



**Republic v Eldama Ravine Sub-County Administrator & 8 others;
Chepyegon & another (Exparte Applicants) (Judicial Review
E001 of 2023) [2024] KEHC 2038 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
JUDICIAL REVIEW E001 OF 2023**

RB NGETICH, J

FEBRUARY 29, 2024

**IN THE MATTER OF AN APPLICATION BY ISMAEL K. CHEPYEGON
AND VICTOR K. RUTO FOR LEAVE TO APPLY FOR THE JUDICIAL
REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF BARINGO COUNTY
GOVERNMENT SINGLE BUSINESS PERMIT BY LAWS**

AND

**IN THE MATTER OF ALCHOHOLIC DRINKS CONTROL ACT, 2010 AND IN THE
MATTER OF BARINGO COUNTY ALCOHOLIC DRINKS CONTROL ACT, 2014**

AND

**IN THE MATTER OF THE FOOD, DRUGS AND CHEMICAL SUBSTANCES
(FOOD HYGIENE REGULATIONS CAP 254 LAWS OF KENYA)**

AND

**IN THE MATTER OF THE LIQUOR LICENSING OR ALCOHOLIC DRINK LICENCE
FOR THE YEAR 2023 FOR KWA CHEPYEGON RESTAURANT-SOLIAN AND BAMBOO
YEMITPUB-KIROBONLEBOLOS IN ELDAMA RAVINE SUB-COUNTY BARINGO COUNTY**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

BETWEEN

REPUBLIC APPLICANT

AND

ELDAMA RAVINE SUB-COUNTY ADMINISTRATOR 1ST RESPONDENT



THE CHAIRPERSON, ELDAMA RAVINE SUB-COUNTY ALCOHOLIC DRINKS COMMITTEE 2ND RESPONDENT

THE SECRETARY, ELDAMA RAVINE SUB-COUNTY ALCOHOLIC DRINKS COMMITTEE 3RD RESPONDENT

BARINGO COUNTY, ALCOHOLIC DRINKS REGULATIONS ADMINISTRATIVE REVIEW 4TH RESPONDENT

THE COUNTY SECRETARY, BARINGO COUNTY GOVERNMENT 5TH RESPONDENT

THE CEC HEALTH, BARINGO COUNTY GOVERNMENT . 6TH RESPONDENT

DEPUTY COUNTY COMMISSIONER, ELDAMA RAVINE SUB-COUNTY 7TH RESPONDENT

CPC, ELDAMA RAVINE SUB-COUNTY 8TH RESPONDENT

CP, ELDAMA RAVINE SUB-COUNTY 9TH RESPONDENT

AND

ISMAEL K CHEPYEGON EXPARTE APPLICANT

VICTOR K RUTO EXPARTE APPLICANT

JUDGMENT

1. The Ex-parte Applicants have moved the court vide a Notice of motion application dated 16th June 2023 brought Under the provisions of order 53 rule 1(1), 1(2), 1(4), order 53 rule 3, Order 53 rule 4 and rule 7(2) of the *Civil Procedure Rules* and section 8 (2) and 9 of the *Law Reform Act* Cap. 26 laws of Kenya seeking for the following orders;
 - i. That an order of certiorari declaring that the whole process under which the 1st, 2nd, 3rd, 7th, 8th and 9th Respondents handled the *ex-parte* applicants applications for liquor licensing for the year 2023 in respect of their businesses-Kwa Chepyegon Restaurant-Solian and Pamboo Yemit Pub in Kirobon Lebolos in Eldama Ravine Sub-County Baringo County leading to the refusal and closure dated the 1st day of March 2023 be declared as arbitrary, irrational, unconstitutional, illegal, in excess of jurisdiction, null and void, constitutes procedural impropriety and accordingly quashed.
 - ii. That an order of certiorari to remove to this court for the purposes of being quashed the decision of the Eldama Ravine Sub-County, the Baringo County Government Alcoholic Drinks Control Committee decision vide their Letter dated the 1st day of March 2023 and any other decision thereafter disallowing the *ex-parte* applicants applications for liquor licensing for the year 2023 for the *ex-parte* applicants businesses at Kwa Chepyegon Restaurant-Solian and Pamboo Yemit Pub in Kirobon Lebolos in Eldama Ravine Sub-County Baringo County and the order for the closure of the said businesses Kwa Chepyegon Restaurant-Solian and Pamboo Yemit Pub in Kirobon Lebolos
 - iii. That an order of prohibition, prohibiting the Eldama Ravine Sub-County, the Baringo County Government Alcoholic Drinks Control Committee from disallowing from cancelling,



from revoking and/or otherwise from interfering with the Ex-parte Applicants liquor license for the businesses Kwa Chepyegon Restaurant-Solian and Pamboo Yemit Pub in Kirobon Lebolos and/or from discussing the matter of the ex-parte applicants liquor licensing application for the year 2023 in breach of the provisions of the [Baringo County Alcoholic Drinks Control Act 2014](#), in breach of the [Constitution](#) of Kenya and the *ex-parte* applicants rights to have a reasonable opportunity of presenting their cases before the decision is made.

