



**Narok Bar Owners Association v Office of Sub-County Administrator, Narok
North Sub-County Liquor and Licensing Board. & 3 others (Judicial Review
E003 of 2023) [2024] KEHC 12022 (KLR) (7 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12022 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
JUDICIAL REVIEW E003 OF 2023
F GIKONYO, J
OCTOBER 7, 2024

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT
AND
IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010
AND
IN THE MATTER OF SECTIONS 4,5,7, AND 8 OF
THE FAIR ADMINISTRATIVE ACTION ACT, 2015
AND
IN THE MATTER OF ARTICLES 40,47,67 AND
162 OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF SECTIONS 4, 10,14(4) AND 16 OF THE NAROK
COUNTY ALCOHOLIC DRINKS (REGULATION AND CONTROL) ACT, 2016
AND
IN THE MATTER OF APPLICATION FOR LEAVE TO
APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS

BETWEEN

NAROK BAR OWNERS ASSOCIATION APPLICANT

AND

OFFICE OF SUB-COUNTY ADMINISTRATOR, NAROK NORTH SUB-
COUNTY LIQUOR AND LICENSING BOARD. 1ST RESPONDENT

OFFICE OF NAROK COUNTY ALCOHOLIC DRINKS CONTROL
DIRECTORATE 2ND RESPONDENT



**THE COUNTY EXECUTIVE COMMITTEE MEMBER, TRADE,
INDUSTRIALIZATION & COOPERATIVE DEVELOPMENT, NAROK
COUNTY 3RD RESPONDENT
NAROK COUNTY GOVERNMENT 4TH RESPONDENT**

JUDGMENT

Background of this case

1. On 20/09/2023, the ex parte applicant was granted leave to apply for judicial review of certiorari and mandamus in respect of matters complained of in the application. The request for leave to operate as stay was also made. The court noted that the order complained of was verbal.
2. The applicant's members have been lawfully running their businesses under a license issued by the County Government, for several previous years.
3. According to the applicant, from 1st September 2023, its members applied for their respective licenses from the county government of Narok through the 1st respondents; they stated that they applied having complied with all the necessary requirements and even holding other valid licenses on health and hygiene, and medical certifications as required by the country and county laws.
4. However, to the shock of the applicant's members during the vetting process, the respondents talked down on them and even blatantly told them to wind up and close their bars within 21 days ending on 21st September 2023, without any logical reason or particulars of their breach of the law and the requisite regulations.
5. The applicants immediately engaged an advocate who addressed all the raised concerns with the respondents and requested for the supply of any adverse reports against the applicant's members or in the alternative, approval towards licensing thus enabling any applicant to proceed with their business but no reply was ever forthcoming.
6. The 1st respondent has completely refused to issue the permits to the applicant's members or at the very least even respond to the concerns raised by the applicant in its letters. This is despite the applicant writing demand letters and giving the said officer time to issue approval and address any other pending issues without any success.
7. The 1st respondent continues to commit procedural impropriety, abuse of office, illegality, and irrationality and is consequently denying the applicant and its members their right to operate under the requisite fair-trade practices without cause.
8. The applicant in this application is seeking judicial review orders of certiorari and mandamus so as to forbid all the respondents from closing down the applicants' businesses and to compel the respondents in their individual and joint capacities to issue requisite licenses and permits from the year 2023/2024 and release the same to the compliant members of the applicant.

The substantive application

9. The notice of motion dated 24/11/2023 is supported by the grounds set out on the face of the application and the supporting affidavit of Joseph Kamau sworn on 27/11/2023.



