Nest Lounge & Grill v Directorate of Liquor Control and Licensing; Osino (Interested Party) (Judicial Review Application E030 of 2023) [2025] KEHC 5036 (KLR) (24 March 2025) (Ruling)

Neutral citation: [2025] KEHC 5036 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION E030 OF 2023

OA SEWE, J

MARCH 24, 2025

IN THE MATTER OF AN APPLICATION BY FRANCIS WAICHOYA TRADING AS NEST LOUNGE & GRILL FORMERLY ABERDARE BAR & RESTAURANT FOR JUDICIAL REVIEW

AND

IN THE MATTER OF SECTIONS 4(1), 4(3), 4(4) OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

AND

IN THE MATTER OF ARTICLES 10(1), 10(2) (B) AND 47(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF MOMBASA COUNTY LIQUOR LICENSING ACT, 2014

AND

IN THE MATTER OF UNLAWFUL HARASSMENT & INTIMIDATION BY THE DIRECTORATE OF LIQUOR CONTROL AND LICENSING

BETWEEN

NEST LOUNGE & GRILL ..... APPLICANT

AND

DIRECTORATE OF LIQUOR CONTROL AND LICENSING ..... RESPONDENT

AND

PAULINE AWINO OSINO ..... INTERESTED PARTY

RULING

1. The substantive Notice of Motion dated 13th June 2024 was filed by the applicant, Nest Lounge & Grill, under Sections 8 and 9of the*Law Reform Act*, Chapter 26of the Laws of KenyaandOrder 53 Rule 3(1) of the Civil Procedure rules, 2010and all other enabling provisions of the law. The applicant thereby prayed for the following orders:

   (a) Spent

   (b) An order of Prohibition to prohibit the respondent from closing his business.

   (c) An order of Prohibition to prohibit the County Commander, Mombasa County, the OCPD, Nyali Police Station and other police officers within the same jurisdiction from arresting, harassing or intimidating the applicant while operating the business.

   (d) An order compelling the respondent to visit the applicant's business premises during business hours.

   (e) An Order compelling NEMA and neighbours to file a report on the conduct of the applicant's business affairs.

   (f) An Order for stay of enforcement of the decision of the respondent to intimidate the applicant.

   (g) An Order for costs to be provided for.

2. The application was supported by the affidavit sworn on 13th June 2024 by the applicant's proprietor, Francis Waichoyaas well as the Statutory Statement filed therewith. The deponent averred that he has been running the business known as Nest Lounge & Grillfor the past seven years; and that previously the business operated under the name and style of Aberdare Bar & Restaurantand was duly issued with a liquor licence. The applicant further explained that his business is located in an area that has private residences such as Royal Apartments; but there are also business entities including Reef Hoteland Maasai Resort. He added that all parties have co-existed peacefully for the past 7 years.

3. The applicant further deposed that he was aware that the interested party, Ms. P.A. Osino, Advocate, was being used to lodge unfounded complaints against his business, yet the interested party is not in close proximity to the business. He annexed a copy of the complaint by the interested party to his affidavit. It is dated 1st September 2023.

4. The applicant's proprietor contended that, upon being issued with a fresh liquor licence for the year 2023, he invested more than Kshs. 7,000,000/= to improve the business. Consequently, the premises were inspected and approved. He added that, throughout the years, it had been running the business in total compliance with the law, specifically the requirements of the Mombasa County Liquor Licensing Act, 2014 and the rules made thereunder.

5. The applicant's proprietor further deposed that he was surprised to receive a letter dated 18th September 2023 from the respondent in connection with allegations pertaining to non-compliance with the liquor licensing regulations and noise pollution. He annexed a copy of the letter to his Supporting Affidavit and contended that the action taken by the respondent was merely intended to drive him out of business since there were more than 7 businesses of a similar kind within close proximity to his business in the same locality. He added that the respondent was being used as a proxy on a witch hunt yet it was the respondent that issued him with a liquor licence.

