New Milimani Sacco Limited v Sacco Societies Regulatory Authority (Miscellaneous Application 317 of 2015) [2016] KEHC 4701 (KLR) (Constitutional and Judicial Review) (14 June 2016) (Judgment)

New Milimani Sacco Limited v Sacco Societies Regulatory Authority [2016] eKLR

Neutral citation: [2016] KEHC 4701 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND JUDICIAL REVIEW

MISCELLANEOUS APPLICATION 317 OF 2015

GV ODUNGA, J

JUNE 14, 2016

IN THE MATTER OF THE CO-OPERATIVE SOCIETIES ACT, CHAPTER 490, LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 23, 24 AND 25 OF THE SACCO SOCIETIES ACT, NO. 14 OF 2008

BETWEEN

NEW MILIMANI SACCO LIMITED ..... APPLICANT

AND

SACCO SOCIETIES REGULATORY AUTHORITY ..... RESPONDENT

JUDGMENT

1. By a Notice of Motion dated 2nd October, 2015, the *ex parte* applicant herein, New Milimani Sacco Limited, seeks the following orders:

    1) An order of certiorari do issue to remove into the High Court for purpose quashing the decision by the respondent dated 25th March 2015 to deny it a licence to give Front Office Service Activities (FOSA) to its members.

    2) An order of Prohibition do issue to stop and/or restrain the respondent from making any further advertisements or publications either on print media or electronic media or radio publicizing the alleged unlicensed activities of the applicant before the respondent

substantively deals with the applicant's application for a FOSA licence that is currently pending before it.

3) An order of *Mandamus* compelling the respondent issue and/or to act on the applicant's application for a licence made on the 13th July 2015 and received by the respondent on the same date under Section 24 of the *Sacco Societies Act*.

Ex Parte Applicant's Case

2. According to the Applicant, it is a duly registered co-operative society having been registered under the Co-operatives Act (hereinafter referred to as "the Act") in the year 2006 through the certificate of registration number CS/ 11202 and it conducts the business of a co-operative society as mandated and sanctioned by the *Act*.

3. It was averred by the Applicant that it has a membership of over 50, 000 members comprising of small scale traders and business persons in the informal sector commonly referred to as 'jua kali' and 'mama mboga'. The Applicant contended that it was approved by the Ministry of Industrialization to offer Back Office Service Activity (BOSA) namely to collect members' funds and disburse loans to its members and extension of the loan guarantee fund for its members. It was disclosed that the Applicant accepts non withdrawable deposits from members which are used as collateral against borrowing on a small scale and sends it audited accounts as required of it to the Ministry of Industrialisation and has observed all the statutory requirements expected of it. However, the Applicant does not allow its members to withdraw their savings except through borrowing loans against their savings and guarantees from members.

4. The Applicant averred that in the year 2014, with the aim of undertaking deposit taking business, also known as Front office deposit taking services (FOSA), it applied for a licence from Sacco Societies Regulatory Authority ('the Respondent'). However, by a letter dated 25th March, 2015 the Respondent rejected the Applicant's application for a deposit taking licence listing various reasons for the rejection, most of which were factually erroneous and particularly the allegation that the Applicant was undertaking deposit- taking business without a licence. This, according to the Applicant was due to the fact due to the nature of the membership of the Applicant, the members pay their contributions erratically as they are self employed and a such the Applicant has set up a mechanism of colleting the deposits which are banked in the Applicant's account through the help of field officers; and also that the Applicant in anticipation of receiving the licence from the Respondent set up an IT system that is compliant with the Respondent's regulatory requirements but is not undertaking the FOSA business. This position was explained to the Respondent vide a letter dated 30th March, 2015 and by a letter of 27th March, 2015, the Applicant responded to the salient grounds cited by the Respondent for the rejection of the application for a license by the Applicant.

5. It was contended that the Respondent did not respond to any of the Applicant's letters though receipt thereof was acknowledged. According to the Applicant, although the Respondent is required to issue a response within 14 days of receipt of the application, the Applicant has received no such response to date and was waiting for the same when the Respondent published a caveat on page 32 of the Daily Nation Newspaper of 10th September, 2015 stating that the Applicant was not licensed to undertake deposit taking business which move, it was averred, caused panic among the Applicant's members who are in the informal sector of the economy.

