



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Appli 627 of 2005**

**GITHURAI OPEN AIR MARKET SELF HELP GROUP.....APPLICANT**

**Versus**

**CHIEF MAGISTRATE, THIKA LAW COURTS & ANOTHER...RESPONDENT**

**JUDGMENT**

By the Notice of Motion dated 25<sup>th</sup> May 2005, the ex parte Applicant, Githurai Open Air Market Self Help Group seeks an order of certiorari to issue to quash the order made by the Chief Magistrate Thika Law Courts on 5<sup>th</sup> April 2005 ordering that all the machinery to be put in place to remove the Applicants from their designated area of trade and business. The application was grounded on the statutory statement dated 28<sup>th</sup> April 2005, a verifying affidavit dated 28<sup>th</sup> April 2005 and a further affidavit dated 4<sup>th</sup> May 2005 both sworn by Muvea Kilonzo who described himself as the chairman of Githurai Open Air Market Self Help Group. Submissions were also filed on 15<sup>th</sup> February 2006. The motion was opposed by the 1<sup>st</sup> Respondent Municipal Council of Ruiru and the Attorney General's representative, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. Ms Warui urged the motion on behalf of the Applicants while Mr. Nderitu Advocate appeared for the 1<sup>st</sup> Respondent and Mr. Chahale appeared for the 2<sup>nd</sup> to 4<sup>th</sup> Respondents.

In their further affidavit, Muvea Kilonzo deposed that their group is registered under Ministry of Gender, Sports, Culture and Social Services vide certificate No. 9045 dated 6<sup>th</sup> April 2005 and that there are about 363 members. He exhibited a list of all the members on behalf of whom he depones.

The background of this case is that the 1<sup>st</sup> Respondent is the owner of the piece of land known as LR 22025 bought about 2002, as per the copy of title, GMM 1. It was for purposes of constructing offices but before the 1<sup>st</sup> Respondent could do so, it was invaded by hawkers, the members of the Applicant herein. That the Public Health Officer sued the 1<sup>st</sup> Respondents in 3770/02 to remove the hawkers and abate the nuisance at the said area under the Public Health Act and it is then Mrs Kidula, Chief Magistrate Thika, ordered the security machinery to assist in enforcement of the court's order. It is the Applicant's contention that the 1<sup>st</sup> Respondent should have been held in contempt of court for disobedience of the court order in No. 3770/02 because the 1<sup>st</sup> Respondent had not indicated in the proceedings that the Applicants were a hindrance to performance of the court orders. It is the Applicants contention that the orders that were made directly affect the 363 members who were not given a hearing by the court before the orders were made. That the court should take into account the fact that the market is where the Applicant's members earn a livelihood and that families depend on them. That the order offends rules of natural justice because though the 1<sup>st</sup> Respondent is the owner of the plot, he had allowed the Applicants to remain on the plot and they used to pay levy to the 1<sup>st</sup> Respondent which the 1<sup>st</sup> Respondent accepted. They exhibited receipts to the verifying affidavit as 'MKI'

In opposing the motion, Mr. Nderitu relied on the affidavit of Geoffrey Mwangi sworn on 21<sup>st</sup> June 2005 and submissions dated and filed in court on 13<sup>th</sup> October 2006. Counsel invited the court to note the location of the alleged market on the Thika – Nairobi Highway and that it is a danger to the Applicants and others. That the land belongs to the 1<sup>st</sup> Respondent and that there have been several attempts to remove the Applicant's members with the help of the 4<sup>th</sup> Respondent and the bundle of correspondence was exhibited. GMN 2 which include notices to vacate dated 1<sup>st</sup> September 2003, letters to 4<sup>th</sup> Respondent soliciting help to evict the Applicants. That the Applicants have no locus

standi in the matter as they are trying to create rights out of an illegality. Counsel also submitted that the receipts that have been exhibited were issued by Githurai Market which is situate in Githurai Ward but not issued by Githurai Open Air Market. He urged the court to dismiss the Application.

