



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KABARNET
JUDICIAL REVIEW APPLICATION NO. 1 OF 2019
IN THE MATTER OF THE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW FOR ORDERS OF
CETIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF ALCOHOLIC DRINKS CONTROL ACT, 2010

AND

IN THE MATTER OF BARINGO ALCOHOLIC DRINKS CONTROL ACT 2014

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF SECTION 5 (1) AND 11 STATUTORY INSTRUMENTS ACT

AND

IN THE MATTER OF ARTICLE 10 OF THE CONSTITUTION

BETWEEN

SOLOMON CHUCHU RUIRU & 4 OTHERS.....EX-PARTE APPLICANTS

AND

ELDAMA- RAVINE ALCOHOLIC DRINKS

CONTROL COMMITTEE & ANOTHER.....RESPONDENTS

JUDGMENT

1. By a Notice of Motion dated 2nd July 2019 upon leave granted by the Court (Olga Sewe, J.) on 12th June 2019, the ex parte applicants seek the following orders:

“NOTICE OF MOTION

a) THAT an order of certiorari to remove to this Honorable Court, for the purpose of quashing, the decision of the Eldama-Ravine Alcoholic Drinks Regulation Committee, the last respondent, contained in the letters all dated 24th April 2019 addressed to all the ex-applicants by the said 1st Respondent.

b) THAT an order of prohibition be issued prohibiting the 1st respondent and the 2nd respondent by themselves, their agents, workers, employees, servants and other National Government or County Government officials or agencies from closing and/or interfering with the operations of all the ex-parte applicants licenses as follows:

- a) 1ST APPLICANT (SOLOMON CHUCHU RUIRU) STAGE BAR, ELDAMA RAVINE
- b) 2ND APPLICANT (LABAN CHELANGA KIPTUM) SANDO BAR, ELDAMA-RAVINE
- c) 3RD APPLICANT (LILIAN AYAPAR) – LIWA STOCKIST, ELDAMA RAVINE
- d) 4TH APPLICANT (STEPHEN NJIHIA NDUMIA) SUNLIGHT RAVINE BAR
- e) 5TH APPLICANT (EMMANUEL KOSKE MALAKWEN) MWANANCHI BAR, ELDAMA RAVINE)
- f) THAT an order of Mandamus compelling the 1st respondent to withdraw its decision contained in its letters dated 24th April 2019 and unconditionally renew all the applicant's Liquor Licenses for the year 2019.
- g) THAT a declaration that the designation of the area adjacent to Eldama Ravine bus stage and market as alcohol outlets free zone is ultra-vires the law, hence null and void.
- h) THAT the costs of this application be provided for.”

2. The application was based on grounds set out in the Statement of Facts dated 13th May 2019 and filed together with the application of leave as follows:

“C) GROUNDS ON WHICH THE RELIEFS ARE SOUGHT:

- 2. THAT the applicants were not given an opportunity to be heard before the decision contained in the said letters of 24th April 2019 was arrived at contrary to the rules of natural justice.
- 3. THAT the designation of the area adjacent to Eldama-Ravine bus stage as an Alcoholic free outlet zone was mad without the knowledge and/or participation of the applicants who were directly affected by the said designation having been operating in the said zone for a long time.
- 4. THAT the designation aforesaid was ultra vires the above mentioned Acts.
- 5. THAT the applicants are not aware and were not made aware of the area and extent of the bust stage or alcoholic outlets free zone to enable them respond.
- 6. THAT the decision of the 1st respondent were discriminative, selective, capricious, mischievous, unreasonable malicious and was made Mala fides.
- 7. THAT the said decisions were made without regard for fair administrative action and against the doctrine or principle of legitimate expectation.
- 8. THAT if leave and stay sought are not granted the applicants will suffer irreparable loss and damage.”

3. The application was supported the verifying affidavit of the 1st applicant as follows:

“AFFIDAVIT VERIFYING FACTS

I, SOLOMON CHUCHU RUIRU a resident of Eldama Ravine and care of Post Office Box 338 ELDAMA RAVINE hereby sincerely and conscientiously make oath and state as follows:

- 1. THAT I am the 1st applicant herein and a male adult of sound mind.
- 2. THAT my true place of abode is within Eldama – Ravine Township.
- 3. THAT I have the authority of the other applicants to swear this affidavit on my own behalf and theirs hence competent to do so.
- 4. THAT the letter of authority from the other applicants has been filed contemporaneously with the filing of this application.
- 5. THAT during the year 2018 and prior to that, I was licensed to operate a Liquor Bar business known as Stage Bar at Eldama – Ravine (annexed hereto are copies of supporting documents marked as indicated:

- a) Single business permit for the year 2016 issued by the 2nd respondent marked exhibit SGR 1.

b) Letter dated 20th January 2017 addressed to me by the 2nd respondent and signed by the 1st marked SGR 2.

c) Single business permit for the year 2017 issued to me by the 2nd respondent marked exhibit SGR3.

d) Single business permit for 2018 issued to me by the 2nd respondent, marked exhibit SGR4.

