



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO.22 OF 2014**

**IN THE MATTER OF: AN APPLICATION SEEKING LEAVE TO INSTITUTE JUDICIAL  
REVIEW PROCEEDINGS IN THE NATURE OF ORDERS OF CERTIORARI AND  
PROHIBITION**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT OF NAIROBI**

**STATUTE**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE NAIROBI CITY COUNTY FINANCE BILL ACT OF 2013**

**AND**

**THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF:**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE SECRETARY THE NAIROBI CITY COUNTY GOVERNMENT....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF ENVIRONMENT.....2<sup>ND</sup> RESPONDENT**

**EX-PARTE**

**PAUL MUTUA MUSAU**

**REGINA WANJIKU**

**DOMINIC MBINDA**

**FRANCIS WAMBUA**

**DANIEL NDEMO**

**JANE GACHERU**

**TITUS NZIOKI MUTUA**

**JUDGEMENT**

**Introduction**

1. By a Motion dated 27<sup>th</sup> day of January, 2014, the ex parte applicants herein, who claim to be members of **Pamoja Uhuru Park Self Help Group**, seek the following orders:

- a. **An Order of Certiorari quashing the decision anchored on an outcome of a ballot exercise conducted on 15<sup>th</sup> January 2014 to evict the applicants from their trading points at the Uhuru Park and Central Park grounds through flawed, unprocedural means of balloting in place of a vetting process earlier notified by the respondents.**
- b. **An Order of Prohibition stopping the Respondent by themselves or their agents and/or their servants and/or their employees from allocating the applicants' trading space at the Uhuru and Central Park grounds to the winner of a purported balloting exercise conducted in a blatant contravention of a vetting notice by the respondents dated 15<sup>th</sup> January 2014.**
- c. **THAT the respondents be restrained through themselves, its agents and/or their servants from harassing arresting and/or interfering in whichever manner with the applicants' and their activities at the Uhuru park and Central park during the pendency of this application.**
- d. **Costs of this application be provided for.**

2. According to the applicants, they have been conducting business in the Uhuru Park and Central Park on an annual basis licence since 2001 having been nominated and subsequently obtained annual licences without fail from the respondents herein. They contended that they have always complied with the terms and conditions of the respondent as a licensing authority all the times by way of obtaining and paying for renewal of their licenses as required by law. However, the 3<sup>rd</sup> respondent has continuously sought to eject them from the trading sites by arbitrarily authorising more traders to conduct business in the parks which traders do not comply with set out regulations in a bid to implicate the duly authorised traders and consequently cause their ejection from their means of livelihood.

3. Despite raising complaints with the respondents on several occasions regarding the influx of unauthorised traders into the parks, the same have been ignored more specifically by the 3<sup>rd</sup> respondent.

4. According to the applicants, in their effort to improve their small scale businesses they have taken loans from the self help group herein mentioned above and invested the same in their businesses at the parks.

5. Despite that they received a notice dated 10th January 2014 signed by the 3<sup>rd</sup> respondent herein informing them of the expiry of their 2013 licence and inviting them for a vetting exercise at the trade chambers on the 15<sup>th</sup> January 2014. On the said date, they availed themselves with their documents for the vetting exercise at the county hall as instructed by the notice aforementioned and were shocked to meet a crowd of over 200 people at the venue preparing for a balloting exercise. They were further shocked when the 2<sup>nd</sup> respondent and her team walked in and without any explanation whatsoever and without giving them a chance to seek any clarification ordered that they were going to undertake a balloting exercise.

6. It was averred that all other people except the applicants seemed to have had a prior knowledge of the ballot exercise and they all seemed prepared and strategic for it except. The said new faces seemed well organised and had strategies to tackle and win the ballots as the lucky ballots were only 18 against a total of 200 ballots for 58 traders and the 2<sup>nd</sup> Respondent allocated 20 traders the sites a fact the applicants deemed an irregularity.

7. Upon reading mischief the applicants opted to keep off the balloting exercise as they had been notified of vetting and not balloting and in a technical move by the respondent herein, all of them were knocked out of their source of livelihood in an unjust and unfair way. In the applicants understanding of the vetting exercise, they expected to appear before a panel and were prepared for the same until the moment they were ambushed with a ballot exercise.

8. As a result of the foregoing the applicants decided to lodge a formal complaint to the respondent. However despite lodging the same, there were efforts to hurriedly allocate the trading points to the people who picked the correct ballots in the flawed ballot exercise conducted on 15<sup>th</sup> January 2014.

