REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 220 OF 2014

REPUBLIC .....APPLICANT

VERSUS

MAVOKO SUB-COUNTY .....1ST RESPONDENT

MACHAKOS COUNTY GOVERNMENT.....2ND RESPONDENT

EX-PARTE

JOHNESE NGULI KATHUKU

ELIZABETH SYOKAU MUEMA

DAVID MWANGI

(Suing in their own capacity & on behalf of 150 members of Kyumbi Jua Kali Self Help Group)

JUDGEMENT

This judicial review application has been brought by Johnese Ngule Kathuku, Elizabeth Syokau Muema and David Mwangi in their own capacity and on behalf of 150 members of Kyumbi Jua Kali Self Help Group. Through the notice of motion application dated 19th June, 2014 the applicants pray for orders that:

> **"(I) AN ORDER OF CERTIORARI to quash the decision by the Respondent to demolish all the business structures of the Respondents (sic) at Kyumbi Market situated at the junction between Machakos road off Nairobi – Mombasa Highway.**
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> **(II) AN ORDER OF PROHIBITION to prohibit and restrain the Respondents whether by themselves, agents, employees, representatives, or anybody whomsoever from harassing, threatening, arresting, charging, or prosecuting the Applicants in relation to carrying on their daily businesses at Kyumbi Market situated at the injunction between Machakos road off Nairobi – Mombasa Highway unless they provide alternative modern market to trade with their merchandises.**
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> **(III) Costs."**

According to the papers filed in Court, the applicants who are the officials of Kyumbi Jua Kali Self Help Group (the Association) and the members of the Association operate small businesses as hawkers and kiosk operators at Kyumbi which is located at the junction of Machakos road and Mombasa road. They sell their wares to travellers along the Nairobi – Mombasa Highway. The applicants' case is that they have been engaged in the trade since 2003 and they have licences from the Municipal Council of Mavoko which falls under Machakos County. Those who do not have licences pay a daily levy of Kshs.30/= to Machakos County and they are issued with receipts for these payments.

The applicants informed the Court that on 5th June, 2014 at around 1.00 a.m. their watchmen informed them that armed police officers accompanied by a group of young men and officers of the Mavoko County Council were in the process of demolishing their business sheds, kiosks, stalls and/or structures. They rushed to the scene with a view to stopping the demolitions but they could not do anything as they were confronted by fully armed police officers. It is their case that the said demolitions were carried out without notice.

Further, that the Nairobi-Mombasa Highway is under the management of Kenya National Highways Authority and it is the said body which should issue eviction notices and not the County Government of Machakos. They assert that the County Government of Machakos acted outside its mandate.

The applicants contend that the way the demolition was conducted is a clear manifestation of the respondents' unreasonableness. Further, that the action was in breach of Article 47 of the Constitution as they were not given any notice prior to the demolition. Further, that they were not given a hearing before the demolition was carried out.

The respondents opposed the application through the grounds of opposition dated 8th July, 2014 and the replying affidavit sworn by the 2nd Respondent's County Secretary on 10th July, 2004. From the respondents' papers filed in Court, it is clear that they oppose the application on several grounds.

It is the respondents' case that the applicants have no locus to institute these proceedings in their representative capacity and neither have they demonstrated that they have sufficient interest to bring these proceedings on their own behalf. Further, that the applicants cannot claim a right of occupancy based on a one day licence.

The respondents assert that the applicants cannot seek to prohibit the respondents from enforcing the law. It is the respondents' case that in evicting the applicants they were acting under the County Governments Act which allowed them to stop encroachment on road reserves. Further, that the applicants were illegal occupiers of the road reserves as no building plans had been received from the applicants and approved by the respondents as required by the Physical Planning Act.

Further, that there is a designated market next to Kyumbi Police Station and in admitting that they were conducting their trade outside the market the applicants in essence admit that they were engaged in illegal acts.

The respondents contend that the greater public interest of the people of Machakos to have illegal structures on road reserves removed overrides the applicants' individual interests.

The respondents assert that prohibition is no longer available as that which the applicants seek to prohibit has already occurred.

The first issue that needs to be answered by the Court is whether the application is so defective that it calls for the entire suit to be struck out. The respondents argued that the application is fatally defective. The respondents contend that a look at the application reveals that there is no ex-parte applicant. It is their case that the Republic is named as the applicant and then there is a respondent and interested parties.

The manner in which judicial review proceedings are supposed to be commenced was clearly enunciated by Ringera, J (as he then was) in **JOTHAM MULATI WELAMONDI v THE ELECTORAL**

COMMISSION OF KENYA [200] 1 KLR 486. The person who seeks relief is called the ex-parte applicant. It is apparent from the proceedings before this Court that the persons who are supposed to be the ex-parte applicants have been named as the interested parties. This is wrong.

However, the parties who have participated in these proceedings are clear in their minds that the persons named as interested parties in the papers filed in Court are actually the ex-parte applicants. This is an error that does not go to the root of the matter. Article 159(2) (d) of the Constitution therefore comes to the aid of the applicants. Justice must be done without undue regard to technicalities. The objection raised by the respondents is therefore dismissed.

The second issue on the competency of the suit is the respondents' assertion that the applicants have not demonstrated any legal capacity to bring this suit either on their own behalf or on behalf of Kyumbi Jua Kali Self Help Group. The respondents submit that the applicants have not tabled any evidence to show that Kyumbi Jua Kali Self Help Group is registered.

The applicants have averred that they had stalls, kiosks or structures that were demolished. Their averment has not been rebutted by the respondents. They were therefore directly affected by the respondent's decision and they were entitled to bring these proceedings - see **JAMES TOROTICH KISA & 3 OTHERS v CITY COUNCIL OF NAIROBI [2010] eKLR.** These proceedings are therefore sustainable by virtue of the fact that the applicants were directly affected by the act complained of.

The applicants contended that the respondents did not comply with the rules of natural justice. The applicants submitted that the rules of natural justice demanded that they ought to have been notified of the decision to evict them, the reasons for the decision and an opportunity to be heard before the decision was implemented. It appears from the material placed before the Court that the applicants were indeed ambushed by the respondents. The notice exhibited by the respondents is dated 4th June, 2014. Eviction was carried out on 5th June, 2014 at 1.00 a.m. That notice was indeed short.

The question of the day is whether the orders sought should be granted. The scope of the orders of judicial review was clearly enunciated by the Court of Appeal in **KENYA NATIONAL EXAMINATIONS COUNCIL v REPUBLIC EX-PARTE GEOFFREY GATHENJI AND 9 OTHERS,** Civil Appeal No. 266 of 1996 as follows:-

> **"That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol. 1 at pg.37 paragraph 128…….**
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> **The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**
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> **"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode**

of redress is less convenient, beneficial and effectual."

At paragraph 90 headed "the mandate" it is stated:

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed……

Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

By the time the applicants approached this Court, the decision had issued and their kiosks had been pulled down. An order of prohibition cannot therefore issue. An order of certiorari can also not issue as such an order would not serve any purpose since the decision the applicants seek to quash was implemented and is irreversible.

Judicial review orders are discretionary in nature. This is clearly brought out by the authors of **Halbury's Laws of England, Fourth Edition, 2001 Reissue, Volume 1(1)** at paragraph 122 (pages 270-271) when they state:

"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), declaratory orders and injunction 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 account of 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 of the right to object may all 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 the 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'."

In the circumstances of this case the relief sought by the applicants no longer serve any useful purpose and even though the applicants may have had genuine complaints, the Court would decline to issue the orders sought.

The application fails and it is dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 27th day of November , 2014

W. KORIR

JUDGE OF THE HIGH COURT