IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPL. NO. E025 OF 2021

SAMMY MATHEKA & 2 OTHERS .....APPLICANTS

VERSUS

THE PRINCIPAL SECRETARY,

MINISTRY OF TRANSPORT, INFRASTRUCTURE

AND URBAN DEVELOPMENT.....RESPONDENT

RULING

1. Sammy Matheka, Benson Irungu and Theresiah Wambui, suing on their own behalf and on behalf of 43 other Applicants in the allocation of the Market Stalls at the Kibera Soweto East Zone 'A' (hereinafter 'the applicants') moved this court vide a Chamber Summons application dated 10th February, 2021 seeking orders:

(i) Spent

(ii) That this Honourable Court be pleased to grant leave to the Applicants to apply for an **Order of Mandamus** to compel the 1st and 2nd Respondents to avail to the Applicants the List of Successful Applicants and minutes relating to the allocation of the Market Stalls at the Kibera Soweto East Zone A, which information is crucial for the Applicants' exercise of their fundamental right to property, equality and freedom from discrimination and fair administrative action.

(iii) That this Honourable Court be pleased to grant leave to the Applicants to apply for an **Order of Certiorari** to bring to this Court for the purposes of being quashed the 1st Respondents lists of successful Applicants in the allocation of the Market Stalls at the Kibera Soweto East Zone A.

(iv) That this Honourable Court be pleased to grant leave to the Applicants to apply for an **Order of Prohibition** to stop the 1st and 2nd Respondents from allocating the Market Stalls at the Kibera-Soweto East Zone A.

(v) That this Honourable Court be pleased to grant leave to the Applicants to apply for an **Order of Mandamus** to compel the 1st and 2nd Respondents to include the Applicants in the list of successful Applicants and forthwith allocate to the Applicants the Market Stalls at the Kibera Soweto East Zone A.

(vi) That leave so granted do operate as stay of the allocation of Market Stalls at the Kibera-Soweto East Zone A pending the hearing and determination of the substantive Application.

(vii) That the costs of this application be awarded to the Applicant.

2. The application is premised on 10 grounds listed on the face thereof and as further particularized in the Statement of facts filed and verified by Sammy Matheka in his Affidavit sworn on 10th February, 2021.

3. The gist of the application as gleaned from the grounds raised is that the 1st Respondent and the Interested Party engaged in a market stalls allocation exercise in respect of Kibera Soweto East Zone 'A' to the exclusion of the applicants. This exclusion was notwithstanding that the applicants were duly registered members in the 1st Respondent's data base and who had saved the required Ksh. 35,000 through the interested party.

4. It is the applicant's case that they were not informed of the exercise that took place on 14th September, 2020 only to find that their names were missing from the list of successful applicants. The applicants further state that the balloting for stalls has to be conducted in accordance

with the 2005 member's register for members who had businesses at the time of the registration and who had saved up to Ksh. 35,000.

5. The Applicant's case, then, is that the 1st respondent infringed their constitutional rights under **Article 27, 40 and 47** to equality and non-discrimination, property and fair administrative action.

6. The application is opposed. Mary Wairimu Ndungu (Director of Slum Upgrading in the Ministry of Transport, Infrastructure, Housing and Urban Development) has sworn a replying affidavit in which she has deponed that the allocation of the 295 market stalls has already taken place and this matter is thus overtaken by events.

7. She avers that the State Department for Housing and Urban Development through Slum Upgrading Department did not delegate its authority but supervised the allocation process through a select committee inclusive of 2 representatives from Settlement Executive Committee; 3 representatives from Soweto Zone 'A' Housing Savings Cooperative; 3 representatives from the Highrise Housing Cooperative; 2 representatives of the Office of the Ministry of Interior and Coordination; 5 representatives from the State Department of Housing and Urban Development; a representative of the area MP and MCA. Minutes are exhibited.

8. It is deponed that the allocation process followed stringent set criteria focused on safeguarding the rights of beneficiaries and was to benefit the residents of Kibera Soweto East Zone 'A' as enumerated in 2005. There were also members enumerated in 2015 and there was hostility between the 2 groups. A meeting held on 10th March 2020 resolved that the stalls were to be shared on a 50-50 basis.

9. Mary adds that the following criteria was agreed upon;

a) For one to be allocated a stall, he or she must have been enumerated in the years 2005 or 2015 as a beneficiary.

b) The enumerated beneficiary must have saved with his or her Cooperative Society for at least ten (10) per cent of the purchase price for the stall.

c) The members must be, at the time of allocation, actually residing and doing business in Soweto East Zone "A" Village.

d) Priority was to be given to those who were doing business on Road Reserves, along pedestrian walk ways and/or on the Market perimeter wall.

e) One must not have sold their enumeration cards to third parties.

f) One must not be a proxy beneficiary.

g) If the beneficiary was living within Canaan Estate, he or she must have been up to date with their mortgage repayments and not in any arrears.

h) Each family was to benefit only once.

