



**Albert Gitari Luka t/a Hakim Commercial Agencies v Chairperson,
Tharaka Nithi Alcoholic Drinks Control Board & 2 others (Petition
4 of 2016) [2023] KEHC 872 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 872 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION 4 OF 2016
TW CHERERE, J
FEBRUARY 9, 2023**

**IN THE MATTER OF: ARTICLE 22(1), 23(1) & 47(1) & (2)(159)
(2)(A) AND 165 OF THE CONSTITUTION OF KENYA, 2010.**

AND

**IN THE MATTER OF: THARAKA NITHI COUNTY
ALCOHOLIC DRINKS CONTROL ACT, 2014**

AND

**IN THE MATTER OF: THE APPLICATION BY THE APPLICANT
FOR RENEWAL OF LICENCE TO MANUFACTURE
ALCOHOLIC DRINKS WITHIN MERU SOUTH SUB COUNTY**

BETWEEN

**ALBERT GITARI LUKA T/A HAKIM COMMERCIAL
AGENCIES PETITIONER**

AND

**THE CHAIRPERSON, THARAKA NITHI ALCOHOLIC DRINKS CONTROL
BOARD 1ST RESPONDENT**

THE ATTORNEY GENERAL 2ND RESPONDENT

**THE PRINCIPAL SECRETARY MINISTRY OF INTERIOR AND
COORDINATION OF NATIONAL GOVERNMENT 3RD RESPONDENT**



JUDGMENT

1. Petitioner is an alcoholic drink manufacturer. As at 16th December, 2015 when this Petition was filed, Petitioner's licence that was issued by the 1st Respondent had expired and his application for renewal of the licence was still pending.
2. On 20th November, 2015, the then Cabinet Secretary, Ministry of Interior and Coordination of National Government, published a notice requiring the Petitioner among other entities to cease manufacturing of alcoholic drinks.
3. Aggrieved by that decision, Petitioner filed those petition seeking the following reliefs:
 - a. A Declaration that by dint of Sections 16,17,18 and 19 of Tharaka Nithi County *Alcoholic Drinks Control Act*, 2014 the petitioner's licence No. 561 continues to be in force until all the rights confirmed to the petitioner by Tharaka Nithi County *Alcoholic Drinks Control Act*, 2014, the *Constitution* of Kenya, 2010 and any other written law are exhausted.
 - b. A Declaration that the order by the Ministry of Interior and Coordination of National Government in the Daily Nation Friday November 20,2015 through its Cabinet Secretary Hon Maj Gen. (Rtd) Joseph Nkaisery affecting the petitioner's business to manufacture Alcoholic Drinks is an abuse of power in so far as it affects the fundamental social and economic right of the petitioner.
 - c. A Declaration that the administrative acts of both the County Government of Tharaka Nithi and the National Government through the Ministry of Interior and Coordination of National Government stopping the operation of the petitioner's business of manufacturing of Alcoholic Drinks without giving the petitioner a chance to be heard is contrary to the rules of Natural Justice and therefore unlawful.
 - d. A Declaration that the order by Hon. Maj Gen. (Rtd) Joseph of Friday November, 2015 is ultra vires, arbitrary and an abuse of power.
 - e. A Declaration that the petitioner is entitled to compensation over loss suffered for the raw material wasted valued at Ksh 12.99 M and for the income cost up to and including the day of re-opening up the business or to be determined by the court.
 - f. A Declaration that the petitioner is entitled to general damages for infringement of his fundamental rights and freedoms.
 - g. Order of injunction restraining the Respondents, their agents, servants, employees and whosoever from harassing the petitioner, his agents, servants, employees, family members and interfering with his business of legally manufacturing Alcoholic Drinks and his premises aforesaid.
 - h. Costs of this suit
 - i. Any other or better relief that this Honourable court may deem fit and just to grant
4. The Petition is supported Petitioner's affidavit sworn on 16th December, 2015. Annexed to the affidavit is a licence issued by the 1st Respondent that expired on 30th September, 2015; copy of application for renewal of the licence and two receipts for payment of the renewal fees; NEMA Discharge License; KRA Licence to manufacture Excisable Goods; Government Chemist's Certificate of Analysis giving



