REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

JUDICIAL REVIEW NO. 17 OF 2015

In the matter of an application by Nelson Kinyua Wambutu for leave to apply for an order of Judicial Review

And

In the matter of the District Alcoholic Drinks Regulation Committee and the County Government of Nyeri

And

In the matter of Alcoholic Drinks Control Act No. 4 of 2010 and Nyeri County Alcoholic Drinks Control & Management Act

BETWEEN

Nelson Kinyua Wambutu.…………………..……………….......................... Applicant

versus

County Government of Nyeri..1st Respondent

Mathira East Sub-County Alcoholic

Drinks Regulation Committee ……………......…..……………………........2nd Respondent

RULING

Pursuant to leave granted to the applicant by this court on 18th January 2016, the applicant moved this honourable court seeking orders *an order of certiorari to remove into the high court for the purpose of quashing the order made by the District Alcoholic Drinks Regulation Committee, Nyeri County Alcoholic Drinks Control and Management Act 2014 rejecting the application of Alcoholic Licence of Pewa Bar & Restaurant.*

Even though leave was granted as aforesaid, the applicant has not stated **when the impugned order or decision was made**. This makes it impossible for the court to determine whether or not the impugned decision or order was made before the expiry of **six months** prior to filing the application for leave as provided under order **53** Rule **(2)** of the Civil Procedure Rules. That crucial issue appears to have escaped the attention of the court at the time of granting leave.

The grounds relied upon by the applicant are inter alia that *the County Government of Nyeri, Mathira*

East District Alcoholic Drinks Regulation Committee had no power to make order of rejection of renewal of alcoholic licence. However, in my virew, Section 12 of the Nyeri County Alcoholic Drinks and Control and Management Act, 2013 is clear on the powers f the sub-county Committee.

The applicant also states *the order complained of was made without due process and that it violates the applicants right to a fair trial contrary to Articles 50 & also violates Article 40 of the Constitution of Kenya 2010 and that the order violated the principles of natural justice;*

The applicant also avers that that the order in question is unreasonable and defective and violates the provisions of the Alcoholic Drinks Control Act number 4 of 2010, Laws of Kenya and the Nyeri County Alcoholic Drinks Control and Management Act 2014. However, no details or particulars of the alleged violation have been violated.

The applicant avers in his supporting affidavit *inter alia* as follows:-

> *a. **That** he has been operating his restaurant since 2006 and that he made his application for renewal of his license as required and paid the requisite fees but the Mathira East District Alcoholic Drinks Regulation Committee never acted upon his application nor did they inspect his premises nor was he invited for a hearing pursuant to section 9 (10) of the Alcoholic Drinks Control Act and the explanation given for the rejection of his application was that there was public outcry.*
>
> *b. **That** the applicant never got any notice to show cause why his licence should not be rejected nor was he afforded an opportunity to be heard, hence the rejection is bad in law and that the applicant has been adversely affected by the deprivation of his rights and livelihood.*
>
> ***c. That** the applicants obtained the requisite clearance forms, completed them and some paid required payments and notwithstanding the said payments, the first Respondent declined to issue the said licenses, while in respect of others, the first Respondent declined to accept the payments.*
>
> *d. **That** despite approval, the first Respondent has continued to close the said premises and has subjected the applicants to arbitrary arrests, hence the temporary licenses were a wood wink to collect revenue, hence the decision to issue temporary licenses is baseless, illegal, unfair and discriminative and has violated natural justice, hence the same ought to be quashed.*

The application is strongly opposed. There is on record the Replying affidavit of **Justus Munyiri,** the Chairman of the Mathira East East Sub-County Alcoholic Drinks Regulation Committee which is charged with the responsibility of receiving, reviewing and recommending for approval and issuing of licenses to the county committee and he avers *inter alia* as follows:-

