REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

JUDICIAL REVIEW NO. 17 "B" OF 2015

IN THE MATTER OF: AN APPLICATION BY JOHN WACHIURI T/A GITHAKWA GRACELAND & WANDUMBI BAR & 50 OTHERS FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI

AND

IN THE MATTER OF THE COUNTY GOVERNMENT OF NYERI

AND

IN THE MATTER OF THE COUNTY COMMISSIONER, NYERI

BETWEEN

THE COUNTY GOVERNMENT OF NYERI…..…….…… 1ST RESPONDENT

COUNTY COMMISSIONER NYERI.....1ST RESPONDENT

AND

JOHN WACHIURI T/A GITHAKWA GRACELAND

& WANDUMBI BAR & 50 OTHERS ……...…SUBJECTS/APPLICANTS

RULING

By a notice of motion expressed under Order **53** Rule **2** of the Civil Procedure Rules 2010, dated 10th December 2015 the applicants herein, moved this honourable court seeking orders *inter alia :-*

*a. **That** they be granted leave to institute Judicial Review Proceedings in the nature of Certiorari for the removal to the High Court for purposes of being quashed the decision of the first Respondent to issue temporary licences to the subject applicant given and a further decision of the aforesaid first Respondent using the second Respondents to close and shut down the subject/Applicants' bars and also to the arrests and harassments against subject/Applicants by second Respondent.*

*b. **That** the leave aforementioned to institute Judicial proceedings for orders of Certiorari do operate as a stay for the decision to close down/shut down the subject applicants bars as well as*

stay any arrests and harassments of the subject applicants by the first and second Respondents.

*c. **That** the applicants be granted leave to institute Judicial Review proceedings in the nature of Mandamus against the first Respondent to issue the full as opposed to temporary licenses upon payment of the requisite fees.*

The application is premised on the grounds stated on the face of the application and the verifying affidavit and statement annexed thereto. Essentially, the grounds are as follows:-

*a. **That** on 30th November 2015 the County Regulation Committee approved a special license for each of the applicants to run their respective businesses for a period of two months between 1st December 2015 and 31st January 2016 and they were granted up to 8th December 2015 to make the requisite payments, but not withstanding the foregoing, the Respondent proceeded to shut down the aforesaid premises and resorted making arbitrary arrests against the applicants on grounds that the temporary licences had been revoked.*

*b. **That** some of the applicants had made the requisite payments but the first respondent had refused to issue the temporary licenses while for some the Respondent has refused to receive the payments.*

*c. **That** despite issuing the temporary licenses, the Respondent has issued contradictory orders for closure of the bars and that a resolution passed by the County Regulation Committee is illegal and that the applicants were not heard before the decision complained of was made and that the applicants were prejudiced by the said decision and have been denied their livelihood.*

The supporting affidavit sworn **John Wachiuri** on his behalf and on behalf of all the applicants states *inter alia* as follows:-

*a. **That** during the six months preceding filing this application, the applicants went through rigorous inspection by the first Respondent.*

*b. **That** on 30th November 2015, the Director, Alcoholic Drinks Control and Management, Nyeri County wrote a communication entitled "Inspection Reports of Alcohol Selling Premises giving instructions to all Sub-County Administrators, Nyeri County," the contents of which were **(i)** Cancelled Licenses were required to pay proportionate part of the fee for appropriate licenses for a limited period of three months to enable them dispose their stock, **(ii)** All alcohol selling premises were given two months from 1st December 2015 to complete selling their stock upon payment of the prorated licence fees and such payments were to be made not later than 8th December 2015 and that enforcement committee shall commence inspection as from 9th December 2015.*

*c. **That** the applicants obtained the requisite clearance forms, completed them and some paid required payments and notwithstanding the said payments, the first Respondent declined to issue the said licenses, while in respect of others, the first Respondent declined to accept the payments.*

*d. **That** despite approval, the first Respondent has continued to close the said premises and has subjected the applicants to arbitrary arrests, hence the temporary licenses were a wood wink to collect revenue, hence the decision to issue temporary licenses is baseless, illegal, unfair and discriminative and has violated natural justice, hence the same ought to be quashed.*

Annexure **JW4 (a)** is a charge sheet showing that a one **John Wanchiuri Wanjiru** was been charged with the offence of permitting the sale of alcoholic Drinks without a licence while annexure **JWN(b)** is a letter dated 7th December 2015 showing that three of the applicants were operating without a license. I will later comment on these two annexures.

