



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO. 5 OF 2018

NYANDARUA NORTH BAR OWNERS WELFARE ASSOCIATION.....1ST PETITIONER
SOUTH KINANGOP BAR OPERATORS SELF HELP GROUP.....2ND PETITIONER
MAGUMU BAR OWNERS SELF HELP GROUP.....3RD PETITIONER
KIPIPIRI BAR OWNERS WELFARE SELF HELP GROUP.....4TH PETITIONER
KARAU ALCOHOL BUSINESS OPERATORS.....5TH PETITIONER
OLJORO-OROK BAR OWNERS ASSOCIATION.....6TH APPLICANT
NYANDARUA RECREATIONAL & ENTERTAINMENT
SELF HELP GROUP.....7TH PETITIONER

V E R S U S

COUNTY COMMISSIONER, NYANDARUA.....1ST RESPONDENT
COUNTY POLICE COMMANDER, NYANDARUA.....2ND RESPONDENT
HON. ATTORNEY GENERAL.....3RD RESPONDENT
COUNTY GOVERNMENT OF NYANDARUA.....4TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....5TH RESPONDENT

J U D G M E N T

The Seven Petitioners namely:

1. *Nyandarua North Bar Owners Welfare Association,*
2. *South Kinangop Bar Operators Self Help Group,*
3. *Magumu Bar Owners Self Help Group,*
4. *Kipipiri Bar Owners Welfare Self Help Group,*
5. *Karau Alcohol Business Operators,*
6. *Oljoro-Orok Bar Owners Association, and*
7. *Nyandarua Recreational & Entertainment Self Help Group* filed this petition dated 15/3/2019 seeking the following reliefs:

(1) A declaration that the arbitrary closure of businesses, impounding of liquor, arrests and arraignment in court of members of the Petitioners in the pendency of determination of their applications for Liquor Licenses is unconstitutional, null and void.

(2) An order of injunction do issue restraining the Respondents from interfering with the petitioners' businesses in the pendency of determination of their applications for Liquor Licenses by the 4th Respondent and any appeals arising therefrom.

(3) An order of mandamus be granted compelling the 4th Respondent to consider applications by members of the petitioners for issuance of alcoholic drinks licenses for the year 2018 forthwith.

(4) Costs of the Petition be provided for.

The petition is premised on grounds found in the body of the petition and an affidavit sworn by Josphat Muiru Ndegwa, who described himself as the Chairman of the 1st petitioner.

The petition is expressed to be brought under Article 19(2), 20(1)(2)(3) and (4); 21(1), 22, 23, 40, 47(1) and (2); 165(3)(b) and (d)(iii) and 259 of the Constitution which have allegedly been violated by the respondents:

- 1. County Commissioner, Nyandarua,**
- 2. County Police Commander, Nyandarua,**
- 3. Hon. Attorney General,**
- 4. County Government Of Nyandarua, and**
- 5. Director of Public Prosecutions.**

The Petitioners' counsel, Mr. Gakuhi Chege also filed written submissions on 22/5/2019 in support of the petition.

The petition was opposed. The 1st to 3rd respondents were represented by Litigation Counsel Victor Ondieki who filed their submissions on 1/2/2019.

Beatrice Nyambura Macharia, the director, legal affairs of the 4th Respondent filed an affidavit in opposition, dated 29/3/2018 and submissions were filed by Maurice Oduor Advocate.

The 5th respondent also opposed the petition and was represented by Mr. Maroro, Snr. Assistant Director of DPP in charge of Nyandarua County. A replying affidavit dated 6/14/2018 was sworn by George Mong'are, Assistant Director of Public Prosecution and submissions were filed on 25/9/2019 by Mr. Maroro.

The petitioners' case is that their members who are bar operators and dealers in alcoholic drinks within Nyandarua County applied for Liquor Licenses to the 4th Respondent for the year 2018 as evidenced by the exhibits JNN(a)(b) & (c); that during the pendency of the said applications, they were assured by the applicable Act that they would continue carrying on business without any interference; that following that assurance, they continued with their businesses till March, 2018 when the 1st and 2nd respondent together with enforcement officers of the 4th respondent descended on the petitioners businesses and ordered their closure, impounded liquor and effected arrest of employees for selling alcoholic drinks without licenses and the cases were filed in Engineer and Nyahururu Law Courts; that they had been no communication from the 5th respondent as to the applications for liquor licenses lodged by the petitioners; that the respondents' actions are an affront to the petitioners' legitimate expectation to equal protection of the law; right to own property as well as their right to fair administrative action guaranteed under the Constitution; that the said actions offended the tenets of right to natural justice, were unreasonable, unfair, arbitrary and unconstitutional and calls for this court's intervention.