10. The criteria was to be applied strictly and if one failed to meet any of the criteria, he or she would be eliminated. It is urged that the applicants were time barred and did not meet the required qualifications set out above.

11. Mary further depones that the allocation and occupation of the stalls by the bonafide members has already taken place and the stalls were handed over to the beneficiaries on 18th December, 2020. The beneficiaries have remitted the 10% savings to the government.

12. It is urged that the applicants' savings in the Housing Cooperation have not been lost and they stand a chance of benefiting in subsequent redevelopment prospect of the government within Kibera Soweto Zone 'B', or any other project under the State Department of Housing and Urban Development.

13. Sammy Matheka, one of the applicants, is said to have filled an application form for a market stall in Kibera Soweto East Zone 'A' but was unsuccessful since he had benefited in the Railway Project (LOI-224) as shown in a list of beneficiaries exhibited.

14. Benson Irungu was found to be in arrears at decanting site Estate, a housing provision by Slum Upgrading Project and hence he did not meet the criteria.

15. The Interested Party did not respond to the application even though I note Ms. Amuga & Co. Advocates are on record for them.

16. The application was canvassed by way of written submissions. I have considered the said submissions and the authorities relied upon and I shall advert to them in my analysis and determination without necessarily reproducing them here.

17. I have considered the application, the affidavit evidence and submissions by learned counsel. The only issue for determination at this stage is whether the applicants have established grounds to warrant the grant of leave to apply for the prerogative writs sought.

18. The importance of obtaining leave in Judicial Review proceedings was eloquently stated by Waki J (as he then was), in the case **of Republic vs. County Council of Kwale and Another Ex-parte Kondo and 57 others** where the judge stated;

"… is to eliminate at an early stage any applications for Judicial Review which are either frivolous, vexations or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for Judicial Review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which Public Officers and authorities might be left as to whether they could safely proceed with administrative action while proceeding for Judicial Review of it were actually pending even though misconceived."

19. In **Meixner & Another vs. AG (2005) IKLR, 189,** it was held that leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of Judicial discretion and the test to be applied is whether the applicant has an arguable case. This helps the court to at a very early stage, filter claims which may be trivial or without merit.

20. The ingredients that an applicant ought to demonstrate before the court at the stage of leave are that he has sufficient interest in the matter (Locus Standi), he is affected by the decisions made, he has an arguable case within a reasonable chance of success and that the challenged decision is by a public body

21. A distinction needs to be made between infringement of constitutional rights *per se* and challenge of administrative action through Judicial Review. In our instant suit, I note that ground 10 of the Chamber Summons states that the 1st Respondent infringed the applicants' constitutional rights under Articles 27, 40 and 47 respectively to equality and non-discrimination, property and fair administrative action.

22. It is not uncommon in the recent past to see these kind of hybrid applications combining enforcement of constitutional breaches and judicial review remedies. And whereas the constitution has expanded the bill of rights and indeed entrenched judicial review under **Article 47,** judicial review proceedings still remain a special jurisdiction which is majorly supervisory in nature in so far as administrate action is concerned. The makers of the constitution were aware of this and indeed under **Article 47(3)** required Parliament to enact legislation to give effect to the rights in **Article 47(1)** and this edict culminated in the enactment of the Fair Administrative Action Act.

23. In my view, where the complaint is about infringement of constitutional rights, the proper forum in which to approach this court would be under a constitutional petition wherein the court would have the necessary wherewithal and flexibility to determine the issue as opposed to the constrained straight jacket jurisdiction in judicial review.

24. The proliferation of suits on breach of constitutional rights when government or a public body fails to comply with the law and has taken an adverse administrative action must be checked. The court's role in supervising administrative action would be blurred in such circumstances. The court in **Kemrajh Harrrikissoon vs. Attorney General of Trinidad and Tobago (1979) 3WLR 63 stated;**

"*The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves contravention of any human right or fundamental freedom.*"

25. Within this background and in so far as the application before court is concerned, my emphasis will be restricted to whether good ground is laid for grant of leave to apply for the judicial review orders of certiorari, prohibition and mandamus.

26. The applicants have demonstrated sufficient interest in the matter as the impugned allocation left them out and they were thus affected by the decision. The facts disclosed show that they have an arguable case which will entail proving their membership and showing the impropriety in the allocation exercise and the case has a reasonable chance of success. The impugned allocation was made by a public body. It is Trite Law that at this stage the court would not delve into details of the case or make any findings. On the whole, the applicants have achieved the threshold for grant of leave.

27. Notably, the allocation has already taken place. In line with the decision in **Kenya National Examination Council vs. Republic; Ex parte Geoffrey Gathenji Njoroge & 9 Others,** the writ of prohibition would be unavailable to the applicants.

28. From the foregoing and for reasons stated, the application dated 10th February, 2021 is successful. The same is allowed. I make the following orders:

i) Leave is granted to the applicants in terms of prayers 2,3 and 5.

ii) Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY FEBRUARY, 2022

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A. K. NDUNG'U

JUDGE