



**Republic v Nairobi City County Assembly & another; Musumba & 4 others (Exparte) (Application E082 of 2023) [2024] KEHC 11424 (KLR) (Judicial Review) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11424 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
APPLICATION E082 OF 2023  
J NGAAH, J  
OCTOBER 1, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**NAIROBI CITY COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**AUDITOR GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**DR JAIRUS MUSUMBA ..... EXPARTE**

**ALLAN IGAMBI ..... EXPARTE**

**MOHAMED SAHAL ..... EXPARTE**

**HESBON MOLE AGWENA ..... EXPARTE**

**JULIUS MATEKWA ASHAMI ..... EXPARTE**

**JUDGMENT**

**The Application**

1. Before court is the applicants’ motion dated 29 June 2023. The motion is expressed to be brought under Article 47 of *the Constitution*, sections 7, 8, 9, 11 and 14 of the Fair Administrative Actions Act, 2015; Section 8 and 9 of the *Law Reform Act*, Cap 26; and Order 53 of the Civil Procedure Rules, 2010. The motion seeks the following orders:

- “(a) Prohibition restraining the Assembly from debating the Report of the Select Committee on the Consideration of the Report of the Auditor General on



Alcoholic Drinks Control and Licensing Board for the Year Ended 30<sup>th</sup> June 2020. The order also does forbid any public entity from acting on the Report as against the Applicants.

- (b) Certiorari to bring to this court and to quash the Report of the Select Committee on the Consideration of the Report of the Auditor General on Alcoholic Drinks Control and Licensing Board for the Year Ended 30<sup>th</sup> June 2020 dated 22<sup>nd</sup> June 2023 and the Report of the Auditor General on Alcoholic Drinks Control and Licensing Board for the Year Ended 30<sup>th</sup> June 2020 dated 28<sup>th</sup> September 2022.
- (c) A declaration that:
  - (i) the constitutional timelines in Article 229(4) and (9) of *the Constitution* and section 48 and 50 of the *Public Audit Act*, 2015 are mandatory and must be complied with.”

2. The applicant also seeks for the costs of the suit.

The motion is based on a statutory statement dated 26 June 2023 and an affidavit verifying the facts relied upon sworn on even date by Dr. Jairus Musumba. Dr. Musumba has sworn that he has sworn his affidavit on his own behalf and on behalf of the rest of the applicants.

- 3. According to this affidavit, the applicants served the County Government of Nairobi in various capacities on diverse dates between 2018 and 2022. In particular, Dr. Mususmba previously served as County Chief Officer for Trade, Tourism, and Cooperatives between May 2019 to March 2020. The 2<sup>nd</sup> Applicant, Mr.Allan Igambi, served as County Executive Committee Member for Trade, Tourism, and Cooperatives between 2018 to 2022.While Mohamed Sahal, 3<sup>rd</sup> Respondent, served as Chief Officer for Trade, Tourism, and Cooperatives between March 2020 to June 2022.The 4<sup>th</sup> and the 5<sup>th</sup> Applicants served as Director and Accountant respectively for the Nairobi City County Alcoholic Drinks Control and Licensing Board, at the time material to this suit.
- 4. The applicants have been informed by their learned counsel, which information they believe to be true, that under Article 47 and section 4 of the *Fair Administrative Action Act*, 2015 administrative action ought to be expeditious, efficient, lawful, and procedurally fair. Further, they are aware that Article 229(4) demands that, for each financial year, the Auditor-General must audit and report, on all accounts, funds, and authorities of the national and county governments within six months after the end of each financial year. In turn, according to Article 229 (8) of *the Constitution*, within three months after receiving an audit report, the County Assembly must debate and consider the report and take appropriate action.
- 5. In the instant case, the Auditor General delayed the audit of the Nairobi City County Alcoholic Drinks Control and Licensing Board for the financial year 2019/20 by over nine months. It is only on 28 September 2022 that the Auditor General submitted her report to the County Assembly. The Assembly, on the other hand, did not debate the report within 3 months but delayed it until June 2022, thus violating Article 229 (8) of *the Constitution*. The Assembly Speaker is said to have tabled the Select Committee Report on the Auditor General’s Report for the Financial Year 2019/2020, for the Nairobi City County Alcoholic Drinks Control and Licensing Board, on 22 June 2023.
- 6. The Applicants are aggrieved by the Select Committee Report for violating the 9-month timeline in Article 229 (4) and (8) of *the Constitution* and for violating Article 47 and 50 thereof by denying the Applicants a fair hearing before making a decision that was prejudicial to them. Besides, the Select



Committee never afforded the applicants a fair hearing before drawing the adverse finding and making the impugned recommendation.

