



Muigana & 16 others v County Government of Nyandarua (Petition E007 of 2023) [2024] KEHC 960 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEHC 960 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU**

PETITION E007 OF 2023

CM KARIUKI, J

FEBRUARY 8, 2024

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 20, 21, 22, 23, 25, 27, 28, 35, 47, 48, 73,
159, 160, 165, 174, 196(1)(B) AND 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: SECTION 2, 3, (F) AND 115 OF THE COUNTY
GOVERNMENT ACT 2012**

AND

**IN THE MATTER OF: SECTIONS 4(1) AND 5 (A) OF THE NYANDARUA COUNTY
ALCOHOLIC DRINKS CONTROL ACT NO. 4 OF 2019**

AND

**IN THE MATTER OF: THE CONSTITUTION OF THE NYANDARUA COUNTY
ALCOHOLIC DRINKS MANAGEMENT & CONTROL COMMITTEE**

BETWEEN

ORDERS.

BETWEEN

JOSEPH MAINA MUIGANA & 16 OTHERS PETITIONER

AND

COUNTY GOVERNMENT OF NYANDARUA RESPONDENT

JUDGMENT

1. By Petition dated 19/7/2023, the petitioners lodged their claim together with a Notice of Motion dated an even date seeking conservatory orders.



2. Subsequently, Interim Conservatory Orders were issued but the same were vacated when the matter came before the Hon. Judge for non-attendance by the Petitioners or their Advocates.
3. This prompted the filing of another Application to reinstate the vacated interim orders. However, the parties abandoned the pending applications and opted for the disposal of the petition.
4. Parties were directed to file any further Affidavits and skeleton submissions before 1/2/2024. However, by the time this decision was drafted none of the parties had filed any further pleadings or skeleton submissions. Thus, the court relied on the content of the Petitioner's pleadings and affidavits on record.
5. The Petition is supported by the Affidavit of Joseph Maina Mungana sworn on 19/7/2023 and annexures thereto. The Petition is opposed by Respondent via affidavit of Joseph Gatore sworn and filed on 1/8/2023.
6. The petitioners seek the following reliefs.
 - a. A declaration that the closure of their businesses via notices dated 3rd July 2023 issued by the respondent to the petitioners was illegal and therefore null and void.
 - b. An order of Certiorari to issue quashing closure notice dated 3rd July 2023 issued by the respondent to the petitioners herein.
 - c. An order of Mandamus be issued compelling the County Government of Nyandarua to afford the Petitioners herein a fair Administrative process.
 - d. An order of Mandamus be issued compelling the County Government of Nyandarua to issue the Petitioners herein with the required licenses to operate their respective business upon the conclusion of a fair Administrative process.
 - e. Order of Prohibition do issue prohibiting the respondent either by themselves or any other person acting on their behalf from harassing the petitioners in their respective business herein.
 - f. Any other order this honorable court may deem fit, just and in the interest of justice grant.
 - g. The costs of this petition be provided for together with interest thereon at the court's rate.

Petitioners' case

7. The petition is founded on the fact that. That the Petitioner are citizen of the Republic of Kenya and therefore entitled to equal protection of the law as other citizens of the said Republic. The petitioners are residents of Nyandarua County, businessmen and businesswomen operating their respective businesses of Bar within Nyandarua County.
8. They have been operating their respective businesses within Nyandarua County for a very long period of over 5-10 years to date having been issued with our respective licenses by the respondent herein. On or about the 13th of July 2023 the respondent ambushed the petitioners issuing each of them with a Closure Notice of their respective businesses dated 3rd July 2023 which was due to lapse on 20th July 2023.
9. The said close notice indicated unknown reasons that the petitioners have never been notified of against the provisions of Article 35 of *the Constitution* of Kenya 2010. The petitioners were never given any fair hearing to respond to if any, of the said reasons in the said notice of closure failing to take into account relevant factors and provisions of the law on due process on the constitutional right to a just and fair hearing as well as rules of natural justice against the provisions of *the Constitution* of Kenya 2010.



10. The respondent's closure notice of Seven (7) days is also not sufficient failing to take into account that the petitioners have all along been operating their respective businesses which include but are not limited to perishable stock notwithstanding the huge investment made by each of us in our respective business against the provisions of Article 47 of *the Constitution* of Kenya 2010.
11. That none of the petitioners have been previously charged and/or convicted of any offense emanating from any of the reasons stated in the notice of closure issued by the respondent acts is in total violation of the Petitioners' constitutional rights.
12. That the actions complained about by the petitioners pose a gross indictment to principles of constitutionalism and the rule of law, and if allowed to stand, the said actions will occasion great injustice and or lawlessness.

