



**Leah Wambui Kamau t/a Lewaka Bar & 3 others v Deputy County
Commissioner Rongai Sub County & 2 others (Petition E009 of 2024)
[2024] KEHC 10993 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10993 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION E009 OF 2024
SM MOHOCHI, J
SEPTEMBER 19, 2024**

BETWEEN

**LEAH WAMBUI KAMAU T/A LEWAKA BAR 1ST PETITIONER
EUNICE NJAMBI ODERA T/A REAL BUDGET BAR & VISION
BAR 2ND PETITIONER
ESTHER MUTHONI MANOAH T/A HIGHWAYS BAR &
RESTAURANT 3RD PETITIONER
SIMON MUNENE T/A CLUB OCEAN BAR 4TH PETITIONER**

AND

**DEPUTY COUNTY COMMISSIONER RONGAI SUB COUNTY 1ST
RESPONDENT
ASSISTANT CHIEF MANGU SUB LOCATION 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

JUDGMENT

1. The Petitioners commenced these proceedings by way of a Petition dated 19th April, 2024 and Supported by the affidavit of Simon Munene with the authority to swear of the other Petitioners sworn on even date. The Respondent’s case was made by Beatrice N. Mbugua the Assistant Chief Mangu Sub Location Rongai Sub County the 2nd Respondent herein in her sworn Affidavit in response thereto.



Petitioners Case

2. The Petitioners claimed unlawful shutting down their businesses by the 1st and 2nd Respondents outside their jurisdiction and without notice, contravening their rights to fair administrative action and right to property guaranteed by *the Constitution*.
3. It was the Petitioners' case that on or around 11th March, 2024, the 1st and 2nd Respondents accompanied by police officers from Menengai Police Station invaded the Petitioners premises ordering them to shut down the premises without a letter or notice. That upon visiting the Nakuru County headquarters to establish the root cause of the shutting down of their business and reasons the County alcoholic drinks committee denied having issued any orders.
4. The Petitioners pleaded that the 1st and 2nd Respondents have no jurisdiction to make any decision affecting the sale of alcoholic beverages or the licencing of outlets running such business and even if they did it was the Petitioners' case that they had organized their business on expectations that any adverse decision to their businesses would be arrived at through a fair process. That any decision affecting their business would be made by the entity which is legally mandated to and they would be given prior notice as well as reasons for the closure.
5. The Petitioner's maintain that the Petition does not challenge issuance of license by the County Government of Nakuru but the conduct of the 1st and 2nd Respondent in exercise of their powers. It is the Petitioners contention that the actions on the part of the 1st and 2nd Respondents were tantamount to a violation of the Petitioners' rights guaranteed under Articles 10, 40, 43 and 73 of *the Constitution* of Kenya, 2010. It is upon this premise that the Petitioners sought the following reliefs:
 - i. A declaration that the 1st and 2nd Respondents in their sole capacities have no jurisdiction in the licensing, inspection, regulation and/or control of alcoholic drinks outlets in Rongai sub county where the petitioners operate their businesses;
 - ii. A declaration that the conduct of the 1st and 2nd Respondents of ordering the closure of the Petitioners business premises was made without jurisdiction;
 - iii. A declaration that the conduct of the 1st and 2nd Respondents of closing and/or ordering the closure of the Petitioners alcoholic beverage outlets contravenes the provisions of Articles 10, 40, 47 and 73 of *the Constitution*;
 - iv. In the first instance , an order of injunction under Article 23 of *the Constitution* restraining the 1st and 2nd Respondents from interfering the Petitioners' business;
 - v. In the first instance , an order of injunction under Article 23 of *the Constitution* restraining the 1st and 2nd Respondents from interfering the Petitioners' business;
 - vi. Damages for loss of business and costs of this Petition

Respondent's Case

6. The 2nd Respondent stated that pursuant to a presidential directive, a circular MOINA/SEC dated 7th March, 2024 was issued on the crackdown on illicit alcohol, drugs and narcotic substances. That a meeting was held by the subcounty security committee and the County Commissioner wrote to all deputy county commissioners vide a letter dated 8th March, 2024 to submit daily returns on the said directive. A multi-agency team raided the Petitioners bars and ordered for their closure.



