



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 141 OF 2013**

REPUBLIC .....APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI .....RESPONDENT

Ex-parte

**EUROPEAN FOODS (E.A) LIMITED**

**JUDGEMENT**

The ex-parte Applicant (hereinafter simply referred to as the Applicant), European Foods (E.A.) Ltd has instituted these judicial review proceedings with a view to having a notice dated 8<sup>th</sup> April, 2013 issued by the Respondent's Public Health Department quashed. The Applicant also seeks an order of prohibition to prohibit the Respondent from executing the said notice. The Respondent is the City Council of Nairobi now the Nairobi City County.

The historical background to this matter is that through a letter dated 28<sup>th</sup> September, 2010 the Applicant applied from the Respondent what it called a "mobile business permit". That application is as reproduced hereunder:

**"The Chief Licensing officer,**

**City Council of Nairobi,**

**City Hall,**

**Nairobi**

**Dear sir,**

**RE: APPLICATION FOR MOBILE BUSINESS PERMIT**

**We have partnered with one of the major European food processing companies and are in the process of starting, on a pilot basis, a take-away pizza business which is very common in Europe, U.S.A, parts of Asia and South Africa.**

The business we intend to set up is very unique and a first in the region in the following ways;

1. Other than where it temporarily stands, the business premises comprises of a customized European-made sales wagon aesthetically built to blend with its immediate surrounding and easily moveable. It is made of stainless steel and measures approximately 4m x 2m x 2 ½m (height). (see picture attached).
  2. The sales wagon is fitted with special pizza warming ovens and deep freezer units which are EU\* certified in terms of quality, safety and environmental-friendliness (see picture attached). The customer may take away the pizza products either warmed or deep frozen.
  3. The wagon enjoys high hygiene standards as it is fitted with its own small water reservoir, clean service counters and wash basins for staff and cleaning the floor and service counters. (see picture attached).
  4. The water receptacle will be regularly emptied into the main waste disposal unit provided at the leased premises from where also clean water will be drawn as and when required. The business being purely take-away (i.e. no sitting and eating at the premises), there will be very little solid waste if at all which will be easily handled through a small portable waste bin on the wagon.
1. The wagon is fitted with standard domestic deep freezers to store the frozen pizzas; thus there is no possibility of pollution by decay.
  2. Our pizzas are high quality ready-made deep frozen from Europe, they are for take-way (either deep frozen or on quick warming). Warming time will be approximately three minutes thereby eliminating any queues at the premises.
  3. The special lighting system on the wagon creates a unique aesthetical ambience especially in the evenings thereby adding to the general beauty of the whole premises.

We intend to station our sales wagons at the private parking lots of the major shopping malls within Nairobi beginning with Nakumatt Ukay Center; Junction; Karen; Prestige; Sarit Centre; Yaya Center; Diamond Plaza; Uchumi Ngong Hyper and the Nairobi Hospital whereof toilet facilities are within the prescribed parameters.

We are in the process of executing tenancy contracts with the respective establishments.

Kindly confirm to us that our intended business is eligible for licensing. We await your positive response hereto.

Yours faithfully,

For: European Foods (E.A) Ltd

Stephan Belzer

Director

Cc: Chief Public Health Officer

City Council of Nairobi – For Information.

P.S

- EU\* Refers to European Union”

Through a letter dated 19<sup>th</sup> October, 2010 the Respondent approved the said application. Thereafter the Applicant’s business continued to be licensed annually.

Things, however, took a different turn on 8<sup>th</sup> April, 2013 when the Respondent's officers issued a notice to the Applicant and asked the Applicant to:

**“(1) AVAIL APPROVED PLANS OF THE PREMISE FROM CITY COUNCIL OF NAIROBI.**

**(2) PROVIDE A CHANGING ROOM WITH LOCKABLE LOCKERS.**

**(3) PROVIDE ADEQUATE SANITARY FACILITIES.”**

It is the Applicant's case that by issuing the said notice, the Respondent acted *ultra vires* since it licensed the Applicant's business as a food wagon. The Applicant also asserts that the notice was issued illegally and with ulterior motives.

