



Chelangat v County Government of Baringo & 2 others (Constitutional Petition E001 of 2023) [2024] KEHC 2050 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2050 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CONSTITUTIONAL PETITION E001 OF 2023
RB NGETICH, J
FEBRUARY 29, 2024**

BETWEEN

DANIEL CHELANGAT PETITIONER

AND

COUNTY GOVERNMENT OF BARINGO 1ST RESPONDENT

**BARINGO NORTH SUB COUNTY ALCOHOLIC DRINKS REGULATION
COMMITTEE 2ND RESPONDENT**

**BARINGO NORTH SUB COUNTY PUBLIC HEALTH
OFFICER 3RD RESPONDENT**

JUDGMENT

1. The petitioners herein filed petition dated 6th June 2023 seeking the following reliefs: -
 - a. A declaration that the decision communicated to the petitioners by the 3rd Respondent is ultra vires, null and void
 - b. Without prejudice to Prayer a above, if the decision communicated by the 3rd respondent is a decision of the 2nd respondent, a declaration that the same is in breach of petitioner’s legitimate expectation
 - c. Without prejudice to prayer (a) above, if the decision communicated by the 3rd respondent is a decision of the 2nd respondent, it is in contravention of article 47 of *the constitution*, *Fair Administrative action Act* and Baringo county Alcoholic Drinks Act
 - d. An order of certiorari to quash the decisions dated 25th April 2023 communicated by the 3rd respondent



- e. An order of mandamus compelling the 2nd and 3rd respondent to issue the petitioners with alcoholic drinks licences valid for calendar year from the time of issuance
 - f. An order of injunction, restraining the respondent, their agents, servants, assigns, employees or any other person acting at the respondent's behest from interfering with the petitioners' businesses.
2. The application is supported by an affidavit sworn by the 1st petitioner who avers that the circumstances are similar to all petitioners herein and he therefore has authority of all the petitioners to swear the affidavit.
 3. He avers that they are owners of outlets and premises that deal with alcoholic drinks and all of the petitioners have been operating for over 5 years and the 1st respondent has been issuing trade licences upon payment of requisite fees under Baringo county *Alcoholic Drinks control Act* 2014. They attached licences issued to each of them; and avers that having operated the businesses in the same premises over a period of time, him and his co-petitioners had legitimate expectation that their annual licences would be renewed.; that they organized their livelihoods around that as the businesses are their only source of income.
 4. That section 11 of Baringo county *Alcoholic Drinks control Act* 2014 has an elaborate procedure of application of licence and the section is in line with Fair Administrative Act and Article 47 of *the constitution*; that the objective of Article 47, section 4 of Fair Administrative Act and section 11 of Baringo county *Alcoholic Drinks control Act* 2014 is to ensure fairness in proceedings for issuance of Alcoholic drinks licences.
 5. He averred that him and his colleagues applied for renewal licence on the strength that circumstances had not changed and had expectation that the 2nd respondent would adhere by the law and procedure under the above statutes but received communication individually that the applications were no successful.
 6. He averred that their applications were considered by subcounty public health officer and not the 2nd respondent and aver that he has no jurisdiction to consider the application.; and any decision communicated by public health officer is ultra vires, null and void; that the decision is unconstitutional and unlawful.
 7. He further avers that the power donated to the 2nd respondent is by statute and the power to issue licence cannot be delegated both as a matter of statute and principles underlying administrative law and therefore the 3rd respondent cannot exercise powers donated to the 2nd respondent.
 8. That Baringo *Alcoholic Drinks Control Act* 2014 is in line with Fair Administrative Actions Act and whenever objection to grant a licence is made, the 2nd respondent is enjoined to
 - a. communicate the objection to the applicant and require a response to the objections made.
 - b. invite the applicant at time of consideration of application to appear in person and present evidence either orally or in writing.
 - c. statutory duty to consider both versions of evidence.
 9. That contrary to the above, the 2nd respondent failed to communicate objections filed against the applications. The petitioners attached to the supporting affidavit copies of documents relied upon by the petitions which include certificate of business registration, licence for 2022, single permit licence, letter of appeal food and chemical licence for year 2022.