7. The applicants contended that the decision is irrational because while the Select Committee recommended the prosecution of the applicants for omissions to submit the financial statements for between five to seven financial years, none of the applicants had been appointed to their respective offices during that period.

### **The response**

8. Mr. Edward Gichana swore a replying affidavit on behalf of the 1<sup>st</sup> respondent, opposing the applicants' motion. Mr. Gichana has introduced himself as the Clerk, Nairobi City County Assembly. According to Mr Gichana, the applicant's application seeking stay of adoption of the impugned report was placed before the Court on 26 June, 2023 by which date the report had been discussed. To be precise, the report had been discussed and adopted on 22 June, 2023. Accordingly, the applicants' search for stay orders had been over taken by events.
9. Mr Gichana has sworn further that, the application by applicants only seek to frustrate exercise of the powers of the Public Accounts Committee under Standing order 203(2) of the Nairobi City County Assembly Standing Orders. In particular, standing order no. 203(2), provides that the Committee shall be responsible for the examination of the Accounts showing the appropriations of the sum voted by the County Assembly to meet the Public expenditure and of such other actions laid before the County Assembly. The standing order is said to be consistent with Articles 201 and 206 of *the Constitution*. These two articles relate to principles of public finance and other public funds including consolidated funds, respectively.
10. As far as the details of the impugned report are concerned, it has been sworn on behalf of the 1<sup>st</sup> respondent that the Select Committee found that Alcoholic Drinks Control and Licensing fund collected a total of Kshs.427,267,499.30 and Kshs.515, 876,790.40 during the Financial Year 2019/2020 and Financial Years 2018/2019 respectively; however, deposits made by the applicants were lacking in supporting documentation such as the receipts and the ledger. Further, the revenue collected by the applicants was not consistent with the schedule of liquor license applicants.
11. The applicants are said to have failed to provide within the time stipulated in the law the Cash Books, the payment Vouchers, and ledgers despite demands for these documents having been made from them. The Statements of receipts and payments are alleged to reflect total receipts of Kshs. 427,267,499 and payments totaling to Kshs. 277,304,402 for the financial year ended 30 June, 2020. However, supporting documents including receipt books, cash books, payment Vouchers, ledgers and supporting schedules were not provided for Audit by the applicants. This omission is said to be contrary to section 100 of the *Public Finance Management Act* (County Governments) Regulations 2015. The Accuracy, completeness and validity for the receipts and payments of Kshs. 427,267,499 and Kshs. 227, 304, 402 respectively could not be confirmed.
12. As a result of the applicants' commissions or omissions, they were found guilty of unsupported supply of goods and services to the tune of Kshs. 28,147, 580.60. They failed to provide the Authority to Incur expenditure, approved procurement plan, receipt Vouchers and issue vouchers for payment of those goods and services. They were also found guilty of unauthorized payments by Non AIE Holder amounting to Kshs. 77,684, 054.00, apparently because the payments were approved by unauthorized officer and there was no evidence of appointment of such officer Contrary to section 148 of the *Public Finance Management Act*, 2012.



13. The 1<sup>st</sup> respondent also contends that contrary to the allegations by the applicants that their rights under Articles 47 of *the Constitution* and section 4 of the Fair administration Action Act, read with Article 229 of *the Constitution*, have been violated, it is the applicants who delayed in submitting the required documents to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
14. On her part, the 2<sup>nd</sup> respondent filed what she described as “2<sup>nd</sup> respondent’s response”. This document is neither a replying affidavit nor grounds of objection. However, whatever is contained in the document is what is more or less replicated in the submissions filed on behalf of the 2<sup>nd</sup> respondent.

