



REPUBLIC OF KENYA



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**Republic v County Government of Nairobi; Oduor & 2 others
(Exparte) (Environment and Land Case Judicial Review Application
E004 of 2023) [2024] KEELC 4205 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4205 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E004 OF 2023**

JA MOGENI, J

MAY 9, 2024

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO
INSTITUTE**

JUDICIAL REVIEW PROCEEDINGS

AND

**IN THE MATTER OF: AN APPLICATION BY MICHAEL ODUOR,
JOHN ODHIAMBO ODEK & IBRAHIM ODHIAMBO NDOO FOR
LEAVE TO APPLY FOR**

**JUDICIAL REVIEW ORDERS OF PROHIBITION AGAINST THE
COUNTY GOVERNMENT OF NAIROBI**

AND

**IN THE MATTER OF: AN APPLICATION BY MICHAEL ODUOR,
JOHN ODHIAMBO ODEK & IBRAHIM ODHIAMBO NDOO FOR**

**LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI AGAINST THE COUNTY GOVERNMENT OF**

NAIROBI AND

**IN THE MATTER OF: ARTICLES 10 & 47 OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: SECTIONS 7,9 & 11 OF THE FAIR
ADMINISTRATIVE ACTION ACT**

AND



RULING FOR ELCLJR NO. E004 OF 20231
IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE
RULES, 2010
AND
IN THE MATTER OF: ORDERS 53 OF THE CIVIL PROCEDURE
RULES, 2010
AND
IN THE MATTER OF: SECTIONS 8 & 9 OF THE LAW REFORM
ACT

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF NAIROBI RESPONDENT

AND

MICHAEL ODUOR EXPARTE

JOHN ODHIAMBO ODEK EXPARTE

IBRAHIM ODHIAMBO NDOO EXPARTE

RULING

1. At the outset, it is noteworthy that on 27/09/2023, the Ex parte Applicants, Michael Oduor, John Odhiambo Odek and Ibrahim Odhiambo Ndoos represented by M/S Telow Advocates LLP applied for Certiorari and Prohibition orders in this matter. This was done pursuant to the Ex Parte Applicants' Application by way of Chamber Summons dated 4/09/2023 brought under Section 8 of the Law Reform Act, Section 7 (2) (b) (c) & (j) of the Fair Administrative Action Act, Section 3A of the Civil Procedure Act, Order 53 Rule 1 (1) of the Civil Procedure Rules and all enabling provisions of law.
2. Subsequently, on 11/10/2023, the Ex-parte Applicants filed a motion on notice dated 9/10/2023 (the application herein) under Order 53 Rule 3 of the Civil Procedure Rules seeking for the orders infra;
 1. An order of Certiorari to remove into the High Court for purposes of being quashed the decision of the County Government of Nairobi to revoke the Ex Parte Applicants' allotment/tenancy over the property known as Block Number B (436T) situated inside Shauri Moyo Market, Nairobi ("the suit premises"), which decision is contained in the letter dated 14/02/2023.
 2. An order of Prohibition to restrain the County Government of Nairobi from interfering with the Ex Parte Applicants' allotment/tenancy of the property known as Block Number B (436T) situated inside Shauri Moyo Market, Nairobi ("the suit premises").



