



Miraa Growers and Traders Co-operative Union v Cabinet Secretary, Agriculture & 2 others; Mithika & 4 others (Interested Parties) (Miscellaneous Civil Application E003 of 2024) [2024] KEHC 16339 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16339 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E003 OF 2024
EM MURIITHI, J
DECEMBER 19, 2024**

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION AND IN THE MATTER OF THE MIRAA PRICING FORMULA COMMITTEE AND IN THE MATTER OF THE CROPS ACT, CAP 318, THE CROPS (MIRAA) REGULATIONS, 2023, FAIR ADMINISTRATIVE ACTIONS ACT, THE LAW REFORM ACT, CAP 26, ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010, THE CONSTITUTION OF KENYA, 2010 AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF THE LAW

BETWEEN

MIRAA GROWERS AND TRADERS CO-OPERATIVE UNION .. APPLICANT

AND

CABINET SECRETARY, AGRICULTURE 1ST RESPONDENT

AGRICULTURE AND FOOD AUTHORITY 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

DR JAMES MITHIKA INTERESTED PARTY

KAMENCU MWENDA MUHURI INTERESTED PARTY

MUSA KIUNGA M’ITHIRIA INTERESTED PARTY

DAVID KARIUKI NGARI INTERESTED PARTY

JERVASIUS NYOMBYEKOTHE INTERESTED PARTY



RULING

1. By the Chamber Summons dated 5/9/2024 for grant of leave to commence judicial review proceedings, the Applicant sought inter alia orders that, “The grant of such leave to operate as a stay against any further action arising from or consequent the entire decision of the 1st Respondent appointing the interested Parties as members of the Miraa Pricing Formula Committee, established under Regulation 29 of the *Crop (Miraa) Regulations, 2023* pending the hearing and determination of the proceedings herein and the substantive Notice of Motion Application for judicial review.”
2. The facts of the application are verified by the affidavit of Gitonga Bernard Mathews, the Applicant’s Secretary General, sworn on even date. It is averred that on 26/4/2024, the 1st Respondent requested the Applicant to nominate 3 members to serve in the Miraa Pricing Committee, which was done via an email dated 2/5/2024. Since the forwarding of the said names, the Applicant never received any communication relating to selection and/or vetting of the members and the subsequent appointment of the members of the Committee. The 1st Respondent, in exercise of its powers under Regulation 29(1) of the *Crop (Miraa) Regulations, 2023* appointed members of the Miraa Pricing Committee to the exclusion of the Applicant, and the said members were invited for the committee’s inception meeting on 26/8/2024 whereof the 1st Interested Party was elected as the Committee’s Chairperson. The decision of the 1st Respondent in appointing the Interested Parties as members of the Committee did not abide by Rule 29(1) of the *Crop (Miraa) Regulations, 2023*, is irrational, illegal, ultra vires, unreasonable, malicious, failed to take into account relevant factors, defied legitimate expectation and was marred with procedural impropriety. The 1st Respondent neither invited the Applicant’s 3 nominees for vetting nor informed them that it intended to exclude them from consideration as a part of the persons to be appointed in the Committee, which contravened their legitimate expectation and rights to fair administrative action under Article 47 of the *Constitution* and Sections 4 and 5 of the *Fair Administrative Action Act*. The failure by the 1st Respondent to publicize and/or gazette the appointments in order to promote the right to information, transparency, good governance and rule of law contravened Articles 10, 35 and 232 (1) (e) and (f) of the *Constitution*. Due to illegal and unprocedural manner of the appointments, the Meru County miraa farmers will not be represented and their interests will not be catered for in the Committee as presently constituted.
3. The Respondents opposed the application *vide* a replying affidavit sworn by Dr. Bruno Linyiru, the 2nd Respondent’s Director General, on 24/10/2024. He avers that the appointment of the members of the Committee complied with Regulation 29 of the *Crops (Miraa) Regulations, 2023*, and in order for the government to fulfill its legal and constitutional responsibility to Miraa/Muguka farmers, it is imperative that the Committee is allowed to proceed with its work pending the hearing and determination of the application. The grant of stay sought would greatly hinder the work of the Committee, which would have serious economic and social consequences to the economy and the people of the Miraa/Muguka growing areas. He strongly believes that the Applicant will not be prejudiced if stay is denied since the denial would not render nugatory the ultimate ends of justice in the unlikely event that the judicial application succeeds. He conscientiously believes that granting stay at this stage would be tantamount to granting the substantive orders sought in the main motion, which would be inefficacious and likely to occasion disruption in the pricing of Miraa/Muguka in Kenya, therefore disenfranchising millions of people relying on the crop for their economic well being. Consequently, the court should apply the principles of proportionality and public interest which all tilt against granting stay. He urges the court to exercise its discretion by dismissing the application for



