



**Republic v Michael Abala Wanga, Acting City Manager, Kisumu City & 2 others; Owiti & 4 others (Exparte Applicants) (Environment and Land Judicial Review Miscellaneous Application E011 of 2021) [2022] KEELC 14449 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14449 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND JUDICIAL REVIEW  
MISCELLANEOUS APPLICATION E011 OF 2021**

**A OMBWAYO, J**

**OCTOBER 27, 2022**

**IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 27, 28, 40, 47, 48, 50, 159, 162 (2) (B) AND 258 OF THE CONSTITUTION OF KENYA.**

**AND**

**IN THE MATTER OF SECTION 7 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 7, 8 AND 9 OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015**

**AND**

**IN THE MATTER OF PUBLIC HEALTH ACT, CAP 242 LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**



**MICHAEL ABALA WANGA, ACTING CITY MANAGER, KISUMU**  
**CITY ..... 1<sup>ST</sup> RESPONDENT**  
**KISUMU CITY BOARD ..... 2<sup>ND</sup> RESPONDENT**  
**COUNTY GOVERNMENT OF KISUMU ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**VICTOR JUMA OWITI ..... EXPARTE APPLICANT**  
**DAVID OCHIENG WINYO ..... EXPARTE APPLICANT**  
**SOPHIA MAUJIH ..... EXPARTE APPLICANT**  
**PENN OMBERE ODHIAMBO ..... EXPARTE APPLICANT**  
**JOHN OKECH OKECH ..... EXPARTE APPLICANT**

### **JUDGMENT**

1. Victor Juma Owiti, David Ochieng Winyo, Sophia Maujih, Penn Ombere Odhiambo, John Okech Okech hereinafter referred to as the *ex parte* applicants, filed the instant judicial review application *vide* a notice of motion dated October 29, 2021 pursuant to leave granted by this court on October 15, 2021. The *ex parte* applicants are seeking inter alia the following orders: -
  - i. An order of certiorari to remove and bring before this honourable court, the Public notice Reference No CGK/COK/CM/PHL/VOL I dated and issued by the 1<sup>st</sup> respondent on March 2, 2021 (hereinafter also referred to as the impugned notice) on what he referred to as “disposal of dead bodies”.
  - ii. An order of prohibition to prevent and or stop the 1<sup>st</sup> respondent and/or the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in person through their agents, from enforcing the impugned notice to the detriment and prejudice of the applicants and or the general residents of the identified areas within Kisumu County.
  - iii. General damages being compensation for the respondent’s infringement of the applicant’s constitutional right to fair administrative action together with the interest accrued thereon at the prevailing court rates until payment is made in full.
  - iv. Any other relief this honourable court may find appropriate in the circumstances of this case.
  - v. Costs herein be paid by the respondent.
2. The application was predicated on the grounds set out on the body of the application and on the statement and the verifying affidavit filed in support of the application for grant of leave.
3. The applicants in support of the application aver that on March 2, 2021 the 2<sup>nd</sup> respondent issued a public notice reference No CGK/COK/CM/PHL/VOL I on “disposal of dead bodies”. The applicants state that the impugned notice purported that Kisumu had identified and designated specific sites as official cemeteries being Mamboleo, Muslim Cemetery and Hindu Crematorium. The applicants’ further states that the notice purported to set levies chargeable for burials and cremations. That the notice further notified residents including the applicants of the prohibition of burial of dead bodies in unauthorized places pursuant to section 144(1) and 2 of the *Public Health Act*.