3. Costs of the Judicial Review Proceedings.
4. Any other or further and consequential orders and/or directions that may be given.
3. The Application is anchored upon a statutory statement including grounds (1) to (12) as set out on its face. The same is further anchored on the Ex parte Applicants' thirteen (13) paragraphed verifying affidavit sworn by Michael Oduor on 4/09/2023 and the exhibits therein.
4. Briefly, the Ex parte Applicants' complaint is that the Applicants have been operating a toilet block inside Shauri Moyo Market since 8/02/2010 as tenants, complying with all terms and conditions of their tenancy agreement. They received a letter dated 14/02/2023 from the Respondent, revoking their tenancy and allocating the premises to Shauri Moyo African Traders Association. The Applicants argue that this decision is unlawful and exceeds the Respondent's jurisdiction, as they have not violated any terms of their agreement. The Respondent's actions have caused harassment and eviction threats without due process. The Applicants seek court intervention to quash the revocation letter and prohibit the County Government of Nairobi from interfering with their tenancy rights.
5. The Application is opposed. The Respondents opposed the present Application through a Replying Affidavit sworn by Nassir Mchana Massai, the Acting Assistant Director of Markets of the Respondent on 24/11/2023. The Respondent argues that the Applicants are forum shopping, having filed a similar case in the ELC in Nairobi previously. They contend that the Applicants were allocated the toilet facilities by the then City Council of Nairobi and were mere licensees, not tenants. The County decided to revert the management of the facilities to market management committees to maintain them better. The Respondent asserts its right to terminate the tenancy with one month's notice, as per the terms and conditions. The Respondent also questions the delay in filing the present case and suggests that the Applicants should be content with owning stalls in the same market. They argue that the present application is misconceived, res judicata, and should be dismissed with costs to the Respondent.
6. When the Application came before me for determination on 9/04/2024, I gave directions for its disposal by way of written submissions. The Ex Parte Applicants filed written submissions dated 9/10/2023 on 16/10/2023 and the Respondent filed written submissions dated 29/02/2024 on 18/03/2024.
7. I have thoroughly read and considered the entire application, rival affidavits and the submissions inclusive of the issues and authorities relied thereupon. On that score, the issues for determination in the instant application are condensed to whether:
 - a. The Ex parte Applicants have met the threshold for judicial review.
 - b. The Ex Parte applicants are entitled to the orders sought in the application.
8. The scope of Judicial Review was well articulated in the case of Municipal Council of Mombasa –vs- Republic & Umoja Consultants Ltd. Civil Appeal No.185 of 2001 where the Court of Appeal stated: -

“ Judicial review is concerned with the decision making process, not with the merits of the decision: 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 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”.

9. In the Ugandan case of *Pastoli vs Kabale District Local Government Council & Others*, (2008) 2 EA, the court gave an in-depth analysis of what a Judicial Review application is as follows:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

10. In the case of *Republic v Tanathi Water services board and 2 others ex parte Senator Johnstone Muthama* (2014) eKLR, the court had this to say on the scope of Judicial review:

“It is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large..... Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case (emphasize added).”

11. What resonates from the above case law is that the scope of judicial review proceedings, is limited to the decision-making process in relation to the decision which is being challenged. The role of the court is therefore supervisory and the court should not attempt to delve into the “forbidden appellate approach”, see *Republic vs Public Procurement Administrative Review Board and 2 others ex parte Rongo University* (2018) eKLR. Thus, the court can neither hear the merits of the dispute nor re-hear the same.
12. Having clearly set out the scope of judicial review, I will now proceed to deal with the issues of administrative process leading to the decision in question.



13. It is not in dispute that the defunct City Council of Nairobi issued the Ex Parte Applicants with a letter of allotment dated 12/02/2010 to run/manage the facility referred to as Shauri Moyo Market Toilet (Block B) 436T. They were also to pay a monthly rent of Kshs. 8,000 which was subject to review from time to time and a non-refundable deposit of Kshs. 8,000.00. It is also not in dispute that the parties herein entered into a tenancy agreement for occupation and management of the suit property. From the record, the Applicants were issued with a Tenancy Card No. 250 which indicated the date of commencement of tenancy as 1/04/2010. The tenancy card had conditions of tenancy of the Nairobi City County Rental Market. The Respondent issued the Ex Parte Applicants with a letter dated 14/02/2023 terminating the tenancy relationship between the parties herein. The Respondent contended that the same was pursuant to a decision that was passed by the Intergovernmental Relationship Steering Committee which was adopted and ratified by the County Secretary and Head of the County Public service in terms of Memo reference number NCC/MKT/1/23/2023.
14. The Ex Parte Applicants contend that the directive contained in the letter dated 14/02/2023 is unlawful and the Respondent is acting in excess of its jurisdiction. That there has been a serious breach of the rules of natural justice as the Respondent has purported to revoke the Applicants' tenancy without being given an opportunity to be heard or to respond to such decision.
15. The issue which emerges for determination is whether the Respondent's decision to terminate the tenancy between themselves and the Ex Parte Applicants was valid.
16. I note that the parties herein entered into an agreement in 2010. As at the date of the agreement, the operational law was the Local Government Act (now repealed). I also note that Section 143 (1) of the Local Government Act (now repealed) gave the local authorities powers to enter into contracts that were necessary for the discharge of their functions.
17. Section 144 (5) of the Local Government Act (now repealed) provided as follows:

“(5) A local authority may let, or grant to any person a licence to occupy, any land which it may possess—

 - (a) with the consent of the Minister for any term;
 - (b) without the consent of the Minister, unless such consent is required by section 177 or by any other written law, for a term not exceeding seven years, and may, in respect thereof, charge rents, stand premium or fees.” [Emphasis added].
18. It is true that Article 40 of *the Constitution* entitles every person to the right to property in Kenya, subject to the limitations set out therein. However, an allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. Furthermore, Section 144 (8) and Section 177 (2) of the Local Government Act (now repealed) both provided that “Nothing in this section shall authorize the disposal of land by a local authority, whether by sale, lease or exchange, in breach of any trust, covenant or agreement binding upon the local authority;”
19. In this matter, the letter of allotment was not the ordinary letter of allotment with terms and conditions to be met in order in order to transfer interest in land to the allottee. It appears that the letter of allotment herein was used to create and/or introduce a tenancy agreement and not transfer of proprietary interest to the Ex Parte Applicants as they have submitted. It was a letter of offer inviting the Applicants to enter into a tenancy relationship with the Respondent. I note that the Respondent



had the authority to do so by virtue of the Local Government Act (now repealed). The Applicants led evidence that they were issued with a Tenancy card no. 250 which then demonstrates that it is the key agreement between the parties herein.

20. It has already been established that a local authority may let, or grant to any person a licence to occupy, any land which it may possess without the consent of the Minister, unless such consent is required by section 177 or by any other written law, for a term not exceeding seven years, and may, in respect thereof, charge rents, stand premium or fees. Be that as it may, a perusal of the tenancy card demonstrates that the document contained conditions of the tenancy outlined thereon among them is a termination cause under conditions 31 and 32. Condition 32 of the tenancy card no. 250 provided that the Respondent could issue a one month's notice in writing. The Ex Parte Applicants assert that with a letter dated 14/02/2023, the Respondent terminated the tenancy relationship between the parties herein. They asserted that they received this letter on 1/04/2023 and that on diverse dates between April 2023 and August 2023, the Respondent proceeded to instruct county officials and unknown persons to evict the Applicants from the suit premises and harass the Applicants without just cause. Although no evidence has been adduced before me to support this allegation, this demonstrates that the Respondent's acted on their notice more than one month after 14/02/2023.
21. The Ex Parte Applicants submitted that the directive contained in the letter dated 14/02/2023 is unlawful and the Respondent is acting in excess of its jurisdiction as the Applicants have not contravened the terms of the allotment/tenancy made to them. That the directive is irrational, illegal and improper as it is issued without any basis. They further submitted that the Respondent is in fault for breach of *the constitution* specifically Articles 10, 35, 47 and 174(f) in addition to flouting sections 2,4,7,8,9,10 and 11 of the *Fair Administrative Action Act*, 2015. In the case of Kenya Human Rights Commission & Another v Non-Governmental Organizations Coordination Board & Another 2018] eKLR in which the court cited with approval the decision of the Court of Appeal in Judicial Service Commission v Mbalu Mutava & Another 2018] eKLR where the court emphasized fair administrative action as a constitution right. To them, the Applicants were not accorded a fair hearing.
22. The Respondent submitted that it would be prudent to note that the decision to terminate the relationship between the Ex-Parte Applicants' and the Respondent was arrived at by the Intergovernmental Relationship Steering Committee which was adopted and ratified by the County Secretary and Head of the County Public service in terms of Memo reference number NCC/MKT/1/23/2023 and dated 13/01/2023. The decision of the Intergovernmental Relationship Steering Committee, which underscored the necessity to revert the management of the suit premises has not been vacated and is still valid. The Intergovernmental Relationship Steering Committee is equally not a party to the Judicial Review proceedings.
23. It is true that the letter dated 14/02/2023 stated that the County Secretary and Head of County Public Service has approved the request to have all toilet blocks within the markets managed by sitting Market Management Committees. However, it is also true that decision of the Intergovernmental Relationship Steering Committee, which underscored the necessity to revert the management of the suit premises has not been vacated and is still valid. There is no evidence before me that this directive has been successfully challenged. The Intergovernmental Relationship Steering Committee is equally not a party to the Judicial Review proceedings. The Applicant in an application for Judicial Review has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.



