REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC. CIVIL APPLICATION NO. 343 OF 2015

IN THE MATTER OF JUDICIAL REVIEW APPLICATION

IN THE MATTER OF CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE JUDICATURE ACT CHAPTER 8 OF THE LAWS OF KENYA

IN THE MATTER OF THE LAW REFORM ACT CHAPTER 23 OF THE LAWS OF KENYA

IN THE MATTER OF APPLICATION SEEKING LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW OF CERTIORARI AGAINST THE HONOURABLE RESIDENT MAGISTRATE P. MUHOLI

IN THE MATTER OF THE ARTICLES 23, 24, 165 AND 159 OF THE CONSTITUTION

MUIGAI INTERNATIONAL (K) LIMITED……...APPLICANT

VERSUS

NAIROBI CITY COUNTY……..……..…...RESPONDENT

JUDGEMENT

Introduction

1. The ex parte applicant herein, **Muigai International (K)Limited**, who is wrongly described herein as the applicant as opposed to the Republic as ought to have been the case moved this Court by a Notice of Motion dated 21st October, 2015, seeks the following orders:

> **1. That an order of Certiorari be issued directed at the respondent to remove to this honourable court and quash the Notice by the respondent's Environmental Monitoring, Compliance Section dated 5/10/2015**
>
> **2. That an order of Prohibition be issued prohibiting the respondent from forcibly closing the applicants business and/or arbitrary arresting the applicant's directors employees, servants agents and patrons as threatened in the notice dated 5/10/2015.**
>
> **3. That costs of this application be cost in the cause.**

Applicant's Case

2. According to the Applicant, it operated a bar and club at Embakasi christened as **Club Bar** and that the said business is duly licensed by the respondent and other relevant authorities. On 6th October, 2015 it received a notice emanating from the respondent's Environmental Monitoring, Compliance and Enforcement department intimating its intention to either close or prosecute the applicant over alleged complaints that its business has been causing noise disturbance to the members of the public.

3. According to the Applicant, it was not supplied with the contents of the complainant neither was it afforded an opportunity to defend and/or make representations to the respondent in answer to the allegations and/or complainants. Further, the said notice was vague and did not give duration of time within which the threatened actions should be taken. Similarly, the notice did not require the applicant to make any remedial measures and therefore it was clear that the decision is final hence to the applicant, it was condemned unheard.

4. The Applicant disclosed that there are numerous similar establishments in the same locality which also have music and television services. It however contended that it was not playing loud music hence its club is unpopular with young patrons.

5. The Applicant averred that from the moment it received the notice it became apprehensive that the respondent and the police were likely to raid its business and make indiscriminate arrests and/or force it to close its business under the aegis of the said notice. That fear was vindicated on the night of 7th October, 2015 when persons who introduced themselves as officers of the respondent and the administration police raided its business and arrested everyone including its patrons and employees who were arraigned at Makadara Law Court and charged together with a group of other 500 person of being drunk and disorderly. Unfortunately they were not allowed to plead to the charges individually but the court did a mass plea taking and entered a plea of guilty and fined each one of them Kshs. 100/=.

6. According to the Applicant, this the second time its business was being raided and arrests being made since on 24th August, 2015 officers from the respondent with the support of the administration police raided its business and isolated its female employees and arrested twelve of them kept them in police custody from Friday night to Monday morning and completely refused to release them and were later charged before the 1st Class Magistrate Court with the offence of loitering with the intention of prostitution and the Applicant had to pay cash bail to secure their release and also hire a lawyer to defend them.

7. The Applicant was therefore apprehensive that the notice issued would be abused to legitimize constant harassment gross violation of its employees' and patrons' right to liberty and adversely affect its business.

Respondent's Case

8. The Respondent on its part filed the following grounds of opposition:

1. **That at the outset, the said application is premature, misconceived and bad in law.**

2. **That further granting the orders sought would be in vain since the respondent is mandated to carry out inspection on premises and businesses and whatever time it deems fit.**

3. **That the respondent is mandated to ensure that business follow the various by-laws that govern them.**

4. **That according to the Environmental Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulation of 2009 the respondent has the mandate to regulate noise pollution within its jurisdiction.**

5. That the application is fatally and incurably defective and does not lie in law since no nexus has been produced to show that there is a statutory duty impose upon the respondent and orders sought.

6. That if the orders sought are granted it would be against public interest as the applicant has continually and with disregard to the public interest allowed ridiculously loud, unreasonable and necessary noise which endangers the comfort, health and environment of the general public.

7. That the applicant has not shown that he has an arguable application or *prima facie* case worth meritorious consideration and determination by this honourable court on perusal of the materials presented to it by the applicant.

8. That the applicant's claim is out rightly frivolous, vexatious, unjust, without substance and raised no single triable issue for the determination of the court.

9. That in the premises, the respondent denies that the applicant is entitled to any of the reliefs prayed in the application or at all.