6. THAT also during the year 2018 and prior thereto the 2nd, 4th and 5th applicants were licensed to carry on the business of selling liquor on their Eldama Ravine Bar premises known as Sando Bar, Sunlight Ravine Bar and Mwananchi Bar respectively, annexed hereto are bundles of copies of documents marked as follows:

a) Previous liquor bar business permit marked exhibit SGR 5 for the 2nd applicant in respect of his Sando Bar, Eldama-Ravine.

b) Previous liquor bar business permit marked bundle exhibit SGR 6 for the 4th applicant in respect of his Sunlight Ravine Bar.

c) Previous liquor bar business permit marked exhibit SGR 7 for the 5th applicant in respect of his Mwananchi Bar Eldama-Ravine.

7. THAT the 3rd applicant was on the other hand licensed as Liwa stockist to carry out the business of liquor stockist or wholesaler to sell such liquor at and not on the premises (annexed hereto are copies of the 3rd applicants previously licences marked exhibit bundle SGR 8.

8. THAT towards the end of the year 2018, all the applicants made their respective applications for renewal of their respective Bar licences or stockist licences.

9. THAT none of the applicants were invited or made aware of the 1st respondents meeting or meeting in which the applicant's applications for renewal of their respective licences were rejected.

10. THAT it was therefore a surprise for the applicants to receive the letters dated 24th April 2019 communicate the 1st respondents decision not to renew the applicants licences – annexed hereto are copies of the said letters marked as follows:

(a) Letter to the 1st applicant marked exhibit SGR 9

(b) Letter to the 2nd applicant marked exhibit SGR 10

(c) Letter to the 3rd applicant marked exhibit SGR 11

(d) Letter to the 4th applicant marked exhibit SGR 12

(d) Letter to the 5th applicant marked exhibit SGR 13

11. THAT the common denominator in rejecting the applications for renewal of the applicants licences were that all the applicants liquor business were situated in an area adjacent to Eldama-Ravine Bus stage and Market which was designated as Alcoholic Outlets free zone.

12. THAT the applicants were not aware of the said designation and the same was made without the knowledge, participation and/or consultation more so when we were already making a living therefrom in future.

13. THAT the 3rd applicant has been a liquor stockist or wholesaler and sells liquor at and not on the premises and therefore the requirement for fulfillment of sanitary or toilet conditions do not arise hence the decision not to renew her license was unreasonable as well as the caveat against the carrying of a whole business from a container.

14. THAT further the area designated as Alcohol outlets free zone is ambiguous and the area so covered was and has not been made known to the applicants.

15. THAT the applicants are apprehensive that the decision by the 1st respondent to refuse to renew their respective licences is discriminative, unreasonable and oppressive as other businesses both general and liquor were not affected.

16. THAT in any case the applicants businesses are not harmful to market operators and travellers as their businesses open at 5:00 pm when the market is about to be closed and travellers are by then minimal; and for the 3rd applicant her business is that of a wholesaler and her operations do not affect market operators or customers as alcohol is not consumed in the premises.

17. THAT in the circumstances therefore it is just and fair that the orders sought for herein be granted.”

4. The respondent's case was set out in the Replying Affidavit of the Chairman of the 1st Respondent sworn on 1st October 2019 as follows:

“REPLYING AFFIDAVIT

I, **DAUDI LUKA AENGWO** of P.O. BOX 53, **KABARNET** make solemn oath and state as follows:

1. That I am an adult of sound mind and the chairman of the 1st respondent hence competent to swear this affidavit.
2. That I have read the Notice of Motion application dated 2nd July, 2019 whose contents have further been explained to me by my advocate on record and having understood the same wish to respond as follows:
3. That the said application is incompetent, misconceived and devoid of merit.
4. That the 1st respondent issued licenses to the ex parte applicants for the 2018 to carry on business of selling liquor over their establishments known as Stage Bar, Sunlight Ravine Bar, and Mwananchi Bar respectively which licenses expired at the end of 2018. **(Annexed and marked “DLA 1a, b, c and d” are copies of the said licenses).**
5. That the 1st respondent issued to the ex parte applicants in advance with notices of non-renewal of their liquor licenses on grounds of proximity to public places, in particular bus stage and market **(Annexed and marked “DLA 2a, b, c and d” are copies of letters dated 8th June, 2018).**
6. That in discharge of its statutory mandate, the 1st respondent issued notices requiring all liquor operators to apply for licenses for 2019 **(Annexed and marked “DLA 3” is a copy of notice dated 30th November, 2018).**
7. That notwithstanding the notices dated 8th June, 2018 the ex parte applicants made applications for renewal of their licenses alongside other applicants **(Annexed and marked “DLA 4a, b, c and e” are copies of applications dated 6th December, 2018 and 24th December, 2018 and list of all applicants dated 23rd April, 2019).**
8. That the 1st respondent issued a notices of invitation to the members of the public, interested parties and stakeholders as required under the Act to raise their concerns plus inspection programme to all liquor operators, stakeholders, interested parties and members of the public giving various specific dates and time of the scheduled inspection and public hearings **(Annexed and marked DLA 5a – f copies of minutes dated 27th March, 2018, 26th February, 2019, 5th March, 2019, notice dated 12th April, 2019, minutes dated 17th April, 2019 and 20th May, 2019).**
9. That indeed the 1st respondent conducted public hearings and in fact the ex parte applicants herein attended in their personal capacities and all parties were accorded an opportunity to ventilate their issues **(Annexed and marked “6” are copies of minutes dated 17th April, 2017 wherein all the ex parte applicants were present and their names appear as items 1, 36, 52 and 55 respectively among other hundreds of members of the public).**
10. That the above annexures are clear demonstration that the respondents herein accorded the petitioners, interested parties and all stakeholders and the general members of the public an ample notice and opportunity to participate and raise their concerns before taking any administrative action.
11. That the 1st respondent upon considering the applications for licences on merit refused to renew the ex parte applicants' licenses since their liquor businesses are located within prohibited zones being within bus stage and public market as earlier communicated during the validity of their licenses vide letter dated 8th June, 2018.
12. That the 1st respondent communicated in writing and informed the ex parte applicants of its reasons of refusal to renew the licenses **(Annexed and marked “7a – f are copies of letters addressed to the ex parte applicants dated 24th April, 2019).**
13. That equally the petitioners' liquor businesses do not meet the requirements of public health as demonstrated by annexure 7a – f above and pose health hazards to unsuspecting members of the public.
14. That the ex parte applicants' liquor business premises contravened and protect consumers under Article 46 of the Constitution specifically vulnerable children under Article 57 (d) and persons below 18 years from abuse and the general members of the public.
15. The implementation of the said Act is extremely of importance and crucial as the measures taken by the 1st respondent in enforcing it are meant to safeguard the interests of the members of the public, important public institutions including bus stage and vulnerable children who accessed alcohol from the ex parte applicants' business premises.
16. That the respondents in the foregoing closed the petitioners' liquor with the full participation of the stakeholders and the members of the public in compliance with articles, 10 and 196 of the Constitution.
17. That the applicants intend to claw – back the tremendous efforts made to protect members of the public by the 1st respondent in

