Republic v County Government Of Laikipia & 2 others; Kimani T/A Club Upstairs & 23 others (Exparte) (Judicial Review E006 of 2023) [2024] KEHC 4257 (KLR) (17 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4257 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

JUDICIAL REVIEW E006 OF 2023

AK NDUNG'U, J

APRIL 17, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

COUNTY GOVERNMENT OF LAIKIPIA ..... 1ST RESPONDENT

LAIKIPIA COUNTY ALCOHOLIC DRINKS REGULATION REGULATION COMMITTEE ..... 2ND RESPONDENT

NYAHURURU SUB COUNTY ALCOHOLIC DRINKS REGULATION REGULATION COMMITTEE ..... 3RD RESPONDENT

AND

PETER MUTERU KIMANI T/A CLUB UPSTAIRS & 23 OTHERS ..... EXPARTE

JUDGMENT

1. The Applicants herein filed a substantive motion dated 17/07/2023 and filed on 19/07/2023 seeking for the following orders;

    i. An order of certiorari do issue to remove to this court for purpose of being quashed the decisions of the Respondents to deny the Applicants Alcoholic Drinks Licenses to sell alcoholic drinks for the year 2023 and to close their businesses.

    ii. That an order of mandamus do issue compelling the Respondents to issue the Applicants with Alcoholic drinks retail licenses to sell alcoholic drinks for the year 2023 at their businesses.

    iii. That an order of prohibition do issue against the Respondents, the police or persons claiming under them from interfering with the Applicants businesses or closing the businesses.

iv. That the costs of the application for leave and the substantive application be borne by the Respondents.

v. Any other relief deemed fit and just to grant.

2. The application is based on grounds on the face thereof as well as the statement of facts and the affidavit of verification of facts sworn by Peter Muteru Kimani. It is averred that the exparte Applicants have been operating the bar business with approval of the Respondents within Igwamati ward at Nyahururu town, Karuga town and Chamanei town within Nyahururu sub-county, Laikipia County. On January 2023, they tendered their applications for alcoholic licenses for the year 2023 to the 1st Respondent and they paid the requisite fees. Subsequently, they were called for a hearing and on 28/04/2023, a list of successful applicants was posted on the 3rd Respondent's notice board but their names were missing. This was done irrespective of the fact that they had satisfied all the conditions set by the Respondents and their bar premises were inspected and confirmed to be fit.

3. That they were not informed of any objections lodged against their applications and they were not called upon to defend themselves against any objection. That the 3rd Respondent failed to prepare a notice setting forth the names of all the Applicants, the type of licenses applied for, the premises in respect of which the licenses were applied for and the time, date and place of the meeting within 21 days of the submission of their applications as per the law. No hearing was conducted in respect of their application and the 3rd Respondent failed to tender written reasons for rejection of their applications.

4. Subsequently, a letter dated 30/06/2023 was written by their advocate requesting for the grounds of rejection but no reasons were offered. They then proceeded to lodge an appeal to the County Committee but they were not called for a hearing and came to learn about the outcome of the appeals after a list of successful appellants was posted on the 3rd Respondent's notice board on 11/06/2023. That they were not accorded a hearing by the 2nd Respondent nor given reasons for rejection of their appeals which were to be determined within 21 days. Further, there was no public participation in arriving at the decision to reject their applications.

5. That section 4 of the Fair Administrative Actions Act No:4 of 2015 places responsibility to provide an opportunity to anyone who may be adversely affected by the decision to be heard and section 4(2) gives every person the right to be given written reasons for any administrative action that is taken against him. That the decision to deny them the licenses was therefore arbitrary, unconstitutional, null and void made without regard to fair administrative action and against the principle of legitimate expectation and public participation.

6. In rejoinder, the Respondent filed a replying affidavit dated 13/09/2023 sworn by Charles Muiruri a director, administration public service and ICT for the 1st Respondent and secretary for the 2nd Respondent. He deponed that licensing for the sale, distribution, consumption and advertising of alcoholic drinks is a preserve of the Respondent. That the Applicants operate within Igwamati Ward where the Respondents held a public participation baraza on 20/01/2023 whereby amongst the issues raised was shifting of bars within residential area to Karuga Trading Centre due to disturbance and proximity to schools. That the decision to reject the Applicant's applications was communicated vide a letter dated 28/04/2023. That the sub-county administrator does not have power to issue licenses or communicate the decision of Laikipia County Alcoholic Drinks Regulation Committee or sub-county committee thus the letter by the Applicants dated 30/06/2023 was not received by the Respondents.

