



**Ireri v County Government of Embu (Miscellaneous Application
E017 of 2023) [2023] KEHC 21345 (KLR) (9 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21345 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION E017 OF 2023
LM NJUGUNA, J
AUGUST 9, 2023**

**IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDER OF PROHIBITION
AND
IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDER OF MANDAMUS
AND
IN THE MATTER OF THE RESPONSE TO THE PETITION ON REBUILDING OF THE
BURNT EMBU MUNICIPALITY COVERED MARKET (OLD MARIGITI) IN EMBU TOWN**

BETWEEN

JOSHUA R. IRERI APPLICANT

AND

COUNTY GOVERNMENT OF EMBU RESPONDENT

JUDGMENT

1. The applicant herein filed chamber summons dated 09th May 2023 under certificate of urgency, seeking orders that:
 - a. The applicant herein be granted leave to apply for an order of prohibition to stop the respondent from putting up temporary wooden structures at Embu Municipal covered Market (Old Marigiti) in Embu Town;
 - b. The applicant herein be granted leave to apply for an order of mandamus to compel the respondent to construct a modern permanent structure as Embu Municipal Covered Market (Old Marigiti) in Embu Town;



- c. That status quo at Embu Municipal Covered Market (Old Marigiti) in Embu town be maintained pending the hearing and determination of the substantive application seeking order of mandamus; and
 - d. Costs for this application be provided for.
2. The application is premised on the grounds on its face, in the statement and verifying affidavit as deposed by the applicant.
3. Brief facts of the matter are that in March 2020, the Embu Municipal Covered Market (Old Marigiti) burned down resulting in losses to the traders. That the county government reluctantly agreed, through a committee, to construct new permanent modern stalls for the traders and the process was fast-tracked. In March 2022, construction which was at the roof stage stopped following political parties' nominations and the contractor was chased away. That some building materials were also stolen. That the new building, in the pendency of completion, was demolished by the respondent without consulting the traders at the said market and in place, the respondent is in the process of constructing wooden stalls.
4. It is upon this basis that the applicant is seeking an order prohibiting the respondent from continuing with construction of the wooden structures; a mandatory order directing the respondent to demolish the wooden stalls and replace the same with permanent modern stalls and that upon completion, the respondent prioritizes the members of Marigiti in allocating the stalls. These reliefs sought are premised on the grounds, inter alia, that the respondent disregarded the recommendations of the Trade Tourism, Investment and Industrialization Committee and proceeded to construct temporary wooden stalls in place of the permanent modern stalls existing before.
5. In the verifying affidavit sworn by the applicant, who is the chairperson of Marigiti Stall Owners, he disclosed that all the members of the said organization have been duly paying their rents and he produced some receipts as prove. He also stated that when the respondent embarked on demolishing the permanent structures and constructing the wooden ones, there was no public participation and the members are now afraid that they will not be prioritized in allocation of the new stalls.
6. In its replying affidavit sworn by the County Attorney, the respondent averred that following the torching of the said market, the respondent compensated the rightful owners. That the decision to construct a new permanent structure was reached in consultation with all the stakeholders including the stall owners. That once the funds for reconstruction were available, the process began but was stopped by protesting traders who caused the contractor to abandon the site. That during the protests some parts of the structure were weakened thereby bringing its integrity into question and the respondent resorted to the re-evaluation of the structural design of the market factoring in the safety of the structure although the construction is yet to begin.
7. That the re-construction is currently underway and a meeting to review the design was held in January 2023. That a series of other meetings regarding the same issue were held and the stall owners were aware of the resolutions. That vide meetings held on 14th March 2023 and 17th April 2023, it was resolved that the traders be relocated and they, and the stall owners were also involved in the decision making and their involvement was documented as evidence. It is their case that no allocation of stalls has been done yet and the applicant cannot seek orders to prohibit construction of the market which is a process already approved and in place. It is also averred that the applicant lacks locus standi to institute these proceedings under Article 22 and 148 of *the Constitution* of Kenya 2010.
8. In his response to the replying affidavit, the applicant stated that the replying affidavit by the respondent is not properly before the court as it was filed past the time when the court ordered. Further