It was also submitted that the 4th respondent admitted that applications for liquor licenses are pending approval and they did not cause anybody to be arrested or charged and they deem the licenses to be valid in terms of Section 15(4) of the Nyandarua County Alcoholic Drinks Control Act, 2014 (NCADCA). Hence no explanation has been given for the arrests by the 1st, 2nd and 3rd respondents whereas the role of enforcing the Liquor Licensing laws is the mandate of the 4th respondent pursuant to Section 45 of the NCADCA as read with Section 4(c) of the 4th schedule of the Constitution. It was also submitted that the 5th respondent has not tendered any evidence to show that it carried out any investigations to prove that the members of the petitioners had tendered applications for Liquor Licenses for 2018 or that the applications were not approved; that the impounding of the petitioners' property is a breach of their rights to property and livelihood under Article 40 of the Constitution; that the arbitrary arrests are a breach of the right to freedom and security under Article 29 of the Constitution; that the protection under Section 15(4) of the NCADCA was a breach of the petitioners' legitimate expectation of the law enshrined in Article 20(1) and (2) of the Constitution; that failure to act on the petitioners' Liquor Licenses within reasonable time was a breach of their rights and resulted in a breach of their rights to fair administrative Action, natural justice and legitimate expectation.

Counsel relied on the case of **Kenya Human Rights Commission v Non-Governmental Organizations Co-ordination Board, 2016, Petition 495/2015 (eKLR 2016) paragraphs 39-45** on what Fair Administrative action entails.

Counsel justified the grant of Judicial Review order of mandamus in a Constitutional Petition by relying on the decision of **Republic v Principal Secretary, Ministry of Internal Security and Another Ex-parte Schon Noorani & another Misc.Appl.615/2017 paragraph 18-27.**

He urged the court to grant the reliefs sought.

1st to 3rd respondent's case:

The 1st to 3rd respondents filed submissions and identified the following issues for determination:

(1) Whether the petition is properly drafted and filed in court;

(2) Whether the petitioners' members have established legitimate expectation based on the law; regarding continued operation of liquor retail businesses as during the pendency of application of liquor licenses;

(3) Whether the admitted actions of the respondents amount to a violation of the petitioners members' rights to fair administrative action.

Counsel for 1st to 3rd respondents submitted that even on a cursory look at the cited Articles and the grounds on which the petition is premised, they are vague, imprecise as respects the prayers sought; counsel argued that Rules 4 & 10 of the Mutunga Rules require that the pleadings be clear and precise so that there is no room for speculation regarding the rights that are allegedly breached; that it is not possible to discern what form of infringement the petitioners seek redress for. Counsel relied on the decision of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others which emphasized the decision of Anarita Karimi Njeru v Republic (1976 – 1980) KLR 1272 where the court underscored the importance of precision in pleadings and framing of issues in Constitutional petitions. Counsel urged that Section 165(3) should only be invoked where there are real and specific issues and that are framed; that the petition is vague, speculative and does not disclose any dispute capable of resolution by this court.

On whether the members of the petitioners have established a legitimate expectation:

Counsel relied on the definition given to the term legitimate expectation in the following decisions:

1. Communication Commission of Kenya (CCK) and 5 others v Royal Media Services Ltd & 5 others (2014) eKLR;

2. South Bucks District Council v Flanagan (2002) EWCA Civ.690 (2002) WLR 260;

3.. Kalpana Rawal v JSC Pet.386 of 2015.

Counsel submitted that the respondent's decision to close down the petitioners members' alcohol outlets, and arrest the operators was **aquasi-administrative** action based on statutory powers of the police under the National Police Act which is to deter, detect crime and apprehend offenders; that the 5th respondent's mandate is to prosecute and that the 1st to 3rd respondents cannot be held responsible for the 5th respondent's actions; that the petitioners have laid emphasis on Section 15(4) of the NCADC Act which came into force on 29/8/2014 and devolved the function of licensing of alcoholic drinks on the 4th respondent and therefore the petitioner's recourse lies with the 4th defendant.