7. That vide section 18 of the Laikipia County *Alcoholic Drinks Control Act*, 2014 (hereby referred as the 'Act'), the Applicants were invited to apply for review vide a letter dated 28/04/2023 however the Applicants did not lodge any appeals and the notices marked as PMK5(a)-(y) have been fabricated for

these proceedings. Further, vide a letter dated 10/07/2023, the Respondents invited late Applicants to make application and those wishing to have review of the denial of the licenses to make application but none was received. That the Applicants cannot claim not to be aware of the decision of the sub-committee and at the same time claim to have made amends as indicated in their letters. Further, the Applicants claimed to have been called for a hearing at paragraph 7 of the affidavit for verification while at the same time claim at paragraph 10 that no hearing was held.

8. He deponed that the orders sought by the Applicants will go against public interest as the decision to deny them the license was made in the interest of the public noting the issues that were raised in the public participation baraza. The order of mandamus will be inviting the court to play the role of the county and sub-county committee and the order of prohibition will erode the powers of the committee and render the Act otiose and leave the Applicants a law unto themselves and therefore, the court is urged to balance the interest of greater public in dismissing the Applicants application.

9. In response to the Respondents' replying affidavit, the Applicants filed a further affidavit dated 17/10/2023. The Applicants denied that there was a public participation held on 20/01/2023 and that the minutes attached were fabricated. That the photographs attached were blurred and they could have been taken elsewhere as none of the persons appearing on the photographs swore an affidavit to confirm attendance. The Respondents did not exhibit the notices inviting them to attend the meeting and their names do not appear on the list of attendance and the Respondents failed to point out their names as bar owners operating in Igwamiti ward. That the minutes attached was in respect of Shamanei sublocation whereas the majority of the exparte Applicants operates in Nyahururu town which does not fall within Igwamati ward and there was no evidence that public participation was conducted in Nyahururu town and other sublocation within igwamati ward.

10. That no hearing was conducted and they were not given a chance to defend themselves and after lodging their appeals, they were not invited for a hearing. That the Respondents did not file a list of successful and unsuccessful Appellants to confirm that they did not appeal and they did not file minutes of the appeal proceedings if a hearing was conducted to show that their names were not part of those who filed appeals. That after filing this suit, the Respondents wrote a letter dated 10/07/2023 but their attempts to apply for review as per the letter was met with hostility by one Charles Muiruri who directed that they first withdraw the suit.

11. That those who indicated that they were asked to make amends in their appeal letters were referring to directions that were given verbally by the 3rd Respondent's team during inspection which included repairs of toilets and it had nothing to do with complaints from members of the public whose names have not be revealed. They maintained that the law was not followed in considering their applications and appeals. That there was an error in paragraph 7 of affidavit of verification of facts where the word not was omitted.

12. The matter was canvassed by way of written submissions. In their submissions, the Applicants argued that Section 12 (3) to (16) of the Act provides for the process that was supposed to be undertaken. That the 3rd Respondent was supposed to prepare a notice within 21 days after the submission of the applications for licenses by Applicants setting forth the names of the Applicants, the type of the license applied, the premises in respect of which the licenses are applied for and the time and date and place of the meeting. The 3rd Respondent was to cause a copy of the notice to be published at its office for a period of not less than 21 days and posted at some conspicuous place or near the Applicant's premises informing them the date and place of the meeting. That there were no such a notice and no minutes have been attached by the Respondents if a meeting was ever held.

13. That the Applicants were not informed of any objection to their applications as provided under Section 12(7) of the Act. The 3rd Respondent was required under Section 12(9) to inform the Applicants of the nature of the objection and accord the Applicants a chance to respond to the objection. They were not called for a hearing as required under Section 12(10). No minutes for such meetings have been supplied by the Respondents to show that the Applicants presented their case but they were unable to satisfy the sub-county committee on the need of the licence sought. Section 12(16) makes it mandatory for such records to be kept. Further, they were not notified in writing of the decision rejecting their applications for licenses as provided under Section 13(1). That their request for reasons to the 3rd Respondent was ignored and arguments by the Respondents that he had no power to communicate such a decision is misplaced as the letter was correctly addressed to the sub county administrator who chairs the sub county committee as per section 12 and 13 of the Act. Reliance was placed on Zacharia Kipkoros t/ a Riverside Bar v County Chairman Liquor Licensing Committee-Uasin Gishu County & 2 others (petition No.9 of 2019).