> *a. **That** the applicant did operate a licensed bar by the name Pewa Bar and Restaurant and that the applicants application was rejected because it did not meet the standards under section 12 of the Nyeri County Alcoholic Drinks Management Act, 2013, and that upon such rejection an unsuccessful applicant is required apply for review to the sub-county committee.*
>
> *b. **That** the role of the committee is to recommend to the county committee for approval or disapproval under section 10.*
>
> *c. **That** the applicant has not exhausted the review mechanism provided under section 17 & 18 of the act, hence this court lacks jurisdiction and that the application is an abuse of court process.*
>
> *d. **That** there was a public outcry on the need to control the management of alcoholic drinks in the county, hence the matter was of public interest and that at a public meeting held on 17 September 2015 the public voted for the closure of bars in the area. Minutes of the said meeting were also annexed to the affidavit.*

The applicant in his replying affidavit reiterates that his application has never been heard, that his business meets all the required standards as confirmed by letter from the chief, that he has never dealt with illicit brew.

Both parties filed written submissions. **Mr A. J. Kariuki**, Counsel for the applicant submitted that **the applicants' application for a license has never been considered by the committee** and that the replying affidavit is sworn by a body that is not provided for under the act, hence the replying affidavit is irregular and ought to be struck off the record, that no gazette notice has been annexed showing how the body referred to was appointed, hence the alleged body is illegal hence a nullity, hence the alleged proceedings are a nullity.

If the applicants application for a license has never been heard as submitted by counsel for the applicant, then this raises a pertinent issue as to whether or not there is a decision to quash by way of *certiorari* or whether or not *certiorari* is the proper remedy in the circumstances. Thus, if the applicants' application has never been considered as, was it not proper for the applicant to apply for an order *mandamus* to compel the Respondents to perform their statutory duties? I will revisit this issue later.

Mr. Ngunjiri, Counsel for the Respondents submitted *inter alia* that the applicant is not entitled to the orders sought because the liquor licensing is a county government function as provided under section 5 (2) (c) of the County Government Act No. 12 of 2012, that the respondents are empowered to accept or reject the applications under section 9 of the Nyeri County Alcoholic Drinks Management Act of 2014 and the sub-county Alcoholic Drinks Regulation Committee is charged with the responsibility accepting or rejecting applications that do not meet the criteria, and this court has no jurisdiction because the applicant has not exhausted the mechanism laid down under the act and that it is in public interest that the orders be refused.

Judicial review is the review by a judge of the High Court of a decision; proposed decision; refusal to exercise a power of decision; to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

Judicial review is a judicial invention to ensure that a decision by the executive or a public body was made according to law, even if the decision does not otherwise involve an actionable wrong. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the rule of law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the supremacy of the law.

Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.

As was held in *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*[1]:-

> *"Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines 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. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and*

a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant......." (Emphasis added)

One of the fundamental principles in regard to the issuing of a writ of *'certiorari'*, is, that the writ can be availed of only to remove or adjudicate on the validity of judicial acts. The expression "judicial acts" includes the exercise of quasi-judicial functions by administrative bodies or other authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministerial acts. **Atkin, L.J**. thus summed up the law on this point in *Rex vs. Electricity Commissioners*[2]

"Whenever anybody or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

The second essential feature of a writ of *'certiorari'* is that the control which is exercised through it over judicial or quasi-judicial tribunals or bodies is not in an appellate but supervisory capacity. In granting a writ of *certiorari* the superior court does not exercise the powers of an appellate tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The offending order or proceeding so to say is put out of the way as one which should not be used to the detriment of any person, vide per Lord Cairns in **–** *'Walsall's Overseers v. L. & N. W.Rly. Co****[3]***

The supervision of the superior court exercised through writs of *'certiorari'* goes on two points, as was expressed by **Lord Sumner** in *King vs. Nat Bell Liquors Limited*.[4]One is the area of inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of law in the course of its exercise. These two heads normally cover all the grounds on which a writ of *'certiorari'* could be demanded. In fact there is little difficulty in the enunciation of the principles; the difficulty really arises in applying the principles to the facts of a particular case.

