



**Republic v County Government of Nakuru & 3 others; Gold Target Youth Group
 (Represented by Andrew Opiyo Weda (Chairman), Gladys Wanjiru Kimani
 (Secretary) and Rahab Wanja Njoroge (Treasurer) (Exparte Applicant) (Judicial
 Review E002 of 2022) [2023] KEHC 18499 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18499 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIVASHA
 JUDICIAL REVIEW E002 OF 2022
 GL NZIOKA, J
 MAY 30, 2023
 IN THE MATTER OF AN APPLICATION BY GOLD
 TARGET YOUTH GROUP FOR JUDICIAL REVIEW
 ORDERS OF CERTIORARI, PROHIBITION AND
 MANDAMUS
 AND
 IN THE MATTER OF ARTICLE 23 AND ARTICLE 47
 OF THE CONSTITUTION OF KENYA 2010
 AND
 IN THE MATTER OF THE COUNTY GOVERNMENTS
 ACT NO. 17 OF 2012 LAWS OF KENYA
 AND
 IN THE MATTER OF THE COUNTY GOVERNMENT
 OF NAKURU
 BETWEEN
 REPUBLIC APPLICANT
 AND
 COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT
 THE CHIEF OFFICER PUBLIC HEALTH SERVICES 2ND RESPONDENT
 DR DANIEL WAINAINA 3RD RESPONDENT**



**FLYING EAGLE YOUTH GROUP (REPRESENTED BY
IBRAHIM ABDI HUSSEIN (CHAIRMAN) AND LOUIS GAKURE
(SECRETARY) 4TH RESPONDENT**

AND

**GOLD TARGET YOUTH GROUP (REPRESENTED BY ANDREW OPIYO
WEDA (CHAIRMAN), GLADYS WANJIRU KIMANI (SECRETARY) AND
RAHAB WANJA NJOROGE (TREASURER) EXPARTE APPLICANT**

JUDGMENT

1. By a Notice of Motion application dated 6th October 2022, brought under the provisions of Order 53 Rules 1 & 2 of the Civil Procedure Rules, and section 8 and 9 of the Law Reform Act, the ex-parte applicant, is seeking for the following orders that:
 - a. This Honourable Court be pleased to issue an order of Certiorari for purposes of removing to this Honourable Court and quashing the decision of the 1st 2nd and 3rd Respondent purporting to authorize the 4th respondent to illegally take over, manage and operate public toilets in Nakuru County and specifically the public toilet at the bus terminus in Naivasha Town, usually referred to as Nairobi Stage from the Ex parte Applicant.
 - b. This Honourable Court be pleased to issue an order Prohibition to prohibit the Respondents from purporting to take over, manage and operate public toilets in Nakuru County and specifically at the bus terminus in Naivasha Town, usually referred to as Nairobi Stage from the Ex parte Applicant
 - c. This Honourable Court be pleased to order the Respondent to bear the costs of this application.
2. The application is based on the ground thereto, the statutory statement and the verifying affidavit of the applicant annexed to the chamber summons application dated, 14th September 2022.

It is the applicant's averment that, it is a self-help group that was registered on 17th August 2018, by the Sub-County Social Services Development Officer, at Naivasha and issued with a certificate of registration No. 377789.
3. That on 26th January 2022, the applicant applied to the 1st respondent to be allowed to manage and operate the public toilet situated at the bus terminus in Naivasha Stage (better known as Nairobi Stage). That vide a letter dated, 14th March 2022, the 1st respondent granted the said permission which was to run for a period of three (3) years commencing 1st April 2022.
4. That subsequently the applicant took over the operations of the public toilet which proceeded smoothly and properly without a complaint. However, an issue arose but was addressed in a meeting held on 1st September 2022 at the offices of the 1st respondent in Naivasha Sub-County and chaired by the 1st respondent's Naivasha Sub-County Administrator.
5. That on 12th September 2022, the agents of the 4th respondent went to the public toilet at Nairobi Stage seeking to take over management and control of the same and it came to the applicant's notice that, the 1st respondent through the 2nd and 3rd respondents had entered into a contract dated 9th September, 2022, with the 4th respondent for the exclusive right to operate the public toilets.



