



Ngunjiri t/a Stage Bar Day & Night Club v Nyeri County Director of Alcoholic Drinks Control Directorate & 3 others (Constitutional Petition E006 of 2024) [2024] KEHC 13051 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13051 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CONSTITUTIONAL PETITION E006 OF 2024
DKN MAGARE, J
OCTOBER 24, 2024**

BETWEEN

JANE WANGUI NGUNJIRI T/A STAGE BAR DAY & NIGHT CLUB PETITIONER

AND

NYERI COUNTY DIRECTOR OF ALCOHOLIC DRINKS CONTROL DIRECTORATE 1ST RESPONDENT

NYERI SUBCOUNTY PUBLIC HEALTH OFFICER 2ND RESPONDENT

NYERI COUNTY LIQUOR COMMITTEE 3RD RESPONDENT

COUNTY GOVERNMENT OF NYERI 4TH RESPONDENT

JUDGMENT

1. By a Petition dated 23/7/2024, the Petitioner sought the following reliefs:
 - i. A declaration that the issuance of a letter dated 8/9/2023 and the carting away of the Petitioner's copy of the business permit and subsequently insinuating investigations in relation to matters concerning the operation of a bar without a license is a threat to the Petitioner's right under Article 47 of *the Constitution* as read with Section 7(2) of the *Fair Administrative Action Act* and Article 50 of *the Constitution*.
 - ii. A Judicial Review Order of certiorari be issued to quash the decision of the 2nd Respondent contained in the letter dated 8/9/2023 by which it was ordered that the Petitioner cease operations with immediate effect for 3 months until permitted or otherwise by the health authority.



- iii. A Judicial Review Order of Prohibition be issued restraining the Respondents, their servants and/or agents, junior officers and/or anybody acting on their authority from interfering with the Petitioner's liquor selling business christened Stage Bar Day & Night Club in any manner whatsoever until the outcome of the vetting process of licenses for 2024-2025 year.
 - iv. A Judicial Review Order of Mandamus be issued directed at the Respondents compelling them to immediately issue liquor license permit for the year 2024-2025.
 - v. An award of general damages to the Petitioner from the Respondents jointly and severally.
2. The petition was supported by the supporting affidavit of Jane Wangui Ngunjiri sworn on 23/7/2024 in which it is deposed as follows:-
- a. The Petitioner has in place all requisite business permits in respect of the operation of her bar.
 - b. The Petitioner applied for renewal of license and paid as early as 12/7/2023.
 - c. The Respondents subsequently failed to give the Petitioner a new license for the current year.
 - d. The Petitioner was summoned to the Nyeri police station on 12/9/2023 and was informed that she was running her business without a license and subsequently given a letter dated 8/9/2023 requiring her to cease operating her bar with immediate effect for 3 months or until permitted or otherwise by the Health Authority.
 - e. The Petitioner was charged with failing to comply with a notice issued under Section 13 and 14 of the Public Health Act Cap 242 on allegation of selling a harmful band, Diamond Ice brand in Nyeri CMCCRC No. E1267 of 2023.
 - f. On 15/7/2024, the Respondents carted away the Petitioner's copy of the business permit but she has the original.
 - g. The Petitioner has received threats of arrest and prosecution on the charge of operating without a license.
 - h. The taking away of the business permit copy was arbitrary, unlawful, unreasonable and procedurally unfair.
 - i. The Petitioner was denied the opportunity to be heard.
 - j. In the Petitioner's filed further affidavit sworn on 22/8/2024 it was deposed inter alia that CMCCRC No. E1267 of 2023 stood closed on 24/7/2024.
3. The Respondents filed a replying affidavit sworn on 8/8/2024 by Josphat Wamathai in which it was deposed as follows:-
- a. It was not correct that the Petitioner had a valid business permit as none had been issued for 2023-2024 year.
 - b. The Petitioner was displaying and selling Diamond Ice brand whose content would pose danger to consumers.
 - c. It is not true that the Petitioner's copy of permit was taken away.
 - d. The Petitioner was carrying out business contrary to the law.
 - e. The petition was premature as internal dispute resolution mechanisms were not followed.



- f. The Petitioner had not demonstrated how the Respondents violated the alleged constitutional rights.

