Njogu v Director of Alcoholic Drinks Control & Management, Nyeri County (Judicial Review Application E014 of 2024) [2025] KEHC 2161 (KLR) (11 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2161 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

JUDICIAL REVIEW APPLICATION E014 OF 2024

DKN MAGARE, J

FEBRUARY 11, 2025

IN THE MATTER OF AN APPLICATION BY STEPHEN MWANGI NJOGU FOR A JUDICIAL REVIEW ORDER OF CERTIORARI AGAINST THE DECISION OF THE DIRECTOR OF ALCOHOLIC DRINKS CONTROL & MANAGEMENT

AND

IN THE MATTER OF SECTIONS 32, 33 OF THE NYERI COUNTY ALCOHOLIC DRINKS CONTROL ACT, 2024

AND

IN THE MATTER OF THE DECISION BY THE DIRECTOR OF ALCOHOLIC DRINKS CONTROL MANAGEMENT WITHDRAWAL OF THE APPLICANT'S LICENCE PERMIT AND CLOSURE OF THE APPLICANT'S BUSINESS PREMISES KNOWN AS HIGHWAY VIEW INN BAR AND RESTAURANT

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION

BETWEEN

STEPHEN MWANGI NJOGU ..... EXPARTE APPLICANT

AND

DIRECTOR OF ALCOHOLIC DRINKS CONTROL & MANAGEMENT, NYERI COUNTY ..... RESPONDENT

JUDGMENT

1. The universality of fundamental rights cannot be gainsaid. The concept that you cannot condemn a man unheard, or hear the other side, Audi alteram partem, is as old as law can be. The use of national security as a ruse to abuse rights has not been easy to detect since, it is both complex and opaque. In Progress Welfare Association of Malindi Kenya National Chamber of Commerce and Industry & another v County Government of Kilifi, County Executive Committee, Member, Lands, Housing, Physical Planning & Urban Development & 4 others [2021] eKLR, while addressing the concept of audi alterum paterm, Nykundi J, posited as follows:

> It is a fundamental principle that a party to a litigation should be allowed to present his or her case in a public hearing under Article 50 (1) of the *Constitution* in an effective manner. This right is an expression of the audi alteram partem principle and part and parcel of the right to a fair trial.
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> > In Rex vs Deferral 1937 AD 370 and 373, the court observed that the audi alteram partem principles literary means, "hear the other side'. This means that no ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity of expressing their views. The audi alteram partem principle is followed in judicial proceedings, in our country, along with the rights such as legal representation, the right to adduce and challenge evidence in cross examination and the right to present ones evidence to the dispute or claim".

2. It is thus fundamental that a party be heard. In spite of multiple decisions of superior courts in Kenya, the County Government of Nyeri still has a concept called with immediate effect. In that concept, a decision is made, and then a party is asked to appeal to an inexistent body.

3. One such decision is impugned herein in an application dated 12.8.2024, where the ex-parte applicant sought the following reliefs:

    i. An Order of certiorari be issued to remove to the High Court for purposes of quashing the decision of the Director of the Alcoholic Drinks Control and Management, Nyeri County made on 16.7.2024 to withdraw the Applicant's liquor license and ordering immediate closure of the Applicant's business premises.

    ii. Costs.

4. The application was supported by the Statement of Facts as well as the Affidavit of Stephen Mwangi Njogu both dated 31.7.2024. It was deposed as follows:

    a. The Applicant has the requisite business permit No. 2024/26801 in respect of the operation of his Highway View Inn, which has been in operation for the last 14 years.

    b. On 16.7.2024, the Respondent arbitrarily and irrationally withdrew the license and ordered immediate closure of the premises and without a hearing or prior notice.

    c. Section 33(2) of the Nyeri Alcoholic Drinks Control and Management Act, 2024 mandated that the Respondent give a report within 7 days, but no decision has been furnished to date.

d. The Applicant has been denied access to his income, and his various inquiries to the offices of the Mathira Sub-county Alcoholic Drinks Regulation Committee have not assured that a report will be filed on the way forward.