Counsel observed that though the petitioners allege that they are still operating under the old licenses under Section 15(4), NCADA no previous licenses were exhibited by the petitioners' members; that the only documents before the court are Registration Certificates for petitioners', list of petitioners members and lists of application, but that there is nothing to show that they had 2017 licenses before applying for renewal in 2018. The 1 – 3rd respondents also questioned on what basis the 'New' would operate without approval and issuance of Liquor Licenses. This is because under Section 15(4) NCADCA, there must be an application for 'renewal'. Counsel submitted that a look at the petitioners' documents shows that 77 businesses were (NEW) and therefore they were operating illegally when the respondent moved to arrest the petitioners; that the 'New' businesses cannot have legitimate expectation under Section 15(4) NCADCA. Counsel urged that Section 15(4) of the Act only applies to businesses which were already in operation but not new businesses.

Counsel also submitted that Section 15(4) presupposes that the application for renewal was made before the expiration of the subject license and only in that case would the license remain in force. Counsel urged that without proof of the existence of the previous license, it is impossible to prove the expiry date of the previous liquor license. Counsel relied on Communication Commission of Kenya case where it was held that there can be no legitimate expectation against clear provisions of the law.

On the 3rd issue, of whether the admitted actions of the respondent were a violation of the members' rights to administrative action, counsel submitted that the said action were anchored in law and done in public interest; that the respondents were enforcing NCADCA and there has been no demonstration of violation of the petitioners' members' Constitutional rights but that if there be any recourse, it is against the 4th respondent.

4th respondent's case:

Beatrice Nyambura Macharia, the Director Legal Affairs of the 4th respondent swore an affidavit opposing the petition contending that the petition is defective, an abuse of the court process and does not disclose any reasonable cause of action; that the petition concerns members of the petitioners, whose rights have allegedly been violated but it does not disclose the specific members and how their rights have been violated; that under Section 8 of the NCADCA, an application is made to the Sub-County Alcoholic Drinks Regulation Committee but one cannot tell from the pleadings which of them made applications; that the petitioners are non-suited since the 4th respondent did nothing to prejudice the operation of Section 15(4) of the Act; that nowhere in the pleadings is it alleged that the 4th respondent acted contrary to Section 15(4) of the Act; that the general complaints against the 1 – 3 and 5th respondents cannot be attributed to the 4th; that no specific violation of rights has been attributed to the 4th respondent and hence the petition is bad in law and incurably defective.

Mr. Martin Oduor, counsel for the 4th respondent filed submissions. His submissions were that there is no legal basis for seeking the orders; that the petitioners members had not availed any evidence to show that they applied for licenses from the 4th respondent; that under Section 9(1) of the NCADCA, application for licenses are made in a prescribed form No1 and a prescribed fee and no copies of the application or receipts are exhibited; that in *Ol Jororok Bar owners and 5 others v Deputy County Commissioner Nyandarua West Sub-County Pet.1/2016 (Naivasha)* the High Court dismissed a similar petition on the grounds that applications for renewal were made well after the license had expired and the petition seeking protection of legitimate expectation could not hold; that the annexure JNM 3(1)(a) being summary of purported applications cannot pass the test of authenticity as the maker did not swear an affidavit and they do not comply with Section 9(1) of NCADCA. Counsel agreed with the submissions of the 1 – 3rd respondents that protection under Section 15(4) NCADCA only applies to persons who apply for renewal of their licenses before the current ones expire. He also relied on *Ol Jororok case* where the court said that:

“...only in such case is the previous license to remain in force pending the decision of the Sub-County Committee.”

It is also the submission of the 4th respondent that the petition does not raise any Constitutional questions or issues against the 4th respondent. As regards the 4th respondent, the petitioners have alleged that as the licensing authority of alcoholic drinks, it has completely abdicated its role of inspection and issuance of licenses to members of the petitioners and has continued to watch as they suffer, the counsel as of 1, 2 and 5th respondents illegal acts. According to counsel, the court is being asked to interpret the conduct and statutory responsibilities of the 4th respondent and those are not the Constitutional issues; that Constitutional questions require interpretation of the Constitution as was discussed in *CNM -vs- WMG (2018) eKLR and Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority (2016) KLR* where it was observed that not every claim can be brought as a Constitutional application; that the practice is that the court will not determine a Constitutional issue when it may properly be decided on under another forum. He urged that these matters could have been addressed in Civil or Criminal proceedings.

