

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**JUDICIAL REVIEW .MISC NO. E002OF 2025**  
**CHRISTOPHER LUMONJE.....APPLICANT**  
**VERSUS**  
**MALAVA SUB-COUNTY LIQUOR LICENSING BOARD.....1<sup>ST</sup>**  
**RESPONDENT**  
**KAKAMEGA COUNTY ALCOHOLIC DRINKS REGULATIONS**  
**ADMINISTRATIVE**  
**COMMITTEE.....2<sup>ND</sup> RESPONDENT**  
**AND**  
**REPUBLIC.....EX-PARTE**  
**APPLICANT**  
**RULING**

1. The applicant filed a notice of motion dated 25<sup>th</sup> May 2025, pursuant to leave granted on 30<sup>th</sup> May 2025. The applicant seeks the following substantive orders against the respondents:
  - a. An order of certiorari to quash the decisions of the 1<sup>st</sup> respondent dated 24<sup>th</sup> February 2025 and the 2<sup>nd</sup> respondent dated 16<sup>th</sup> April 2025 for refusing to renew the applicant’s liquor licence for Kakunga Best Bar and Restaurant.
  - b. An order of prohibition prohibiting the respondents, their agents, or servants from interfering with, closing, or otherwise disturbing the applicant’s business operations at the said premises.
  - c. An order of mandamus compelling the 1<sup>st</sup> respondent to consider the applicant’s renewal application afresh in accordance with the law and to issue the requisite liquor licence for the year 2025.
2. The application is premised on the grounds that the decisions of the respondents were illegal, irrational, procedurally improper, and in breach of the applicant’s right to fair administrative action as

guaranteed under **Article 47 of the Constitution** and the **Fair Administrative Action Act, No. 4 of 2015**.

- 3.** The application is opposed by the respondents, who filed a statement of grounds of opposition dated 16<sup>th</sup> June 2025 and a replying affidavit sworn by the county director. The respondents contend, inter alia, that this court lacks jurisdiction as there is a statutory appeal mechanism, that the decision was lawful and rational and that the application is an abuse of the court process.
- 4.** The applicant is the proprietor of Kakunga Best Bar and Restaurant located at Kakunga within Malava Sub-County. He has operated this business for approximately twenty-three (23) years, a fact not contested by the respondents. On or about 20<sup>th</sup> November 2024, the applicant submitted an application to the 1<sup>st</sup> Respondent, for the renewal of his annual liquor licence.
- 5.** Pursuant to the 1<sup>st</sup> respondent's protocol, a multi-agency team comprising officers from the police, public health, and education departments conducted inspections for all liquor businesses and the applicant was slotted between 16<sup>th</sup> and 23<sup>rd</sup> December 2024. Reports from these agencies as evidenced by the respondent's report concluded that the premises were located 38 meters from Kakunga Girls Secondary School and 42 meters from Kakunga Primary School.
- 6.** Based on these reports, the 1<sup>st</sup> respondent, in its sitting of 5<sup>th</sup> February 2025, resolved to refuse the renewal application. The applicant was

notified of this decision by a letter dated 24<sup>th</sup> February 2025, which cited the proximity to learning institutions as the sole reason for refusal.

7. Aggrieved, the applicant, lodged an appeal for review before the 2<sup>nd</sup> Respondent, the Kakamega County Alcoholic Drinks Regulations Administrative Committee. The applicant contended, among other things, that:

a. The applicable law was the Kakamega County Alcoholic Drinks Control Act, 2014, which prescribes a distance of 100 meters and provides for exemptions under **Section 14(3)** where premises are sealed off and do not bear external advertisements.

**“14. (1) The Sub-county Committee shall not grant a new licence for the sale of an alcoholic drink to be consumed on the premises unless the Sub-county committee is satisfied:**

**(c) that the premises in respect of which the application is made are located at least one hundred metres from any nursery, primary, secondary or other learning institutions for persons under the age of eighteen years.”**

b. As a renewal applicant with a long-standing business, his application should have been considered under the specific, restrictive grounds set out in Section 15(2) of the County Act, which were not alleged.

