



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njoroge t/a Jupiter Bar v Laikipia county Alcoholic Drinks Regulation Committee & another  
(Constitutional Petition 1 of 2023) [2024] KEHC 4584 (KLR) (16 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4584 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CONSTITUTIONAL PETITION 1 OF 2023  
AK NDUNG’U, J  
APRIL 16, 2024**

**BETWEEN**

**BENARD MUIRURI NJOROGE T/A JUPITER BAR ..... PETITIONER**

**AND**

**LAIKIPIA COUNTY ALCOHOLIC DRINKS REGULATION  
COMMITTEE ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF LAIKIPIA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 03/08/2023 the Petitioner lodged the petition herein challenging the revocation/cancellation of his 2023 liquor license by the 1<sup>st</sup> Respondent. Various declarations and orders are sought including orders of certiorari and prohibition.
2. Filed together with the petition is an application by notice of motion dated 01/08/2023 seeking an appropriate conservatory order pending hearing and disposal of the petition. The specific order sought is an order to restrain the Respondents –  
  
“...from interfering with the smooth running and operation of the Applicant’s business trading as Jupiter bar situate at Karuga township within Laikipia County.  
  
And  
  
An order quashing the Respondents business revocation of the Applicant’s liquor license renewal approval.”
3. The application is grounded on the grounds on the face thereof and supported by an affidavit sworn by the Applicant herein. He averred that he applied for the renewal of the single business permit and liquor license for his alcohol retail business, Jupiter Bar and on 08/05/2023, he was issued with a



single business permit upon successful payment. On 26/05/2023, his business premise was raided by officers from the 1<sup>st</sup> Respondent who confiscated the business permit claiming that the same was issued erroneously and the same remained revoked/cancelled without giving further explanation. That he was not accorded a fair hearing and was not given any information on the alleged erroneous approval and no prior notice was issued.

4. That the 1<sup>st</sup> Respondent has refused to supply the Petitioner with the reasons for revocation of the license despite the formal request made by him. Therefore, it is in the interest of justice that the orders sought be granted to avert further injustice as no prejudice will be suffered by any party.
5. The Respondents filed a joint replying affidavit dated 19/09/2023 sworn by Charles Muiruri, the director of the 2<sup>nd</sup> Respondent and secretary of the 1<sup>st</sup> Respondent. He deponed that the 1<sup>st</sup> Respondent has powers to cancel licenses that have been issued in accordance with Section 30 of the [Laikipia County Alcoholic Drinks Control Act 2014](#) (hereby referred as the 'Act'). That the Applicant operates within Igwamati ward where a public baraza was held on 20/01/2023 at Shamanei primary school where among the issues raised was bars operating in residential areas and disturbance. That the Applicant misrepresented facts as to the locality of his bar which he noted to be in Nyahururu and not Karuga, an area where the public had made an outcry of the nuisance and security of various bars in Karuga. That revocation of the license that was erroneously issued was done verbally and vide a letter dated 18/05/2023 and the decision made was of public interest nature as the bar was a nuisance and raised security concerns for the Karuga residents.
6. That no explanation was sought from the Respondents by the Applicant as he admitted in the motion that he was advised to seek for an explanation and the letter marked BMN7(a) was not received by the Respondents. That the decision to cancel his licence was made in the interest of the greater public and an order of certiorari will prejudice the Respondents as the decision to revoke was due to public outcry and that the order of prohibiting the Respondents from interfering and closing the petitioner's business would erode the powers of the committee and subcommittee and consequently render the Act otiose leaving the Applicant law unto himself. That the Respondents do not intend to deny deserving applicants licenses. However, the Respondents have a duty to protect people of Laikipia County from harm.
7. In response, the Applicant filed a supplementary affidavit dated 11/10/2023 where he averred that the Respondents do not possess the authority to close a licensed business or revoke a validly issued liquor license without adhering to the due process under the enabling legislation. That summary revocation of his license without being heard rendered their decision unconstitutional. That his business is situated at Karuga Trading Centre which is 4 kilometres from Shamanei and was not appraised of the purported public participation or chief baraza held on 20/01/2023. That the baraza failed to comply with Section 11 (a) of the [Act](#) which requires Respondent to ensure there is sufficient public participation. That Jupiter bar is located at Karuga Trading centre and according to Respondent's annexure CG-1 the public intent was all liquor establishment to be relocated to Karuga trading centre and the annexed minutes did not name his bar as one of the bars causing nuisance.
8. He further averred that decision to revoke the license was passed during public participation that took place months prior to his application, issuance and revocation of the permit. That the allegation that he misrepresented the location of his business premises as Nyahururu was a lie not substantiated with evidence and the Respondents failed to present any corroborating evidence of the communication for the purpose of revocation. On the allegation that he was informed to relocate due to 'one bar per building rule', he averred that this rule has not been published, gazetted nor referenced in any of the Respondents' annexures to support this claim. That his letter was dispatched by the G4S courier service but the Respondent has denied receiving yet there is proof of service by the signed waybill. That the