14. Further, the Respondents did not demonstrate that they complied with mandatory provisions of the Act. That the letter dated 28/04/2023 did not state the date of the meeting when the applications were considered and no minutes were attached or referred in the letter. That no notices inviting stakeholders and members of the public to the baraza held on 20/01/2023 at Shamanei sub location were attached. The Applicants' bars are not mentioned in the minutes of the purported meeting. That majority of the Applicants operate bars at Nyahururu town and not Shamanei sub location where public participation was held on 10/01/2023 and that resulted to the closure of their bars. The respondents did not prove that the Applicants were informed of the resolutions made in the meeting of 20/01/2023 and that they were called upon to defend themselves of the allegations before their applications for licenses were determined and declined. That the public participation meeting preceded most applications by the Applicants.

15. That there was gross violation of Section 4(2) of the Fair Administrative Actions Act as was held in the case of Zacharia Kipkoros (supra). Further, that they filed the appeals within 14 days in compliance with the letter dated 28/04/2023 posted in the notice board and which appeals they attached to their application and the committee chair has not sworn an affidavit denying receipts of the appeals. Therefore, they exhausted the available avenues before approaching the court.

16. On the other hand, the Respondents submitted that the Applicants have not exhausted all remedies available under the Act before filing this suit as Section 18 (1) provides for review mechanisms and the Applicants did not apply for review and as such, there were no appeals for consideration. Therefore, the jurisdiction of this court has prematurely been invoked contrary to Section 9 of the *Fair Administrative Action Act* which provides for the doctrine of exhaustion. Reliance was placed on the case of Capital Markets Authority v Ciano & Another (2023) KECA 581 (KLR) where the court held that an internal remedy must be exhausted prior to judicial review. That the notices marked PMK 5(a-y) were not received by the Respondents and no evidence was presented to counter the Respondents' assertions as the onus of proving the service was on the Applicants as was held in Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others (1996)eKLR where the court held that once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent.

17. As to whether the Applicants are entitled to the orders sought, counsel submitted that the order of certiorari prayed for would be inviting this court to play a role of the County Committee under section 18(1) of the Act to review the decision. That the assertion that paragraph 7 of the affidavit verifying facts where they admitted to have been invited for a hearing was a typographical error is an afterthought. On the order of the mandamus, it is submitted that the same would invite this court to play the role of the licensing authority and the licensing requirements required by the Respondents

would be circumvented at the expense of the general public. Further, the suit relates to licenses for the year 2023 which expired on 31/12/2023 and therefore, the order will be overtaken by events by the time the decision of the court is rendered. As to the order of prohibition, he submitted that granting the same would take away the powers of the Respondents to regulate the production, sale, distribution, consumption and outdoor advertising of alcoholic drinks in relation to the Applicants and that will take away the need to apply for licenses.

18. I have had occasion to consider the Notice of Motion, the statutory statement and all affidavit evidence for and against the Motion. Am quick to add that despite the subject licensing period having lapsed, these proceedings are still alive since should the rights of the Applicants be found to have been breached, damages would be an available remedy. 2 issues arise for determination;

    a. Whether the Applicants are in breach of the doctrine of exhaustion.

    b. Whether the applicants have established the legal threshold for the grant of orders of judicial review.

19. Section 9(2) of the FAA Act provides that the High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section (3) which provides that "the High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that an applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

    The law is largely settled on this legal principle. Mativo J (as he then was) in Republic v Commissioner of Domestic Taxes Ex Parte Fleur Investments Limited [2020] eKLR stated;

    > " The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine has assumed esteemed juridical lineage in Kenya,[39]a position upheld by the Court of Appeal[40] in Speaker of National Assembly vs Karume[41] which held that- "Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

52. Many Post-2010 court decisions have added justification and rationale for the doctrine under the 2010 Constitution[42]among them Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others[43] in which the Court of Appeal provided the constitutional rationale and basis for the doctrine as follows-

    > " It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords

with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

53. The High Court in the Matter of the Mui Coal Basin Local Community,[44] explained the rationale in the following words:-

> " The reasoning is based on the sound Constitutional policy embodied in Article 159 of *the Constitution*: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." *The Constitution* does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, *the Constitution* creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."

54. An analysis of the jurisprudence on the doctrine shows that at least two principles emerge. First, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[45] Two, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it."