5. The Respondent filed a Replying Affidavit sworn by one Josphat Wamathai on 29.8.2024 in which it was deposed as follows:

a. The deponent is the holder of the office established under Section 4 of the Nyeri County *Alcoholic Drinks Control Act* 2024.

b. The Applicant has been subject to a multidisciplinary hearing that compromised various security sectors.

c. The premises were being used as a haven to organize and perpetrate crime, which is a security risk, as observed by the Ministry of Interior and Coordination of National Government.

d. The Applicant was barred from filing the application as he was notified of the right of appeal as no appeal was lodged to the Liquor Committee as required under Section 36 of the relevant county legislation.

e. There are alternative remedies for resolving the Applicant's grievances.

Submissions

6. The Petitioner filed submissions dated 4.11.2024. It was submitted that the Petitioner has a right to fair administrative action under Article 47 of the *Constitution*, which is expeditious, efficient, reasonable, and procedurally fair, and which the Respondent violated.

7. It was the submission of the Petitioner that the Respondent violated Section 33(2) of the Nyeri County *Alcoholic Drinks Control Act* 2024, which required that whenever a license was temporarily withdrawn, the Director would within 7 days submit a report to the County Liquor Committee. It was submitted that the decision by the respondent to suspend the Petitioner's license was not temporary as it was final, contrary to the said county legislation.

8. On the part of the Respondents, they filed submissions dated 29.8.2024. It was submitted that the Applicant has not demonstrated that the decision was tainted with illegality, irrationality, or procedural impropriety. Reliance was placed on the case of Republic v Public Procurement Administrative Review Board & another Ex parte Intertek Testing Services (EA) Pty Limited & Authentix Inc; Accounting Officer, Energy, and Petroleum Regulatory Authority & another [2022] eKLR as follows:

> "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...Illegality is when the decision- making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...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."

9. It was also submitted that the only unfairness the Petitioners may claim is the failure to be afforded a fair hearing. However, concerning the rules of natural justice on unfairness and a fair hearing, the Respondent submitted that the now repealed Nyeri County Alcoholic Drinks and Management Act, 2024, provides an avenue to have the Petitioners' issues addressed.

10. The Respondent also submitted that the Petitioner has elected to elect the provisions of the law to rely on, which defeats the statute's purpose. Reliance was placed on the case of Martin Kabubii Mwangi v County Government of Laikipia [2019] eKLR where the Court stated as follows:

> " The exhaustion principle enunciated in precedents such as the case of Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR does not permit an election as to the parts of a statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case the suit was filed before the exhaustion of the remedy under the law, namely the provisions of Section 77 of the *County Governments Act*. The Claimant ought to have appealed against his removal to the Public Service Commission before moving the court. The suit did not fall in the category of suits that can be entertained by the court. As he did not appeal as provided for in law, the suit is a non-starter and is accordingly struck out with no order as to costs."

Analysis

11. The issue that presents to me for determination is whether the Petitioner has satisfied the criteria for issuance of a judicial review order of certiorari as entitled to the relief sought in the application.

12. The Applicant maintained that the acts of the Respondent in suspending his business permit in respect of the Highway View Inn was arbitrary, illegal, unreasonable, unconstitutional and infringed on Article 47 of the *Constitution* as it violated the Petitioner's right to fair administrative action.

13. The right to fair administrative action is enshrined under Article 47 of the 2010 Constitution as doth;

    (1) Every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

    (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

    (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall —provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.

14. The Applicant also claims that the Respondent did not serve him with any document on the alleged complaint or invite him to a hearing before making the decision to suspend his license. Further, after having suspended the license, the Respondent ought to have delivered a report on the applicant's fate within 7 days as required under Section 33(2) of the County *Alcoholic Drinks Control Act*, 2024.

15. The Respondent's general case is that the Applicant has not demonstrated that the decision was tainted with illegality, irrationality, or procedural impropriety. Further, the Applicant was in violation of the doctrine of exhaustion by not appealing to the County Liquor Committee if aggrieved, before filing this Petition.

16. The court has perused the Liquor License Permit dated and issued on 24.1.2024 for expiry on 30.6.2024. It is a 6-month validity license for the Applicant to operate business at his Highway View Inn. I have also seen a disclaimer at the bottom of the license denoting that the license did not exempt the operator (Applicant) from complying with current regulations on health and safety as established by the Government of Kenya and the County Government of Nyeri Alcoholic Drinks Control and Management Act, 2024.

17. The Respondents posit that the business permit was withdrawn when the Ministry of Interior and National Administration had considered the Applicant's operation at the Highway View Inn to be a risk to the security of the members of the public as it was being used as a haven to organize and perpetrate crime. This is fortified by the letter dated 12.7.2024 addressed to the Respondent herein requesting the Respondent to withdraw the license of the premise and order closure of the bar immediately.

