



REPUBLIC OF KENYA



KENYA LAW
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**Mutiva v County Government of Nyeri (Judicial Review E002 of 2023)
[2024] KEHC 10104 (KLR) (8 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
JUDICIAL REVIEW E002 OF 2023
MA ODERO, J
AUGUST 8, 2024
IN THE MATTER OF: NYERI COUNTY ALCOHOLICS DRINKS
CONTROL ACT 2014
AND
IN THE MATTER OF: AN APPLICATION FOR LEAVE TO
APPLY FOR THE JUDICIAL REVIEW ORDERS OF CERTIORARI**

BETWEEN

LEONARD BANDE MUTIVA APPLICANT

AND

COUNTY GOVERNMENT OF NYERI RESPONDENT

JUDGMENT

1. Before this court is the Notice of Motion application dated 5th April, 2023 by which the Ex Parte Applicant Leonard Bande Mutiva seeks the following orders
 - “(a) An Order of Certiorari to remove into the High Court for the purpose of being quashed the decision of the Respondent’s Directorate of Alcoholic Drinks Control and Management contained in the letter dated 10th March 2023 directing the closure of the ex-parte applicant business known as ‘Liquor Box Wines and Spirit’ situated in Kamakwa.
 - (b) That the costs of this application be provided for and be borne by the Respondent”



2. The application which was premised upon Articles 23 and 47 of *the constitution* of Kenya, 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 53 Rule 3 of the Civil Procedure Rules and all other enabling provisions of law was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent Nyeri County Government opposed the application through the Replying Affidavit dated 22nd May 2023 sworn by one Josphat Wamathai Wanyiri, the Director of the Directorate of Alcoholic Drinks Control and Management (hereinafter ‘the Directorate’) established under Section 4 of the Nyeri County Alcoholics Drinks and Management Act, 2014.
4. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated 16th April, 2024, whilst the Respondents relied upon their written submissions dated 13th May, 2024.

Background

5. The Applicant has been operating a business known as Liquor Box Wines and spirits situated in the Kamakwa area of Nyeri County.
6. The Applicant avers that he holds a valid license issued under the Respondents Alcoholic licensing procedures allowing him to operate his business until June 2023.
7. However on 10th March 2023 the Directorate of Alcoholic Drinks Control and Management vide its letter of same date directed the Applicants to close down his business premises citing the following violations
 - (i) Dispensing alcohol on site.
 - (ii) Selling alcohol at football events frequented by minors.
8. The Applicant alleges that the decision of the Directorate was illegal as it contravened the Nyeri County Alcoholic Drinks Control and Management Act 2014.
9. That the violations cited invited criminal sanction and not closure of the business. Finally that the decision of the Directorate was made in an arbitrary manner as the Applicant was not given prior notice nor was he invited to be heard before the decision was made contrary to the Applicants rights under *the Constitution* of Kenya 2010 and the Fair Administrative Actions Act 2015.
10. As stated earlier the application was opposed. In their Replying Affidavit the Respondents deny having violated the Applicants license rights. The Respondents insist that the Applicant licence was withdrawn during a meeting of the County Alcoholic Drinks Regulation Committee held on 27th February 2023.
11. The Respondents further insist that the Applicant had violated the terms of his licence by selling alcohol on site contrary to their licence and allege that the Applicants also sold alcohol to minors during football events and claimed that the Applicant owed the Respondent Kshs. 368,400/=. The Respondents also stated that the Applicant was yet to exhaust all remedies provided for under the Act.
12. The Respondents state that due notice of the violations was issued to the Applicant by the Kenya Revenue Authority (KRA).

Analysis And Determination

13. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties. The only issue is whether the notice of closure ought to be quashed.