Determination

9. I have considered the application, the affidavit in support thereof, the grounds of opposition filed and the submissions made on behalf of the respective parties herein.

10. Since the Respondent has not filed any affidavit in reply the factual averments on behalf of the applicant are not in dispute. According to the impugned notice, the respondent notified the applicant that it was intending to prosecute the applicant and/or close the applicant's business. Whereas in cases where there is an intention to prosecute a person, it may not be necessary that that be person be heard, since each case must depend on its peculiar circumstances, where a person's business is at the risk of being closed, the intended action amounts to an administrative action.

11. Section 4(3) of the ***Fair Administrative Action Act, 2015,*** (hereinafter referred to as "the Act"), a statute enacted pursuant to Article 47 of the Constitution, 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.

12. Section 4(4) on the other hand provides as follows:

The administrator shall accord the person against whom administrative action is taken an opportunity to

(a) attend proceedings, in person or in the company of an expert of his choice;

be heard;

(b) cross-examine persons who give adverse evidence against him; and

(c) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.;

13. Section 2 of the Act 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;

14. 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.

15. The general position on the right to a hearing was restated in ***Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74*** as follows:

"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available."

16. In **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR,** it was held that:

"As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board* **[2005] 4 IR 217).** Hilary Delany **in his book,** *Judicial Review of Administrative Action,* ***Thomson Reuters 2nd edition, at page 272,*** **notes that, '*Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision*'…Article47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including '*(c) responsive, prompt, effective, impartial and equitable provision of services*' and '*(f) transparency and provision to the public of timely, accurate information*'…Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in** *TV3 v Independent Radio and Television Commission* **[1994] 2 IR 439)…In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (*See* *Charkaoui v Canada* [2007] SCC 9,** *Alberta Workers' Compensation Board v Alberta Appeals Commission* **(2005) 258 DLR (4th), 29, 55 and** *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750).***"**

17. This was the position adopted by **Kasanga Mulwa, J** in **Republic vs. Registrar of Companies *ex parte* Githungo [2001] KLR 299,** where he held that natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed.

18. In my view, an administrator must in its notice be clear as to the action it intends to take so that the person against whom the action is intended can properly direct his mind to the proposed action and properly answer the allegations made against him. This clarity in my view is both in respect of the grounds upon which the intended action is based as well as the intended administrative action. A notice which is vague either terms of the grounds or the intended action cannot be said to meet the threshold of a valid notice for the purposes of the foregoing provisions.

19. Apart from that the notice ought to call upon the party against whom the allegations are made to answer to the same. It is therefore not sufficient merely to notify the person that an administrative action is in the offing as the Respondent did in this case.

20. In my view the Respondent ought to have taken cue from section 119 of the ***Public Health Act*** which provides that:

> ***The medical officer of health, if satisfied of the existence of a nuisance, shall serve a notice on the author of the nuisance or, if he cannot be found, on the occupier or owner of the dwelling or premises on which the nuisance arises or continues, requiring him to remove it within the time specified in the notice, and to execute such work and do such things as may be necessary for that purpose, and, if the medical officer of health think it desirable (but not otherwise), specifying any work to be executed to prevent a recurrence of the said nuisance.***

21. According to the decisions in **Githui vs. Public Health Officer Crim. Application No. 141 of 1996, Republic vs. Kigera [2006] 1 KLR (E&L) 132**, **Republic vs. Kisanga & 8 others[1989] eKLR** and **Barclays Bank of Kenya vs. City Council of Nairobi Nairobi HCMA No. 4475 of 2005,** a closing order cannot be issued before the person against whom a complaint is made is afforded an opportunity of

being heard on the alleged nuisance and if possible an opportunity given to him to abate the same.

22. The Respondent has however contended that its action is in furtherance of the protection of the interest of the public. As was held in **Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya [2014] eKLR**:

> **"There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision."**

23. One of the grounds for impugning a decision is where the decision is tainted with procedural improprieties and as was held in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300:**

> **"Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

24. In this case, as the applicant's application cannot be assailed, I find merit in the said Motion.

Order

25. Consequently an order of certiorari is hereby issued removing into this Court for the purposes of being quashed the Notice by the respondent's Environmental Monitoring, Compliance Section dated 5th October, 2015 which decision is hereby quashed.

26. I further prohibit the Respondent from forcibly closing the applicants business and/or arbitrary arresting the applicant's directors, employees, servants agents and patrons based on the said notice dated 5th October, 2015.

27. With respect to the costs, as I stated at the beginning of this judgement these proceedings were improperly intituled. Applications for judicial review ought to be made in the name of the Republic rather than in the name of the ex parte applicant. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779** and **Mohamed Ahmed vs. R [1957] EA 523.**

28. In the result there will be no order as to costs.

29. It is so ordered.

Dated at Nairobi this 20th day of September, 2016

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

Cc Mwangi