## Submissions

### (a) Applicants’ submissions

15. Talking of submissions, the applicant’s submissions have narrowed on the validity or lack thereof of the 1<sup>st</sup> respondent’s select committee’s report on consideration of the Report of the Auditor General on Alcoholic Drinks Control and Licensing Board for the Year Ended 30 June 2020; the report is dated 22 June 2023. In the same vein, the applicants have also questioned the Report of the Auditor General on Alcoholic Drinks Control and Licensing Board for the Year Ended 30 June 2020 dated 28 September 2022. The two reports are impugned for violation of the rules of natural justice and for failing to comply with the constitutional and statutory timelines.
16. Thus, the two issues which the applicant has sought this Honourable court to determine are whether, the 1<sup>st</sup> respondent’s County Assembly and Auditor General violated Article 47 and 50 of *the Constitution* by denying applicants the right to a fair hearing and, secondly, whether the County Assembly and Auditor General reports violate the constitutional timelines in Article 229 (4) and (8) as read with section 48 and 50 of the *Public Audit Act* 2015.
17. As far as the first question is concerned, the applicants have submitted that the 1<sup>st</sup> Respondent did not give the Applicants an opportunity to be heard before the adverse findings or recommendations against them were made by the select committee. The applicants, it is alleged, had no opportunity to respond to the allegations before the final report was made. This is said to be in violation of Article 47 and 50 of *the Constitution* and contrary to the principle of audi alteram partem.
18. By denying the applicants opportunity to be heard, the respondents are also alleged to have breached Section 18 of the *County Assemblies Powers and Privileges Act* and standing order no. 183 of the Nairobi County Assembly standing orders which provides that the committees which includes the select committee shall enjoy and exercise all the powers and privileges bestowed on County Assembly by *the Constitution* and statute, including the power to summon witnesses, receive evidence and to request for and receive papers and documents from the Government and the public. The 1<sup>st</sup> respondent, it is alleged, did not summon the Applicants or persons adversely mentioned in the reports as they were required under these provisions of the law.
19. The applicants have submitted that Article 47 of *the Constitution* codifies every person’s right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. For an administrative action to be considered as having satisfied all these requirements, the person affected by the action has to be accorded the right to be heard. The applicants have relied on Kenya Human Rights Commission v Non-Governmental Organizations Co-ordination Board [2016] eKLR where Onguto, J. held that a person whose interests and rights are likely to be affected by an administrative action, has a reasonable expectation that they will be given a hearing before any adverse action is taken and that they will be given reasons for the adverse administrative action in accordance with Article 47