Response by Respondent

13. The Respondents in replying affidavit sworn by Joseph Gatore County Attorney for the Respondent sworn and filed on 1/8/2023 narrate their case as follows;
14. That on or about June 2023, the South Kinangop Alcohol Drinks Regulation and Control Committee hereinafter "the committee" commenced the licensing process for 2023 by meeting all bar owners wherein it explained the application process and notified them that they have 7 days to make their applications.
15. The Petitioners herein applied for the renewal of licenses for their businesses in June 2023. Upon review of their applications, the Alcohol Drinks Regulations and Control Committee declined to renew the licenses. They attached annexure JG 1 being a list of all the applicants.
16. In reviewing the applications the Committee also invited members of the public to participate in line with Article 10 of *the Constitution*. The committee also worked closely with the Ward Administrators, the Assistant County Commissioner, respective Officer Commanding Stations, the sub-county enforcement, commander, chiefs, and assistant chiefs to ensure wide circulation of information as well as compliance.
17. Members of the public participated by presenting several petitions against the grant of licenses to some of the bar owners. Vide Annexure JG-2 is a copy of some of the Petition received from members of the public. The committee also inspected 283 liquor premises in South Kinangop Sub County. During the inspection, the committee noted that some bars were operating without licenses in 2022 and did not meet the minimum requirements provided under the Act amongst other reasons.
18. Upon inspection of the bars and consideration of the petitions submitted by members of the public, the Committee recommended 16 bars to be issued with licenses, 76 to be issued with licenses subject to acting on the recommendations given whereas 191 of the applications were denied. The renewal applications were declined for the following reasons which were communicated to the Petitioners in the closure notice:⁷
19. The premises do not meet the minimum requirement for licensing as stipulated in the Nyandarua County Alcohol Drinks Control Act, 2019. Some of the bars are located on agricultural land and there was no proof of a change of user as per the relevant land laws in Kenya. Intelligence report from the Criminal Investigation Department. Operating without a license. Some of the premises are located in residential areas.
20. Recommendations from community members to close premises. Premises fail to conform to the prescribed requirements of occupational health safety regulations. Posing insecurity threats in the



community. Not having stock. An attachment of An AnnexureJG-3 was said to be an inspection report with the detailed reasons why the Petitioners' applications were denied.

21. In declining to renew the Petitioner's licenses, the committee followed the due procedure set out in sections 16, 17, and 18 of the Nyandarua County Alcohol Drinks Control Act, 2019. Upon deliberations, the Committee decided to reject the Petitioner's applications for renewal under section 19(2) (a) of the Nyandarua County Alcohol. Drinks Control Act, 2019, and issued notices to each of the Petitioners citing reasons for the rejections.
22. Annexed and marked JG4 was to be a copy of the regret/closure notices issued to the Petitioners. That it is averred that, the County Government has adhered to the provisions of the Nyandarua County Alcohol Drinks Control Act, 2019, and Article 10, 47 of the Constitution in reviewing the applications made by the Petitioner.
23. It will be against the tenets of public policy to allow the petitioners to continue operating their business in residential areas, on agricultural land, and without meeting the minimum requirements for licensing as set out in the Act. That it is in the interests of justice that the notice of closure be allowed to take effect forthwith.

Issues, Analysis, and Determination.

24. After going through the pleadings and the affidavits on record, I find the issues are;
 - i. whether the constitutional threshold of a right of hearing met by the process of decision-making for licensing and notices issued for the closure of petitioners' businesses?
 - ii. And whether the closure of bars run by petitioners was justified.
 - iii. Are Petitioners entitled to the reliefs sought?
25. The core complaint of the Petitioners is that; they have been operating legally their respective businesses for a very long period between 5-10 years having been issued by the respondent the respective licenses for all the previous years up to the year 2022.
26. Each of them had fully complied by making the necessary application to the respondent for issuance of the required licenses for the year 2023 which they had always been issued with. They attached documents to demonstrate that, (annexed hereto and marked JMM5 are copies of the relevant application forms.)
27. The respondent's closure notice of Seven (7) days is said to be insufficient as it fails to consider that they have all along been operating their respective business which includes but is not limited to perishable stock notwithstanding the huge investment made by each of them in their respective businesses.
28. They have invested heavily in their respective businesses and the said closure of business is occasioning them and continues to cause them irreparable loss and damage. The respondents' reasons in the said notice of closure are illegal since no such allegations have ever been brought to their attention to each of them for them to respond to or be given a chance to defend such allegation which is untrue and misleading thus they were condemned unheard which is against the rules of natural justice as well as the constitutional rights,
29. The respondents' decisions were made for an illegal or improper motive and or for selective extraneous purpose failing to consider relevant factors and provisions of the law on due process on the right to a just and fair hearing.