Respondent's Case

10. In response, the respondents filed replying affidavit sworn by Hellen Juma who is the Administrator with the 1st respondent. She avers that the petition lack particularity as per doctrine in Anarita Karimi Njeru Vs. Attorney General. She stated the mandate of 2nd respondent is to issue licences to persons who wish to manufacture ,produce, sell and distribute or dal in any alcoholic drinks within Baringo North as stipulated by Baringo County Alcoholic Drinks Act 2014;that the 2nd respondent issued notices to all stakeholders dated 22nd November 2022 inviting interested parties for alcoholic drinks licences for year 2023.That upon receiving applicationg,2nd respondent issued public notice setting out names of the applicants, names of bars and establishment and particulars of location of the premises; that a further list was published at the offices of Baringo North subcounty administration office at Kabartonjo for a period of 21 days as required by law.
11. Further that the general public including petitioners were informed to give views in barazas and members gave views on diverse dates and attached copies of lists of members of public who participated in public participation.
12. She further averred that the committee carried out inspection on the applicant's premises and based on inspection and vetting report, prepared recommendations on whether to grant or deny licence to individual applicants and upon considering applications on merit, the 2nd respondent refused to renew the applicant's licences.
13. She averred that the 4th petitioner has been charged with criminal case no. E364 of 2022 for breaching terms of alcoholic outlet licence and opening before hours allowed by law and paid hefty fine and this was among the reason the committee rejected application for renewal of the licences.
14. That the decision of committee was communicate to both successful and unsuccessful applicants on 25th April 2023 by secretary of 2nd respondent and attached copy of communication.
15. Further that the applicants lodged appeals on diverse dates between 25th may 2023 to chairperson liquor licensing Board Baringo North subcounty and the board convened a siting and deliberated on all appeals filed and upheld the verdict of the 2nd respondent; that the exparte applicants save for 6th applicant who did not appeal were called and informed of the verdict; that they were requested to pick their letters but they declined; that the 6th petitioner who did not appeal has filed this petition prematurely contrary to section9(2) of FAAA 2015 which require internal mechanisms of appeal to be exhausted by filing appeal to county review Board.
16. He further avers that the wishes of the public cannot be disregarded as they expressed themselves that there is increase in sale of adulterated alcohol to children and the youth which has resulted in high school dropout, premature deaths among the youth and wasted generation and by so doing contravened the rights of the consumers under Article 46 of *the constitution* and specifically vulnerable children under Article 57(d) of *the constitution* and general members of public.
17. That the licences for the petitioners were not renewed for failing to comply with previous year licence conditions and failure to comply with *public health Act*. That the respondents acted in compliance with the law and all applicants were accorded opportunity to be heard.
18. She avers that the public interest supersedes private interest and the petitioner's interest should be weighed against safety and interest of general public and grant of prayers sought shall highly prejudice the interest of the members of public and vulnerable members of the society.



19. The respondent avers that the petitioners have continued to operate with impunity and in particular the 1st petitioner has continued to operate without licence. That judicial Review orders cannot sanction illegality; that the applicants should not be allowed to operate without licence; that the application has been made in bad faith calculated at impeding the 1st respondent from discharging its statutory duties; and urge this court to dismiss this petition.
20. The petition proceeded by way of written submissions.

Petitioners Submissions

21. The petitioners filed written submissions dated 6th October 2023 through their counsel Mr. Githui and identified the following as issues for determination:-
 - a. whether the petition lacks precision under principle in Anarita Karimi Njeru case
 - b. whether the petitioners were granted right to be heard
 - c. whether petitioners failed to exhaust local remedies
22. on jurisdiction counsel for the petitioners submit that a body may have jurisdictional mandate but commit errors which take it outside of jurisdiction and secondly it may make and communicate without jurisdiction making it void abinitia and the affected party cannot be accused of failing to exhaust internal mechanism since there was no decision in the first instance and quoted the case of Republic vs public procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR.
23. He further cited the case of Republic vs Chuka university Exparte Kennedy Omondi Waringa & 16 others [2018] eKLR where the court stated that illegality is where the decision-making authority commits an error of law in the process of taking decision or making an act, the subject of the complaint.
24. He submits on composition of the committee and argued that any decision made and communicated by one component of the 2nd respondent is void for want of jurisdiction. He referred to the documents attached and submit that all the communication on rejection are made on the letter head of subcounty public health office, Baringo subcounty and conclusion is that the decisions were made by that office. Further that the invitation to apply for renewal of licences were issued by one Hellen Juma under the letter of 2nd respondent and submit that was the entity which had jurisdiction to consider the applications.
25. Further that assuming that the decisions were made by the 2nd respondent's, it committed errors which took it out of its jurisdiction.
26. Counsel submit that the 2nd respondent invited petitioners to apply for renewal of licences, that the petitioners applied and 2nd respondent invited members of public for and there was substantial attendance by members of public and a report was presented which constitute objection to renewal of licence to petitioner among others but there is no indication that objection were communicated to the applicants neither were they invited to respond to objections or cross examine objectors. That decision and communication was made on skewed set of facts therefore denying the petitioners fair hearing.
27. On breach of legitimate expectation, counsel submit that the petitioners have been operating for substantial period of time and over the period, the 2nd respondent granted licences to petitioners to operate their outlets and the petitioners organized their lives around the expectation that as long as they sell the same merchandise within same premises, their licences would be renewed and if denied licence they would be given reasons; that they were invited to make application for renewal of licence and