- (2) of *the Constitution*. The learned judge also held that one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached.
20. It is the applicants' submission that the select committee's decision is a nullity because it violates the rules of natural justice under Articles 47 and 50 and sections 4(1), 7(2)(a)(v), and 7(2)(c) of the *Fair Administrative Action Act*. The applicant's also invoked the Supreme Court decision in *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR. where the court held that a decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision and that if the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of essential principles of justice. For the same argument the applicants cited Halsbury Laws of England, 5<sup>th</sup> Edition 2010 Vol 61 at para 639; *Ridge v Baldwin* [1964] AC 40; *General Medical Council v Spackman* [1943] 2 ALL E.R.
  21. On the question of violation of the constitutional timelines in Article 229(4) and (8) of *the Constitution*, it was submitted on behalf of the applicants that the Auditor General's Report and the Select Committee report were outside the constitutional timelines set out under Article 229 (4) and (8) as read with Section 48 and 50 of the *Public Audit Act* 2015. The applicants cited this Honourable Court's decision in *Kenya Human Rights Commission & 3 others v Attorney General & 3 others; Council of Governors & 2 others (Interested Parties)* [2020] eKLR where these provisions of the law are said to have been applied.
  22. It has been submitted that timelines set out in *the Constitution* are neither negotiable nor can they be extended by the courts. And where the constitutional timelines are violated, any decision arising out of the same should be considered to be invalid, null and void. In this regard the applicants relied on the Court of Appeal decision in *Ferdinand Ndung'u Waititu versus Independent Electoral & Boundaries Commission [IEBC] & 8 others* (2013) eKLR where it was held that timelines set by *the Constitution* and the *Elections Act* are neither negotiable nor can they be extended by any court for whatever reason. The court described these constitutional imperatives with respect to time as "the tyranny of time". It was similarly held by the Supreme Court in *Raila Odinga v IEBC & 3others*, supreme court petition *No.5 of 2013* and in *Mary Wambui Munene v. Peter Gichuki King'ara S.C. Petition No. 7 of 2014;* (2014)eKLR.
  23. The applicants invoked Article 2 (1) and (4) of *the Constitution* as laying down the foundational basis as to why any decision originating from an act or omission in contravention of *the Constitution* should be rendered invalid, null and void. It was further submitted that, the office of the 2<sup>nd</sup> Respondent, is a constitutional office created pursuant to Article 229 of *the Constitution* of Kenya 2010 as read with section 4 of the *Public Audit Act*, 2015. The roles, function and powers of the 2<sup>nd</sup> respondent prescribed under Article 229 (4)(b) of *the Constitution* includes, inter alia, auditing and reporting on the accounts of national and county governments, all funds of all authorities including the 1<sup>st</sup> Respondent within six months after the end of each financial year.
  24. The 2<sup>nd</sup> respondent, it is submitted, abdicated her constitutional mandate as provided for under Article 229 (4)(b), of *the Constitution*. She delayed the audit and report of (Nairobi City County Alcoholic Drinks Control and Licensing Board) for the financial year 2019/20 beyond 9 months until 28 September 2022. The act or omission of non-compliance to the constitutional timelines set out is a gross violation or contravention of *the Constitution* and any decision that arises out of it should be considered to be void and invalid by dint of Article 2(4) of *the Constitution*.
  25. As far as the 1<sup>st</sup> respondent is concerned, it was submitted that although the audit report was submitted to the Assembly on 28 September 2022 which, in any event was outside the prescribed timeline, it was



- not until June 2023 that the County Assembly discussed the report. This was contrary to Article 229 (8) which provides that within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action. Section 50 of the *Public Audit Act*, 2015 is also in the same terms.
26. The applicants have urged that the County Assembly and Auditor General are bound by the constitutional timelines set out in *the Constitution* and that failure to comply with the constitutional timelines is not only procedurally improper but is also an illegality.
  27. On the specific grounds of judicial review upon which the judicial review reliefs are sought, it was urged on behalf of the applicants that the report of the Select committee is tainted on the grounds of irrationality and unreasonableness. According to the applicants, it was unreasonable of the select committee to recommend prosecution of the applicants for omission to submit the financial statements between five to seven financial years when none of the Applicants had taken up their dockets during that time.
  28. In this submission, the applicants cited Republic v Inspector General of Police & another ex parte Patrick Macharia Nderitu [2015] eKLR where Odunga, J (as he then was) defined irrationality to arise when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision, it was urged, was in defiance of logic and acceptable moral standards.
  29. In conclusion, it was urged that the Reports by the 2<sup>nd</sup> Respondent and by of the select committee of the Nairobi City County Assembly dated 28 September 2022 and 22 June 2023 respectively, are unconstitutional, illegal, invalid and, null and void, by dint of Article 2(4) of *the Constitution* of Kenya, 2010 for having contravened Article 229 (4) and (8) of *the Constitution*. The applicants thus urged that the application be allowed.

