



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIAMBU
JUDICIAL REVIEW NO. 10 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN GATUNDU NORTH COUNTY ALCOHOLIC

DRINK COMMITTEE & 2 OTHERS.....RESPONDENT

JUDGMENT

1. By a Notice of Motion dated 01/11/2016, the *Ex Parte* Applicant, Dominic Irungu Mungai (“Applicant”) seeks for orders that:

a. An order of *certiorari* do issue to bring before this Honourable Court to quash decision of the Chairman of the Gatundu North Sub County Alcoholics Drink Committee made on 24/3/2016 rejecting and cancelling the Applicant’s application for renewal of his Alcoholic Drinks Retail Licence Number 3877.

b. An order of *certiorari* do issue to bring before this Honourable Court to quash the decision of the Secretary of the Kiambu County Alcoholics Drinks Regulation Administrative Review Committee made in the meeting held on 19th April 2016 upholding the Sub County’s decision of revoking, annulling and rejecting the Applicant’s application for renewal of his Alcoholic Drinks Retail Licence Number 3877.

c. An order of prohibition directed against the Respondents barring the Respondents from annulling, revoking and rejecting the renewal of the Applicants Alcoholic Drinks Retail Licence Number 3877 in respect of the premises known as Tupendane Bar.

d. An order of Mandamus directed against the 1st Respondent compelling the Chairman, Gatundu North Sub County Alcoholics Drinks Committee to renew the Applicant’s Alcoholic Drinks Retail Licence Number 3877 in respect of the premises known as Tupendane Bar and to issue the Applicant with the Retail Licence in respect of the year 2016.

e. That costs of this Application be provided for.

3. The Applicant’s case is straightforward. He holds an Alcoholic Drinks Retail Licence number 3877 for the year 2015 in respect to the premises known as Tupendane Bar in Kiambu County.

On 29/12/2015, the Applicant applied to the Gatundu North Sub County Alcoholic Drinks Committee (“Drinks Committee”) for the renewal of his licence. On 24/03/2016, his application was rejected vide a

Notification dated the same day and signed by the Secretary to the Drinks Committee. The reason for the rejection was conveyed in a single word: "Convicted."

4. The Applicant was aggrieved by that decision of the Drinks Committee and vide a letter dated 07/04/2016, he wrote to the Drinks Committee, through the Chairman, seeking for a review of the Committee's decision and seeking for certain other interim reliefs including time to dispose off the stock he had in his premises.

On 19/04/2016, the Applicant received Notification from the Secretary of the 2nd Respondent, the Kiambu County Alcoholic Drinks Regulation Administrative Review Committee ("Review Committee") that his appeal had been rejected and that the decision of the Drinks Committee had been upheld. The reason given for the appeal was stated in a single sentence: "Sale of Chang'aa in the bar."

5. The Review Committee thereby gave the Applicant three months to clear stock and close down his premises in accordance with Section 23 of the Kiambu County Alcoholic Drinks Control Act, 2013.

6. The Applicant was aggrieved by that decision hence his appeal to this Court by way of Judicial Review. His case is that he has never been convicted of any crimes as alleged by the Respondents and that therefore the Decision by the Drinks Committee to reject his application for renewal was underhanded and unwarranted. He finds the decision by both the Drinks Committee and the Review Committee to be illegal, irrational and tainted with impropriety. Further, he finds the decisions to be unprocedural because he was not given an opportunity to be heard before either Committees.

7. On their part, the Respondents filed a Replying Affidavit deposed by Michael Kang'ethe, the Director of Alcoholic Drinks Control and Secretary to the Review Board.

8. The Replying Affidavit rehashes the history of the case given above and then explains that when the matter reached the Review Committee, it was noted that the Applicant had not been convicted at the time of making the application but had "during the period of renewing the licence been charged with being in breach of Section 38 of the Kiambu County Alcoholic Drinks Control Act, 2013".