- iv. That an order of Mandamus commanding and directing the 5th to the 9th Respondents to follow the [Baringo County Alcoholic Drinks Control Act, 2014](#) to follow the law and the [Constitution](#) of Kenya and forthwith stop interfering with the ex -parte applicants alcoholic businesses at Kwa Chepyegon Restaurant-Solian and Pamboo Yemit Pub in Kirobon Lebolos without regard to the law and in particular without regard to Article 47 of the [Constitution](#) of Kenya on fair Administrative Action and ;legitimate expectation of the Ex-parte applicants tom have their businesses continue uninterrupted in the year 2023
 - v. That the cost of this application be provided for.
2. The application is founded on the grounds set out in the statutory statement and verifying affidavit of Ismael K, Chebiegon and Victor Kiprotich Ruto filed in support of the Chamber Summons dated 22nd May 2023 together with a supplementary affidavit.
 3. The ex-parte applicants states that they operate businesses duly licensed under the General Retail Alcoholic Drinks License issued pursuant to the [Alcoholic Drinks Control Act, 2010](#) in outlets namely Kwa Chepyegon Restaurant-Solian and Pamboo Yemit Pub in Kirobon Lebolos in Eldama Ravine Sub-County.
 4. That they have operated the said businesses premises in a hygienic and environmental friendly state and have been running the businesses for the last thirty (30) years being from the year 1993 or thereabouts.
 5. That having been duly licensed and observing the conditions attached to the said licenses, the Ex-parte applicants had legitimate expectation that they will run their business uninterrupted, they have made massive investments in the businesses running into millions and currently employ Seventeen (17) workers and depended by several families.
 6. That in year 2014, the Baringo County Government passed the [Baringo County Alcoholic Drinks Control Act, 2014](#) and under the Act the ex-parte applicants applied for renewal of their liquor licences for the year 2023.
 7. That on the 1st March, 2023 and without a hearing the 1st, 2nd, 3rd, 7th, 8th and 9th Respondents herein in case of blatant breach of the fundamental rights and freedom of the ex-parte applicants under the said [Baringo County Alcoholic Drinks Control Act, 2014](#) and in total breach of the rules of natural justice proceeded to disallow the Ex-parte Applicants' applications for the liquor licensing for the year 2023 and ordered the closure of their bars; and their decision was made without given the petitioners a hearing and is therefore baseless, unfounded, unconstitutional and a breach of the rules of natural justice.
 8. That the actions of the Respondents were in breach of sections 11(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16) sections 12, 13 and 14 of the [Baringo County Alcoholic Drinks Control Act, 2014](#) and Article 47 of the [Constitution](#) of Kenya which calls for fair administrative action, that is expeditious, efficient, lawful, reasonable and procedurally fair. The Ex-parte applicants had a reasonable expectation that the respondents would deal with their applications for licenses in an efficient and fair manner and give them opportunity to be heard before decision to disallow the licenses and closure of businesses was made.