#### **(b) Respondents' submissions**

30. The submissions by the 1<sup>st</sup> respondent, by and large, rehashed the depositions made in the affidavit sworn on behalf of the 1<sup>st</sup> respondent in opposition to the applicants' application. The 1<sup>st</sup> respondent has reiterated that the applicants' application has been overtaken by time since the select committee's report had been debated and adopted when the applicants filed their application and, for this reason, the application is mala fides. To the extent that the report has been discussed and adopted, the 1<sup>st</sup> respondent urges that the order of prohibition cannot issue. Granting the orders sought, it has been urged, would be in vain and in this regard the 1<sup>st</sup> respondent relied on Salim Juma Onditi v Minister of Local Government & Others (2008) eKLR where it was held that orders of court are not issued in vain.
31. The 1<sup>st</sup> respondent has urged that *the Constitution* ought to be interpreted in its entirety and not in isolation and to this end the 1<sup>st</sup> respondent has invoked Article 259 (1) of *the Constitution* on how *the Constitution* is to be construed. It has also been submitted that the established principles with respect to the burden imposed on a party seeking to enforce alleged violation of fundamental rights are clear that the applicants must set before the court, with a reasonable degree of precision, the constitutional provisions said to have been violated or infringed and the manner of infringement to enable the court address itself to the issues, and the respondent to answer the alleged violations. In the instant case, none of the alleged violations has been established by the applicants. The 1<sup>st</sup> respondent cited Githunguri Dairy Farmers Co-operative Farmers Society Ltd v Attorney General & 2 others [2016] eKLR, in which the Court held that the burden of proof that a fundamental right has been breached rested upon the person who asserts it. It is the 1<sup>st</sup> respondent's submission that the applicants have failed to establish a prima facie case and prays that their application be dismissed with costs.



32. On behalf of the 2<sup>nd</sup> respondent, Article 229 of the Constitution and section 4 of the Public Audit Act have been invoked on the mandate of the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent has admitted in her submissions that her report was made outside the constitutional and statutory timelines but has attributed the delay to the late issuance by the Alcoholic Drinks Control and Licensing Board's of the Board's financial statements within the stipulated timelines which, in itself, is in contravention of Section 47 (1) of the Public Act, 2015 that requires the financial statements required under the Constitution, the Public Financial Management Act, 2012 and any other Legislation, to be submitted to the Auditor General within three (3) months after the end of the financial year to which the accounts relate.
33. As far as the financial statements in issue are concerned, they were submitted for audit on 21 June 2022, more than one year and eight months after the Constitutional and Statutory deadline of 30 September, 2020. It has been urged that the impugned report has captured the failure by the Board in submitting its financial statements as by law required, the resultant effect being issuance of a disclaimer opinion for want of accompanying financial statements.
34. The 2<sup>nd</sup> respondent has also submitted that the court should take judicial notice of the fact of the vacancy in the position of the Auditor-General that necessitated the backlog of audit reports that ensued noting that the Constitution did not contemplate a situation where somebody other than the Auditor-General appointed as per Article 229 of the Constitution would discharge the constitutional functions of the Auditor-General.
35. The 2<sup>nd</sup> respondent relied on Constitutional Petition No. 388 of 2016 (the full citation has not been given), where, Mwita J. is said to have held that an acting Auditor General cannot perform functions of the substantive holder of that office. Despite the 1<sup>st</sup> respondent's delay in submitting the financial statements, the 2<sup>nd</sup> respondent, nonetheless, did audit in arrears the financial accounts in issue and issued a disclaimer opinion citing the violation by the Nairobi City County Alcoholic and Licensing Board.
36. The 2<sup>nd</sup> respondent urged that in undertaking Public Audits, the Auditor-General is not bound by strict rules of evidence and that Public Audits are conducted in accordance with International Public Sector Accounting Standards and International Standards of Supreme Audit Institutions. The second respondent cited the case of *Russel v Duke of Norfolk* [1949] All ER 109 at p.118 para D E where Tucker CJ is said to have held:
- “There are in my view no words which are universal to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, ... and so forth”.
37. The 2<sup>nd</sup> respondent also relied on *Selvarajan v Race Relations Board* 1976 1 All ER 12, where Lord Denning held that an investigating body is the master of its own procedure and that it can do everything in writing; *Kenya Revenue Authority v Menginya Salim Murgani* Civil Appeal No. 108 of 2009 where it was held that, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters and that decision-making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. The 2<sup>nd</sup> respondent also cited In the case of *Lloyd v McMahon* [1987] A.C. 628 where representations were made in writing rather than by way of oral hearing. The House of Lords held that procedures followed were fair, even without an oral Hearing.