Replying affidavit

10. The respondents opposed the application vide replying affidavit sworn by the chief officer in charge of devolution and public administration of the 4th respondent, Malvine Nkoitoi on 15/02/2024.
11. The respondents contend that the 1st and 2nd respondents have always issued licenses to the applicants to carry on the business of selling liquor in their establishments.
12. The 1st and 2nd respondents conducted public hearings and the applicants attended the said public hearings in their personal capacities and all parties therein were accorded an opportunity to ventilate their issues and raise their concerns before any administrative action could be taken.
13. During the public participation hearing on 19th July 2023 at the Ole Ntimama stadium which attracted over 200 applicants, the 1st and 2nd respondents highlighted the steps to be undertaken for the issuance of new licenses for the 2023/2024 financial year.
14. The 1st and 2nd respondents issued notices of invitation to a meeting that was held at the Narok central sub-county offices on 11th September 2023 between the respondents and the Narok central bar owners association, the applicants herein.
15. It was during the said meeting that the applicants were advised and told of what was required of them before the issuance of the new licenses for the financial year 2023/2024.
16. The public health officer and the physical planner in the said meeting took their time to explain in detail to the applicants herein what they would be looking at during inspection time and were clearly notified that failure to comply with the said requirements would lead to the denial of license and closure of the non-compliant premises.
17. In the discharge of its statutory mandate, the 1st and 2nd respondents issued notices requiring all liquor operators to apply for licenses for 2023/2024.
18. The applicants made applications for renewal of their licenses alongside other applicants.
19. The 1st and 2nd respondents in the said discharge of its statutory mandate vetted all applicants.
20. During the vetting process undertaken by the 1st and 2nd responses, some premises adhered to the requirements of compliance while others failed to comply leading to their closure with valid reasons given for their closure.
21. The 1st and 2nd respondents upon considering the applications for renewal of licenses, on merit refused to renew some of the applicant's licenses.
22. The 1st and 2nd respondents communicated both verbally, during the vetting process, and in writing and informed applicants of their reasons for refusal to renew the licenses.
23. The 1st and 2nd respondents issued to the applicants in advance notices of non-renewal of their liquor licenses on grounds of proximity to public places. equally, the applicants' liquor businesses did not meet the requirements of public health and posed health hazards to unsuspecting members of the public.
24. All the affected applicants were given a chance to appeal/review latest by 23/09/2023.
25. The chairperson of the applicants brought this application without consulting all the bar owners.



26. The respondents contend that each case is to be dealt with individually as each applicant's case is unique.
27. The implementation of the Narok county alcoholics and Drinks (regulations and Control) Act, 2016 measures are taken by the respondent to safeguard the interests of members of the public, public institutions, and vulnerable children who may access alcohol from the applicant's business premises.
28. The respondents contend that the grant of the prayers sought highly prejudiced interests of the members of the public and vulnerable members of the society at large. The application also seeks to impede the 1st and 2nd respondents from discharging their statutory obligation.

Supplementary affidavit

29. The applicant filed a supplementary affidavit sworn by Joseph Kamau on 03/06/2024.
30. The applicant averred that the cause of action arose when the respondent embarked on a campaign to 'reduce' liquor businesses in the county which move was being pushed by the national government without any regard to procedure and regulations.
31. The applicant averred that in this financial year, the respondent gave in to pressure to unreasonably and unfairly deny licenses or opportunities to apply for the same to dozens of applicants.
32. The applicant contends that the alleged public hearings didn't happen and the notices, minutes, and invitations have been mischievously and craftly prepared purposely for addressing this suit and to deceive and hoodwink this court. That is from a meeting on 04/09/2023 that was quickly called and the applicant's members directed to close down their bar businesses quickly with effect from 21/09/2023 without giving any written reasons for the said action.
33. The applicant contends that they were not served with the notice annexed to the replying affidavit marked as MN-1
34. The applicant contends that there was no communication from the respondents. They received communications from the respondents through third parties and police officers that they should close their liquor business and venture into other businesses.
35. The applicant contends that the minutes marked as MN-2 of the alleged meeting between the applicant and the respondents held on 11/09/2023 were prepared as an afterthought; after the filing of the suit. Further, the minutes were not confirmed and signed by the chairperson. The minutes have also indicated Loidima Nasieku as the chairman of the applicant which position is not true.

Directions of the court

36. The application was canvassed by way of written submissions.

The Applicant's Submissions.

