



REPUBLIC OF KENYA



**Lydia Chelimo t/a Carwash Bar v Uasin Gishu Alcoholic Drinks Control Board & another
(Judicial Review E010 of 2024) [2025] KEHC 4915 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4915 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
JUDICIAL REVIEW E010 OF 2024
JRA WANANDA, J
APRIL 25, 2025**

BETWEEN

LYDIA CHELIMO T/A CARWASH BAR APPLICANT

AND

UASIN GISHU ALCOHOLIC DRINKS CONTROL BOARD .. 1ST RESPONDENT

COUNTY GOVERNMENT OF UASIN GISHU 2ND RESPONDENT

RULING

1. The subject of this Ruling is the Applicants' Notice of Motion dated 12/07/2024 filed through Messrs Ombima & Co. Advocates. The orders sought are as follows:
 - i. [.....] spent
 - ii. An Order for certiorari to remove into the High Court and quash the decision of the first Respondent made on the 23/05/2024 suspending and/or cancelling the Applicant's Bar license for being unlawful, illegal ultra vires and directing its revocation.
 - iii. An Order for prohibition be and is hereby issued prohibiting the Respondents from suspending, cancelling withdrawing and in any other manner whatsoever implementing enforcing or interfering with the Applicant's Bar license issued on 26/01/2024 and/or interrupting the Applicant's operations deriving from the respective licenses.
2. The Application is supported by the Affidavit sworn by the Applicant, Lydia Chelimo in which she deponed that she is the sole proprietor of the business entity referred to above which is registered by the 2nd Respondent to engage in the business of buying and selling of alcoholic drinks and connected beverages. She deponed that the business is licensed to operate as a bar within Illula, Eldoret town, has been in operation for over 4 months, and that prior to reviewing the Application for a license, the Uasin Gishu Alcoholic Drinks Regulation Committee in accordance with Section 1(a), 2 and 3(b) of



the Uasin Gishu Alcoholic Drinks Act conducted an inspection of the premises and undertook public participation. She contended that upon satisfaction, the Committee approved the Application and authorized the establishment's operations upon payment of the requisite fees, and that no objection has since been raised by the Committee under Section 12(1) and (2) of the Act.

3. She deponed further that on 23/05/2024, the 1st Respondent informally purported to direct that the Applicant's licences had been withdrawn and/or cancelled pursuant to a public participation meeting held at Illula center on that date and which recommended closure of the business, that the functions of the board are strictly administrative specifically to co-operate with established committees towards management of the licensing, selling, consumption and distribution of alcoholic products within the County and that pursuant to Section 4 of the Act, neither the Board nor its Director is vested with power to suspend or cancel a licence issued by the Committee. She deponed further that the procedure for cancelling or terminating a license is set out in Section 30 of the Act which must originate from a Report be tabled exclusively by the County Public Health Officer or a police officer not below the rank of Inspector and that therefore, the alleged "public participation meetings" did not satisfy the above criteria and that the directive issued is illegal as the procedure is couched in mandatory terms. She contended further that in addition, the Respondents also violated the Applicant's right to a fair hearing secured under Section 30(3) prior to issuing the suspension order.
4. She deponed further that she is aware that the crux of the alleged complaints raised by the residents against the business is that of noise pollution, which however is a matter regulated by the Environment Management and Co-ordination Act which establishes the National Environmental Complaints Committee under Section 31, that Section 32 empowers the Committee to investigate complaints relating to environmental degradation and pollution and that she fully paid fees for approval of the nature, location and viability of the business in relation to environmental degradation and pollution and that therefore, the complainants ought to have registered their complaints with the Committee under Section 33. She added that Section 101(a) of the Act bestows upon the Authority the power to set standards for noise management and prescribe and determine the criteria for the measurement of noise and vibration pollution as espoused in the Environmental Management and Co-ordination Noise and Excessive Vibration Pollution Control Regulations (2009), that to date, no complaint has been raised by the National Environment Management Authority against the business regarding violation of the rules and guidelines laid out. She contended further that pursuant to Article 191(2) of *the Constitution*, the Uasin Gishu Alcoholic Drinks Control Act is sub-servient to the Alcoholic Drinks Control Act (national legislation) where there might be conflict in application of the statutes.
5. It is obvious that the above Affidavit, instead of being confined to matters of facts as is required by procedure, is unnecessarily argumentative and contains substantive legal contentions, complete with exhaustive reference to statutory provisions. No wonder it sounds more like Submissions. I realize that many Advocates still fail to appreciate that an Affidavit, as a pleading, has a specific role and purpose to play in legal proceedings suit. What ought to be contained therein is specifically provided for and it should never transgress beyond its limits. In respect to this principle, I draw Counsel's attention to the following excerpt picked from the decision of Aburili J made in the case of Rabote (Suing as the *Legal Representative of the Estate of Leonard Taabu Rabote Deceased*) v Juma (*Civil Appeal 44 of 2022*) [2022] KEHC 13742 (KLR) (14 October 2022) (Ruling):

“ 11. The affidavit sworn by the respondent cites legal provision, legal principles and legal authorities both statutory and judicial pronouncements thereby making it a submission and not an affidavit. I must therefore deal with it's validity on record first. On the face of it, the affidavit by the respondent provides legal



arguments and not factual matters. The matters expressed therein are legal opinions.