'Certiorari' may lie and is generally granted when a court has acted without or in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceeding or from the absence of some preliminary proceeding or the court itself may not be legally constituted or suffer from certain disability by reason of extraneous circumstances.[5]

Such writs are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or if there is an error apparent on the face of the record, and such act, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to me that it is not so wide or large as to enable the High Court to convert itself into a court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made. The foregoing passages indicate with sufficient fullness the general principles that govern the exercise of jurisdiction in the matter of granting writs of *'certiorari'*. The court has discretion to examine all the circumstances of the case and satisfy itself that the substantive grounds for review are serious enough.[6]

Judicial Review involves supervision of administrative decision making process, that is, did the public body act in a lawful manner in deciding the way it did. There are three categories of public law wrongs which are commonly used in cases of this nature. These are **Illegality**, **Fairness**, **Irrationality** and **proportionality. Lord Diplock J**, summed up these remedies in *Council of Civil Service Union Vs Minister for the Civil Service****[7]*** as follows:-

"Judicial Review has I think developed to a stage today when …………. one can conveniently classify under three heads the grounds upon which administrative action are subject to control by

> *Judicial Review. The first ground I would call 'illegality' the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. 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. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. By 'irrationality' I mean what can now succinctly be 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 has applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well-equipped to answer, or else there would be something badly wrong with our judicial system…….. I have described the third head as procedural fairness towards the person who will be affected by the decision. This is because susceptibility to Judicial Review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid out in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."*

Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. It is a well settled principle of law that certiorari is a discretionary remedy. It is one of those remedies in public law which cannot be claimed ***ex debito justiciae***. An applicant who makes out a case may yet be denied the remedy on a number of grounds; depending on the facts and circumstances of each case.[8]The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

The court usually has a discretion to refuse *certiorari* even though a substantive review ground has been established. However there has long been a debate as to whether the discretion **always** exists. There are many judgments saying that there is no discretion where the vitiating error is **"manifest"** (or apparent on the face of the record), and the applicant for the remedy is a person directly aggrieved. That question appears to have been resolved by *Re Refugee Review Tribunal; Ex parte Aala,*[9] where the court approved the following statement by **Gibbs CJ** in *R v Ross-Jones; Ex parte Green*[10]

> "*If, therefore, a clear case of want or excess of jurisdiction has been made out, and the prosecutor is a party aggrieved, the writ will issue* ***almost as of right****, although the court retains its discretion to refuse relief if in all the circumstances that seems the proper course*."(Emphasis added).

The court of Appeal in *Bluesea Shopping Mall Ltd vs The City Council of Nairobi & Others*[11] stated that in administrative law matters, courts have discretion to withhold a remedy of judicial review even where a substantive foundation has been laid because administrative law remedies are inherently discretionary. But courts are slow to deny the remedy. The discretion to refuse to grant judicial review orders where they are merited must be very sparingly exercised. In normal circumstances, a decision that has been found to be *ultra vires* must be quashed. Public policy considerations demand that public bodies must not be encouraged to breach the law and courts should not give the perception that breach of law will not attract sanctions and for this reason the discretion not to grant the remedy of judicial review where the application is merited ought to be exercised very sparingly so as to discourage unlawfulness. Where a public body under a duty to act fairly has failed to do so, an aggrieved party with a right to be heard cannot be denied his rights lightly. Judicial review is intended to enforce the rule of law. It should ensure that administrative decisions are taken in accordance with the powers conferred by Parliament.

As stated above, the applicant states that his application for a license has never been heard. It's not clear when and how the decision complained of was communicated (if at all). Both the parties did not enlighten the court on this. If there was no hearing, then it's not possible for the court to interrogate the decision complained of and arrive at a decision as to whether or not it can be allowed to stand. If the application was not heard at all, then this raises a question of the efficacy of the order sought because to me it suggests that the Respondents have refused to act, hence the most efficacious remedy would have been an

order of *mandamus* compelling the Respondents to perform their duties.

