



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**Judicial Review No.4 Of 2017**

**[FORMERLY ELDORET JUDICIAL REVIEW NO. 11 OF 2015 AS CONSOLIDATED WITH KABARNET PETITION NO. 7 OF 2017 FORMERLY NAKURU PETITION NO. 38 OF 2015]**

**BETWEEN**

**REPUBLIC**

**VERSUS**

**BARINGO COUNTY GOVERNMENT**

**BARINGO CENTRAL SUB-COUNTY ALCOHOLIC DRINKS**

**REGULATION COMMITTEE.....RESPONDENTS**

**STEPHEN K. CHEPTOO**

**SOLOMON K. BOWEN**

**LYDIAH CHELIMO**

**JOSEPH CHEMITEI**

**WILLIAM K. TOMNO**

**GILFORD KIMETO**

**IBRAHIM K. CHELANGAT**

**PETER KOROS**

**JASMINE CHEBON.....EX-PARTE APPLICANTS**

**AND**

**PETITION NO. 7 OF 2017**

**JULIUS KIBET RONO**

**DICKSON YATICH**

**WILSON KIPROP TOO.....PETITIONERS**

**VERSUS**

**BARINGO CENTRAL SUB-COUNTY ALCOHOLICS**

**DRINKS REGULATION COMMITTEE**

**BARINGO COUNTY GOVERNMENT.....RESPONDENTS**

**JUDGMENT**

**BACKGROUND**

**Judicial Review Application No. 11 OF 2015**

1. The applicants' moved the Court by a Notice of Motion Application under Order 53, Rule 3(1) of the Civil Procedure Rules, section 8 and 9 of the Law Reform Act and section 3A of the Civil Procedure Act. The application was supported with an Affidavit by Solomon K. Bowen. The Applicants' were seeking for the following Orders:

*a) That an Order of Certiorari do issue to quash the decision of the Respondent's to deny the applicants liquor trading licenses to sell alcoholic drinks for the year 2015 and close their business.*

*b) That an Order of Mandamus do issue to compel the Respondent's to issue the Applicants' with liquor trading licenses to sell liquor for the year 2015.*

*c) That costs of this application be met by the Respondent's.*

2. This Application was given a date in 2016 yet it had been filed on 13.08.2015, necessitating the applicant's to file another Application under Certificate of Urgency. The Application is dated 21.8.15 and was filed on 26.08.2015. The applicants main reliefs being sought were:

*"a. That on 28.07.2015 the Honourable Court granted the applicants leave to file a Judicial Review Proceedings herein within twenty one (21) days but the leave granted was not to act as stay of the Respondent's decision to deny the Applicant's liquor trading licences to sell alcoholic drinks for the year 2015 and the resultant closure notices.*

*b. That the Applicants' have complied and filed the requisite Notice of Motion application however the earliest the Notice of Motion application will be heard will be next year 2016 since the court diary for the year 2015 is already full."*

3. The said application's main motion sought for the Court to review its Order issued on 28.7.2015 and that the granted leave acts as stay of the Respondent's decision to deny the applicants' liquor trading centres to sell alcoholic drinks for the year 2015 and the determination of the Judicial Review proceedings. This Application was supported by an Affidavit of Solomon K. Bowen, the 2<sup>nd</sup> applicant who averred that upon expiry of the closure Notice issued closed the Respondent's closed their premises thus they were unable to operate or carry out business.

4. The said Application (above) was canvassed and a ruling was delivered by Kimondo, J. on 28.7.2015 Paragraph 11. of the ruling stated as follows:

*"11. It is thus clear beyond peradventure that the Court found that it was not efficacious to grant a stay on the basis of the materials before it on 28.7.15. That is why the ex-parte applicants have brought additional materials to sway the Court to depart from it's position. In a synopsis, the ex-parte Applicants are saying that their businesses have been shut down, that their stocks will expire; that their landlords may throw them out of their premises, that their economic livelihood and that of their employees is in jeopardy; that they will lose their goodwill; that some of the ex-parte Applicants had taken out loans and at peril of losing their collateral. That the 4<sup>th</sup> Respondent was arrested and charged in a Criminal Court for matters relating to this dispute, and that the substantive motion will be rendered nugatory.*

*12. Those are powerful arguments. But I regret that the Court lacks jurisdiction to review the Order of 28.7.2015."*

Having dismissed the application to review its Order, this Court shall now determine the main application for Judicial Review.