Mr. Chahale in opposing the motion relied on grounds of opposition dated 4<sup>th</sup> July 2005 and filed in court on 12<sup>th</sup> July 2005 and skeleton arguments filed in court on 28<sup>th</sup> February 2007. Counsel submitted that the Applicant lacks the legal capacity to bring these proceedings being an amorphous body not known in law. That the Applicant was not a party to the proceedings in the lower court and lacks the necessary standing in the matter to require the court to quash it.

Another ground raised by Mr. Chahale is that the application is incurably defective since it was not brought in the name of the Republic. He also urged that the lower court conducted the matter before it within its jurisdiction and there would have been no reason for it to consider the Applicants position. Ms Warui asked the court to exercise its discretion and overlook the defect in the application.

I have considered the application, affidavits on record, submissions by Counsel and I wish to note that the defect in the notice of motion is fundamental and cannot be overlooked. It is trite that Judicial Review applications are brought in the name of the Republic and should be properly intituled. This was so held in the case of **FARMERS BUS SERVICE LTD V THE TRANSPORT LICENSING APPEALS TRIBUNAL 1959 EA 779** where the Court of Appeal of Eastern Africa held that Judicial Review applications should be correctly intituled in the name of the Crown (now Republic).

In **JOTHAM MULATI WELAMONDI V ECK CHAIRMAN (2002) 1KLR 486**, Justice Ringera restated the law on the same point and went further to demonstrate how a Chamber Summons application for leave in a Judicial Review application and the notice of motion should be drawn. A notice of motion in Judicial Review has to be brought in the name of the Republic because Judicial Review is a mechanism that was set up by the state to check excesses of its officers or public bodies and it is the Republic that steps in the shoes of the aggrieved person and brings the motion on behalf of the exparte Applicant. For that reason the exparte Applicant has no capacity to bring the said application in his own name. The Notice of Motion as presented to court in the name of Githurai Open Air Self Help Group with the Republic as the Respondent is therefore incompetent and that defect is fatal. The court in the **WALAMONDI CASE** and **HMISC 1124/05 THE NATIONAL COUNCIL NON-GOVERMENTAL ORGANISATIONS V PROF. ANYANG NYONG'O** struck out such applications which were not brought in the name of the Republic. The court cannot exercise its discretion to grant any prayers on this application because the party which was supposed to move the court has not done so and the motion cannot be salvaged.

The 1<sup>st</sup> Respondent claims to be the owner of the land upon which the Applicants claim to have been conducting their businesses. The Applicant has not shown the contrary. The Applicant's members claim to have been on the plot with the permission of the 1<sup>st</sup> Respondent and paid levies. Even assuming that the applicant's members had initially been allowed on the property which was on day to day basis as evidenced by the annexed receipts, once the permission was withdrawn they became trespassers. The 1<sup>st</sup> Respondent has denied that the exhibited receipts were issued at the said Githurai Open Air Market. The Applicants illegally occupied the said plot and mere occupation did not give them any rights especially considering that the 1<sup>st</sup> Respondent had been trying to remove them for some years without success. Having illegally occupied the plot they cannot claim to have been denied a right to be heard by the court because they had no right to the said plot so as to be allowed audience by the court and they therefore lack the locus standi to bring this application. They cannot purport to create rights out of an illegality.

I also do agree with the Respondents submission that the Applicants have no legal capacity to bring this application. Githurai Self Help Group is not a legal person. Some of the members could have filed this motion as individuals. As to whether the Chief Magistrate's court in Thika in giving the orders under challenge acted outside its powers, the Applicant has not demonstrated how the court exceeded its powers. The court acted within its mandate, gave a ruling to which the Applicants were not a party because they had no legal capacity to be invited into the proceedings or enjoined. The only party that could have challenged the order or appealed should have been the 1<sup>st</sup> Respondent.

In sum I find that apart from the application being incompetent, it is also unmerited and it is hereby dismissed with costs to the Respondents.

Dated and delivered this 27<sup>th</sup> day of November 2008.

R.P.V. WENDOH

JUDGE

**Present:**

Mr. Ali holding Mr. Nyasani for the Applicant

Mr. Onyancha for 2<sup>nd</sup> & 3<sup>rd</sup> Respondent

Daniel: Court Clerk