



Republic v P.S Ministry of Finance & 4 others; Kimathi Munjuri (Suing on his own Behalf and on Behalf of Nyambene Miraa Trade Association (Nyamita) & another (Exparte) (Suing on his Own behalf and on behalf of Nyambene Miraa Trade Association (Nyamita)) (Judicial Review E001 of 2021) [2022] KEHC 646 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
JUDICIAL REVIEW E001 OF 2021**

EM MURIITHI, J

APRIL 28, 2022

BETWEEN

REPUBLIC APPLICANT

AND

P.S MINISTRY OF FINANCE 1ST RESPONDENT

P.S MINISTRY OF AGRICULTURE 2ND RESPONDENT

THE BOARD OF TRUSTEE- COMMODITIES FUND 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

COUNTY GOVERNMENT OF MERU 5TH RESPONDENT

AND

KIMATHI MUNJURI (SUING ON HIS OWN BEHALF AND ON BEHALF OF NYAMBENE MIRAA TRADE ASSOCIATION (NYAMITA) EXPARTE

IGEMBE HUMAN RIGHTS & LEGAL CENTRE (IHLAC) EXPARTE

SUING ON HIS OWN BEHALF AND ON BEHALF OF NYAMBENE MIRAA TRADE ASSOCIATION (NYAMITA)



RULING

1. This is a ruling on an application by ex parte Chamber Summons dated 9/10/2020 by which the ex parte applicants sought leave of court to file judicial review proceedings for the orders of Certiorari, Prohibition and Mandamus, as follows:
 - a) Certiorari: To bring before this Honorable Court and Quash the public order and/or directive compelling Commodities Fund to transfer back and/or reverse the Miraa Revolving Funds money back to the Ministry of finance and/or Ministry of Agriculture.
 - b) Prohibition: Preventing the 1st 2nd and 3rd respondents and/or their agents and/or officers from implementing the Miraa Taskforce Report without compliance with the Constitution of Kenya and Orders of this court issued on 9th Nov. 2020.
 - c) Prohibition: Preventing the 1st, 2nd and 3rd respondents and/or their agents and/or officers from disbursing the Miraa Revolving Funds money without compliance with the Constitution of Kenya and Orders of this court issued on 9th Nov. 2020.
 - d) Mandamus: Do issue against the 1st and 2nd respondents; compelling them and/or their officers and/or their agents to reverse and/or transfer the Miraa Revolving Funds money back to the Commodities Fund; for their onward disbursement to relevant miraa stakeholder groups and/or organizations in compliance with constitution the Constitution of Kenya and the court orders issued by this Honorable court on 9th Nov. 2017.
 - e) Mandamus: Do issue against the 1st and 2nd respondents; compelling them and/or their officers and/or their agents to implement the Miraa Taskforce Report in compliance with the Constitution of Kenya, the Devolution and public participation principles and procedures thereto, the Rule of law and the Court Orders issued by this court dated 9th Nov.2017.”
2. The ex parte applicants also sought an order that the grant of leave do operate as a stay as follows:

“That the Honourable court be pleased to allow the Leave granted herein to operate as a stay of the directive and/or order issued by the office of the CS-Ministry of Agriculture, Livestock Fisheries and Co-operatives and/or its officers and/or its agents; reversing and/or transferring the Miraa Revolving Funds money back to the Ministry of Finance for re-allocation and/or utilization; pending the hearing and determination of the intended substantive application.”
3. When the matter first came up before the court on 21/10/2020 the Court (Mabeya, J.) certified the matter urgent and directed hearing inter partes on 27/10/2020.
4. The record shows that no proceedings were held until 14/12/20 when counsel Ms. Kendi and Mr. Kobia, respectively for the respondents and the ex parte applicants, appeared before the court and directions were given that the Respondents file their Replying Affidavits within 14 days and hearing



was set for 19/1/2021. On this occasion, counsel for the applicants protested the suggestion by counsel for the respondents that the matter was related to a similar one which was pending before Otieno, J. and set to come up on 18/12/20 saying that the latter case was a concluded matter and was on contempt of court.