stay in order to allow the Committee to continue with executing its very critical mandate to the Miraa/Muguka farmers in Kenya.

Submissions

4. The Applicant urges that the Interested Parties are lacking in capacity to exercise their duties in the Committee and their said appointment is an illegality and an abuse of power. It urges that it has established a prima facie arguable case upon which the court can exercise its discretion in its favour, and cites *Republic v City Council of Nairobi Ex parte Francis Kimani Mwaura & 3 Others* (2012) KEHC 265 (KLR) and *Constatine Maghanga Mwadime v Directorate Criminal Investigations & Director of Public Prosecutions; Fauzziah Emman Mohamud (Interested Party)* [2021] KEHC 6568 (KLR). It urges that the decision and actions that are being done by the Committee can be stayed because they are of continuing nature, and cites *Republic v County Government of Embu Ex parte Peterson Kamau Muta t/a Embu Medical and Dental Clinic & 6 others* (2022) eKLR and *Madanyang Tuliakong v Chairman, Chief Magistrate's Court, Kitale & Johnstone A. Lokamar* [2011] KEHC 526 (KLR).
5. The 2nd Respondent cites *Beatrice Kwamboka v Leader of Majority Party of the Nairobi County Assembly* (2016) eKLR, where the principles guiding the question of whether leave to institute judicial review proceedings should act as stay were comprehensively discussed. It urges that guided by the overriding principles of proportionality and equality of its arms, the stay sought herein is not warranted because the decision to be stayed is already complete, and it is in the public interest to deny stay and the judicial review proceedings will not be rendered nugatory if stay is denied. It relies on *Republic v Nairobi City County Assembly Service Board Ex parte Applicant Pauline Sarah Akuku* (2022) eKLR, where the court noted that a stay cannot be issued if the action sought to be stayed has already been completed. It urges that the action of appointment has already been carried out as evidenced by the appointment letters of each member of the Pricing Committee, and thus the same cannot be stayed. It urges the court to caution itself against granting orders not prayed for or stay orders which have the effect of acting as substantive orders at a preliminary stage, as was noted in *Bell & another v L.L. Matterello Limited* (Civil Appeal 72 of 2019) [2022] KECA 168 (KLR) (18 February 2022) (Judgment). It urges that in the current circumstances, it is in the public interest to deny stay, and cites *Manabo Holdings LLP v Capital Markets Authority* (Miscellaneous Civil Application E078 of 2022) [2022] KEHC 15492 (KLR) (Judicial Review) (17 November 2022) (Ruling). It urges that staying the operation of the Pricing Committee will be stunting the growth of the miraa market and creating an environment where innocent farmers are exploited by unscrupulous middlemen and the government itself is handicapped in regulating and taxing the miraa industry due to fluctuation of pricing. It urges that denial of stay will not render the judicial review suit nugatory as the question of the validity of the appointment process would still be rife for determination, and cites *Republic v National Assembly & another Ex parte Coalition for Reform and Democracy (CORD)* (2016) eKLR.
6. The 1st and 3rd Respondents urge that the grant of stay would effectively cripple the critical and important operations of the Miraa Pricing Committee before hearing the defence by the Respondents, and cite *Taib A. Taib v The Minister for Local Government & Others* (2006) eKLR and *R v Permanent Secretary of Local Government and Others ex parte Immaculate Transporters Limited and Others* (2008) eKLR. They urge that the appointment of the Committee members is complete and therefore stay cannot issue, and cite *R v Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya County Bus Owners Association and 8 Others* (2014) eKLR, *James Opiyo Wandayi v Kenya National Assembly & 2 Others* (2016) eKLR, *R v Capital Markets Authority ex parte Joseph Mumo Kivai & Another* (2012) eKLR, *R (H) v Ashworth Special Hospital Authority; Re Bivac International SA (Bureau Veritas)* (2005) 2 EA 42 and *R v Monopolies and Mergers Commission ex parte Argyll Group PLC* (1986) 1 WLR 763. They urge that staying the functioning of the Committee would highly jeopardise