that the orders sought herein can be granted regardless of the response by the respondent because the nature of this application is to seek leave to institute judicial review proceedings. He denied that the permanent market was demolished by the traders at the market but rather by goons sent by a politician. That in as much as the respondent stated that the integrity of the building had come into question, they did not provide any expert evidence to that effect. He denies that the temporary structures were erected by the traders. That the temporary wooden structures were in fact funded by the respondent and the same were allocated to traders excluding the initial owners. That the contractor who was assigned the project of re-constructing the market was a stranger whose appointment was passed without public participation. He further denied that the members attended the said meeting as the old members were not involved in the process. He also denied that the initial owners of the burnt market were relocated and that the temporary stalls were allocated to them as the owners. That in fact, the meetings referred to were held involving traders from one section of the market only.

9. Both parties filed their submissions as directed by the court.
10. The applicant, in his submissions, stated that the replying affidavit was filed after the lapse of 10 days as the court had directed and was therefore not properly before the court. He stated that the substantial judicial review case has merit and a high chance of success and therefore, leave must be granted. On this, he relied on the case of Republic Vs Central Bank of Kenya Ex parte Nairobi City County Assembly Services Board; Office of the Clerk of the County Assembly of Nairobi (Interested Party); Edward Ombwori Gichana & another (Intended Interested Parties) [2022] eKLR the court found that the court should consider an application for leave based on the whether the issues are triable.
11. The applicant also relied on the case of Republic Vs Public Procurement Administrative Review Board & 2 others Ex Parte MIG International Limited & another [2016] eKLR to emphasize the importance of judicial review proceedings. He argued that the decision by the respondents to demolish the permanent stalls and erect temporary ones without the knowledge of the stall owners was unprocedural and unfair. On this, he referred to the cases of Republic Vs. County Government of Embu exparte Peterson Kamau Muto t/a Embu Medical and Dental Clinic & 6 Others (2022) eKLR and Republic Vs Public Procurement Administrative Review Board & 2 others Ex Parte MIG International Limited & another (supra) where the court stated that judicial review is more concerned with the manner in which the decision is made more than the decision itself. In conclusion, he urged the court to grant leave to institute judicial review proceedings against the respondent based on the foregoing.
12. The respondent in its submissions termed the application herein as frivolous, vexatious and an abuse of the court process. That the respondent has taken all the necessary steps to ensure that they deliver a modern market and the same is under construction and that the application seeks to compel the respondent to do what it has already done. They relied on the case of R. Vs County Council of Kwale & Another exparte Kondo & 57 others Mombasa HCMCA No. 384 of 1996 where the court stated that the purpose of an application for leave to institute judicial review proceedings is to enable the court to weed out frivolous proceedings before they are instituted thereby saving judicial time.
13. On the applicant's prayer for status quo, the respondent submitted that it has already commenced construction of the modern permanent market structure and so the prayer, if granted, will only go against the very spirit of judicial review proceedings which is to seek to remedy illegal and unfair and irrational decision by an authority. This was the position in the case of R Vs. National Land Commission & Another exparte Farmers Choice Limited (2020) eKLR which they relied on. In conclusion, they submitted that the actions of the respondent do not raise any concerns for illegality or unfairness as there is no need to prohibit or compel the respondent regarding actions that are already underway.