Respondents are estopped from relying on public interest justification for reasons that the impugned decision was marred with violation of due process and right to fair hearing and no substantial violation of license was demonstrated.

9. Further, he did not receive any official communication regarding the decision to cancel the license even after his advocate wrote to the Respondents. The procedure for cancelling his license under the Act was not followed raising concerns about the legality of the cancellation. The Respondents failed to carry out any inspection and file reports and no complaints were lodged against him and his bar for breaching any provisions of the Act. That the doctrine of exhaustion in the circumstances of this case justifies its exemption as there exist special circumstances which are ineffective internal remedies, wanting dispute mechanism, manifest abuse of discretion and level of public interest.
10. The application was canvassed by way of written submissions. On behalf of the Applicant, counsel on record argued that no report was made on alleged violations of the license as required under Section 29 of the Act; the petitioner was not served with a copy of the said report as per Section 30 (a) of the Act; the Applicant was not informed of any meeting as per Section 30 (b); that he was not provided with an opportunity to appear and respond to the allegations as provided under Section 30(2) of the Act and the decision to cancel the license was made summarily without affording him due process.
11. On whether he has met the threshold for issuance of conservatory orders, he submitted that he has a *prima facie case* as what is being challenged is violation of the fundamental right to a fair hearing and fair administrative action by a quasi-judicial body. That the Respondents made the impugned decision without involving him and the decision was made in violation of Article 47 of the Constitution and Section 7 of the Fair Administrative Action Act. That the Respondents did not demonstrate any wrong doings on his part to warrant the cancellation and also failed to refund the money he had paid. Reliance was placed on the case of *Congreve vs Home Office* (1976) QB 629 where the judge held that he did not think that the minister could lawfully revoke the license not without offering the money back except for good cause.
12. That the impugned decision was illegal as it contravened Section 11, 29, and 30 of the Act on due process of revocation and was unreasonable for claiming that his business was a nuisance and has misrepresented the location of his business without an iota of evidence; was irrational for purporting to revoke on account of non-compliance with 'one bar per building' rule without proof of publication or promulgation of the said rule; and it was unconstitutional for violating his rights to fair hearing contrary to Article 50(1) and (2) (b), (2)(k) of the Constitution. That his right to natural justice were violated in that he was not accorded right to receive a written copy of the decision and the right to be heard as no notice on cancellation was served and the respondents did not prove that the same was served. That failing to act on his request to reinstate the business permit and liquor license without reasons was in breach of Article 47 of the Constitution and Section 4(1)(2) and (3) of the Fair Administrative Action Act 2015, hence the administrative action was not fair.
13. Further, the purported public participation baraza was held two months after the cancellation of his license; that the decision to cancel his license was made on 18/05/2023 but it begs the question whether the Respondents gave him a chance to be heard before cancelling the license; the Respondents' replying affidavit did not show that he was notified of the said public baraza; the decision to revoke his license paralysed his business which resulted to prejudice including loss of goodwill and customers, loss of stock etc hence the urgent need to grant conservatory orders sought; that grant of conservatory orders will enhance constitutional values and object of bill of rights in that it will ensure that he is not denied a right previously enjoyed without due process.