4. The applicants aver that the notice will have a drastic change on their way of life as well as the other residents in the identified areas. The applicants' contention is that no meaningful public participation had been conducted before the issuance of the impugned notice which purports to create an offence in an irregular manner. The applicants contend that an order for judicial review by way of a writ of certiorari and/or prohibition compelling the respondents to quash the said notice and/or stop the respondents from enforcing the said notice is merited.
5. The respondents, through a replying affidavit sworn by Michael Abala Wanga, the 1<sup>st</sup> respondent herein who is the acting city manager, Kisumu City on 9<sup>th</sup> February 2022 opposed the application. The 1<sup>st</sup> respondent states that section 103 of the [County Governments Act](#) provides it with county objectives. The 1<sup>st</sup> respondent further states that planning and development control within Kisumu County is anchored under the second Kisumu County Integrated Development Plan (Kisumu CIDP) for 2018-2022 developed in accordance with the principles and values of the [Constitution](#) and the [Urban Areas and Cities Act](#). He states that the Kisumu CIDP had been prepared through an inclusive and consultative process in conformity with the [Constitution](#) on public participation in public policy making. The 1<sup>st</sup> respondent contends that members of the public came up with development strategies, programs and projects through memoranda and during public participation fora including the issue of designated burial sites.
6. The 1<sup>st</sup> respondent further contends that the respondents had powers under the [Constitution](#), [County Governments Act](#), [Urban Areas and Cities Act](#) and the [Public Health Act](#) to designate cemeteries and to impose rules on its use. He adds that the impugned notice had been issued by a statutory office exercising powers donated by the [Constitution](#) and that the respondents had all authority to designate burial grounds and cemeteries. He states that the judicial review application does not have merit, plainly speculative and an abuse of the court process and should be dismissed with costs.
7. Victor Juma Owiti the 1<sup>st</sup> *ex parte* applicant swore a supplementary affidavit dated March 31, 2022 and filed on the same day in reply to the respondents replying affidavit. The applicant reiterated the averments of the affidavit verifying the facts sworn on March 17, 2021. The applicant contends that the 1<sup>st</sup> respondent had no authority to issue the impugned notice in purported exercise of the function of the county health services including cemeteries, funeral parlours and crematoria. The 1<sup>st</sup> *ex parte* applicant contends that the issue of prohibition of burial was neither discussed nor passed by the County Assembly of Kisumu as required by law and further that the alleged Kisumu CIDP ever been tabled before or approved by the County Assembly. He added that the impugned notice was issued in contravention of national values and principles of governance and further that there was no meaningful public participation in coming up with the notice. It is his contention that the notice was issued without considering the need to protect their historical and cultural heritage. The 1<sup>st</sup> *ex parte* applicant avers that the applicants need not wait until their rights have been threatened to move the court as the impugned notice suffices to make them entitled to seek redress.
8. The application was argued by way of written submissions. The *ex parte* applicants' submissions were filed on April 28, 2022, and the respondents filed their submissions on October 4, 2022. I have reviewed and considered the parties filed written submissions. The applicant raises six issues for determination. One, whether the honourable court has jurisdiction where the applicants in answering in the affirmative relied on article 162(2)(b) of the [Constitution](#) and the case of [Ken Kasing'a v Daniel Kiplagat Kirui & 5 Others](#). Second issue is whether the issues are ripe for consideration. The applicants submit that they have established the real threat of violation to their right to property resulting from prohibition by the respondents of burial of their freehold parcels of land. They relied on article 169 (2)(b) of the [Constitution](#) and section 13(2) of the [Environment and Land Court Act](#).



9. The third issue is whether the 1<sup>st</sup> respondent acted without authority. The applicants submit that the 1<sup>st</sup> respondent had no authority to issue the impugned notice as the delineation of county health services as a function of the county is limited to the management of such facilities but does not extend to designation of cemeteries which remains the function of the minister. The applicant contends that the *Urban Areas and Cities Act* stipulates the principles of governance and management which the 1<sup>st</sup> respondent ought to have complied with in issuance of the notice. He submits that the 1<sup>st</sup> respondent acting on behalf of the 2<sup>nd</sup> respondent could only exercise powers as delegated by the 3<sup>rd</sup> respondent. He relied on section 21(1) of the *Urban Areas and Cities Act*. The applicant further contends that assuming the 1<sup>st</sup> respondent had authority to issue the impugned notice, the same had to be done by way of gazettment and not a notice as provided under section 144 of the *Public Health Act*. He argues that the 3<sup>rd</sup> respondent had not delegated the function to the 2<sup>nd</sup> respondent nor was the said function assigned to the 1<sup>st</sup> respondent.
10. The fourth issue is whether there was need for county assembly approval where the applicant contends that the 3<sup>rd</sup> respondent never tabled the issue of purported prohibition of burial as in the impugned notice before the county assembly Kisumu. They submit that the respondents were required to table proposals to issue the said notice but failed to do so thereby contravening sections 8(1)(e), 30 (2) (f) and 111(6) of the *County Governments Act* and section 41 (3) (b) of the *Urban Areas and Cities Act*. The fifth issue is whether there was meaningful public participation. The applicants submit that there was no public participation in issuance of the impugned notice. They submit that the respondents are on record for their position that there was no need for public participation since they were not coming up with new laws or policies but merely enforcing laws in place. They relied on the case of *Kitty Njiru v Nature & Style Fun Day Events & 2 Others* as well as the *Civil Procedure Rules* on the doctrine of estoppel.
11. The final issue is whether the intended limitation is justifiable/ reasonable. They relied on article 24 of the *Constitution* and submit that the 1<sup>st</sup> respondent by issuance of the impugned notice imposed a limitation to the applicants right to property over their freehold land owners in a manner not justifiable. The applicants submit that the 1<sup>st</sup> respondent acted illegally by purporting to extend the offence under section 144 of the *Public Health Act*, irrationally by issuing the impugned notice ultra vires his powers and unreasonably by failing to consider the relevant factors.
12. The respondents on the other hand identified one issue for determination being whether the 1<sup>st</sup> respondent had authority to issue the impugned notice and whether the said notice is lawful. They relied on article 159(2)(e) and 186(1) of the *Constitution* and submit that they had the requisite powers under the *Constitution*, *County Governments Act*, the *Urban Areas and Cities Act* and the *Public Health Act* to designate cemeteries and to impose rules on the use of such cemeteries. They further submit that the restriction and/or limitation by the impugned notice is justified, proportionate and necessary under article 24 of the *Constitution* and maintains balance between the public interest and private right. They contend that they had the constitutional obligation to make public policy decisions as was made through the impugned notice.
13. The respondents relied on the case *Joan Akoth Ajuang & Another v Michel Owuor Osodo the Chief Ukwala Location & 3 Others; Law Society of Kenya & 3 Others* where the court held that among other things, that an unrestricted property right does not exist in a dead body. They cited the case of *Kenya Guards Allied Workers Union v Security Guards Services & 38 Others*, Misc 1159 of 2003 and submit that it is trite in law that when public interest and private interest collide, public interest supersedes private interests of an individual. The respondents in conclusion urges the court to dismiss the present petition with costs to the 3<sup>rd</sup> respondent.