6. That the applicant explained to the 4th respondents' agents that it had not received a notice of termination of their contract and therefore the contract issued to the 4th respondent was illegal and improper and the agents of the 4th respondent left but vowed to return with officers of the 1st respondent to enforce the takeover of the public toilet.
7. The applicants aver that the action of the respondents is illegal, unreasonable, unwarranted and injurious to it and they are justifiably apprehensive that they will be ejected causing irreparable harm.
8. Further, the 1st, 2nd and 3rd respondent failed to give them any notice therefore their actions are ultra vires and have abrogated the applicant's rights' to fair administrative action, natural justice and the right to be heard
9. However, the application was opposed by the 1st 2nd and 3rd respondent vide a replying affidavit dated, 9th February 2023 sworn by George Njoroge Gachomba, the 1st respondent's County Public Health Officer in the Public Health & Sanitation Department.
10. He avers that, Article 185 (2) of *the Constitution* grants the County Government powers to make laws necessary for the performance of its functions and that section 2 and 3 of part 2 of the 4th Schedule of *the Constitution* of Kenya vests the County Government with function of managing public health.
11. Further, Nakuru County Public Health & Sanitation Act 2017, gives effect to sections 2 & 3 of part 2 of the 4th schedule of *the Constitution* and section 11 establishes the Public Health Department and vests it with powers to inter alia; promote public health and sanitation. Furthermore, sections 20 and 21 vests the County Department of Public Health with the mandate of licensing and regulating public sanitation facilities within the County.
12. That on 7th September 2022, the department received a request to manage the public toilet at the Naivasha – Kinangop stage. On the same date the matter was deliberated as a matter of urgency and approval granted. Consequently, the two parties executed a Memorandum of Understanding dated, 9th September 2022, which elaborated the modalities of managing the stated public toilets.
13. That the applicant has never requested permission to operate and/or manage the Naivasha – Kinangop Stage public toilets nor approached the 1st respondent's department of health or other County Department in relation to the issue. Further, there is no existing contract between the applicant and the 1st respondent in that the document relied on by the applicant is a letter of offer by an unauthorized person and does not constitute a contract.
14. Further, the application is challenging the merits of the respondents' action of awarding the respondent permission to operate the Naivasha – Kinangop public toilet yet judicial review is concerned with the decision making process and therefore the application does not fall within the purview of judicial review and is not merited.
15. Furthermore, the applicant has not placed any material or evidence before the Court to demonstrate that it was given unfair treatment arising from the decision making process. Additionally, the application fails to meet the tenets of; Article 159 (c) of *the Constitution* and section 88 and 89 of the County Government Act, 2012.
16. That the 1st respondent acted within the law and the decision to grant the 4th respondent permission to operate the public toilets is as a result of procedural propriety.



17. The 4th respondent also opposed the application vide a replying affidavit dated 26th October 2022 sworn by its secretary, Louis Gakure. He averred that the 4th respondent is the bona-fide occupant and allottee operating the public facility and has fulfilled all its obligations in the allotment letter.
18. Further, the 1st and 2nd respondents are the bona-fide custodians of the suit property and the applicant lacks merit to content or raise issues in the subject petition, therefore the application should be dismissed.
19. In response to the replying affidavit by the 1st, 2nd and 3rd respondents, the applicant filed a further affidavit dated; 17th February 2023, sworn by its secretary Gladys Wanjiru Kimani. She averred that while *the Constitution* of Kenya and the Nakuru County Public Health and Sanitation Act gave the 1st respondent its mandate to manage public health issues, the conduct of its officer including the 2nd and 3rd respondent must be in accordance with the law, the principles of constitutionality and natural justice.
20. That, the respondents had failed to show the statutory underpinnings for the Public Health Toilet Allocation Committee which upon receipt of the 4th respondent's application hurriedly convened a meeting. That it is not possible to determine the committee's legal membership, its procedures, and authority for convening the meeting.
21. Further, that the committee having sat and made a decision directly impacting the applicant, it should have conformed to the rules of natural justice and informed the applicant of its meeting. That the application by the 4th respondent is dated 8th August 2022 and yet the application annexed to the replying affidavit of the 4th respondent is dated 18th August 2022.
22. Furthermore, the address of the 4th respondent on the annexed application is similar to the address of the 1st respondent's Naivasha offices. That, the committee failed to consider that the 1st respondent's Sub-County Administrator had on 14th March 2022 awarded the applicant the mandate to operate the said toilets. It further ignored the decision of the meeting held on 1st September 2022 chaired by the Sub- County Administrator where the issue of the public toilet was deliberated and confirmed that the applicant is duly authorized to operate the same.
23. That the letter granting the applicant authority to manage the public toilet is signed by the officer in charge of all operations of the 1st respondent within Naivasha Sub-County and it constitutes a contract.
24. That if the 1st to 3rd respondents' are dissatisfied with the applicant's mandate to operate the public toilet, they should have initiated the procedures to terminate the contract. However, that the respondents did not follow due process of the law in taking away the contract issued to the applicants 'and awarding it to the 4th respondent without giving the applicant a chance to make any representations. As such the actions of the 1st to 3rd respondents demonstrate bias in the decision making process and the application is properly before the court.
25. The application was disposed of by filing of submissions. The applicant filed submissions dated, 6th February 2023 and reiterated the averments in the affidavits in support of the application and further that the respondents have failed to explain to the applicant or the court the considerations taken into account in rendering the opaque, unreasonable and unjustifiable decision.
26. That, the 1st 2nd and 3rd respondents did not attempt to comply with the law or apply the principles of natural justice. Reliance was placed on municipal Council of Mombasa vs Republic, Umoja Consultants Ltd (2002) eKLR where the Court of Appeal stated that it was the duty of a statutory



