice.
10. **THAT** furthermore, the 1st Respondent did not give sufficient reasons for disallowing my application for liquor licensing. The closure notices served upon me only stated that my application had been disallowed for security issues, public interest and public health recommendations.
11. **THAT** upon receipt of the Closure Notice I immediately lodged an appeal on the 5th March 2019 and was surprised on 28th of May 2019 when I appeared before the Appeals Committee to find that the Sub County Administrator was the Chairman. (Annexed herewith and marked **ECY9 a and b** is a copy of the application for Appeal.
12. **THAT** the Closure Notice was issued by the Sub County Administrator and I was surprised that he was the Chairperson of the Appellate body that was reviewing his previous decision.
13. **THAT** I am apprehensive that I will not find justice considering that the same Sub County Administrator who rejected my application was the same person hearing my appeal.
14. **THAT** the Appellate body was not properly constituted since it has the Sub County Administrator as Chairman, DAPC, Revenue Clerk and Public Health officer contrary to the clear provisions of the law.
15. **THAT** the responsibility of providing security is a national government function and I have supplemented government efforts by employing security guards and bouncers at my premises.
16. **THAT** with regard to public interest I was not issued with copies of objections to the issuance of a liquor Licence as stipulated under Section 11 (6) of the Baringo County Alcoholic Drinks Control, Act, 2014.
17. **THAT** the responsibility of maintaining public cleanliness rests with the 2nd Respondent and my responsibility is with regard to my premises which I have dutifully maintained.
18. **THAT** I was never granted an opportunity to defend my application or fact the persons who had raised objections (if any) which is contrary to principles of natural justice, Fair Administrative Act and the Constitution of Kenya.
19. **THAT** I was unfairly treated and discriminated by the Respondents since they granted licence to some applicants like one at Bartolimo which is less than Twenty (20) metres from a school or another one in Kapkiamo which is not near any security installation.
20. **THAT** all the licences that were issued in Kabartonjo are in one building which building is in the major highway unlike my bar which is in the second avenue which is less busy and not near any school.
21. **THAT** my bars are near District Headquarters and, Sub County Kenya Police, and Administration Police headquarters.
22. **THAT** the foregoing I aver that the acts by the 1st Respondent infringed my constitution right to fair administrative action as enshrined in article 47 of the Constitution of Kenya, Fair Administrative Act, in that I was not invited to participate in the hearing of the application for the licenses and as especially when presumably the 1st Respondent on its own motion raised an objection to my application, because I was never served with an objection as required by the Baringo County Alcoholic Drinks Control Act, 2014.

23. **THAT** I should have been afforded an opportunity to be heard and given sufficient reasons for the rejection of our applications for liquor licenses.

24. **THAT** therefore the 1st Respondent infringed our constitutional right to Fair Administrative Action under Article 47 of the Constitution of Kenya.”

4. The Notice of Preliminary Objection dated 18th July 2019 made by the Respondents was as follows:

“NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE THAT the 1st and 2nd Respondents shall at the hearing of the Petitioners Notice of Motion Application dated 7th June 2019 raise a Preliminary Objection on a point of law on the following points:

1. The Applicant’s Application and Petition is defective, frivolous and incompetent as this Court has no jurisdiction to entertain the matter.

2. That the Application and Petition Offends provisions of Section 5, 7 and 8 of the Fair Administrative Action Act No. 4 of 2015.

3. The Application and the Petition Offends Section 19 of the Baringo County Alcoholic Drinks Control Act, 2014.”

5. The Respondents further filed a Replying Affidavit sworn by the Chairman of the 1st respondents on 23rd July 2019 setting out its response to the facts set out in the Constitutional Petition and Notice of Motion of 7th June 2019.

6. By its directions made on 24th September 2019, the court directed that the Preliminary Objection be heard and determined first on 8th October 2019 and ruling was reserved..

Submissions by the parties

7. Counsel for the parties filed written submissions respectively dated which they highlighted before the court in oral argument as follows:

“Mr Kibet for Mr Nyingi for Petitioner.

Mr Kiptoon for Respondents

Mr Kiptoon for the Respondents

Preliminary Objection dated 18/7/19. It is against the Petition and the application itself.

Petition is abuse of process.

Whether the 1st and 2nd Respondent are public bodies.

1st Respondent is established under the County Act. 2nd Respondent established under the Constitution.

The 1st and 2nd Respondent are public bodies subject of Fair Administrative Action.