9. That the *ex-parte* applicants through Counsel complained of the issues herein vide a letter dated the 11th day of April, 2023 but did not receive any response and besides lack of hearing the decision dated the 1st March, 2023 by the 1st, 2nd, 3rd, 7th, 8th and 9th respondents acted in excess or lack of jurisdiction, committed an error of law on the face of the record and above all breached the rules of natural justice and is therefore a nullity.
10. That they are dealing with legitimate businesses going back to several years with massive investment and decision to close the business is arbitrarily, irrational, illegal and constitutes procedural impropriety; that the respondents dealt with the *ex-parte* applicants as if they were applying for a new Licences yet the *Exparte* applicants were applying for a renewal of licenses.
11. That it does appear from the 1st, 2nd, 3rd, 7th, 8th and 9th respondents' Notice that inspection and vetting by Eldama-Ravine Sub-County Alcoholic Drinks Committee was conducted on the 1st day of March, 2023 the basis of which was used to reject the petitioner's application. The rules of natural justice, the Constitution of Kenya and Baringo County Alcohol Drinks Committee 2014 anticipate a hearing, sharing of their findings of inspections and vetting with the *Ex-parte* applicants but was not done rendering the entire process nullity *ab initio*.
12. That it is clear from the face of the Notice that the same constitutes a rejection of the *Ex-parte* applicants' applications for the licences and if that be the case then the provisions of section 12 (4) of the Baringo County Alcoholic Drinks Control Act, 2014 comes into play and it shows that in rejecting the *Ex-part* applicants' application for licenses as they did, they ought to:
 - i. Give reasons for rejecting the application
 - ii. Make comments and recommendations thereon and return the application to the applicants.
13. That the said notice to comply/closure contains no reasons for rejection of the petition's application, has no comments and recommendations and is null and void.
14. Further that the said Baringo County Alcoholic Drinks Control Act, 2014 presupposes a hearing before reaching the decision and Article 47(2) of the Constitution of Kenya gives a right or fundamental freedom to a person who has been or is likely to be adversely affected by the administrative action to be given written reason for the action; that the rules of natural justice are fundamental and are a cushion to ensure that public bodies do not take any decision at their whims to the detriment of those affected.
15. Counsel cited the case of *General Medical Council v Spackman* [1943] 2 ALLER 337 at page 345 where Lord Wright held as follows:

“If the principles of natural justice are violated in respect of any decision, it is indeed immaterial, whether the same decision would have been arrived at in the absence of the departure from the essential principle of justice. The decision must be declared to be no decision ”
16. And further submit that in the present matter not only did the administrator Eldama Ravine Sub-County and the other respondents exceeded their powers but abused their powers, acted in bad faith and acted unreasonably and failed to comply with Article 47 of the Constitution were to be followed to the letter; that the *Ex-parte* Applicants will suffer irreparable losses unless the decision of the respondents is stayed by this Honorable court.
17. In response, the respondents filed Replying affidavit sworn by Dorcas Kibet who is the Sub-County Administrator with the 1st Respondent. She avers that the Petition lacks precision on the complaint,



the constitutional provisions infringed, the manner in which they are alleged to be infringed and by whom and that the Petition therefore lacks particularity as per the doctrine in *Anarita Karimi Njeru v Attorney General*.

18. Further that the 2nd Respondent's mandate includes but is not limited to issuance of licenses to anyone who wishes to manufacture, produce sell and distribute or deal with any alcoholic drinks within Baringo County and specifically within Eldama Ravine sub-county and In performing the functions as stipulated under *Baringo County Alcoholic Drinks Act*, they issued a notice to the members of the general Public and all stakeholders dated 8th December,2022 inviting Applications from interested persons for alcoholic drinks licences for the year 2023.
19. And upon receiving the Applications the 2nd Respondent issued a public notice setting out the names of the Applicants, the names of the bars and establishments and particulars of the location of the premises and the list was published. She states that in the notice the general members of the public who included the Applicants were informed to give views on the Applications in the Barazas and the members gave their views on diverse dates as per the attached list.
20. That after the public participation was conducted a report was generated and signed by the secretary and it was clear from the concerns of members of the public that Kwa Chepyegon bar which belongs to the 1st Applicant is next to a school, has been operating without a license since 2015 and is a nuisance to the public and Bamboo Yemit pub was cited for notorious insecurity issues and after conducting public participation. The 2nd Respondent requested the OCPD -Eldama Ravine to carry out a security report on all liquor premises that applied for licences. Inspection was carried out on the said premises and a report was generated and in the generated report, Bamboo Yemit bar was accused of operating for more than 24 hrs with loud music and had known assault cases have been reported.
21. That inspection was carried out on the Applicant's premises and based on the inspection and vetting a report was thereafter prepared with recommendations on whether or not to grant or deny licenses to the individual Applicants with licence.
22. That the 2nd Respondent upon considering the Application for licenses on merit refused to renew ex-parte Applicants licences because in the case of the 1st Applicant, he was operating a liquor business in proximity with school Neswin Academy school without a licence since 2015.In the case of the 2nd Applicant security reported resulted in public outcry.
23. She avers that committee's decision was communicated to the Applicants both the successful and unsuccessful applicants on 1st March,2023 by the 2nd respondent as clearly indicated in the letters and as per the records of the Respondents. That the 1st petitioner has not appealed against the decision of the committee to date and has therefore filed this Application prematurely contrary to section 9(2) of the *Fair Administration Action*,2015 as he has not exhausted all the internal mechanisms of Appeal to the County Review Board.
24. That the ex-parte Applicants cannot allege that they received communication of the rejection of their applications from a body without jurisdiction as the Applications were received, vetted and determined by the 2nd respondent as stipulated by law.
25. She avers that the wishes of the general public cannot just be disregarded as they clearly expressed themselves on the increase in sale of adulterated alcohol to children and the youth, this has significantly resulted to high school drop-outs, premature deaths amongst the youth and wasted generation and the applicant's licences were not renewed due to non-compliance with the previous year licenses and conditions and failure to meet requirements of the *Alcoholic drinks Act* and *public health Act*.