5th respondent's case:

The 5th respondent opposed the petition and George Mong'are Assistant Director of Public Prosecution in charge, Nyandarua County deponed that it is not within the power of the 5th respondent to consider and approve applications for Liquor Licenses tendered by the petition; that there was no court order barring the 5th respondent from carrying out its functions; that the 4th respondent's functions include enacting laws and Regulations pertaining to manufacture, storage and sale of alcoholic drinks within its jurisdiction and the 4th respondent is not bound to approve new applications by the petitioners who were not previously in the business of selling alcoholic drinks; that the applications for licenses made by the petitioners are still under considerations and due to the many numbers, the evaluation criteria involved, they are likely to take longer period of time and that there is no specific time set within which an application for a license may be determined and also no guarantee that all applications will all be approved; that it is therefore absurd and unreasonable to seek to injunct the respondent from discharging their statutory duties.

The 5th respondent also filed submissions on 25/9/2019 in which similar issues were identified for determination.

The 5th respondent is of the same view that the petition is not precise and clear but is vague, speculative and does not disclose any violations by the respondents to enable the respondents to respond as was held in the decision of *Anarita Karimi and Mumo Matemu's cases (Supra)*.

As to whether the petitioners members have established a legitimate expectation regarding continued operation of liquor licensing retail business during the pendency of their applications, counsel revisited the principles on legitimate expectation that were enunciated in *CCK & 5 others v Royal Media Services (Supra) (para.269); South Bucks District Council v Flanagan (2002) EWCA Civ.690/2002* where the court discussed what amounts to legitimate expectation.

Counsel further submitted that the decision to close down the petitioner's members alcohol outlets and arrest operators and their workers and impound liquor was a quasi-administrative function based on statutory powers of the respondents.

The 5th respondent also agreed with the other respondent's submissions that though the petitioners members claim to be operating under the old licenses, awaiting approval of their liquor licenses for the year 2018, they did not exhibit the previous licenses; that they only exhibited Registration Certificates, list of petitioners and list of applications; the 5th respondent also paused the question of how the new business licenses could be in operation without approval and issuance of a liquor license. This is because Section 15(4) of the NADCA only applies to businesses already in operation and not to new businesses; that new business did not have any legitimate expectation to continue operating without first obtaining the necessary approval; that it was impossible that all the petitioner's licenses expired on the same day and if they expired on 31/12/17 and applications were made on 31/12/2017, then they do not qualify for renewal under Section 15(4) of the Act. It is the 5th respondent's case that those who were prosecuted are those who did not have 2017 licenses but those who had paid for 2018 licenses and had receipts, were protected if they produced the receipts.

As to whether the admitted acts of the respondents amount to violation of the petitioner's members rights to administrative action. The 5th respondent contends that their actions were anchored in law and were done in public interest under Article 157 of the Constitution. That the ODPP does not have powers to arrest or investigative but that is the work of the police and they should not have been joined to these proceedings. The 5th respondent urged that the petition be dismissed.

Analysis:

Having considered all the affidavits on record, the submissions of all counsel, the cases relied upon, I will consider each of the issues raised.

The petitioners members' main dispute is that their alcoholic outlets have been closed, some of the workers arrested and others charged before the court. At the time of filing this petition, the complaint is that though the members had been previously licensed and had been assured under the Section 15(4) NCADCA that they should continue operating their businesses pending renewal of their licenses, the 1st and

2nd respondents' officers had gone against the said assurance and started arresting the members, impounded liquor and closed their premises despite the fact that there has been a delay in the renewal of the licenses.

1. The first issue for consideration is whether the petition discloses any breach of the petitioner's members Constitutional rights:

The respondents have submitted that the petitioners pleadings do not meet the threshold required that the pleadings be clear and precise as required by Rule 10 of the Mutunga Rules on the filing of Constitutional petitions.

The petitioners invoked the following Articles, 10, 19(2), 20(1), (2), (3) & (4), 21(1), 22, 23, 40, 47(1) and (2), 165(3)(b) & (d)(iii) of the Constitution in its title. However, very little was provided and no particulars as to the allegations thereunder and the manner of infringement.