18. There was no allegation that there were criminals who had perpetually been hiding in the premises. There were none arrested. The letter referred to protests that took place in June-July 2024. The court takes judicial notice of the pervasive nature of the so-called Gen Z protests. Such demonstrations cannot be said to have been led by criminals. These were young people protesting the passage of an Act of Parliament, which they found, in their wisdom, to be oppressive.

19. Further, there is a letter dated 16.7.2024 addressed to the Applicant from Respondent advising that the members of the public reported and corroborated the report of the Mathira East Security Committee that the Applicant's establishment was a threat to the security of the community. Consequently, the Respondent, vide the said letter, withdrew the license and ordered the Applicant to close the bar with immediate effect. It was also stated that the Applicant had 30 days to appeal to the County Liquor Committee.

20. This court is called upon to subject the acts of the Respondent to a judicial review test for the grant of an order of certiorari. The Applicant seeks to quash the Respondent's decision to withdraw his business license. The principles for Judicial Review reliefs were set out in a landmark case of Republic V *Kenya National Examination Council Ex parte Gathenji and others, Civil Appeal No.266 of 1996*, where the Court of Appeal stated inter alia:

> An order of certiorari can only 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 adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision-making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal."

21. In light of the matters under this Judicial Review application, the court is concerned with the decision-making process more than the merits of the decision itself. The procedure appertains whether the Respondent had the jurisdiction to make the decision it made in the manner it did. Further, whether the Applicant's constitutional rights and freedoms were breached in making the decision, in that

connection, if fundamental rights and freedoms were infringed in the process of arriving at a decision, it does not matter whether a correct decision was reached.

22. This is very fundamental in the context of defending the rule of law. The rule of law sometimes appears to be something to navigate around or ignore. If it is not protected or upheld, we end up in the darkest of places. Article 259 of the *Constitution* provides that the *Constitution* should be interpreted in a manner that promotes its purposes, values, and principles; advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights. In that context, it must permit the development of the law; and contribute to good governance. In order to interpret any statute or statutory provision, the same must be given a purposive interpretation. The whole provisions are read as a whole with each provision sustaining the other and not derogating from each other.

23. One of the safeguards in our constitutional order is the right to be heard. Without being heard or given an opportunity to be heard before the decision is made, then such a decision is null and void. Indeed, it resembles a decision that Lord Denning was considering while delivering the opinion of the Privy Council in Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, at page 1172 (1) as follows:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

24. What is the use of making a decision before hearing a party when such a decision of monumental nature, with effects of cataclysmic proportions, was being made? It is irrelevant that some people sat and discussed in some committee and agreed to have the bar closed. The decision to suspend the license for the bar was to be made by the decision maker. It is him and only him who was to consider the facts, after genuinely hearing the party that was to be affected.

25. Considerations such as security are in the domain of the interior ministry. They have to deal with those issues after hearing the affected party. To withdraw a license without a hearing is not only capricious but also arbitrary. The Respondent assumed powers that they do not have.

26. The Respondent withdrew the Applicant's business permit vide the letter dated 16.7.2024, which took effect immediately. The liquor permit had expired after 30th June 2024, but pursuant to the circular dated 4.7.2024 and issued by the County Government, there were delays in the issuance of new licenses, so the current license was validated until the county government issued licenses for 2025.

27. The purpose for which the Applicant's license was withdrawn was contained in the said letter dated 16.7.2024 and was that the public members had reported, and Mathira East Security Committee also noted that the Applicant's establishment was a threat to the security of the community. The previous letter dated 12.7.2024 and issued by the Deputy Commissioner, one Deborah Mwarania, also advised the Respondent to withdraw the Applicant's license as the bar had created a haven for criminals to plan and execute their activities, especially in the wake of the demonstration that rocked Karatina Town. This letter also mentioned that the Applicant's bar had earlier closed in March 2024 following a presidential directive on the eradication of illicit brews, drugs, and substance abuse, which nullified licenses whose premises were within residential areas and around basic education institutions. It was not, however, stated circumstances under which the Applicant's bar was reopened, if at all it was closed in March 2024, and also consciously missing was whether the Applicant was one of such bars that were within or near residential and basic education premises.