Petition seeks prayers best sought by Judicial Review.

Procedures have not been exhausted. I refer to 9 (1) of the Baringo County Alcoholic Drinks Act. There is procedure for appeal to the County Revenue Committee. The procedure was not exhausted. It is an abuse of the court process.

*A party must exhaust the alternative procedure. I refer to **Moses Kuria Njuguna v. County Government of Kiambu** (2019) eKLR.*

Nature of prayers sought seeking to restrain a public body from performing their functions. The only way to seek redress is by Judicial Review, which has a special procedure.

Section 18 of the Baringo County Alcoholic Drinks Act, a party is not prohibited from seeking remedy else. The court contemplated in the Act is a Judicial Review Court and a Constitutional Court.

Petition offends section 5, 7 8 of the Fair Administration Act. The Petition has also cited Article 47 of the Constitution which is enforced by Fair Administrative Action Act of 2015.

The Petitioner’s prayer falls for not invoking the Judicial Review procedure as the challenges the procedure of the decision.

I rely on Petition no. 6 of 2019 **Teresa Cheruiyot t/a Cool Shade Bar v. County Chair Liquor licensing Committee - Uasin Gishu County & 3 Ors.** per Githinji, J. that the case was premature.

We pray for a finding that the case is not properly before the court.

Authorities by the applicant are all from a Judicial Review court. The Petitioner appreciates that proper court is a Judicial Review court.

This court has no jurisdiction to entertain the matter. It should down its tools, we pray that the court strikes out the matter with costs.

I rely on **M/V Lilian "S"** (1989) KLR 1 cited in **Peter Kabete v. Jacob Mwathi** (2017) eKLR.

Mr Kibet for the Petitioner

I have considered the Preliminary Objection - exhaustion of the internal mechanism. I refer to section 17, 18 of Baringo County Alcoholic Drinks Control Act. Applicant can appeal to County Review Committee. **The Review Committee does not exist.** The Replying Affidavit only states that the applicant should go to Review Committee.

We require evidence of the existence of the Committee.

Paragraph 11 Supporting Affidavit. the Petitioner states that when served with closure notice, he filed an appeal which is attached. The same committee that heard the application. The applicant came to court when it realized that it was the same committee.

The applicant has complied with Act section 19 of the Act notwithstanding section 17, there is procedure for approaching the court. The applicant's licence had been refused and he filed the proceedings. The Baringo Act does not define the court as Judicial Review or Constitutional court. The Fair Administrative Action Act, section 7 specifically states that any person may approach the court through Judicial Review. If the Baringo Act wished to provide Judicial Review, it would have said so.

Judicial Review is governed by section 8 & 9 of law Reform Act and order 53 Civil Procedure Rules. One can only seek Prohibition, Mandamus and certiorari. The Constitution of Kenya Article 47 provides for Fair Administrative Action Act. Section 11 of the Act lists the orders that one can seeks in Judicial Review. They are 10 in number declaration of rights, prohibition certiorari. Mandamus and compensation.

Petitioner in this matter seeks a declaration. Such a prayer cannot be granted in Judicial Review. The only way the applicant could approach is the Petition.

The jurisdiction to grant damages and compensation is not settled in the Country. **R v. Baringo Central Alcoholic Committee** (2018) eKLR, damages was awarded because Judicial Review was consolidated with a Petition, otherwise, damages would not have been awarded.

I refer to **KRA & 2 Ors. v. Darasa Investments Ltd.** (2018) eKLR at page 9. Citing Karanja JA. paragraph 49 Judicial Review remedies are not available where facts are disputed.

The facts are disputed where there is a Baringo County Review Committee. Is the Petitioner setting second generation alcohol. Is the Petitioner near a school? Whether there is discrimination. Only a Petition can resolve the disputed facts including visit by court.

I have considered the decision of **Teresa Cheruiyot**, (2019) e KLR. The facts of the Petition are different. The applicants did not attempt the internal mechanism and at page 5 second last paragraph, the court said that there was no proof that the avenues had been exhausted or attempted.

The Petitioner followed the procedure. The Respondent went to hear an appeal for their own case.

Mr. Kiptoon for the Respondents in reply

Appeal "ECY 9A" and B are not appeal. It is addressed to the chairman of the Sub-committee. The body of the letter is that they have complied with the claims. **It is not an appeal.** An appeal challenges the decision.