5. The Respondents' in the above case face a similar suit where they had been sued vide Nakuru Petition No. 38 of 2015. The respondents made an application to have this Petition be transferred to Eldoret and be consolidated with Eldoret High Court Judicial Review No. 11 of 2015. The Court heard the parties and an Order was issued on 8.2.17 by G.K. Kimondo, J. ordering that Petition No. 5 of 2016 whose subject matter was the same be Consolidated with Eldoret Judicial Review file No. 11 of 2015 which was chosen as lead file.

**Petition No. 38 OF 2015**

6. The Petitioners in this case were Julius Kibet Rono, Dickson Yatich and Wilson Kiprop Too who were the owners of Matendo Bar, Bontana Wines & Spirits and Baraka Bar respectively. They sued Baringo Central Sub County Alcoholic Drinks Committee and Baringo County Government as Respondents. The Petition was premised on Article 2(1), 2(4), 3, 10, 19(1, 2 & 3), 20(1), 47 and 259 of the Constitution, and also on National Values and Principles of Governance. The Petitioners' averred that they operated bars within Tenges Baringo Central Sub-County. They had met all the conditions set by the liquor licensing and upon expiry of their licenses issued in 2013, they applied to the 1<sup>st</sup> Respondent for renewal of the same. They did not get any responses till July 2015 when they received closure notices for having not met the statutory requirements. They averred that they were never afforded a fair hearing contrary to the Rules in Baringo

County Alcoholic Drinks Control Act, 2014 and the Rules of natural justice. They urged for the following Orders:

*“a) A declaration that the 1<sup>st</sup> Respondent has infringed the Petitioner’s right to fair administrative action as enshrined under Article 47 of the Constitution of Kenya.*

*b) A declaration that the decision by the 1<sup>st</sup> Respondent disallowing the Petitioner’s Application for liquor licensing to be unlawful.*

*c) An Order annulling the decision by the 1<sup>st</sup> Respondent disallowing the Petitioner’s Application for liquor licensing.*

*d) A declaration that the Petitioners are entitled to freely conduct their liquor business operations as per their previous licenses until such time that the 1<sup>st</sup> Respondent shall hear their Applications for liquor licensing a fresh and render a decision thereof.*

*e) An Order of prohibition against the Respondent’s or persons and /or authorities claiming under them from interfering with the Petitioner’s business or closing the Petitioner’s premises known as Matendo Bar, Bantana Wines and Spirit and Baraka Bar.*

*f) Costs of the Petition*

*g) Any further Orders and directions that this Honourable Court may consider appropriate and/is fit to grant in the circumstances.”*

7. The Petition was supported by an Affidavit by Julius Kibet Rono who had authority to swear on behalf of his Co-Petitioners. They were issued with business permits for the year 2015, they had fully complied with the conditions for issuance of the liquor licenses; however they received closure notices on 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> July 2015 respectively, that they had not met the statutory requirements.

8. It was their contention that they were not given a hearing contrary to the Acts and Rules and they were not given sufficient reasons for disallowing the licenses. This was an infringement to their Constitutional Right to fair administrative action as enshrined in Article 47 of the Constitution. Finally he urged the Court to allow the application as no prejudice shall be occasioned to the Respondents’.

## **RESPONSES**

### **Response to the Application dated 10.8.2015**

9. A Replying Affidavit was sworn by one Julius Kipkoech Bolei on behalf of the 2<sup>nd</sup> respondent he averred that by advise from his advocate, the deponent to the affidavit dated 21.08.2015 had not been authorised by the other applicants.

10. The gazette notice no. 8896 dated 7.09.14 had names of the members of the County Alcoholic Drinks Committees, County Review and Sub-County Committees, County Review and Sub-County Committees upon the enactment of Baringo County Alcoholic Drinks Control Act, 2014. A notice was issued to all liquor operators to apply for licences under the new regulations and the members of the Public were invited to raise their concerns. Objections were raised by the members of the public in regard to the applicants’ premises.