28. Presidential directives have no effect when it comes to the actions by the Respondent. The respondent must exercise their powers within the confines of the *Constitution*. All the letters exchanging hands ignored one fundamental principle, that those decisions affected the Ex-parte Applicant. In that connection, he needed to be heard, before the decision was made. It is even more precarious when the crimes that are said to be committed were protected rights under Article 37 of the *Constitution*, which provides for the right to Assembly, demonstration, picketing, and petition. The same provides as follows:

> Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.

29. The ex parte applicant is not a duty bearer in relation to the demonstrators. He has a right to sell whatever he is licensed to sell at such times as the customers, whomever they are (subject to age limit). He cannot be held responsible for allowing demonstrators to quench their thirst or even plan their demonstrations as that is part of the fundamental right to Assembly, demonstration, picketing, and petition.

30. More poignantly, however, is that the ex parte applicant was not heard. Without a hearing, the entire decision falls like the dominoes. It is unsupportable and unconstitutional. Further, the decision was in excess of what the Nyeri County provided for in the Nyeri County *Alcoholic Drinks Control Act*, 2024. Section 32 of the Act provides as follows regarding Cancellation of Licenses:

32.

(1) Upon receipt of a report made under Sections 13 and 34 (2) the Sub-County Committee shall -

i. send, by registered post or other verifiable mode of dispatch, a copy of the report to the licensee concerned therewith, informing him that at a meeting of the Sub-County Committee to be held on a date to be specified, but not less than thirty (30) days therefrom, the report will be considered by the Sub-County Committee;

ii. send a copy of the report to every member of the Sub-County Committee and to the Officer Commanding Police Services in the Sub- county; and

iii. inform the Sub-County public health officer or the police officer, as the case may be, of the date upon which the Sub-County committee will consider the report and require him to attend on the date specified.

(2) Any licensee concerning whom a report is to be considered may appear in person or by advocate before the Sub-County Committee.

(3) The Sub-County Committee, having duly considered the report and having heard the licensee, if he appears, may make such recommendations to the County Liquor Committee in respect of such licence or the licensed premises specified therein.

(4) The County Liquor Committee upon receiving and reviewing the recommendations under sub-section (3), may make such an order in respect of such licence or the licensed premises specified therein as, in the opinion of the County Liquor Committee, is necessary.

(5) Any person aggrieved by the decision of the County Liquor Committee upon any such report may within twenty-one (21) days appeal against the decision to Court.

(6) The Court, on an appeal under this section, may confirm or reverse the decision of the County Liquor Committee.

(7) If a license is cancelled or if on appeal under sub-section (6), the appeal is dismissed by the Court, the licensee shall be entitled, on payment of the proportionate part of the fee for the appropriate license, to a license of such description and for such period, not exceeding three months, as the SubCounty committee may deem necessary for the purpose of disposing of the alcoholic drink or apparatus on the premises, such license to run from the date of the decision of the County Liquor Committee or of the Court as the case may be.

31. On the other hand, the Director has the power to temporarily withdraw a license, subject to the provisions of Section 33 of the Act. The said section provides as follows:

33. (1) Subject to section 4 sub-section (2)(k) of this Act, the Director may, without notice to any holder of a license issued under this Act, temporarily withdraw or suspend such license in the event:

(a) there are reasonable grounds for suspicion that the license holder is utilizing the license for the manufacture, distribution, and/or sale of adulterated/illicit alcoholic drinks; there are reasonable grounds for suspicion that the license holder is utilizing the license for the manufacture, distribution and/or sale of adulterated/illicit alcoholic drinks;

(b) it is realized after the grant of the license that the same was approved by the County Liquor Committee due to a misstatement of fact(s) by the applicant/license holder during the application process;

(c) public health concerns arise in the premises in respect to which the license has been issued;

(d) of the occurrence of an epidemic within the area of operation of the license holder; and

(e) of any other grounds where there is reasonable belief or suspicion that the license holder has violated the provisions of this Act.

(2) where a license is temporarily suspended or withdrawn under this section, the Director shall, within 7 days, submit a report to the County Liquor Committee on all matters relevant leading to the temporary suspension or withdrawal of the license for determination in accordance with the provisions of Section 32 of this Act.

32. Security issues are not recorded as the reasons for the withdrawal of a license. This means that the Respondent acted without powers to do so. In Okiya Omtatah Okoiti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 6 others [2021] eKLR the court held:

> "An act of ultra vires when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of law or its principles renders the decision made laced with illegality."