38. The 2<sup>nd</sup> respondent has also urged that in proffering illegality as a ground for seeking judicial review, the applicants ought to demonstrate that the public body has exceeded its rightful jurisdiction or has abused its discretion by exercising its discretion for an improper purpose, improper delegation and irrelevant considerations. The applicants, it is urged, have not demonstrated how the Auditor-General in arriving at the findings in the Audit Report acted irrationally. The test for rationality is reasonableness and for judicial review ground for irrationality to hold, the party alleging irrationality should demonstrate how a decision maker in whom a discretionary power is vested has exercised that power in a way that no reasonable body would. In this regard the 2<sup>nd</sup> respondent relied on *Associated Provincial Picture House Ltd. V Wednesbury Corporation (1948) I K.B. 22*.
39. As far as the ground of procedural impropriety is concerned, it was urged on behalf of the 2<sup>nd</sup> respondent that the key principle is that the rules of natural justice have to be observed where there is a duty to act judicially and this duty is not confined to the procedure of a court of law but exists where any body of persons has legal authority arising from statute or common law or contract to determine questions affecting the rights of other bodies. Also, it was urged, where the legislature has laid down a procedure which should be followed before a body can exercise its powers, the body will be acting ultra vires if it does not follow the procedure.
40. The 2<sup>nd</sup> respondent cited *Lord Diplock in Council of Civil Service Unions v. Minister for Civil Service [1985] I A.C. 374* in which the learned judge recognised two aspects to procedural impropriety which are first, failure to observe procedures laid down in the statute and secondly, failure to follow common law principles of natural justice; that a person cannot incur the loss of liberty, property or livelihood unless he has an opportunity of a fair hearing. Even then, the content of a right to fair hearing may vary according to the circumstances of the case.
41. Finally, it was urged, on behalf of the 2<sup>nd</sup> respondent that the applicants have failed to demonstrate any grievance against the 2<sup>nd</sup> respondent that would warrant issuance of the orders sought. The 2<sup>nd</sup> respondent urges that the application be dismissed with costs to the 2<sup>nd</sup> respondent.

### **Analysis and Determination**

42. Looking at the application and the response thereto, there is one fact, material to the determination of this application, that is not in contention: It is common ground that the Auditor General's audit of the 1<sup>st</sup> respondent's Alcoholic Drinks Control and Licensing Board's financial accounts for the year ending 30 June 2020 and her subsequent report were done outside the timelines set by *the Constitution*. The audit and the report were outside the timeline because Article 229 (4) of *the Constitution* states in mandatory terms that the accounts of the Government, at the national and county level, ought to be audited and a consequent report by the Auditor General made within six months after the end of each financial year. This specific provision reads as follows:

- (4) Within six months after the end of each financial year, the Auditor-General shall audit and report, in respect of that financial year, on—
- (a) the accounts of the national and county governments;

43. This provision is replicated in Section 48 (1) of the *Public Audit Act*. It reads as follows:

- (1) Within six months after the end of each financial year, the Auditor-General shall audit and report, in respect of that financial year, on the accounts specified in Article 229 of *the Constitution*.



44. The 2<sup>nd</sup> respondent did not audit and report on the financial accounts with respect to the 1<sup>st</sup> respondent's Alcoholic Drinks Control and Licensing Board for the year ending 30 June 2020 until 28 September 2022. The 2<sup>nd</sup> respondent has attributed the obvious delay to inaction on the part of the 1<sup>st</sup> respondent. In the submissions filed on the 2<sup>nd</sup> respondent's behalf, it has been submitted as follows:

“4. Contrary to the applicant's averments that the Audit Report of the funds of Nairobi City County Alcoholic Drinks Control and Licensing Board was issued outside of the Constitutional and statutory timelines, the late issuance was occasioned by the Alcoholic Drinks Control and Licensing Boards delay in submitting the Board's financial statements within the stipulated timelines in contravention of Section 47(1) of the Public Act, 2015 which states that:

the financial statements required under *the Constitution*, the *Public Finance Management Act*, 2012 and any other Legislation, shall be submitted to the Auditor General within three (3) months after the end of the financial year to which the accounts relate.

5. Your Lordship, the financial statements for the year under review were submitted for audit on 21<sup>st</sup> June 2022, more than one (1) year and eight months after the Constitutional and Statutory deadline of 30<sup>th</sup> September, 2020.”