5. The record shows that the matter did not come up until 15/4/21 when counsel for the respondents told the court that she had filed a response to the application of 9/10/2020 and asked the court to give a date for directions. Directions were set for the 29/6/2021.
6. On 29/6/21, the court gave directions that –
 1. Written submissions to be filed with each party taking 21 days beginning with the ex parte applicants.
 2. Directions as to Judgment set for 23/9/21.
7. The matter next came up on 19/10/2021 when counsel for the respondents indicated that she had not been served with any submissions and prayed to be allowed to file her own set of submissions and the matter be reserved for ruling. The court made the following orders:
 1. Respondent may file written submissions within 21 days notwithstanding failure by the applicants to file their submissions.
 2. Directions as to ruling on 22/11/2021.
 3. Notice to issue [to the applicants who are absent].
8. At 9.35am on the same day, the record shows the counsel for the applicant Mr. Kobia appearing and requesting to file other evidence and the court directed that-

“Court: Applicant may file application for further affidavit.”
9. On 22/11/2021, Counsel for the Respondents appeared and requested for 7 days to file submissions as the applicant had not filed the further affidavit as intimated on 19/10/2021. The court then ordered that –
 1. The respondent to file submissions within 7 days.
 2. Ruling on 10/2/2021 at 2.30pm.
10. The record shows that the 5th Respondent filed a Replying Affidavit on 27/1/2022, apparently in the wrong file.
11. The Ex parte applicants neither filed written submissions on the application nor the further affidavit that it had intimated to file to introduce other evidence or application therefor.

The ex parte applicant’s case

12. The applicants’ case is set out in the Statement dated 9th October 2020 in support of the application for leave is that the decision by the 1-4 respondents to return funding allocation known as Miraa Revolving Fund to the Ministry was unlawful for offending the constitutional principle of public participation, as shown in the Grounds of the application as follows:

“Grounds:

The Applicant seeks the said reliefs on the grounds set hereunder:



1. That the office of the CS-Ministry of Agriculture issued a dummy cheque drawn in favour of one account for an amount of Kes.122,000,000/- two weeks ago, which amount is part of the Miraa Revolving Funds yet the entire amount. In respect to the said Miraa Revolving Fund totals to Kes180.000,000/= and no public office has explained the whereabouts of the balance.
2. That the 1st 2nd and 3rd respondents issued a public order directive to reverse and/or return the Miraa Revolving Funds back to the Ministry of Finance without basis nor consultation.
3. That the said directive was arrived at without prior consultation and/or participation of the Meru County Government and/or the relevant Miraa stakeholder groups and/or organization.
4. That the 1st applicant and his association's members and/or all miraa stakeholders in general particularly within Meru County were never given an opportunity to be heard nor give their opinion thus infringing on their right to public participation.
5. That the applicant further avers that the impugned public order and/or directive to reverse the Miraa Revolving Funds and/or have the same utilized in another manner, is ultra-vires and contrary to the devolved function of Agriculture as per the constitution.
6. That the applicant further avers that the impugned directive is also unfair, unlawful, illegal and improper in that the same was arrived at without an iota of recognition of the constitutional mandate of Agriculture being a devolved function of the government.
7. That the applicant further avers that there was a court order issued on 9th Nov. 2020 by this honorable court which order is clear, concise and non-ambiguous.
8. That the applicant further avers that the impugned public order and/or directive IS contrary, derogatory and in total breach of the court orders issued by this court on 9th Nov. 2017.
9. That the intent and spirit of the public order and/or directive is mainly to create loop-hole for misappropriation, misuse and mis-utilization of the said Miraa Revolving Funds.
10. That the 1st, 2nd and 3rd respondents clearly went beyond the scope of their powers and/or jurisdiction.
11. That it is only fair and just that the 1st, 2nd and 3rd respondents directive to implement the Miraa Taskforce Report contrary to the constitution and orders of this court be quashed for being:
 - i. Contrary to the Spirit of *the Constitution of Kenya*.
 - ii. Contrary to the principles of Natural Justice
 - iii. Otherwise unreasonable, unfair, and founded on irrelevant considerations.



- iv. *Ultra-vires* to the Constitution, the *County Government Act*, the *Crops Act* the *Agriculture and Food Authority Act*, and the court order issued on 9th Nov. 2020.
12. That the said public order directive issued by the 1st 2nd and 3rd respondents in the circumstances is unlawful, unreasonable, unfair and contrary to the rules of natural justice and public participation.
13. That unless the Honorable Court is pleased to urgently intervene, the Applicant and/or thousands of Miraa stakeholders may suffer greatly and irreparably from the said directive.
14. That the application herein has been brought without any inordinate delay.”