6. The Applicant averred that despite lodging a protest at this action which was taken after the Applicant had visited the Respondent on 5th August, 2015 to enquire on its application's status and corrective action by the Applicant, the Respondent's publication was featured in the Daily Nation Newspaper of

the 15th September, 2015. I was the Applicant's contention that by making the allegations contained in the advertisement, the Respondent has acted *ultra vires* its statutory mandate and put in jeopardy the business of the Applicant and the savings of its members. Further, the utterances of the Respondent were *ultra vires* the provisions of the Act and the Respondent has abused the process of licensing for it has without affording the Applicant the protection of the law, resorted to determining the Applicant's application for a licence through the press.

7. To the Applicant, the Respondent ought to undertake its functions under the Act by acknowledging and acting on the Applicant's application without unreasonable delay and not to take advantage of having not done their duty to claim that the Applicant is not licensed. It was however contended that the Respondent unreasonably delayed in considering the Applicant's application for a licence thereby jeopardising the business of the Applicant and the savings of its members.

The Respondent's Case

8. The Respondent, on its part opposed the application.

9. According to the Respondents, the application for judicial review is misconstrued and misapprehended in the circumstances since, to them judicial review is only meant to challenge the decision making process and not the merits of the decisions. Therefore, they contended, in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. However, from the pleadings, the applicant seems to challenge the decision of the Respondent of not issuing it with a license rather than how that decision was reached at. It was therefore their view that this is a backdoor attempt to sneak an appeal against the Authority's decision to refuse to grant a license and an attempt by the applicant to task the Court with the duty to consider its application for a license.

10. According to the Respondent, the applicant's application dated 19th July 2014 (although received by the respondent on 19th February, 2015) was duly considered and rejected and the applicant furnished with reasons for the rejection dated 25th March 2015. Similarly, the second application of 13th July 2015, was duly received, considered and the applicant accorded a hearing at which it was explained to the Applicant the reasons for not allowing the application and this was followed by a letter which rejected the applications which punctuated this decision with reasons.

11. To the Respondent, the applicant therefore suppressed the facts by averring that the application of 13th July 2015 was not considered. It was therefore the Respondent's position that there is no challenge on the decision making process but rather on the merits of the Respondent's decision to deny the applicant a deposit taking license hence the current application is an abuse of the courts process.

12. In any case, the Respondent asserted that judicial review remedy is not available where there are other alternative remedies available in law as it is a remedy of last resort. In the instant case, section 24(3) of the *Sacco Societies Act* cap 490B provides for an alternative remedy by way of an appeal to the Minister where the decision of the Authority can be overturned.

13. It was the Respondent's view that in any case the application equally lacked in merit in that the Applicant's first, the application of 19th July 2014 as well as the 13th July, 2015 failed to comply with mandatory requirements provided for in section 24 of the *Sacco Societies Act* as well as Regulation 4 of the *Sacco Societies (Deposit-Taking Sacco Business) Regulations, 2010*. To the Respondent, while considering the requirements thereunder, the Respondent exercises some form of discretion hence the applicant's application is a challenge to the Respondent's discretion which must be rejected. Further, the process of application, approval and issuance of license is highly regulated under the law,

Particularly, section 24 of the *Sacco Societies Act* and regulation 4 of the *Sacco Societies (Deposit-Taking Sacco Business) Regulations, 2010*

14. The respondent asserted that since there is no time limit within which it had to consider the application, the applicants assertion that the Respondent has failed to consider its application within the mandatory period is fallacious since it is only the second and the third stages which carry time limits of thirty days each. The Respondent reiterated that contrary to the applicant's assertion that the applicant's application has not been considered, it notified the applicant that its application was not in consonance with the act. As a sign of good faith, the Respondent met with the applicant on various occasions during which the applicant was explained why their 2nd application for a license was not entertained. This was followed up by a letter.

15. The Respondent averred that the applicant's purported application of 13th July 2015 was defective since it sought to amend the already existing application of 2014 which was unprocedural since once the Respondent considers and rejects an application, it becomes functus officio and cannot review its decision. Accordingly, it was contended this is why section 24(3) of the *Sacco Societies Act*, provides that an applicant may Appeal to the Minister in reference to refusal to grant a license within thirty days after the receipt of notification of refusal.