45. Regardless of the reason or reasons the 2<sup>nd</sup> respondent may have for the delay, Article 229(4) of *the Constitution* is couched in such mandatory terms that leave no room for any other interpretation than the interpretation that the audit and the report can, and must be done within a specific timeframe.

46. No doubt, this time frame must have not only been thought through by the framers of *the Constitution* but it is also consistent with other related parts of *the Constitution*. For instance, under Article 10, *the Constitution* espouses, the national values and principles of governance. These virtues include good governance, integrity, transparency and accountability. Of the many reasons the Auditor General is enjoined to audit and submit her audit report, to Parliament or County Assembly for discussion, consideration and action, the constitutional quest for good governance integrity transparency and accountability is certainly amongst those reasons.

47. It is in the spirit of furtherance of this constitutional norms that it is not left to the Auditor General and to the legislative bodies both at the national and county government levels to decide when they can act. Needless to repeat, the wording of Article 229 is such that the obligation to act within specific timelines is peremptory. Further, Article 259(8) of *the Constitution* affirms the position that where a specific time is prescribed for certain action, that action must be taken within that time. It states as follows:

(8) If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises.

48. By necessary implication, this provision is to the effect that where time is prescribed, action must be taken within the prescribed time. It is only where time is not prescribed that action must be taken within a reasonable time or, as *the constitution* states, without unreasonable delay. Whether a delay is reasonable or unreasonable will, of course, depend on the circumstances of each particular case.

49. If it was open for the Auditor General to act outside the limitation period, *the Constitution* would have expressly said so. I am of this opinion because Article 259 (9) insinuates that there may instances when



a person or a state organ may be authorised to extend time prescribed by *the Constitution* to take a certain action. This clause reads as follows:

(9) If any person or State organ has authority under this Constitution to extend a period of time prescribed by this Constitution, the authority may be exercised either before or after the end of the period, unless a contrary intention is expressly mentioned in the provision conferring the authority."

50. One such instance where a state organ is enjoined to act within time prescribed by *the Constitution* but has authority to extend time is Article 261 (1) as read with clause (2) thereof, of *the Constitution* according to which Parliament is obligated to enact certain legislations within prescribed timelines. It reads as follows:

261.

(1) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.

(2) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all the members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year.

51. *The Constitution* proceeds to state in clause (3) that the power to extend time under clause (2) may be exercised only once in respect of a particular matter and only in exceptional circumstances to be certified as such by the Speaker of the National Assembly.

52. Without belabouring the point, these provisions go to show that where *the Constitution* has prescribed a specific time for taking a particular action, the action must be taken within time although, in certain circumstances and, subject to certain conditions, time may be extended.

53. The reasons given by the Auditor General for failure to act as prescribed, do not fall under the exceptions specifically given by *the Constitution*. Afortiori, the Auditor General has no authority to extend time to audit and prepare the requisite report as contemplated under Article 229(4) of *the Constitution*.

54. The Supreme Court and the Court of Appeal have pronounced themselves on the question of constitutional timelines in decisions where this question has come to the fore and reiterated that there is no room to act outside the set timelines except, of course, where, as noted, *the Constitution* itself provides a window for an extension.

55. In *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR, for instance, the Supreme Court held:

“This Court had the opportunity, in *Raila Odinga and 5 Others v. Independent Electoral and Boundaries Commission and 3 Others*, [2013] eKLR, to consider the question of constitutional timelines. The Court held that timelines of *the Constitution* were of mandatory character, even where Court process itself was the subject.” (see paragraph 88).



56. The court cited with approval a decision of the Court in Appeal on this same question of time and noted as follows:

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“89. The Court of Appeal affirmed the status of constitutional timelines in *Ferdinand Waititu v. Independent Electoral and Boundaries Commission (IEBC) & Others*, Civil Appeal No. 137 of 2013 (Mwera, Musinga and Kiage JJA) in the following terms:

‘These timelines set by *the Constitution* and the *Elections Act* are neither negotiable nor can they be extended by any Court for whatever reason. It is indeed the tyranny of time, if we may call it so. That means a trial Court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously’.