14. It is not in any doubt that the Applicant held a valid liquor licence permit issued to him by the County Government of Nyeri, for which licence the applicant paid a sum of Kshs. 30,000. A copy of said licence is Annexure 'JWW1' to the Replying Affidavit dated 22nd May 2023. This licence was issued in the name of the Applicant and the validity period was to run from 18th March 2022 to 30th June 2022. The Applicant annexed to his statement dated 14th March, 2023 copies of an application form to cover the year 2022-2023 as well as proof of payment (Annexure LBM 1(a) and (b)). Indeed the Respondents do not deny that the Applicant held a valid licence.
15. The Applicant took issue with the decision of the Directorate to close down his liquor business known as liquor Box Wines and spirits. According to the Applicant the said decision which was communicated to him vide a letter dated 10th March 2023 was reached arbitrarily, was illegal and violated his constitutional rights.
16. On its part the Respondent does not deny having written the letter dated 10th March 2023 and does not deny having directed the closure of the Applicants business. A copy of said letter appears as Annexure LBM '2' to the Supporting Affidavit dated 14th March 2023. It is therefore quite apparent that the Respondents purported to withdraw and/or cancel the Applicants licence during the period of validity of the said licence.
17. Article 47 (1) of *the Constitution* of Kenya 2010 provides as follows;-
- “47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
18. Section 4 of the *Fair Administrative Action Act* 2015 provides as follows;-
- “4(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
19. Section 4 (3) of the Act provides as follows:-
- (3) where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision a prior and adequate notice of the nature and reasons for the proposed administrative action.
- (b) an opportunity to be heard and to make representations in that regard.
- (c) notice of a right to review or internal appeal against an administrative decision where applicable.
- (d) a statement of reasons pursuant to section 6.
- (e) notice of the right to legal representation, where applicable.
- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials any evidence to be relied upon in making the decision or taking the administrative action. [own emphasis]
20. Section 4(4) of the same Act goes on to provide thus:-
- “The Administrator shall accord the person against whom administrative action is taken an opportunity to –



- a. Attend proceedings in person or in the company of an expert of his choice.
- b. Be heard
- c. Cross-examine persons who give adverse evidence against him, and
- d. Request for an adjournment of the proceedings, where necessary to ensure a fair hearing.” [Own emphasis]

21. The three traditional grounds for judicial review being illegality, irrationality and procedural impropriety were explained in the case of *Council of Civil Service Unions vs Minister for the Civil Service* (1985) AC 374, 410 Where Lord Diplock spoke of these grounds as follows:-

“My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’ the second ‘irrationality’ and the third ‘procedural impropriety.’ That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of ‘proportionality’ which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By ‘illegality’ as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By ‘irrationality’ I mean what can by now be succinctly referred to as ‘Wednesbury unreasonableness’ (*Associated Provincial Picture Houses Ltd vs Wednesbury Corporation* [1948], 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court’s exercise of this role, resort I think is today no longer needed to Viscount Radcliffe’s ingenious explanation in *Edwards vs Bairstow* [1956] AC 14 of irrationality as a ground for a court’s reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision maker. ‘Irrationality’ by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.....”



22. Closer home in the Ugandan case of *Pastoli Vs Kabale District Local Government Council and Others* (2008) 2 EA 300 it was held as follows:-

In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety....illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.... Procedural impropriety is when there is failure to act fairly on part of the decision making authority in the process of taking a decision. The unfairness may be its 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.

23. Therefore in a case where a person's rights or fundamental freedoms are likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against where applicable; a statement of reason; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action.
24. The Respondents aver that at a meeting held on February 27, 2023 the County Alcoholic Drinks Control Committee deliberated on the alleged violations committed by the Applicant. At that meeting the decision was reached to close the Applicant's business.
25. There is no indication that the Applicant was given any opportunity to be heard before the decision to close his business was reached. The Applicant was not invited to attend the meeting at which the decision to close his business was made, nor was he granted an opportunity to respond to the alleged violations committed by himself. This was clearly a breach of the Applicant's right to be heard.
26. I will now move on to consider the individual allegations made against the Applicant.
27. In the Notice dated 10th May 2023, it was indicated that the Applicant had violated the terms of his licence by 'Dispensing alcohol on site' thereby breaching Section 22 of the Nyeri County Alcoholic Drinks Control and Management Act, 2014.
28. Section 22 of the said Act provides as follows:-

“ 22.

