



**Republic v County Government of Nyeri & another; Edith Kaluhi  
Kegode t/a Annabelle Guest House (Exparte Applicant) (Judicial Review  
E003 of 2022) [2023] KEHC 2174 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2174 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
JUDICIAL REVIEW E003 OF 2022  
FN MUCHEMI, J  
MARCH 23, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF NYERI ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR, ALCOHOLIC DRINKS CONTROL &  
MANAGEMENT ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**EDITH KALUHI KEGODE T/A ANNABELLE GUEST  
HOUSE ..... EXPARTE APPLICANT**

**RULING**

1. This is a ruling on a preliminary objection dated June 17, 2022 against these judicial review proceedings filed through a Notice of Motion dated May 17, 2022.
2. In the Notice of Motion, the applicant seeks orders of certiorari and mandamus as follows:-
  - a. An order of certiorari to remove into the High Court for purposes of being quashed the decision by the respondents for closure of her guest house;
  - b. That the respondents be compelled to issue a liquor license for the current year to the *ex parte* applicant and she be allowed to operate her business on payment of requisite fees due for the year 2022 and any subsequent year thereafter;
3. The respondents argue that this honourable court lacks jurisdiction to entertain the application for want of exhaustion of the review mechanisms set out in Section 17 of the Nyeri County Alcoholic



Drinks Control Act, 2013 and further argue that the suit is time barred as it was filed outside the twenty-one day limit set out in Section 19 of the Nyeri County Alcoholic Drinks Act, 2013.

4. Parties agreed to dispose of the preliminary objection by way of written submissions.

### **The Respondents' Submissions**

5. The respondents submit that through the County Alcoholic Drinks Regulation Committee, resolved to deny the *ex parte* applicant a liquor licence and close her business on March 15, 2022. The respondents state that they communicated this decision to the *ex parte* applicant on April 4, 2022. The *ex parte* applicant instituted the suit on May 6, 2022, thirty three (33) days after the decision was conveyed to her.
6. The respondents contend that Sections 18, 19 and 20 of the Nyeri County Alcoholic Drinks Control and Management Act, 2013 provide for review mechanisms for refusal to renew a liquor license as well as timelines for the same. A request for review of such a decision is to be made in writing, within fourteen (14) days to the County Alcoholic Drinks Regulation Committee. The request sets in motion the review process whose resultant decision is what can be challenged in court. The respondents contend that the need for exhaustion of the review mechanism set out in Section 19 of the Act is spelt out in mandatory terms.
7. The respondents argue that the *ex parte* applicant has failed to provide any evidence of a request for review of the decision to deny her business a liquor licence and close the premises.
8. The respondents cite the cases of *Anthony Miano & Others vs Attorney General & Others* [2021] eKLR and *Geoffrey Muthiga Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others* [2015] eKLR and submit that where there is a clear procedure for redress of any particular grievance prescribed by the law, that procedure ought to be strictly followed. The respondents contend that the *ex parte* applicant ought to have complied with the doctrine of exhaustion and thus this court lacks the jurisdiction to hear and determine the application for judicial review.
9. The respondents further rely on the cases of *Jones M Musa & Another vs Kenya Hospital Association & Another* [2017] eKLR and *David Mwangi Maina vs Simon Sana Koli & Another* [2018] eKLR and submit that the suit is time barred as it was filed thirty three (33) days after the communication of the impugned decision contrary to Section 20 of the Nyeri County Alcoholic Drinks Control and Management Act, 2013.

### **The Ex parte Applicant's Submissions**

10. The *ex parte* applicant submits that there is no appointment by the county to the Senior Legal Officer to file the objection according to Section 51 of the Act, as a certificate is required of appointment and therefore the Senior Legal Officer has no *locus standi* in filing the said objection.
11. The *ex parte* applicant further submits that the court granted leave to file the judicial review proceedings on May 9, 2022 and thus the *Limitation of Actions Act* has no legal bearing on the matter.
12. The *ex parte* applicant submits that there was no public participation pursuant to Section 10(a), 196(i) (a) and (b). Further, the minutes of the County Government titled Minutes of Public Participation did not indicate that they invited her but instead invited Mr Benson Muriuki, who is not the proprietor of the business. As such, the *ex parte* applicant avers that any verdict by the sub county and the county committee has no bearing in law and Sections 18 and 19 of the Nyeri County Alcoholic Drinks Control Act has no relevance at all.



13. The *ex parte* applicant states that her business has been running for 9 years without any complaints from anyone and neither has she received any form of threats of closure by the respondents. She further relies on the case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 and submits that the preliminary objection has been improperly raised and ought to be struck out.

