REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 646 OF 2016

BETWEEN

THE REPUBLIC.....APPLICANT

VERSUS

THE NAIROBI CITY COUNTY....RESPONDENT

EX PARTE B CONCEPT LIMITED T/A B CLUB

JUDGEMENT

1. By a Notice of Motion dated 29th December, 2016, the *ex parte* applicant herein, **B Concept Limited T/A B Club,** seeks the following orders:

> **1) That the judicial review order of certiorari be issued to move to the High Court and to quash the decision communicated by the respondent's letter Ref No. NCC/TRD/8/2016 dated the 25th November, 2016 to revoke the Single Business Permit No. 1393053 and Liquor Licence No. 7212 issued to the ex parte applicant herein.**
>
> **2) That the judicial review order of prohibition be issued against the respondent prohibiting the revocation of the Single Business Permit No. 1393053 and Liquor Licence No. 7212 issued to the ex parte applicant herein without affording it the benefit of a hearing.**
>
> **3) THAT the costs of his application be in the cause.**

2. According to the ex parte applicant, t is a high end and u-market entertainment club situated on Galana Palaza off Galana Road off Argwings Kodhek Road in Nairobi and begun its operations in January, 2016 after meeting all conditions laid down by the County Government of Nairobi and upon being issued with the Single Business Permit No. 1393053 and the Liquor Licence N. 7212.

3. However on 29th November, 2016, the ex parte applicant received a letter dated 25th November, 2016 advising that the said Permit and Licence had been revoked on the grounds that the area residents had complained that the applicant's Club was playing loud music at high decibels.

4. It was the applicant's case that it was never asked to respond to the said allegations hence the decision to revoke the said permit and licence was unlawful, high-handed and irrational.

5. The application was opposed by the Respondent whose case was that the Respondent has the power to revoke the said permits and the licence. However no replying affidavit was sworn by the Respondent.

Determinations

6. I have considered the foregoing including the submissions filed on behalf of the parties herein and the authorities relied upon.

> Since the Respondent did not file any affidavit, the factual averments made by the Applicant were not controverted. The consequences of the failure to controvert allegations were restated in **Mohammed & Another vs. Haidara [1972] E.A 166** *at page 167* paragraph F-H, where **Spry V.P** expressed himself as follows:
>
> **"The respondent made no attempt to reply to these allegations and they therefore remain unrebutted…Here, the respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied…"**

7. The purview of judicial review was clearly set by **Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** when he stated that:-

> **"Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it... By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."**

8. 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.***

9. That the revocation of the Permit and the Licence by the Respondent were administrative actions is not in dispute since section 2 of the ***Fair Administrative Action Act, 2015*** defines "administrative action" to include:

> ***(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or***
>
> ***(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;***

10. The same section defines 'administrator" as "a person who takes administrative action or who makes an administrative decision." Section 3 on the other hand provides:

> ***(1) This Act applies to all state and non-state agencies, including any person***
>
> ***(a) exercising administrative authority;***

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

11. As was held in **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194** in which **O'reilly vs. Mackman [1982] 3 All ER 1129** was cited with approval:

> **"Wherever any person or body of persons has authority conferred by legislation to make decisions affecting the rights of the subjects, it is amenable to the remedy of an order to quash its decisions either for an error of law in reaching it, or for failure to act fairly towards the person who will be adversely affected if the decision maker fails to observe either one or other to the two fundamental rights accorded him of the rules of natural justice or fairness, viz: to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made..."**

12. The Respondent was therefore under a duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness necessarily requires that persons who are likely to be affected by the decision be afforded an opportunity of being heard before the decision is taken. Further, it is a Constitutional requirement that that person be given written reasons for the action.

13. As to whether a licensee is entitled to a hearing before the same is revoked, in **Congreve vs. Home Office [1976] QB 629**, **Lord Denning** expressed himself *inter alia* as follows:

> **"But now the question comes: can the Minister revoke the overlapping licence which was issued so lawfully? He claims that he can revoke it by virtue of the discretion given to him by section 1(4) of the Act. But I think not. The licensee has paid £12 for the 12 months. If the licence is to be revoked – and his money forfeited – the Minister would have to give good reasons to justify it. Of course, if the licensee had done anything wrong – if he had given a cheque for £12 which was dishonoured, or if he had broken the conditions of the licence – the Minister could revoke it. But when the licensee had done nothing wrong at all, I do not think the Minister can lawfully revoke the licence, at any rate, not without offering him his money back, and not even then except for good cause. If he should revoke it without giving reasons, or for no good reason, the courts can set aside his revocation and restore the licence. It would be a misuse of power conferred on him by Parliament: and these courts have the authority – and I would add, the duty – to correct a misuse of power by the Minister or his department, no matter how much they resent it or warn us of the consequences if we do. *Padfield vs. Minister of Agriculture, Fisheries and Food [1968] AC 997* is proof of what I say. It shows that when a Minister is given a discretion – and exercises it for reasons which are bad in law – the courts can interfere so as to get him back on to the right road."**

14. Before the Respondent can determine whether a licensee or the holder of a permit has not complied with the conditions for the issuance thereof, it is my view and I so hold that the Respondent ought first to afford the person concerned an opportunity of addressing the issue before revoking the same. There is no such evidence on record.

15. This Court does not doubt that the Respondent has the power to revoke the permit or licence issued by it. However, the issue that the Court has to determine in this application is whether based on the uncontroverted facts before the Court the decision made by the Respondent was procedural and ought to stand. As was held by **Emukule, J** in **Republic vs. Kombo & 3 Others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 [2008] 3 KLR (EP) 478**:

> **"The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this**

requires that every government authority which does some act which would otherwise be wrong (such as taking a man's land), or which infringes a man's liberty (as by refusing him planning permission), must be able to justify its action as authorised by law – and nearly in every case this will mean authorised directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard."

16. It is clear that the said notice was both unlawful and unprocedural.

17. As was held by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice.....A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void *ab initio."*

18. Consequently, I find merit in the Notice of Motion dated 29th December, 2016.

Order

19. In the result I issue the following reliefs:

1. An order of Certiorari removing into this court for the purposes of being quashed the decision communicated by the respondent's letter Ref No. NCC/TRD/8/2016 dated the 25th November, 2016 to revoke the Single Business Permit No. 1393053 and Liquor Licence No. 7212 issued to the ex parte applicant herein which decision is hereby quashed.

2. An order of prohibition against the respondent prohibiting the revocation of the Single Business Permit No. 1393053 and Liquor Licence No. 7212 issued to the ex parte applicant herein without affording it the benefit of a hearing.

3. The Applicant will have the costs of these proceedings.

20. Orders accordingly

Dated at Nairobi this 17th day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Maina for the Respondent

CA Mwangi