- the Petitioner's products a clean bill of health; Chemical Water Analysis Report; Certificate of Registration and KRA Pin Certificate.
5. Petitioner accused the 1st Respondent for not renewing his licence and for not giving reasons for its action and the 3rd Respondent for directing Petitioner to cease its manufacturing operations without giving it a hearing or reasons for its actions.
 6. 1st Respondent by its response filed on 14th January, 2016 challenged its capacity to be sued and stated that it supported the order to the Petitioner to cease manufacture of Alcoholic Drinks for the reason that it did not have a valid licence.
 7. By a replying affidavit sworn by Dr. Engineer Karanja Kibicho on 05th May, 2016, the 2nd and 3rd Respondent's justified the action of stopping the Petitioner from manufacturing alcoholic drinks on the grounds that the drinks were substandard and did not comply with the statutory requirements.
 8. On 29th March, 2022, the court directed that the Petition be disposed of by way of written submission which only the Petitioner filed on 23rd March, 2022.
 9. Petitioner argues that the 1st Respondent's refusal to renew his licence on account of 3rd Respondent's directive dated 20th November, 2015 and offends the provisions of Article 27 of the *Constitution* which guarantees the Petitioner equal treatment before the law, amounted to unfair administrative action in contravention of Article 47 of the *Constitution*. And denied the Petitioner a right to a fair hearing guaranteed by Article 50(1) of the *Constitution*.
 10. Petitioner supported his case with numerous authorities among them the following:
 1. *Keroche Breweries Limited & 6 others v Attorney General & 10 others* [2016] eKLR where Odunga J (as he then was) declared as unconstitutional a directive cancelling the Petitioner's licences without giving Petitioner a chance to be heard.
 2. *David Oloo Onyango v Attorney-General* [1987] eKLR where the Court of Appeal held that the principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly.
 3. *Republic v City Council of Nairobi & another* [2013] eKLR where Odunga J (as he then was) held that: A person likely to be affected by an administrative action, in my view, is not necessarily a party to the subject of the transaction.
 4. *Keroche Industries Limited v Kenya Revenue Authority & 5 others* [2007] eKLR where Nyamu J (as he then was) held that: A public authority must act reasonably and in good faith and upon lawful and relevant grounds of public interest
 5. *Kenya Country Bus Owners Association & 8 others v Cabinet Secretary for Transport & Infrastructure & 5 others* [2014] eKLR where Odunga J (as he then was) held that: Whereas public and State Officers have a duty to protect the public, they have no right and authority to do so unlawfully. The protection of the public must be done in accordance with the law as laid down in the *Constitution* and the existing legislation.
 6. *Republic v Public Procurement and Administrative Review Board Ex-Parte Zhongman Petroleum & Natural Gas Group Company Limited* [2010] eKLR where Wendoh J held that: an unreasonable decision is a nullity



7. *Kuria Greens Limited v Registrar of Titles & another* [2011] eKLR where Musinga J (as he then was) held that: cancellation of titles by the 1st respondent not only violated the petitioner's constitutional rights but was also unreasonable and contrary to its legitimate expectation.
8. *Re Hardial Singh and others* [1979] KLR 18; [1976-80] 1 KLR 1090, the Court expressed itself as follows: The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law...

Analysis and determination

11. I have considered the material placed before the court. Petitioner seeks judicial review reliefs. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilized governance, by holding the public authority to the limit defined by the law.
12. Article 47(1) of the *Constitution* is in mandatory terms that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
13. The *Constitution* is the Supreme law of the Republic and decrees as such in Article 2(1). It binds all persons and all state organs in the course of performing their duties. The provisions in Article 47 require that an administrative action be expeditious, fair, lawful and reasonable, and that where such an action adversely affect a person's right or fundamental freedom, the affected person is entitled to be given written reasons for the action. This article is a constitutional control over administrative bodies to ensure that they do not abuse their power and that individuals concerned receive fair treatment when actions are taken against them.
14. The instant petition is grounded on the allegation that the 1st and 2nd Respondents acted ultra vires the *Constitution*, by denying the Petitioner the right to be heard, right to fair trial and disregarded the rules of natural justice by failing to give reasons for failure to renew his licence and by directing him to cease production of alcoholic drinks.
15. Section 4 *Fair Administrative Action Act*, 2015 provides that:
 - (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
 - (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 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; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) 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; Administrative action to be taken expeditiously, efficiently, lawfully etc.
 - (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.
- (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
- (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

16. The importance of this right to fair administrative action as a constitutional right in our Article 47 cannot be over emphasized. The Court of Appeal stated in the case of Judicial Service Commission v Mbalu Mutava & another [2014] eKLR 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.”

17. Whereas the 1st and 3rd Respondents have attempted explain why the impugned decisions were made, they do not deny that the Petitioner was neither given reasons for the said decisions nor availed an opportunity to present his case.
18. From the foregoing, I find that the impugned decisions fail the test of a fair administrative action and violates the Petitioner’s rights of equality before the law, fair administrative action and fair hearing enshrined in Articles 27, 47 and 50 of the Constitution respectively.



19. I appreciate that the 1st and 3rd Respondents have a duty to protect the citizenry from manufacture and sale illicit brews but all actions of the Government must be in accordance with the rule of law. Failure to observe this constitutional decree, for all intent and purposes, undermines the rule of law and the value of Article 19(1) of the *Constitution* which states that the Bill of Rights is an integral part of Kenya's democratic state as the framework for social, economic and cultural policies.
20. From what is stated hereinabove, I find that Petitioner has demonstrated violation or infringement his Constitutional rights. Flowing from the foregoing, it is hereby ordered:
- a. Petitioner's licence No. 561 expired in 2015 and the relief that it continues to be in force until all the rights confirmed to the petitioner by Tharaka Nithi County *Alcoholic Drinks Control Act*, 2014, the *Constitution* of Kenya, 2010 and any other written law are exhausted is therefore declined.
 - b. The order by the Ministry of Interior and Coordination of National Government in the Daily Nation Friday November 20, 2015 through its Cabinet Secretary Hon Maj Gen. (Rtd) Joseph Nkaisery stopping the petitioner's business to manufacture Alcoholic Drinks is void and has no legal effect.
 - c. The administrative acts of both the County Government of Tharaka Nithi and the National Government through the Ministry of Interior and Coordination of National Government stopping the operation of the petitioner's business of manufacturing of Alcoholic Drinks without giving the petitioner a chance to be heard are contrary to the rules of Natural Justice are illegal and unconstitutional
 - d. The relief sought for compensation does not lie in a Constitutional Petition and it is declined
 - e. Respondents are condemned to pay the costs of this Petition

DELIVERED THIS 09TH DAY OF FEBRUARY 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

For Petitioner - Mr. Musyimi for Ojwang Sombe & Co. Advocates

For 1st Respondent - Mr. Murango for Murango Mwenda & Co Advocates

For 2nd & 3rd Respondents - N/A for Attorney General