The Respondents’ case

13. The 1-4 respondents’ case is principally that the application is barred by the rule on sub judice as set out in the Grounds of Opposition dated 12/4/2021 as follows:

“Grounds of Opposition

Take Notice that the 1st – 4th Respondents (‘the Respondents) herein, shall at the hearing of Chamber Summon dated 9th October, 2020 (“the Applications”) oppose the same on the following grounds:

1. The subject matter of the Application and the grounds upon which the Application is predicated are the subject of the following pending and ongoing Court proceeding, therefore the Application and the entire proceedings offends the doctrine of *res sub judice*; Meru Constitutional Petition No. 10 of 2017 (Formerly Milimani Petition No. 154 of 2017) Kimathi Munjuri (Suing on his own behalf and or on behalf of Miraa Trade Association) Versus The Head of Public Service and Chief Staff Hon. Joseph Kinyua, Cabinet Secretary Ministry of Finance, Cabinet Secretary Ministry of Agriculture & Honourable Attorney General (respondents) and Meru County Government, Commissioner of Co-operative, Mwenge Sacco aka Mwenge Miraa Sacco aka Nyambene Miraa Saccoo and Managing Trustee- Commodities Fund (intended Interested Party)
2. The Leave sought herein cannot be granted for the Application is a mischievous and illegal attempt to circumvent the prayers that have already been addressed in the pending proceedings which the matter had been concluded by consent judgment and the matter is under way implementation by the Respondents.
3. That the Order of the Court; and seeks to embarrass a Court of coordinate jurisdiction, which is already seized with the hearing and determination of High Court Petition No. 10 of 2017.
4. The grounds of the Application seek to Challenge the authority, decisions and/or mandate of the Respondents clearly outlined under the *Public Finance Management Act* Cap 412 and the same was clearly brought before court in pending judicial proceedings.



5. The Application is therefore constructively an attempt for forum shopping for orders and/or outcomes of issues and/or pending judicial proceedings.
6. The Application is an abuse of the court process and is calculated to embarrass and prejudice the fair and orderly administration of justice. It is therefore detrimental to the administration of justice.
7. The Application is a disguise to challenge the authority and/or, decisions and/or outcomes in pending judicial proceedings which is at submission stage thus to proceed with the Application in the face of the existing pending court and administrative processes would render judicial proceedings a circus.
8. The Application is oppressive, vexatious, abuse of court process and otherwise detrimental to the administration of justice since the matters in issue are directly and substantially in issue in a court proceedings of the same jurisdiction.
9. The Respondents are being subjected to multiple proceedings on the same facts and issues in multiple fora by the same parties wearing different disguises or appearing under proxies.
10. Therefore, the Court has no jurisdiction to grant the orders sought in the Application rendering the Application moot, irredeemably bad in law, oppressive, vexatious and a complete waste of judicial resources and time.

Reasons Wherefore the Respondents pray that the Chamber Summon dated 9th October 2020 be and is hereby dismissed in limine.

Dated at Meru this 12th day of April, 2021.”

14. The 1-4 Respondents’ counsel then filed elaborate submissions dated 29/11/2021 on the matter of sub judice, as follows:

“ 1st – 4th Respondents Submissions

1. Your Lordship, this submission is brought in response and in opposition to the Exparte Applicants’ Chamber Summons Application dated 9th October 2020.
2. We have filed our Grounds of Opposition dated 12th April 2021 and wish to rely on the same in its entirety.
3. Your Lordship, we wish to add and submit that the Exparte Applicants have filed the application herein in blatant ignorance of the doctrine of res sub judice knowing well that the same issues brought before this court are similar to those pending before court in Meru Constitutional Petition No. 10 of 2017 (Formerly Milimani Petition No. 154 of 2017) Kimathi Munjuri & 3 others vs The Head of Public Service and Chief of Staff Joseph Kinyua & 3 others.
4. Your Lordship, Section 6 of the [Civil Procedure Act](#) provides as hereunder;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties.



or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. "

5. In *Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others* [2017] eKLR the court held that:

"... Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed ... "

6. The rationale for this principle was restated in Kampala High Court Civil Suit No. 450 of 1993 - *Nyanza Garage vs. Attorney General* in which the Court held that:

"In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."