- body to comply with the law in arriving at its decision and that it is its duty to bring to the attention of those affected by the decision.
27. That the decision of the 1st, 2nd and 3rd respondents being arbitrary, illegal and unfair and the 4th respondent having benefited unfairly, the court should issue an order of certiorari to remove and quash the said decision. Further, the court should issue an order of prohibition to prevent the respondents from taking over, managing and operating the public toilet at the bus terminus in Naivasha.
 28. However, the respondent in its written submissions dated 10th February 2023, argued that in an application for judicial review, the court must satisfy itself that the applicant has demonstrated the respondent's action was marred with illegality, irrationality and procedural impropriety as stated in the case of; *Council of Civil Servants Union vs Minister for the Civil Service* [1985] 2 AC.
 29. Further in the case of; *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others* (1997) eKLR the Court of Appeal stated that the prerogative writ of certiorari can quash a decision already made and will be issued if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with.
 30. Further the prohibition order looks to the future to prohibit a tribunal from acting contrary to the rules of natural justice but the order will not be effective against a decision that has already been made whether in excess or lack of jurisdiction, or whether in the violation of the rules of natural justice.
 31. It was reiterated that; judicial review is concerned with the process leading to the making of the decision. Reliance was placed on the cases of *Ernest B.M Oranga v Kakamega County Commissioner of Cooperatives & 6 Others* [2016] eKLR where it cited the case of; *Municipal Council of Mombasa Versus Republic & Another* (2002) eKLR, wherein the Court held that, it is only be concerned with the process leading to the making of the decision, how it was arrived at, if those who made the decision had jurisdiction to make it, if the persons affected by the decision were heard before it was made, if in making the decision, the decision - maker took into irrelevant matters. Further reliance was placed on the case of; *County Government of Mombasa: Clerk County Assembly of Mombasa & 6 Others (Interested Parties) Ex Parte Patrick Kabundu & 2 Others* (2020) eKLR and *Samuel Thinguri Waruthe & 2 Othes vs Kiambu County Government & 2 Others* [2015] eKLR.
 32. The respondent further submitted that there is no existing contract between the applicant and the 1st respondent. That the Black's Law Dictionary defines a contract as: "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law."
 33. That the document the applicant relied on was a letter of offer and lacks the basic elements of a contract therefore it does not constitute a contract and is unenforceable. Reliance was placed on the case of *Caleb Onyango Adongo vs Benard Ouma Ogur* (2002) eKLR where the stated the elements of a contract were outlined as: offer, acceptance and consideration which require to be proved and that an objective approach should be adopted in contract interpretation.
 34. That the court can only interfere with the 1st respondent's constitutional mandate where it acts outside the law or fails to act as required by the law as stated in the case of *Nairobi Metropolitan PSV Saccos Limited Union and 25 others vs County of Nairobi Government & 3 others* [2013] eKLR that it the court will only intervene where it is shown that there has being a violation of existing law or contravention of the law.
 35. That, the application is superfluous and ill-conceived and only seeks to unjustly scuttle the respondent's mandate of imposing charges on services rendered. The case of *Republic v National Employment Authority & 3 others Ex parte Middle East Consultancy Services Limited* (2018) eKLR was cited where the court highlighted instances when it may be reluctant to grant the prerogative writs



of mandamus, prohibition and certiorari as where the applicant's own conduct has been unmeritorious or unreasonable for instance, unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration or where the judge considers that an alternative remedy could have been pursued.