11. In view of the concerns and objections raised the applicant’s licenses were not reviewed. This was because these liquor businesses were inaccessible and did not meet the requirements of public health. This was so since consumers had to be protected under Article 46 specifically vulnerable children under Article 57 (d) and persons below 18 years from abuse.

12. The Applicants were only derailing the efforts made to protect members of the public. If the orders sought are granted then it shall lead to suspension of the provisions of the Baringo County Alcoholic Drinks Control Act, 2014.

### **Response to Petition**

13. The Respondents averred that they were statutory bodies established under section 9 of the Baringo County Alcoholic Drinks Control Act, 2014 and Article 176 (1) of the Constitution and are tasked under Article 46 (1) to protect the rights of members of public who visit liquor premises. They therefore issued notices for renewal of the licenses and also a notice of inspection programme was issued to all liquor operators, stakeholders, interested parties and members of the public.

14. A public hearing was conducted on 23.06.2015 as part of the inspection programme according all parties an opportunity to ventilate their issues. That the Petitioners liquor businesses did not meet the requirements of public health and thus their licenses were not renewed.

15. The Act was implemented to safeguard the interests of the members of the Public, Public Institutions such as schools and vulnerable children who accessed alcohol from the Petitioners business premises. The closure of these business was with full participation of stakeholders and members of the public.

16. Finally, they averred that the Petition did not raise any cause of action, was incompetent, bad in law and prayed it be struck out.

## **SUBMISSIONS**

### **Applicants’ & Petitioners’ Submissions**

17. The Applicants in the application dated 10.8.2015 urged that an inspection on their premises was conducted on 1.7.2015 and on 2/07/2015 they were informed their application for liquor licencing had been disallowed. Section 11 of the Act provides for the procedure of applying for liquor license yet the respondents had failed to follow the procedure especially by failing to prepare a notice setting forth the names of all applicants and the types of licenses applied for, also these names were not published at the office of the sub-county Administrator for a period not less than 21 days. They were also not supplied with objections received as they had averred.

18. Article 47 gives a proviso for fair hearing whereas section 4 of the Fair Administrative Act No. 4 of 2015 places responsibility on the public body to provide an opportunity to anyone who may be adversely affected by the decision. In **Erick Okango Omogeni v. Independent Electoral Boundary Commission & 2 Ors**, Nairobi H.C Misc Civil App No. 40 of 2013 the court held that where a person is not granted an opportunity to be heard, it cannot be said the process was fair. See also. **Republic v. County Government of Mombasa Ex-parte – Outdoor Advertising Association of Kenya** [2014] eKLR.

19. It was their submission that the respondents had to renew their licenses noting that they had been in business for more than 10 years and had invested so much on the business. The court was referred to **R. v. Devon County Council ex-parte P. Baker** [1995] ALL ER where it was held:

*“it is in the interest rather than the benefit that is the substance of the expectation. In other words, the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness, the law recognizes that the interest cannot properly be withdrawal (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision”.*

See also **Council of Civil Service v. Minister for Civil Service** [1984] ALL ER 935 page 949 where Lord Diplock stated that for a legitimate expectation to be thwarted, the impugned decision.

*“must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”*

20. The respondents considered irrelevant factors in reviewing liquor licenses, some names of purported people who attended the meeting signed more than once. The physical plan report produced on 7/8/2015 which the respondents claim to have used on arriving at a decision on 2/7/15 was doctored. It had been prepared a month earlier than the date of the meeting.

21. The respondents were taking shield in public interest as compared to individual rights of the investors. In **R v. County Government of Mombasa Ex-parte – Outdoor Advertising Association of Kenya** [2014] eKLR, where the Court held that Public interest must accord to the Constitution and the law as the rule of law is one of the National values.

22. The 2<sup>nd</sup> Respondent was not properly constituted as there was no secretariat by section 9 (8) of the Baringo County Alcoholic Drinks Control Act 2014, and hence could not conduct public participation or public education.