Although all these decisions were in respect of election petitions, the principle that constitutional timelines cannot be altered and must be strictly complied with is as much applicable to all other cases. As a matter of fact, that is what the Supreme Court held in the *Justus Kariuki Mate & another v Martin Nyaga Wambora & Another* case (supra) where it noted at paragraph 90 as follows:

“All indications, from the stand of the superior courts, are that expressly prescribed constitutional time frames are binding on the governance processes in place. Even though our specific examples are drawn only from *the Constitution*’s scheme of electoral justice, they nonetheless bear a wider signal, regarding time, as it must direct the various agencies of the state.”

57. The provisions of *the Constitution* I have cited and the court decisions in the forgoing cases point to the conclusion that the 2<sup>nd</sup> respondent’s audit and report is a nullity to the extent that they were done outside the limitation period. For the same reason, the purported discussion and implementation of the 2<sup>nd</sup> respondent’s report by the County Assembly of the County Government are of no legal consequence. In any, event, even assuming the report was presented in time, it was discussed outside the period prescribed by *the Constitution*. Article 229(8) of *the Constitution* is to the effect Parliament or the county assembly shall debate and consider the report and take appropriate action within three months after receiving an audit report. Section 50. (2) of the *Public Audit Act*, mirrors Article 229(8) of *the Constitution* and it reads as follows:

(2) Within three months of receiving an audit report referred to under subsection (1), Parliament or the relevant county assembly shall debate and consider the report and take appropriate action.

58. From the parties own pleadings and affidavit, the 2<sup>nd</sup> respondent’s report was submitted on 28 September 2022 yet it was not until 22 June 2023 that it was discussed and adopted. This was clearly outside the constitutionally prescribed period within which the 1<sup>st</sup> respondent ought to have considered the audit report and taken appropriate action.
59. Having held as I have done, the question whether the applicants were accorded the right to a fair hearing and, in particular, given opportunity to be heard does not, and need not arise. There was simply no report or no valid report that was submitted by the 2<sup>nd</sup> respondent to 1<sup>st</sup> respondent for discussion, consideration or action. The 1<sup>st</sup> respondent, on the other hand,



could not purport to discuss and adopt a nullity. For these reasons, I am satisfied that the Report of the 2<sup>nd</sup> respondent on the County Government of Nairobi's Alcoholic Drinks Control and Licensing Board for the Year Ended 30 June 2020 is ultra vires Article 229(4) of *the Constitution* and section 48 (1) of the *Public Audit Act*. Similarly, the 1<sup>st</sup> respondent's Select Committee report dated 22 June 2023 on the Consideration of the Report of the Auditor General on Alcoholic Drinks Control and Licensing Board for the Year Ended 30 June 2020 is also ultra vires Article 229(8) of *the Constitution* and section 50(2) the *Public Audit Act*.

60. In judicial review terms, two reports are tainted on the ground of illegality. This ground of judicial review, amongst other grounds of judicial review was defined in the English case of *Council of Civil Service Unions versus Minister for the Civil Service* [1985] A.C. 374,410 where Lord Diplock set explained it in the following terms:

“By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.”

61. Having deliberately acted outside the timelines prescribed by *the Constitution* and the statute, the respondents cannot be said to have understood correctly the law regulating their decision-making power and neither can it be said that they gave effect to it. On the contrary, by flagrantly breaching *the Constitution* and the *Public Audit Act*, the respondents assumed jurisdiction which they did not have.
62. Accordingly, I am persuaded that the applicants' application is merited. It is hereby allowed in the following terms:
- (a) An order of certiorari is hereby issued bringing to this Honourable Court and quashing the Report of the Select Committee dated 22 June 2023 on the Consideration of the Report of the Auditor General on Alcoholic Drinks Control and Licensing Board for the Year Ended 30 June 2020. For the avoidance of doubt, the said report of the 1<sup>st</sup> respondent's select committee is hereby quashed.
- (b) A declaration is hereby issued that the constitutional timelines spelt out in Article 229(4) and (9) of *the Constitution* and section 48 and 50 of the *Public Audit Act*, 2015 are mandatory and must be complied with.
- (c) The applicants will have costs of the suit.

Orders accordingly.

**SIGNED, DATED AND UPLOADED ON THE CTS ON 1 OCTOBER 2024**

**NGAAH JAIRUS**

**JUDGE**