enforcing the provisions of the said Act.

18. That grant of prayers sought shall highly prejudice the interests of the members of the public and the vulnerable members of the society at large.

19. That the petitioners are seeking immunity from the law (Annexed and marked DLA 8 is a copy of charge sheet dated 10th April, 2018).

20. That the said application has been made in bad faith calculated at impeding the 1st respondent from discharging its statutory obligations.

21. That the applicants have absolutely failed to demonstrate that they are entitled to the orders sought.

22. That I swear this affidavit in opposition to the said application.

23. That what is deponed to herein above is true and correct as the same are well within my knowledge, information and belief.”

5. Counsel for the parties then agreed to canvas the application by way of written submissions filed in Court. The respondent's filed their submissions first and urged the court to dismiss the ex parte applicant's Notice of Motion by written Submissions dated 28th October 2019 as follows:

“1ST AND 2ND RESPONDENTS' WRITTEN SUBMISSIONS

Your Lordship

It is our humble submission that the declaratory order being sought under paragraph d of the aforesaid application are not available within the meaning of Order 53 of the Civil Procedure Rules. The aforesaid prayer is misconceived, incompetent and not available in judicial review proceedings. The High Court sitting in Nairobi in **MISCELLANEOUS CIVIL APPLICATION NO. 359 OF 2014 (FORMERLY MISC. CIVIL APPLICATION NO. 331 OF 2013 J/R)**, Republic v Commissioner of Mines & another Ex-parte Basu Mining Limited & Cortec Mining Kenya Limited & 5 others [2015] eKLR held as follows:

Under judicial review the Court's jurisdiction is restricted to issue orders of Mandamus, certiorari and prohibition which of necessity are confined to review of decisions whose propriety is in question. As earlier stated judicial review is about reviewing the process through which the decision was made to determine whether the process was indeed fair and not about the merit or the demerits of the decision. Accordingly it is my holding and finding that the applicant's application for declaratory orders within the present judicial review proceedings is misconceived and incompetent and cannot be granted. I dismiss the Applicant's prayers for declaratory order with costs to the Respondents, 1st, 2nd and 6th Interested Parties.

Your Lordship,

It is the ex-parte applicants' case that they initially held Liquor licences for the year 2016, 2017 and 2018 in respect of their liquor establishment known as Stage Bar, Sondo Bar, Liwa Stocklist, Sunlight Ravine Bar and Mwananchi Bar respectively in Eldama Ravine, Baringo County. Towards the end of 2018, the ex-parte applicants made applications for renewal of their respective bar and/or stockiest licences. The same were however not renewed and or never invited for any meetings by the 1st respondent to discuss the rejection of their licences. They only learnt of the same through letters dated 24th April 2019 sent to them indicating the reason for rejection being that the liquor establishments were situated in an area adjacent to Eldama Ravine Bus stage and market which was designated as Alcohol Outlets free zones. Aggrieved by the said decision, the ex-parte applicants moved this Honourable Court through the Judicial Review Application before you today.

Your Lordship,

It is not in issue that the ex-parte applicants had been issued with liquor licences for the year 2018 to carry on liquor business over their liquor establishments which licences were however to expire at the end of the year 2018. The 1st respondent during the validity of the said licenses issued to the ex-parte applicants in advance with notices of non-renewal of their liquor licences on grounds of proximity to public places, in particular the bus stage and market as evidence by the Respondents' copies **of letters dated 8th June, 2018 being annexures “DLA 2a, b, c and d”**. The 1st Respondent in the course of discharging its duties issued notices requiring all liquor operators to apply for licences for the year 2019 as per the respondents' annexure **“DLA 3**. On 8th June, 2018, the ex-part applicants made applications for renewal of their licences along other applicants as demonstrated by annexure **“DLA 4a, b, c, d and e”**. Subsequently, the 1st respondent issued a notice of invitation to the members of the public, interested parties and stakeholders as required under the Act to raise their concerns plus inspection programme to all liquor operators, stakeholders, interested parties and members of the public giving various specific dates and time of the scheduled inspection and public hearings as demonstrated by the respondents annexure **DLA 5a – f**. The first respondent indeed conducted public hearing and in fact the ex-parte applicants herein attended in their personal capacities the said meetings and all parties were accorded an opportunity to ventilate their issues as demonstrated by annexures **“DLA6”**.