9. It was the applicants' case that:

- a. Before such a decision was taken they ought to have had the complaints levelled against them brought to their attention, and that they should have been granted an opportunity to give their response thereto.
- b. They have a constitutional right to an expeditious, efficient, lawful, reasonable administrative action that adheres to the principles of procedural fairness, including a right to be given reasons for acts that are likely to affect us adversely.
- c. The decision was a blatant infringement of their Constitutional right to due notice, fair trading practices and fair administrative procedures.
- d. The Respondents, in arriving at its decision of 15<sup>th</sup> January 2014, was arbitrary, unprocedural, unfair, unjust and derogation from, its Statutory duty to uphold their rights to due notice, a fair hearing, proper procedures and correct and proper applications of rules of natural justice; deliberately concealed from the applicants their intention to hold a balloting exercise and instead deliberately misinformed them of a vetting exercise in their notice; did not afford them an opportunity to prepare for a balloting exercise; and did not afford them an opportunity to be heard.
- e. The said decision on the part of the Respondents was made in transgression of the rules of natural justice in that it never afforded the applicants an opportunity to be vetted in a fair, competitive and orderly manner before the decision was made.
- f. The said decision transgressed the applicants' legitimate expectation that any decision or action against them would not be taken until and unless they had been let in on the wrong doing and/or accusations against them and afforded opportunity to be heard, as provided for by statute.
- g. The said decision was an abuse of the power granted to the Respondent by the enabling statute as it was not made in conformity with the law.
- h. The said decision was unfair in that no notice whatsoever was served upon the applicant for balloting, especially so shortly after the respondents had given a formal notice for vetting.
- i. The said decision was arrived without giving any reasons whatsoever that they would respond to.
- j. The decision to evict the applicants from their locations of work had no anchor whatsoever, as the **County Government Act**, the Respondents Statutes, our Terms of binding for the work spaces within the park and letters of acknowledgement anticipate no such decision.

10. Though the applicants, in good faith, made efforts to obtain from the Respondent the details of their actions and accusations and/or any wrong doing on their part which justified the actions taken by the Respondents, the respondents instead commenced the process of allocating new persons the said trading spaces and their demand elicited no response.

11. To the applicants, the proper and fair procedure would have been to have given a clear and unequivocal notice notifying them of the purported balloting which was not the case as they were served with a notice for vetting instead. They averred that they were ready and willing to be subjected to all procedures of the Respondents hence their prayer is that the Respondents follows fair and just procedures

in line with the rules of natural justice and of fair procedure.

12. They contended that they risked incurring immense loan interests and loss of stocks already procured for the businesses, as they had taken loans to boost their businesses and we had no reason to doubt that the respondents would fail to renew their licences for the year 2014.

### **Respondents' Case**

13. According to the Respondents, City Park and Uhuru Park are not trading markets but recreation facilities where few traders are allowed to carry on business.

14. It was conceded that the Respondents issued a notice of expiry of licenses and a joint meeting was held between Applicants and Respondents with a view of deliberating on how the few slots could be distributed to the Applicants. It was disclosed that the Respondents held a meeting with all contestants including the Applicants and informed them of the purpose of the meeting and how balloting was to be conducted.

15. To the Respondents recreation facilities is not a preserve of some few individuals and that is why it included various persons who had shown interest in carrying out business in the said parks and the balloting process was transparent. It was averred that the Applicants attended and participated in the balloting exercise which was transparent and all participants were agreeable to the process and that the persons who were lucky in the balloting were the ones to carry out business as this is what the process entailed.

16. To the Respondents the Applicants' Application lack merit on the following grounds:

1. **A notice was issued to the Applicants and all persons interested in carrying out business at the parks.**
2. **The Applicants fully participated in the balloting which culminated into the few who were lucky.**
3. **The parks are meant for trading purposes it only allows a few to conduct business purposely to enable those who come for recreation access few items that the traders would be licensed to offer.**
4. **The Respondent discharged its lawfully mandated duty fairly and without any discrimination.**
5. **The Applicants have not come to court with clean hands.**

### **Determination**

17. Having considered the foregoing, this is the view I form of this matter.

18. It is not disputed that the applicants were licensees in the said two parks. That the said licences had lapsed is also not disputed. The applicants however contend that the notice they were given amounted to a misrepresentation. In my view if that position was correct, the same may well amount to a breach of contract assuming the licences were for any other reason apart from their expiry, valid. In my view a distinction must be drawn between situations where there is an attempt to terminate an existing notice without compliance with the rules of natural justice and where what is sought is in effect an attempt to protect a licence which has expired by effluxion of time, as is the case here. Whereas the former may give rise to issues relating to failure to adhere to principles of fair administrative action, in the latter, the cause of action, if any, does not give rise to remedies under public law as opposed to private law reliefs for breach of contract. Ordinarily matters relating to contractual issues are not elevated to found a cause of action in judicial review jurisprudence. That was the position adopted by **Visram, JA** in **Maseno University & 2 Others vs. Prof.Ochong' Okello [2012] eKLR** in which the learned Judge held:

**“...orders of judicial review are orders used by the Court in its supervisory jurisdiction to review the lawfulness of an act or decision in relation to the exercise of a public act or**

duty. In this case, the contract of employment between the respondent and Maseno University was a contractual relationship governed by private law. The dispute between the respondent and the appellants arose from the performance of the respondent's contract of employment. While it is true that the public has a general interest in the University being run properly, that interest does not give the public any rights over contractual matters involving the University and other parties. The trial Judge appears to have been moved by the fact that the respondent is "a senior citizen and a senior lecturer who has dedicated his service to the public by imparting knowledge to us and to our children". This may well be so. Nonetheless, that fact does not make the contractual relationship between the respondent and the applicant which is governed by terms and conditions agreed by the parties a matter of public duty or matter governed by public law. Moreover, if one were to accept the reasoning of the trial Judge that the treatment of the respondent becomes a matter of public law because of the public expectation that the University would act lawfully and fairly towards the respondent, then it is not the respondent but the public who would have a right of action for orders of judicial review based on breach of their expectation...[T]he breach or threatened breach of the appellants' contract of employment was not a public act or matter of public law but was a matter of contractual relationship between the respondent and the appellants, governed by private law. It was not therefore an appropriate action justifying the granting of orders of judicial review. The respondent may well have had a genuine grievance. His remedy however, lies under private law which covers disputes relating to contractual relationships. Therefore, the High Court erred in granting the orders of judicial review as Prof. Ochong' did not have public law right capable of protection under the supervisory jurisdiction of the Court."

19. I also associate myself with the position taken in Republic vs. City Council of Nairobi ex parte Meshack Mbutia Macharia & 2 Others [2012] eKLR that judicial review cannot provide a remedy for an alleged breach of contract.

20. Parties are cautioned against elevating all disputes into public law disputes even where there are adequate remedies available under private law for vindication of an alleged wrong. In Ngoge vs. Kaparo & 4 Others Nairobi HCMA No. 22 of 2004, a three judge bench of this Court expressed itself as follows:

"Any such inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn trivialise the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry...The notion that whenever there is 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 the chapters of the Constitution is fallacious ... 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 the unlawful administrative action which involves no contravention of any human right or fundamental freedom."

21. The same position was adopted in Rodgers Mwema Nzioka vs. The Attorney General & 8 Others Nairobi HCCC No. 613 of 2006 where the Court was of the view that:

"Where a party deliberately avoids to pursue remedies for compensation or any other remedy and he instead purports to invoke section 84 of the Constitution, the court finds that such a move constitutes an abuse of the court process and also trivialises the Constitutional

jurisdiction. Vindication of any breach of contractual right or alleged duress can be articulated as a private right in the courts of the land. Section 84 clearly was intended for vindication of pure fundamental rights and freedoms violations which in turn necessarily never constitute causes of action elsewhere. Freedom of contract, although a laudable principle, is not absolute and in view of the court, positive governmental intervention would be constitutionally justified under section 70 of the constitution in order to articulate and advance the public interest.

22. A similar approach was adopted in *Kanzika vs. Governor, Central Bank of Kenya & 2 Others* Nairobi HCMCA No. 1759 of 2004 [2006] 2 KLR 545 in which the Court held that:

**“The Court cannot overstretch this by providing for situations which were never contemplated by the framers of the Constitution because as in this case they were properly regulated by contract or commercial law. For this reason the Court declines to apply the living tree principle to the matter before me. Any growth that does not derive its food from the roots of the tree is a stranger to the tree. Where as in the case of the Kenya Constitution a Chapter is devoted to fundamental rights and freedoms (i.e. chapter 5) a court is constrained by the framework, text and language and while recognizing that International Conventions to which Kenya is a signatory have widened or expanded civil, political, social and economic rights, where there is no domestication, expansion can only come in handy where there is ambiguity in the interpretation of the Constitution in which event, it would be prudent and even necessary for the court to interpret the provision in a manner compatible with the relevant Convention otherwise the constitutional restrictions must prevail. Where the rights have been defined the State has four levels of duties namely to respect, protect, promote and fulfil the rights. Most constitutions provide for allocation of governmental power – this is the root and the trunk of the living tree. Contractual and commercial transactions belong to other different but smaller living trees. They cannot be naturally grafted into the living tree i.e. Constitution. The court can only graft in what is not constrained by the language, structure and history of the constitutional text, by constitutional traditions, by history and by the underlying philosophies of our society. This court has declined to overshoot or grafting, as invited to by the applicant. The claim is misconceived.”**

23. In my view the issues raised herein fall within the private law rather than the public law arena.

24. Apart from that it is clear that the balloting whether rightly or wrongly did take place and third parties acquired interests in the said parks. As is stated in *Halsbury’s Laws of England 4<sup>th</sup> Edn. Vol. 1(1) para 12 page 270*:

**“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary**

**decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.” [Emphasis added].**

25. To grant the orders sought herein would have the effect of violating the rules of natural justice in so far as the said third parties are concerned. It may also be arguable whether such third parties would be bound by orders made in a case where they were not parties. It is therefore not far-fetched to say that the orders sought herein may well be in vain.

26. Apart from the foregoing there are conflicting factual matters as to whether the parties herein agreed on the process to be undertaken. In that event, judicial review is not the appropriate forum for determination of such factual matters.

27. In the premises, this application fails but in light of the clear short notice given by the Respondents, there will be no order as to costs.

Orders accordingly.

**Dated at Nairobi this day 19<sup>th</sup> of February, 2016**

**G V ODUNGA**

**JUDGE**

***Delivered in the absence of the parties.***

***Cc Florence***