7. She added that it was not the first time the Petitioners' business premises had been closed since on or about 5th July, 2015 following a directive by the former President on second hand brews, the Petitioners' bars were closed. That further vide a letter dated 27th August, 2019 the County government of Nakuru through the Rongai Sub-County Liquor Committee disapproved some outlets including the Petitioner's business on the basis that they were operating near schools.
8. It was the Respondent's case further that the office of the 2nd Respondent had received letters of complaint from schools adjacent or near the said outlets complaining of the nuisance and effects of operating the business near schools. She noted that it was the role of the County Government to license alcoholic selling outlets and the Respondents do not purport to have authority to issue or revoke licenses to alcoholic selling outlets

Petitioners' Submissions

9. The Petitioners in their submissions dated 3rd June, 2024 submitted on the doctrine of legitimate expectation and argued that the Petitioners expected the Respondents to uphold the values and the principles of *the Constitution*. Reliance was placed in Kevin K Mwititi & Others v Kenya School of Law & 2 Others [2015] eKLR to submit that there was an expectation that the Respondent would comply with fair administrative action.
10. The Petitioners also relied on the case of Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1KLR 280 to argue that where legitimate expectation exists, the public authority must give good reasons for departing from it.
11. The Petitioners contended that they expected the Respondents being public servants to act fairly and impartially and not in a capricious and arbitrary manner. To confine themselves to their jurisdictional mandate and in making decisions, comply with the Fair Administrative Actions Act and Article 47 of *the Constitution*. That there was a breach of their legitimate expectation.
12. It was the Petitioners' submission that their right to fair administrative action was contravened in that they had been licensed by the County Alcoholic Drinks Control Committee the entity legally mandated to control alcoholic drinks and therefore any decision to withdraw the licenses and close down premises ought to have been made by the subcommittee. That acting on a directive from the president amounts to an admission of want of jurisdiction and an abuse of powers.
13. The Petitioners also submitted that their right to fair hearing was contravened. That verbal orders to close down were issued and were not supported by any letter or notice. They relied on the case of Republic vs Non-Governmental Organizations Coordination Board Ex-Parte Evan Kidero Foundation [2017] eKLR where the Court in that instance observed that "all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken"
14. It was argued further that the explanation advanced by the 2nd Respondent does not pass the statutory and constitutional muster. That she sought to justify her conduct by reference to the merit of the decision. That the Respondents' conduct was a contravention of the national values and principles of good governance. It was a breach of the public trust bestowed upon them.

Respondents' Submissions

15. The Respondents through the office of the Attorney General filed submissions dated 23rd May, 2024 and submitted on two issues. Firstly, on whether the closure of the Petitioners' business was made without jurisdiction, it was submitted that their jurisdiction falls under the express authority bestowed



upon them by being members of the National Government Administrative Officers and were simply complying with a presidential directive.

16. Secondly as to whether there was infringement of the rights of the Petitioners' it was argued that the burden was with Petitioners to demonstrate with evidence the violation of their rights. That the burden was not discharged and instead focused on jurisdiction of the actions of the Respondents. Reliance was placed on the cases of Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR and Constitutional Petition [No. 128 of 2006](#) Lt Clo Peter Ngari & Others vs Attorney General.
17. It was argued that the Petitioners did not come to Court with clean hands since their business were subject of several complaints from schools and residents within therefore not deserving of the prayers sought.