14. As to whether the public interest will be served or prejudiced, he stated that the orders will counteract the Respondents' excessive actions driven by ulterior motive and misuse of administrative processes for purposes other than legitimate objective. Failing to grant the orders will also harm the public as it could lead to detrimental consequences that can affect other businesses like suppliers, employees and other trading partners. That there was breach of legitimate expectation as he expected that the 2<sup>nd</sup> Respondent would communicate its decision in a timely manner but there was no such communication despite written follow up. That having renewed his business permit and license, it created a legitimate expectation that any irregularities in the issuance of the same would not be detrimental to his interest without affording him a hearing thereon.
15. That though the Act provides for an internal dispute mechanism under Section 18 and 19, there exists exceptional circumstances to warrant exceptions to the doctrine of exhaustion of administrative remedies as was held in *Republic vs National Environment Management Authority Ex parte Sound Equipment Ltd* and as provided under section 9(4) of the *Fair Administrative Action Act*. That the exceptional circumstances include ineffective internal mechanisms as his right to appeal was frustrated by the Respondents for failure to grant him right for hearing nor written reasons, that pursuit of internal remedies will prove ineffective and remedies will be futile endeavour due to constraints of time, that where the mechanisms adequacy and availability are lacking, such exceptional circumstances warrant the court's intervention. Another exemption is manifest abuse of discretion which was manifested by the Respondents restriction of his rights to due process and finally the public interest and polycentricity in the petition. That the Respondents' failure to timely communicate their decision to revoke his permit thereby preventing him from pursuing review or appeal through internal mechanisms justifies immediate court intervention. The internal remedy proves to be ineffective and insufficient and futile in rectifying grievances and it is flawed.
16. The Respondents' counsel on the other hand submitted that the supreme court in the case of *Gatirau Peter Munya v Dickson Mwenda Kitinji & 2 others* (2014) eKLR observed that conservatory orders should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes. In the instant case the conservatory orders sought will go against public interest and the objectives of the Act as laid in Section 3.
17. That the Applicant applied for a license in May 2023 and the same was issued on 08/05/2023 and cancelled on 18/05/2023 and therefore, he would not suffer harm or prejudice noting that the permit was only active for 8 days before it was revoked. That it is misleading and false to state that continuance of his business was in public interest as it had clearly a more negative effect on the community than a positive one hence requiring government intervention. Further, grant of the said order will extend the validity of the single business permit and intended license beyond the specified date of 31/12/2023 and usurp the role of the subcounty alcoholic drinks regulation committee and county alcoholic drinks regulation committee as it would invite the court to take over the roles of the committees. Reliance was placed on the case of *Witmore Investment ltd v County Government of Kirinyaga & 3 others* (2016) eKLR.
18. That quashing the decision of the Respondents to revoke or otherwise refuse to issue the license will prematurely determine the entire petition and deprive the Respondents of an opportunity to prosecute their response to the same. That the Applicant has failed to reach the threshold for the issuance of conservatory orders and it will be highly prejudicial to the public if the said orders are granted.



19. I have considered the submissions by learned counsel. I have also read the petition, the application and all supporting affidavits and documents. At this interim stage, the court must guard against going into the merits of the petition which is a preserve of the trial court.
20. The circumstances under which conservatory orders may be granted were discussed in *Judicial Service Commission v. Speaker of the National Assembly & Another* [2013] eKLR:
- “Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the *Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”
21. The Supreme Court in *Gitirau Peter Munya vs. Dickson Mwenda Kitbinji and 2 Others* further ventilated the applicable principles as follows;
- “Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success’ in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”
22. Under Article 47 of the *Constitution* which grants the right to judicial review and which is given effect by the Fair Administrative Actions Act, a stay of the impugned action pending the hearing of the Motion is at the unfettered discretion of the court which, however, like all discretions, must be exercised judiciously. The key considerations are whether the applicant has established an arguable case worth of further interrogation at a substantive hearing, whether the stay would be efficacious in the circumstances and whether failure to grant stay would render the proceedings nugatory.
23. My reading of the Petition herein clearly shows that, despite being couched as a constitutional petition, the application is one seeking the right to Fair Administrative action provided under Article 47 of the *Constitution* and given effect by the Fair Administrative Actions Act. The Petition leans more on the remedies available in Judicial Review. I will mention in passing that while the *Constitution* grants a wide latitude in the enforcement of the Bill of Rights, experience has shown that many claims become convoluted when parties do not approach the court with the necessary precision targeting the wrong to be remedied and the direct remedy available in law.
24. That approach ends up obfuscating issues before the court and must be discouraged. In this particular case, the Applicant’s grouse falls perfectly within the scope of judicial review and ought to have been presented as such. That scope is well settled in law. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Anor*, this court (Mativo J as he then was) had the occasion to discuss supervision of administrative decision making process, that is, did the public body act in a lawful manner in deciding the way it did and the court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature. These are:-
- a. Illegality- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or



decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.