## The Law

### Whether the preliminary objection is sustainable.

14. The case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

15. Sir Charles Newbold P stated:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

16. Similarly the Supreme Court in the case of *Hassan Ali Jobo & Another vs Suleiman Said Shabal & 2 Others* SCK Petition No 10 of 2013 [2014] eKLR held that:-

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

17. Further in the case of *Hassan Nyanje Charo vs Khatib Mwasbetani & 3 Others*, [2014] eKLR the court held that:-

Thus a preliminary objection may only be raised on a ‘pure question of law.’ To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.

18. Evidently, a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. The respondent has raised the issue of jurisdiction and that the suit is time barred as points of law. Indeed the question of jurisdiction was explained in the case of Owners of the *Motor Vessel “Lilian S” vs Caltex Kenya Limited* [1989] KLR 1 where the court held:-

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

19. The respondents contend that this court lacks jurisdiction to entertain the instant application because the *ex parte* applicant did not exhaust the review mechanisms provided in Sections 18 and 19 of the Nyeri County Alcoholic Drinks Control and Management Act.

20. Section 18 of the Act provides:-



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
  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 to any action to be taken;
    - e. Make any other declaration as it may deem fit.
21. Section 19 provides:-
- No person shall appeal to Court under this Act on a matter related to Section 18 unless the person has exhausted the review mechanism provided therein.
22. It is trite law that an applicant is mandated to exhaust all internal remedies of the respondent before initiating judicial review proceedings. Section 9(2) of the *Fair Administrative Action Act* 2015 provides:-
1. The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
  2. The High Court or subordinate court shall, if it is not satisfied that the remedies referred to in sub section (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under sub section (1).
  3. Notwithstanding sub section (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
23. Exhaustion of alternative remedies has been exemplified by emerging jurisprudence as explained by the Court of Appeal in *Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others* [2015] eKLR as follows:-
- It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be for a of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest with mechanisms in place for resolution outside



the courts. The ex parte applicants argue that this accords with Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.

24. Courts have also dealt with the exceptions to the doctrine of exhaustion. In R vs Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved- including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau & 9 Others vs Aelous (K) Ltd & 9 Others.

As observed above, the first principle is that the High Court may, in exceptional circumstances consider, determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting the court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd vs Nairobi County Government & 2 Others [2018] eKLR.

25. It is not in dispute that the impugned decision to close the ex parte applicant's business was communicated to her on 4<sup>th</sup> April 2022. It is said that the *ex parte* applicant did not raise any concerns with the respondents by way of review in writing to the County Committee pursuant to Section 18 of the Act and instead, instituted these judicial review proceedings herein. Upon perusal of the notice to close the ex parte applicant's business and note that it does not spell out existence of any committee where the *ex parte* applicant would have sought review in the event that she was dissatisfied with the decision of the respondent. It was the respondent's duty to notify the ex parte applicant existence of such a forum in its closure notice. The respondent argues that the respondent is yet to establish the relevant committee under section 18(a) of the Nyeri County Alcoholic Drinks Act. No evidence was presented on the existence of such committees before this court.
26. Even assuming that the respondent had established a review committee, this does not shut out the ex parte applicant from the doors of justice should she decide to seek remedy in court.
27. On the issue of filing these proceedings out of time, the respondent depones he obtained leave of the court on May 9, 2022. The record shows that these proceedings were filed in court on May 19, 2022 whereas the court granted the applicant leave to operate as stay and a period of twenty one (21) days to file these proceedings was given. This is in accordance with the provisions of Order 53 rule 3(1) of the Civil Procedure Rules. The respondent cites Section 19 of the Alcoholic Drinks Act which gives



no time limit as to lodging appeal in the High Court. I would think the respondent meant Section 20 of the same Act which limits the time to appeal to the High Court against refusal by the respondent to issue, renew or transfer a licence to twenty-one (21) days. The applicant herein has not appealed against any such refusal. Her grievance is the decision of closure of her business which she terms as arbitrary. The applicant has now instituted judicial review proceedings which are not governed by the Nyeri Alcoholic Drinks Act. The applicant complied with the timelines of twenty one (21) days under Order 53 of the Civil Procedure Act in filing these proceedings as directed by the court on May 19, 2022. In my considered view, these proceedings were filed within time and the provisions cited by the respondent herein are not applicable.

28. From the foregoing analysis, I am of the considered view that the Preliminary Objection has no merit and it is hereby dismissed with costs to the *exparte* applicant and which will abide in the appeal.
29. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 23<sup>RD</sup> DAY OF MARCH, 2023.**

**F. MUCHEMI**

**JUDGE**

Ruling delivered through videolink this 23<sup>rd</sup> day of March, 2023

