REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 467 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL

PROCEDURE RULES

AND

IN THE MATTER OF THE NAIROBI CITY COUNTY ALCOHOLIC

DRINKS CONTROL AND LICENSING ACT OF 2014

AND

IN THE MATTER OF GAZETTE NOTICE NO. 7706 OF 2016

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE BY JAPHET

MURIIRAMUROKO AND FRANK ANYIKO TO APPLY FOR

ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

REPUBLIC……..……APPLICANT

VERSUS

THE OFFICE OF THE GOVERNOR,

NAIROBI CITY COUNTY…..…….……...…..…..RESPONDENT

EX PARTE APPLICANT: JAPHETH MURIIRA MUROKO

FRANK ANYIKO

JUDGMENT

1.By a Notice of Motion dated the 21st October, 2016, the ex-parte applicants herein **Japheth Muriira Muroko** and **Frank Anyiko** seek the following orders:

> **i. An order of Certiorari to remove to the High Court for purposes of quashing the decision of the respondent in publishing Gazette Notice No. 7706 of 2016 revoking the appointment of the ex parte applicant's as member and chairperson of the Starehe and Kibra Subcounty Alcoholic Drinks Control and licensing committees respectively.**
>
> **ii. An order of prohibition restraining the respondents and/or their servants and/or their agents and/or their employees from doing any act to the detriment of the applicants, in furtherance of the Gazette Notice No. 7706 of 2016.**
>
> **iii. An order of mandamus compelling the respondent and/or their servants and/or their agents and/or the employees to reinstate the applicants to their respective positions as well as to allow them to execute their mandate and duty without any adverse interference whatsoever.**
>
> **iv. An order that costs of this application be borne by the respondent.**

Ex-Parte Applicants' Case

2. The applicants' case was that they were the chairman of the Kibra Subcounty Alcoholic Drinks Control and licensing Committee and member of the Starehe Subcounty Alcoholic Drinks Control and Licensing Committee following their appointment in 2014 vide Gazette Notice No. 5278 of 2014.

3. The applicants averred that from the time of their appointment, they had been diligently and lawfully executing their duties and mandate as per section 6 of the ***Nairobi City County Alcoholic Drinks Control and Licensing Act 2014***. They disclosed that on 29th September, 2016, they convened their usual routine meeting as members of the Kibra Sub County Alcoholic Drinks Control and Licensing Committee to deliberate on matter concerning licensing. After the said meeting they received communication from one of the members informing them that the Chief Officer had reprimanded the said member over the attendance and/or convening of the aforementioned meeting, despite there being no validly recognized chairman to the committee.

4. According to the applicants, it is then that they came to learn that the respondent had published a Gazette Notice No. 7706 of 2016, revoking the applicants' appointment as chairman of the Kibra Subcounty Alcoholic Drinks Control and Licensing Committee and member of the Starehe Sub County Alcoholic Drinks Control and Licensing Committee respectively. To the applicants, this news came as a surprise to them as they have never been issued with any letter and/or communication on the alleged revocation.

5. The applicants averred that during their time in office so far, there have never been any complaints and/or allegations raised against them in any adverse manner and they have never been summoned to answer to any charges raised against them. It was their case that by publishing the said Gazette Notice No. 7706 of 2016, the respondent acted in breach of the applicants' right to fair administrative action. To them, the fact that they were issued with a letter of appointment would warrant the respondents to issue them with a similar letter informing them of the revocation and the reasons culminating into the said revocation.

6. The applicants therefore averred that the said Gazette Notice No. 7706 of 2016 was published out of malice and ill will.

7. It was submitted by the applicants that whereas the principle of separation of powers is aimed at allowing persons in the various arms of government to perform their functions effectively, the same is subject to the control mechanisms that are in place, more so where there is likelihood that the functions may be performed in an arbitrary manner, inconsistent with the Constitution and cardinal legal principles. It was submitted that the Respondents acted in breach of the rules of natural justice as the applicants had occupied their respective positions for more than two years.

8. According to the applicants, the Respondent's office being a public office, persons clothed with public authority should exercise their discretion with caution and within the confines of the law. As there was no apparent reason and/or justification to warrant the said move, it was submitted that the respondent acted irrationally an illegally.