Your Lordship,

The 1st respondent upon considering the applications for licences on merit refused to renew the ex-parte applicants' licenses since their liquor business were located within prohibited zones being within a bus stage and public market as earlier communicated during the validity of their licences vide letter dated 8th June, 2018. The same was communicated to the ex-parte applicants in writing of the reasons of refusal to renew the licenses as demonstrated by the Respondents' annexure "7 a – f" which clearly states the reason for non-renewal of the applicants licenses being proximity to public places and also their businesses do not meet the requirements of public health and pose health hazards to unsuspecting members of the public.

Your Lordship,

From the above, we note that the respondents herein accorded the ex-parte applicants herein, interested parties and all stakeholders and the general members of the public an ample notice and opportunity to participate and raise their concerns before taking any administrative action. We further note that the ex-parte applicants' liquor business premises contravened and violated County Alcoholics Drinks Control Act whose intent and purpose is to protect consumers under Article 46 of the Constitution specifically vulnerable children under Article 57 (d) and persons below 18 years from abuse and the general members of the public.

Your Lordship,

The proper province of Judicial Review was stated in **NAIROBI CIVIL APPEAL NO. 185 OF 2001, MUNICIPAL COUNCIL OF MOMBASA V REPUBLIC & ANOTHER [2002] eKLR** wherein the Court of Appeal held that:

“Judicial Review is concerned with the decision making progress, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

Your Lordship,

We therefore opine that the issues for determination are;

- i) Whether the respondents were in breach of Article 47 of the Constitutional and Section 11 and 12 of Baringo County Alcoholic Control Act
- ii) If so, are the applicants entitled to the reliefs sought.

Your Lordship,

On the first issue, it is our submission that Section 11 of the Baringo County Alcoholic Drinks Control Act, 2014 sets out the procedure of liquor licensing which the applicants state the respondents breached. It provides as follows:

- i) A person intending to produce, manufacture, import, distribute any alcoholic drink on the County or to operate an establishment for the sale of an alcoholic drink shall make an application in a prescribed form to the Sub-County committee in the Sub-County where the premises is to be situated and shall pay a prescribed fee.
- ii) The Sub-County Committee shall, within 21 days after the submissions of application for a license, prepare a notice setting forth the names of all applicants, the types of licenses applied for, the premises in respect of which the licenses are applied for and the time, date and place of the meeting and shall forthwith cause a copy of the notice to be:
 - a) Published at the office of the Sub-County Administration for a period of not less than twenty-one consecutive days.
 - b) Posted in some conspicuous place at or near the applicants' premises.
 - c) Any person may lodge objection to an application. Every objection to an application shall made in writing to the secretary to the Sub-County Committee, and the objector shall serve notice of the grounds of the objection on the applicant, personally or by post, seven days before the hearing of the application and the onus of such service shall be on the objector.
 - d) A Sub-County committee may of its own motion take notice of any matter or thing, which on the opinion of the committee constitutes an objection to an application, whether or not any objection has been otherwise lodged. Where in respect of an application a Sub-County committee acts 'Suo moto', the committee shall inform the applicant of the nature of the objection, and shall, if the applicant so requests, adjourn the hearing for such period, not being less than seven days, as the Sub-County committee considers necessary to enable the applicant to reply thereto.
 - e) Every person making an application shall, save as otherwise provided, appear in person or by an advocate before the Sub-County Committee that there is need for the grant of a license of the type applied for in the particular locality in respect of which the application is made.
 - f) Any objector may appear personally or by an advocate at the hearing of the application.

Your Lordship,

We submit that the 1st Respondent as earlier stated issued to the ex parte applicants in advance with notices of non-renewal of their licences on grounds of being close proximity to public places, in particular bus stage and market as demonstrated by the Respondent's annexure DLA 2a, b, c and d being letters dated 8th June, 2018. Section 11 (ii) above gives the committee 21 days to issue a Public Notice to all the applicants. The respondents as per the annexure DLA 3 issued a public notice notifying the public to apply for licences on or before the 24/12/2018. The said letter is stamped 30/11/2018. Notwithstanding the notices earlier issued to the ex-applicants (DLA 2a, b, c and d) they went ahead and applied for renewal of their licences vide annexure DLA 4a, b, c, d and e. the 1st Respondent letter released the list of all applicants as per Section 11 of the Act.

Your Lordship,

Section 11 (iii) above provides for the public participation to the effect that any person who had an objection to an application could raise and it should be served to the applicant. The 1st Respondent issued a notice of invitation of the members of the public, interested parties and stakeholders as required under the Act to raise their concerns touching on the aforementioned list plus inspection programme to all liquor operators, stakeholders, interested parties and members of the public giving various specific dates and time of the scheduled inspection and public hearings as demonstrated by the Respondents annexure DLA 5 a-f. the public forum was held on the 17th April, 2019 as per annexure DLA 6 of the respondents which in fact show that the ex parte applicants were present as their names appear as items 1, 36, 52 and 55 respectively among other public members.