37. The applicant submitted that closing/ issuing an ultimatum to close the members of the applicant's premises within a specified timeline and threats thereof constitutes a violation of the applicant's right to fair administrative action in Article 47 of *the constitution*. Further, the applicant was not afforded an opportunity to be heard before making the decision to close some of the members' premises. The applicant relied on sections 8, 9, and 11, of the Narok County *Alcoholic Drinks Control Act* of 2016, Republic V Baringo County Government & Another; Stephen K. Cheptoo & 8 Others (Ex Parte



Applicants) [2018] eKLR, and [*Erick Okongo Omogeni V Independent Electoral Boundary Commission & 2 Others, Nairobi H.C. Misc. Civil app. No. 40 of 2013.*](#)

38. The applicant submitted that the applicant was committed to exhausting internal remedies and redressing the respondents' obstruction of such mechanism but their efforts were thwarted by the respondents' deliberate inaction. Section 9 (2) of the [*Fair Administrative Action Act*](#) 2015, Article 159 (2) © of [*the Constitution*](#), and [*Geoffrey Muthinja Kabiru & 2 Others Vs Samuel Munga Henry & 1756 Others \(supra\)*](#).
39. The applicant submitted that in judicial review the court does not determine the merits of the case but is only concerned with the process of the decision-making to ensure the applicants are given fair treatment. The applicant contends that any alteration in licensing status should be preceded by a due process wherein the applicants would be duly engaged in the decision-making framework the respondents' failure to involve the applicants in the decision-making process deprived them of their fundamental right to a fair hearing. the applicants relied on [*Commissioner of Lands V Kunste Hotel Limited \[1997\] eKLR*](#)

The Respondents' submissions

40. The respondents submitted that the applicant was subjected to a fair process and was heard and had the whole process explained to them and as such the applicant has not met the threshold for judicial review. The respondents contend that all due process was followed before the issuance of licenses to compliant premises and the refusal of licenses to non-compliant premises was done. Further, the applicants were granted a fair hearing and given a chance to appeal / review. The respondents relied on [*Municipal Council Of Mombasa Vs Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001*](#), [*Pastoli Vs Kabale District Local Government Council & Others \[2008\] 2 EA, Republic Vs Tanathi Water Services Board, And 2 Others Exparte Senator Johnstone Muthama \[2014\] eKLR, Republic Vs Public Procurement Administrative Review Board And 2 Others Exparte Rongo University \[2018 eKLR, Kenya Human Rights Commission & Another Vs Non-Governmental Organizations Coordination Board & Another \[2018\] eKLR, Judicial Service Commission Vs Mbalu Mutava & Another \[2018\] eKLR, and section 2, and 4\(3\) of the fair administrative actions.*](#)
41. The respondents submitted that the applicant is not entitled to the orders sought having not met the threshold for judicial review.
42. They urged the court to dismiss the application.

Analysis and Determination

43. The issue arising from the pleadings and submissions of the parties is;
 - i. Whether the orders of certiorari and mandamus are merited

Competence manenos

44. The ex parte applicant has stated with reasonable precision and particularities the alleged violations and manner of violation, cited provisions of the law which have been violated; Article 47 of [*the constitution*](#), sections 8, 9, and 11, of the Narok County [*Alcoholic Drinks Control Act*](#) of 2016; and reliefs sought.
45. The also argued that, the applicant was committed to exhausting internal remedies and redressing the respondents' obstruction of such mechanism but their efforts were thwarted by the respondents' deliberate inaction. They cited Section 9 (2) of the [*Fair Administrative Action Act*](#) 2015, Article 159 (2) © of [*the Constitution*](#).



46. Thus, passing the Anarita Karimi Njeru case (supra) test.

Ex parte applicant's gravamen

47. The applicant feels aggrieved by the respondents' actions in; arbitrarily closing down the businesses; and denying some of its members, licenses to operate liquor businesses within Narok County. They claimed that, the respondents in pursuit of a national government drive to crack-down on businesses selling liquor in close proximity to schools, residential areas and other public institutions, arbitrarily ordered closure of some of the applicant's members' businesses.
48. They stated that the closure was done without following due process or public participation. According to them, the purported public participation was not carried out and the minutes of the alleged public participation were prepared to respond to this suit. Further, the respondents did not conduct a public hearing to collect their views on the public revocation of licenses to the applicants.
49. In addition, they stated that, their members were not given any opportunity to apply for licenses as the respondents had already determined their fate by closing their businesses down arbitrarily. In particular, they were not given an opportunity to be heard before the closure of their businesses and eventual denial of licenses to sell liquor.
50. According to them, these acts and omissions by the respondents constituted violation of article 47 of *the Constitution*.

