



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW APPLICATION NO. 1 OF 2017

**LEONARD MBOGO MUTUTHO (SUING AS THE CHAIRPERSON
OF THE WIPER SANITARY DISPOSERS).....1ST APPLICANT
BENAR OWINO ONYANGO T/A TAKAVENTURES.....2ND APPLICANT
MEDRINE KARIUKI WANJERI (SUING AS THE CHAIRPERSON OF
THE HADASSAH WOMEN GROUP3RD APPLICANT
ESTEHR NAINI MALOI T/A BIDII YETU ENTERPRISES.....4TH APPLICANT**

VERSUS

**NAKURU COUNTY GOVERNMENT.....1ST RESPONDENT
NAKURU COUNTY EXECUTIVE COMMITTEE
MEMBER DEPARTMENT OF ENVIRONMENT, NATURAL RESOURCES,
ENERGY AND WATER.....2ND RESPONDENT
CHIEF OFFICER DEPARTMENT OF ENVIRONMENT, NATURAL
RESOURCES, ENERGY AND WATER3RD RESOPONDENT**

AND

**GEOGIADIS BYRON OWINO.....1ST INTERESTED PARTY
ERNEST NJEGA MBUGUA.....2ND INTERESTED PARTY
JOHN NJOROGE CHEGE.....3RD INTERESTED PARTY
JOHN KIMANI GITAU.....4TH INTERESTED PARTY
SOLOMON MWANGLI.....5TH INTERESTED PARTY
MARTIN MUGWE.....6TH INTERESTED PARTY
BETH NDEGWA..... 8TH INTERESTED PARTY
ESTHER MBITHIA.....9TH INTERESTED PARTY
SAMUEL NDUATI.....10TH INTERESTED PARTY**

EDWIN KAGO.....11TH INTERESTED PARTY

STEPHEN ODHIAMBO.....12TH INTERESTED PARTY

JUDGMENT

1. The ex-parte applicants are proprietors of business entities licensed by the 1st Respondent to carry out solid waste management in Nakuru, Naivasha Sub-County. Following a procurement process undertaken by the 1st Respondent sometimes in 2015, the Applicants were awarded contracts for solid waste management. When they set out to work however, they encountered opposition from the Interested Parties who wanted a share of the houses.

2. The Respondents subsequently issued a letter dated 3rd November 2016 summoning the Applicants to the Respondents' offices for a conflict resolution session. The Applicants state that on attending the meeting, the Respondents issued them with typed resolutions directing them to surrender some of the zones already awarded to them in the tenders and a letter dated 2nd November 2016 forwarding the said resolution. The Applicants subsequently filed the present application seeking orders that:-

1. An order of certiorari to remove into this honourable court for the purpose of it being quashed the decision by the respondents to order the forfeiture of zones awarded to the applicant's for purposes of garbage collection.

2. An order of prohibition to restrain the respondent from further acting on the letter dated 2nd November, 2016 and 1st November 2016 directing the applicants to forfeit their zones.

3. A declaration that the decision by the respondents coerce the applicants to forfeit their respective zones duly awarded to them as a result of successful bidding is illegal, egregious and unlawful hence void and of no effect.

4. An order for costs.

3. The affidavit in verification of the facts is sworn on behalf of all the Applicants by Leonard Mbogo Mututho, the 1st Applicant. He sets out the facts leading to the application as already summarized above. He has annexed all the relevant advertisement of tender (**LMM 2**) copies of letters by the 2nd Respondent to the Applicants informing them that they were qualified to participate in the tender (**LMM 3**). Copy of the bid document (**LMM 4**); copies of the letters dated 29th August, 2016 informing the Applicants that they had been awarded tenders (**LMM5**); copies of agreements dated 12th September, 2016 (**LMM 6**).

4. Further, the deponent deposed that when the Applicants started work, their operations were interfered with by other parties who had not participated in the tender and that they informed the Respondents who subsequently came up with the resolution to re designate the areas of operation to accommodate the persons who had not participated in the tender. In further averments, Leonard Mbogo stated that those who protested the re-designation received a letters dated 2nd November 2016. He faults the decision making process as a breach of rules of natural justice, ultra vires, irregular and void.

5. The 1st Respondent entered appearance through the firm of Hari Gakinya & Co. Advocates dated 25th January 2017. On the same date Mr. Gakinya appeared before Odera J and sought time to file a reply to the application which was duly granted by the court. There is on record a notice of change of advocates filed by Ms. Momanyi and Associates on 14th June 2017 that the said firm had been appointed by the 2nd and 3rd Respondents in place of Hari Gakinya Advocates. Ms. J. A. Simiyu & Co. entered appearance for the Interested Parties on 13th February, 2017.