9. The Review Board's position was that the Applicant had breached his licence conditions by being found in possession of chang'aa at the bar premises known as Tupendance Bar. Hence, the Review Committee resolved to uphold the decision of the Drinks Committee in view of the existing criminal charges the Applicant was facing.

10. The Respondents' case is that the Review Board's decision was guided by Section 15(2)(a) and (d) as well as Section 17 of the Kiambu County Alcoholic Drinks Control Act, 2013. The Review Committee is persuaded that it took into consideration all relevant facts and the decision arrived at was not in any way illegal or irrational. Further, the Review Committee says that it gave the Applicant a chance to be heard because it took into consideration his letter dated 07/04/2016.

11. The Respondent says that it acted in accordance with the law and there is no basis for nullifying its decision.

12. The facts of the case are not in dispute. The only question is whether, in the circumstances of this case, the Applicant has made out a case for Judicial Review.

13. The proper province of Judicial Review was stated in ***Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd***(Civil Appeal No. 185 of 2001). In that case, the Court of Appeal held that:-

"Judicial review is concerned with the decision making process, 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."

14. Hence, where a public authority has acted in exercise of its discretion, the Court is only entitled to interfere with the exercise of discretion in the following situations:- (i) where there is an abuse of discretion; (ii) where the decision-maker exercises discretion for an improper purpose; (iii) where the decision-maker is in breach of the duty to act fairly; (iv) where the decision-maker has failed to exercise statutory discretion reasonably; (v) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (vi) where the decision-maker fetters the discretion given; (vii) where the decision-maker fails to exercise discretion; (viii) where the decision-maker is irrational and unreasonable. See **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze** Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.

15. The question presented here is, to my mind, two-fold:

a. Did the Review Committee act irrationally by refusing to renew the Applicant's licence on account of the fact that he was charged but not convicted with a criminal offence?

b. Is the decision of the Review Committee susceptible to the charge of procedural impropriety for the failure to accord the Applicant an opportunity to be heard?

16. The Applicant argues that it is irrational for the Review Committee (as well as the Drinks Committee) to refuse to renew his licence merely because he was charged with a criminal offence. This is because, the Applicant argues, presumption of innocence is a fundamental value protected in the Constitution. Everyone has a right to be presumed innocent until proven guilty. Penalizing someone merely for being charged with a criminal offence before its determination, the Applicant argues, goes against the Constitution. The action, the Applicant insists, fails to appreciate the implications of Article 50 of the Constitution on the right to fair trial.

17. The Applicant also says that in failing to give the Applicant an opportunity to appear before the Drinks or Review Committee, the Respondents are in breach of Article 47 of the Constitution which guarantees the right to fair administrative action.

18. On their part, the Respondents, through their advocate, Mr. Ranja, argued that taking into consideration the fact that the Applicant was facing a criminal charge and using that as a basis for refusing to renew his licence is not irrational or improper. This is so because the Drinks and Review Committees are obliged to take into consideration whether an applicant for a licence is a fit and proper person before granting a licence or renewing it. I understood Mr. Ranja to imply that being charged with a criminal offence made one not a "fit and proper" person.

19. Lastly, Mr. Ranja argued that the Applicant was given due process and was, in fact, heard. He submitted that his letter dated 07/04/2016 was considered by the Review Committee and that this was sufficient opportunity for the Applicant to air his views.

20. Mr. Ranja pointed out that reviews against decisions by Drinks Committees are regulated by Section 17 of the Kiambu County Alcoholic Drinks Control Act, 2013.

21. Section 17 of the Kiambu County Alcoholic Drinks Control Act, 2013 provides as follows:

(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 Review Committee.

(2) A person aggrieved by the decision of the subcounty 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 Review Committee shall notify the sub-county committee of the pending review.

(4) The Review Committee shall within twenty-one days consider and make a final determination

22. Mr. Ranja argues that the Section does not provide for oral or other presentation to the Review Committee after the initial written application.

23. I have considered the rival submissions by the parties here. It appears readily obvious to me that the Application should succeed under both grounds relied on.