23. There was no concrete evidence that their businesses had interfered with learning institutions and the allegation that the business premises were on prohibited zones and residential zones. Finally, they urged the court to grant the orders of Certiorari and Mandamus against the Respondents.

24. On the other hand, the petitioners urged there was violation of their fundamental rights or freedom, under Article 22 (1). In **Anarita Karimi Njeru v. The A.G, Rashid Aloggoh & 245 Ors v. Haco Industries** [2007] eKLR it was held that a petition alleging violation of a constitutional right must state with reasonable precision, what provisions of the Constitution had been violated. Article 47 gives every person a right to Administrative action that is expeditious efficient, lawful, reasonable and procedurally fair as was held in **Kalpana H. Rawal v. Judicial Service Commission & Ors** [2015] eKLR.

25. The petitioners had failed to act on strict commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10. There was no reason given for the rejection of their applications, and when they raised their concerns through writing to them, the respondents did not answer back, which is seen as malice and the rejection of the renewal of licenses was made in bad faith. The respondents had annexed letters addressed to Dickson Yatich and Julius Rotich in their Replying Affidavit dated 14/1/2016 [JKB 9 (a) and (b)] giving reasons for the rejection however damage had already been occasioned. The said letters did not have postal addresses thus never reached them. In **Nyangilo Ochieng & Anor v. K.C.B.**, [1996] eKLR , the court of Appeal in Kisumu held as follows:

*“once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent”.*

26. The 1<sup>st</sup> respondent was mandated to discharge its duty within the confines of Article 10 which states as :

*“10. National values and principles of governance*

*1). The national values and principles of governance in this Article bind all state organs, state officers, public officers and persons*

whenever any of them.

- a. Applied or interprets this Constitution
- b. Enacts, applies or interprets any law ; or
- c. Makes or implements public policy decisions

In regards to Article 10 (2 C) and (2 d) the 1<sup>st</sup> respondent failed to exhibit good governance, which had led to decline of the County revenue. The failure of the respondents to act fairly was in breach of natural justice. In **Onyango Oloo v. A.G** [1986 -1989] EA 456, the Court of Appeal stated as follows:

*“the principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard. There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice”.*

27. It is their submission that they are entitled to the reliefs sought as held in the South African Constitutional court in **Fose v. Minister of safety and Security** 1997 (3) SA 786 (CC) where Ackerman J, for the majority held:

*“an appropriate relief will in essence be a relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced”.*

28. Finally, they urged that the respondents’ decision be annulled and they be compensated for the losses they suffered through an order for general damages. In **Peter M. Kariuki v. A.G** [2014] eKLR the Court of Appeal bench unanimously decided that the appellant’s Constitutional rights had been breached and awarded a sum of Ksh. 15,000,000/-.

29. The respondents urged that they would rely on the Replying Affidavit by one Julius Kipkoech Bolei. The applicant’s licenses had not been renewed since the businesses were near schools and residential areas. Further the 1<sup>st</sup> respondent had published names of members of the County Alcoholic Drinks Committee, the County Review and Sub-County Committees upon the enactment of Baringo County Alcoholic Drinks Control Act, 2014. There was a public notice writing all liquor operators to apply for licenses in implementation and enforcement of the new regulations under the Act. They fully complied with Articles 10, 174, 196 and 201 of the Constitution. The Court was referred to Meru Petition No. 32 of 2014 **Meru Bar, Wines and Spirits Owners Self Group v. County Government of Meru** [2014] eKLR, Nairobi **Metropolitan PSV Saccos Union Limited & 24 Ors v. County of Nairobi Government & 3 Ors** [2013] eKLR. In Meru Petition (Supra) the Court held as follows:

*“The fact that the respondent produced evidence that published public consultative meeting between the respondents’ assembly and public took place over the subject bill 2014 is enough proof that public participation took place”.*

30. The respondents conducted sanitary and safety inspection reports. The business premises passed as a health hazard to the public since there was no waste collection bin, no water and urinal and the bar attendants had not been medically examined. Section 3 of the Baringo County Alcoholic Drinks Control Act, 2014 mandates the respondents to regulate production, sale consumption and advertisement as held in Meru Petition No. 32 of 2014 that:

*“though the consumers of alcohol may have the right to take as much alcohol as their pockets and stomachs may be able to accommodate, that right is not absolute as it ought to be regulated as far as it is possible to protect the right of other members of the safety who do not indulge in such liabilities and where rights may be affected by the unfettered production, sale, consumption, advertisement and deception.”*

It was forged that this Act was for the public interest and the application seeks to defeat the purpose and intent of Alcoholic Drinks Control Act and Baringo County Alcoholic Drinks Control Act, 2014 which seeks to protect consumers under Article 46 and Article 57 (d) of the Constitution.

31. Further the respondents in opposing the Petition urged this Court to refer to the response to the petition. The Petition was misconceived and devoid of merit. The Petitioners business did not meet the requirements of the Public Health Act which posed a health Hazard to the public. The petitioners were issued with the alcoholic drinks committee inspection programme specifying the date, time and venue of inspection which was a clear demonstration that they fully participated in the exercise.

#### **Issues for determination**

32. The Court has referred to the application dated 10/8/2015 and the petition dated 4/8/2015, the responses, replying affidavits and the submissions and the following specific issues arise for determination:

- a) Whether the respondents were in breach of Article 47 of the Constitutional and the Baringo County Alcoholic Control Act
- b) If so are the applicants entitled to the reliefs sought.

## **Determination**

33. The applicants and the petitioners herein are seeking for reliefs from this court. They feel aggrieved by the respondents' actions in denying them licenses to operate liquor business within Baringo County. The Alcoholic Drinks Control Act 2010 came into force and all liquor businesses had to adhere to these new rules and regulations. The Baringo County Alcoholic Drinks Control Act, 2014 was also enforced to govern liquor business within the County. The businessman, the applicants and the petitioners had to renew their yearly licenses through the County Committee. In *Anarita Karimi Njeru* (supra) the Court established the threshold for one to allege that his Constitutional right had been breached. The person had to establish will precision which provisions of the Constitution had been violated.

## **Fair Administrative action**

34. The applicants and petitioners urged that the respondents were in breach of Article 47 which provides as follows:

1. i. *Every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
2. ii. *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 actions.*

The applicants' allege that once they submitted their applications for liquor licensing after paying the requisite fees and submission of the application forms on time for the 2015/2016 licenses. Section 11 of the Baringo County Alcoholic Drinks Control Act, 2014 sets out the procedure of liquor licensing which the applicants/petitioners state the respondents breached. It provides as follows:

- i. A person intending to produce, manufacture, import, distribute any alcoholic drink on the County or to operate an establishment for the sale of an alcoholic drink shall make an application in a prescribed form to the Sub-county committee in the Sub-county where the premises is to be situated and shall pay a prescribed fee.
- ii. The Sub-County Committee shall, within 21 days after the submissions of application for a license, prepare a notice setting forth the names of all applicants, the types of licenses applied for, the premises in respect of which the licenses are applied for and the time, date and place of the meeting and shall forthwith cause a copy of the notice to be:
  - a). published at the office of the Sub-county Administration for a period of not less than twenty one consecutive days
  - b). posted in some conspicuous place at or near the applicants premises.
- iii. Any person may lodge objection to an application. Every objection to an application shall be made in writing to the secretary to the Sub-County Committee, and the objector shall serve notice of the grounds of the objection on the applicant, personally or by post, seven days before the hearing of the application and the onus of proof of such service shall be on the objector.
- iv. A Sub-county committee may of its own motion take notice of any matter or thing, which on the opinion of the committee constitutes an objection to an application, whether or not any objection has been otherwise lodged. Where in respect of an application a Sub-county committee acts 'Suo moto', the committee shall inform the applicant of the nature of the objection, and shall, if the applicant so requests, adjourn the hearing for such period, not being less than seven days, as the Sub-county committee considers necessary to enable the applicant to reply thereto.
- v. Every person making an application shall, save as otherwise provided, appear in person or by an advocate before the sub-county committee and shall satisfy the Sub-County Committee that there is need for the grant of a license of the type applied for in the particular locality in respect of which the application is made.
- vi. Any objector may appear personally or by an advocate at the hearing of the application.