Submissions

4. The Petitioner filed submissions dated 22/8/2024. It was submitted that the letter dated 8/9/2024 should be quashed for breach of Article 47 of *the Constitution*. Reliance was placed on the case of *Muigana & 16 others v County Government of Nyandarua (Petition E007 of 2023)* [2024] KEHC 960 (KLR) based on which it was also submitted that the actions of the Respondents were contrary to Article 47 of *the Constitution*.
5. It was also submitted that the actions of the Respondent fell short of the dictates of *the Constitution* and a reading of Section 7 of the *Fair Administrative Action Act* sets out circumstances under which this court can review any administrative action.
6. On damages, they relied on *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 Others (Civil Appeal 243 of 2017)* [2021] KECA 328 (KLR) to submit that the award for general damages in constitutional petitions is allowed with immense powers to grant the petitioners the same and such powers are purely discretionary. They urged the court to exercise its discretion in favour of the Petitioners and consider granting them general damages.
7. On the part of the Respondents they filed submissions dated 8/8/2024. It was submitted that the Petitioner had not demonstrated the rights that were violated as the Petitioner did not have a valid license for 2023/2024 year.
8. The Respondents also submitted that the Petitioner had not proved the allegation of infringement. Reliance was placed on Constitutional Pet. No. 128 of 2006 - LT Col. Peter Ngaru Karume & Others vs Attorney General and Anarita Karimi vs Republic (1979) KLR 154.
9. Therefore, it was also submitted that the Petitioners failed to demonstrate that the decision to remove the license was tainted with illegality, irrationality or procedural impropriety as to be entitled to the judicial review orders sought.
10. It was also submitted that Section 18 of the Nyeri County *Alcoholic Drinks Control Act* 2014 (repealed) ousted the jurisdiction of the court as no appeal is allowed until internal mechanisms are exhausted.

Analysis

11. The issue that presents to me for determination is whether the Respondents acted in breach of the constitutional rights of the Petitioners under Article 47 of *the Constitution* as to entitle the petitioners to the reliefs sought.
12. The Petitioner maintained that the acts of the Respondents in carting away the photocopy of the business permit in respect of the impugned bar was arbitrary, illegal, unreasonable and unconstitutional and infringed on Article 47 of *the Constitution* as it violated the Petitioner's right to fair administrative action. The Petitioner sought to quash the resultant letter dated 8/9/2023.
13. The right to fair administrative action is enshrined under Article 47 of the 2010 Constitution as doth;
 - (1) 1) Every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.



- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall —provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.
14. On the other hand, the Respondents general case is that the Petitioner’s copy of the business permit was in fact not carted away and the Petitioner did not have a valid permit for the year 2023-2024. Also, that the Petitioner has not exhausted internal dispute resolution mechanisms under the Nyeri County *Alcoholic Drinks Control Act*, 2014 (repealed) and the petition was thus premature.
15. The Petitioners sought certiorari, mandamus and prohibition orders. She seeks to quash the decision confiscating the copy of her business permit. The principles for Judicial Review reliefs were set out in a land mark case of Republic Vs *Kenya National Examination Council Ex parte Gatbenji and others Civil Appeal No.266 of 1996*, where the Court of Appeal stated inter alia:
- ‘An order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal.’
16. This court notes that there is no material placed before it by the Respondents to demonstrate that there was a valid license for 2023-2024 year. The Petitioner only attached a receipt issued on 12/7/2023 for license renewal. The same is not a permit in itself and the Petitioner had to place sufficient material before this court from which it would be inferred that the Respondents had unreasonably declined to issue a license to the Petitioner.
17. In respect of the prohibition against the alleged interference with the Petitioner’s business, the view of this court is that unless the Petitioner lays material to justify interference, it is difficult to make such inference. It is not enough for the Petitioner to seek to prohibit actions that are not vividly described, by merely seeking to prohibit the Respondents pending the vetting process for licenses in the year 2024/2025. Unless illegality or any such ground upon which unconstitutionality can be inferred, this court has no mandate to interfere with the functioning of the Respondents as regards licensing. In respect to the powers of the Court in proceedings of this nature, in *Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170*, the Court of Appeal held as follows:
- “It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings ... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”



18. The Petitioners also prayed for mandamus to compel the Respondents to issue business permit for the year 2024/2025. The court has found that the Petitioner failed to demonstrate how the Respondents infringed on the constitutional rights or statutory provisions in the manner pleaded.
19. Consequently, this court finds no actual breach of the Petitioner's alleged right to fair administrative action by the Respondents as pleaded. The licence said to have been carted away is not a licence. It is a photocopy of the license and the Petitioner was clear that she has the original version of the photocopy that was taken away. Also, the apprehension of fear of refusal to issue a license for the current year has not been properly founded. In my view, this court cannot interfere with the functioning of the Respondents at this stage when no breach of the law or administrative action has been demonstrated. In *Judicial Service Commission vs. Mbalu Mutava & Another* [2015] eKLR the Court of Appeal held that:-

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

20. The petition fails in limine.

Determination

21. The upshot is that I make the following orders: -
- a. The Petition dated 23/7/2024 lacks merit and is dismissed in limine.
 - b. The Respondents shall have costs of the petition assessed at Ksh. 45,000/=.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 24TH DAY OCTOBER, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Mahugu Mbarire for the Petitioner

No appearance for the Respondent

Court Assistant – Jedidah