12. In my humble view, such an affidavit cannot help the court reach a fair decision. If the applicant wanted this court to hear written submission, she should have filed written submissions separate from an affidavit which is full of legal opinions and arguments.
13. In the cases of Albany Taylor & Wendy Taylor vs Stella Nafula & Christopher Taylor CA 352/2004; Kamlesh Pattni Vs Nassir Ibrahim Ali & Others HCC 63/2009; Manchester Outfitters Vs Prann Galot & 3 Others & Lila Vadgawa Vs Mansukhala Shantilal Patel, the courts made it clear that expressions of law are not to be contained in an affidavit; submissions are not to be entertained in an affidavit;

6. Be that as it may, the Application is opposed by the Respondents by way of the Replying Affidavit sworn on 19/11/2024 by one Koiya Arap Maiyo, who described himself as the Director and executive head of the 1st Respondent pursuant to the Uasin Gishu County Alcoholic Drinks Control Board, 2014. The same is filed through Messrs. Keter N. K Advocates. The deponent stated that the powers of the Board include, but are not limited to, carrying out campaigns and public education on alcoholic drinks control and drug abuse within the County and facilitate citizen participation.
7. He denied that the Board had cancelled the Applicant's license or written to the Applicant in regard to closure of the business which is licensed until the end of the year. He further deponed that the premises do not belong to the Respondent hence cannot be closed as they belong to the respective Landlords whom they do not know individually. He deponed further that public participation was conducted by the residents against licensing of liquor premises within that locality, the Board remains steadfast to the procedures of the law, which require public participation and which was conducted on 23/05/2023. He exhibited a copy of alleged minutes of the meeting. He then deponed that the Respondents always ensure to sustain businesses for livelihoods not to be disparaged as the Respondents collect revenue and that there are no reports that the Applicant's business is emitting noise beyond the allowed decibels. In a statement that appears incomprehensible, he then deponed that the cause should have been raised with the 4th Respondent to allow expert reports on the same rather than relying on the Applicant's approximation. I term this statement incomprehensible because there is no 4th Respondent in this matter. Nonetheless, he then deponed that the Applicant has not shown that the Respondents have written or withdrawn the licence, that the procedure for cancellation of licences and closure of premises is well provided in Section 30 of the Act and is done by the County Committee after receipt of a Report that favours closure and that the Board has not received any such Report and has not therefore taken any action. He then termed the suit as premature, disclosing no cause of action against the Respondents, and is based on falsehood.
8. The Application was then canvassed by way of written Submissions. The Applicant filed the Submissions dated 18/11/2024 whereas the Respondent filed the Submissions dated 19/11/2024.

Applicants' Submissions

9. As aforesaid, the Applicant's Supporting Affidavit comprises of arguments on points of law complete with citations from statutes. The Applicant's Submissions has basically repeated the same matters and arguments. For this reason, it is needless to recount the Submissions.



Respondents' Submissions

10. Counsel for the Respondents urged that contrary to the Applicant's allegation that the Respondents issued a directive closing her business, there has been no decision rendered or communicated by the Respondents, that therefore, the Applicant complaints of a decision yet he has not attached any and which situation renders the Application fatally and incurably defective and incompetent.
11. Counsel cited Order 53 Rule 7(1) of the Civil Procedure Rules. He submitted further that the rationale for the above provision is that the Court must satisfy itself that the decision sought to be challenged exists and that the contents of the decision need to be verified to decide whether it satisfies the grounds for Judicial Review. He cited the case of *Republic v Mwangi S. Kimenyi ex parte Kenya Institute for Public Policy and Research Analysis (KIPPR)* and urged that the ex parte Applicant invites the Court to invalidate a decision the substance of which cannot be ascertained, the Application is based on speculation and cannot stand in law and that the Respondents have neither made nor communicated any decision capable of being quashed. Regarding the prayers for Certiorari and Prohibition, Counsel cited the case of *Pastoli v Kabale District Local Government Council & Others (2008) 2 EA 300* and contended that the Applicant has not met the requirements for granting the said Judicial Review Orders as the Respondents made no decision.

