REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

HIGH COURT MISCELLANEOUS APPLICATION NO. 5 OF 2012

IN THE MATTER OF THE DECISION BY THE THIKA WEST DISTRICT ALCOHOLIC DRINKS COMMITTEE REVOKING/DENYING RENEWAL OF LICENCE TO RESTAURANT & BAR OWNERS IN JUJA CONSTITUENCY

BETWEEN

REPUBLIC
…….APPLICANT

AND

MINISTER IN THE OFFICE OF THE PRESIDENT PROVINCIAL ADMNISTRATION & INTERNAL SECURITY……..1ST RESPONDENT

THIKA WEST DISTRICT ALCOHOLICS DRINKS COMMITTEE……..…2ND RESPONDENT

HON. ATTORNEY GENERAL…….3RD RESPONDENT

ex parte

FRANCIS MBUTHIA KAMAU

JUDGMENT

By a Notice of Motion dated 20th day of November, 2012, the Applicant sought judicial review orders of certiorari to remove to this Honourable Court for purposes of being quashed "***the decision of Thika West District Alcoholic Drinks Committee made and communicated vide undated notice from the Office of the President Provincial Administration and Internal Security to deny, revoke or withdraw license to the Applicants herein"*** and prohibition to restrain the 1st and 2nd Respondents either by themselves or through provincial administration, the police or through their agents or assigns ***"from implementing the decision to deny the applicant the said licence to operate bars and restaurants in breach of the rules of natural justice."***

The substantive Motion was preceded by a Chamber Summons dated 30th October, 2012 filed under a certificate of urgency of even date seeking this honourable court's leave to apply for the orders of certiorari and prohibition against the Respondents. I note, however, that while the Applicant was specific in his application for leave that the order of certiorari was being sought to bring to this court for purposes of being quashed a decision by the 2nd Respondent communicated to him vide a letter dated 8th August, 2012 by the 1st Respondent, the substantive Notice of Motion speaks of ***"undated notice from the Office of the President Provincial Administration and Internal Security".***

The Applicant's Chamber Summons for leave and the subsequent Notice of Motion were based on a statutory statement dated 30th October, 2012 and supported by a verifying affidavit sworn by the *ex parte* applicant, Francis Mbuthia Kamau on the same date. It is contended in these documents that, at all times material to this Motion, the Applicant was the proprietor of a business enterprise in Thika town trading under the name and style of Mambo Yote Bar & Restaurant. The Applicant's core business was sale of alcohol and to that extent it was largely regulated or ought to have been regulated by the Alcoholic Drinks Control Act, No. 4 of 2010 (hereinafter referred to as "the Act") and the regulations made thereunder.

The Alcoholic Drinks Control Act, No. 4 of 2010 is amply elaborate in its provisions on the control of the production, sale, and use of alcoholic drinks; licensing, which is covered under Part III of the Act, is one of the means through which this control is exercised. Of particular relevance to this Motion is **Section 7 (1) (b)** thereof which provides that no person shall sell, dispose of, or deal with any alcoholic drink except under and in accordance with a licence issued under the Act.

The licence to sell, dispose of or deal with alcoholic drink is issued by the District Alcoholics Drinks Regulation Committee, the second Respondent herein, which is established under **Section 8 (1)** of the Act with an express mandate to issue licences contemplated under **Section 7 (1) (b)** of that Act. The Committee may also renew such licences subject to such conditions as are provided in the Act although in

issuing licences the committee may impose on the licensee or licensees such terms or conditions it may deem appropriate; in addition to its powers to grant or renew licences, the Committee has been vested with the discretion, whenever any application for a licence or renewal of a licence is made, to refuse to grant or renew a licence. Where a licence has been previously issued, the Committee may withdraw or cancel it. The powers and the discretion of the Committee are matters covered under **Section 14 (1)** of the Act. A licence issued or renewed under the Act has, pursuant to **Section 14 (3) (b)** of the Act, a lifespan of twelve months from the date of issue.

Section 9(1) of the Act is to the effect that the Application to operate an establishment for the sale of an alcoholic drink must be made in a prescribed form to the District Committee. **Section 13(1) (a) to (f) of the Act** spells out circumstances under which the licence shall not be granted. Where the application before the Committee is that of a renewal of an existing licence, as appears to have been the case in this Motion, Section **13(2)** comes to play and such an application for renewal will be refused if the applicant falls victim to any of the conditions spelt out in **Section 13(2) (a) to (f**).

