REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 326 OF 2012

REPUBLIC ....APPLICANT

VERSUS

THE CHAIRMAN GITHUNGURI DISTRICT ALCOHOLIC

DRINKS REGULATION COMMITTEE............................RESPONDENT

EX-PARTE

MARION WANJIKU

KAREN WAIRIMU SUSAN

KENNEDY MURIMI KARANJA (as registered Chairman, Secretary and Treasurer of Githunguri Social Club**)**

JUDGEMENT

Githunguri Social Club through its officials Marion Wanjiku, Karen Warimu Susan and Kennedy Murimi Karanja has brought this judicial review application against the Chairman of Githunguri District Alcoholic Drinks Regulation Committee. Through the Notice of Motion application dated 27th November, 2011 the Applicant prays for orders:

1. **THAT an Order of Certiorari to bring into this Honourable Court and quash the decision of the Chairman Githunguri Liquor Licensing Committee made and issued pursuant to the notice dated 3rd of August 2012 and in particular cancelling the applicant's Alcoholic Drinks Licence No. 080.**
2. **THAT an Order of Prohibition directed at the Respondent from proceeding to cancel the applicant's Alcoholic Drinks Licence number 080 as set out in the notice dated 3rd day of August 2012 or enforcing the said notice on any other day in contravention of the Alcoholic Drinks Control Act, 2010.**
3. **THAT cost of this application be provided for.**

The application is supported by a statutory statement dated 17th August, 2012 and a verifying affidavit sworn by Kennedy Murimi Karanja on the same date. The Applicant is a registered social club dealing in alcoholic beverages. Its licence was set to expire on 30th June, 2012 and it applied to the Respondent for renewal of the same. Through a letter dated 3rd August, 2012, the Applicant was informed by the Respondent that:

> **"Your letter dated 1st August, 2012 on the above matter refers.**
>
> **Please note that we have given up to 31st August, 2012 to all alcoholic outlets near schools to clear their stocks and close, in line with parliamentary instructions on the matter.**

Please note that this deadline cannot be extended for anyone in the District as that will raise issues. That is why we have made it uniform for all persons involved.

You are therefore, expected to cease all alcoholic drinks business at the premises by close of business on <u>31st August, 2012.</u>

Please adhere to this deadline without failure."

The letter was signed by F.A.O. Ndunga, the District Commissioner, Githunguri. This is the decision that the Applicant challenges through these proceedings.

It is the Applicant's case that in the first place the Respondent had misdirected itself by issuing it with a Restaurant Alcoholic Drinks Licence instead of a Club Alcoholic Drinks Licence and this contravened Section 17 of the Alcoholic Drinks Control Act, 2010 ('the Act'). The Applicant contends that even if the Respondent was correct in cancelling its licence, it was entitled to three months to clear its stock and not the 28 days given to it by the Respondent. The Applicant asserts that its licence was cancelled in contravention of the rules of natural justice since it was not given an opportunity to be heard. The Applicant also submits that the decision of the Respondent is unlawful and ultra vires the Act in that its application for renewal of the licence was treated as if it was an application for a new licence.

The Respondent opposed the application by way of a replying affidavit sworn by F.A.O. Ndunga, the Deputy County Commissioner, Githunguri. Through the said affidavit the Respondent asserts that the Applicant shares a boundary with Githunguri Township Primary Boarding School and all Alcoholic Drinks Regulation Committees countrywide are under strict parliamentary instructions not to renew licences for liquor outlets that are within 300 metres from learning institutions. The Respondent asserts that this requirement is in accordance with Section 12(1)(c) of the Act. The Respondent contends that it has power under Section 10(4) of the Act to refuse to grant a licence. It is the Respondent's case that judicial review is not available to the Applicant since it ought to have filed an appeal, in the High Court, against the impugned decision under Section 15 of the Act.

One issue I to need to dispose without further ado is the question as to whether judicial review is the most efficacious remedy in the circumstances of this case. The Respondent asserts that the Applicant ought to have filed an appeal instead of commencing judicial review proceedings. The Respondent is correct in stating that Section 15 of the Act grants any applicant dissatisfied with the decision of a District Alcoholic Drinks Regulation Committee a right of appeal to the High Court.

The question then is whether a right of appeal of itself disentitles an applicant from seeking judicial review. Counsel for the Respondent in support of its argument cited the decision of the Court of Appeal in **Republic v National Environmental Management Authority [2011] eKLR** where it was held:

> **"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD. Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge."**

The decision of the Court of Appeal essentially captures the position of the law in relation to denial of judicial review where an alternative remedy is available. The factors to be considered were stated by the learned authors of **Halbury's Laws of England** at Paragraph 67 (Page 141) of the Fourth, 2001 Reissue,

as follows:

> **"The courts in their discretion will not normally make the remedy of judicial review available where there is an alternative remedy by way of appeal or where some other body has exclusive jurisdiction in respect of the dispute. However, judicial review may be granted where the alternative statutory remedy is 'nowhere near so convenient, beneficial and effectual' or 'where there is no other equally effective and convenient remedy'. This is particularly so where the decision in question is liable to be upset as a matter of law because it is clearly made without jurisdiction or in consequence of an error of law. Factors to be taken into account by a court when deciding whether to grant relief by judicial review when an alternative remedy is available are whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than the procedure by way of judicial review; and whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body. Further, a court should bear in mind the purpose of judicial review and the alternative difference between appeal and review."**

The above citation then brings us to the purpose of judicial review. Judicial review concerns itself with the process leading to the making of an impugned decision. The process must meet certain standards and where it fails to do so, judicial review orders will issue. The grounds under which judicial review orders can issue were established by Lord Diplock in the case of **COUNCIL FOR CIVIL SERVICE UNIONS v 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 without reiterating any analysis of the steps by which the development has come about, 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."……..**
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> **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.**
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> **By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"**
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> **(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). 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. 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.**
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> **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. 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 down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."**

Looking at the application as presented to this court, I find that the same is directed at the decision making process. In my view, it is a matter that falls into the province of judicial review and the Applicant

cannot be faulted for opting for judicial review. The objection raised by the Respondent is therefore dismissed.