30. That the respondent's decision was unfair, discriminatory, arbitrary, inconsistent, contradictory, malicious, and capricious and offended the rules of natural justice and their rights as enshrined in *the constitution*. The decision to close their respective business continues to occasion irreparable loss and damage to each of them since the said businesses are their only source of livelihood which they have been operating, having respectively heavily invested in the said business and the respondent's action is unwarranted.
31. That the decision of the respondent was not proportionate to the issues raised on the impugned report and as such does not meet the proportionality test under Article 24 of *the Constitution* of Kenya.
32. The Respondent rejoinder is a reference to notices annexed H notices to inform the four (4) petitioners of the intention to close their business premises, namely;
 - i. Esther Wambui Waweru
 - ii. Priscilla Njeri Kihui
 - iii. Caroline Wamuyu Mwangi and
 - iv. Hezekiah Kamau Waithaka all dated 3/7/2023.
33. The reasons for the denial of the license were;
 - a. For; Esther Wambui Waweru
 - i. Premises did not meet the minimum requirement for licensing as stipulated in Nyandarua, County *Alcoholic Drinks Control Act*.
 - ii. Operating without a license.
 - iii. The bar is located in agricultural land and there was no proof of change of user as per the relevant land laws in Kenya.
 - b. Priscillah Njeri Kihui; Note reasons in Esther Wambui Waweru's case above are replicated.
 - c. Caroline Wamuyu Mwangi; -The reason for the decline to tender license;
 - i. Premises did not meet the minimum requirement for licensing as stipulated in Nyandarua County Alcohol Drinks Control Act 2019.
 - ii. The Public Petitioned against the premises.
 - iii. The premises are located in a residential area.
 - d. Hezekiah Kamau Waithaka, - The reason for refusal to license was:
 - i. The premises did not meet the minimum requirements under the Nyandarua County Alcohol Drinks Control Act 2019.
 - ii. There was an intelligent report by CID.
34. Petitioner's rejoinder was that they were ambushed with a seven (7) day Notice of closure of their premises. The petitioners were never given detailed grounds of the intended closure nor given a hearing to rebut the allegation against them. Yet these are petitioners who aver that they have been running the bars for between five (5) and ten (10) years.



Law on judicial review on right to be heard.

35. The right to fair administrative action is articulated in Article 47 of the 2010 Constitution, which is to the effect that;

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.

36. In general, the *Fair Administrative Action Act* has introduced six aspects that are important in enhancing access to administrative justice in Kenya. First, Section 3(1) has expanded the scope of judicial review to include the actions of public and private bodies. This implies that it is not only the actions of public bodies that are subjected to judicial review but also the actions of private actors that may be subjected to judicial review where they violate the rights or interests of affected individuals.
37. Second, the Act has expounded on the constitutional grounds for judicial review and codified the grounds for judicial review under common law such as ultra vires, procedural fairness, and reasonableness. Section 7(2) of the Act provides for the grounds upon which a court or tribunal may review an administrative action or decision.
38. Third, Section 9 of the Act outlines the procedure for judicial review Fifth schedule, under Part IV of the Act (titled ‘Miscellaneous’), stated that the provisions of the *Fair Administrative Action Act* are additional to and not derogations from the rules of common law and natural justice. See M Akech, *Administrative Law* (2016).
39. The acknowledgment of common law principles in the review of administrative action has a significant impact on how Article 47 of *the Constitution* should be interpreted. According to OJ Dudley, in ‘*The Constitution* of Kenya 2010 and Judicial Review, Courts that interpreted the *Fair Administrative Action Act* have continued to appreciate and apply the principles of common law in the post-2015 jurisprudence. Courts have further interpreted Article 47 and the *Fair Administrative Action Act* in a way that ensures common law principles and rules of natural justice are further developed.
40. Lastly, the Act has elaborated the right to be given written reasons for administrative action. The requirement to give reasons for administrative action under the *Fair Administrative Action Act* has both substantive and procedural aspects. Substantively, Section 4(2) of the *Fair Administrative Action Act* recognizes that every person has a right to be given written reasons for any administrative action that is taken against him/her. See Chirwa (n 47); H Corder, ‘Administrative Justice in the Final Constitution’
41. This provision gives the court power to review administrative actions. This position was clearly stated in the case of *Such an Investment Limited v Ministry of National Heritage and Culture, & 3 others*, (2016) KLR that, Article 47 where the Court found that its power to statutorily review administrative action no longer flows directly from the common law, but inter alia from the constitutionally



mandated *Fair Administrative Action Act* and Article 47 of *the Constitution* of Kenya 2010. see *Fair Administrative Action Act* (No 4 of 2015), Section 12.