20. In our instant application, it is the Applicants' case that they tendered applications for alcoholic licences for their bars for the year 2023 in January 2023. They assert they were not called for hearing (and here I note there is contradictory affidavit evidence on this fact) only for a list of successful applicants to be posted on the 3rd Respondent's notice board in which notice their names were missing. It is their case that they were not informed of any objections lodged against their applications and no hearings were conducted. They add that the Respondents did not render written reasons for the rejection of their applications.

21. In the assumption that the facts as stated present the obtaining situation to the Applicants cases thus leaving them aggrieved, the question that readily springs to mind is what was their legal remedy?

22. Under section 18(1) of the Laikipia County *Alcoholic Drinks Control Act* 2014, an aggrieved party has the opportunity to apply for a review of the decision of the Sub-County decision to the County Committee. Indeed, the Applicants were advised to lodge appeals vide a letter dated 28/4/23. Thus there exists a mechanism for review and within the meaning of Section 9(2) of the FAA Act, the Applicants were bound to exhaust this remedy before resulting to court. Did they?

23. The Applicants have exhibited annexture "PMK5" being a bundle of alleged respective appeals filed by each applicant. The Respondents on their part deny that such appeals were ever lodged with the 2nd Respondent.

24. I have perused annexture "PMK5". Whereas all the said appeals which are drawn as letters to the Chairman, Laikipia County Liqour Committee briefly explaining each applicant's ground(s) of appeal would be, in my view, valid appeals as no particular format is set in the law. However, there is no iota of evidence that the said appeals were ever sent and or filed with the 2nd Respondent. The same are plain letters with no receiving stamp or any form of evidence of service on the 2nd Respondent. There is no evidence of whatever mode of dispatch that could have been used to send the same to the 2nd

Respondent be it by post, courier or runner. In the premises, evidence is lacking that these appeals were ever filed.

25. It is denied by the Respondents that the said appeals were ever filed. The burden was on the Applicants to prove that they indeed filed the appeals and that the 2nd Respondent declined to hear them thus putting themselves within the exception in Section 9(4) of the fair administrative Actions Act.

26. Useful guidance can be drawn from the decision of the Court of Appeal in Nyangito Ochieng & Another vs Fanuel B. Ochieng & 2 Others [1996] eKLR where the court stated;

> " Miss Awino, for the second Respondent, and Mr. Oraro, for the third Respondent, have argued that the learned Judge correctly found that statutory notices were received by the appellants at P.O. Box 120, SARE which is the last known postal address of the appellants. There is no doubt that address is the last known postal address if the appellants but it must be understood that in the face of the denial of receipt of statutory notice or notices it is incumbent upon the charge to prove the posting.
>
> It would have been a very simple exercise for the bank to produce a slip or slips showing prof of posting of the registered letter or letters containing statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove that the same were sent. Even a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts tot eh addressee as is conteplacted by Section 3 (5) of the *Interpretation and General Provisions Act*, Cap 2, Laws of Kenya.
>
> Mr. Charles Manono Magachi (DW3) who worked for the bank at the material time simply produced his file copies of the notices allegedly sent by M/S Hamilton, Harrison and Mathews, the bank's advocates. As pointed out earlier it was incumbent upon the bank to, at least prove posting of the registered letter or letters containing the statutory notice or notices.
>
> It is quite possible that such notices were seen but that fact, in the face of denial of receipt, must be proved. It is possible that the letters addressed to the two appellants were received by the first respondent who avoided telling the appellants of anything about the same as he was, as the learned judge has pointed out, in the judgment, ''the villain in the matter''.
>
> In the absence of proof of such posting we are constrained to hold that the sale by auction was void. We think that the learned judge, with respect, fell into error and misdirected himself when he held that the notices were sent to their correct address on the supposition alone that the post address of the appellants was P.O. Box 120,SARE."

27. Having failed so to do, the Applicants have fallen afoul of the doctrine of exhaustion. The judicial review application before the court offends the said doctrine which divests the court of the jurisdiction to adjudicate over the matter.

28. The resultant effect is that the Notice of Motion herein is improperly before the court. As this finding disposes the application, I find no need to delve into issue no (b) above.

29. The Notice of Motion dated 17th July 2023 is dismissed. In the circumstances of this case, I direct that each party bears its own costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF APRIL 2024.

A.K. NDUNG'U

JUDGE