16. It was averred that having received the Notification of refusal dated 25th March 2015, the applicant had an opportunity to appeal to the Minister within 30 days but rather than do so, it applicant attempted to have the Respondent review its decision contrary to the law; yet the only remedy that the applicant had was to make a fresh application.

17. With regard to the advertisements placed on the newspaper, the Respondent's position was that it was just stating factual position that the applicant herein was not licensed to carry out Front Office Services Activities (FOSA). Accordingly, the advert could not cause any harm unless of course the applicant was already operating FOSA illegally.

18. It was averred that with respect to the allegation that in line with the process of application, approval and issuance of license, regulation 4(3)a of the *Sacco Societies (Deposit-Taking Sacco Business) Regulations, 2010* provides that the activities that the applicant is engaging in can only be allowed at the 2nd stage of application and after it being issued with a letter of intent by the Authority. Accordingly, the applicant's activity of operating banking halls and having fully fledged tellers goes contrary to the provisions of the law. To the Respondent, even if this were not the case, the applicant draws its membership from the informal sector, these categories of people are susceptible to being misled by the applicant's activities and infrastructure into believing that the applicant is a licensed Deposit Taking Society. The Respondent disclosed that the applicant has brochures which are already in the public which promise interest on savings are also in consonance with the business running a Front Office Service Activities. To the Respondent, SAACOS which operate Back Office Service Activities do not offer interest on deposits. On the contrary they only provide loans against such deposits and members are only allowed to withdraw their term deposits upon ceasing to become members of the SACCO.

19. The Respondent contended that the prayers sought in the application are untenable in law. To it, an order of certiorari to quash the decision of the Respondent of 25th March 2015 is mistaken since having failed to comply with the mandatory requirements; the applicant's cannot invite court to cure its inadequate application. On the other hand an order of *Mandamus* compelling the Respondent to issue a license and or to act on the applicant's application of 13th July 2015 is idle an this is because the application was rejected and the applicant notified. Again it is an attempt to substitute court to perform the functions of the Respondent Authority.

20. The Respondent therefore prayed that the application dated 2nd October 2015 be dismissed with costs.

Determinations

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

22. The parameters of judicial review were set out by the Court of Appeal in *Republic vs. Kenya National Examinations Council ex parte Gathenji & Others* Civil Appeal No. 266 of 1996 as follows:

> " Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *Mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *Mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *Mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *Mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *Mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *Mandamus* cannot quash what has already been done...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

23. The Applicant seeks an of certiorari to remove into this Court for purpose quashing the decision by the respondent dated 25th March 2015 to deny it a licence to give Front Office Service Activities (FOSA)

to its members. In the said letter, the Respondent explained in details the reasons why the Applicant could not be issued with the licence. This issue calls for a determination of what constitutes the scope and parameters of judicial review.

24. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See *Reid vs. Secretary of State for Scotland* [1999] 2 AC 512.

25. Judicial review, it has been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R vs. Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285.

26. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See *Chief Constable of the North Wales Police vs. Evans* (1982) I WLR 1155.

27. With respect to the ground of Wednesbury unreasonableness, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.

28. In other words, the courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by Professor Wade in a passage in his treatise on *Administrative Law, 5th Edition* at page 362 and approved by in the case of the Boundary Commission [1983] 2 WLR 458, 475:

> " The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those

bounds, it acts *ultra vires*. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

29. As was appreciated in *Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited* where Majanja J. quoting with approval the decision of Githua J in *Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited* Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR held:

> "It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates."

30. This was the position adopted by the Court of Appeal in *Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd* Civil Appeal No. 185 of 2001 where it was 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...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

31. I also associate myself with the expressions in *Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others* [2013] eKLR, that:

> "...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision...I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be *ultra vires* as to attract remedy

for the prerogative writs. The Court of Appeal in *Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others*, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter..."

32. Similarly, in *Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England 4th Edition* Vol (1)(1) para 60.

33. I have considered the decision of the Respondent as expressed in the letter dated 25th March, 2015, and it is my view that whereas one may disagree with the Respondent's basis for its determination therein, I am not convinced that the Respondent's decision as expressed was so irrational as to warrant being quashed in these proceedings.