the public interest especially of the people of the Miraa growing counties. They urge that the Applicant will not be prejudiced if stay is denied since the denial would not render nugatory the ultimate ends of justice in the unlikely event that the judicial review application succeeds.

Analysis and Determination

7. The grant of stay in judicial review proceedings is governed by Order 53 Rule 1 (4) of the [*Civil Procedure Rules*](#) as follows:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

8. The purpose of the stay is to preserve the substratum of the substantive motion for judicial review pending the hearing and determination thereof.

9. The threshold to be met before leave to operate as stay can issue was discussed in *Republic v National Transport & Safety Authority & 10 others* [2014] eKLR, where the court (W. Korir J., as he then was) expressed as follows:

“In issuing an order of stay, the Court must always balance the interests of the parties before the Court. The Court must also consider the impact of the stay orders on the wider public. In the case before me, failure to issue an order of stay will not render nugatory the Applicant’s case. If at the end of the day the application succeeds, matters will revert back to the position that prevailed prior to the implementation of the Legal Notice...A situation where an Applicant seeks to stop the implementation of a law, he must demonstrate that the implementation of the law will cause irreparable harm.”

10. Comparatively in *Taib A. Taib v The Minister for Local Government & Others* (Supra), cited by the 1st and 3rd Respondents, the court (D. K Maraga J as he then was), encapsulated that;

“What is always in issue is whether, in the circumstances of any particular case, a stay order is efficacious. I also want to state that in judicial review applications like this one the court should always ensure that the Ex-parte applicant’s application is not rendered nugatory by the acts of the respondent during the pendency of the application. Therefore where the order of stay is efficacious the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction? The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made...It also encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act.”

11. Whilst the Applicant contends that the decisions of the Miraa Pricing Committee being taken can still be stayed because they are continuing in nature, the Respondents are adamant that stay is not viable because the appointment of the Interested Parties has already been completed and fully implemented.



12. In *Republic v Richard Langat Kerich & 5 others* [2013] eKLR, the court (G.V. Odunga J as he then was) rendered thus:

“However, the mere fact that the application discloses a prima facie case does not necessarily qualify the matter to a grant of stay. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant’s case notwithstanding.”

13. The Applicant’s grievance is not per se that the process leading to the appointment of the Interested Parties was flawed for want of adherence to the laid down procedure. Its gravamen is the 1st Respondent’s failure to consider the persons it had nominated for appointment to the Committee. This with respect may be shortly remedied, if the applicants be successful in the main motion, by an order for inclusion of the Applicant’s nominees. The remedy would to me, respectfully, lie in an expedited hearing of the substantive Notice of Motion for an early determination of the dispute.

14. The court must zealously guard against the unnecessary curtailment of the Respondents’ performance of their functions, which would ultimately and adversely affect the Miraa farmers and the economy. That is what the public interest in this case demands. The court finds that the Applicant has not established how the hearing and determination of the substantive judicial review proceedings will be rendered nugatory, if the Miraa Pricing Committee continues to run its operations, as currently constituted.

15. Suffice to state, justice can still be done by quashing the appointment of the Interested Parties if the court, upon full hearing and determination of the judicial review application, finds that the same was marred with illegalities and procedural irregularities.

Orders

16. Accordingly, for the reasons set out above, the court declines, in public interest, to order that the leave granted herein do operate as stay.

17. The Directions as to hearing and determination of the substantive Notice of Motion herein shall be given on 10th February 2025 as scheduled.

18. Costs in the Cause.

Order accordingly.

DATED AND DELIVERED ON THIS 19TH DAY OF DECEMBER 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Muguyu for the Ex parte Applicants.

Mr. Juma for the Respondents.

