



Republic v Officer of the County Executive Committee Member Trade, Tourism and Cooperative Development Kilifi & another; Muriungi t/a Mabeshte Sport Bar (Exparte) (Miscellaneous Civil Application 52 of 2021) [2023] KEELC 10 (KLR) (11 January 2023) (Ruling)

Neutral citation: [2023] KEELC 10 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS CIVIL APPLICATION 52 OF 2021
MAO ODENY, J
JANUARY 11, 2023
IN THE MATTER OF: ARTICLES 20 (3) ,22, 23, 40,47,48
AND 50 OF THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF: SECTION 2,7,8,9, 10 (1) AND 11 OF
THE FAIR ADMINISTRATIVE ACTION NO.4 OF 2015
AND
IN THE MATTER OF: AN APPLICATIO FOR JUDICIAL REVIEW

BETWEEN

REPUBLIC APPLICANT

AND

**OFFICER OF THE COUNTY EXECUTIVE COMMITTEE MEMBER TRADE,
 TOURISM AND COOPERATIVE DEVELOPMENT KILIFI ... 1ST RESPONDENT
 COUNTY ATTORNEY OF KILIFI 2ND RESPONDENT**

AND

ROMANO MWENDA MURIUNGI T/A MABESHTE SPORT BAR EXPARTE

RULING

1. This ruling is in respect of a Preliminary Objection dated 10th December 2021 by the 1st and 2nd Respondent’s Preliminary Objection against the Applicant’s Application dated 26th November 2021 on the following grounds; -



- a. That this Honourable court lacks jurisdiction to hear and determine the subject suit in light of Section 11 of the Kilifi County Trade Licence Act, 2016.
 - b. That the ex-parte Applicant's application and suit are frivolous, premature and untenable.
 - c. That where *the Constitution* or Act of Parliament has provided for a procedure for resolving a dispute before approaching the court it must be exhausted first as was held in the case of *Republic vs Council of Legal Education ex parte Desmond Tutu Owuoth [2019]* eKLR
 - d. That the application is defective and bad in law.
 - e. That the application is misconceived and an abuse of the court process and the same ought to be struck out.
2. Counsel agreed to canvas the application by way of written submissions which were duly filed.

1st And 2nd Respondent/applicants Submissions

3. Counsel for Respondents submitted that this court has no jurisdiction to handle this matter as the dispute before court ought to be handled by the Kilifi County Trade License Act, 2016 which establishes the Review Committee under Section 11 of the Act. That the suit is premature since the issues ought to first be adjudicated upon by the Committee.
4. Counsel gave a brief background to the case leading to the current application and stated that the Applicant was licensed under the Kilifi County Trade License Act 2016 to carry out its business as provided by this Act, the terms of the license and all other relevant laws and regulations.
5. That on 20th October 2021, the County Environment Officer wrote to the Applicant raising a complaint of noise pollution and loud music from his bar was becoming a nuisance and that it was being monitored to ensure compliance with the law and regulations failure of which further legal action would be taken against him.
6. That the Applicant failed to comply with that letter necessitating revocation of the business permit by the 1st Respondent which communicated to him through a letter dated 22nd November 2021 more than one month after being notified of the complaint and failing to take required steps to rectify the problem.
7. It was the Respondent's case that upon revocation of the license, the Applicant was bound to seek resolution of the grievance from the Review Committee before going to court as clearly laid down under Section 11 of the Kilifi County Trade License Act 2016 hence this application is premature.
8. On whether the court has jurisdiction to handle this matter, counsel relied on the cases of *Tenacle Limited v Kenya Copyright Board & 2 others in Kenya Association of Music Producers & 2 others (Interested Parties) (2021)* eKLR and *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989)* KLR that jurisdiction is everything.
9. Counsel further submitted that the dispute preferred before this Court is one that ought to be handled by Kilifi County Trade License Act, 201 which is the Dispute Resolution Mechanism established under the Act that has proper jurisdiction and is competent to resolve the issues raised in this application.
10. Further that the mandate to resolve such disputes is vested upon the Review Committee under Section 11 of the Act which provides as follows: -



1. There is established a review committee which shall listen and determine appeals by the aggrieved parties that will comprise of three senior officials from the department of trade.
 2. The members of the review committee shall be appointed by the Executive Committee Member under such terms as may be prescribed by the Executive Committee Member.
 3. A person not satisfied with a decision of the review committee may appeal to a court of competent jurisdiction against the decision.
 4. The court may confirm, reverse or modify the decision appealed against, and make such orders and give such directions to the licensing authority as may be necessary to give effect to the court's decision.
11. According to counsel the above Section is clear that where a licensee is aggrieved by a decision of the licensing authority, the first port of call for resolution of the such a dispute is the review committee whereby a decision of the Review Committee is appealable to this Honourable Court.
 12. It was counsel's further submission that the Applicant has brought a premature suit whose issues ought to first have been adjudicated upon by the Review Committee as provided for under the Act and that the Applicant has not exhausted the dispute resolution mechanism provide under the said Act hence an outright disregard of Article 159(2).
 13. Counsel submitted that it is now settled that where *the Constitution* or an Act of Parliament provides a mechanism for dispute resolution, parties must first exhaust that mechanism before going to court as was held in the cases of Speaker of National Assembly v Njenga Karume [2008] KLR 425, *Francis Nzioki Kavuu v Kenya Copyright Board & 2 others [2021]* eKLR, *East Africa Pentecostal Churches Registered Trustees & 1754 others v Samuel Muguna Henry & 4 others [2015]* eKLR.
 14. Counsel therefore urged the court to uphold the preliminary objection and dismiss the application with costs to the Respondents.