7. In *Barclays Bank of Kenya Ltd vs. Elizabeth Agidza & 2 Others* [2012] eKLR the court held that:

".... if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the *Civil Procedure Act*, Section 6 will still apply. This is so because the overriding objective of the *Civil Procedure Act* is for expeditious and proportionate resolution of civil disputes between parties ..."

8. The parties in Meru Constitutional Petition No. 10 of 2017 and the application herein are substantially similar. Both matters are also pending in court where Meru Constitutional Petition No. 10 of 2017 is in submission stage. Your Lordship. the Ex-parte Applicants in the suit herein have pleaded issues relating to:

- lack of public consultation and participation in the issuance of the public order directing the return of Miraa Revolving Funds back to the Ministry of Finance.
- misappropriation of Miraa Revolving Funds by the respondents.



- illegality and impropriety of the directive issued by the 1st, 2nd and 3rd Respondents.

- the court order issued on 9th November 2020 in Meru Constitutional Petition No. 10 of 2017 (Formerly Milimani Petition No. 154 of 2017) Kimathi Munjuri & 3 others vs The Head of Public Service and Chief of Staff Joseph Kinyua & 3 others.

9. Your Lordship, it is clear that the Ex-parte Applicants' issues in the application herein and those in Meru Constitutional Petition No. 10 of 2017 (Formerly Milimani Petition No. 154 of 2017) Kimathi Munjuri & 3 others vs The Head of Public Service and Chief of Staff Joseph Kinyua & 3 others are directly and substantially in issue. The application herein is hence offensive to section 6 of the Civil Procedure Rules and ought to be dismissed.
10. In addition, as articulated in our grounds of opposition the Applicants seek to challenge the authority, decision and mandate of the Respondents clearly outlined under the *Public Finance Management Act* cap 412. We wish the court as it retires to pen down its ruling to look at the provision.
11. Section 45 of the *Public Finance Management Act* Cap 412 provides:
 - a. An appropriation that has not been spent at the end of the financial year for which it was appropriated shall lapse immediately at the end of that financial year.
 - b. Subject to any other legislation, where at the end of a financial year a National Government entity is holding Exchequer Account but had not been spent, it shall repay the unspent money into the National Exchequer Account and shall prepare and submit a statement of the same to the controller of budget."
12. We submit that as per the above provision, the Ministry of Agriculture and Treasury instructed the 3rd Respondent to return the Funds since time had lapsed and disbursements had not been made.
13. My Lord, Tax payer money cannot be treated like an individual money. Funds that are allocated for a purpose the law requires that if they are not utilized as allocated they should be returned back to the exchequer for re-allocation or outlined need.
14. Your Lordship, it is therefore in the interests of justice that we pray that this Honorable Court finds that the Chamber Summons Application dated 9th October 2020 is frivolous, vexatious, a waste and abuse of the courts process, time and resources and therefore it should be dismissed with costs to the Respondents.

Dated at Meru this 29th Day of November, 2021

Ms. J. Kungú

Deputy Chief Litigation Counsel"



The 5th respondent's case

15. The 5th Respondent's Replying Affidavit sworn by Rufus Joseph Miriti Mwereria, County Secretary, on 26/1/22 and filed on 27/1/22 indicates that it is filed as Replying Affidavit "To the applicant's applications dated 11th June 2020 and the contempt application amended on 8th Oct. 2020". Indeed, paragraph 12 of the 5th Respondent's Replying Affidavit is clear they are responding to the proceedings in Petition No. 10 of 2017 where the Cabinet Minister for Agriculture is the 3rd respondent as follows:

"12. That it is evident that the office of the 3rd Respondent is in contempt of this court's orders dated 9th Nov. 2017 and in violation of two mandatory Constitutional provisions of Devolution of the Agricultural function and of inter-governmental consultation and co-operation."

16. The 5th Respondents Affidavit of 26/1/2022 and filed on 27/1/2022 is obviously filed in the matter; it is misplaced and it clearly belongs to the proceedings referred by Counsel for the Respondent on 14/12/2020.