36. The 4th respondent in its submissions dated 8th February 2023 submitted that the applicant lacks locus to bring the suit as they have never occupied the premises in dispute and have never been issued with a license. That, the exhibits GTYG3 and GTYG4 relied on by the applicant's show that Goll Target Youth Group is the one that applied for a license to operate the subject premises.
37. Further, the prayers sought for by the applicant are illegal, oppressive and unlawful as the applicant has failed to show a nexus between the licensing body and or occupation. Further the applicant has failed to demonstrate the illegality and or excessiveness the respondents have occasioned them.
38. That the applicant ought to demonstrate that they had applied for an operating license; operated the premises in dispute to the exclusion of the respondent; and are the one and the same with Goll Target Youth Group. The case of Chuka Judicial Review No. E001 of 2021 Republic vs District Land Adjudication & Settlement Officer Maara Sub-County & 3 Others and Njeru Kiririka & M'Nyiri Ragwa was cited where the court stated that the claim of judicial review must be strictly proved.
39. The applicant filed supplementary submissions dated 17th February 2023 and argued that the document they relied on is a contract. That a contract need not be lengthy and can be composed of correspondence and implied from conduct of the parties. Reliance was placed on the case of Caleb Onyango Adongo v Bernard Ouma Ogur [2020] eKLR.
40. Having considered the arguments advanced by the respective parties and I find that, the main issue herein is whether the applicant has met the threshold of grant of the orders sought. In that regard, the elements of judicial review provide inter alia that; the decision or act complained of is or be tainted with illegality, irrationality and procedural impropriety as observed in Ernest B.M Oranga v Kakamega County Commissioner of Cooperatives & 6 Others [2016] eKLR.
41. Further the writ of certiorari is issued to quash a decision made without or in excess of jurisdiction as was held by the Court of Appeal in of Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge [1997] eKLR.
42. Furthermore, the writ of prohibition looks at the future, thus where a decision is already made prohibition order will not issue.
43. In considering the subject matter herein, I note that it is settled law that, the power of the court to grant of judicial review remedies is discretionary. However, the remedy will not be granted to impede the mandate of an Authority's to discharge its functions or where an alternative remedy available or avoid statutory laid down processes. In Republic v National Employment Authority & 3 others Ex parte Middle East Consultancy Services Limited (2018) e KLR the court stated that:

“65. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include ... where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued...



The grant of the orders of Certiorari, Mandamus and Prohibition is discretionary. The Court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that a serious issue arises, namely, whether or not the ex parte applicant is using Court processes to avoid the statutory laid down process.

44. The respondent herein has raised several issues in opposing the application, which include the fact that the letter dated 14th March 2022 relied on by the Ex parte applicant is a letter of offer by an unauthorized person. First and foremost, that argument is subject to proof through evidence. Secondly it is unlikely that the Ex parte applicant would be concerned with the internal affairs of the 1st and 2nd respondent.
45. Similarly, the only opportunity the Ex parte applicant would have had to defend the subject document is if it had been accorded an opportunity to be heard before the permitting the 4th respondent to operate the toilets. That was not done.
46. One of the grounds upon which the court will award a remedy under judicial review is where the rules of natural justice have been violated.
47. In deed there are mainly two principles of natural Justice which every administrative authority should follow whether or not these are specifically provided in the relevant Acts or rules, that: No one should be the judge in his/her own case, and Each party should be given the opportunity to be heard (*nemo iudex in causa sua*) and (*audi alteram partem*) respectively.
48. The right to a fair hearing requires that individuals should not be penalized by decisions affecting their rights or legitimate expectations unless they have been given prior notice of the case, a fair opportunity to answer it, and the opportunity to present their own case. The mere fact that a decision affects rights or interests is sufficient to subject the decision to the procedures required by natural justice.
49. What prejudice would the 1st and 2nd respondent suffered if they allowed the Ex parte applicant an opportunity to be heard? In my considered opinion none.
50. The right to a fair hearing is also provided for under section 4 of the Fair Administrative Actions Act as follows:
 1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair
 2. Every person has the right to be given written reasons for any administrative action that is taken against him.
 3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;



- (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action. (4) The administrator shall accord the person against whom administrative action is taken an opportunity to—
 - (a) attend proceedings, in person or in the company of an expert of his choice;
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
- (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
- (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure.
51. In furtherance of that right, Article 47 of *the Constitution* of Kenya states that: -
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is *Constitution of Kenya, 2010* 33 likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration. Access to justice
52. Pursuant to the aforesaid I find that the process used to award the 4th respondent a contract to manage the subject toilets was not procedurally correct for failure to grant the Ex parte applicant an opportunity to be heard and therefore cannot stand
53. However, the prayer for prohibition cannot be granted as it relates to future actions and it is deposed that a decision has already been made to award the contract. As regards the prayer for an order of certiorari, I note that the subject facilities are matters of public health and to just quash the decision to award the 4th respondent the contract may cause serious health challenges and/or become a health hazard as the subject matter is a matter of hygiene.
54. In the interest of justice I shall allow the 1st and 2nd respondent a period of one month to follow the due process of law by according the Ex parte applicant an opportunity to be heard. In default to comply with the order given within 30 days of the date of 2nd June, 2023, the prayer for certiorari will automatic issue without recourse to court.
55. It is so ordered.



DATED, DELIVERED AND SIGNED ON THIS 30TH DAY OF MAY 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. P. K. Njuguna for the ex parte applicant

Mr. G. Kinuthia for the 1st & 2nd respondent

Mr. G. Kimani for the 4th respondent

Mr. Kinuthia for the 3rd respondent