**“14(2) The Sub-county committee may refuse to renew an existing licence only when the Sub-county Committee is satisfied that:**

**(a) the licensee is not a fit and proper person to hold the licence; or**

**(d) the business to which the licence relates is conducted in a manner that is in breach of this Act, or any other rules and regulations for the time being in effect, or conditions set by the Sub-county Committee ; or**

**(e) the conditions of the licence have not been satisfactorily fulfilled;”**

c. The principles of natural justice were violated as he was not afforded a hearing prior to the initial decision, nor were the inspection reports furnished to him for comment.

8. The 2<sup>nd</sup> respondent heard the review on 8<sup>th</sup> April 2025 and delivered its decision on 16<sup>th</sup> April 2025. The committee upheld the 1<sup>st</sup> respondent’s decision. It based its ruling on three key findings:

a. That the premises violated the distance stipulated in Section 14(3) of Kakamega County Alcoholic Drinks Control Act.

b. That the national legislation prevailed over the conflicting provisions of the County legislation.

c. That the applicant had been accorded a fair hearing through his written submissions.

9. The following issues arise for determination:
- a. Whether this court has jurisdiction to entertain this application for judicial review.
  - b. Which legal regime governs the licensing of the applicant's premises: The National Alcoholic Drinks Control Act, 2010, or the Kakamega County Alcoholic Drinks Control Act, 2014.
  - c. Whether the respondents' decisions were arrived at through a process that was procedurally fair.
  - d. Whether the applicant is entitled to the judicial review orders sought.

### **Analysis**

10. In **Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR)**, the Supreme Court said of Judicial Review;
- “Judicial review was introduced to Kenya from England in 1956 through sections 8 and 9 of the Law Reform Act, Cap 26. The jurisdiction to hear and determine judicial review was then vested in the High Court. Under that system, the High Court could issue orders of mandamus, prohibition, and certiorari. The grounds for the issuance of such orders were borrowed from common law. Prior to the promulgation of the Constitution of Kenya, 2010, there were two legal foundations***

***for the exercise of the judicial review jurisdiction by the Kenyan courts found in sections 8 and 9 which constituted the substantive basis for judicial review of administrative actions on the one hand, and, order 53 of the Civil Procedure Rules which was the procedural basis of judicial review of administrative actions, on the other hand. The entrenchment of judicial review under the Constitution of Kenya, 2010 elevated it to a substantive and justiciable right under the Constitution. Accordingly, judicial review was no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in the Constitution. Thus, Article 47 of the Constitution provided that every person had a right to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair.***

***The entrenchment of judicial review in the Constitution had led to the emergence of divergent views on the scope of judicial review. The first group postulated that judicial review was concerned with the process a statutory body employed to reach its decision and not the merits of the decision itself while the second group opined that under the current constitutional dispensation, courts could delve into both procedural and merit review in resolving disputes."***

11. Article 50 CoK 2010 provides;

**“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

12. The respondents’ preliminary objection is that this court lacks jurisdiction. They argue that the applicant’s recourse was a statutory appeal to the high court under **Section 15 of the Alcoholic Drinks Control Act**, and that judicial review is inappropriate.

**“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 against such refusal to the High Court.”**

13. This objection is without merit and is hereby overruled. The jurisdiction of the high court to supervise inferior tribunals and public bodies through the remedy of judicial review is inherent and constitutional. It is preserved by **Article 165(6) and (7) of the Constitution**.

**“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**

**(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”**

14. In addition, **section 9(1) of the Fair Administrative Action Act** states:

**“(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.”**

15. This supervisory jurisdiction is distinct from an appellate jurisdiction. In **Republic vs Chief Magistrate’s Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties); Ex-parte Applicant: Pravin Galot**, the High Court distinguished supervisory jurisdiction as against appellate jurisdiction and held that it ought to be used only in circumstances of grave miscarriage of justice:

***“59. There is a clear distinction between supervisory jurisdiction, judicial review jurisdiction and appellate jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control the power is conferred on superior courts to issue the necessary and appropriate writs.{{^}}60. This power of superintendence conferred by Article 165 (6) of the Constitution, as pointed out by Harries, CJ in Dalmia Jain Airways Ltd v Sukumar Mukherjee,<sup>[43]</sup> is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of the Constitution to interfere.”***

16. Judicial review is concerned not with the merit of the decision but with the decision-making process. It inquires whether the decision-maker had the power to make it, followed the right procedure, and acted fairly.