The respondents stated in their replying affidavits averred that they had published names of members of the County Alcoholic Drinks Committee, County Review and Sub-County Committees once the Baringo County Alcoholic Drinks Control Act, 2014 was enacted. This was contested by the applicants who said that there was no proper committee by the time they made their application. The Court has referred to annexure JKB 1 which is a copy of the gazette notice no. 8896. At page 3301 shows the appointment of the County Review Committee and also the Sub-County Committees. This appointment came into force on 11/12/14 which is evidence enough that by the time the applicants submitted their application forms, there was already a Committee in office.

35. Section 11 (ii) above gives the committee 21 days to issue a Public Notice to all the applicants. The respondents as per the annexure JKB 2 issued a public notice notifying the public to apply for licenses on or before the 20/05/2015. The said letter is stamped 7/5/2015. The public was also notified to familiarize with Baringo Alcoholic drinks Control Act 2014 and further the public was encouraged to forward their concerns in writing before licensing is done. The annexures on record JKB (4b) shows the applications for grant or renewal of alcoholic retail drinks license. The applications were done between the 13<sup>th</sup> May 2015 to 20<sup>th</sup> May 2015 which was within the prescribed period, therefore the applicants were within the time limit provided for renewal of licenses.

## **Public participation**

36. This brings the Court to the next issue by the applicants that there was no public participation as alleged. Section 11 (iii) above provides that any person who had an objection to an application could raise and it should be served to the applicant. Respondents' averred to have

issued a public notice (JK 2 b) shows the public forums were to be held on 23<sup>rd</sup> Tuesday and 25<sup>th</sup> Thursday at various centers including Kituro, Ngetmoi, Kiptagich, Tenges, Timboiywo, Kapkut only to name a few. This letter notifying the public is not dated; therefore this court is unable to tell which month the public forum was to take place. On the other hand the replying affidavit by Julius Kipkoech Bolei in response to the application dated 16/11/2015 annexed a letter purported to have invited the members of the public, interested parties and stakeholders to raise their concerns. The said letter is addressed to various people and has the 23<sup>rd</sup> Tuesday and 25<sup>th</sup> Thursday and the centres are the same as to the letter annexed as JK 2 b in the replying affidavit to the Petition, which is stamped 15/06/2015. How could the two letters have same names of centres, one has the address it is being referred to and from which person that the other doesn't have but they have been annexed by the same person. The court has also referred to the list of persons who purportedly attended the public forums and finds that indeed there was such a meeting and the error of having two names of person could arise out of people signing more than once on the papers provided.

37. This Court has referred to the annexures of the minutes for public participation for the same deponent Julius Kipkoech. One minute is handwritten and the other typed containing contents on what transpired on 23/06/2015. One attached in the application says the meeting was held at Tenges the other indicates at D.O's ground the annexure shows that the people had unanimously agreed that no bar would be licensed in Tenges and its environs. This minute had been adopted as MIN 4/23/6/2015 liquor licensing. There were reasons given by the people such as the bars were near schools, the crime rate was becoming rampant, most brands identified in the bars were not certified by KEBS as a result people were dying from taking second generation drinks etc. This is similar to the recommendation report carried out by the Physical Planning Officer who had carried out inspection on 2/7/2015. The inspection report listed the various bar businesses and found out they had not complied with the provisions of Public Health Act Cap 212 and 254. For example the conditions established in Matendo Bar Tenges were as follows: no ceiling provided, poor drainage in the toilet, pit latrines not labelled for male and female, no running water provided, poor ventilation, food handler net, medically examined and provided with valid medical certificates and poor state of painting.