In the case of *Anarita Karimi Njeru (Supra)* the court stated as follows:

“If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important. (If only to ensure that justice is done to his case) that he should set out with precision that of which he complains the provisions said to be infringed and the manner in which they are alleged to be infringed.”

Though the *Anarita case* was determined under the retired Constitution, it is still good law. The same principles apply under the current Constitution and courts still rely on the decision.

The principle in *Anarita* was further enunciated in *Mumo Matemu v Trusted Society of Human Rights Alliance (2014) eKLR* where the court said:

“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by court..”

The principle in Anarita Karimi Njeru (Supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution. Procedure is also a handmaid of just determination of cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (Supra) that established the rule that requires reasonable precision of framing of issues in Constitutional petitions is an extension of this principle”

In *CNM v WMG (2018) eKLR (paragraph 18)*, the court observed “when determining whether an argument raises a Constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights and values.”

One of the petitioner's allegations was breach of Article 40 which I will consider. Article 40 of the Constitution guarantees protection to property. The Article reads in part as follows:

“40 (1) subject to Article 65, every person has the right either individually or in association with others, to acquire and own property:

(a) Of any description, and

(b) In any part of Kenya

(2) Parliament shall not enact a law that permits the State or any person:

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).”

It is settled law as espoused in the *Anarita case* and a host of other cases that the pleadings in a Constitutional petition must be precise and clear to enable the other party to ably respond to them. In this case, apart from citing Article 40 it is not specified which Sub-Article has been infringed and there is no pleading specifying the nature of the complainant and the nature of infringement. The allegations are too general. If the petitioners intended to invoke Article 40(2)(e) on protection against arbitrary deprivation of property in that some property was carried away during the arrests, Section 56 of NCADCA provides for restoration of seized property meaning that the petitioners have a remedy under the statute.

At paragraph (v) of the petition, the petitioners members are alleged to have lodged their applications with the 5th respondent who had not acted on them. However that claim does not make sense in light of the 5th respondent's mandate under Article 157 of the Constitution. The 5th respondent does not approve and issue licenses but deals with prosecution.

As regards the 4th respondent, it was pleaded that the 4th respondent abdicated its role of inspection and issuance of licenses to members of

the petitioners and has continued to watch as they suffer the consequences of the 1st, 2nd and 5th respondents' illegal acts.

From the above excerpt, the court was not being invited to interpret the Constitution but the statutory functions of the 4th respondent.

The petitioners are many. They must have obtained licenses for different trades at different times. The pleadings were not specific on how each party or groups' rights were infringed.

I have also noted from the body of the petition that there are allegations of breach of Article 29, which guarantees freedom and security of the person. That right was not pleaded in the title of the petition.

Generally, the courts have held that where there exists other avenues for resolving disputes, a party should not invoke the Constitutional jurisdiction. In ***Gabriel Matava & 2 others v Managing Director Kenya Ports Authority & another (2016)***, the Court of Appeal observed:

“Time and again, it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in the other forum. Such party ought to seek redress under such other legal regime rather than trivialize Constitutional litigation. Indeed, in the case of *Harrikissoon v Attorney General [1980] AC 265*, the Privy Council held that:

“.....The notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to individual by Chapter 6 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for normal proceedings for invoking judicial controls of administrative action...”

Looking at the petition, the grounds and supporting affidavit, I am unable to find any semblance of a Constitutional pleading breach. The petition is general, vague and does not disclose a real dispute capable of resolution under the Constitutional provisions.

2. Whether the petitioners' members have established legitimate expectation based on the law regarding continued operation of liquor retail without holding relevant liquor licenses:

The petitioners' members complaint is that they were assured under Section 15(4) NCADCA that they would continue to operate their businesses without any interference and they had reasonable legitimate expectation to retain the said benefit without interference pending determination of the approval of liquor licenses but the same has been violated and hence an affront to fair administrative action.

The case of ***Kenya Human Rights Commission v Non-Governmental Organizations Co-ordination Board (2016) eKLR*** extensively considered the right to administrative actions where the court stated:

“39. On the petitioner's alleged violation of its right under Article 47, it is provided therein that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. These Constitutional provisions have been echoed in the Fair Administrative Act, 2015 particularly under Section 4(1) and (2).

