Republic v Ministry of Transport, Infrastructure Housing, Urban Development & Public Works & 3 others; City Park Hawkers Development Society (Exparte) (Application E074 of 2021) [2022] KEHC 18055 (KLR) (Judicial Review) (29 September 2022) (Judgment)

Neutral citation: [2022] KEHC 18055 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E074 OF 2021

J NGAAH, J

SEPTEMBER 29, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

MINISTRY OF TRANSPORT, INFRASTRUCTURE HOUSING, URBAN DEVELOPMENT & PUBLIC WORKS ..... 1ST RESPONDENT

NAIROBI CITY COUNTY ..... 2ND RESPONDENT

NAIROBI METROPOLITAN SERVICES ..... 3RD RESPONDENT

NAIROBI REGIONAL COMMISSIONER ..... 4TH RESPONDENT

AND

CITY PARK HAWKERS DEVELOPMENT SOCIETY ..... EXPARTE

JUDGMENT

1. On 25 May 2022, the respondent listed in a daily newspaper 689 names of persons to whom it was going to allocate refurbished market stalls at City Park Market in Nairobi County. The list was by way of an advertisement headed 'Public Notice' in the Standard newspaper notifying all and sundry of the completion of rehabilitation works at the City Park Market, Nairobi City County and that the project had been funded by the National Government.

2. According to the notice, the market was not only ready for occupation but the 689 people identified as trading in the market were going to be allocated the market stalls. If any person was aggrieved by the

allocation, he was required to lodge his grievances to the Deputy County Commissioner, Westlands Sub County not later than 2 June 2021**.**

3. The advertisement was signed by Charles M. Hinga, the Principal Secretary in the 1st respondent Ministry.

4. The applicant's members were aggrieved by the 1st respondent's decision and so they registered their objection through a letter dated 26 May 2021. The letter was addressed to the Deputy County Commissioner, Westlands Sub county and his stamp on the letter shows that it was received on 27 May 202.

5. In their letter, members of the applicant wanted the allocation of stalls halted and sought to have an assurance from the Deputy County Commissioner that this will be done failure to which they would seek legal redress.

6. No response was received within the two-day notice period that they had given the Deputy County Commissioner and so they instituted the instant suit.

7. The suit is by a way of motion dated 4 June 2021 brought under sections 8 and 9 of the *Law Reform Act*, cap. 26 and Order 53, Rule 3(1), (2), (3) and (4) of the *Civil Procedure Rules*. It seeks the prerogative orders of certiorari, mandamus and prohibition. The prayers for these orders have been framed as follows:

8. That this Honourable Court be pleased to issue the prerogative order of prohibition directed against the respondents either by their agents, servants, employees or anyone acting on their direction, prohibiting them from allocating at the setback markets the 689 persons named in the standard newspaper of 25th of May 2021.

9. That this Honourable Court be pleased to issue the prerogative order of certiorari to quash the decision by the 1st respondent to allocate spaces or stalls at the City Park Market to the 689 persons named in the standard newspaper of May 25, 2021.

10. That this Honourable Court be pleased to issue the prerogative order of mandamus directed against the 1st, 2nd, 3rd and 4th respondents in this suit directing them to allocate 1, 075 registered members of the ex parte applicant, the spaces or stalls at the City Park market, being the ascertained and known active traders on the ground at the market, such allocation to be based on the ex parte applicant's register of members."

11. The application is based on a statutory statement dated 2 June 2021 and a verifying affidavit of even date sworn by one Peter Mungai Chege who has described himself as the secretary of the applicant.

12. A certificate of registration exhibited to the verifying affidavit shows that indeed the applicant was registered as a society under section 10 of the *Societies Act*, cap. 108 on 27 March 2002. It is the applicant's case that prior to and after its registration, its members have occupied and traded at the City Park market.

13. For the time they have been at the market, they have sought from several government agencies assistance in the renovation of the market and, eventually, the national government rehabilitated the market. However, rather than allocate the market stalls to the members of the applicant, the government has allocated them to persons who are not applicant's members. Of the list that the 1st respondent has published, only 83 members of the applicant have been allocated stalls.

14. It is the applicant's position that if the orders sought are not granted its members will be rendered destitute because they have no other source of income apart from this market.

15. Only the 2nd respondent responded to the application through a replying affidavit sworn by Joyce Kyengo, who is the 2nd respondent's director of market services.

16. According to Kyengo, on or about 1991, President Daniel Arap Moi requested the City Council of Nairobi to allocate some space to traders within the City Park market. It is then that the 2nd respondent allocated space to traders and issued them with allotment cards that contained such details as the traders' names, their national identification numbers and space numbers as demarcated on the ground.