38. The intention of the County Alcoholics Drinks Control Act was to protect consumers under Article 46 and 57 (d) of the Constitution. This court respectively finds that the respondents' have a duty to safeguard the interests of the public who had access to the applicants/Petitioners businesses. Section 12 (4) of the Baringo County Alcoholic Drinks Control Act, 2014 gives mandate to the respondents to reject any application made by them. This can only be done when public participation has been fully complied with and inspection done on these premises. The applicants/Petitioners had a duty to comply since when issued with a public notice to notify them of the renewal of licenses they were urged to read the County Act on Alcoholics. This means failure to adherence to any law or rule would lead to an outright refusal to renew their licenses. Though the applicants alleged that there was no public participation, the court finds that the respondents ensured there was public participation as per the list of persons who were in attendance, thus the views of the public was considered in the process of refusal to renew their licenses. This court respectively agrees with the sentiments held by Sachs J. in **Minister of Health v. New Clicks South Africa (PTY) Ltd**, supra as follows:

*“The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinitive variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case”.*

#### **Rejection of the renewal of licenses**

39. Once the respondents had decided not to renew the applicants' and petitioners' licenses, section 12 (4a) mandates them to notify the applicant within thirty days giving reasons further refusal. The applicants stated that there was no particular reason given to them by the respondents' for rejection of their applications. They even wrote to them but no response was received other than closure notices. The respondents' were within section 4 and 4 (a) to reject the application if they were not satisfied with the application. Section 12 (4) (a) also cites the respondents' were to notify the applicants' and petitioners' within 30 days. The applicants' and petitioners' were not invited by the respondents to be heard as required by the rules of natural justice. The Court of Appeal in **Onyango Oloo v. A.G** [1986-1989] supra the court stated as follows:

*“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard. There is a presumption in the interpretation of statutes that rules of natural justice all apply and therefore the authority is required to act fairly and so to apply the principle of natural justice”.*

40. The respondents being a public body are governed by Article 10 (2) (c) and (d) which provides as follows:

2) *The National values and principles of governance include-*

c) *Good governance, integrity, transparency and accountability*

d) *Sustainable development*

The respondents are blamed for relying on the public interest compared to the applicants Individuals rights. Though they have remitted tax to the County as they stated, the respondents had a duty to protect the general public too as seen in the **Meru Petition No. 32 of 2014** (Supra) as follows:

*“it is the duty of the government to exercise due diligence in carrying put its responsibility through its legislative arm to legislate and provide them enjoy their rights without interference with their health and with the rights of others”.*

The above was in regard to Meru County and this Court is of the same opinion that the respondents had a duty to protect the public. This is

so, as long as they do not act contrary to Article 2. Article 2 (d) provides for sustainable development and this court notes that the public, especially in Tenges had resorted not to have bars in their locality since alcoholism was having a negative impact on the socio-economic development for example “In MIN 5/6/2015 WAY FORWARD the youth, men and women were asked to venture into economic activities that would empower them e.g from companies and register groups.” This recommendation was for the benefit of the society as a whole.

### **Were the applicants/ petitioners heard**

41. As discussed above, the applicants’ and petitioners’ were only served with closure notices. The respondents did not tender any evidence to counter the allegation laid against them. The applicants stated that after inquiring on their licenses they received closure notice. In **R v. County Government of Mombasa Ex-parte Outdoor Advertising Association** it was held that the duty of the public body is to provide a forum in accordance with the law where the ex-parte applicant members are granted an opportunity to be heard. See also **Erick Okango Omogeni v. IEBC** (Supra). The respondents also had to hear out the applicants as dictated by natural justice. One cannot be condemned unheard, since the applicants’ and the petitioners’ had been carrying out business for some 10 years or more, they had wages, bills and salaries to pay. Closure of the businesses without any explanation amounted to breach of their rights. I respectfully with Lord Diplock in **Council of Civil Service v. Minister for Civil Service** (Supra) where he stated that for a legitimate expectation to be opposed the impugned decision-

“Must affect such other person either

(a) by altering rights or obligations of that person which are enforceable by or against him in private law or

b) by depriving him some benefit or advantage which either (i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn”

The applicants’ legitimate expectation was breached by the respondents’.