6. The application was opposed by the respondent. It relied on the Replying Affidavit sworn by its Director, Mr. Simon Mbaru. The respondent thereby deposed that the applicant lacks the capacity to institute this suit as Nest Lounge and Grill is not a registered entity. The respondent further contended that Aberdare Bar and Restaurant does not belong to Francis Wachoya, but belongs to one David Kamau Mbugua; and that it was therefore necessary for the applicant to avail a Certificate of Registration of Business in the name of Nest Lounge and Grill or a Certificate of Change of Name from Aberdares Mega to Nest Lounge Grill to demonstrate its legal status as a registered business.

7. The respondent further averred that all business owners seeking licences for liquor outlets must meet the necessary criteria outlined in Section 24(4)(c) and Section 36 of the Mombasa Liquor Licensing Act, 2014. It pointed out that for the year under reference, the applicant had not fully complied in that it had not obtained clearance from the Kenya Police or the Department of Health. It was the posturing of the respondent that the applicant has been running a sales outlet for alcohol without a licence, and therefore has been in violation of Section 37 of the *Alcoholic Drinks Control Act*.

8. The respondent further stated that its Department of Environment had invited the applicant's proprietor for a meeting and warned him over the complaint that he was playing loud music past 11.00 pm but that the applicant's proprietor has continued to in his unlawful course. The respondent annexed copies of the Minutes of the Meeting it referred to, as well as a copy of the letter written to the applicant dated 23rd May 2023, among other documents. Thus, the respondent averred that this suit is an abuse of the court process and ought to be dismissed.

9. The interested party also opposed the application. She relied on her Replying Affidavit sworn on 15th August 2024 in which she deposed that the application lacks merit, has been made in bad faith and therefore ought to be dismissed with costs. The interested party pointed out that the leave dated 19th January 2024 was limited to the letter dated 18th September 2023 and therefore the orders now sought in the instant application are superfluous.

10. It was further the averment of the interested party that there was no evidence placed before the Court that the applicant has ever applied for or been issued with any licence by the respondent; or that it is a legal entity existing in law. The applicant further contended that no nexus was shown between the applicant, Nest Lounge and Grilland the deponent of the Supporting Affidavit, Francis Waichoyawho in the lease is shown as the proprietor of Aberdare Restaurant.

11. The interested party asserted that both Nest Lounge & Grilland Aberdare Bar and Restaurantoperated within close proximity to her residence at the Royal Apartments. She complained that the applicant's business operates on a 24-hour basis, with revelers singing along and shouting in loud voices while drinking alcohol and playing pool. She posited that the business is operating illegally in a residential area. She added that she owns and lives in an apartment at Royal Apartment and her living room and bedroom windows directly overlook the Makuti/Canvas bar operated by the applicant.

12. The interested party pointed out that, when the applicant started operating the bar in December 2022, she took prompt action along with her neighbours by reporting the matter to the respondent and other relevant authorities for action. She complained that her flat has been rendered unhealthy and dangerous; and that meetings with the applicant, her neighbours and the officials of the respondent and NEMA have yielded no fruits. She therefore opposed the application on those grounds.

13. The applicant filed a Further Affidavit sworn by Francis Waichoyaon 6th October 2024 in response to the averments of the respondent. The applicant posited that paragraphs 3 to 15 of the respondent's Replying Affidavit are based on mere conjecture intended merely to paint the applicant in bad light. The applicant averred that these proceedings were issued in the name of the deponent, Francis

Waichoyatrading as Nest Lounge and Grill;and therefore any contention that the suit is misconceived is diversionary.

14. The applicant's proprietor pointed out that the issue at hand is the respondent's unfair and unilateral decision to shut down his business and deny him a licence for the year 2024. He also averred that his business name is not Abardare Mega (sic) as referred to in paragraph 4 of the respondent's Replying Affidavit. He urged the Court to note that in paragraph 5 the respondent referred to his business as Abardare Bar and Restaurant. The applicant further stated that, at no time during these proceedings had the issue of business registration certificates come up and therefore he had no reason to avail the same. He added that he is ready to provide further details if called upon to do so by the Court.

15. The application was canvassed by way of written submissions, pursuant to the directions of the Court given herein on 16th July 2024. Accordingly, the applicant filed written submissions dated 9th July 2024 in which the following issues were proposed for determination:

    (a) Whether the applicant is an existing legally recognized business entity;

    (b) Whether the applicant is compliant in respect of County Government licences;

    (c) Whether the applicant has a prima facie case; and

    (d) Whether the interested party has satisfactorily proven her case.