Your Lordship,

Vide annexure DLA 5a, the minutes dated 27th March, 2018 clearly indicate agenda 3 as zoning wherein the members pointed out that petitions from members of public from Timboroa, Seguton, Saos, Kirobon and Kabimoi had presented the same through a memoranda complaining and suggesting that bars around bus stages and markets should not be allowed to prevent drunk people from disturbing passengers in bus stages and traders in markets. The members concluded that the applicants in areas affected by petition will know their fate after public hearings in those areas. Dates for the public hearings were set to wit the same took place as evidenced by Daudi Luka Aengwo's annexure DLA 5b, c. from the outcome of the meeting, the committee after inspection finalized that the said applicants bar establishments were not to be licensed. It is after that decision that the alcoholic drinks applicants were given a notice of an intended meeting vide DLA 5d which meeting took place as evidenced by the minutes dated 17th April, 2019 and marked as DLA 5e. The applicants attended in their personal capacities. In the said meeting it was held that containers were not to be licenced as premises for liquor outlets as well as bus stages and markets were zoned as alcohol free areas. It pointed out those applicants in those areas had been given one year to relocate and their licences were only valid for 2018. They were however given 7 days to appeal to the committee through the secretary. Their appeals were later rejected since they had expressly been given reasons for rejection of their renewal of licences. This is as per the minutes dated 20-5-2019 and marked DLA 5f.

Your Lordship,

In **MACHAKOS CONSTITUTIONAL PETITION NO. 305 OF 2012, MUI COAL BASIN LOCAL COMMUNITY & 15 OTHERS V PERMANENT SECRETARY MINISTRY OF ENERGY & 17 OTHERS [2015] eKLR** where the Court at paragraph 97 (c) stated that:

a) "Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR MISC. APP. NO. 374 OF 2012)*. In relevant portion, the Court stated:

"Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."

Your Lordship,

The intention of the County Alcoholic Drinks Control Act was to protect consumers under Article 46 and 57 (d) of the Constitution. We urge this Honourable Court to find that the respondents' have a duty to safeguard the interests of the public who had access to the applicants' businesses. Section 12 (4) of the Baringo County Alcoholic Drinks Control Act, 2014 gives mandate to the respondents to reject any application made by them herein persons in alcohol free zones. This was possible since public participation has been fully complied with and inspection done on these premises.

The applicants had a duty to comply since when issued with a public notice to notify them of the non-renewal of licenses they were urged to relocate since their businesses were in alcohol free area zones. This was a good enough reason to out rightly refuse/decline renewal of their 2019 licences. Though the applicants alleged that there was no public participation, we urge the Court to find that the respondents ensured there was public participation as per the list of persons who were in attendance, thus the views of the public were considered in the process of refusal to renew their licences. This is as was held in a South African case by Sachs J. in *Minister of Health v. New Clicks South Africa (PTY) Ltd* as follows:

"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinitive variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequately say. What amounts to a reasonable opportunity will depend on the circumstances of each case".

Your Lordship,

On rejection of the renewal of licenses Section 12 (4) (a) mandates the respondents to give reasons for rejection of the application which in our case at hand, the respondents informed the applicants that the reasons for refusal to renew their licences was that their businesses were that their establishments were adjacent to Eldama Ravine Bus stage and market which areas are designated as alcohol area free zones, the 3rd ex-parte applicants business premise was not suitable for the business since it was contained and did not have sanitary facilities. The respondents were within section 12 (4) and 4 (a) to reject the application if they were not satisfied with the application. Section 12 (4) (a) also cites the respondents were to notify the applicants within 30 days which they did. They were in fact notified of the said decision of non-renewal way back in June, 2018 and invited by the respondents to be heard as required by the rules of natural justice. The Respondent had never expressly or impliedly assured the ex-parte applicant that their license would continue to be renewed regardless of complying with the set-out requirements. In the case of **Peter Bogonko v National Environment Management Authority (2006) eKLR**, the Court held that:

“The remedy of Judicial Review being a public law remedy, the Court would obviously weigh Public interest vis a vis the rights of the applicant”

In **NAIROBI ELECTION PETITION No. 2 & 6 of 2013 (Consolidated), JOEL NYABUTO OMWENGA & 2 OTHERS V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER (2013) eKLR** where the Honourable Court stated as follows:

“...for a legitimate expectation to arise, the decisions of the administrative authority must effect the person by depriving him of some benefit or advantage which either (i) had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do and until there has been communicated to him some rational grounds for withdrawing it on which he had been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”

Your Lordship,

On the issue on whether the ex-parte applicants were heard, we note that as earlier discussed, the ex parte applicants were served with notices of non-renewal of their licences way back on 8th June 2018 as per annexure DLA 2a, b, c and d. The 1st Respondent later invited members of the public, interested parties and stakeholders to raise their concerns and later another public hearing in which the ex parte applicants attended and they were accorded an opportunity to ventilate their issues. All this is demonstrated in annexure DLA a-f and 6. After their appeals being heard and dismissed, they finally received communication of refusal to renew their licences as per annexure DLA 7a-e. In *R v. County Government of Mombasa Ex-parte Outdoor Advertising Association* it was held that:

The duty of the public body is to provide a forum in accordance with the law where the ex-parte applicant members are granted an opportunity to be heard.