17. The core of the substantive dispute is a conflict of laws. The applicant relies on the Kakamega County Alcoholic Drinks Control Act, which apportions 100 metre distance between the premise and schools, whereas the respondents rely on the National Alcoholic Drinks Control Act which demands a 300 metre absolute prohibition. **Section 12 (1)(c) Of the National Alcoholic Drinks Control Act** dictates:

**“12. Licence for premises**

**(1) The District Committee shall not grant a new licence for the sale of an alcoholic drink to be consumed on the premises unless the District Committee is satisfied:**

**(c) that the premises in respect of which the application is made are located at least three hundred metres from any nursery, primary, secondary or other learning institutions for persons under the age of eighteen years.”**

18. Whereas **Section 14 (1)(c)** of the Kakamega County Alcoholic Drinks Control Act, dictates:

**“14. (1) The Sub-county Committee shall not grant a new licence for the sale of an alcoholic drink to be consumed on the premises unless the Sub-county committee is satisfied:**

**(c) that the premises in respect of which the application is made are located at least one hundred metres from any**

**nursery, primary, secondary or other learning institutions for persons under the age of eighteen years.”**

19. **Article 191(2)** of the Constitution provides an unequivocal resolution. National legislation prevails over county legislation provided that the matter cannot be regulated effectively by legislation enacted by the individual counties.

**“191. (1) This Article applies to conflicts between national and county legislation in respect of matters falling within the concurrent jurisdiction of both levels of government.**

**(2) National legislation prevails over county legislation if:**

**(a) the national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or**

**(b) the national legislation is aimed at preventing unreasonable action by a county that:**

**(i) is prejudicial to the economic, health or security interests of Kenya or another county; or**

**(ii) impedes the implementation of national economic policy.”**

20. The regulation of alcoholic drinks, for the purposes of protecting public health and the welfare of children, is a classic matter of national concern that requires uniform standards to be effective. The Alcoholic Drinks Control Act, in its preamble states the objective of the Act:

**“The object and purpose of this Act is to provide for the control of the production, sale, and use of alcoholic drinks, in order to:**

**(a) protect the health of the individual in the light of the dangers of excessive consumption of alcoholic drinks;**  
**(b) protect the health of persons under the age of eighteen years by preventing their access to alcoholic drinks.”**

**21.** This court finds that Section 12(1)(c) of the National Alcoholic Drinks Control Act, 2010 is applicable. It provides a blanket prohibition against licensing premises within three hundred metres of any primary or secondary school. There is no room for exemptions or discretionary waivers in the national statute concerning this specific siting requirement.

**22.** The respondents’ finding that the applicant’s premises are 38 metres and 42 metres from two schools is a finding of fact grounded in official inspection reports. This places the premises in direct and unequivocal contravention of the prevailing national law. The decision to refuse a licence on this basis cannot, therefore, be said to be illegal or irrational. The objective of shielding school going children from the proximity of bars is a legitimate and compelling public interest, recognized under **Article 53 (2)** of the Constitution.

**“(2) A child’s best interests are of paramount importance in every matter concerning the child.”**

**23.** Consequently, the applicant’s arguments based on the county Act’s 100-meter rule and the special provisions for renewal in Section 15(2) are superseded. A renewal is not an automatic entitlement but a

fresh application subject to all current legal requirements. A premise that is illegally sited under the prevailing law cannot acquire legitimacy through renewal.

24. While the respondents' decision was substantively lawful, the court must scrutinize the path taken to reach it. **Section 4 (1) of the Fair Administrative Action Act** mandate that administrative action must be procedurally fair.