14. Upon consideration of the pleadings and submissions herein, I am faced with the question as to whether the application is merited.
15. The essence of an application for leave such as this one is to enable the court to determine whether the applicant should be allowed to institute judicial review proceedings. It is an initial assessment of the facts in order to determine whether it is prudent use of judicial time to consider a substantive judicial review suit. I share the sentiments of the court on this as stated in the case of Republic Vs National Land Commission & another Ex-parte Farmers Choice Limited (2020) eKLR. In the case of Republic Vs County Government of Embu Ex parte Peterson Kamau Muto t/a Embu Medical and Dental Clinic & 6 others [2022] eKLR in which the court held that a decision on whether or not to grant leave should be based only on a cursory perusal of the evidence provided and not on depth consideration of the substance.
16. With that in mind, no evaluation of the facts and evidence must be made. The applicant's case is that the respondent has acted severally without due regard to procedures involving the stall owners as the case should be. From the respondents replying affidavit, annexure KG5 is a report of a consultative meeting held on 09th February 2023 between the respondent and the stall owners where the latter was represented by Joshua Rutere alongside 8 other individuals who were representing 58 registered owners of the stalls. The applicant herein is also suing as chairperson of an organization to which the stall owners are members. This discrepancy especially comes into question when the respondent in its replying affidavit claims that the applicant lacks locus standi. From a perusal of annexure KG9 of the replying affidavit, the list of market stall-owners is longer than the 58 people referred to in KG5. The greater issue here may well be that the owners of the stalls may not have been clearly identified. However, it is clear that these are legal issues but they are not for trial before this court, neither would they be issues under judicial review. Therefore, the issue of applicant's locus standi may be a valid one but not triable in a suit for judicial review.
17. The applicants registered their apprehension that they may not be allocated the stalls once the new building is complete. To this, the respondent stated that allocations were yet to be done. My view is that in any event, the applicant and all the other owners will have an opportunity to claim through whatever legal means they choose once the building is completed and the respondent begins allocating the stalls.
18. The applicants, in their response to replying affidavit stated that the respondent filed the replying affidavit long past the timeline directed by the court. I note that the same was filed on 30th May 2023, being 10 days after the deadline set by the court. On this issue, I shall fall back on the Article 159(2) (d) which discourages the courts from giving undue regard to technicalities. In my view, this does not affect the issues in the application and I shall therefore treat it as a technicality that can be overlooked.
19. The respondent has demonstrated that it is actually in the process of constructing the market. Strategic meetings have been held severally toward the objective of completing construction of the building in question and the minutes have been provided. However, I note that the minutes are not signed, neither are any other documents adduced as part of their evidence. However, this has not been contested by the applicant in his response to the replying affidavit.
20. On the threshold for grant of leave to institute judicial review, I rely on the Ugandan case of Pastoli Vs. Kabale District Local Government Council and Others [2008] 2 EA 300, the Court citing Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 held that:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural



impropriety...Illegality is when the decision- making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.” (emphasis added)

21. Further, in the case of Republic Vs Chief Magistrate Milimani Commercial Courts & 2 others Ex Parte Fredrick Bett [2022] eKLR the court cited with approval the case of HCJR Case No. E087 of 2021, AAR Insurance vs Public Procurement Administrative Review Board, Secretary IEBC and Zamara Risk and Insurance brokers Limited Interested Parties (unreported), which summed up the rationale for the requirement for leave as such:

“I must reiterate that judicial review remedies are discretionary and it is partly for this reason that a judicial review court has been clothed with the discretion to interrogate, at a preliminary level, the intended application for prerogative orders. It is at that stage that, in exercise of its discretion, the review court will weigh between ‘the legitimate requirement of public authorities that they should be free to perform their proper functions on behalf of the public and the corresponding requirement that they should have due regard for the legitimate rights and interests of the individual and groups of individuals.’ If upon examination of the material before it, the court is persuaded that a case has been made out that on further interrogation the legitimate rights and interests of the individual or group of individuals may have been abrogated, it will intervene and exercise its discretion in favour of grant of leave to institute a substantive motion for judicial review reliefs. It follows that the application for leave is not a mere procedural technicality that can be dispensed with at the whims of either the court or an applicant. It is a material stage in the application of judicial review orders at which the discretion of this Honourable court is called into question and which, for this very reason, cannot be taken away without an express provision of the law in that regard.”

22. Consequently, I am not convinced that the applicants have satisfied the requirements for granting of leave to institute judicial review proceedings against the respondent as the application fails to meet the required threshold. The application for leave is therefore unmerited and is hereby dismissed with no order as to costs.
23. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF AUGUST, 2023.

L. NJUGUNA

JUDGE

..... for the Applicant

..... for the Respondent