Prayers

Prayer (b)-(g) are Judicial Review reliefs. Only prayer (a) of the Petition seeks a declaration that the committee is improperly constituted. That is process which is the province of Judicial Review. Null and void refers to the decision of the committee. It is a challenge on the process.

Baringo County Review Committee exists. He did not appeal to the Review Committee. If he alleges that it is not there, he should have asked for its constitution by way of Mandamus.

Damages

The prayer seeks the quashing of the decision of the committee. The prayer seeks certiorari and prohibition looking at the body of the Petition. Damages is a secondary issue. It is not a primary issue in their prayers.

Prayers sought cannot be granted by this court. This court has no jurisdiction.

Section 11 of Fair Administration Action Act. Prayers by Petition falls under the province of Fair Administration Action Act.

Section 17 of Baringo Alcoholic Drinks Control Act. Appeal to the court. The court has not been stated in section 19. The Act is to be read with the Fair Administrative Action Act and Constitution of Kenya.

The court contemplated under section 19 is the Judicial Review Court.

The Petitioners did not follow the procedure to appeal from the decision of the committee. The prayers are Judicial Review prayers. Let the matter be heard in the right forum.”

Issues for determination

8. The issues before the Court, therefore, are-

a. Whether the petitioner has exhausted the internal dispute resolution mechanism of the Baringo County Alcoholic Drinks Control Act, 2014; and

b. Whether the court will take up jurisdiction over the matter despite failure of the petitioner to comply with or exhaust the internal dispute resolution mechanism, if that be the case.

9. The merits of the case are not before the court at this stage of determination of the Preliminary Objection which is argued on the basis that the facts as set out by the petitioner/applicant are correct. See *Mukisa Biscuits Co. Ltd. v. West-End Distributors Ltd.* (1969) EA 696.

Determination

10. Section 9 of the Fair Administrative Action Act, 2015 provides as follows:

“9. (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) 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.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.”

11. Sections 17, 18 and 19 of the Baringo County Alcoholic Drinks Control Act 2014 provides for the mechanism of resolution of disputes through review, application and appeal as follows:

“17. (1) An applicant whose application for a new licence, to renew or transfer a licence has been refused or cancelled may within fourteen days of such refusal, **request in writing the review of such refusal to the [sub] County Review Committee.**

(2) A person aggrieved by the decision of the Sub-County Committee to grant a new licence or to renew a licence may **request in writing the review of such decision.**

(3) Upon receipt of a request under this section, **the County Review Committee shall notify the Sub-County Committee of the pending review.**

(4) The County Review Committee shall within twenty-one days consider and make a final determination on the request for review.

(5) The County Review Committee may-

(a) **dismiss the request for review** in its opinion, the request is frivolous or vexatious;

(b) **uphold the decision of the Sub-County committee;**

(c) **annul the decision of the sub-County committee**

(d) **give directions** to the sub-County committee with respect to any action to be taken;

(e) **make any other declaration** as it may deem fit.

18. The right to request for review under section 17 does not prohibit a person from seeking any other legal remedy a person may have.

19. (1) Notwithstanding section 17, an applicant whose application for a new licence, to renew or transfer a licence has been refused may within twenty-one days of such refusal appeal against such refusal to Court.

(2) An applicant under section 17 who is not satisfied with the decision of the County Review Committee may within twenty-one days appeal to the High Court.?

12. There are five (5) procedure for the correction of a decision by the licencing committee and or challenging a refusal of a licence as follows:

i. Request for review in writing to Sub-County Committee

ii. Request for review of the decision of Sub-County Review Committee to the County review Committee

iii. **Application to court under any other available procedure**

iv. Appeal within 21 days **from a refusal of licence** from a decision under section 17 of the Baringo Alcoholic Drinks Control Act; and

v. Appeal within 21 days **from the decision of the County Review Committee.**

13. All the above avenues for the resolution of the dispute are, however, subject to the overarching provisions of the Fair administrative Action Act, 2015 enacted pursuant to Article 47 (3) to give effect to the right to Fair Administrative Action under Article 47(1) of the Constitution.