Determination

12. The broad issue that arises for determination herein is "whether the Applicant has demonstrated that the Respondents have suspended and/or cancelled the Applicant's bar licence, or intend to do so, through a procedure that is illegal and/or irregular and whether therefore an order of Certiorari or Prohibition should be issued stopping such cancelation or suspension of the licence."
13. The Applicant claims that the Respondents made a decision to suspend and/or cancel his bar business licence and which decision he alleges was made on 23/05/2024. It is this decision that he wants the Court to quash. Needless to state, the Applicant has not attached any decision nor any kind of communication from the Respondent in respect thereto. Indeed, the Respondents have pointed out this situation and argued that the Application is incompetent in the absence of the exhibition of any such decision.
14. The Respondents have denied making any decision to suspend or cancel the licence. They have however disclosed that it is the residents of the locality where the bar business is located who convened a public participation meeting on 23/05/2024 to discuss the proliferation of bars and/or alcohol and liquor businesses within the area. The Respondents exhibited a copy of alleged minutes of the meeting. A look at the minutes reveals that the meeting was held at Illula Centre, the subject of the meeting was titled "public participation on closure of alcohol outlets" and the two agenda items were listed as "insecurity within the area" and "closure of liquor outlets".
15. The number of residents who attended were stated to have been 202, including bar owners. 14 persons in attendance and described as "Officials" included representatives from the 1st Respondent, office of the County Commissioner, the police, County Government, local Chiefs, village elders, "Nyumba Kumi and other stakeholders. The person who presided over the meeting is not however expressly disclosed. The minutes then reveal that at the end of the meeting, the matters in issue were put to vote "to determine the direction that the County Government would take on the views of the residents". The results of the voting are reported to have been that "92 residents voted for closure of all bars while 31 residents, including bar owners, voted to continue carrying out liquor business" and the recommendation made was "to abide by the wish of the majority which is closure of all bars in



Illula Centre”, and that “the closure is immediate and County security agencies, both National Police and County Enforcement teams to enforce the closure”. The minutes is then signed by one David Kendagor who is described as the 1st Respondent’s Programmes Officer.

16. My understanding of the Respondents’ contention is that although they are aware of the above meeting, its resolutions and recommendations, they have not as yet made any decision thereon. In fact, in their Affidavit, the Respondents were emphatic that they fully understand the procedure that must be complied with before cancelling licences as set out in Section 30 of the Uasin Gishu County Alcoholics Drinks Act, 2014, that they have not received any reports that the fingered businesses emit noise beyond the allowed decibels, and that no expert reports have been submitted to them. According to the Respondents therefore, the Application is premature.
17. Since the Applicant did not seek leave to file a Supplementary Affidavit to controvert the above matters deponed by the Respondents, and noting that at paragraph 12 of her own Affidavit, the Applicant has deponed that the 1st Respondent, on 23/05/2024, “informally purported to direct that the Applicant’s bar licenses had been cancelled and/or withdrawn arising from a public participation meeting”, I am constrained to agree with the Respondents that the Applicant cannot succeed herein since she is seeking to quash an alleged “decision” which she has not even demonstrated to be in existence in the first place. I do not think that the mere presence of representatives from the 1st Respondent in the alleged public participation meeting can be correctly interpreted to mean that the 1st Respondent has adopted and implemented the recommendations made therein. As correctly appreciated by both Counsels, cancellation and/or withdrawal of the licence is governed by statute and can only be effected after full compliance with the procedures set out therein.
18. It is agreed that the nature and scope of Judicial Review is generally concerned with the reviewing, not the merits of the subject decision, but the process leading to the decision. In the case of *Municipal Council of Mombasa vs Republic & Another* [2002] eKLR, the Court of Appeal explained the purpose of Judicial Review in the following terms:

“..... The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.
19. In this case, it has not been shown that the Respondents have even initiated or commenced any process to cancel, suspend or withdraw the licence pursuant to the recommendations made in the public participation meeting. What then is the process or procedure undertaken by the Respondents that this Court is being asked to interrogate and declare illegal?
20. In respect to the question of asking a Court to quash a decision that has not been exhibited or is non-existent, in the case of *Republic v Mwangi S. Kimenyi ex parte Kenya Institute for Public Policy and Research Analysis (KIPPR)* [2013] eKLR, the Court of Appeal pronounced as follows:

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“ 23. The learned judge in issuing the orders of certiorari stated that the decision of 3rd December 2004 (if any) is patently ultra vires the relevant Act in relation to the respondent. Is there a decision made on 3rd December 2004? The judge stated in the judgment that it is noteworthy to observe that no Board resolution made on 3rd December 2004 had been produced terminating the respondent’s employment. The object of the order of certiorari is to call and remove into the High Court a decision that has been made. The evidence on record does not show how the judge arrived at the conclusion to remove and call into the High Court a decision which the court had not satisfied itself that it existed. We have perused the record and we have not seen a decision made on 3rd December 2004. The letter dated 16th December 2004 purports to implement a decision made on 3rd December 2004. If the court is not satisfied that a decision was made on 3rd December 2004, it follows that there was no substratum upon which the court could quash the letter dated 16th December 2004. The letter of 16th December 2004 derives its force from the decision of 3rd December 2004.