24. First, it is my finding that relying on the fact that a person was charged with a criminal offence as a categorical reason to deny them renewal of their Alcoholic Drinks licence is irrational and unreasonable. This is not only because in our constitutional schema everyone is presumed innocent until a conviction is entered and that everyone is entitled to a fair trial, but also on prudential grounds. If all it takes to revoke a person's licence is to charge them with a criminal offence under the Kiambu County Alcoholic Drinks Control Act, 2013 or some other Act, this will provide a fertile ground for abuse of power where authorities can simply charge traders they dislike without evidence with the sole aim of establishing the threshold for revoking their licences.

25. I note that the Kiambu County Alcoholic Drinks Control Act, 2013 enumerates the appropriate reasons for refusing to renew an existing licence in Section 15(2) of the Act. The sub-section provides that the Drinks Committee may refuse to renew an existing licence only when it is satisfied that:

a. the licensee is not a fit and proper person to hold the licence; or

b. the licensee has been convicted of an offence under this Act or any Act at any time in force regulating the manufacture, distillation, distribution sale of an alcoholic drink for more than three times within one year; or

c. has been convicted of an offence and sentenced to imprisonment without the option of a fine in Kenya or elsewhere for a period in excess of six months; or

d. the business to which the licence relates is conducted in a manner that is in breach of this Act, or any other rules and regulations for the time being in effect, or conditions set by the Sub-county Committee ; or

e. the conditions of the licence have not been satisfactorily fulfilled; or

f. the premises to which the licence relates are not in a proper state of repair, or are not provided with proper sanitary arrangements, or do not comply with the reasonable requirements of the Sub-county public health officer and the owner of the premises or the licensee refuses or is unable to give satisfactory guarantees that the necessary repairs will be carried out, or due compliance effected, as the case may be, within a time specified by the Sub-county Committee.

26. It seems obvious from this list that being charged with an offence whether under the Kiambu County Alcoholic Drinks Control Act, 2013 or any other Act is not a sufficient ground to refuse to renew a licence. Indeed, both Sections 15(2)(b) and 15(2)(c) of Kiambu County Alcoholic Drinks Control Act, 2013 are explicit that the trigger is a conviction. Merely being charged is not sufficient.

27. Yet, both the Drinks Committee and the Review Committee relied on the fact that the Applicant had been charged with an offence as the reason to refuse to renew the licence. In the case of the Drinks Committee, it compounded the illegality by misdescribing the Applicant's situation as one of conviction – and admittedly wrong description of the position. As for the Review Committee, they ostensibly refused to renew because the Applicant was found in possession of chang'aa. It provided no evidence of this whatsoever. However, in the Replying Affidavit filed in Court, it emerged that the Review Committee

merely relied on the charge sheet in the criminal case to come to that conclusion. This is obviously problematic because, as stated above, the charge sheet does not amount to a conviction. It is only after the conviction that this position can be taken as true.

28. For clarification, it is important to state that both the Drinks Committee and the Review Committee can rely on its own information and investigations to refuse to renew a licence under Sections 15(2)(a); 15(2)(d) and 15(2)(e) of Kiambu County Alcoholic Drinks Control Act, 2013 even without the benefit of a conviction. However, there must be proper investigations establishing concrete facts which are relied on. Additionally and crucially, the Applicant must be given an opportunity to confront such collected evidence and address it before the Committee makes its decision.

29. Here, there is no evidence whatsoever that either Committee did its own investigations or relied on any other information other than the fact that the Applicant had been charged with a criminal offence. To compound the problem, neither Committee gave an opportunity to the Applicant to confront the evidence it had relied on to reach its conclusions. Therefore, it cannot be said that either Committees relied on the grounds under Sections 15(2)(a); 15(2)(d) and 15(2)(e) of Kiambu County Alcoholic Drinks Control Act, 2013 to deny renewal of the license. Instead, it appears obvious that both Committees relied on the simple fact that the Applicant had been charged as the reason to refuse to renew the licence. As I held above, being charged with an offence, without more, is not enough.