26. That the Respondent at all times acted in compliance with the law and all applications for licenses were accorded an opportunity to be heard, further the reason for the decision to deny the ex-parte applicants licenses were communicated to them.
27. Further, the ex-parte applicants' liquor business contravened the rights of the consumers under Article 46 of the Constitution specifically vulnerable children under Article 57(d) of the Constitution and persons below 18 years from abuse and the general members of the public.
28. That the request for closure of the said liquor premises was made with the full participation of the stakeholders and the members of the public in compliance with Article 10 and 196 of the Constitution and the grant of prayers sought shall highly prejudice the interests of the members of the Public and the vulnerable members of the society.
29. That the judicial review orders sought by the Applicants is untenable as the court cannot sanction an illegality by allowing the ex-parte Applicants to operate without valid licenses and if orders sought are granted, a lot of confusion will be created in view of the Applicants who accepted the verdict of the 2nd Respondent and the Board.

Petitioner's Submissions

30. The Petitioner submit that on the 1st March, 2023, the respondents summarily refused to issue the applicants with the licences citing flimsy reasons and without a hearing and restated averments in the supporting affidavit
31. They submit that there was no evidence of any complaint made against the applicants' business or breach of licence provisions produced to show persons affected by alleged breach of conditions for issuance of licences.
32. The Applicants argue that the Respondents violated the applicants' right to a fair hearing contrary to Article 50(1) of the Constitution; that they failed to inform the Applicants of allegations against them in sufficient detail necessary to make a defence thereto which is contrary to the provisions of Article 70(2) (h) of the Constitution; that they denied the applicants an opportunity to respond to the allegations contrary to the provisions of Article 50(2)K of the Constitution and cancelled the applicants' licence in a process that is unlawful, unreasonable and procedurally unfair contrary to Article 47 of the Constitution and the Fair Administrative Action Act, 2015.
33. That the respondents' actions are malicious and inspired by other factors aside from the Law thereby warranting intervention by this court as the said actions have occasioned loss and extreme prejudice by way of closure of the applicants' business thereby exposing the applicants to recovery actions by suppliers, financiers and other third-party commercial obligations.
34. They further submit that liability is likely to make the applicants go under, which is unfair and unjust in an open and democratic society governed by the rule of law- That in this case, the respondents acted with impunity thereby destroying the businesses of the applicants which breaches the applicants' legitimate expectations and caused them massive financial losses and mental anguish and trauma hence it is in the interest of justice that the motion be allowed.
35. On whether the Application is pre-mature for failure to exploit the doctrine of exhaustion prior to the matter being lodged in court, the applicant submit that all attempts to resolve this matter amicably by visiting the respondents' offices have not been successful at all as the respondents have completely refused to hear the applicants hence these proceedings; that they did not receive any communication of the decision to cancel, non-renewal of their licences and have been denied right to administrative



action that is expeditious, efficient, law, reasonable and procedurally fair contrary to Article 47 of the Constitution; that the notice to comply with closure contains no reasons for rejection of the petition's application; contains no comments and recommendations, a clear case of procedural unfairness. They cited the case of *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA where the court held that the Respondents were under a duty to ensure that their actions were efficient, lawful, reasonable and procedurally fair.

36. That in refusing to renew licences and ordering the closure of the Applicants businesses, the Respondents were constitutionally obligated to follow the due process of the law and not to consider extraneous issues; further that they failed to conduct public participation.