- they applied as they had done in previous years; that it was not demonstrated that the petitioners had changed the locations of their premises or changed their merchandise; and it was upon 2nd respondent to show that circumstances upon which they applied for licences before had changed and on account of the change ,licence would not be renewed.
28. That in contrast, the respondents engaged in public participation where allegations were made against the petitioners but were not given an opportunity to challenge the allegations and submit that the respondents acted in breach of legitimate expectations and the decision to deny the petitioners licence is in contravention of *the constitution* and the Fair Administrative Actions Act.
 29. In a rejoinder in respect to lack of specificity, counsel cited among other authorities, the case of Kenya pharmaceutical Association & another v Nairobi city county and 46 other county Governments & Another [2017] eKLR where the court held that the function of pleading in civil proceedings is to alert the other party to the case they need to meet and further define precise issues for determination so that the court may conduct a fair trial; that the cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action(or defence) and material facts is not synonymous with providing all circumstances.
 30. And submit that the petitioners pleaded that the basis of the petition was article 47 of *the constitution* and its statutory derivatives which are Fair Administrative Actions Act and Baringo county Alcoholic Drinks Act 2014; and having pleaded legal and constitutional basis of the petition, the petitioners set out facts supporting the petition and drew connection between facts of the matter and legal basis of the petition and in a nutshell, pleaded that their case was founded on account of want of substantive jurisdiction, illegality on account of breach of right to fairness and breach of legitimate expectation.

Respondent's Submissions

31. The respondents filed written submissions dated 11th November 2023 through counsel for the county Government Ms. Koimogul. She submits that section 14 Baringo Alcoholic Drinks Act 2014 provide that the subcounty committee cannot renew licence unless it is satisfied that it will be in public interest for provision to be made for sale of alcoholic drinks; that no licence shall be granted for sale of alcoholic drinks in any institution of basic learning including primary and secondary schools or in any residential are demarcated under any written law.
32. Secondly the premises in respect to applications made are in good condition and are provided with adequate and proper access to water and sanitary arrangements.
33. Thirdly, that the premises in respect to which application is made are located at least 300m from any Nursery, primary ,secondary or any learning institution; that reason given for rejecting applications from petitioners is because as from annexure HJ4 reasons for refusal to grant licence to 2nd and 6th petitioner was failure to meet the distance required from learning institution and the others are located next to churches ,residential homes and operating during wrong hours, poor lighting and ventilation and further 2nd petitioner operated without legal documents.
34. Counsel for the respondents cited Misc Appl.no.359 of 2014 republic v commissioner of mines & Another Exparte Basu mining Limited & Cortec mining Kenya Limited & 5 others [2015] eKLR where the court held that judicial review is about reviewing the process through which the decision was made to determine whether the process was indeed fair and not about merits or demerits of the decision and prayers for declaratory orders in judicial review is misconceived and incompetent.
35. Counsel further submit that the respondents granted the petitioners, all stakeholders and other members of public ample notice and opportunity to participate and raise concerns before taking any



administrative action. She restated provisions of section 11 of Baringo county Alcoholic Drinks Act 2014 and submit that the procedure as provided under section 11 was followed.

36. Further that a look at HJ4 show that the decision was made by the sub county committee and minutes confirm that the members constituting the committee signed the minutes and the fact that subcounty public health letterhead was used on the minutes do not make the proceedings ultra vires but was a minor technicality which cannot be used to divert the main issue; that the committee members were all present when the decision was made and some of the affected applicants have since rectified the anomalies and applied for licence which have since been approved.
37. Counsel submits that contrary to petitioner's argument that there was no public participation, a list of persons who attended confirm that there was public participation and the views of members of public who attended barazas were considered in decisions made; that reasons for refusal were stated; that the premises were local at alcohol area free zones and urged this court to weigh public interest vis a vis rights of the applicants.
38. On whether the petitioners were heard, counsel for the respondent submit that the petitioners were served with notices of refusal way back on 25th April 2023 and were therefore granted opportunity to be heard. She concluded that the petitioners were heard and the respondents did not violate applicant's constitutional right to fair administration under article 47 of *the constitution* and were not ultra vires on its own statute, section 11 of the Baringo county *Alcoholic Drinks Control Act* 2014.