Analysis

51. The *Alcoholic Drinks Control Act* 2010 came into force and all liquor businesses had to adhere to these new rules and regulations. The Narok County *Alcoholic Drinks Control Act* of 2016 was also enforced to govern liquor business within the County. The businessmen, the applicants, and the petitioners had to renew their yearly licenses through the County Committee.

Of public participation

52. The Supreme Court of Kenya in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)*, Petition 5 of 2017, [2019] eKLR expressly stated that, the Court recognized that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people of Kenya. And, being alive to the absence of a legislative framework on public participation, the Court under its mandate under Section 3 of the Supreme Court set out the following guiding principles for public participation: -
- i. As a constitutional principle under Article 10(2) of them Constitution, public participation applies to all aspects of governance.
 - ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
 - iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

53.



- iv. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
 - v. Public participation is not an abstract notion; it must be purposive and meaningful.
 - vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
 - vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
 - viii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
 - ix. Components of meaningful public participation include the following:
 - a. clarity of the subject matter for the public to understand;
 - b. structures and processes (medium of engagement) of participation that are clear and simple;
 - c. opportunity for balanced influence from the public in general;
 - d. commitment to the process;
 - e. inclusive and effective representation;
 - f. integrity and transparency of the process;
 - g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.
54. One powerful character of public participation which the Supreme Court recognized is that, public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people of Kenya. The sovereignty of the people is declared in article 1 of *the Constitution* and the manner it shall be exercised, thus: -
- 1.
 - (1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
 - (2) The people may exercise their sovereign power either directly or through their democratically elected representatives.
55. Public participation should, therefore, be understood within that framework, and questions now abound, whether it is one of the ways the people exercise their sovereign power directly; shaping the weight their views must carry in the final deliberation of the matter at hand.
56. As Sachs J. observed in *Minister of Health v. New clicks South Africa (pty) ltd*;
- “the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinitive variation. What matters is that at the end of the day a reasonable



opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case”.

57. But,
Components of meaningful public participation include the following:
- a. clarity of the subject matter for the public to understand;
 - b. structures and processes (medium of engagement) of participation that are clear and simple;
 - c. opportunity for balanced influence from the public in general;
 - d. commitment to the process;
 - e. inclusive and effective representation;
 - f. integrity and transparency of the process;
 - g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter. (Supreme Court decision, *supra*)
58. This court has been referred to the annexed minutes for public participation, notices of public hearings, and invitations. The applicant stated that there was no public participation; and that these minutes are not signed; but, were contrived to respond to this suit. They also denied ever receiving the notice for the meeting alluded to.
59. From the evidence, the court does not find anything to show that, notice for the meeting was given to the applicant or its members.
60. Of particular relevance is the arbitrary order for closure of liquor-selling businesses without following due process. Arbitrariness in public-decision making is most loathed, forcing *the Constitution* to zealously guard against it by expressly entrenching important imperatives, inter alia, provisions on National values and principles of governance in art 10, equality before and protection of the law and non-discrimination in article 27, and the right to fair administrative action in article 47.
61. One of the noble intentions of the Narok County Alcoholics Drinks Control Act is to protect consumers under article 46 *the Constitution*. However, implementing institutions and instruments must also conform to the due process and fair administrative action requirements in relation to persons who will be affected by the decisions made under the Act. Thus, a call for a proportioned balance demanding observance of the due process whilst ensuring the businesses comply with the legal and other public health requirements for licensing set out in the applicable law.
62. Under the Narok County *Alcoholic Drinks Control Act* of 2016, the respondent has the mandate of inter alia, licensing; and in the exercise of the mandate, the respondents may reject any application for lawful and valid reason. Closure of existing businesses makes public participation necessary as well as inspection of the premises to ensure they do not offend other public good criteria such as proximity to schools, residential areas, public institutions, and public health considerations.
63. Nonetheless, the license is not automatically granted to an applicant.
64. Once the respondents had decided not to renew the applicants’ licenses, section 10 (4) (a) mandates them to notify the applicant within thirty days giving reasons for refusal. The applicants stated that there was no particular reason for rejection of application that was given to them by the respondents. They even wrote to them but no response was received other than closure notices.