### **Conclusion**

42. The court finds that in taking its decision to close the bar operations of the applicants in the judicial review application and the petition herein without giving them notice and or an opportunity to be heard, the respondent County acted in violation of the applicants’ constitutional right to fair administrative action under Article 47 of the Constitution and *ultra vires* its own statute, the Baringo County Alcoholic Drinks Control Act, 2014, section 11 thereof, and the said decision was, consequently, unconstitutional, illegal, null and void.

43. For the breach of their constitutional right to fair administrative action, the applicants are entitled to a remedy in damages under Article 23 (3) (e) of the Constitution. Although damages are not available under the judicial review procedure adopted in Kabarnet HC. Misc. Appl. (JR) No. 4 of 2017 (formerly Nakuru HC. Misc. Appl. No. 11 of 2015), the act of consolidation with Kabarnet HC Constitutional Petition No. 7 of 2017 (formerly Nakuru HC Petition No. 5 of 2016) by order of the Court (Kimondo, J.) made on 8<sup>th</sup> February 2017 makes available for the *ex parte* applicants in the Judicial Review the same remedies as are available to the applicants in the constitutional application under Article 22 of the Constitution, for which the remedy of damages is available under Article 23 (3) (e) of the Constitution.

44. As the applicants’ businesses are already closed, the court does not exercise the respondent County’s authority and discretion to allow operations and grant licences under the Alcoholic Drinks Control Act. That is a matter for the County to determine upon suitable applications therefor by the applicants.

45. The Court only holds that the refusal of licences and decision for the closure of the businesses, which was the subject of the present litigation was illegal, *ultra vires*, null and void. It does not, however, hold that the licences should have been granted or that the businesses should not have been closed upon due process.

46. The businesses having already been closed on the impugned decision of the County, the judicial review order of Prohibition sought in Petition is not available as what was sought to be prohibited has already occurred. Similarly, the order for Mandamus to compel the grant of the 2015 licence sought in the Judicial Review application is also overtaken by events and time, and not available. To be sure the Petition and the Judicial Review cases were only transferred to Kabarnet after the order of consolidation of 8<sup>th</sup> February 2017 long after expiry of the validity period of the relevant 2015 licences.

47. The applicants are at liberty in accordance with the law to apply for fresh licences, and the County Government is under a duty under its relevant Act to consider such applications for licence, and that exercise may only become the subject of litigation if the County performs its duty in an illegal, *ultra vires* manner and in breach of the applicants’ constitutional right to fair administrative action.

48. For the breach of the fair administrative action right of the applicants by the decision and acts challenged herein, the court will award each applicant in the suits the sum of **Ksh.500,000/-** in damages.

### **Orders**

49. Accordingly, for the reasons set out above, the court makes the following orders:

1. The Court finds that the decision by the County Government of Baringo to decline bar licences to the applicants in the JR No. 4 of 2017 and Petition No. 7 of 2017 and to direct their closure was made in breach of the applicants' right to fair administrative action under Article 47 of the Constitution and was *ultra vires* the Baringo County Alcoholic Drinks Control Act, 2014 and, therefore, illegal, null and void.

2. The applicants in both proceedings consolidated herein are entitled to damages for breach of their right to fair administrative action under Article 47 of the Constitution.

3. The Baringo County Government shall pay to the applicant proprietors of the affected businesses herein the sum of **Ksh.500,000/-** each in damages.

4. For avoidance of doubt, this order only affects and benefits the applicants in the two suits and not any other bar businesses at large which may have been affected by the decision the subject of this litigation.

5. The applicants are, needless to state, entitled to apply for bar business licences in accordance with the Baringo County Alcoholic Drinks Control Act and the respondent County Government is under a constitutional and statutory duty to consider the same in accordance with the law.

6. Each party shall bear its own costs of the suits, as the applicants sought to enforce their rights and the respondents acted in enforcement, though improperly, of its mandate under its statute for the public interest in alcoholic drinks control.

*Order accordingly.*

**DATED AND DELIVERED THIS 14<sup>TH</sup> DAY OF DECEMBER 2018.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S Kiplenge & Kurgat Advocates for the Petitioners

M/S Ngaywa Ngigi & Kibet Advocates for the ex-parte applicants

M/S Limo R.K. & Co. Advocates for the Respondents