14. In the *Speaker of the National Assembly v. James Njenga Karume* [1992] eKLR, (2008) 1 KLR (EP) 428, it is established as a constitutional principle that-

“where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

15. The petitioner herein cannot complain of breach of right to Fair Administrative Action when he has himself refused to follow the statutory mechanism for the resolution of his grievance. He should file an appeal from the decision of the 1st respondent or the appeal committee therefrom by way of judicial review proceedings under the Fair Administrative Act. While there, the Court shall grant relief if it determines, as I held in *ex Stephen Cheptoo*, that “*the County [has performed] its duty in an illegal, ultra vires manner and in breach of the applicants’ constitutional right to Fair Administrative Action.*”

16. If the complaint is that the review committee was not properly constituted, that is a ground of appeal in accordance with section 17 and 19 of the Baringo County Alcoholic Drinks Control Act or an application under section 18 thereof, whether of judicial review or constitutional reference, as the litigant may be advised by his legal advisors. The only condition is that section 9 of the Fair Administration Act be complied with in exhausting the internal statutory remedies or seeking exemption from that requirement thereunder.

17. In *Republic v Baringo County Government & another; Stephen K. Cheptoo & 8 others (Ex Parte Applicants)* [2018] eKLR cited by the Petitioner, this court set out the duty the 1st respondent herein to consider the grant of licences as follows:

Conclusion

42. *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.*

43. For the breach of their constitutional right to fair administrative action, the applicants are entitled to a remedy in damages under Article 23 (3) (e) of the Constitution. Although damages are not available under the judicial review procedure adopted in *Kabarnet HC. Misc. Appl. (JR) No. 4 of 2017* (formerly *Nakuru HC. Misc. Appl. No. 11 of 2015*), the act of consolidation with *Kabarnet HC Constitutional Petition No. 7 of 2017* (formerly *Nakuru HC Petition No. 5 of 2016*) by order of the Court (Kimondo, J.) made on 8th February 2017 makes available for the *ex parte* applicants in the Judicial Review the same remedies as are available to the applicants in the constitutional application under Article 22 of the Constitution, for which the remedy of damages is available under Article 23 (3) (e) of the Constitution.

44. As the applicants' businesses are already closed, the court does not exercise the respondent County's authority and discretion to allow operations and grant licences under the Alcoholic Drinks Control Act. That is a matter for the County to determine upon suitable applications therefor by the applicants.

45. The Court only holds that the refusal of licences and decision for the closure of the businesses, which was the subject of the present litigation was illegal, *ultra vires*, null and void. It does not, however, hold that the licences should have been granted or that the businesses should not have been closed upon due process.

46. The businesses having already been closed on the impugned decision of the County, the judicial review order of Prohibition sought in Petition is not available as what was sought to be prohibited has already occurred. Similarly, the order for *Mandamus* to compel the grant of the 2015 licence sought in the Judicial Review application is also overtaken by events and time, and not available. To be sure the Petition and the Judicial Review cases were only transferred to *Kabarnet* after the order of consolidation of 8th February 2017 long after expiry of the validity period of the relevant 2015 licences.

47. The applicants are at liberty in accordance with the law to apply for fresh licences, and the County Government is under a duty under its relevant Act to consider such applications for licence, and that exercise may only become the subject of litigation if the County performs its duty in an illegal, *ultra vires* manner and in breach of the applicants' constitutional right to fair administrative action.

48. For the breach of the fair administrative action right of the applicants by the decision and acts challenged herein, the court will award each applicant in the suits the sum of **Ksh.500,000/-** in damages."

18. In seeking to circumvent the requirement to exhaust internal dispute resolution mechanism, the petitioner in Counsel's submissions dated 17th September 2019 urged that Article 159 (2) of the Constitution required the court to be guided by the principle that "*justice shall be administered without undue regard to procedural technicalities*" citing ***Bremer Vulcan Schiffbar and Maschinen Fabrick v. South Indian Shipping Corporation Ltd.*** (1981) AC 909 on the constitutional role of the court "to prevent its powers from being abused in a such a way as to diminish its capability to arrive at a just decision on the dispute, and the dicta of Apaloo, J. in ***Philip Chemwolo & Anor. v. Augustine Kubende*** (1982-88) KAR 1040 quoted in ***Republic v. The Speaker of Nairobi County Assembly & Anor. ex parte Evans Kidero*** [2017] eKLR that-

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of jhis case not being heard on merit. I think the sound equity approach to this matter is that unless there is fraud or intention to overreach, there is no error that cannot be put right by payment of costs. The court as it is often said exists for the purpose of deciding rights of parties and not the purpose of imposing discipline."

19. With respect, the principle that 'a mistake is a mistake' was cited in a matter for extension of time to file the substantive Notice of Motion within the prescribed 21 days upon grant of leave under Order 53 of the Civil Procedure Rules.