- b. Fairness- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.
  - c. Irrationality and proportionality- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker.
25. The Judge went on to say that Judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure and become the most powerful enforcement of constitutionalism, one of the greatest promoters of rule of law and perhaps one of the greatest and most powerful tools against abuse of power and arbitrariness.
26. As testimony that the Applicant is aware that the application fell under this ambit of the law, his counsel states in part in his submissions;
- “ what is being challenged is violation of the fundamental right to a fair hearing and fair administrative action by a quasi-judicial body. That the Respondents made the impugned decision without involving him and the decision was made in violation of Article 47 of the Constitution and section 7 of the Fair Administrative Action Act. That the Respondents did not demonstrate any wrong doings on his part to warrant the cancellation and also failed to refund the money he had paid. Reliance was placed on the case of *Congreve vs Home Office* (1976) QB 629 where the judge held that he did not think that the minister could lawfully revoke the license not without offering the money back except for good cause.
- That the impugned decision was illegal as it contravened section 11, 29, and 30 of the Act on due process of revocation and was unreasonable for claiming that his business was a nuisance and has misrepresented the location of his business without an iota of evidence; was irrational for purporting to revoke on account of non-compliance with ‘one bar per building’ rule without proof of publication or promulgation of the said rule; and it was unconstitutional for violating his rights to fair hearing contrary to Article 50(1) and (2) (b), (2)(k) of the Constitution. That his right to natural justice were violated in that he was not accorded right to receive a written copy of the decision and the right to be heard as no notice on cancellation was served and the respondents did not prove that the same was served. That failing to act on his request to reinstate the business permit and liquor license without reasons was in breach of Article 47 of the Constitution and section 4(1)(2) and (3) of the Fair Administrative Action Act 2015, hence the administrative action was not fair”.
27. A simple judicial review application would have sufficed in this matter notwithstanding the fact that the court has the wider latitude in interpretation of the Constitution in enforcement of the Bill of Rights.
28. Back to the matter at hand. The Applicant seeks conservatory orders restraining the Respondents from the smooth running and operation of the Applicants business trading as Jupiter Bar. Such running according to the Applicant was legally sanctioned by the Respondents through the issuance of a Liquor License and a Single Business Permit issued on 8<sup>th</sup> May 2023 and valid until 31<sup>st</sup> December 2023.



29. Upon filing the Petition and the subject application and on the same being placed before this court (Muchemi J) *ex parte* an interim conservatory order was issued in terms restraining and or barring the Respondents from in any way whatsoever interfering with the smooth running and operation of the Applicant's business trading as 'Jupiter Bar' situate at Karuga township within Laikipia County pending hearing and determination of the application.
30. It is plain and obvious that the validity of the licence granting the Applicant to run or operate the said bar business lapsed as at 31<sup>st</sup> December 2023.
31. The substratum of this Petition became otiose on the lapse of the validity of the licence giving the Applicant the authority to operate the bar. In those circumstances, granting the conservatory order sought pending the hearing of the Petition would be tantamount to this court assuming the powers of the Respondents and proceeding to extend the validity of the Single Business Permit and Liquor Licence beyond its lifespan, that is, up to 31<sup>st</sup> December 2023.
32. Were the circumstances to be different, upon a successful prosecution of the Petition herein, and if a finding be made that the rights of the Applicant to conduct business were infringed through unlawful and illegal acts of the Respondents leading to loss and damage, the Applicant would be entitled to compensation. (See *Peter Githaiga Mwangi T/A Konyu Bar vs Nyeri County Alcoholic Drinks Control and Licensing Board & Another* [2022] KEHC 3381 (KLR))
33. The obtaining situation in this matter is that the Applicant was granted conservatory orders early in the proceedings at the *ex parte* stage and he thus enjoyed the order throughout the live of his Liquor licence and Single Business Permit and therefore the issue of damages cannot arise.
34. In the premises, the application for conservatory order serves no useful purpose at this stage and is dismissed. I direct that each party bears its own costs. In the circumstances of this case, and specifically the sentiments of the court stated above, the Petitioner is at liberty to consider the way forward in pursuit of the main Petition.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF APRIL 2024**

**A.K. NDUNG'U**

**JUDGE**