The Respondent submitted that it has authority to grant or refuse to grant a licence. Sections 10(4) and 12 of the Act are cited in support of this proposition. That is not denied. The authority granted to the Respondent should, however, be exercised for the purpose for which it was granted and in accordance with the law. It cannot be exercised unreasonably, arbitrarily or maliciously. The rules of natural justice must be complied with where applicable.

The Applicant argued that it was granted a Restaurant Alcoholic Drinks Licence instead of a Club Alcoholic Drinks Licence and this contravened Section 17 of the Act. Section 17(1) provides that:

Types of licences

"17. (1) The several licences which may be granted under this Act shall be those specified in the First Schedule, and the provisions of that Schedule and of any rules made under this Act shall have effect in relation to the respective licences therein specified."

The licences according to the First Schedule are a brewer's, wholesale and retail licences. It is presumed that the Applicant's licence is a retail licence. The Act does not create categories for retail licences and I do not find any ground in support of the Applicant's argument. There is nothing wrong with the licence issued to it being called a Restaurant Alcoholic Drinks Licence.

Did the decision of the Respondent contravene the Act? The Applicant had applied for a renewal of its licence and the applicable law is contained in Section 14 of the Act which provides that:-

Validity and renewal of licences

"14. (1) Except as otherwise provided in this Act, a District Committee may, subject to this Part, grant, renew, transfer or remove a licence, and may embody therein such conditions as it may deem appropriate, or it may refuse to grant, renew, transfer, withdraw or cancel a licence.

(2) Every licence and every renewal, transfer, withdrawal or cancellation thereof shall be sufficiently authenticated by the District Committee.

(3) Every grant of a licence or its every renewal or transfer shall—

(a) be subject to the payment of such fee or fees as may be prescribed;

(b) expire at the end of twelve months from the date of issue;

(c) specify in the licence the hours within which the sale of alcohol is permitted.

(4) Where an application for the renewal of a licence has been made and the District Committee has not by the date of expiration of the licence reached a decision thereon, such licence shall continue in force until the decision of the District Committee is made known.

(5) Where an application for a licence has been refused, or a licence has been cancelled, no subsequent application by the former applicant or licensee for a licence of the same description shall be considered by the District Committee during the period of six months from the date of such refusal or cancellation, except at the discretion of the District

Committee."

The Respondent has pegged its rejection of the Applicant's application for the renewal of its licence on Sections 10 and 12 of the Act which in my view are applicable to applications for new licences. For example Section 12 states that:

Licence for premises

"12. (1) The District Committee shall not grant a new licence for the sale of an alcoholic drink to be consumed on the premises unless the District Committee is satisfied—

(a) that it would be in the public interest for provision to be made for the sale of alcoholic drink for consumption on the premises in the particular locality in respect of which the application is made, and that the number of such premises in respect of which such licences have already been granted is insufficient for the requirement of the locality given the population density per square kilometre and the permitted maximum number of such premises as shall be prescribed by law:

Provided that no licence shall be granted to sell alcoholic drinks in any institution of basic education including primary and secondary schools or any residential area as have been demarcated by or under the relevant written laws;

(b) that the premises in respect of which the application is made are in good repair and are in a clean and wholesome condition, and are provided with adequate and proper sanitary arrangements;

(c) <u>that the premises in respect of which the application is made are located at least three hundred metres from any nursery, primary, secondary or other learning institutions for persons under the age of eighteen years.</u>

(2) The District Committee shall not grant a licence for the sale of an alcoholic drink in a supermarket or such other related retail chain store unless it is satisfied that the applicant has taken measures to ensure that the area in which the sale is to take place is not accessible to persons under the age of eighteen years."

(Underlining mine for emphasis).

The Section is clearly meant for applications for new licences. In applying the conditions for the grant of a new licence to the Applicant's application for renewal of its licence, the Respondent misdirected itself. It took irrelevant and extraneous matters into consideration thus denying the Applicant a renewal of its licence.

The Applicant was already enjoying a licence and there was need to give the Applicant a hearing before the licence was cancelled. The Applicant cannot be compared to an applicant for a new licence. There was need to invite the Applicant for a hearing before rejecting the application for renewal of its licence. In failing to give the Applicant an opportunity to be heard, the Respondent proceeded in breach of the rules of natural justice. It is even interesting that the Respondent claimed to have acted on Parliamentary instructions without revealing to the Applicant those instructions.

Considering what I have stated above, I find that the Respondent's decision was tainted with illegalities and was arrived at in clear breach of the rules of natural justice. It cannot be allowed to stand. The decision of the Respondent contained in the letter dated 3rd August, 2012 cancelling the Applicant's Alcoholic Drinks Licence No. 080 is therefore quashed. The Respondent is prohibited from cancelling the said licence in contravention of the Alcoholic Drinks Control Act, 2010. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 21st day of February, 2014

W. K. KORIR,

JUDGE OF THE HIGH COURT