Whether the present application is sub judice

17. The order of the Court made on 9th November 2017 is instructive as to the similarity of the reliefs sought in the previous sought with the relief in this case:

"By consent of all the respective counsels:

It is hereby Ordered:

1. That the Miraa Taskforce Report, the subject of the matter be implemented without further delay.
2. That the National Government to consult and cooperate with the County Governments in Miraa value chain in the implementation of the Report.
3. That the National and County Governments shall involve the 1st, 2nd and 3rd and the 4th petitioners and other stakeholders in the Miraa value chain in the implementation of the said Report.
4. That each party shall bear its own costs."

18. And the parties are the same, save the Cabinet secretary who is the 3rd respondent in the Petition but is omitted in the present proceedings. Kimathi Munjuri, Jacob Mwiti, Naftali Kathurima and Nyambene Miraa Trade Association are the Petitioners and the Head of the Civil Service and Chief of Staff, the Cabinet Secretary Minister for Finance, Cabinet Secretary Minister for Agriculture and the Attorney General as Respondents. In this application the ex-parte applicants are Kimathi Munjuri suing on behalf of the Nyambene Miraa trade Association joined by Igembe Human Rights & Legal Aid Centre. The respondents are the PS, Ministry of Agriculture, PS Ministry of Agriculture, The Board of Trustees Commodities Fund the Attorney General and the County Government of Meru. The only difference in this suit is that the Permanent Secretaries who are the executive officers of their respective ministries are sued instead of their Cabinet Secretaries as in the Petition.

19. The ex parte applicant seeks orders of mandamus "against the 1st and 2nd respondents; compelling them and/or their officers and/or their agents to implement the Miraa Taskforce Report in compliance with the Constitution of Kenya, the Devolution and public participation principles and procedure



thereto, the Rule of law and the Court Orders issued by this court dated 9th Nov. 2017”. This is clearly the province of enforcement and execution of court orders as has already been commenced by the applicants in the previous suit Petition no. 10 of 2017. It seems the ex parte applicant seeks to enforce consent order of 9th November 2020 in parallel to the application for contempt of court in Petition No. 10 of 2017. To seek the prerogative public law remedy of mandamus to enforce a court order when there is already pending application for contempt of court is an abuse of the process of the court.

20. It is also clear that the ex parte applicants lost interest in the matter soon after filing it as any progress there was in the matter was pushed by counsel for the Respondents and when the counsel for the ex parte applicants attended court he sought to file further evidence which he failed to do and did not file any submissions on the applications or in response to the submissions by the counsel for the respondents.

Conclusion

21. Upon considering the application, it is clear that the present proceedings are sub judice by virtue of the prior proceedings in Meru HC Constitutional Petition No. 10 of 2017 (formerly Milimani Petition No. 154 of 2017 *Kimathi Munjuri & 3 Others v. The Head of the Public Service and Chief of Staff Joseph Kinyua & 3 Others*). That the same question is before the Court in Petition No. 10 of 2017, only at the stage of execution by application for committal for contempt of court, explains the misfiling in this proceedings of the 5th Respondents Replying Affidavit of 26/1/2022. The fact that the ex parte applicants seek to enforce the Consent order of 9/11/2017 in Petition No. 10 of 2017 is testimony of the relationship between the two proceedings.
22. On the basis of the sub judice rule of section 6 of the *Civil Procedure Act*, this court cannot proceed with the subsequent application under Order 53 of the Civil Procedure Rules when the previously filed case in Petition No. 10 of 2017 is pending hearing and determination before a competent court, albeit by way of execution proceedings. The court finds that this application is barred by sub judice rule. It is an abuse of the process of the court. The applicant must be punished in costs.
23. There cannot be any arguable case in an application which is barred by law, and, therefore, in accordance with *Meixner & Anor. v. Attorney General* (2005) 2 KLR 189, the Court does not grant leave to file the judicial review proceedings as sought by the ex parte applicants.

Orders

24. Accordingly, for the reasons set out above, the court finds no merit in the ex parte applicants’ Chamber Summons application dated 9/10/2020 and the same is dismissed with costs to the Respondents, as agreed between the parties or taxed by the taxing officer of the Court in default of agreement.

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF APRIL 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kobia for Applicants.

Ms. Kungú for the Attorney General for the 1-4 Respondents.

M/s Mutuma Kibanga & Co Advocates for the 5th Respondents.