17. One of the conditions for allocation or ownership of space was the requirement for payment by the traders' council levy initially paid to the 2nd respondent but which is currently paid to the Kenya Revenue Authority.

18. In the course of time, the original allottees surrendered the spaces to the 2nd respondent or sublet them to third parties.

19. In the year 2014, the entire market was destroyed when the then existing structures in the market were gutted down by fire. 918 traders were compensated for the loss occasioned by the destruction and these persons included the original allottees and those traders who had been sublet space at the market.

20. After the fire outbreak, traders were relocated on temporary basis, to the parking area of the market while others went to the road reserve where they constructed makeshift stalls. In the process, other parties, who were not previously in the market, joined them and also constructed their temporary makeshift stalls alongside those traders who had moved from the market.

21. When Covid-19 pandemic struck, the national government got concerned that the pandemic would easily spread due to overcrowding and lack of basic amenities at the market. In order to forestall this eventuality, the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, in conjunction with the 3rd respondent, completed the construction of the stalls. The construction works had initially been assigned to private contractors who could not complete the works in time due to wrangles between them.

22. A multi-agency team was appointed to allocate space once the construction of the market was complete. This team was chaired by the Nairobi County Commissioner.

23. Sometimes in April 2021, when the construction was nearing completion, the chairman of the traders' committee, One Mr. Daniel Kamau, presented before the multi-agency team a list of 1075 persons whom he claimed were the beneficiaries of the stalls for purposes of allocation. But some of the committee members of the traders' committee protested and disowned the list on the grounds that it contained names of persons were not doing any business at the temporary market.

24. Upon request by the multi-agency team, the 2nd respondent prepared and produced a list of 661 names of genuine allottees or traders. The criteria of identifying these genuine allottees or traders was their payment of the council levy to the county.

18. The multi-agency team also conducted its own investigations and collected data of 689 persons who, according to its own assessment, are entitled to allotment of the stalls. It is this list that was published in the Standard newspaper of 25 May 2021 as persons who would be allocated the stalls.

25. But being aware of the controversy that would arise in the allocation of stalls, considering the various lists presented as being of beneficiaries entitled to the stalls, the multi-agency team notified traders and the public at large to lodge whatever claim they may have in respect of the published list. To this end, the multi-agency team appointed what has been described as a 'grievance committee' comprising representatives of the applicant society and others who were opposed to the list.

26. It is deposed that the grievances committee had resolved up to 95% of the grievances raised as at the time the 2nd respondent's affidavit was filed.

27. The respondent alleges that the applicant's claim will only result in an irregular allotment of the stalls which will eventually be sublet to third parties. It is also alleged on behalf of the 2nd respondent that only 574 persons named in the applicant's list presented themselves for verification before the multiagency team.

28. Considering that there is an alternative means by which the applicant's grievances could have been resolved, the 2nd respondent contends that the applicant has not exhausted the available remedies and procedure and therefore the application is premature and contrary to the *Fair Administrative Action Act* No. 14 of 2015.

29. The respondent also deposes that, in any event, a decision on the final list is yet to be made and therefore the order of certiorari cannot issue.

30. The applicant and the 2nd respondent filed written submissions for the positions they have adopted in support of or in opposition to the application before court.

31. On his part, the learned counsel for the applicant contends that judicial review orders of prohibition and certiorari ought to issue because the process by which the list of names published in the newspaper of 25 May 2021 was shrouded in secrecy. At any rate, it was neither fair nor transparent.

32. On the issue of there being no decision to be quashed, the applicant cited the case of *Kenya National Examination Council vs Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* where the court stated that the remedy of prohibition is meant to prohibit the making of a contemplated decision.

33. In response, it was submitted on behalf of the 2nd respondent that there is no decision capable of being quashed as the verification exercise is still underway, a fact that has been alluded to by the applicant in its statement of facts. The learned counsel for the 2nd respondent relied on *Republic v Commissioner for Lands & 13 others ex parte Ereri Co. Ltd & 8 others* [2013] eKLR and *Republic vs. National Employment Authority & 3 Others ex parte Middle East Consultancy Services Limited* [2018] eKLR for the position that no decision capable of being quashed had been made and that the application was afoul of the doctrine of ripeness.

34. The 2nd respondent has also urged that the applicant has not demonstrated his right to a fair hearing has been violated or that the respondents acted contrary to the law in any particular manner. It was also submitted that although Judicial Review is concerned with the process rather than the merit of the decision, a judicial review court can also now undertake merit review as was held by the Court of Appeal in *West Kenya Sugar Company v. Kenya Sugar Board & another* [2014] eKLR and the court in *County Government of Kakamega & 2 others v Salaries & Remunerations; County Government of Mombasa (Interested Party)* [2018] eKLR.