40. Section 4(3) of the Fair Administrative Action Act, 2015 provides that where an administrative action is likely to adversely affect the rights and fundamental freedoms of any person, the administrator shall give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations in that regard; notice of a right to a review or internal appeal against an administrative decision, where applicable, a statement of reasons pursuant to Section 6.

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42. Thus, 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 as well as reasons for the adverse administrative action as provided under Article 47(2) of the Constitution. Generally, one expects that all precepts of natural justice are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted, the court is not limited to the traditional judicial review grounds. The Fair Administrative Action Act, 2015 must be viewed in that light.”

An administrative action, therefore, includes an administrative decision which adversely affects or is likely to affect any person or contemplated by certain public officers, state officers pursuant to a power conferred by either the Constitution or any written law. From a reading of the above cited decision, relief for administrative grievances is not restricted to the common law jurisdiction of Judicial Review but can be sought by way of a Constitutional Petition.

Article 47 of the Constitution guarantees the right to fair administrative action. It reads as follows:

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

The Fair Administrative Actions Act, 2015 gives effect to the above provisions in which it makes elaborate provisions on fairness.

The principle of legitimate expectation was discussed in CCK & others v Royal Media Services where the court said:

“269 – The emerging principles may be succinctly set out as follows:

- (a) There must be an express, clear and unambiguous promise given by a public authority;***
- (b) The expectation itself must be reasonable;***
- (c) The representation must be one which it was competent and lawful for the decision maker to make; and***
- (d) There cannot be a legitimate expectation against clear provisions of the law or the Constitution.”***

In South Bucks District Council v Flanagan (2002) ELCA Civ.690 (2002) WLR 26011 at page 18, the court held:

“Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say, it would not be one to whom he was entitled.”

Also see the Kalpana H. Rawal case (Supra).

In this case therefore, the petitioners’ members’ right to fair administrative action was hinged upon their legitimate expectation, to be treated in accordance with the law, that is, Section 15(4) of the NCADCA.

The respondent’s, decision to close down the petitioner’s members outlets and to arrest the owners and/or impound liquor was a quasi-administrative function based on the statutory powers donated to the police under the National Police Service Act whereby the mandate is to deter, detect crime and apprehend those suspected of committing offence.

The 5th respondent ODP’s function under Article 157 of the Constitution is to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. In doing so, the ODP must take into account public interest, the interest of the administration of justice and need to prevent and avoid abuse of the legal process. As for the 4th respondent, its mandate is governed by the NCADCA which came into force on 29/8/2014 devolving the function of licensing of alcoholic drinks and other related functions to the 4th respondent. The preamble of the Act reads:

“An Act of Nyandarua County Assembly to provide for the licensing and regulation of the production, sale, distribution and outdoor advertising of alcoholic drinks and for connected purposes.”

The petitioners’ members base their protection of legitimate expectation on Section 15(4) of NCADCA which reads as follows:

“Where an application for the renewal of a license has been made and the Sub-County Committee has not by the date of expiration of the license reached a decision thereon, such license shall continue in force until the decision of the Sub-County Committee is made known.”

I have keenly examined the documents that were exhibited by the petitioners as JNM 1a – 2 which are certificates of Registration of the petitioners, lists of their members (bar owners). At JNM 3a, the petitioners exhibited a summary of the applicants, the business name, the type of license, the plot number and town and lastly the status of the license, being ‘new’ or ‘renewal’. The petitioners contend that the summary was obtained from the 4th respondent.

Although the summary (JNM 3a) bears a stamp, the maker of the summary is not disclosed nor did he swear an affidavit to vouch for its authenticity. As properly observed by the respondents, the petitioners did not exhibit the receipts issued to them upon payment for the licenses and the actual application forms. It is required under Section 9(1) of NCADCA, that the application has to be in a prescribed form. Section 9(2) specifies the contents of the application which includes ***“comprehensive information on the nature, orientation and other justification for the establishment of the manufacturing plant or establishment for sale (b) an indication as to whether the manufacture or sale of the alcoholic drink is licensed in another County and if so, the evidence of such licensing (c) certification from Kenya Bureau of standards..”*** The summary exhibited does not satisfy the above requirements and the said summary JNM a b & c cannot be deemed to be a liquor license application made to the 4th respondent. So far, each of the bar owners has not demonstrated that they had applied for a license and paid for it.