What recourse is available to an applicant whose application for a licence or renewal of a licence has been rejected? **Section 15** of the Act provides the answer; it provides that an applicant whose application for a new licence or to renew a licence has been refused shall appeal against such refusal to the High Court within twenty-one days of the refusal.

Coming back to the Applicant's Motion, it is apparent that the Applicant was granted an alcoholic drinks licence on 27th October, 2011; it is clear on the face of the licence a copy of which was included in the Applicant's bundle of exhibits annexed and marked as "JNM" on his verifying affidavit that the licence was set to expire on 30th June, 2012. The Applicant has indicated in his statutory statement that he sought renewal of the licence in July 2012. By a letter dated 8th August, 2012 the District Alcoholic Drinks Committee of Thika West District, the second Respondent herein, informed the Applicant that his application for renewal of licence had been refused. The reasons given for refusal to renew the licence were that the Applicant's business was 100 metres from two learning institutions and that the Applicant did not have a restaurant or hotel licence. The Applicant was aggrieved by that decision and it is for this reason he has moved this honourable court by way of judicial review to intervene and address his grievances by way of certiorari and prohibition.

The Notice of Motion was opposed and the Honourable Attorney General who appeared for the Respondents filed a Replying affidavit sworn by the Chairman of the 2nd Respondent herein. After several adjournments the Motion finally came up for hearing *inter partes* on 5th February, 2013 when both counsel for the Applicant and the Respondents ably argued and submitted on their respective clients' cases; the court acknowledges counsel's industry in this respect.

Among the grounds that the Applicant has raised for his application is that prior to the application for renewal of his licence, the Applicant had paid for and obtained several other licences and permits that he considered a prerequisite before his alcoholic licence could be renewed and having obtained these authorisations it was his legitimate expectation that the relevant District Alcoholics Drinks Committee would renew his alcoholic drinks licence. However, Regulation 14 of the Alcoholic Drinks Control (Licensing) Regulations, 2010 suggests otherwise; that Regulation is to the effect that notwithstanding a licence has been issued by the District Committee, a licensee shall bear the responsibility of obtaining the

approvals of other Government agencies, local authorities or other relevant authorities that may be required for the provision of licensed services. It is clear from this Regulation that the issue of the alcoholic drinks licence is independent of any other licence or authorisation and in any event the acquisition of other licences or permits from any other authority is not a condition precedent to obtaining an alcoholic drinks licence, unless the Committee expressly states so. The perception that the Applicant legitimately expected, or that he was entitled to, an alcoholic drinks licence only because he had other licences or permits was, in view of the provisions of Regulation 14, misplaced.

Even if the Applicant was to be taken at his word on the question of prior licences or permits, the court notes that among the licences that the Applicant alleges to have obtained was the restaurant and hotel licence which the 2nd Respondent found that the Applicant did not have and for that reason rejected the application for renewal of his licence. A copy of the restaurant licence is annexed to the Applicant's affidavit and it shows that it was issued on 15th August, 2012; if the Applicant applied for renewal of his licence in July, 2012 as he has alleged then it is logical that he did not have the restaurant licence as at the time the Alcoholic Drinks Committee considered his application and, accordingly, that committee cannot be faulted for rejecting the Applicant's application for lack of a restaurant licence if, in the Committee's view, that licence was necessary for the renewal of the licence. Simply put, the Applicant's own evidence does not support his case.

The Applicant has also stated as a ground of his application that many other bars and restaurants are within prohibited limits of the learning institutions yet they have been granted alcoholic drinks licences; the applicant's case is that since the rest of his competitors in business have been given licences despite their apparent failure to meet the conditions set by the law or the Alcoholic Drinks Committee, it his legitimate expectation that he should also have had his licence renewed. The Applicant does not seem to deny that his business enterprise is within 100 metres of learning institutions; his bone of contention is that he is not the only one who has breached this condition and to the extent that he has been denied a renewal of his licence when other culprits' licences have either been granted or renewed he has been discriminated against. The discrimination stems from, so the Applicant alleges, corruption and extortion tendencies on the part of the Respondents. It is imperative to bear in mind that corruption, extortion or any allegations of malfeasance in public office are, by any stretch of imagination, serious allegations which not only bring the integrity of an individual into question but also border on criminality and it is necessary, if not mandatory, that whenever such allegations are made against any person in proceedings such as these, they must, as much as possible, be proved. However, in this motion, no evidence or particulars thereof have been proffered to support the Applicant's allegations. On more than one occasion, the Court directed that the Applicant's application be served upon the interested parties or persons against whom the allegations had been made so as to respond to these rather unsavoury remarks but as at the time of hearing this Motion *inter partes* none of those parties or persons had been served. In the absence of proof or particulars therefore of these allegations I am hesitant to accept them as valid or substantive grounds upon which an application of judicial review can be founded.