16. The applicant submitted that it is a legally registered compliant business operating in Nyali within the County of Mombasa and that it was the duty of the respondent to ascertain its status. The applicant reiterated his posturing that it was previously operating under the name and style ofAberdare Bar & Restaurant,which was subsequently changed toNest Lounge & Grill.The applicant therefore contended that it has been in business for the past 7 years and that the change was procedural.

17. On whether the applicant has a prima facie case, reference was made to the case of Nguruman Limited v Jan Bonde Nielsen & 2 others, Civil Appeal No. 77 of 2012 and Mrao Ltd v First American Bank of Kenya Limited & 2 others[2003] eKLR, as to the three requirements for an order of injunction. The applicant submitted that it has met those conditions and is therefore entitled to the orders sought.

18. As to whether it complied with the applicable law in respect of the applicable County Government licences, the applicant urged the Court to find that the burden of proof was on the respondent on the basis of the rule that he who alleges must prove. The applicant relied on Evans Otieno Nyakwana v Cleophas Bwana Ongaro[2015] eKLR and Central Bank of Kenya Ltd v Trust Bank Ltd & 4 others,Civil Appeal No. 215 of 1996 to buttress his submissions.

19. In respect of the interested party, the applicant submitted that the respondent has never entered appearance and therefore that renders the interested party a busy body in this case. In addition, the applicant reiterated its submissions on the burden of proof and urged the Court to find, on the basis of the documents presented by it, that it discharged the obligation of proving compliance with the conditions for licensing; and that the evidential burden shifted to the interested party to prove her allegations. In the applicant's view, the evidential burden was not discharged by the interested party.

20. On its part, the respondent filed written submissions dated 7th October 2023. It proposed the following issues for determination:

    (a) Does the applicant have locus standi to institute proceedings against the respondent?

    (b) Does the applicant have a license granted under the Mombasa Liquor Licensing Act, 2014?

(c) Did the applicant meet the requisite requirements to be issued with a liquor license by the respondent?

(d) Does the respondent have the mandate to request for documents for change of user in business name from Aberdares Mega to Nest Lounge?

(e) Has the applicant lodged the decision that need to be quashed?

(f) Was the applicant accorded fair hearing?

(g) What are the specific grounds upon which the remedy is available?

(h) What decision is being challenged by the applicant?

(i) Was the respondent under duty in law to request for documents to ensure compliance with the Mombasa Liquor Licensing Act?

(j) What are the reliefs available to the applicant?

21. The respondent was of the view that it was incumbent upon the applicant to avail the licence issued under the name of Nest Lounge & Grill, and the previous licence issued under the name of Abardares Mega(sic) in addition to demonstrating that there was a change of name as alleged by the applicant. Reliance was placed on Fort Hall Bakery Supply Co. v Fredrick Muigai Wangoe[1959] EA 474 and Law Society of Kenya v Commissioner of Lands & others,Nakuru High Court Civil Case No. 464 of 2000 for the submission that, Nest Lounge & Grill, being a non-existent person, has no locus standi to sue herein.

22. It was further the submission of the respondent that the applicant has failed to demonstrate illegality, irrationality or procedural impropriety and is therefore not entitled to the judicial review orders sought herein. In addition, the respondent urged the Court to note that the impugned decision was not annexed to the applicant's application, and therefore contravened Order 53 Rule 7(1) of the Civil Procedure Rules. The respondent relied on Samson Kirere M'Ruchiu v Minister for Lands & Settlement,Civil Appeal No. 21 of 1999 to shore up its arguments and prayed for the striking out or dismissal of the suit with costs.

23. The interested party relied on her written submissions dated 7th October 2024. She took issue with the fact that the applicant filed two Statutory Statements, the first one having been filed at the leave stage and the second one with the substantive application. She urged for the striking out of the substantive application on that ground alone. She further submitted that prayers 1, 3, 4, 5, 6 and 7 of the substantive application do not relate to the leave granted by the Court on 19th January 2024. In her view, since prayer 2 cannot stand on its own without the letter dated 18th September 2024 being quashed, the application is untenable. Counsel relied on Siat Kedie Salat v Commissioner of Prisons[2017] eKLR to buttress this argument.