We submit that this was fully complied with by the 1st Respondent.

Your Lordship,

In conclusion, we submit that the respondent's decision to close the bar operations of the parte applicants was proper and lawful and that the ex parte applicants were given sufficient notice and or an opportunity to be heard. The respondents did not in any way violate the applicants' Constitution Right to Fair Administrative Action under Article 47 of the Constitution and were not ultra vires on its own statute, the Baringo County Alcoholic Drinks Control Act, 2014 section 11 thereof, and the said decision was therefore constitutional. We submit that the application herein is devoid of merit and ought to be dismissed with costs.”

(6) For the ex parte applicant's Submissions dated 10th December 2019 urged that their right to be heard before an adverse decision is made against them was violated by the respondents as follows:

“EX-PARTE APPLICANT'S SUBMISSIONS

1. In a Notice of Motion dated 2nd July, 2019, the ex-parte Applicants sought for the following reliefs:

(a) **THAT** an order of Certiorari to remove to this Honourable Court, for the purpose of quashing, the decision of the 1st Respondent, contained in the Letters dated 24th April, 2019 addressed to all the ex-parte applicants by the said 1st Respondent.

(b) **THAT** an order of prohibition be issued prohibiting the 1st Respondent and the 2nd Respondent by themselves, their agents from closing and/or interfering with the operations of all the ex-parte Applicants' Licenses as follows:

(i) 1ST APPLICANT (SOLOMON CHUCHU RUIRU) STAGE BAR, ELDAMA –RAVINE

(ii) 2ND APPLICANT (LABAN CHELANGA KIPTUM)

(iii) 3RD APPLICANT (LILIAN AYAPAR) LIWA STOCKIST, ELDAMA-RAVINE

(iv) 4TH APPLICANT (STEPHEN NJIHIA NDUMIA)

(v) 5TH APPLICANT (EMMANUEL KOSKE MALAKWEN MWANANCHI BAR, ELDAMA RAVINE.

(c) **THAT** an order of Mandamus compelling the 1st Respondent to withdraw its letters dated 24th April, 2019 and unconditionally renew all the applicants' liquor licences for the year 2019.

(d) **THAT** a declaration that the designation of the area adjacent to Eldama-Ravine bus stage and market as alcohol outlets free zones is ultra vires the law, hence null and void.

(e) **THAT** the costs of this application be provided for.

2. **THAT** the ex-parte applicants' motion is grounded on the statement of facts which accompanied the application for leave dated 13th May 2019 and which statement was filed together with the Notice of Motion. The Notice of Motion is also supported by the affidavit verifying the facts and annexures thereto sworn by the 1st Ex-parte applicant on behalf of the other ex-parte Applicants and himself which affidavit was annexed to ex-parte Chamber Summons dated 13th May 2019.

(a) **THAT** the decisions of the 1st Respondent were made contrary to the rules of natural justice as the Applicants were not given an opportunity to attend the proceedings of the 1st Respondent and be heard.

(b) **THAT** the decisions of the 1st Respondent were contrary to law and ultra vires the Alcoholic Drinks Control Act 2010 and Baringo County Alcoholic Control Act, 2014 hence null and void ab initio.

3. **THAT** the main ground in support of ex-parte Applicants' motion is that they were not afforded an opportunity to be heard before the 1st Respondent committee proceeded to decline to renew the ex-parte Applicants' respective Licenses.

4. **THAT** the ex-parte Applicants were not invited to the 1st Respondent committee's meeting in which the decision contained in the 1st Respondent's Letters dated 24th April, 2019 addressed to the ex-parte Applicants, were made.

5. **THAT** the 1st Respondent did not serve the ex-parte Applicants which copies of complainants or objections applications against the ex-parte applications for issue of liquor licenses to enable them defend themselves and were therefore condemned unheard.

6. **THAT** the 1st Respondent has opposed the ex-parte Applicants' motion and filed a Replying Affidavit sworn on 12th October, 2019 by DAUDI LUKA AENGWO, the Chairman of the 1st Respondent committee; the upshot of which is that the ex-parte Applicants were given an opportunity to be heard. However, the ex-parte Applicants will shortly demonstrate that the ex-parte Applicants were not given an opportunity to be heard before the decision to disallow their applications for renewal of their respective licences were made.

7. **THAT** the ex-parte Applicants submit that the matters deponed to in the Replying Affidavit of DAUDI LUKA AENGWO, the Chairman of the 1st Respondent committee do not demonstrate that the ex-parte applicants were given an opportunity to be heard before the ELDAMA-RAVINE, ALCOHOLIC DRINKS CONTROL COMMITTEE.

8. **THAT** the ex-parte Applicants' contention are based on the following:

(a) In paragraph 5 of the said Replying Affidavit the 1st Respondent's Chairman depones that the ex-parte applicants were issued with advance notices that their licenses would not be renewed. The deponent does not state who made the decision when and where. It is clear that the ex-parte Applicants did not appear before the Liquor committee before the said decision was made. It is also clear that a decision had been made not to renew the ex-parte Applicants' licenses. The letters referred to in paragraph 5 aforesaid were dated 8th June 2019 and Notice for applications for Liquor Licence for the year 2019 were issued long after the 1st respondent had made a unilateral decision not to renew the ex-parte Applicants' Licences.