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

25. The record reveals a critical flaw in the initial stage of the process. The 1<sup>st</sup> respondent made its decision on 5<sup>th</sup> February 2025 based on adverse inspection reports from December 2024. The applicant was simply notified of the refusal by a letter dated 24<sup>th</sup> February 2025. There is no evidence that prior to this decision, the applicant was:
- a. Served with the specific inspection reports that formed the bedrock of the case against him.
  - b. Given notice of the intended refusal and the specific grounds.
  - c. Offered any opportunity, whether oral or in writing, to address the findings in those reports before the decision was made.

26. The right to be heard is a cornerstone of natural justice. It must be exercised at a stage when it can be meaningful before a final and adverse decision is rendered. In **Republic vs. Attorney General & Another Ex-parte Salome Nyambura Nyagah [2014] Eklr**, the court found expressed itself thus:

***“In my view fair administrative action imports the rules of natural justice. To fail to adhere to the rules of natural justice may render an administrative action procedurally improper and procedural impropriety is no doubt one of the grounds for grant of judicial review remedies. In Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, the Court while citing Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 held: ‘...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 or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.’”***

27. The subsequent review before the 2<sup>nd</sup> respondent, while it involved written submissions, was an appeal. An appeal is not a cure for a fundamental denial of justice at first instance. The defect was the

lack of a fair hearing at the point where the primary administrative decision was made. This constitutes a procedural impropriety.

28. The respondents' argument that the applicant was heard through his lawyers on appeal is therefore rejected. A hearing on appeal does not retroactively sanitize a process that was fundamentally unfair at its origin.

### **Conclusion**

29. Having found a procedural impropriety, the applicant is entitled to a remedy. However, the remedy must be proportionate and just.

30. An order of mandamus to compel the issuance of a licence is not possible. This court cannot order a public body to act contrary to substantive law. The premises remain in violation of the 300-meter rule.

31. An order of prohibition to prevent the closure of the business is, at this juncture, premature and overly broad. It is not the role of this court to grant a blanket operational license where a legal impediment exists.

32. The appropriate remedy is an order of certiorari.

33. The decisions of both respondents are hereby quashed. The rationale is clear the 2<sup>nd</sup> respondent's decision on appeal is infected by the procedural flaw in the 1<sup>st</sup> respondent's initial decision, which it upheld. The entire process is tainted.

34. The quashing of the decisions, however, does not grant the applicant a licence. It restores the parties to the position they were in before the flawed decision was made. Consequently, the matter is remitted back to the 1<sup>st</sup> respondent, the Malava Sub-County Liquor Licensing Committee.

### **Orders**

35. The Preliminary Objection on jurisdiction raised by the respondents is hereby overruled.

36. An order of certiorari is hereby issued, removing into this court and quashing the decision of the 1<sup>st</sup> respondent dated 24<sup>th</sup> February 2025 and the consequent decision of the 2<sup>nd</sup> respondent dated 16<sup>th</sup> April 2025.

37. The applicant's application for renewal of a liquor licence for "Kakunga Best Bar and Restaurant" is remitted back to the 1<sup>st</sup> respondent for a fresh determination.

38. In conducting the fresh determination, the 1<sup>st</sup> respondent shall:

- a. Provide the applicant with copies of all inspection reports, evidence, or material it intends to rely upon.
- b. Give the applicant a clear and reasonable notice of not less than fourteen (14) days to submit a written response or request for an oral hearing to address the said material.

c. After considering the applicant's response, make a new decision which shall be communicated in writing with reasons.

39. The prayers for orders of mandamus and prohibition are hereby declined.

40. Each party shall bear its own costs.

41. Right of Appeal 30 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA 30<sup>TH</sup> DAY OF APRIL, 2026.**

**S.MBUNGI**

**JUDGE**

**In the presence of:-**

**CA:** Angong'a

Mr. Arwanda for the Respondent present online.

Alwenya for the Applicant absent.

Applicant absent.