- (1) The several licenses which may be granted under this Act shall be those specified in the Second Schedule, and the provisions of the Schedule and of any rules made under this Act shall have effect in relation to the respective licenses therein specified.
- (2) Save as otherwise provided in this Act, no licence may be granted so as to be applicable to more premises than one.



- (3) The County Committee shall, when a licence is granted, renewed, withdrawn or cancelled, include in the licence a sufficient description of the licensed premises.”

29. The Act at the second schedule identifies three types of licences that can be issued to wit: Manufacturer’s licence; Wholesale Licence and Retail as follows:-

The following licenses may be granted under this Act

1. Manufacturer’s Licence Subject to the conditions specified in the licence, a Manufacturer’s licence authorizes the holder to -
 - a. manufacture and store the manufactured alcoholic drink in his depot;
 - b. sell the product of his manufacturing plant by wholesale in accordance with the conditions that are for the time being, applicable to a holder of a wholesale licence or by delivery from depot throughout Kenya in accordance with the Alcoholic Drinks Control and Management Act, 2010: Provided that the manufacturer shall be required to possess a licence to distribute the product of his manufacturing plant within the county; and
 - c. bottle the alcoholic drink subject to such conditions as may be prescribed: Provided that where the manufacturer’s takes place, the manufacturer shall be required to possess such a licence applicable to a person operating a depot. For the purposes of this paragraph, “depot” means premises of whatever description which are occupied by a Manufacturer of his trade.
 2. Wholesale Licence: A wholesale licence authorizes the licensee to sell alcoholic drink at the premises specified in the licence, subject to such conditions as may be prescribed.
 3. Retail Licence: A retail licence authorizes the licensee to sell an alcoholic drink on the premises, at the hours and subject to such other conditions as are specified in the licence.
30. The Licence issued to the Applicant authorized him to engage in the activity of “Wines & Spirits (Depots).” In other word, the Applicant had been issued with a ‘Wholesale licence.’ i.e the Applicant was authorized to sell alcohol to other retailers but was not allowed to sell alcohol to customers on site at his premises.
31. In the Replying Affidavit it is alleged that the Applicant encouraged the consumption of alcohol to buyers with vehicles within and outside his premises in blatant disregard of the strictures of his licence. The Respondent averred that they had received complaints from various stakeholders in this regard.
32. None of the stake holders who raised such complaints have been named. Neither is there any affidavit deponed by such aggrieved stakeholder. The Applicant was therefore denied the opportunity to confront his accusers.



33. The Respondents also stated that following complaints from these un-named stakeholders a multi-Agency team made an impromptu visit to the Applicants premises. The members of this multi-Agency team were not named and no report from said team was annexed.
34. The Respondent goes on to state that a verbal warning was issued to the Applicant on 9th November 2022 and that on 28th September 2021 a ‘Notice of Offence’ was issued to the Applicant by KRA. The said Notice of Offence appears as Annexure ‘JWW3’ to the Replying Affidavit.
35. Firstly in my view a verbal warning does not constitute sufficient Notice to the Applicant given the serious nature of the violation he was being accused of.
36. Secondly the offences cited in the ‘Notice of Offence’ issued by KRA are not the same as the alleged offences cited in the Notice of 10th March 2023. The Notice from KRA did not make reference to selling alcohol on site. Instead the KRA Notice indicated that the Applicant had failed to comply with

“Section 28 of the EDA 2015 as read with regulation 30 of the EGMS 2017----- being in possession of excisable goods without excise stamp”
37. The offences cited in the KRA Notice are not contemplated under the Nyeri Alcoholic Drinks and Management Act. The question then is which particular violation was the Applicant being cited for by the Directorate. I find that the notice issued by KRA to the Applicant was not relevant to the issue at hand and therefore cannot be deemed sufficient notice.
38. The Respondents submit that the “Doctrine of Exhaustion’ would apply in this matter as the Applicant failed to avail himself of the remedies provided for under the Act before filing this Petition. The Respondents act Section 18 and 19 of the Act.
39. Section 18 of the Act stipulates that:
 - (1) An applicant whose application for a new licence, to renew or transfer a licence has been refused may within fourteen days of such refusal, request in writing the review of such refusal to the County Committee. [own emphasis]
 - (2) A person aggrieved by the decision of the sub-county committee to approve grant of a new licence or to renew a licence may request in writing the review of such decision by the County Committee.
 - (3) Upon receipt of a request under this section, the County Committee shall notify the sub-county committee of the pending review.
 - (4) The County Committee shall within twenty one days consider and make a final determination on the request for review.
 - (5) The County Committee may –
 - (a) dismiss the request for review if in its opinion, the request is frivolous or vexatious;
 - (b) uphold the decision of the sub-county committee;
 - (c) annul the decision of the sub-county committee
 - (d) give directions to the sub-county committee with respect of any action to be taken;
 - (e) make any other declaration as it may deem fit. [Own emphasis]