24. Section 2(2) of the Fair Administrative Actions Act defines administrative action to mean –
“any act, omission or decision of any person, body or authority that affects the legal rights of interests of any person to whom such action relates;”
25. Section 4 (3) of the Act provides that where administrative action is likely to affect the rights or fundamental freedoms of any person, the person ought to be subjected to natural justice and to be given a hearing.
26. By its very definition, Judicial Review is the means through which the courts supervise the actions or decisions of administrative bodies or tribunals. In the case of *Council for Civil Service Unions v Minister for Civil Service* [1985] A.C. 374 the Court classified judicial review under three heads: illegality, irrationality and procedural impropriety. In a Judicial Review application, the court’s role is not to concern itself with the merits of the decision but with the decision-making process. This was aptly put by the court in *Municipal of Mombasa vs Republic and Umoja* (supra). The court made similar observations in *Pastoli v Kabale District Local Government Council and Others* (supra), which cited with approval the decision of the court in *Council of Civil Unions vs Minister for the Civil Service* [1985] AC 2 and in *An application by Bukoba Gymkhana Club* [1963] EA. 478.
27. Section 143 (1) of the Local Government Act (now repealed) gave the local authorities powers to enter into contracts that were necessary for the discharge of their functions. The Ex Parte Applicants role was to run/manage the toilet facility in Shauri Moyo Market. Is terminating a tenancy agreement an administrative action? Would it fit into the compartmentalization of judicial review? I do not think so. This is a matter of private law. I opine that terminating a tenancy agreement is not exercising administrative authority and therefore the action does not fall within the preview of Article 47 of *the Constitution* and the Fair Administrative Actions Act. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority after according fair treatment reached on matter, which it is authorized by law to decide for itself a conclusion, which is correct in the eyes of the court.
28. The Applicants in this matter were tenants of the Respondent. A local authority may let, or grant to any person a licence to occupy, any land which it may possess without the consent of the Minister for a term not exceeding seven years. The tenancy relationship has clearly exceeded 7 years. The Applicants aver that they were denied an opportunity to be heard but I note that the decision of the Intergovernmental Relationship Steering Committee has not been vacated and is still valid and there is no evidence that the same was ever challenged. The Respondent submitted that they invoked the provisions of the tenancy agreement by issuing a notice to terminate the tenancy as required. The Applicants have not denied receiving the termination notice.
29. Judicial review is concerned with the decision-making process. According to the Respondent, the decision to terminate the relationship between the Ex-Parte Applicants’ and the Respondent was arrived at by the Intergovernmental Relationship Steering Committee. The Intergovernmental Relationship Steering Committee are not a party herein. Their decision was adopted and ratified by the County Secretary and Head of the County Public service in terms of Memo reference number NCC/MKT/1/23/2023 and dated 13/01/2023. There is no evidence that the Applicants attempted to challenge the same. The Applicants submitted that the directive is illegal as it purports to take away the Applicants’ proprietary interests in the suit property. Once again, I reiterate that the Applicants were only tenants and the letter of allotment did not confer any proprietary interest in the suit property to them. The Applicants are more concerned with how the decision will affect them specifically the economic aspect of the termination of the tenancy agreement and not the decision-making process. It is



my humble view that the Applicants have failed to demonstrate that the directive issued on 14/02/2023 was tainted with illegality, irrationality and procedural impropriety.

30. In that regard, I find that the ex parte Applicants have not met the threshold of a judicial review application in seeking for an order of certiorari for purposes of quashing the letter dated 14/02/2023 and an order of prohibition prohibiting the Respondent from implementing the terms of the letter.

b. Whether the Ex Parte applicants are entitled to the orders sought in the application.

31. From my findings above, it is clear that the Ex Parte Applicants have not met the threshold of a judicial review application and are therefore not entitled to any of the reliefs sought in the Application dated 9/10/2023.

Conclusion

32. In conclusion, the Ex-parte Applicants' Notice of Motion dated 9/10/2023 is unmerited and is hereby dismissed with costs.

33. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2024

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MOGENI J

JUDGE

In the virtual presence of:

Mr. Musyoka for the Respondent

Ms. Nicholas for the petitioners

Ms. Caroline Sagina: Court Assistant