9. Since the applicants were presumably appointed by virtue of their capability and competency, it was submitted that the revocation of their appointment, for their revocation before the lapse of their term, it is presumed that there should be a compelling reason for the change of heart. In this respect the applicants relied on Republic vs. Commission for **Higher Education ex parte Peter Soita Shitanda [2013] KLR** and section 5 of the ***Fair Administrative Action Act***. In absence of any reason it was contended that the respondent's action was unwarranted and was driven by pure malice and ill will.

10. While conceding that the Respondent has the power to revoke appointments, it was submitted that the said power ought not to be exercised arbitrarily as that would be in breach of the rule of law and the applicants relied on **Republic vs. Public Procurement Oversight Authority ex parte Getrio Insurance Brokers Limited [2011] KLR**.

Respondent's Case

11. In response to the application, the Respondents filed the following grounds of opposition:

> **1. That the applicant's application is fatally incompetent incurably defective, vexatious and an abuse of the court process.**
>
> **2. That the honourable court has no jurisdiction to issue the orders sought as it would interfere with the principle of separation of powers and undermine the powers conferred upon the respondent by law.**
>
> **3. That the respondent revoked the appointments of the applicants in accordance with the law.**
>
> **4. That the respondent is mandated by Section 6(30(a) and (d) of the Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014 to appoint the chairman and three residents of the subcounty as some of the members of the sub-county Alcoholic Drinks Control and Licensing Committee.**
>
> **5. That the appointive power conferred upon the respondent by law is not restricted to appointments only but also extends to the power to revoke the appointment therein as per Section 51 (1) of the interpretation and General Provisions Act, Cap 2 laws of Kenya.**
>
> **6. That the respondent owes no legal duty to the applicants to summon them to answer to charges against them prior to exercising the power to revoke their appointments because the power conferred to the respondent is exercisable solely by the respondent and without the prior recommendation, approval or consent of another person(s).**
>
> **7. That it is in the interest of justice and fairness that the instant application be dismissed with costs to the applicant as it is fatally incurably defective, vexations and an abuse of the court process.**

12. It was submitted on behalf of the Respondent that it evoked the applicants' appointed in accordance with section 6(3)(a) and (d) of the ***Nairobi City Council Drinks Act, 2014*** (hereinafter referred to as "the Act"). Though the Respondent conceded that the said provision does not expressly empower the Respondents to revoke the applicants' appointments, it was submitted that this power is implied by section 51(1) 0f the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya.

13. According to the Respondents this power is by law exercisable exclusively by himself without prior recommendation, approval or consent of any other persons. According to the Respondents the applicants have not proved any procedural irregularity in the process of revocation of their appointment. With respect to the prayer for mandamus it was contended that the same is defective as the said prayer is drawn as mandatory injunction and based on **John Kipng'eno Koech & 2 Others vs. Nakuru County Assembly & 5 Others [2013] KLR**, it was submitted that the applicants have not illustrated the public duty or function that the Respondent is mandated to do and failed to do

It was submitted that since the Gazette Notice had already been issue granting an order of prohibition would be in vain.

15. The Respondents further took the view that granting the orders sought herein would interfere with the doctrine of separation of powers and undermine the powers conferred upon the Respondent by law. To the Respondent, the application was brought against the Governor of Nairobi City County who exercised his duty conferred under the said Act. In support of this position the Respondent relied on **Democratic Alliance vs. The President of the Republic of South Africa & 3 Others CCT 122/11 [2012] ZACC 24** as well as Articles 174 and 179 of the Constitution and urged the Court to dismiss the application with costs.

Determination

16. The Respondents have contended that the doctrine of separation of powers bars this Court from granting the orders sought herein.

17. The doctrine of separation of powers, was dealt with by **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006(6) SA 416 (CC) (17 August 2006)** as hereunder:

> **"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation."**

18. According to the learned Judge:

> **"It seems to me therefore that a distinction should be drawn between constitutional**

provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation. By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does."

19. It was further held that:

"While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution."

20. I associate myself fully with the said sentiments. Since this Court is vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, it has the duty and is obliged to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. Since this application alleges a violation of Article 47 of the Constitution by the Respondent, the invitation to this Court to intervene is more than welcome and the Respondent cannot obstruct it from doing so by placing road-blocks on its path by invoking the doctrine of separation of power. In other words, the doctrine does not inhibit this Court's jurisdiction to address the applicants' grievances so long as they stem out of alleged violations of the Constitution as that is one of the core mandates of this Court.