In the supporting it is stated:- ***(a)** some of the applicants have met payment conditions but the first*

Respondent has refused to issue licenses, ***(b)*** *that others have been denied an opportunity to pay,* ***(c)*** *that the issue of the licenses is a sham, illegal and against the rules of natural justice,* ***(d)*** *the reasons behind the issuance of the temporary licenses was not deliberated by the parties herein.*

The application is strongly opposed. There is on record the Replying affidavit of **Herman Shambi,** the Deputy County Commissioner in charge of Nyeri County and a member of the **Alcoholic Drinks Regulation Committee** who avers *inter alia* as follows:-

a. ***That*** *the office of the County Commissioner has nothing to do with the subject matter, hence has been wrongfully enjoined in these proceedings save for being a member of the Regulation Committee ensures compliance with the Regulations and also provisions of the National Authority for Campaign Against Alcohol and Drugs Abuse (NACADA) Act.*

b. ***That*** *the application is incompetent and lacks merit since the prayers sought will amount to legalizing an illegality.*

c. ***That*** *the applicants have not disclosed true facts and are misleading the court and that the applicants licenses expired long time ago, about the period when there were directives to close bars near schools, residential areas and particularly selling the now called 3rd generations spirits and other unauthorized alcoholic drinks.*

d. ***That*** *the applicants made applications to be allowed to sell the alleged remaining stock upon cancellation of their licenses and that as a member of the committee he attended the meeting whereas, some applications were not approved because they did not meet the requirements among them health concerns. Annexed thereto is letter dated 30th September 2015 communicating detailed of the approved applications, differed and or not approved applications and rejected or closure applications and also communication on requisite conditions for the ones which were approved.*

e. ***That*** *several petitions both oral and written were received from members of the public relating to re-opening of bars and delivery of large stocks and this necessitated meetings involving the bar owners, members of the public and various consultative meetings were held and all parties including bar owners were afforded an opportunity to air their views.*

f. ***That*** *the County Government issued a list of unlicensed bars and those who received temporary licenses to sell stocks and the licensed ones were warned. The relevant communication is attached to the affidavit.*

g. ***That*** *further investigations also revealed that some bars that had been closed for various reasons where still operating, and the applicants herein fall into that category and that due to public outcry and misuse of the temporary licenses, a circular was issued suspending them.*

h. ***That*** *some of the applicants were issued with temporary approval forms which were conditional to payment and existence of stock and other lawful requirements.*

i. ***That*** *some of the alleged applicants are either dead or unaware of these proceedings while others ceased operating, hence the applicants are not genuine.*

Also on record is a supplementary affidavit sworn **John Wanchiuri** on behalf of himself and the **42** applicants filed on 18th January 2016 in which he avers that the second applicant is properly sued in these proceedings, that the allegation that the applicants sell 3rd generation alcoholic drinks is un substantiated and none of the applicants has ever been charged with selling the said drinks and that the temporary licenses were issued after the applicants satisfied all the conditions.

The first Respondents also filed the affidavits of **George Mwangi Murithi** dated 5th February 2016 and

16th February 2016 in which he avers as follows:-

> *a. **That** he is the chairman of Tetu Sub-County Alcoholic Drinks Regulation Committee under the first Respondent herein.*
>
> *b. **That** in 2015 the applicants operated various bars with permanent licenses but the licenses expired and they applied for renewal and that the Nyeri County Alcoholic Drinks Management Act 2013 provides various standards to be met before an applicant is issued with a license.*
>
> *c. **That** the committee received numerous complaints from the public relating to selling of 3rd generation alcoholic drinks concerning bars operated by the applicants in total contravention of the standards set by the Nyeri County Alcoholic Drinks Management Act of 2013, and as a consequence the licenses were not renewed*
>
> *d. **That** the applicants have concealed material facts and that the purpose of the temporary licenses was to enable them to sell their stock within a period of two months, but even then the applicants continued to flout the conditions leading to the closure of the bars and that the appropriate action for the applicants to do was to apply for the renewal of the licenses.*
>
> *e. **That** the committee is legally empowered to issue both temporary and permanent licenses and that it is in the interests of the public that such control measures be maintained.*
>
> *f. **That** the Nyeri County Alcoholic Drinks Management Act 2014 provides for procedures for applications for renewal of licenses or new licenses and various standards to me met before an application is allowed and the committee is mandated to receive and process the applications within the legal requirements.*
>
> *g. **That** some of the bars owned by some of the applicants listed in paragraphs **12-14** of the second affidavit referred to above were closed for not meeting the required standards.*
>
> *h. **That** a consultative meeting was held involving members of the public and it was resolved that the bars were to undergo fresh inspection and **186** bars were inspected out of which **81** bars received recommendations for meeting the standards and were licensed and that the applicants licenses were not issued for failure to meet the standards.*
>
> *i. **That** the Act provides for the procedure for review if the application is not granted and that the applicants have not exhausted the review mechanism provided under the Act.*