The grounds upon which administrative action is subject to control by judicial review have been classified as threefold. The first ground is 'illegality' meaning that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second is 'irrationality', namely *Wednesbury* unreasonableness. The third is 'procedural impropriety' (**See Council of Civil Service Unions versus Minister for the Civil Service (1985) AC 374 per Lord Diplock at 410-411).** Without any proof of illegality, irrationality or procedural impropriety on the part of the second Respondent, the Applicant's allegations appear to me to be far from any of these well-established grounds for interrogating an administrative action; I am not persuaded that, in coming to the decision it did, the second Respondent fell short of any of these thresholds. There is no sufficient material upon which I can exercise my discretion in favour of the Applicant.

One further question which warrants consideration is whether in view of the provisions of **Section 15** of the Act, the Applicant's grievances, assuming they were merited, could be addressed by way of an application for Judicial Review. Counsel for the Respondents raised this question in her submissions; she also made reference to it in the replying affidavit though it is more of a legal issue rather than a factual one. It was submitted that the only recourse available to the Applicant, in the wake of the second Respondent's decision, was an appeal against that decision and not an application by way of judicial review. **Section 15** which addresses this issue provides thus:

"An applicant whose application for a new licence, to renew or transfer a licence has been refused or cancelled may within twenty-one days of such refusal appeal to the High Court."

On the face of it and literally speaking this law provides the Applicant, firstly, with the option of challenging the Committee's decision refusing an applicant's application for a new, renewal of or transfer of a licence and secondly, where he chooses to exercise this option, he is enjoined to do it only through an appeal to the High Court. The question that then follows is whether, in the light of the Applicant's Motion, an application by way of Judicial Review can be interpreted to mean the appeal contemplated under **Section 15** of the Act. In other words, where a statute provides for an appeal against a decision of a tribunal in exercise of its statutory mandate can a judicial review application pass for such an appeal? Is judicial review, in these circumstances, distinct from an appeal?

Judicial review and what it is all about is a wide subject in administrative law and to navigate to this subject's depths would require no less than a treatise which, for purposes of this judgment, is unwarranted. However, the questions that have been raised are not novel; they are questions that have been raised and adequately addressed by learned judges in previous cases and I am content, in this judgment, to follow and adopt those decisions in so far as they answer these pertinent questions.

There is no doubting that judicial review is always concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but with ensuring that the bodies exercising public functions observe the substantive principles of public law and that the decision-making process itself is lawful. In ***Chief Constable of the North Wales Police v Evans*** **[1982] 3 All ER 141 at 154** Lord Brightman said;

"**Judicial Review, as the words imply is not an appeal from a decision, but a review of the manner in which the decision was made."**

Again in ***R v Panel on Take-overs and Mergers, ex p Datafin plc*** **[1987] QB 815 at 842,** Sir John Donaldson MR said;

"***an application for judicial review is not an appeal".***

In ***R v Secretary of State for the Home Department, ex p Launder*** **[1997] 3 All ER 961 at 978,** Lord Hope of Craighead stated thus;

"the function of the court in the exercise of its supervisory jurisdiction is that of review. This is not an appeal against the Secretary of State's decision on the facts".

It is clear from the foregoing cases that judicial review is different from an ordinary appeal. Contrary to determination of a judicial review application, when hearing an appeal the court is concerned with the merits of the decision under appeal. This is explained further in ***Re Amin*** **[1983] 2 AC 818 at 829** where Lord Fraser of Tullybelton observed that:

"**Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made . . . Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer"**.

And in ***R v Secretary of State for the Home Department, ex p Brind*** **[1991] 1 AC 696 at 765**, Lord Lowry said:

"Judicial review of administrative action is a supervisory and not an appellate jurisdiction; the court 'is not sitting on appeal but satisfying itself as to whether the decision-maker has acted within the bounds of his discretion".