21. In my view the doctrine of separation of powers must be read in the context of our constitutional framework and where the adoption of the doctrine would clearly militate against the constitutional principles the doctrine must bow to the dictates of the spirit and the letter of the Constitution.

22. It is important therefore to appreciate the nature of the Constitution of Kenya, 2010. Our Constitution is a transformative constitution. This must necessarily be so since Article 10 thereof provides that all State organs, State officers, public officers and all persons whenever they make or apply policy decisions are bound by the national values and principles of governance which include participation of the people, inclusiveness, integrity, transparency and accountability. That ours is is transformative Constitution

appears from Article 20(3) of the Constitution which provides that:

> ***In applying a provision of the Bill of Rights, a court shall—***
>
> ***(a) develop the law to the extent that it does not give effect to a right or fundamental freedom;***
>
> ***(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.***

23. Similarly Article 259(1) of our Constitution provides that:

> ***This Constitution shall be interpreted in a manner that—***
>
> ***(a) promotes its purposes, values and principles;***
>
> ***(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
>
> ***(c) permits the development of the law; and***
>
> ***(d) contributes to good governance.***

24. What the above provisions mean is that in the interpretation of the Constitution the Court must do so in a manner that advances the values and principles of the Constitution. Since ours is a constitutional democracy the authorities handed down in systems that practice parliamentary supremacy are not necessarily relevant to our constitutional set up. Therefore in applying authorities emanating from such systems, care must be taken to ensure that such decisions conform to our transformative constitutional framework. This was the position adopted by **Kasanga Mulwa, J** in **R vs. Kenya Roads Board ex parte John Harun Mwau HC Misc Civil Application No.1372 of 2000**where he expressed himself as follows:

> **"Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution."**

25. Our Constitution is therefore not just structurally based but is a value-oriented Constitution. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and *inter alia* Article 10 of the Constitution. The distinction between the two was made by **Ulrich Karpen** in ***The Constitution of the Federal Republic of Germany*** thus:

> **"…the value –oriented, concerned with intensely human and humane aspirations of personality, conscience and freedom; the structure-oriented, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements."**

26. Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality. As appreciated by **Ojwang, JSC**, in **Joseph Kimani Gathungu vs. Attorney General& 5 Others Constitutional Reference No. 12 of 2010**:

> **"A scrutiny of several Constitutions Kenya has had since independence shows that, whereas**

the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of2010 is dominated by s "social orientation", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point I governance functions."

27. As was appreciated by the majority **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Advisory Opinion Appl. No. 2 of 2012** at para 54:

"Certain provisions of the Constitution of Kenya have to be perceived in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm."

28. The Court is therefore required in the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach. The German Federal Constitutional Court in **Luth Decision BVerfGE 7, 198 I. Senate (1 BvR 400/51)** noted as follows:

"But far from being a value free system the Constitution erects an objective system of values in its section on basic rights and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of human being to develop the society must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration and judicial decisions. It naturally influences private law as well, no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit."

29. The foregoing position was aptly summarised by the South African Constitutional Court in **Carmichele vs. Minister of Safety and Security (CCT 48/00) 2001 SA 938 (CC)** in the following terms:

"Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and the judiciary.' The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed."

30. Therefore the Constitution of Kenya, 2010, just like the post Nazi German Basic Law and the post-apartheid 1996 Constitution of South Africa, as "a transformative instrument, is the key instrument to bring about a better and more just society". See **Michaela Hailbronner** in ***Traditions and Transformations: The Rise of German Constitutionalism***.

31. It is my view that our position is akin to the one described by the German Constitutional Court in

BVverfGE 5, 85 that:

> **"Free democratic order of the Basic Law…assumes that the existing state and social conditions can and must be improved. This presents a never-ending task that will present itself in ever new forms and with ever new aspects."**

32. To paraphrase **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57,** the Constitutionis a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle.It must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. As appreciated **In the Matter of the Estate of Lerionka Ole Ntutu [2008] KLR 452:**

> **"Constitution of any country of the world should not represent a mere body or skeleton without a soul or spirit of its own. The Court would not like to discard the possibility of the court adopting broader view of using the living tree principle of the interpretation of the Constitution where they are "amongst others, ambiguity, unreasonableness, obvious imbalance or lack of proportionality or absurd situation."**