It is clear from a reading of Section 15(4) of NCADCA that to be entitled to the protection under that Section, the application for renewal of the license must be made before the current license lapses. The petitioners should have therefore demonstrated that they had valid liquor licenses for the year 2017 and that they made the application for renewal when the said licenses were still valid. The petitioner did not exhibit the 2017 licenses.

This issue was considered in *Ol-Jororok Bar owner & 5 others case (Supra)* and I agree with the judge. The court said at paragraph 36 that “the operative words in that section are *Sub-Committee has not by the date of expiration of license reached a decision thereon..... This section anticipates the license renewal application having been made ‘before’ the expiration date of the subject license and a delay in the decision of the Sub-County Committee. Only in such case is the previous license to remain in force pending the decision of the Sub County Committee.*”

37. In other words, whereas in this case an application is made for ‘renewal’ of a license, the license cannot remain in force having ceased operating on the expiry date. And of course, a fresh application for a license would mean that the fresh applicant must wait for the approval, that is, has no license pending the decision of the Sub-County Committee.”

The petitioners not having exhibited their previous licenses for 2017, it cannot be ascertained when the licenses were to expire and therefore, whether they made their applications before the expiry of the 2017 licenses, to be entitled to the protection under Section 15(4) NCADCA.

In addition, I have seen on the summary list (JNM 3(a), of purported applicants that some are described as ‘New’ which means that they are new applicants. The new applicants cannot benefit from the protection under Section 15(4) of NCADCA. The question that begs is how come the applicants for new licenses who are listed were operating without licenses or approval? If the petitioners’ members did not have licenses, then the 1st to 2nd respondents had the mandate to move in and apprehend those doing business without licenses. Counsel for 1 – 3rd respondent indicated that there were 77 ‘new’ applicants. So far, the petitioners have not availed any evidence that the 4th respondent abdicated it’s duty of inspection and issuance of licenses as alleged in light of the findings made above. The constitutionality of NCADCA has not been challenged. The New applicants operating without license had flouted the law and if arrested, the 5th respondent had the duty to prosecute.

In conclusion, I adopt the finding in *Andrew Omwenga Wanjiru T/A Triangle 3 and others v Nakuru County Commissioner & 3 others Pet.5/2015* where the court stated:

“Security agents and police have the duty and mandate to enforce the law. In this case, the Alcoholic Drinks Control Act which is still in place and requires that business/people dealing with alcohol be licensed accordingly. Actions taken lawfully by authorized persons in the enforcement of the Act, as appears to be the case here, cannot ordinarily give rise to a valid claim of violation or threat of violation of the alleged rights of those on the wrong side of the law.”

As held in by the Supreme Court in *CCK & 5 others v Royal Media Services Ltd (Supra)* there cannot be a legitimate expectation against clear provisions of the law or the Constitution.

3. Whether the admitted act is of the respondents’ amount to violation of the petitioner’s rights, the answer is in the negative:

Some of the petitioners were charged with failure to display a license which is an offence under Section 22 of NCADCA. Others were charged for selling alcohol after hours which is also an offence as per 1st Schedule of NCADCA. The actions to arrest and arraign the petitioners for alleged breaches were anchored in the law and the respondents cannot be faulted for carrying out their mandate under the law. Under Section 46(1) of NCADCA, an authorized officer at a reasonable time, can enter any place in which the officer believes on a reasonable ground that any person or persons is controverting the provisions of NCADCA. The petitioners have not challenged the said laws as being unconstitutional.

So far, may be the only blame that can be leveled against the 4th respondent in taking too long to approve the licenses though from the list, the members are quite many but that is not a Constitutional issue. The 4th respondent must speed up the exercise.

In the end, I find that the petition does not raise any Constitutional issues. It fell short of the threshold laid in the *Anarita case*. The petitioners have not demonstrated that their protection under Section 15(4) NCADCA has been flouted. The petition lacks merit and is hereby dismissed with costs to the respondents.

Dated, Signed and Delivered at NYAHURURU this 6th day of December, 2019.

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R.P.V. Wendoh

JUDGE

Present:

Mr. G. Chege for Petitioners

Ms. Wanjiru Muriithi holding brief for Mutai 4th respondent

Ms. Rugut for 5th respondent

1 – 3rd respondent – absent