On 10th December 2015 the application came up before me *ex parte* and as provided in the proviso to Order **53** Rule **4** of the Civil Procedure Rules, 2010, I directed that the application be served for hearing *inter partes* for determination on the question of grant of leave and whether or not the leave so granted shall operate as a stay pending the hearing and determination of the substantive application. The said proviso provides as follows:-

> *Provided that where the circumstances so require, the judge may direct that the application be served for hearing **inter partes** before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.*

Thus, the issues now before me for determination are **(a)** *whether the applicants have satisfied the threshold for grant of the leave sought* and **(b)** *whether the leave if granted shall operate as stay as aforesaid.*

Both parties opted to file written submissions. Mr. Muhoho, Counsel for the applicants submitted that the impugned decision is contained in a letter dated 30th November 2015 which gave the applicants two

months to sell their existing stock and asserted that he first Respondent did not adhere to part **111** of the *Nyeri County Alcoholic Drinks Control and Management Act 2014* and insisted that the said act has no provision for special licenses. Counsel also submitted that Sections **12** to **17** of the Act gives a elaborate procedure for licensing and submitted that the decision complained of was against the law and urged the court to find so and grant leave as sought and order that the same operates as a stay as sought.

Mr. Ngunjiri, Counsel for the Respondents submitted *inter alia* as follows that the applicants are not entitled to the orders sought because the court has no jurisdiction since the applicants have not exhausted the available legal procedures provided for under section **17** of the Act. Further counsel cited Section **19** of the Act which expressly provides that no person shall appeal to court unless he has exhausted the review mechanism provided under the Act.

Counsel cited the case of *Republic vs Susan Kihika & Others*[1]where it was held *inter alia* as follows:-

> *"It is noteworthy to note that the orders sought are also discretionary and the court before exercising such discretion in favour of the subject must be satisfied that the subject has exhausted or followed the available legal procedures laid down by statute. If the court were to exercise such discretion at this point in time it would be tantamount to judicial interference with the affairs of the concerned political parties. There is a wealth of decisions where the courts have been reluctant to invoke jurisdiction to assist a litigant who has chosen not to exhaust other available statutory procedures for the redress of grievances."*

Counsel also submitted that the orders sought have been overtaken by events since the period communicated in the letter complained of has since lapsed and cited the case of *Republic vs Minister for Metropolitan Dev & 2 Others Ex parte Timwood Products Ltd & 13 Others*[2] and the appropriate procedure would be for the applicants to apply for fresh licenses.

Counsel also insisted that the closure of the bars was in the interest of the public and cited the decision in the case of *Republic vs Kenya National Commission on Human Rights Ex-parte Uhuru Muingai Kenyatta*[3] where it was held that sometimes private rights have to bow to public interest and insisted that in the present case rights of the public far out-weigh the applicants rights.

C. Masaka, Litigation Counsel at the Attorney General's office filed submissions on behalf of the second Respondent. It is important to mention that **Muriuki Ngunjiri** Advocates filed a notice of appointment of advocates dated 17th December 2015 for and on behalf of both Respondents and there is no notice of appointment by C. M. Masaka on behalf of the second Respondent nor is there a notice of change of advocates. There is nothing on record to show that Miss Masaka regularized her appointment as required even though she appeared in the proceedings and filed submissions. For this reason, I find that her submissions are not properly before the court.

The importance of obtaining leave in a judicial review application was well captured in the words of **Waki J** (as he then was) in the case of *Republic vs County Council of Kwale& Another Ex-parte Kondo & 57 others**[4]*** where he stated:-

> *" is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.."*

However, the application before me is a Judicial Review proceeding and not an appeal as provided for under Section **19** of the Nyeri County Alcoholic Drinks and Management Act, 2015. This raises the question *"what is a Judicial Review*? Judicial review is the review by a judge of the High Court of a –

• decision;

• proposed decision;

• refusal to exercise a power of decision.

To determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

Judicial review is a judicial invention to ensure that a decision by the executive or a public body was made according to law, even if the decision does not otherwise involve an actionable wrong. The superior Courts developed their review jurisdiction to fulfill their function of administering justice according to law. The legitimacy of judicial review is based in the rule of law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the rule of law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the paramountcy of the law.

Judicial review is not the same as an appeal. An appeal exists when a statute provides that a decision can be appealed to a court. In an appeal a judge will more clearly review the merits of the earlier decision. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.

As was held in *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji**[5]*:-

> *"Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant....."*

I find that the Judicial Review proceedings before me are properly before the court for the court to determine the legality of the decision and to satisfy itself that the Respondents acted *intra vires* and not *ultra vires*. For this reasons, I find nothing at all in sections 17 to 19 of the Act which can oust the powers of this court to court to entertain the Judicial Review before me and in particular for the court to examine and satisfy itself that the proceedings in question and the impugned decision was arrived at within the confines of the law.

On the question of whether to grant leave or not, guidance can be obtained from the decision in *Meixner & Another vs A.G,**[6]* where it was held that the leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case.

The first step in the judicial review procedure involves the mandatory **"leave stage."** At this stage an application for leave to bring judicial review proceedings must first be made. The leave stage is used to *identify* and *filter* out, at an early stage, claims which may be *trivial* or without *merit*. At the leave stage an applicant must show that he/she has **'sufficient interest'** in[7]the matter otherwise known as *locus standi*. In other words, the applicant must demonstrate that he/she is affected in some way by the decision being challenged. An applicant must also show that he/she has an arguable case and that the case has a reasonable chance of success. The application must be concerned with a public law matter, i.e. the action must be based on some rule of public law. The decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function.

The court has discretion to examine all the circumstances of the case and satisfy itself that the substantive grounds for review are serious enough.[8] As **Sedley J** put it in *R vs Somerset CC Ex parte Dixon(COD)* [9]:-

> *"Public law is not about rights, even though abuse of power may and often do invade private rights; it is about wrongs-that is to say misuse of public power."*

Broadly, in order to succeed, the applicant will need to show either:-

a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or

b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

Judicial Review involves supervision of administrative decision making process, that is, did the public body act in a lawful manner in deciding the way it did. There are three categories of public law wrongs which are commonly used in cases of this nature. These are:-

a. **Illegality**- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be **"illegal".** Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.

b. **Fairness**- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

c. **Irrationality and proportionality**- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute **'irrationality"** or **'perversity'** on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of **Lord Green** in *Associated Provincial Picture Houses Ltd* vs *Wednesbury Corporation*[10]:-

> *"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."*

The above threshold is extremely difficult to meet, that is why the threshold laid down in the above case is usually argued together with the other grounds. However, the onus is on the applicant to establish irrationality or perversity. In general terms, the concept of proportionality requires a balancing of exercise between, on the one hand, the general interests of the community and the legitimate aims of the state and, on the other, the protection of the individual's rights and interests. Thus, the following questions are in my view relevant, namely, is the States objectives legitimate?, is the measure suitable for achieving it?, is it necessary to achieve the aim and does the end justify the means?'

Thus, at the leave stage, the applicant has the burden of demonstrating that the decision is *illegal, unfair* and *irrational* as discussed above. The applicant must persuade the court that the application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the judge believes that the applicant has raised an arguable issue that can only be resolved by a full hearing of the judicial review application. If the court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further.

Broadly speaking, the grounds upon which the courts grant judicial review were stated in the case of *Pastoli vs Kabale District Local Government Council and Others*[11] where it was held as follows:-

> *"in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted …illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality. ……..…**irrationality** is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such decision is usually a defiance of logic and acceptable moral standards.……..…**procedural impropriety** is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice.……It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument.….."*

The grounds upon which the court can exercise its judicial review jurisdiction are incapable of exhaustive listing.[12] I also find useful guidance in the words of **Nyamu J** in *Republic vs The Commissioner of Lands Ex Parte Lake Flowers Ltd***[13]**where he held as follows:-

> *"Availability of other remedies is no bar to the granting of the judicial relief but can however be an important factor in exercising the discretion whether or not to grant the relief….The high court has the same power as the high court in England up to 1977 and much more because it has the exceptional heritage of a written constitution and the doctrines of the common law and equity in so far as they are applicable and the courts must resist the temptation to try and contain judicial review in a strait jacket….Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations…..Even on the principle of establishing standing for the purposes of judicial review the courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them….Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case to case basis.……"*

Judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in **illegality, irrationality, impropriety** of procedure and become the most powerful enforcement of constitutionalism, one of the greatest promoters of rule of law and perhaps one of the greatest and most powerful tools against abuse of power and arbitrariness. [14] It has been said that the growth of judicial review can only be compared to the ever never ending categories of negligence after the celebrated case of *Donoghue vs Stevenson* in the last century.[15]

As was held in the case of *Sanghani Investments Ltd vs Officer in charge Nairobi Remand and allocation Prison,**[16]* Section **8** of the Law Reform Act specifically sets out the orders that the High Court can issue in Judicial Review proceedings and the orders are Mandamus, Certiorari and Prohibition. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

Judicial review is primarily concerned with controlling the exercise by public bodies and statutory bodies on powers conferred upon them. The role of the court is to ensure that those bodies do not exercise those powers unlawfully. In *Nasieku Tarayia vs Board of Directors, AFC & another*[17] it was held that judicial review is an alternative remedy of last resort and where alternative remedy exists, the court has to be satisfied that judicial review is the more convenient, beneficial, efficacious alternative remedy available for the court to grant.

I have carefully evaluated the material before the court and I am not persuaded that the applicants have demonstrated sound grounds for the court to exercise its discretion in their favour and grant the leave sought. First, the orders sought seem out rightly to be geared to perpetuating an illegality. The applicants seek to stay the *decision to close down/shut down the subject applicants bars as well as stay any arrests and harassments.* It is not disputed that the licenses for the premises expired and the applicants were issued with temporary licenses to enable them sell their stock. The period allowed to sell the stock has since lapsed. By asking this court to stay the decision to close un licensed premises is in my view tantamount to asking the court to abet an illegality,

Secondly, the alleged arrests have not been shown to be unlawful or malicious. The arrests are directed upon those who purport to sell alcohol without the requisite license. The charge sheet annexed to the applicants affidavit confirms this. The court cannot stop a lawful arrest and prosecution. It can only intervene if the arrest and prosecution is shown to be an abuse of the court process, illegal or baseless or if it is prompted by ulterior motives or any such other motives other than furtherance of the law and public interest. The applicants have not alleged any of the ingredients of a malicious or illegal prosecution as stated herein or even violation of their constitutional rights.

Also, it has not been shown that the Respondents acted illegally. The first Respondent is vested with powers to issue or approve licenses. It has not been shown that this power was not exercised as provided for under the law. The alleged allegations of unfairness have not been proved. It has not been proved or even alleged that the Respondents acted outside their powers or their decision was arrived at after taking into account irrelevant or extraneous matters. The applicants have not demonstrated that they satisfied all the required conditions to qualify to be issued with the licenses and were denied the licenses and were denied licenses despite being qualified.

In fact the statement and affidavits in support of the application seems to generalize the position instead of giving specific details. For example it is stated *"some applicants proceeded and made payments"*. It is further stated *"as for the other applicants"* the first Respondent has declined to accept their payments. Details of these applicants in the above two categories have not given. It is left to the court to find out who among the long list of applicants falls in either category if at all. In any event, issuance of the licenses is subject to numerous conditions and payment of fees is only one such requirement and even where a license is paid for and granted, the same can be revoked in the event of breach of the conditions. The Respondents case is that the applicants violated the conditions for granting the licenses including selling illegal brew prompting public protests.

The Respondents also maintain that the applicants were issued with temporary licenses for two months to sell their stock and that the entire issue was subjected to public participation and members of the public spoke strongly against some of the applicants. This position has not been rebutted. The applicants are at liberty, if they do satisfy the conditions to apply for licenses and let the application go through the laid down procedures including exhausting all the laid down procedures. In my view, the applicants rushed to court pre-maturely and ought to have exhausted the laid down procedures.