Analysis and Determination

18. The Court has considered the pleadings, each party's arguments and submissions on record. On the basis of the material placed before Court, the issues for determination are therefore:-
 - i. Whether there was a legitimate expectation and if the answer is in the affirmative, was there breach;
 - ii. Whether the Petitioners' rights and freedoms were violated by the Respondents; and
 - iii. Whether the prayers sought can issue in the circumstances
19. The Petitioners are all business owners operating bars within Mangu Rongai Sub County within Nakuru County. They contend that they were ordered to shut down their business premises after a raid by the 1st and 2nd Respondents and the police officers. They argue they were never given prior notice or a letter or reasons for the order to shut down. Further that the Respondent acted outside their jurisdiction in ordering for their shut down yet that was a reserve for another body.
20. The Respondent on the other hand argued that, closure of the Petitioners' premises was warranted for the reason that there was a presidential directive for 'eradication of illicit brews, alcohol drugs and substance abuse' and that being the National Government Administrative officers they were simply complying with a presidential directive. The other argument propounded was that there had been prior complaints regarding the Petitioners business premises as regards the proximity to schools and residences.
21. The Nakuru County [Alcoholic Drinks Control Act](#), 2014 is the guiding legislation of issuance of permits on production, manufacturing, distribution and sale of alcoholic drinks at the County level. Section 14 of the Act provides for licensing, selling of alcohol withdrawal of licencing and Part IV enforcement of the act.
22. Pursuant to the provisions of Section 14 as read with Sections 11, 12, and 13 of the said Act, for a premise to be licensed to sell alcohol, there are certain requirements to be met including location, sanitary requirements and distance from learning institutions being at least 300 meters among others. The Petitioners have attached their alcohol licences and trade licences. The Respondents have not challenged the validity of those licences therefore the Court will proceed with the notion that indeed the bars were properly licenced under the Nakuru County Alcoholic Control Drinks Act and were therefore operating under laid down regulations.
23. First, and foremost the Petitioners have prayed for a declaration that the 1st and 2nd Respondents in their capacities have no jurisdiction in the licensing, inspection, regulation and or control of alcoholic drinks



outlets in Rongai sub county. The case before Court is not an issue of licencing and the Respondents have maintained they do not purport to issue licences. The licences of the Petitioners were never revoked and a still in force and at no point did the raid question their licences to operate alcohol selling premises. The aspect of control of alcohol drinks outlets in Rongai shall be dealt with in the issues.

24. Coming to the issues at hand the genesis of this mayhem was the said directive. The Respondents acted on the said directive and raided the Petitioners establishment thereafter ordering their closure. Security agents including the 1st and 2nd Respondents and the police have the duty to enforce the law and maintain it. There is also provision of enforcement of the Act including inspections removal of licenses shutting down establishments and so on.
25. The Petitioners submitted that the 1st and 2nd Respondents as state and public officers are under obligation to uphold the principles and values outlined in Article 10 of *the Constitution*. Further, the responsibilities they are called upon to adhere to as well as to act with integrity, with respect for the people and in a manner that promotes public confidence and honour to the nation in accordance with Article 73 of *the Constitution*.
26. Article 10(1) (2) provides: -

10. National values and principles of governance –

1. The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
 - a. applies or interprets this Constitution;
 - b. enacts, applies or interprets any law; or
 - c. makes or implements public policy decisions.
2. The national values and principles of governance include—
 - a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
 - c. good governance, integrity, transparency and accountability; and
 - d. sustainable development.

27. Article 73 provides for Responsibilities of Leadership:

73. Authority assigned to a State officer—

(1)

- a. is a public trust to be exercised in a manner that—
 - i. is consistent with the purposes and objects of this Constitution;
 - ii. demonstrates respect for the people;



- iii. brings honour to the nation and dignity to the office; and
 - iv. promotes public confidence in the integrity of the office; and
- b. vests in the State officer the responsibility to serve the people, rather than the power to rule them.
28. In *Republic vs. Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO* [2019] eKLR it was stated at paragraph 17 thus: -

“A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims the court follows a twostep approach. Firstly, it asks whether the administrator’s actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, that is enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. Once a reasonable expectation exists the administrator is required to act in accordance with that expectation, except if there are public interest considerations which outweighs the individual’s expectation.”