33. The powers assumed by the respondent were not there. They were plucked from the air and exercised. The cadre of judicial review under our constitutional dispensation is higher, and administrative law is now hinged on Article 47 of the *Constitution*, whose effect is to be enforced as a threat to the right to fair administrative action. Under this pretext, the state's administrative bodies only act within their mandate and not more and for whatever is done outside the mandate, judicial review is the corrective measure. In *Daniel Ingida Aluvaala and another vs Council of Legal Education & Another, [Pet No. 254 of 2017*] I observed that:-

> " Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decisions to be allowed to stand, it must be demonstrated that the decision is grounded on law."

34. The *Constitution* has thus embedded into our legal system a transformative development of administrative justice which not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies but also entrenches the right to fair administrative action in the Bill of Rights. In Judicial Service Commission vs. Mbalu Mutava & Another[{2015} eKLR] the Court of Appeal held that:-

> " Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

35. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1 at paragraphs135 -136 as follows with regard to similar provisions on just administrative action in Section 33 of the South African Constitution:-

> " Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades..."

36. As a derivative of Article 47 of the *Constitution*, Section 7(2) of the *Fair Administrative Action Act*, 2015 provides for grounds of Judicial Review which include bias, procedural impropriety,

ulterior motive, failure to consider relevant matters, abuse of discretion, unreasonableness, violation of legitimate expectation or abuse of power.

37. The allegations that the Applicant's bar was a haven for criminals were not placed to the Applicant to answer. There were no guns recovered or some serious crimes. No one has, from the record, been charged with a crime with origin in the bar. Further, the alleged crimes are not crimes since demonstrations are constitutionally protected activities. A government officer cannot make a decision on the basis of rumours, hyperbole, rhetoric and innuendos. The respondent must remember that they have a solemn duty to act responsibly and not to bring their offices in public odium. Article 10 of the *Constitution* places upon their shoulders the responsibility to act with human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency, and accountability both of their actions and public resources.

38. Further, Article 73 of the *Constitution* requires that the respondent hold their offices in a public trust to be exercised in a manner that is consistent with the purposes and objects of this Constitution, demonstrates respect for the people, brings honour to the nation, and dignity to the office; and promotes public confidence in the integrity of the office. Therefore, to decide based on a letter from the Ministry of Interior without carrying out its functions is to descend to the lowest nadir that is unknown in modern times. Such arbitrary decisions bring to mind the recent decision by AC Mrima J, in Richard Owuor & 2 others (suing on behalf of Busia Sugarcane Importers Association) v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Cooperatives & 7 others [2021] eKLR, where the court addressed the issue of arbitrariness as follows:

> 29. This Court recently discussed the doctrine of arbitrariness in Nairobi High Court Constitutional Petition No. E283 of 2020 Law Society of Kenya vs. The Attorney General & Others (unreported). This is what I stated: -
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> > 116. The Court of Appeal in Malindi Civil Appeal 56 of 2014 Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR made reference to the Black's Law Dictionary 8th Edition that defined arbitrariness in the following manner: -
> >
> > In it connotes a decision or an action that is based on individual discretion, informed by prejudice or preference, rather than reason or facts.
> >
> > 117. The High Court in Civil Suit No. 3 of 2006 Kasimu Sharifu Mohamed vs. Timbi Limited [2011] eKLR referred to Oxford Advanced Learner's Dictionary A. S. Horby Sixth Edition Edited by Sally Wehmeiner which defines the term 'arbitrary in the following way: -
> >
> > The term arbitrary in the ordinary English language means an action or decision not seeming to be based on a reason, system and sometimes, seeming unfair.
> >
> > 118. The Supreme Court of China in Sharma Transport vs. Government of A. Palso (2002) 2 SCC 188 had the occasion to interrogate the meaning and import of the term 'arbitrarily'. The Court observed as follows: -
> >
> > The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

119. The term ‘arbitrariness’ had earlier on been defined by the Court (Supreme Court of China) in Shrilekha Vidyarthi vs. State of U.P (1991) 1 SCC 212 when it comprehensively observed as follows;

> The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you'. This is what men in power must remember, always.