Respondent's Submissions

37. The respondents submit that the applicants should have utilized and exhausted the Statutory right of review before filing the current Applications if aggrieved by the 2nd respondent's refusal to renew licence. That records show that the 1st Ex parte Applicant has not appealed against the decision of the 2nd Respondent and has come to court prematurely contrary to provisions of section 9(2) of the Fair Administration Action Act, 2015 and has not exhausted all the internal mechanisms of Appeal to the County Review Board.
38. Further that a perusal of annexure "DK5" being minutes of the 2nd Respondent shows the reasons for refusal to grant the licenses of the ex-parte Applicants being the Applicants flawed the law hence the refusal to renew their licenses.
39. On whether it is in the public interest to decline renewal of licence, the respondents submit that Baringo County Alcoholic Drinks Act 2014 provides that the citizens of Baringo County be served by bars that have complied with the standards as set out in the Act and the Act empowers the sub-county committee to ensure that there is effective public participation. That the applicants were denied licences because there was a huge outcry from the members of the public due to unregulated and uncontrolled sale of alcoholic drinks within the proximity of schools, churches, residential homes and even by the roadside and submit that private rights must bow to public rights as was held by the Court in *Republic v National Commission on Human Rights Ex-parte Uhuru Muigai Kenvatta* misc Civil appeal no 86 of 2009, [2010] eKLR.
40. Further that that the intention of the County Alcoholic Drinks Control Act was to protect consumers under Article 46 of the Constitution and submit that the applicants were urged to relocate their businesses from alcohol free area zones.
41. On whether there was public participation, the respondents submit that they respondents ensured there was public participation as per the list of persons who were in attendance and they considered views of the public were considered in the process of refusal to renew their licences. That the ex parte applicants herein, interested parties and all stakeholders and the general members of the public an ample notice and opportunity to participate and raise their concerns before taking any administrative action. That the applicant breached procedure of liquor licensing set out in section 11 of Baringo county alcoholic drink licensing Act.
42. That the respondents followed the right procedure in considering application as shown by minutes marked DK4 duly signed by the Secretary and the chair-person of the said committee and reasons for rejection of the application and in this case, the respondents informed the applicants as required by Section 12 (4) (a) of the Act.



43. On whether the applicants were given opportunity to be heard, the respondents submit that the applicants were served on 25th April, 2023 and were therefore given an opportunity to be heard.

Analysis And Determination

44. I have considered averments herein, perused documents attached and considered submissions by parties herein and what I wish to consider is whether the applicants have met threshold for grant of reliefs sought.
45. In the case *Council of Mombasa v Republic & Umoja Consultants Ltd* (Civil Appeal No. 185 of 2001), the Court of Appeal state as follows: -
- “Judicial review is concerned with the decision making process, not with the merits of the decision itself; the Court would concern itself with such issues as to 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... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself... in view of the above I wish to consider whether the application has met the threshold for grant of reliefs sought.”
46. The Applicant argue that they were not accorded a fair hearing contrary to article 50 of the *Constitution* and the respondents were in breach of Article 47 of the *Constitution* which guarantees the right to fair administrative action for failing to give them opportunity to appear before the committee.
47. On the other hand, the respondents argue that invitations to apply for renewal or new licences was advised and applicants names and the particulars of their business were advertised for members of public to give their views through public barazas and upon receiving views from member of public, the applicants were notified reasons for refusal to renew their licenses.
48. In the case of *Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others*, (2016) eKLR the court of appeal stated that that even though Article 47 of the *Constitution* as read with the grounds for review provided by section 7 of the *Fair Administrative Action Act*, reveals an implicit shift of judicial review to include aspects of merit review of administrative action, the reviewing court has no mandate to substitute its own decision for that of the administrator or to usurp the roles of the administrator.
49. Article 47 of the *Constitution* provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”
50. Record show that that the applicants applied for the renewal of licenses and the same were rejected after a public participation and through barazas the public vehemently opposed the renewal of licences with reasons and the exparte applicants were given reasons that Kwa Chepyegon bar which belongs to the 1st Applicant is next to a school and has been operating without a license since 2015 and are a nuisance to the public. In respect to Bamboo Yemit pub issues of insecurity were raised being operating for more than 24 hours, with loud music and cases of assault reported.
51. From the foregoing, the applicants were notified reasons for refusal to renew licence following public participation as shown by the list of persons who were in attendance. The process was therefore subjected to public participation and the applicants were notified of reasons for refusal to issue licences.



In my view, the applicants are obligated to comply with the law. The respondents have a duty to ensure that the law is complied and the interest of the public is protected as provided under Article 46 of the *Constitution*. Public interest should prevail over any private interests of the ex-parte Applicants as was held in *Republic-vs-National commission on Human rights Ex-parte Uhuru Muigai Kenvatta* misc Civil appeal no 86 of 2009, [2010] eKLR.

52. Further the 1st applicant, he has not demonstrated that he has exhausted internal mechanism by appealing the decision to review board before filing this JR and has therefore failed to exhaust internal mechanism. The applicants have not therefore demonstrated reasons for grant of orders sought.
53. Final Orders;
 1. This application is hereby dismissed.
 2. Each party to bear own costs.

JUDGMENT* delivered, dated and signed Virtually at Kabarnet

This 29th Day of February 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr Boiwo for Exparte Applicant.

Ms Koimugul for Respondent.

Elvis/Sitienei – Court Assistants.