29. The Petitioner’s had the expectation that an adverse decision on their businesses would be reached through a proper procedure and in total compliance with the law. That shut would be by legally sanctioned by the County Alcoholics committee or the enforcement committee and further that they would be issued with prior notice as well as written reasons for the shutdown. Laid down rules of procedure and the fact that the Petitioners had valid licences created an expectation for any member of the administration to accord them the right to a fair and jut process when it came to law enforcement.
30. The 2nd Respondent admitted to raiding and subsequent shutdown and to acting on a directive from the president and a circular from the security committee from the ministry. To buttress the order was verbal.
31. The Court in *Republic v Non-Governmental Organizations Co-Ordinations Board Ex Parte Okiya Omtatah Okoiti & 2 others* [2017] eKLR cited *Onyango Oloo vs. Attorney General* [1986-1989] EA 456 where the Court of Appeal held the position that: -

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...”

32. Shutting down the bars was unfair mainly because the Respondents had not undertaken the process with an official from the alcohol licensing committee or the enforcement committee, they had not



established that there was sale of illicit alcohol and they have also not demonstrated how those bars are promoting abuse of drugs or alcohol as per the directive.

33. Further even when if they were acting in their capacity a law enforcement officers the Petitioners derived due process. Those actions were not anchored in law and capricious to the detriment of the Petitioner's expectations. This Court does find that the Petitioners have established they had a legitimate expectation which was nevertheless breached.
34. The Petitioners also contend that the 1st and 2nd Respondents failed to accord them a fair hearing and further no reasons were given for the order to shut down. The Respondents argued that there had been prior complaints in the area from residents and nearby schools. That there had been a crackdown in 2015 after a directive by the former president where there was a recommendation for the shutdown of the Petitioners bars. That in 2019 the Petitioners' licence' were disapproved.
35. Article 47 of the Constitution provides:
47. Fair Administrative Action
1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.
 2. Suppose a person's right or fundamental freedom has been or is likely to be adversely affected by administrative action. In that case, the person has the right to be given written reasons for the action.
36. Sections 4(1), (2) and (3) of the *Fair Administrative Action Act* provide thus: -
1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair;
 2. Every person has the right to be given written reasons for any administrative action against him;
 3. Where an administrative action is likely to affect the rights or fundamental freedoms of any person adversely, 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 a 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; org.
 - g. information, materials, and evidence to be relied upon in making decisions or taking administrative action.
37. From the material placed before Court, the Court is inclined to infer that the acts of the Respondents were informed by events of 2015 and 2019, local complaints and now recently the presidential directive. It goes without saying that implementation of the directive from the president should have conformed with the law and most importantly *the Constitution*. The process ought to have been carried out in a way



to achieve the purpose intended and not deprive anyone of their constitutional rights and freedoms. The security actors were withing their lawful mandate to enforce the law and any directive from the president. The Petitioners were however entitled to an investigation, prior and adequate notice of the nature and reasons for the order and written reasons for the shutdown.

38. The Court takes note of the fact that there has been increase in alcohol abuse and challenges brought about by excessive consumption of alcohol including addiction, broken families, gambling and death. The Court also takes note of the risks associated with having alcohol selling premises near learning institutions and residential areas. Curbing production and sale of illicit alcohol and curbing alcohol and drug is a matter of public interest. The Respondents may have had valid reasons to raid the Petitioners business premises or the merits of the decision. This Court is however concerned with the process culminating to the shut-down of the bars and the whether the acts of the Respondents were anchored on law and not the merits.

39. The Court of Appeal in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [2016] eKLR stated: -

“Under Article 47 (2) of *the Constitution* as read with the provisions of the Fair Administrative Actions Act of 2015, the common law position that there is no duty to give reasons for administrative decision is no longer a general principle of law in Kenya. A shift has taken place and there is requirement to give reasons for administrative decisions.

...Article 47 (2) of *the Constitution* as read with Sections 4 (3) (d) and 5 (d) (i) and 6 (2) (a) and 6 (4) of the *Fair Administrative Action Act* require written reasons for administrative decision...”