39. There was no allegation that the products sold were counterfeit or any license condition was breached. The action related to the license, thus, appears arbitrary and not related to the license. It was the duty of the Respondent to bring materials before this court to justify the assertion that the Applicant's business establishment was but a haven for criminals. The reasons given by the Respondent were not justifiable in a free and democratic society. This was compounded by the fact that the license was withdrawn indefinitely. The only assurance given to the Applicant was the right of appeal to the Liquor Committee. The right of appeal was inconsequential because the details of the facts based on which the decision was made were not revealed to the Applicant. The decision was also unrelated to the matters the Liquor Committee could handle. Issues of picketing, demonstrations, and criminality were matters squarely within the confines of Articles 37 and 245 of the *Constitution*.

40. Being accused of operating a haven where criminals hatched was a serious allegation that needed to be particularized to enable the Applicant to defend himself effectively. The Respondent had the duty if at all the allegations were true, to invoke the criminal process to bring the alleged perpetrators of the criminal activities to book before moving to indefinitely withdraw the Applicant’s license, especially when the Applicant was not said to be involved in such unbecoming activities.

41. The Applicant could not be accused by written letters and then left to prove the case against himself. I find that the Respondent's decision was tainted with illegality, irrationality, procedural impropriety, and lack of jurisdiction and cannot stand the test of judicial review.

42. The indefinite suspension or revocation of the Applicant’s license placed his life upon the rack, influenced by the Respondent who could choose only what the Respondent desires to achieve other than justice, by keeping him out of the trade, ad infinitum. This court will intervene where it is demonstrated that the administrative acts of the Respondent have caused the Applicant and other citizens at large to live and operate their businesses at the mercy of state authorities.

43. It is also the finding of this court that the doctrine of exhaustion, though submitted by the Respondent as applicable, cannot limit the intervention of this court in the circumstances of this case. From the

acts and conduct of the Respondents, it cannot be anticipated that the Applicant could access justice through the appellate process under the County Liquor Committee.

44. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR where the Court stated as follows:

> The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution* and was aptly elucidated by the High Court in R v Independent Electoral and Boundaries Commission (I E B C) ex parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.43.While this case was decided before the *Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

45. Therefore, whereas it is true that where dispute resolution mechanism exists outside Courts, the same should be exhausted before the jurisdiction of the Courts is invoked, this requirement also promotes the application of Article 159 of the *Constitution*; the said doctrine is not absolute. Thus in Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, the Court of Appeal stated that:

> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The ex parte Applicants argue that this accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.

46. There exists exceptions to the doctrine of exhaustion. In R vs Independent Electoral and Boundaries Commission (I E B C) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

> What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake

> an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others.)

47. Therefore, this court will, in exceptional circumstances, consider and determine whether the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed. This places the burden upon this Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

48. Moreover, the jurisdiction of this Court to consider disputes on constitutional breaches from parties who lack adequate audience before a forum created by a statute or the quality of audience before the forum is in doubt must not be ousted from the seat of this Court. Therefore, statutory provisions ousting the Court's jurisdiction are not cast in stone and must be construed restrictively on a case-to-case basis. This was extensively elaborated by Mativo J in Night Rose Cosmetics [1972] Ltd v Nairobi County Government & 2 others [2018] eKLR as doth:

> In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

49. This court thus has the requisite jurisdiction. The jurisdiction of this court is circumscribed under Article 165(3) of the *Constitution* of Kenya, which posits as follows: -

> (3) Subject to clause (5), the High Court shall have-
>
> (a) unlimited original jurisdiction in criminal and civil matters;
>
> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
>
> (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

50. An award of costs in this court is governed by Section 27 of the *Civil Procedure Act*. They are discretionary. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit,

then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

51. I find no reason to deny the Applicant costs since costs follow the event. I award Ksh. 85,000/- as costs. The Respondent shall pay the costs.

Determination

52. The upshot is that I make the following orders: -

    a. The ex parte Applicant's Notice of Motion application dated 12.8.2024 is merited and is allowed.

    b. An Order of Certiorari be and is hereby issued to remove to this Court for purposes of being quashed and quashing the Decision of the Director of the Alcoholic Drinks Control and Management, Nyeri County made on 16.7.2024 to withdraw the Applicant's liquor license and order immediate closure of the Applicant's business premises.

    c. The Respondent shall bear the costs of this Petition payable to the Petitioners assessed at Kshs. 85,000/=.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF, FEBRUARY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Muchiri Wa Gathoni for the Applicant

Mr. Irungu for the Respondent

Court Assistant – Jedidah