Analysis And Determination

39. The petitioners are aggrieved by the respondents' refusal to renew their licences to operate liquor business within Baringo County. The Baringo County *Alcoholic Drinks Control Act*, 2014 was enacted to govern liquor business operation within Baringo county. The petitioners' argument is that the respondents acted outside jurisdiction, that they were denied opportunity to be heard and their legitimate expectation was breached and approached this court for reliefs captured in paragraph 1 above.
40. I have considered grounds of the petition, averments in support of petition, averments in replying affidavit and submissions filed by the parties herein and wish to consider whether the petitioners have met threshold for grant of reliefs sought.
41. From averments herein, there is no dispute that the petitioners among others were invited to apply for renewal of licence under Baringo County *Alcoholic Drinks Control Act* 2014. The applicants herein are among the people who applied for renewal of licences.
42. upon applications being made, the 2nd respondent notified the public of the applications listing the names of applicants and their outlets. The 2nd respondent further invited the public to give their views in public barazas concerning the applications.
43. The petitioners confirmed that the 2nd respondent has jurisdiction to consider the applications but if errors are committed then the body making decision will have acted outside jurisdiction. The petitioner admit that invitation and notices were issued by one Hellen on behalf of the 2nd respondent but the decision was issued by public health officer in their letter head. On the other hand, the 2nd respondent argue that decision was made and signed by all committee members and communication was done through the secretary of the committee.
44. I however note that the petitioner has not denied that objections were raised concerning their outlets and upon rejection of application, appeals were made by 1st to 5th petitioner and 7th and 8 petitioners;



that their appeals were considered and determined. In my view the appeal process gave opportunity to the petitioners to challenge the objections raised by members of public. It will not therefore be right to say they were not granted an opportunity to be heard. As for the applicants/petitioners who did not appeal, they have failed to exhaust internal dispute resolution mechanism and filing this petition is premature. In the case of Republic v County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya [2014] eKLR the court held that the duty of the public body is to provide a forum in accordance with the law where the ex-parte applicant members are granted an opportunity to be heard. In my view the hearing before review board granted the petitioners opportunity to state their case and the board upheld 2nd respondent's decision.

45. On issue of public participation, the respondents have availed a list of members of public involved in public participation. The petitioners argue that they were not granted opportunity to address the objections raised by members of public but as observed above, the appeal process gave the petitioners opportunity to respond to allegations raised by members of public. This court respectively agrees with the sentiments held by Sachs J. in Minister of Health v New Clicks South Africa (PTY) Ltd [2005] ZACC 14 where he stated as follows:-

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinitive variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case”

46. On reasons for refusal to renew licence, the minutes clearly indicate reason which include the outlets failing to comply with distance requirement from learning institutions, churches and residential areas. Further reasons given are security and failing to comply with hours for operations, poor lighting and ventilation, selling second hand generation spirits; and in respect to 2nd petitioner, he has been operating without legal documents/licence. That the decision of the committee was communicated to the Applicants this applied to both the successful and unsuccessful candidates on 25th April, 2023 by the secretary of the 2nd respondent as clearly indicated in the letters. Copies of the said communication are attached and marked HJ6 a-h.

47. The petitioner's argument is that they have operated the business for long; that they had legitimate expectation which the respondents have breached; however, the fact that the outlets have operated for long do not make a wrong right nor justify flaunting of legal requirements and the respondent had a duty to protect the general public too as seen in the case of Meru Bar, Wines & Spirits Owners Self Help Group v County Government of Meru [2014] eKLR where the court sated as follows:

“It is the duty of the government to exercise due diligence in carrying put its responsibility through its legislative arm to legislate and provide them enjoy their rights without interference with their health and with the rights of others.”

48. It is also worth noting that it is the respondent is willing to renew licence if applicants whose licences were rejected rectify the wrongs and comply as they have indicated that some of the applicant's whose licences were rejected have complied and they have been issued licences.

49. In view of the above I find that the petitioners have failed to demonstrate that the respondents failed to follow the required procedure in considering their applications for renewal of licences. I find that this petition is not merited.

50. Final Orders



1. The petition herein is hereby dismissed.
2. Each party to bear own costs.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET DAY OF FEBRUARY 2024.

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RACHEL NGETICH

JUDGE

In the presence of

Ms Sakami holding brief for Maina for Defendant.

Mr Opar for Plaintiff.

Elvis/Sitienei – Court Assistants.