## Analysis and Determination

14. I have considered the arguments and submissions made and find that the main issue for determination is whether the application for judicial review is merited. In the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR*, the Court of Appeal held as follows: -

“Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether the 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”.

15. In the instant case, this court would not be concerned with the issue of whether the delineation of county health services including cemeteries, funeral parlors and crematoria were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did the party who issued the decision have the power or jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did it take into account irrelevant matters?
16. The applicants contend that the 1<sup>st</sup> respondent had no authority to issue the impugned notice. They argue that the said authority lies with the 3<sup>rd</sup> respondent and not the 1<sup>st</sup> or 2<sup>nd</sup> respondent. The respondents on the other hand argue that Mamboleo cemetery already exists as a public cemetery and has not been created nor gazetted by the respondents. They contend that they require the public to ensure that the public bury the dead within the gazetted areas.

Section 144(1) of the *Public Health Act* provides that it shall be lawful for the minister to select, appoint and notify in the gazette sufficient and proper places to be sites of and to be used as cemeteries. Section 31 of the *Urban Areas and Cities Act* provides that the management of a city and municipality shall be vested in in a town committee. Section 31A further provides that the functions performed by the board of a city or a municipality shall be performed by the town committee. Section 111 of the *County Governments Act* provides that each city should have land use plans and building and zoning plans. The city plans provide the functions and principles of land use and building plans, location of various types of infrastructure within the city and development control in the city. It goes further to state that the city land use and building plans is binding on all public entities and private citizens operating in that particular city.

17. The impugned notice was issued by the acting city manager of Kisumu County notifying the public of the designated cemeteries and crematoriums. It is this court’s view that the notice was not a decision but a way of conveying information to the public on the areas they are to bury the dead. While in agreement with the applicants that designated burial areas in the city are to be done by way of gazetment and not notice, it is clear that the notice was not designating the said areas as burial sites for use by the public. The respondents have already confirmed that the designated burial areas already existed as public cemeteries.
18. This court finds that the impugned notice was not a decision but it was only conveying information to members of the public on where they were required to bury the bodies of their departed. From the above, it is clear that the 3<sup>rd</sup> respondent is mandated to designate burial areas in the city while the 1<sup>st</sup>



and 2<sup>nd</sup> respondents only manage the affairs of the city in a manner authorized by the statute. The applicants' argument is therefore misplaced since the 1<sup>st</sup> respondent through the impugned notice did not designate the mentioned areas as burial sites.

19. In the upshot, this court finds that the ex parte applicants notice of motion dated October 29, 2021 is without merit. The said application is therefore dismissed with no order as to costs this being a public spirited litigation.

**DATED AND DELIVERED AT KISUMU THIS 27<sup>TH</sup> OCTOBER 2022.**

**A O OMBWAYO**

**JUDGE**