40. Section 19 stipulates that:

No person shall appeal to Court under this Act on a matter related to section 18 unless the person has exhausted the review mechanism provide therein.

41. A clear reading of Section 18 shows that it is only applicable in situations where an application to obtain a new licence or to renew an existing licence has been refused. This was not the situation pertaining in this cases.

42. As stated earlier the Applicant already had obtained a valid licence and he had not made any application for renewal of said licence. As such I find that sections 18 and 19 are not applicable in this matter.

43. I further reject the contention by the Respondents that the jurisdiction of the court has been ousted in this matter.

44. Indeed, in *Fleur Investments Limited v Commissioner of Domestic Taxes & Another* [2018] eKLR it was held:.....

“The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.” [own emphasis]

45. . Accordingly I find that the Respondents did not avail any proof of their claim that the Applicant was violating his wholesale licence by selling alcohol at their site to individuals clients. Nor can the Respondent rely on the notice issued by KRA which cites a totally different offence as a grounds upon which to close down the Applicants business.

46. Secondly the Respondents claimed that the Applicant violated the terms of his licence by selling alcohol at football matches and by selling alcohol to minors has not been proved. The Respondents have not cited the dates and/or venues of these football matches where the Applicant was allegedly selling alcohol. There is no affidavit from any witness to confirm this allegation.

47. Regarding sale of alcohol to minor if this happened then it would amount to a criminal offence. Was any report made to the police. No OB report/number has been annexed as proof of this alleged violation Once again the court notes that no report from the Multi-Agency team which allegedly investigated and uncovered these alleged violations has been produced in court.

48. Finally the Respondent alleges that the Applicant owes the Directorate Kshs. 368,400/= representing arrears and penalties of outstanding licence fees. The Respondents have annexed an invoice. (Annexture ‘JWW3’) detailing the amount claimed.

49. Once again the Respondent ought to have issued a demand to the Applicant and ought to have allowed the Applicant an opportunity to respond to this claim. This is a Civil Claim which could quite easily have been pursued by filing a suit to recover the amount due.

50. The act of closing the Applicants business on account of this alleged debt was high handed. Moreover the claim of this debt appears to be an afterthought as no mention of this debt was made in the notice dated 10th March 2023. It was not one of the reasons cited by the Respondent for the closure of the business.

51. In conclusion I find that the Respondents had no authority to close down a validly licensed business unless authorized by the law. In this case I find that the Respondents actions were capricious, arbitrary



and unprocedural. The Respondent did not apply the rules of natural justice before reaching the decision to close down the Applicants business.

52. The Applicant has prayed for an order to certiorari to quash the decision made by the Directorate to close down his business. I find that the Respondents action in closing down the Applicants business was tainted with procedural improprieties. In the circumstances I am satisfied that the Notice of Motion dated 5th April 2023 has merit. I allow the same and make the following orders:-

1. “An order of certiorari be and is hereby issued to quash the decision of the Respondent’s Directorate of Alcoholic Drinks Control and Management contained in the letter dated 10th March 2023 directing the closure of the Ex Parte Applicants business known as ‘Liquor Box Wines and Spirit’ situated in the Kamakwa Area of Nyeri County.
2. Costs of this application will be borne by the Respondent.

DATED IN NYERI THIS 8TH DAY OF AUGUST 2024.

MAUREEN A. ODERO

JUDGE