.....

29. The learned judge in his judgment was correct in stating that the court cannot act in vain against a non-existent decision. There was no decision or letter dated 24th August 2004 that could be called and removed into the High Court to be quashed. This being so, the learned judge erred in quashing the alleged decision of 24th August 2004 when the said decision is non-existent. Further, the learned judge erred in issuing orders to quash the letter of 16th December 2004 when the court had not determined that the decision made on 3rd December 2004 was in existence. A court of law should not descend into the realm of speculation. The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into court a decision to be quashed. We hold that the learned judge erred and it was not appropriate to issue the judicial review orders in this matter.”

21. Indeed, Order 53 Rule 7(1) of the Civil Procedure Rules, 2010, provides as follows:

“ 7.

(1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.”

22. It is therefore clear that in judicial review proceedings, when asking the Court to quash a decision, demonstration of the existence of such impugned decision is paramount. Where the alleged decision has not been exhibited, reasons for not exhibiting it must be disclosed. It therefore follows that in the absence of proof of existence of the alleged decision, this Court cannot entertain the Application.

23. Even in respect to the prayer for prohibition, it has not been demonstrated that the Respondents have been moved by anyone to make a decision on the resolutions and/or recommendations made



by the residents in the public participation meeting. It has not therefore been demonstrated that the Respondents are seized of the matter, or even that the Respondents have commenced steps to deliberate on the issue such that they could be alleged to have invoked an irregular procedure or that the Applicant has not been given a hearing. The Applicant has not alleged that her business has been closed down or that she has been asked to do so by the licensing authority, and neither has she received any communication that her licence has been suspended or withdrawn. What then will the Court be prohibiting under these circumstances? The Court cannot act on unsubstantiated apprehension, speculation or imaginations. There is accordingly no doubt that these Judicial Review action is wholly premature and cannot succeed.

24. Before I pen off, I will comment on the persistent problem of the correct way of intituling Judicial Review actions. Advocates, to date, still continue to get it wrong on the manner of framing the heading of Judicial Review cases. This is despite the simple guidelines set out in the old case of *Farmers Bus Service & Others v. The Transport Licensing Appeal Tribunal* (1959) EA 779. It should be always remembered that prerogative orders are issued in the name of the “Republic” at the instance of an “ex parte Applicant” and are directed to the person who is to comply therewith. The heading and title of Judicial Review cases ought to therefore always reflect the “Republic” as the “Applicant” and the party filing the Application as the “ex parte Applicant”.
25. This persistent disregard to procedure was aptly captured by the Court of Appeal in the case of *Republic v Charles Lutta Kasamani & another ex parte Minister for Finance & Commissioner of Insurance as Licencing and Regulating Officers* [2006] eKLR in the following terms:

“As correctly submitted by Mr. Ombwayo, the problems of intitulumt of pleadings in judicial review matters is as old and intractable as the law that provides for that remedy. Indeed, the predecessor of this Court was grappling with similar problems in the East African region half a century ago on matters of form in intituling proceedings under the Law Reform Ordinance, as it then was by name, and has since remained in substance. The two cases which illustrate the historical foundation of the problem are *Mohamed Ahmed vs. R* [1957] EA 523 and *Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal* [1957] EA 779. The court also gave guidelines on the proper form to be adopted in such proceedings and the decisions have been cited with approval on many occasions by this Court. It is evident however that the problem still persists in our courts fifty years after a solution was made available but it is not for want of authoritative precedent. Perhaps it is a matter that might have to be revisited by the Rules Committee to iron out the creases for the benefit of legal practitioners.”

26. Although the Courts have generally “looked the other way” and excused this disregard to basic procedure as being merely an omission on form rather than on substance, time may soon come when the Courts may finally “put their feet down” and start penalizing litigants or striking out pleadings that, almost 70 years after *Farmers Bus Service & Others* (supra), still continue to flout the stipulated procedure.

Final Orders

27. In view of the matters set out above, I find that the Notice of Motion dated 12/07/2024 and by extension, these entire Judicial Review proceedings, lacks merit. The same is accordingly dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 25TH DAY OF APRIL 2025



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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms Lubanga for Ombima for the Applicant

N. K. Keter for the Respondent

Court Assistant: Brian Kimathi