6. When the matter came up for further direction on 14th February, 2017, parties informed the court that they wished to settle the matter out of court. No settlement was forthcoming however and on 16th October, 2017 parties took directions to file submissions. Apart from the Applicant, none of the parties filed any responses or submissions. The court shall therefore proceed without the benefit of the position of the Respondents and the Interested Parties.

7. The only issue in this application is whether the orders sought are merited.

8. It has long been settled that judicial review is not concerned with the merits of the decision but rather with the decision making process [see **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd. Civil Appeal NO. 185 of (2001)**. See also **Republic vs Kenya Revenue Authority Ex parte Yaya Towers Ltd (2008) eKLR**]. An applicant for judicial review must show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety of that the decision maker had no jurisdiction to make decision. See **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** cited in **Republic vs Chief Magistrate Milimani Commercial Court and 2 others Ex parte Violet Ndanu Mutinda & 5 others 2014 eKLR**. Further, it is now accepted that availability of other remedies is not an absolute bar to the granting of judicial review relief. See **Republic vs the Commissioner of Lands Ex parte Lake Flowers Limited Nairobi Misc. Application No. 1235 of 1998**.

9. In the present case, it has not been disputed that the Applicants were successful in their bids for solid waste management and garbage collection. They have displayed contractual agreements to that effect signed between themselves and the procuring entity. It has not also been disputed that the Interested Parties who felt left out of the business pie demanded a share of the business. In a bid to resolve the standoff between the Applicants and the Interested Parties, the Respondents called a meeting or meetings in which the standoff is said to have been resolved. According to the Applicants they were required to cede off some areas of operation to the Interested Parties. The Applicants fault the decision making process. They have stated in the application and in the submissions filed by their counsel that they were

summoned by the 2nd Respondent to a meeting on 1st November 2016 at the 2nd Respondent's office. That they complained that they were not heard but found the resolutions already drafted. That subsequently, they received a letter from the 2nd Respondent forwarding the minutes of the meeting and advising any group that may be dissatisfied to lodge their complain directly to his office for further consultation.

10. I have considered the submissions and also the impugned notice and minutes of the meeting held on 1st November 2016. It is not clear who was present in the meeting as there was no attendance list. The minutes clearly detail a number of resolutions. The minutes however do not reflect the decision making process. Were the Applicants heard? Were the resolutions drawn before the meeting as the Applicants allege or were a product of consultations in the meeting? Clearly there is nothing to demonstrate that the Applicants were given a hearing before the decision to alter their operation areas was made. The decisions might as well have had merit and reflected equitable distribution of business but if the decision making process was not fair, or that the Applicants were not heard, then the process offended the rules of natural justice and in particular the right to be heard before the decision affecting the parties was made.

11. In **Republic vs Chief Magistrate Milimani Commercial Court & 2 others Ex parte Violet Ndanu Mutinda & 5 others [2014] eKLR** cited in **Republic v Chairman Business Premises Rent Tribunal & 2 others ex parte Abdulkadir Hubess [2017] eKLR**, it was stated:-

“Judicial Review is concerned with the decision making process, not the merits of the decision itself with such issues as to whether the decision makers had jurisdiction whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters.... The court should not act as a court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision.”

12. As stated earlier in this ruling, the Respondents did not file any responses. Their counsel who attended court did not comply with the court's directions to file responses and submissions. They denied the court the benefit of the other side of the case. The Applicant's case therefore remained uncontroverted. In the end I find that the decision making process fell foul of the rules of natural justice and cannot be called to stand.

13. The Applicants also seek a prohibition order to restrain the Respondent from further acting on the impugned letter and minutes dated 2nd November 2016 and 1st November 2016 respectively. Prohibition looks to the future. I have already found that the decision making process was not fair and was tainted with procedural impropriety. It would follow therefore that the Respondent would be prohibited from further acting on the letter and the minutes of 2nd November, 2016 and 1st November 2016 respectively.

14. Further, I am persuaded that the action of the Respondents did not amount to fair administrative action. They fell short of section 7 of the Administration Act. It follows that the decision which came out of the procedure that was neither fair nor proportionate, should be quashed.

Order:

(i) An order of certiorari be and is hereby issued removing into this court for the purposes of being quashed the 2nd Respondent's decision dated 2nd November, 2016 and communicated by letter dated 1st November 2016 which is hereby quashed.

(ii) An order of prohibition is hereby issued restraining the Respondents from any further execution of the 2nd Respondent's decision.

(iii) The Applicant shall have costs of this application which costs shall be met by the Respondents.

Orders accordingly.

Judgment signed on this

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R. LAGAT-KORIR

JUDGE

Judgment dated, delivered and signed at Nakuru this 26th day of September, 2018.

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JANET MULWA

JUDGE

In the presence of:

..... Court clerk

..... For the Applicants

..... For the Respondent

..... For the Interested Party