Further, it has been alleged that the applicants withheld crucial information from the court. They for example omitted to disclose details of the happenings before the letter complained of was written as enumerated in the Replying affidavits. They did not disclose that their previous licenses had expired and their premises had been inspected and found to be wanting. In my view, a party is under a duty to disclose to the court all relevant information even if it is not to his or her advantage. In *Brinks-Mat Ltd vs Elcombe*,[18] discussing what constitutes material non-disclosure, the court had this to say:-

> *"**(i)** The duty of the applicant is to make a full and fair disclosure of the material facts. **(ii)** The material facts are those which it is material for the judge to know in dealing with the application made; materially is to be decided by the court and not by the assessment of the applicant or his legal advisers. **(iii)** The duty of disclosure therefore applied not only to material facts known to the applicant but also to any additional facts which would he would have known if he had made inquiries, **(iv)** The extent of inquiries which will be held proper, and therefore necessary, must depend on all the circumstances of the case including **(a)** The nature of the case which the applicant is making when he makes the application, **(b)** The order for which application is made and probable effect of the order on the defendant, and **(c)** .....The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. ...."*

In *Republic vs The Independent and Boundaries Commission & 2 Others ex-Parte Ibrahim Hussein Washenga*[19] **Muriithi J** held that an *ex parte* applicant is obliged to make full and frank disclosure of the case and where the applicant conceals material facts, the court will refuse to deal with the merits of the case and discharge any order or remove any benefit that the *ex parte* applicant would have received on account of the concealment or non disclosure of material facts.[20]

Attached to the applicants application is a charge sheet showing one of the applicants had been charged in court for permitting the sale of Alcoholic Drinks without a license. The applicants describe the said charges as harassment. In my view, for such a allegation to suffice, the applicant has a duty to demonstrate that the said charges were not genuine or were malicious, or that the person accused went through the trial and the same were dismissed or found to be malicious and baseless. In fact, in my view, such charges do confirm all what the Respondents have been saying, that is the applicants have been acting in breach of the law.

Also attached to the Respondents affidavit is a letter dated 7th December 2015 listing three of the applicants as persons who were not licensed. The contents of this letter have not been rebutted nor have the applicants shown that the said contents are malicious or baseless. If the applicants or some of them are unlicensed as evidenced by the said letter, then, how can this court issue orders to protect them to continue operating without licenses. The proper thing would be for any desiring applicant to allow his premises to be inspected and if found fit pursue the laid down channel and obtain the license and if the license is denied illegally, then challenge the decision in court.

Further, the letter that triggered the application before me dated 30th November 2015 is in my view a clear communication whose contents have been summarized in paragraph **6** of the applicants affidavit. The illegality of the said letter has not been brought out. In fact it simply states that those whose licenses had been cancelled were granted two months to exhaust their stocks and that the enforcement committee shall commence inspection from 9th December 2015. An administrative decision can only be challenged for ***illegality, irrationality*** *and* ***procedural impropriety.*** A close look at the material presented before me does not demonstrate any of the above. The intended inspection has not been shown to be illegal or *ultra vires* and outside the functions of the first Respondent.

As stated earlier, the grant of leave to file judicial review proceedings as well as the ultimate grant of the orders or certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought to be initiated and satisfy itself that their is reasonable basis to justify the leave sought so as to file the substantive application in court.

Upon analysing all the material before me and upon considering the arguments advanced by both sides, I find that the applicants have not satisfied the threshold for this court to grant leave as sought. Having so concluded, it is not necessary for me to consider the next issue, namely whether leave should operate as stay.

The effect is that the leave sought to institute Judicial Review Proceedings and apply for an order of

Certiorari is refused and the application dated 10th December 2015 is hereby dismissed with costs to the Respondents.

Orders accordingly

Signed, Dated and Delivered at **Nyeri** this **1st** day of **April** 2016

John M. Mativo

Judge

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[1] J.R. No. 20 of 2014

[2] J.R. Case No. 122 of 2011

[3] Misc Civil App No. 86 of 2009

[4] Mombasa HCMISC APP No 384 of 1996

[5] [2014] eKLR

[6]{2005} 1 KLR 189

[7] See R vs Panl for Takeovers and Mergers ex p Datafin {1987}I Q B 815

[8] See R vs Inland Revenue Commissioner ex p National Federation of Self -Employed and Small Businesses {1982}AC 617

[9]{1997} Q.B.D. 323

[10] {1948} 1 K. B. 223, H.L.

[11] {2008} 2EA 300

[12] See JR NO. 112 of 2011, High Court, NBI, Seventh day Adventist church , applicant and PS Ministry of NBI Metropolitan Dev

[13] HC MISC App No 1235 of 1998

[14] See Ondunga J in J R 112 of 2011 cited above in note 3

[15] Ibid

[16] {2007} 1 EA 354

[17] {2012}Eklr

[18] {1988} 3 ALL ER 188

[19] {2013}eKLR

[20]See R vs The Kensington General Commissioners for purposes of Income Tax ex parte Princes Edmund de Polgnac {1971} 1 KB 486