(b) **THAT** the matter deponed to in paragraph 8, 9 and 10 of the said Replying Affidavit do not support the 1st Respondent's contention that the ex-parte Applicants were afforded an opportunity to be heard.

(b) **THAT** in any case the meetings referred to in paragraph 8 and 9 were not public participation meetings but minutes to sensitize bar owners on the operation of Baringo Alcoholic Drinks Control; and in any case a Public participation meeting cannot take away the 1st Respondent's statutory mandate to hear the ex-parte Applicant's application and give them an opportunity to be heard,

(c) **THAT** sections 11 (iii) of the Baringo County Control Act, 2014 provides as follows:

(i)

(ii)

(iii) “Any person may lodge objection to an application every objection to an application shall be made in writing to the Secretary to the Sub-County Committee; and the objector shall serve notice of grounds of the objection on the application and the onus of proof of such service shall be on the objector”)

(e) **THAT** the ex-parte Applicants were not served with any objection or invited to respond to objection. And the 1st Respondent cannot hide behind section 11 (iv) of the said Act since the letters of 8th June 2018 referred to in paragraph 5 of the said Replying Affidavit cannot be construed to be the committee’s objection acting *Suo Motu* under Section II (IV) of the Act. The said letters were actually unilateral decisions arrived at before applications for liquor licences for 2019 were invited from Applicants and before the committee met to deliberate on the said applications.

9. **THAT** it is therefore the ex-parte Applicants’ submission that the 1st Respondent in refusing to issue the ex-parte Applicants’ with their liquor Licences for the year 2019 acted in breach of the rules of natural justice and we urge the Court to so find.

10. **THAT** the ex-parte applicants’ application is based on the propriety of the decisions refusing to issue the ex-parte Applicants with liquor Licences for the year 2019. The principles of natural justice were violated; and we therefore agree with the decision cited by the 1st Respondent in their submissions – i.e NAIROBI Misc. Application No. 359 of 2014.

11. **THAT** we also submit that the 1st Respondent’s decision to fail to renew the ex-parte applicants’ Licences violated the ex-parte applicants legitimate expectation to make or enjoy a livelihood which they had in the past been permitted to enjoy which were withdrawn without giving the ex-parte Applicants an opportunity of advancing reasons for contending that they should not be withdrawn refer to NAIROBI ELECTION PETITION NO.286 OF 2013 cited by the 1st Respondent in its submissions.

12. **THAT** in the circumstances we urge the Court to find that the ex-parte Applicants have met the threshold for granting the orders sought for in the application dated 2nd July 2019 and allow the same with cost.”

Issues for determination

7. The issues arising for determination in these proceedings are three-fold:

- a. Whether the remedy of declaration is available under the judicial review procedure in Kenya; and
- b. Whether the ex parte applicants’ right to be heard was violated, and consequently whether the reliefs sought will be granted.

Determination

No declaratory relief in Kenya’s judicial review

8. At the outset, the court will unhesitatingly hold that the remedy of declaration although available in judicial review reforms of 1977 in the United Kingdom is not available in Kenya where there is no similar reform expanding the traditional prerogative orders available in judicial review procedure by an order of declaration. In Kenya, *Declaration* remains the preserve of regular civil and constitutional procedures and not *judicial review* procedure, which although Order LIII was so renamed from its original name of *Applications for Prerogative Orders* did not incorporate declaration as a relief under the new Order entitled *Applications for Judicial Review*, and Order 53 rule 1 (1) of the Civil Procedure Rules still retains as available only “*order of mandamus, prohibition or certiorari*”.

Right to be heard

9. It would appear that while the ex parte applicants were heard on their applications for renewal of licences for the year 2019, which were rejected because their premises were situated at a prohibited zone, they were not given an opportunity to be heard s persons who occupied the said zone, before the zoning decision prohibiting bar operations in the subject zone was reached.

The creation of Alcoholic Free Zones

10. The minutes of the 1st respondent’s committee meeting of 27th March 2018 indicated that it had received petitions from members of the Public in affected areas seeking creation of alcohol free zones as follows:

“- Bars will not be allowed in and around bus stages and markets to prevent drunk people from disturbing passengers in bus stage and traders in markets.

- There were Petitions from members of Public from Timboroa, Seguton, Saos, Kirobon and Kabimoi. The petitions were presented in form of signed memoranda. In the petitions members of public requested that no bar should be licensed in the areas concerned for reasons contained in their memoranda.”

11. The Committee proceeded to make a decision to close of the areas to bar operations and to communicate the decision to the affected operators as follows:

“-Applicants around bus stage and markets were recommended for half year licensing and be notified to relocate or close or change business at the end of June 2018.

- The applicants in areas affected by petitions which include Seguton, Timboroa, Kabimoi, Kirobon in Sabatia and Saos will know their fate after the Committee hold public hearing in these areas.

- Dates for the Public hearing in Barazas were set as follows:

1. E/Ravine town – 4/4/2018 at 11:00 am

2. Seguton and Timboroa – 5/4/2018 at 11:00 am and 2:00 pm respectively.

3. Kabimoi – 6/4/2018 at 11.00 am”

County and National Government vehicles were proposed for use during the Barazas.