30. It is also my finding that failing to give an opportunity to the Applicant to present his case or confront any adverse information the Drinks Committee or the Review Committee has is a violation of his fair administrative rights.

31. *Perhaps the best statement of this rule of administrative fairness is stated by the author in Halsbury's Laws of England*, 5th Edn. Vol. 61 page 539 at para 639 states:

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination of civil rights or obligations or any criminal charge.”

32. Hence, Article 47 of the Constitution provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

33. Section 4(3) of the *Fair Administrative Action Act, 2015* provides as follows:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

34. What both Article 47 and the Fair Administrative Action Act make clear is that any person who will be adversely affected by an administrative action must have meaningful opportunity to be heard and to make representations on the issue. In particular, the person must be informed of the nature of the case against him so that he can adequately respond to it.

35. The way the Review Process is structured, I am unable to say that it meets the standard of procedural fairness demanded by our Constitution and the Fair Administrative Action Act. The only opportunity an Applicant is given to communicate with either the Drinks Committee or the Review Committee is when he writes a letter asking for a review. At the Drinks Committee, an Applicant has no opportunity to appear to respond to any concerns the Committee might have or confront any adverse information it may have. An Applicant only learns of the adverse information when receiving the negative outcome.

36. Similarly, an Applicant who is asking for a review is forced to assume which information the Review Committee will rely on to either affirm or nullify the decision of the Drinks Committee. In some cases, as here, the Review Committee might rely on completely different grounds to affirm the Drinks Committee's decision – as happened here. In such cases, it would mean that the Applicant would have made an adverse administrative decision without affording the Applicant any opportunity whatsoever to confront the evidence relied on. Needless to say, such a decision would be procedurally unfair.

37. I note that Section 17(4) of the Kiambu County Alcoholic Drinks Control Act, 2013 states that the "Review Committee shall within twenty-one days consider and make a final determination on the request for review." To my mind, this does not, in appropriate cases, bar the Review Committee from structuring its processes so that an Applicant gets an opportunity to make representations to the Review Committee either orally or in writing after such an Applicant had been aware of the reasons the Review Committee is considering a particular course of action.

38. Having considered the issues raised in the Application, I am of the view and finding that the decision by both the Gatundu North Sub-County Alcoholics Drink Committee made on 24/03/2016 rejecting the Applicant's application for renewal of his Alcoholic Drinks Retail Licence No. 3877 and the Kiambu County Alcoholic Drinks Regulation Administrative Review Committee made on 19/04/2016 upholding the Drinks Committee's decision revoking, annulling and rejecting the Applicant's application for renewal of his Alcoholic Drinks Retail licence were procedurally unfair and legally infirm for being laced with irrationality and/or taking account of improper considerations.

39. Consequently, I find merit in the Notice of Motion dated 01/11/2016 and I grant the following orders:

a. An order of certiorari is issued removing into this Court for purposes of being quashed the decision of the Gatundu North Sub-County Alcoholics Drink Committee made on 24/03/2016 rejecting the Applicant's application for renewal of his Alcoholic Drinks Retail Licence No. 3877 which decision is hereby quashed.

b. An order of certiorari is issued removing into this Court for purposes of being quashed the decision of the Kiambu County Alcoholic Drinks Regulation Administrative Review Committee made on 19/04/2016 upholding the Gatundu North Sub-County Alcoholics Drink

Committee's decision revoking, annulling and rejecting the Applicant's application for renewal of his Alcoholic Drinks Retail Licence No. 3877 which decision is hereby quashed.

c. An order of Mandamus compelling the Gatundu North Sub-County Alcoholics Drink Committee to consider de novo the Applicant's application for renewal of his Alcoholic Drinks Retail Licence No. 3877 and doing so in a manner that is procedurally and administratively fair and in accordance with the law.

d. The costs of this application are awarded to the Applicant and will be borne by the Respondents.

Delivered at Kiambu this 13th day of July, 2017.

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JOEL NGUGI

JUDGE