34. The Applicant also seeks an order of prohibition to stop and/or restrain the respondent from making any further advertisements or publications either on print media or electronic media or radio publicizing the alleged unlicensed activities of the applicant before the respondent substantively deals with the applicant's application for a FOSA licence that is currently pending before it. This relief was based on the fact that the Respondent did not make a determination with respect to the Applicant's second application dated 13th July, 2015.

35. Whereas the Respondent contended that it indeed considered the said application and made a decision and exhibited a copy of the letter dated 7th September, 2015 which purportedly transmitted the decision, the Applicant contended that no such communication was received by it. In my view where an applicant contends that the decision was not furnished to him, it is upon the Respondent not only to prove that it determined the matter but that the decision was actually communicated to the applicant.

36. In this case, there is no evidence at all that the letter date 7th September, 2015 was transmitted to the Applicant. Accordingly, the Applicant was justified in instituting these proceedings.

37. The Respondent has contended that the Applicant ought to have appealed to the Minister. In my view, until a decision is made by the Respondent and transmitted to the Applicant, the applicant cannot be expected to lodge an appeal. In any case I associate myself with the decision on Nyamu, J (as he then was) in *Stephen Mutuku Muteti vs. The Director of Land Adjudication & Settlement & Others* Nairobi HCMA 246 of 1998 that:

> " The court deals with limits of power because the Government is limited by law and when public officers act outside the law aggrieved parties are as of right entitled to ask for relief from the Courts so that those limits of power are defined by the Court and the necessary

sanctions are given. Where the decision making process is clearly flawed in that the public officers clearly acted outside their jurisdiction and their acts were both biased, unreasonable and not supported by any provision under the relevant Act, a constitutional and judicial review court cannot deny the applicant a judicial remedy because the illegality brings the matter within the judicial review ambit."

38. Whereas the availability of an alternative remedy is a factor to be taken into consideration, the Court ought not, in its decision to sanitise a patently illegal action since because there is a right of appeal provided by the statute especially where such a right is less convenient, effective and beneficial.

39. The Respondent contends that the decision whether or not to grant the licence was an exercise of discretion. However, Article 47(1) of the *Constitution* provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Where an authority takes an unreasonably long delay in making a determination, such inaction on the part of the respondent cannot be excused on the ground that it is exercising a discretion. It is therefore clear that power ought to be properly exercised and ought not to be misused or abused. According to Prof Sir William Wade in his Book *Administrative Law*:

> " The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them..."

40. In my view, to hold that the Respondent was the sole judge when it comes to the exercise of discretion with respect to whether or not to grant the applicant the subject licence would amount to throwing the rule of law out of the window and to whittle away the Constitutional safeguards provided under Article 47 of the *Constitution*. Accordingly, the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion. In other words whereas the decision whether or not to register any application for licence is an exercise of discretion, public authorities are not entitled to abuse the discretion given to them since public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To decline to furnish an applicant with reasons for declining to issue a licence or to fail to determine such an application within a reasonable time would amount to wrong exercise of discretion. Public officers must remember that under Article 129 of the *Constitution* executive authority derives from the people of Kenya and is to be exercised in accordance with the *Constitution*

in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

41. Therefore there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. Whereas I appreciate the fact that the decision whether or not to grant an application for licence is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) 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.

42. In the premises an order of *Mandamus* is hereby issued compelling the respondent to act on the applicant's application for a licence made on the 13th July 2015 within 30 days from the date of service of this order and to furnish the Applicant with the decision and the reasons therefor if the decision is adverse to the Applicant.

43. In the event that the order is not complied with within the said period an order of *Mandamus* will issue compelling the Respondent to grant the said application.

44. In the meantime the Respondent is prohibited from making any further advertisements or publications either on print media or electronic media or radio publicizing the alleged unlicensed activities of the applicant.

45. The Applicant will have the costs of this application.

46. Orders accordingly.

DATED AT NAIROBI THIS 14TH DAY OF JUNE, 2016.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muthee for Ms Shaw for the Applicant

Miss Fundi for Mr Ligunya for the Respondent

Cc Mutisya