Applicant's Submissions

15. Counsel for the Applicant identified three issues for determination as follows: -
 - a. Whether this Honourable Court has the Jurisdiction to hear and determine the matter
 - b. Whether the Respondents' decision was procedurally flawed, ultra vires, is void and of no legal effect?
 - c. Whether the ex-parte applicant is entitled to the relief sought?
16. Counsel submitted that this is a Judicial Review application challenging the process which the Officer of the County Executive Committee Member Trade, Tourism and Co-operative Development Kilifi Hon.Nahida Mohammed used leading to the determination of the decision dated 22/11/2021 and as such it is not challenging the merits of the decision.
17. It was counsel's further submission that Judicial Review is concerned with the decision making process and not the merits of the decision as was held in the case of *Republic v Land Registrar Kilifi & another Exparte Rodgers Sammy Katana (Acting for and on behalf of the estate of Sammy Katana alias Katana Baya Thoya alias Toya Baya); Katsran Logistics Limited (Interested Party) [2022]* eKLR where the court here relied on the parameters set out in the case of *Biren Amritlal Shah & Another -vs- Republic & 3 others (2013)* eKLR



18. Mr. Ole Kina submitted that the suit is not premature as Part III of the *Fair Administrative Act*, 2015 provides for Judicial Review of administrative action and that Section 7(2) (a) (ii) of the said Act empowers any person aggrieved by an administrative action or decision to apply for review of the said action to the court in accordance with Section 8 of the Act.
19. Counsel relied on the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2019] eKLR the court held that role of the court in judicial review is supervisory and not an appeal and should not attempt to adopt the 'forbidden appellate approach '
20. Mr. Ole Kina further submitted that the Respondent's objection is premised on the allegation that the ex-parte Applicant did not exhaust the available statutory remedies provided under the Act. Section 11 of the Kilifi County Trade License Act, which the Respondent argued that the said section ousts the jurisdiction of the Honourable Court and the ex-parte Applicant ought to have appealed to the said committee.
21. According to counsel the impugned letter neither communicated the existence of the appeal mechanism nor a suggestion that the review committee existed at the time of the impugned action or subsequently.
22. Counsel relied on Section 9(4) which provides as follows; -
 - (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
23. Consequently, counsel submitted that the court therefore has the power to exempt a party from the obligation of exhausting alternative remedies if the Court considers such exemption to be in the interest of justice, further that the exceptional circumstances are not outlined in the Act, thus leaving the Courts to exercise their discretion when faced with an application for exemption.
24. Counsel cited the cases of *Krystalline Salt Limited v Kenya Revenue Authority (2019)* eKLR and *Republic v Council for Legal Education ex parte Desmond Tutu Owuoth (20 19)* eKLR on the definition of exceptional circumstances where the court stated that "what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/ or where its pursuit would be futile, a court may permit a litigant to approach the court directly.
25. The court further stated that "the *Fair Administrative Action Act* does not define ' exceptional circumstances'. However, this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an Applicant first to pursue the available internal remedies"
26. It was counsel's submission that a Court is obliged to look at whether the dispute resolution mechanism established under the statute in question is competent in the circumstances of the case to serve the interests of justice, or whether it warrants a party applying for an exemption from the doctrine of exhaustion of remedies.
27. Counsel stated that in the present case the Respondents abused the process from its inception which clearly demonstrated that the Respondents were not intent on giving the ex-parte Applicant a fair hearing as they conducted all their investigations and hearings in secrecy and when they decided to suspend the license, the suspension was in effect a termination as it was for an indefinite period. Further



that there was no indication that the ex-parte Applicant could seek redress as the forum to which he was supposed to appeal has not been shown to have been in existence.