40. The Respondents maintain that the reasons were known and submitted at paragraph 6 of their submission that: -

“.....it is noteworthy that the Petitioners were notified of the reason for inspection of their outlets as well as the reason for the closure of their outlets. This being the presidential directive on the crackdown on illicit, brews and dealing in second hand generation alcoholic drinks respectively.” (Emphasis)

41. Plainly saying the “reasons were a presidential directive” is manifest of how *the Constitution* was disregarded how the rights of the Petitioners were disregarded. The Petitioners were never given any written reasons or prior notice of the exercise. The reasons pleaded by the Respondent are uninspiring and not anchored in law. Allowing security agencies to employ knee jerk reactions to situations will surely breed anarchy. If security agencies are allowed to act on any directive as they wish, police officers and local authorities would be raiding and closing down establishments on a whim regardless of the laid down structures and claim compliance with orders or directives.

42. Before any adverse action was taken, due process demanded that the Petitioners were entitled to fair administrative action prerequisites to be adhered to. The directive was well intentioned however 1st and 2nd Respondents were constitutionally obligated to follow the due process and to this end this Court does find that the 1st and 2nd Respondents contravened the right to fair administrative action

43. As regards violations of Article 40, it provides that: -

1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--



- a. of any description; and
 - b. in any part of Kenya.”
2.
 3. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
44. For the Petitioners to succeed under this claim, they must prove proprietary rights and thereafter the injury occasioned see: *Salim Seif Ambunya Andanje & Another vs. Alex Jepkoech Yano & Another* [2019] eKLR.
 45. The Petitioners have attached valid alcoholic drink licences and trade licences for the year 2024 to show that they were operating the businesses and that they were legally authorized operate for the remainder of the year. They have therefore established the right to property.
 46. On the aspect of injury, they contend that their sources of livelihoods have been affected by the acts of the 1st and 2nd Respondents which the Court does find to be so. The closure of their business meant they will cease to generate income. The Court therefore is satisfied that the 1st and 2nd Respondents have infringed on the right to property of the Petitioners.
 47. The Petitioners have sought under Article 23 an order of injunction restraining the 1st and 2nd Respondents from interfering with the business and an order for damages for loss of business.
 48. Article 23(3) of *the Constitution* gives this Court the power to grant appropriate relief. The Court further has the power to issue orders that are just and equitable in order to meet the ends of justice. As regards a permanent injunction to the 1st and 2nd Respondents the Court need not remind the Petitioners that security agents, local admiration officers and the police have a responsibility to enforce, maintain and uphold the law. Despite having found that that the acts of the 1st and 2nd Respondents were not anchored in law, not every act warrants an injunctive order moreso one that is of a permanent nature.
 49. As the Court has aptly put it, controlling the alcohol menace is a matter of public interest and preventing the 1st and 2nd Respondents from enforcing the law cannot be legally endorsed by this Court. Implementation of a presidential directive or ministerial directive is within the law and their duty. It has been extensively established that the problem was the process culminating to the implementation not the implementation itself. This prayer cannot therefore stand
 50. On the issue of damages, the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR had this to say:

“...It seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise



in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration...”

51. The Court finds declaration of violations of rights to be an appropriate remedy in the circumstances.
52. The upshot of the foregoing is that the Petition is allowed in following terms;
- i. A Declaration is hereby made, that the conduct of the 1st and 2nd Respondents of Ordering the closure of the Petitioners business premises was made without jurisdiction;
 - ii. A Declaration is hereby made, that the conduct of the 1st and 2nd Respondents of closing and/or ordering the closure of the Petitioners alcoholic beverage outlets without color of the law or basis, contravenes the provisions of Articles 10, 40, 47 and 73 of *the Constitution*;
 - iii. The Respondents are hereby restrained from interfering with the Petitioners ordinary course businesses (subject only to licensing conditions compliance) of the following businesses;
 - a. Lewaka Bar
 - b. Real Budget Bar & Vision Bar
 - c. Highways Bar & Restaurant
 - d. Club Ocean Bar

53. There will be no order as to costs.

It is so ordered

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 19TH DAY OF SEPTEMBER 2024.

MOHOCHI S. M.

JUDGE