35. The 2nd respondent also urged that the applicant is seeking a private law remedy in judicial review proceedings and yet, being a discretionary remedy, judicial review is concerned with public as opposed to private law. The cases of *Republic v Public Service Commission ex parte Joshua Wachira Nderitu* [2018] eKLR and *Republic v Mwangi S. Kimenyi ex parte Kenya Institute for Public Policy and Research Analysis (KIPPRA)* eKLR were cited in support of this position.

36. The 1st respondent against whom most, if not all of the allegations have been made did not respond to the application and, in the absence of any evidence to the contrary, the court will proceed on the assumption that the applicant's allegations against it are true.

37. On its part, the 2nd respondent does not dispute that a section of the applicant's membership trades at City Park market and have presented themselves, in that capacity, before a committee set up by the multi-agency team to resolve grievances arising out of the allocation of stalls. Its case against the applicant is that most of the people on the list provided by the applicant as being traders at the City Park market and who are its registered members are not traders, at least at the market and they have been included in the list for ulterior motives.

38. A judicial review court would not go into interrogating who, in the several lists of persons alleged to be traders at the City Park market, are the genuine traders entitled to be allocated market stalls. It has very little to do with evaluating competing evidence or evidence in dispute so as to come to what, in its view, is a correct finding of fact which may or may not be consistent with the finding of the body or tribunal whose decision is sought to be impeached.

38. A bit of the law on the extent to which judicial review court can delve into evidence was considered in the English decision in *R v Secretary of State for the Home Department, ex p Khawaja* [1984] AC 74. The court noted as follows:

> The migration officer, whether at this stage of entry or at that of removal, as to consider a complex of statutory rules and non-statutory guidelines. He has to act upon documentary evidence and such other evidence as inquiries may provide. Often there will be documents was genuineness is doubtful, statements which cannot be verified, misunderstandings as to what was said, practices and attitudes in a foreign state which have to be estimated. There is room for appreciation, even for discretion. The Divisional Court, on the other hand, on judicial review of a decision to remove and detain, is very different situated.It considers the case on affidavit evidence, as to which cross-examination, though available, does not take place in practice. It is, as this case well exemplifies, not in a position to find out the truth between conflicting statements-did the applicant receive notes, did he read them, was he incapable of misunderstanding them, what exactly took place at the point of entry? Nor is it in a position to weigh the materiality of personal or other factors present, or not present or partially present, to the mind of the immigration authorities. It cannot possibly act as, in effect, a court of appeal as to the facts on which the migration officer decided. What it is able to do, and this is the limit of its powers, is to see whether there was evidence on which the immigration officer, acting reasonably, would decide as he did. (Per Lord Wilberforce at p. 949B-D). (Emphasis added).

39. Although this case was about immigration and the questions raised were pertinent to the immigration issues, the principle applied as to the limits of a judicial review court entertaining disputes on factual issues goes beyond immigration cases and is as much applicable in the instant case.

40. As far as matters evidence are concerned, a judicial review court relies on the affidavit before it and, for this very reason, it is not in a position to tell the truth between conflicting depositions.

41. Again, a judicial review court cannot assume appellate jurisdiction and interrogate the evidence afresh so as to come to its own conclusion different from what, for instance, a subordinate court, tribunal or other administrative body whose decision is in question, has come to.

42. Lord Woolf was more apt in *R v Derbyshire County Council, ex p Noble* (1990) ICR at p. 813C-D where he stated:

> " The present application is one which is unsuitable for disposal on an application for judicial review-unsuitable because it clearly involves a conflict of fact and conflict of evidence which

would require investigation and would involve discovery and cross examination. Cross-examination and discovery can take place on application for judicial review, but in the ordinary way judicial review is designed to deal with matters which can be resolved without resorting to those procedures."

43. On the same point Lord Diplock at p.316G in *Hoffmann-La-Roche (F) & Co AG versus Secretary of State for Trade and Industry* (1975) AC 295 was of the view that the procedure on a judicial review motion is unsuited to enquiries into disputed facts. Oral evidence and discovery, although catered for by the rules are not part of the ordinary stock in trade of the prerogative jurisdiction.

44. But a judicial review court will not mind digging into the process by which the impeached decision was reached to satisfy itself that the decision was made legally, rationally and with procedural propriety. (See *Council of Civil Service Unions versus Minister for the Civil Service* [1985] A.C. 374,410).