28. On the issue whether the Respondents' decision was procedurally flawed, ultra vires, is void and of no legal effect, counsel submitted that the Respondents' failed to take into account relevant considerations while making decision and failed to fulfill substantive legitimate expectations, that the decision was a result of a letter of complaint on noise pollution dated 20th October, 2021 from the County Environment Officer and that the ex-parte Applicant was never informed of who made the complaint or to what extent his business was causing noise pollution, if it was in excess of the required sound level as prescribed in Rule 6 as read with the 1st schedule of the Noise and Excessive Regulations of 2009.
29. Mr. Ole Kina stated that the Respondent denied the Applicant a fair hearing since the Applicant was not given an opportunity to face and challenge his accuser and relied on the case of Republic vs. Kenyatta University Ex Parte Njoroge Humphrey Mbuti [2015] eKLR together with the Rules 25 & 26 of the Noise and Excessive Regulations of 2009 which require issuance of Improvement Notice where the Environment Inspector has reasonable cause to believe that a person is emitting excessive noise/vibrations, and closure notice after inspection is done of which counsel submitted that the same were not given to the Applicant.
30. Counsel finally submitted that the entire process was tainted with illegalities and it is therefore a nullity and urged the court to dismiss the Preliminary Objection with costs.

Analysis And Determination

31. The issue for determination is whether the Preliminary Objection on the jurisdiction of the court to hear and determine this matter has merit. Whether the Applicant ought to have exhausted alternative remedies through the Kilifi County Trade License Act 2016 which has a review process if parties are aggrieved.
32. This is a Judicial Review of the process that the Respondents used to arrive at the suspension of the Applicant's business license. It is not about outcome of the process.
33. In the case of Biren Amritlal Shah & Another -vs- Republic & 3 others (2013) eKLR the Court of Appeal reiterated the position that Judicial Review is not concerned with the merits of the decision but rather the fairness of the process in reaching the decision and held that: -

“Judicial Review is not concerned with reviewing the merit or otherwise of a decision by a public entity, in respect of which the application for review is made, but the decision, making process itself. It is important to note in every case, that the purpose of Judicial Review is to determine whether the application was accorded fair treatment by the concerned public body, and that it is not within the remit of the court to substitute its own opinion with that of the public entity charged by law to decide the matter in question”.
34. I agree with counsel for the Ex parte Applicant that the Applicant is aggrieved by the decision making process and not the merit of the decision by the Respondents. If that was the case, then the Applicant would have appealed to the Review Committee as provided for under Section 11 of the Kilifi County Trade License Act 2016.
35. It would be erroneous and a travesty of justice for the Applicant to subject itself through the same process or institution that it accuses of a flawed procedural process and expect a different outcome. That is why the remedy of Judicial review of administrative actions is available for aggrieved parties.



36. It should also be noted that the court is cognizant of the fact that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance as was held in the Supreme Court case of *United Millers Limited v Kenya Bureau of Standards & 5 others [2021]* eKLR.
37. The Respondents' objection is pegged on the fact that the Applicant has not exhausted other alternative dispute resolution mechanisms before coming to court. Section 11 of the Kilifi County Trade License Act 2016 does not oust the jurisdiction of the court to hear a judicial review on the process used to arrive at a decision that affected the Applicant.
38. Counsel for the Applicant cited the provisions of Section 9(4) of the Fair Administrative Actions Act which provides for exemption in exceptional circumstance from the obligation to exhaust remedies before coming to court. The Section provides that the court may grant such exemption on application by the Applicant which in this case is not applicable as no such application for exemption has been made by the Applicant. The court will therefore ignore that line of argument.
39. In the case of *Republic v Cabinet Secretary for Petroleum & Mining & 2 others Ex parte Dennis Ruto Kapchok (Suing on his Behalf and on behalf of the Citizens of Tamkal, Kiwawa, Alale, Ortum Sebit, Pusel and Chepchoi, Iyon Iyang River, Marich and Endough in West Pokot County; County Government of West Pokot & another (Interested Parties) [2019]* eKLR the court held that: -
- “It appears then that the mere existence of provisions for alternative dispute resolution per se in a statute do not automatically and fully oust the jurisdiction of this court to handle a dispute once lodged before it by an applicant in the form of judicial review as in this case. This court has jurisdiction notwithstanding such provisions. In addition, the suitability and expedition inherent in that procedure or lack thereof are matters this court is entitled to consider in determining whether it should address the dispute and make a determination thereof.”
40. Similarly, in the case of *Republic Vs NEMA Ex Parte Coral Drive Luxury Homes Ltd 2012* eKLR the court held that: -
- “Discussing the issue of availability of alternative remedy as a bar to judicial review, the learned authors of H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 9th ed. 2004 at p. 703 observe that:
- “In principle there ought to be no categorical rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal to see whether the action will in the end be taken or not. An administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter. This is merely to restate the essential difference between review and appeal which has already been emphasized. The only qualification is that there may occasionally be special reasons which induce the court to withhold discretionary remedies where the more suitable procedure is appeal,”



41. I have considered the Preliminary Objection, the submissions by counsel and the relevant authorities and come to the conclusion that the court is clothed with the jurisdiction to hear and determine this matter. The upshot is that the Preliminary Objection is dismissed with costs to the Ex parte Applicant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF JANUARY, 2023.

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M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