In view of the foregoing decisions and pronouncements, it can safely be concluded that where a statute restricts an applicant, as it does in this particular case, to a particular course in challenging a decision, it is incumbent upon the applicant to take that stipulated course; his options are limited and in this case the only avenue open to the Applicant was lodging an appeal which to my mind is the only statutory remedy available against the second Respondent's decision.

It is also worth adding that ordinarily, the courts in their discretion will not normally make the remedy of judicial review available where there is an alternative remedy by way of appeal **(see *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] QB 424 at 433)** and judicial review may be granted only where the alternative statutory remedy is, as has been stated by Lord Denning MR in ***R v Paddington Valuation Officer, ex p Peachey Property Corpn Ltd*** **[1966] 1 QB 380 at 400, [1965] 2 All ER 836 at 840** "nowhere near so convenient, beneficial and effectual" or "where there is no other equally effective and convenient remedy"(see ***R v Hillingdon London Borough Council, ex p Royco Homes Ltd*** **[1974] QB 720 at 728, per Lord Widgery LCJ**). Factors to be taken into account by a court when deciding whether to grant relief by judicial review when an alternative remedy is available are whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory

procedure would be quicker, or slower, than the procedure by way of judicial review (see ***R v Civil Service Appeal Board, ex p Bruce*** **[1988] 3 All ER 686)**; and whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body as per Gladwell LJ in ***R v Hallstrom, ex p W*** **[1985] 3 All ER 775 at 789-790.**

Judgments in the cases of ***R v Chief Constable of the Merseyside Police, ex p Calveley*** **(ibid) at 440 and 267** and ***Harley Development Inc v IRC*** **[1996] 1 WLR 727,** made references to the need for '**exceptional circumstances**' before the jurisdiction of judicial review will be exercised where there is an alternative remedy by way of appeal**.** What amounts to 'exceptional circumstances' was explained in ***R v Secretary of State for the Home Department, ex p Swati*** **(1986) 1 All ER at 485 and 724;** Sir John Donaldson MR said in that case that **"exceptional circumstances defy definition, but where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided". In *R v Chief Constable of the Merseyside Police, ex p Calveley (ibid),*** Sir John Donaldson MR said that judicial review is **'very rarely' available when there is an alternative remedy by way of appeal (at 433 and 261-262); and May LJ said that 'the normal rule' in** cases such as this is that an applicant for judicial review should first exhaust whatever other rights he has by way of appeal (at 435 and 263).

In ***R v IRC, ex p Opman International UK*** **[1986] 1 All ER 328 at 330, [1986] 1 WLR 568 at 571**, Woolf J said the fact that there is an alternative procedure available in revenue matters does not mean that an application for judicial review should never be made; however, particularly in such matters, applicants should bear in mind that 'an application for judicial review is the procedure, so to speak, of last resort. It is a residual procedure which is available in those cases where the alternative procedure does not satisfactorily achieve a just resolution of the applicant's claim'.

When I consider the Applicant's Motion through the spectrum of the forgoing decisions, I cannot find anything that would suggest that the Applicant opted for judicial review rather than an appeal because of exceptional circumstances; indeed such circumstances have not been demonstrated to exist. Neither has it been suggested in the Application that the Applicant preferred the judicial review route to an appeal one because the latter is less convenient, effectual, beneficial or expedient than the former. Even if the Applicant was to convince the court that the judicial review alternative is preferable for reasons of convenience, efficacy and expediency, he would still have had a further hurdle to overcome; in opting for one course rather than the other, convenience, efficacy and expediency are attributes considered not just in the interest of the Applicant alone but also take into account the interest of the public at large. It has been held, per Glidewell J at page 63, in ***R v Huntingdon District Council, ex p Cowan [1984] 1 All ER 58*** *that,* ***"a major factor to be taken into account is whether judicial review or the alternative remedy available by way of appeal is the most effective and convenient in all the circumstances, not merely for the applicant, but in the public interest."***

In the final analysis, the Applicant's Motion is not only deficient in merits but, from whichever angle I consider it, I cannot help but find that the Motion is also misconceived; I, accordingly dismiss, it with costs.

Dated and delivered in open court on the 5th day of April, 2013

Ngaah Jairus

JUDGE

In the presence of:

Court Clerk:_____

Counsel for the Applicant:_____

Counsel for the Respondent:_____