At the risk of repeating myself, I reiterate that an application of this nature must be based on the grounds that the body or tribunal:-

> *a. acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;*
>
> *b. failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;*
>
> *c. erred in law in making a decision or an order, whether or not the error appears on the face of the record;*
>
> *d. based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;*
>
> *e. acted, or failed to act, by reason of fraud or perjured evidence; or*
>
> *f. acted in any other way that was contrary to law.*

To me, none of the above grounds have been proved. In any event, the applicant states that his application was not heard at all and as I pointed out earlier, if that was the case, then a writ of *certiorari* would have been the most efficacious in the circumstances.

Certiorari being an extraordinary remedy, the party who seeks to avail of the same must strictly observe the rules laid down by law.[12] The extraordinary writ of *certiorari* may be availed of only upon showing, in the minimum, that the Respondent has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion.[13]

For a petition for *certiorari* and *prohibition* to succeed, it must be shown that; (a) the Respondent issued the order without or in excess of jurisdiction or with grave abuse of discretion; or (b) the order is patently erroneous, and the remedy of appeal cannot afford adequate and expeditious relief. It is equally imperative that the applicant must satisfactorily specify the acts committed or omitted by the body or officer that constitutes grave abuse of discretion.

Grave abuse of discretion means such capricious or whimsical exercise of judgement which is equivalent to lack of jurisdiction. To justify the issuance of the writ of *certiorari*, the abuse of discretion must be grave and so patent and gross as to amount to an evasion of positive duty or refusal to perform the duty or to act at all or act without jurisdiction.

A reading of the application before me does not satisfy that the above requirements have been met or even satisfactorily pleaded. As observed above, the position is made worse by the fact that the applicant states that his application was never heard, raising doubts as to whether the decision complained of was rendered, and if so, how and when.

In *Nasieku Tarayia vs Board of Directors, AFC & another*[14] it was held that judicial review is an alternative remedy of last resort and where alternative remedy exists, the court has to be satisfied that judicial review is the more convenient, beneficial, efficacious alternative remedy available for the court to grant.

It has not been demonstrated that judicial review is the most convenient, beneficial, efficacious alternative remedy available to the applicant in the circumstances. The applicant has not demonstrated that he satisfied all the required conditions to qualify to be issued with the license and that he was denied the license despite being qualified. It would have been prudent for the applicant to give details of the requirements to qualify for a license, demonstrate in detail that he satisfied the requirements, including but not limited to submitting evidence that premises was fit for the purpose, and demonstrate that the

premises were inspected by the relevant authorities and certified to be fit for the purpose or adduce evidence that the respondents failed to inspect the premises, hence the unfair decision. The applicant has not averred the above in his application.

Upon analysing all the material before me and upon considering the arguments advanced by both sides, I find that the applicant has not satisfied the threshold for this court to grant the orders sought. The effect is that the order of *Certiorari* is refused and the application dated 26th January 2016 is hereby dismissed with costs to the Respondents.

Orders accordingly

Signed, Dated and Delivered at **Nyeri** this **29th** day of **August** 2016

John M. Mativo, Judge

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[1] [2014] eKLR

[2] {1924-1} KB 171 at p.205 (C)

[3] {1879} 4 AC 30 at p. 39 (D)

[4] {1922} 2 AC 128 at p. 156 (E)

[5] Halsbury, 2nd edition, Vol. IX, page 880.

[6] See R vs Inland Revenue Commissioner ex p National Federation of Self -Employed and Small Businesses {1982}AC 617

[7] {1985} AC at P. 410

[8] Maudah Atuzarirwe vs Uganda Registration Services Bureau & Others, Misc. Cause No. 249 of 2013, High Court of Uganda

[9] {2000} 75 ALJR 52

[10] {1984} 156 CLR 185

[11] Civil Appeal No. 129 of 2013, Karanja, G.B.M. Kariuki & M'inoti JJA.

[12] Manila Midtown Hotels & Land Corp. vs NLRC, G.R. No. 118397, March 27 1998, 288, SCRA 259, 265.

[13] Camacho vs Coresis, Jr; G.R No. 134372, August 22, 2002, 387 SCRA 628

[14] {2012}Eklr