33. Similarly in **Charles Lukeyen Nabori& 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006,**it was held that:

> **"…the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits."**

34. **Nyamu, J** (as he then was) in **Richard Nduati Kariuki vs. Honourable Leonard Nduati Kariuki& Another [2006] 2 KLR 356** expressed himself as hereunder:

> **"The Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future."**

35. It follows that the norms and values identified in Article 10 of the Constitution are bare minimum or just examples. This must be so because Article 10(2) of the Constitution provides that:

> ***"The national values and principles of governance include…"***

36. By employing the use of the term "include" the framers of the Constitution were alive to the fact that there are other values and principles which may advance the spirit of the Constitution and hence all State organs, State officers, public officers and all persons may be enjoined to apply them. What this means is that the national values and principles of governance in Article 10 of the Constitution are not exclusive but merely inclusive. The Constitution set out to plant the seed of the national values and principles of national governance but left it open to all State organs, State officers, public officers and all persons when applying or interpreting the Constitution, enacting, applying or interpreting any law, or applying or implementing an public policy decision to water and nurture the seedling to ensure that the plant develops all its parts such as the stem, the leaves, the branches and the flowers etc. In other words the national values and principles of governance must grow as the society develops in order to reflect the true state of the society at any given point in time.

37. These constitutional principles apply to judicial review just as in constitutional petitions or references as the South African Constitutional Court (**Chalkalson, P**) expressed itself on the issue in **Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)** at para 33:

"The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts."

38. It therefore follows that Parliament, being a State organ, in making policy decision must adhere to the national values and principles of governance. If it does not do so, it may well fall foul of Article 10 of the Constitution. To this extent I may not agree with the position adopted by the US Supreme Court in **U.S vs. Butler, 297 U.S. 1[1936]**line, hook and sinker when it holds that:

"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."

39. My view on the nature of our Constitution is based on the decision of the Supreme Court of Kenya in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** where it expressed itself as follows:

"Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy.* This is clear right from the preambular clause which premises the new Constitution on – *"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."* And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. The transformative concept, in operational terms, *reconfigures the interplays between the States majoritarian and non-majoritarian institutions*, to the intent that the desirable goals of governance, consistent with dominant perceptions of *legitimacy*, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racialist governance system. Karl Klare, in his article, "*Legal Culture and Transformative Constitutionalism," South African Journal of Human Rights*, Vol. 14 (1998), 146 thus wrote [at p.147]: *"At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent."*The scholar states the object of this South African choice: *"By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law."* The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country's

achievements in constitutional precedent. We in this Court, conceive of today's constitutional principles as incorporating the transformative ideals of the Constitution of 2010".

40. I therefore associate myself with the views of **Mohamed A J** in the Namibian case of **S. vs Acheson, 1991 (2) S.A. 805** (at p.813) to the effect that:

"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a 'mirror reflecting the national soul'; the identification of ideals and…aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion."

41. It is therefore my view and I hold that where it is contended that the constitution or the law has been violated, this Court ought not to wring its hands and say that based on the doctrine of separation of powers there is nothing it can do.

42. In this case, it is conceded by the Respondent that whereas the Respondent had the power to appoint the applicants there was no express power under the Act empowering the Respondent to revoke the said appointments. However section 51(1) of the ***Interpretation and General Provisions Act*** provides as hereunder:

Where by or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission, committee or similar body appointed constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.

43. From the foregoing, there is no doubt that the Respondent could, subject to the Constitution and the law revoke the applicants' appointments. However without any laid down procedure for invoking the said power, the question that arises is under what circumstances can such power be lawfully exercised. It ought to be remembered that more often than not, in making appointments, the appointing authorities endeavour to go for the most suitable persons. Some of these persons do give away their positions and benefits in order to render service to the public. To say, as the Respondent contends here that in the exercise of his power to revoke the appointments he is not answerable to anybody is with due respect the height of impunity in exercising public power.

44. That impunity has no place in the exercise of public authority was appreciated by **Prof Sir William Wade** in his book ***Administrative Law*** where he expressed himself as hereunder:

"The powers of public authorities are…essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a

public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…"

45. In this case, the Respondent seems to be of the view that the law empowers him to have absolute discretion when it comes to the revocation of appointments under the Act. That view, with due respect has no place in current constitutional dispensation. To hold therefore that a member of the executive is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance or whims of the Executive the independence of the judiciary and the rule of law become the first victim. See **Masalu and Others vs. Attorney General [2005] 2 EA 165.**

46. Accordingly the Courts are empowered to and are under a duty to investigate allegations of abuse of power and improper exercise of discretion.