42. The fact that the provision of the complementarity between the *Fair Administrative Action Act* and the common law appears in the miscellaneous part of the Act does not mean that it is less weighty at least from jurisprudence.
43. Procedurally, the *Fair Administrative Action Act* expounds on how a request for reasons for administrative action can be made, modes of enforcing the right to be given reasons, and the remedies that accrue for breach of the right. Section 6(1) of the *Fair Administrative Action Act* allows an individual adversely affected by administrative action to request certain information from public administrators to facilitate his/her application for review of that administrative action in court.
44. The information requested includes reasons for the administrative action taken and any other relevant documents relating to the decision. Section 6(3) of the *Fair Administrative Action Act* gives a public administrator thirty (30) days to provide written reasons after receiving a request for the same. Reasons provided orally would not suffice.
45. Written reasons are more likely to be adequate because the administrator would have had sufficient time to properly consider the issues by considering relevant factors to enable him to justify his decision.
46. This may not be the case if the administrator was allowed to provide reasons orally at the point of making the decision. The time frame of 30 days looks reasonable because it gives an administrator sufficient time to properly consider the issues and relevant factors and provide written reasons for administrative action.
47. The test of adequate reasons that has been adopted in Kenya is that the reasons for the administrative action must be capable of informing the other person. See 5 SCR McIntosh, Fundamental Rights, and Democratic Governance: Essays in Caribbean Jurisprudence (2005) 34, where it is opined that the purpose of the duty to give a reason is to justify the administrative action – to explain to the affected person why a particular action was taken. This makes the requirement for adequate reasons to be given to be important.
48. The question of the adequacy of the reasons given should be assessed from the point of view of the affected person rather than that of the public administrator, See S Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990-91) 9 Law and Philosophy, 327.
49. When evaluating the adequacy of reasons given for administrative action, courts should ensure the reasons are unambiguous and intelligible to the person affected. They should be precise to enable the affected person to understand why and how the decision was reached.
50. In the English case of *Re Posyer and Mills Arbitration*, 57 Megaw J stated that proper and adequate reasons must be given. The reasons that are set out must be reasons that will not only be intelligible but will deal with substantive points that have been raised. Migai Akech Suppra, rightfully argues that the decision in the *Re Posyer* case means that the reasons provided must not only be both adequate and intelligible but also rationally relate to the evidence and be comprehensible.
51. The requirement to provide adequate reasons for administrative action is significant to public administration in two ways. First, it illustrates that proper consideration of the matter took place. Second, adequate reasons help in setting standards that may serve as guidelines to be applied in treating similar administrative action in the future, thus enhancing consistency in the decision-making process.
52. The question is, in the instant matter can the reasons rendered meet the aforesaid constitutional threshold?



53. Reasons like the premises did not meet minimum requirements under Nyandarua County Alcohol Drinks Control Act 2019. There was an intelligent report by CID. The Public Petitioned against the premises. Cannot by any standard meet the stated threshold of adequacy, intelligible even of being rational! What does an intelligence report by CID, entail and how would a petitioner defend himself from a CID report without knowing what was gathered and contained therein?? How would a petitioner defend such undisclosed grounds against him/herself?
54. In Re Posyer's case supra, the court held that the reasons provided must not only be both adequate and intelligible but also rationally related to the evidence and comprehensible. The content of the notices issued did not meet the thresh hold afore stated, in substance.
55. The report of inspection seems to have been influenced by non-committee members who went around purporting to inspect premises. Were they mandated by the statute to take such roles?
56. The entire process against the petitioners was unfair and so are the notices issued thereof thus unconstitutional.
57. However, the court has taken judicial notice that the Nyandarua county alcoholic Drink Control Act 2024 has been enacted and operationalized with effect from 22.1.2024.
58. Thus, ushering in a new legal framework for business pertaining to alcoholic drinks control. The same gives hope for order in the sphere of alcoholic drinks control, after a span of uncertainty following the nullification of the 2020 Nyandarua County *Alcoholic Drinks Control Act* for the county herein.
59. For justice to be not only done but also seem to be done, I make the orders;
 - i. A declaration that the notices for closure petitioners' business dated 3rd July 2023 issued by the respondent to the petitioners were unconstitutional and therefore null and void.
 - ii. An order of Certiorari be and is hereby issued quashing the decision denying to grant license to petitioners as applied and closure notices dated 3rd July 2023 issued by the respondent to the petitioners herein.
 - iii. Order of Mandamus be and is hereby issued compelling the County Government of Nyandarua to afford the Petitioners herein a fair Administrative process. Thus, the court orders and directs the respondent to expedite the process of licensing under the new legal regime and decide as to the eligibility of the petitioners to be licensed to run their business within the next thirty days (30) from the dates herein.
 - iv. The petitioners whose businesses were closed courtesy of the flawed process and invalid notices will be at liberty to claim the loss and damages where they will prove their case as required by the law.
 - v. The respondent shall bear costs for the petitioners herein.
 - vi. There be liberty to apply.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 8TH DAY OF FEBRUARY 2024.

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C KARIUKI
JUDGE