65. The respondents acted pursuant to section 10(4)(a) to reject the application which requires them to notify the applicant of the rejection and reasons thereof. The respondents have annexed a schedule of the applicants, and decisions made including reasons for the decision. But, there is no evidence that the list was shared with or served upon the applicant, or that they gave the particular reason(s) for their decision to reject application for license by some members of the ex parte applicant.
66. The requirement for giving reasons for the decision sets the ground for applicants who are dissatisfied with the decision to apply for review or appeal; a constitutional right.
67. Thus, the due process requirements feed the right to fair administrative action as well as fair hearing and should never be sacrificed at the alter of, but to be observed by the implementing institution whilst serving the public interest involved.
68. This Court recognizes the need and duty of the respondents to protect the public as long as they do not act contrary to *the Constitution*. It appears the decision to close the bars was arbitrary. And, they may not have given the affected owners an opportunity to be heard.

Conclusions and Orders

69. The court finds that the respondent has the mandate to grant or reject an application for license-both initial or renewal. But, must notify the applicant of the reasons for rejection within 30 days so as to set the ground for review or appeal by any dissatisfied applicant. Evidence show that no reasons were given to the applicants for the rejection of their licenses.
70. Whereas the respondents stated that the applicants ought to have applied for review as provided in the Act and regulations, the ex parte applicant argued that the review mechanism had not been operationalized, thus, it was not available to provide remedy, bringing to the fore the importance of discussing the doctrine of exhaustion of remedies and its application.
71. As a general rule, where proceedings are brought in a matter which is the subject of alternative dispute resolution mechanisms, the court should decline jurisdiction or stay the proceedings, and refer the parties to the alternative dispute resolution mechanism. Except of course courts may permit a party to depart only in the interest of justice, or where the internal mechanism or remedy is ineffective or futile or illegal.
72. Therefore, as the doctrine of exhaustion is a preclusion doctrine, the review mechanism must be duly operational as provided in the enabling law or regulations to offer remedy. The doctrine may not be successfully invoked against a party where the dispute resolution mechanism is not operational or is inadequate to provide remedy.
73. Each of the persons in the list provided by the applicant whose application for licenses was rejected, should have been supplied with the decision and reasons for the rejection of application within 30 days from today; and any dissatisfied party is to apply through the review mechanism provided in the Narok County *Alcoholic Drinks Control Act* and the regulations made thereto, but, if the mechanism is not operational, to this court. Time starts to run upon the notification of the reasons in the manner forestated.
74. The applicant did not specify which of its members had their businesses shut down and were never given an opportunity to apply for a license. Therefore, the court agrees with the respondents that, an omnibus order would be inappropriate as it will hurt public good. Accordingly, the order of mandamus on the specific terms above which will enable the individuals who are dissatisfied with the decision and



the reasons, to apply for review or appeal as provided in the Narok County [Alcoholic Drinks Control Act](#).

75. Notably though, the order herein is not a license under the Narok County [Alcoholic Drinks Control Act](#).

76. In the premises, the ex parte Applicants' Notice of Motion dated 24/11/2023 succeeds to the extent stated below, to wit: -

- a. Each of the persons in the list provided by the ex parte applicant whose application for licenses was rejected, shall be supplied with the decision and reasons for the rejection of application within 30 days from today; and if any party is dissatisfied, shall apply through the review mechanism provided in the Narok County [Alcoholic Drinks Control Act](#) and the regulations made thereto, but, if the mechanism is not operational, to this court. Time will start to run upon the notification of the reasons in the manner forestated.
- b. Given the nature of these proceedings, each party shall bear own costs of the application.
- c. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
7th DAY OF OCTOBER, 2024**

.....

F. Gikonyo M

Judge

In the presence of: -

1. C. Langat & Korir for the Ex parte applicant
2. Musyoka for the respondents
3. Otolu C/A