24. The interested party also reiterated the contention by the respondent that the applicant is not a legal entity capable of suing for redress under Article 47of *the Constitution*. She urged the Court to note, from the documents exhibited by the respondent, that Aberdare Bar and Restaurant was still in existence as at 17th September 2024, contrary to the allegations of the applicant that there was a change of name. She similarly made reference to page123 of her Replying Affidavit to show that the two business entities are operating within the same building.

25. Lastly, the interested party submitted that no evidence was placed before the Court to prove that the applicant ever applied for or has been issued with a licence by the respondent. She proceeded to discount the documents presented by the applicant on the following grounds, among others:

    (a) The two receipts attached to the application from the Health Service Department were issued to Aberdare Mega which is not a party to these proceedings; and that the purpose of the payment is not indicated at all.

    (b) The receipts dated 28th March 2023, 29th March 2023 and 29th May 2023 were paid for by Nancy Njoki Wakinyi who is not a party to these proceedings.

    (c) The lease attached to the initial application for leave indicates that the tenant of the premises is one Francis Wakinyi Waichoya t/a Aberdare Restaurant who is not a party to these proceedings; and that in any case, the lease expired on 1st March 2022 before the filing of these proceedings.

26. In the premises, the interested party underscored the mandate of the respondent under Sections 6 and 7 of the Mombasa County Liquor Licensing Act to regulate the production, sale, distribution and consumption of alcoholic drinks in Mombasa County to meet the objectives and purpose of the Act as stated in Section 3 thereof. In her submission, the letter of 18th September 2023 adhered to the requirements and that at no time was there a threat to close the applicant's business. She accordingly prayed for the dismissal of the suit contending that the applicant failed to make out a case for the issuance of the orders sought by it.

27. I have given careful consideration to the application, the affidavits filed in respect thereof as well as the written submissions filed by the parties. The respondent and the interested party have raised certain technical issues, namely:

    (a) Whether the applicant has locus standi to file this suit.

    (b) Whether the application is in conformity with the leave granted by the Court on 13th June 2024.

    (c) Whether the applicant has lodged the impugned decision.

    (d) Whether orders can validly issue against third parties such as NEMA and the Police.

28. Locus standi is defined in Blacks Law Dictionary, 9th Edition to mean "place of standing"or the right to bring an action or to be heard in a given forum. Accordingly, in Alfred Njau and others v City Council of Nairobi[1982] KAR 229 it was held:

    The term locus standi means a right to appear in Court and conversely to say that a person has no locus standi means that he has no right to appear or be heard in such and such proceedings."

29. To urge this point, the respondent relied on Law Society of Kenya v Commissioner of Lands & others (supra) in which it was held:

    " ...A person must have sufficiency of interest to sustain his standing to sue in Court of Law..."

30. The said decision was rendered long before the promulgation of *the Constitution*. It is therefore significant that judicial review proceedings have, since 2010, been given constitutional grounding. What that means is that "the place of standing"must now be viewed from the prism of *the Constitution*. For instance, Article 165(6)of the Constitutionis explicit that the supervisory jurisdiction of the High

Court encompasses decisions made by "...any person, body or authority exercising a judicial or quasi-judicial function..."

31. A perusal of the Statutory Statement filed by the applicant confirms that he invoked the supervisory jurisdiction of the Court as provided for in Article 165(6) of *the Constitution*, in addition to Articles 10 and 47 of *the Constitution*. More importantly, Article 258of *the Constitution* states:

    (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

    (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

        (a) a person acting on behalf of another person who cannot act in their own name;

        (b) a person acting as a member of, or in the interest of, a group or class of persons;

        (c) a person acting in the public interest; or

        SUBPARA (d)

        an association acting in the interest of one or more of its members.

32. It is plain then thatArticle 258(1)of the Constitutiongives a right to every person claiming that *the Constitution* has been contravened or is threatened with contravention to institute court proceedings. Article 258 (2) (b)and (d)of *the Constitution* are explicit that the proceedings can be filed by a person acting as a member of, or in the interest of, a group or class of persons and an association acting in the interest of one or more of its members.