20. The mistake or error in this present matter is not one capable of remedy by payment of costs. It is an antecedent failure to comply with a statutory requirement for exhaustion of internal dispute resolution mechanism, which may only be excused by the court in exceptional circumstances upon "***an application by the applicant***" under section 9 (4) of the Fair Administration Action Act set out above. I respectfully agree with Githinji, J. in ***Teresa Cheruiyot t/a Cool Shade Bar & 4 Ors. v. The County Chairman Liquor Licensing Committee – Uasin Gishu & 4 Ors.*** (2019) eKLR when dealing with the case before him said-

"In the absence of proof that any of these avenues have been exhausted let alone attempted (e.g. an appeal in writing as per the Uasin Gishu Alcoholic Drinks Control Act or a request in writing to review the decisions), I find that the petition is premature and the Preliminary Objection is merited."

The same in this case!

21. If there was or will be need for extension of time, the arguments put forward in ***Republic v. The Speaker of Nairobi County Assembly & Anor. ex parte Evans Kidero*** [2017] eKLR, relied on by the applicant may avail him in that regard. In the decision, Aburili, J. held, properly in my view, that the Court had jurisdiction to extend the period prescribed under Order 53 of the Civil Procedure Rules for the filing of the substantive Notice of Motion upon grant of leave by the Court, as follows:

"53. In my humble view, therefore, I find that Order 50 Rule 6 of the Civil Procedure Rules on enlargement of time under the rules is applicable to Judicial Review applications contemplated in Order 53 Rule 3 of the Civil Procedure Rules and even if it was not so, this court retains its inherent power to extend the time limited by Order 53 Rule (3), as a strict application of the rule would not be a legitimate restriction on the right of access to justice which is a constitutional right stipulated in Article 48 of the Constitution."

22. However, there being no application before the court for such extension of time and or showing of exceptional circumstances in terms of section 9 (4) of the Fair Administration Act, the same must await a suitable occasion and proceedings. I would only observe as held in **Kenya Revenue Authority & 2 Ors. v. Darasa Investments Limited** [2018] eKLR that it is “a settled principle that judicial review remedies are not available where fact are disputed”. I would readily acknowledge that whether or not there exists in fact a Review Committee as contested between the parties is a matter of fact. However, in approaching the court, the applicant is required by section 9(4) of the Fair Administrative Action act to exhaust the internal statutory machinery except where exemption in exceptional cases is granted on application.

23. I appreciate the Meoli, J.’s recalling in **Moses Kuria Njuguna v. County Government of Kiambu** [2018] eKLR of Lord Diplock’s admonition in **Harrissoon** case against making every legal claim a constitutional issue, as follows:

“34. An exhortation issued in the judgment of Lord Diplock in **Harrissoon v Attorney General of Trinidad and Tobago** [1980] AC 265 which is cited by superior courts in this jurisdiction is also relevant here:-

“The notion that whenever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by... the Constitution is fallacious. The right to apply to the High Court ... for redress when any human right or fundamental freedom is or is likely to be contravened, is diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action ... the mere allegation that a human right of the Applicant has been or is likely to be contravened is not itself sufficient to entitle the Applicant to invoke the jurisdiction of the Court... if it is apparent that the allegation is frivolous, vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”(emphasis added)

24. Obviously, in filing the proceedings as a constitutional petition the petitioner aimed to recover damages as prayed in Prayer No. (f) of the Petition as “**compensation for infringement of petitioner’s right and losses suffered by the petitioner as a result of the respondents’ actions.**” The same is, however, not ripe for recovery in these proceedings which must be rejected for being premature by failure to exhaust all internal statutory dispute resolution mechanism.

Conclusion

25. For failure to comply with statutory mechanism under the Baringo County Alcoholic Drinks Control Act for the redress of the petitioner’s grievance in relation to rejection of a licence under the Act and having not sought, or demonstrated any exceptional circumstances as to call for, leave of Court for exemption from the requirement to exhaust the statutory mechanism under section 9(4) of the Fair Administrative Action Act, the Petitioner’s suit is incompetent and the same is struck out in its entirety.

26. However, in view of the public element in challenging the exercise by the respondents on a statutory duty, there shall be no order as to costs.

Orders

27. Accordingly, for the reasons set out above, the petition and Notice of Motion both dated 7th June 2019 are dismissed with no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 21ST DAY OF NOVEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Nyingi Wanjiru & Co. Advocates for the Petitioner.

M/S Kiptoon & Co. Advocates for the 1st and 2nd Respondents.