45. At the core of the 2nd respondent's attack against the applicant's case is the contention that there is no decision capable of being quashed. It is its argument that the advertisement in the standard newspaper of 25 May 2021 is nothing more than a procedural step in identifying traders who are entitled to be allocated space at the refurbished city market.

46. I find this argument to be inconsistent with the tenor and import of the wording of the advertisement as expressed in the print media.

47. The advertisement is headed as follows:

> Public Notice Allocation of Stalls for City Park Market in Nairobi City County"

48. It then goes further to read as follows:

> The completion of rehabilitation works at the City Park Market, Nairobi City County using funds from the National Government is now ready for occupation.

49. The following six Hundred and Eighty-Nine (689) persons currently trading within the market will be allocated the market spaces(stalls) directly. (Emphasis added).

50. It is clear, on the face of this notice, that the 2nd respondent has already made up its mind that there are people who are not only trading in the refurbished market but also who, for that very reason, will be allocated the market stalls directly. The number of people together with their identities have been expressed in very clear terms.

51. I find it difficult to agree with the learned counsel for the 2nd respondent that this not 'a decision' as known in law. The argument that the decision is not a decision properly so called because a final decision as to who should occupy the available spaces is yet to be made cannot hold because, first, as noted, the wording of the notice leaves no other impression than that a decision has been made. Second, a decision need not be final for it to be impeached by the order of certiorari. At least that is what section 2 of the *Fair Administrative Action Act* states; it reads as follows:

> decision" means any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be;

52. This definition leaves no doubt that even if the public notice was merely a proposal or an expression of intention of the 2nd respondent, as the learned counsel for the 2nd respondent would want the court to believe, it would still fit the description of a decision as defined under the Act. With such unambiguous explanation by the Act of what a 'decision' in its technical sense entails, I need not say anything more

save to dismiss the 2nd respondent's argument that the 2nd respondent has not made any decision capable of being called into this honourable court for purposes of being quashed.

53. If it is agreed that the public notice is a decision, in the strict sense of the word, the only other question that this honourable court would be concerned about is the process by which it was arrived at.

54. It has been argued that the applicant has been given a fair hearing in the sense that its members were invited to present their grievances.Indeed, at the foot of the notice we have these words:

> " Any one with grievances is required to lodge the same in writing to the Deputy County Commissioner, Westlands Sub County not later than 2nd June 2021."

55. The problem I have with this statement is that there is nothing in it that suggests that the lodgment of grievances will have any impact, one way or the other, on the decision that has already been made. Secondly, it is simply irrational for a body to make a decision and later purport to hear the parties affected by the decision of their grievances. Considering that the applicant or its membership was bound to be affected by the applicant's decision, it was imperative that the applicant be heard first before the 2nd respondent could come to the conclusion that the people whose names it published in the press were in fact traders at the city market and that they were either entitled or eligible to be allocated the market stalls.

56. For the avoidance of doubt section 4 of the *Fair Administrative Action Act* is clear that where an administrative action, which in this case includes a decision, is likely to affect adversely the rights of another person, the action can only be made after the person who will be affected by it has been given an opportunity to be heard. Its states as follows:

> 4.
>
> (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.

57. In the face of this provision of the law, a decision that is made prior to the hearing of a party whose rights are adversely affected by the decision smacks of all the three traditional grounds of judicial review of illegality, irrationality and procedural impropriety.

58. It is illegal because it is contrary to section 4(3) of the *Fair Administrative Action Act*. It is irrational because it so outrageous in its defiance of logic that no sensible person who had applied his mind to the

question to be decided could have arrived at it. And finally, it is deficient of procedural propriety for the simple reason that the applicants were condemned unheard. (See *Council of Civil Service Unions v Minister for the Civil Service* (*supra*)).

59. For the reasons I have given I am satisfied that the applicant's application merits the grant of the orders sought in the motion dated 4 June 2021. It is allowed as prayed. For the avoidance of doubt;

    1. An order of Prohibition is hereby issued against the respondents either by themselves, their agents, servants, employees or anyone acting under their direction, prohibiting them from allocating spaces or stalls at the City Park Market to the 689 persons named by the 1st Respondent in the Standard Newspaper of May 25, 2021.

    2. An order of Certiorari is hereby issued quashing the decision by the 1st Respondent to allocate spaces or stalls at the City Park Market to the 689 persons named in the Standard Newspaper of May 25, 2021.

    3. The applicant will have costs of the application.

    Orders accordingly.

SIGNED, DATED AND DELIVERED ON 29 SEPTEMBER 2022

NGAAH JAIRUS

JUDGE