33. Further to the foregoing, it is now trite that Article 3(1)of the Constitutionhas had the effect of widening the scope of locus standi considerably. The Supreme Court made this clear in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others[2014] eKLR thus:

> "...The issue of locus standi raises a point of law that touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity. In Mary Wambui Munene v. Peter Gichuki Kingara and Six Others,Sup. Ct. Petition No. 7 of 2013; [2014] eKLR, this Court held (at paragraphs 68 and 69) that the question of jurisdiction is a "pure question of law," and should be resolved on a priority basis...
>
> (67) It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or *the Constitution* in general. In John Wekesa Khaoya v. Attorney General, Petition No. 60 of 2012; [2013] eKLR the High Court thus expressed the principle (paragraph 4):
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> "...the locus standi to file judicial proceedings, representative or otherwise, has been greatly enlarged by *the Constitution* in Articles 22 and 258 of *the Constitution* which ensures unhindered access to justice..."

34. In Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others[2013] eKLR the Court of Appeal had earlier held:

> "(27) Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability

> under article 10 of *the Constitution* by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process...We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus stand to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in article 258."

35. Lastly, the word "person"is defined by *the Constitution* in Article 260to include "...a company, association or other body of persons whether incorporated or unincorporated."I therefore entertain no doubt at all that the applicant had locus standi to bring the instant suit. I am fortified in this stance by the position taken byHon. Nyamweya, J.in Republic v Committee on Senior Counsel & Another,Ex parteAllen Waiyaki Gichuhi[2021] eKLR, that:

> " 26. Since judicial review is a special supervisory jurisdiction which is different from both ordinary adversarial litigations between private parties and appeal rehearing on the merits, the question that determines the capacity of a defendant is whether there is some recognizable public law wrong that has been committed. A defendant in judicial review proceedings therefore, is the public body or public office holder which made the decision under challenge (or failed to make a decision where that failure is challenged), or where the public body or official has legal responsibility for the relevant matter.
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> 27. This Court therefore finds for the foregoing reasons, that the Committee of Senior Counsel, being an unincorporated body that has been given existence and duties by the *Advocates Act*, is a statutory and public body that is capable of suing and being sued for purposes of judicial review."

36. On whether the application is in conformity with the leave granted by the Court on 19th January 2024, a valid objection was raised by the interested party in this regard. She pointed out that the leave granted by the Court was restricted to the judicial review orders of Certiorari and Prohibition. A perusal of the Court record confirms that the orders granted by the Court pursuant to the application for leave were as follows:

(a) Leave be and is hereby granted to the applicant to commence judicial review proceedings for an order of Certiorari to quash the decision of the respondent as per the letter dated 18th September 2023.

(b) Leave be and is hereby granted to the applicant to apply for an order of Injunction restraining the respondent whether by itself, servants, agents or howsoever otherwise from arresting, harassing or intimidating the applicant when operating its business.

(c) Leave be and is hereby granted to the applicant to apply for an order of Prohibition to prohibit the respondent from closing the applicant's business.

(d) The substantive application be filed within 14 days from the date hereof.

(e) The Leave granted to operate as stay of enforcement of the decision of the respondent as per the letter dated 18th September 2023.

(f) The costs of the application to be costs in the substantive application.

37. The court record further confirms that upon filing an interlocutory application for conservatory orders as well as mandatory injunction, among other prayers, the applicant's application was dismissed for being misconceived. The subject application was the Notice of Motion dated 15th February 2024 and the specific orders prayed for were as follows:

(a) That pending the hearing and determination of the application, the Court be pleased to grant the following orders:

(i) a conservatory order in the nature of injunction restraining the respondent, its agents, officers or any other persons acting under its instructions from further visiting the applicant's business with the intention of closing it down.

(ii) a mandatory injunction directing the respondent to withdraw the letter dated 15th February 2024.

(iii) an order to direct the National Environment Management Authority to conduct an assessment on noise pollution at the applicant's premises and thereafter file a report.

(iv) Leave to file the substantive judicial review application out of time since the 14 days earlier granted has lapsed.

(b) Such further or other orders as the Court may deem fit and just to grant.