47. It has been contended by the applicants that they were not given any reasons for the revocation of their appointment. The Respondent on his part has not adduced before this Court any evidence or basis upon which the applicants' appointments were revoked.

48. According to the Applicants the revocation of their appointment breached the rules of natural justice. It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process.The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

49. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in **Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held:

"**The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."**

50. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given in case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker.

51. Article 47 of the Constitution provides for the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

52. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

"The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release...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...To consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings or of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void *ab initio."*

53. In this case no reasons for the revocation were given. In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090,** the Court expressed itself as follows:

"The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law…In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons…Orders made must comply with the Act, and if they do not so comply in important aspects, they will be null and void…The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority…An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not direct himself in fact or law…It is clear that both sections 187(1) and (4) require the Minister to be "satisfied". It gives him a discretion; and it is his discretion to act upon the facts before him, and not for the court to sit on appeal so as to impose its judgement on the facts upon the Minister. There is no doubt that the Minister acted in good faith. But the Minister had to have certain facts before him. The farms had to be managed and supervised; that had to be done so inadequately that the result was necessity to prevent or delay deterioration. The Minister did not give evidence but he swore an affidavit…It is clear that the reasons given in the order for sale illustrate that the Minister had asked himself the wrong question; it being a question not enjoined upon him by the Act. He had therefore misdirected himself in law and that order is null and void."

54. It is therefore my view that in revoking the applicants' appointments there ought to have been some rational basis for doing so. As the Respondent has no shown the Court the basis upon which he acted in the manner he did which was no doubt contrary to the applicants' legitimate expectations that they would serve their full term, this Court must conclude that the Respondent had no basis for taking the action he took.

55. With respect to legitimate expectation, it was contended that the evolution of the doctrine in the Common law jurisdiction can been traced to an obiter dictum of **Lord Denning M. R** which was restated by **B. N. Pandey** in his article "**Doctrine of Legitimate Expectation**" in which it restated the holding of the court in **Sehmidt vs. Secretary of Home Affairs [1969] 2 Ch 149; (1969) 1.AllE.R. 904** that:

> **"The speeches in Ridge v Baldwin show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say …"**

56. In **CCSU vs. Minister for the Civil Service [1984] 3 All ER, 935 Lord Diplock** stated, at page 949 that:

> **"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It 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 an 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."** (Emphasis supplied)

57. In this case I am satisfied that the doctrine was applicable

58. In the case of **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194 Platt, JA** held that:

> **"Wherever any person or body of persons has authority conferred by legislation to make decisions affecting the rights of the subjects, it is amenable to the remedy of an order to quash its decisions either for an error of law in reaching it, or for failure to act fairly towards the person who will be adversely affected if the decision of failing to observe either one or other to the two fundamental rights accorded him of the rules of natural justice or fairness, viz: to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made."**

59. It must be remembered that under Article 10 of the Constitution some of the national values and principles of governance are transparency and accountability, the rule of law and human dignity. Under the said Article, all State organs, State officers, public offers and all persons are enjoined whenever they make or implement public policy decisions to be bound by the said values and principles. To revoke the applicants' appointment without disclosing the reasons therefor clearly violates the aforesaid values and principles.

60. In the result I find merit in the Notice of Motion dated the 21st October, 2016.

Orders

61. Consequently, I issue the following orders:

1. An order of certiorari removing in to this Court for the purposes of being quashed purposes of quashing the decision of the respondent published in Gazette Notice No. 7706 of 2016 revoking the appointment of the ex parte applicants as member and chairperson of the Starehe and Kibra Subcounty Alcoholic Drinks Control and licensing committees respectively which decision is hereby quashed.

2. An order of mandamus compelling the respondent and/or their servants and/or their agents and/or the employees to reinstate the applicants to their respective positions as well as to allow them to execute their mandate and duty without any adverse interference whatsoever.

3. Having quashed decision, it is nolonger necessary to issue the order of prohibition sought.

4. The applicants will have the costs of this application.

Dated at Nairobi this 18th day of January, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Olando for the ex parte applicant

Mr Ilako for the Respondent

CA Mwangi