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

13. The creation of Alcoholic Free Zones was communicated by a notice entitled “Alcoholic Free Zones Notice” dated 8th June 2018 in terms as follows:

“BARINGO COUNTY GOVERNMENT

ELDAMA RAVINE SUB COUNTY ALCOHOLIC DRINKS CONTROL COMMITTEE

Date: 8/6/2018

To: **Proprietor**

ALCOHOLIC FREE ZONES NOTICE:

Following the Zoning of Markets and Bus stages as Alcoholic free zones by the Sub-County Alcoholic Drinks control committee after Public outcry resulting from nuisances caused by highly intoxicated patrons from your bars, the committee notifies you that licence for your business will not be renewed upon expiry of the current license.

You are therefore required to comply and cooperate towards this notice by:

1. Relocating your business to suitable place

2. Charge business type or

3. Close your business

Your cooperation will be highly appreciated.

Thank you”

14. The applicants did not elect any of the options set out in the notice letter and only waited to apply for renewal of licences for the following year 2019 when such applications were invited by the respondents by it letter of 30th November 2018, as follows:

“BARINGO COUNTY GOVERNMENT

ELDAMA RAVINE SUB COUNTY ALCOHOLIC DRINKS REGULATION COMMITTEE

Date: 30th November, 2018

APPLICATION FOR LIQUOR LICENCE 2019

Pursuant to Sec. 9 sub – sec (1a) of Baringo County Alcoholic Drinks Control Act 2014, Eldama Ravine Sub-County alcoholic drinks regulation committee invites interested persons to apply for **New and Renewal** of existing alcoholic drinks.

Those interested are expected to fulfill the following requirements:

1. Submit dully filled application forms
2. Attach certificate of business registration.
3. Attach a copy of identification card (ID)
4. Attach a copy of KRA PIN.

Duly filled application forms are expected to reach the Sub-County Administrator on or before 24/12/2018 at 10:00 am. The forms will be received upon payment of Ksh.1000 application fee, and public health inspection fees of Ksh.1000.

N/B

- Application must be made in prescribed forms available at the Sub-County administrator's office.

- All new applicants should not be currently operating.

Thank you

DAUDI AENGWO

CHAIRMAN – ALCOHOLIC DRINKS REGULATION COMMITTEES ”

15. Significantly, the applicants did not challenge the Alcoholic Free Zones Notice dated 8th June 2018.

Delay defeats prerogative orders of judicial review

16. Although the ex parte applicants were notified by letter of 8th June 2018 that their licences would not be renewed for the place their premises were situate was in a zone where no bars would be would allowed, they did not seek judicial intervention in the matter until after their applications for renewal of their licences for the year 2019 were rejected on the very ground of being located at a prohibited zone.

17. The scheme of judicial review as established by the Law Reform Act and Order 53 of the Civil Procedure Rules makes provision for application for the judicial review order of certiorari without delay and in any event not later than 6 months for applications against judgment, ruling and other proceedings, as follows:

“1. (2) Leave shall not be granted to apply for an order of certiorari tot remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made **not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act;** and where the proceeding is subject to appeal and a time is limited by law for brining of the appeal, the judge may adjourn the application for leave until the appeal s determined or the time for appealing has expired.”

18. Although other proceedings has been interpreted *ejusdem generis* as judicial proceedings, the principle of expedition in judicial review of administrative makes sense because just like in judicial orders whose validity cannot be open to challenge for too long, so also administrative decisions on government (national and county) policy, which cannot similarly suffer uncertainty for too long if implementation thereof is to be achieved in an effectively and purposive manner.

19. Indeed, with regard to licencing which takes place every year or 12 months, a delay in challenging a policy direction for over 6 months as provided in the case of judicial proceedings under Order 53 rule 1 (2) of the Civil Procedure Rules means that the licensing circle is affected, and it may involve loss of revenue and delayed implementation of policy changes stretching across licensing years. In such circumstances, I would, as I hereby do, hold that a delay of more than 6 months in challenging a licensing decision or a policy decision affecting licensing, which is granted annually, would bar such proceedings. The ex parte applicants here did not challenge the zoning decision communicated to them by letter of 8 August 2018 until over nine (9) months later on 15th May 2019 when the application for leave was filed.

Judicial review discretionary

20. Judicial review orders are discretionary and will be denied where the court in exercise of its discretion finds that a reasonable ground for withholding the relief even where it may, technically, be available. Delay in presenting the application for judicial review is, in my respectful view, such a reasonable ground.

21. Another reasonable ground for withholding relief is public interest concerns. I would agree with the Respondents that the public interest in the zoning of alcohol free areas should prevail over any private interest of the ex parte applicants. Such public interest was demonstrated by the overwhelming objection by members of the public recorded in the Minutes of the public participation meetings held for that purpose by the respondents.

22. The ex parte applicants may, as they may be advised by their legal advisors, seek compensation for the loss of business opportunity occasioned by the zoning of the areas occupied by their bar businesses set apart as a no-bar zone without being heard on the matter. Damages are however, not available under the judicial review procedure and the matter is, therefore, outside the scope of these proceedings.

ORDERS

23. Accordingly, for the reasons set out above, the court finds no merit in the ex parte applicants application for judicial review orders herein by Notice of Motion dated 2nd July 2019, and the same is declined.

24. In view of the public element of the matter, there shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 19TH DAY OF DECEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Tengekyon & Koske Co., Advocates for the Applicant.

M/S Limo R.K. & Co., Advocates for the Respondent.