(d) that costs of the application be in the cause

38. Upon considering the application on its merits, the Court found the application misconceived and dismissed the same vide its ruling dated 13th June 2024. The Courts findings were as hereunder:

(17) In the application before the court the Applicant has sought conservatory orders to restrain the respondent from closing their establishment; a mandatory injunction directing the respondent to withdraw the letter dated 15th February 2024; and that the court be pleased to direct the National Environment Management Authority to conduct an assessment on noise pollution at the Applicant's premises and, thereafter, file its report before the Court.

(18) It is plain from the foregoing summary that the instant application is convoluted in so far as it merged merit aspects with an application for judicial review. It has often been pointed out that judicial review is sui generis with its focus trained on process rather than merit. Accordingly, in Emfil Limited v The Registrar of Titles Mombasa & 2 Others (2014) eKLR which was cited with approval in Republic v County Government of Mombasa, Ex parte Outdoor Advertising Association of Kenya [2018] eKLR, the court stated:

> "Judicial Review proceedings, are proceedings of a sui generis nature subject to its own peculiar rules. While we appreciate Article 159 of *the Constitution* and the need to apply substantive justice, that article provides no justification for a court to ignore a specific procedure provided by law and deliberately chosen by a litigant, nor does it allow a court to bend backwards to accommodate persons who have deliberately failed to protect or assert their interest."

(19) In the case of R v Attorney General & 4 Others, Ex Parte Diamond Hashim Lalji and Ahmed Lalji [2014] eKLR the court observed that:

> "Judicial review applications do not deal with merits of a case but only with the process. In other words, judicial review only determines whether the decision maker had 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."

[20] It is therefore not appropriate for a party to seek conservatory or injunctive orders by way of judicial review. The Court of Appeal made the point in Cortec Mining Kenya Ltd v Cabinet Secretary Attorney General and 8 Others [2015] eKLR as hereunder:

> "It is plain to see that in judicial review; the Court is concerned with public law remedies. An injunction is a private law remedy, and it can also serve as a public law remedy. However, in the context of judicial review, it is not available either in the High Court or in this Court on appeal under the *Law Reform Act*."
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> (also see Republic v Cabinet Secretary Lands & another; Orwa Group Ranch Representatives (Interested party) Ex-Parte Patrick Pkiach & 6 others [2019] eKLR)

(21) It is also notable that the letter relied on herein dated 15th February 2024 has nothing to do with the leave that was granted herein on 11th April 2024; and therefore comprises a totally new cause of action that was not envisaged by the Order of 11th April 2024. In addition, the applicant seeks an order directing the National Environment Management Authority to conduct an assessment before the filing of a substantive application for hearing and determination. In the court's Ruling dated 19th January 2024, the court found a similar prayer to be premature. That decision subsists and has not been set aside. The prayer is clearly untenable.

(22) More importantly, since the substantive application is yet to be filed, there is absolutely no basis for the prayers now sought by the applicant at paragraphs *2* [i], [ii], and [iii]. It was therefore in vain that the Court was addressed on those aspects of the application, including the issues of locus standi. In Republic v Communications Commission of Kenya, Ex Parte East Africa Television Network Limited [2001] eKLR the Court of Appeal held:

> "In our view, the fallacy in Dr. Kiplagat's contention lies principally in his assuming that it is the chamber summons application for leave to apply for the orders which originates the proceedings under Order 53. The proceedings under that order can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted."

(23) I therefore have no hesitation in holding that prayers [i], [ii] and [iii] of the applicant's Notice of Motion are misconceived and are for dismissal.

39. It is manifest therefore that the reasons given in respect of the applicant's locus standi lead to the inevitable conclusion that it is no longer necessary to deny a party audience simply because the party did not attach the decision complained of. To my mind, what counts in the final analysis is whether such a party has proved the requisite elements to warrant the issuance of the specific orders prayed for.

40. It is also manifest from the foregoing excerpt that the issue as to whether orders can issue herein against NEMA the Kenya Police Service was determined with finality by the Court in its ruling dated 13th

June 2024 and is therefore res judicata. Section 7of the*Civil Procedure Act*, Chapter 21of theLaws of Kenya,is explicit that:

> " No Court shall try any suit or issue in which the matter in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title...and has been heard and finally decided by such Court."