The application is opposed through the replying affidavit of Robert Ayisi sworn on 29<sup>th</sup> July, 2013. Through the said affidavit, it is revealed that the Applicant did indeed apply for a mobile business permit and was issued with a licence to operate a café in 2010. The licence was renewed in 2012. Further, that in 2013 the Applicant was issued with a licence to operate a snack bar. It is the Respondent's case that on 8<sup>th</sup> April, 2013 its officers were on routine inspection of the Applicant's premises when they found that the Applicant was operating a restaurant contrary to the licensing permit.

The Respondent asserts that since the requirements for operating a restaurant are different from those of a snack bar, a notice was issued to the Applicant to comply with requirements in order to bring the premises to its new status of a restaurant. As such, the Applicant was required to provide adequate sanitary facilities, a changing room with lockable lockers and an approved plan from the Respondent. The Respondent therefore urged the Court to find that its decision was legal and not highhanded. The Respondent contends that the application is defective and that the Applicant did not disclose material facts to the Court.

The question to be answered is whether the Respondent exceeded its powers in issuing the notice in question to the Applicant. The Applicant is of the view that once its business was licenced the Respondent had no reason for issuing the notice in question. The Respondent asserts that the Applicant operated a business other than what was licenced.

I have gone through the Applicant's exhibits. One of them is a Single Business Permit issued on 7<sup>th</sup> March, 2011 which was to expire on 31<sup>st</sup> December, 2011. The business in which the Applicant was to be engaged in is **“SMALL EATING HOUSE AND PIZZA TAKEAWAY.”** The licence proceeds to reveal the particulars of that business as : **“Small Eating House; Snack Bar; Tea House “Hotel”.”**

The second document is a Single Business Permit issued on 12<sup>th</sup> January, 2012 and whose expiry date is 31<sup>st</sup> December, 2012. The Applicant is licenced to engage in the business of **“SMALL EATING HOUSE AND PIZZA TAKEAWAY”** and whose specifics are: **“Small Eating House; Snack Bar; Tea House “Hotel”.”**

The third permit exhibited by the Applicant was issued on 15<sup>th</sup> January, 2013 and its expiry date is given as 31<sup>st</sup> December, 2013. This particular Single Business Permit allows the Applicant to engage in the business of **“LARGE EATING HSE”** whose specifics are indicated as **“Large Eating House; Snack Bar; Tea House “Hotel”.”**

The Respondent's case is that it acted in accordance with the provisions of the **Public Health Act, Cap 242** and the **City Council of Nairobi (Restaurant, Easting House and Snack Bar) By-Laws, 2007**. The Respondent alleges that the Applicant was licensed to operate a snack bar but instead went ahead and operated a restaurant.

I have looked at the requirements for operating restaurants, eating houses, snack bars and cafes. The By-

Laws do not define what a restaurant, eating house, snack bar or café is. **Paragraph 3 of the By-Laws**, however, state that a restaurant includes among others an eating house, a snack bar and a cafe. I do not therefore understand the fine distinction which the Respondent is trying to make between the Applicant's business and a restaurant.

The Applicant was licensed to conduct its business as per its proposal dated 28<sup>th</sup> September, 2010. It must stick to that proposal and where it proceeds to do any other business then the Respondent is entitled to deny it a licence or approve the new business upon payment of the requisite fee. In the circumstances of this case, it seems that the Applicant has continued to execute its business plan as proposed to the Respondent.

The Respondent appears to be intent on harassing the Applicant. So long as the Applicant has been licenced to conduct the business it is doing, and so long as that business is within the parameters of the licence, the Respondent cannot close the business. The Respondent will be abusing its powers if it introduces new conditions when the licence is still valid. There is no evidence that the Applicant has done anything it is not licenced to do.

In the circumstances of this case, I find that the Applicant has established a case for the issuance of judicial review orders. The Respondent's notice dated 8<sup>th</sup> April, 2013 is therefore removed into this Court and quashed. Having quashed the notice, I find that issuing a prohibition order is superfluous as there is no longer a decision in existence which the Respondent can be prohibited from implementing. The Respondents will meet the Applicant's costs in respect to these proceedings.

Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of February, 2015

**W. KORIR,**

**JUDGE OF THE HIGH COURT**