41. Needless to mention that res judicata is as applicable to main suits as it is to interlocutory applications. Hence, in Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others) Civil Appeal No. 36 of 1996),the Court of Appeal held that:

> " There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature in India and our *Civil Procedure Act*. That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation..."

42. In view of my findings above, the only prayer pending determination is the prayer for Prohibition. Therefore, the single issue for determination is whether the applicant has made out a case to warrant the issuance of the judicial review order of Prohibition, to prohibit the respondent from closing its business.

43. In respect of the remedy of Prohibition, the Court of Appeal had the following to say in Kenya National Examination Council v Republic,Ex ParteGeoffrey Gathenji Njoroge & 9 others[1997] eKLR:

> " ...It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised...The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition."

44. Ordinarily, an applicant for judicial review is expected to prove any of the three elements, namely, illegality, irrationality or procedural impropriety. These elements were discussed in the Ugandan case of Pastoli v Kabale District Local Government Council & Others[2008] 2 EA 300, 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: See Council of Civil Service Union v Minister for the Civil Service [1985]

AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).Illegality is 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 a law or its principles are instances of illegality...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: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E".Procedural impropriety is when there is 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. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

45. I hasten to add that, the judicial review trains its eye, not on the merit of the decision but on the decision-making process itself, the same being supervisory by nature. As pointed out hereinabove, since the promulgation of *the Constitution* of Kenya, 2010, judicial review acquired constitutional grounding; and, therefore, its only apt to acknowledge that the scope of judicial review has somewhat widened to involve some measure of merit review, where necessary. The Supreme Court made this clear in the case of Saisi & 7 others v Director of Public Prosecutions & others, (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment)as follows:

> 75. In order for the court to get through this extensive examination of section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly "in the circumstances of the case", without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in Judicial Service Commission & another v Lucy Muthoni Njora, Civil Appeal 486 of 2019; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against article 259 of *the Constitution* which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.
>
> 76. Be that as it may, it is the court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the

nature of reliefs that they may grant to those set out in section 11(1) and (2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1) (e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised..."

46. In the instant matter, the only applicable ground for the issuance of Prohibition is ultra vires or illegality. The applicant needed to show either that the respondent acted without jurisdiction or in excess of its jurisdiction. A perusal of the material presented before the Court shows that applicant's proprietor was only apprehensive that the respondent and the interested party had colluded to drive him out of business. This fear was premised on the fact that the interested party had complained about noise pollution at her place of residence, which is in the neighbourhood of the applicant's business.

47. The respondent's letter dated 18th September 2023 in respect of which leave was granted states:

> "...The Directorate of Liquor Control and Licensing is mandated by the Mombasa County Liquor Licensing Act 2014 to regulate the production, sale, distribution and consumption of alcoholic drinks in the County.
>
> Our surveillance has established the following:
>
> That you are operating in Breach of licensing regulations by playing loud music which is Nuisance to the Neighbourhood.(Copy of warning attached).
>
> Kindly note that we have received complaints from the neighbourhood that the area where your facility is situated is a residential area and there has been no change of user to operate as a commercial premise. Kindly furnish us with documentation in proof of change of user.
>
> Further note and share the documentation that established the Nest Lounge as change of name from Aberdare to Nest Lounge.
>
> Breach of the licensing conditions constitute an offence..."

48. There is no indication of imminent closure of the applicant's business in the said letter. Moreover, no material was placed before the Court to demonstrate that the respondent acted ultra vires its statutory mandate by writing that letter. It cannot be said that the contents of the impugned letter were unreasonable or that the letter was issued without due regard to the applicable procedural imperatives. To the contrary, the respondent demonstrated that it invited the applicant for a meeting before the letter was written and had warned the applicant about the issue of noise pollution.

49. There being no proof that the impugned decision was made to perpetuate ulterior motives, I find it apt to reiterate the expressions of Lord Hailsham of St Marylebonein Chief Constable of the North Wales Police v Evans[1982] 1 WLR 1155 that:

> "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court."

50. For the foregoing reasons, it is my considered view that the Notice of Motion dated 13th June 2024 lacks merit. The same is hereby dismissed. Each party to bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF MARCH 2025.

OLGA SEWE

JUDGE