



Republic v Principal Secretary Ministry of Transport, Infrastructure, Housing & Urban Development & another; Soweto East A Housing Co-operative Society Limited (Interested Party); Matheka & 2 others (Exparte Applicants) (Miscellaneous Application E025 of 2021) [2025] KEHC 1935 (KLR) (Judicial Review) (6 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E025 OF 2021
JM CHIGITI, J
FEBRUARY 6, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

**PRINCIPAL SECRETARY MINISTRY OF TRANSPORT, INFRASTRUCTURE,
HOUSING & URBAN DEVELOPMENT 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

AND

**SOWETO EAST A HOUSING CO-OPERATIVE SOCIETY
LIMITED INTERESTED PARTY**

AND

SAMMY MATHEKA EXPARTE APPLICANT

BENSON IRUNGU EXPARTE APPLICANT

THERESIAH WAMBUI EXPARTE APPLICANT

JUDGMENT

1. The application before this Court is the Notice of Motion dated 26th May, 2022. The application is brought Under Order 53 Rules 3 and 4 of the Civil Procedure Rules 2010, Sections 8 and 9 of the [Law Reform Act](#) Cap 26 Laws of Kenya and all other enabling provisions of the Law. It seeks the following orders:



1. That this honorable court be pleased to issue an order of Certiorari quashing the 1st respondents list of successful applicants in the allocation of the market stalls at the Kibera Soweto East Zone A.
 2. That this honorable court be pleased issue an order of Mandamus to compel the 1st and 2nd respondents to avail to the applicants the list of successful applicants and minutes relating to the allocation of the market stalls at the Kibera Soweto East Zone which information is crucial for the applicants' exercise of their fundamental right to property, equality and freedom from discrimination and fair administrative action.
 3. That this honorable court be pleased to issue an order of, mandamus to compel the 1st and 2nd respondents to include the applicants in the list of successful applicants and forthwith allocate to the applicants the market stalls at the Kibera Soweto East Zone A.
 4. That the costs of this application be awarded to the applicant.
2. The application is supported by an amended Verifying Affidavit by one Sammy Matheka sworn on 10th February, 2021 and Statutory Statement dated 10th February, 2021.
 3. It is their case that sometimes in the year 2005, the 1st Respondent declared that Residents of Kibera Soweto East Zone A whose records were registered in the Ministry's database were entitled to the market stalls and qualified for balloting
 4. The said Market Stalls at the Kibera Soweto East Zone A was built through the 1st Respondent's shelter and slum upgrading programs in Nairobi's Kibera Area.
 5. It is their case that they were duly qualified and entitled for balloting and were advised by the ministry to save through the Interested Party up to Kshs. 35,000/=.
 6. They saved up to the required threshold and were issued with a booklet and unique personal card for the purpose of allocation of the Market Stalls.
 7. On 18th March 2020, there was an allocation exercise for the Market Stalls organized by the 1st Respondent and the Interested Party which all the Applicants were notified of however, the same was aborted due to COVID- 19 Containment measures.
 8. They contend that on 14th September 2020 another similar exercise was conducted but the Applicants in the instant suit were not informed to attend the exercise. They later established that their names were missing from the list of successful Applicants.
 9. The Applicants posit that balloting for stalls was to be conducted in accordance with the 2005 members' register for members who had business as at the time of the register and had saved up to the requisite Kshs. 35,000/= however, they were excluded from the list of qualified members, which had been skewed to constitute members fraudulently, irregularly and procedurally introduced by the Interested Party who purported to unlawfully replace the duly qualified members.
 10. It is their case that the Respondents and Interested Party in excluding them from the list of qualified members was irrational and unreasonable.
 11. They contend that the way in which the stalls were dishd out abrogated the first come, first serve fair process basis of allocation and the due process of law and as such was illegal.
 12. They argue that the 1st Respondent infringed their constitutional rights under Articles 27, 40 and 47.



13. It is also their case that the Respondents have continued with the allocation exercises which is at advance stages of completion and unless stopped, the 46 Applicants will suffer injustice.
14. The Applicants canvassed their application by way of written submissions dated 2nd September, 2024 and further submissions dated 14th November, 2024.
15. It is submitted that they individually met all the conditions set by the Respondents and for this reason, they were qualified and ought to have been considered for allocation of the market stalls in 2020.
16. It is their submission that having been enumerated in 2005, they ought to have been allocated market stalls in priority to the 2015 applicants.
17. They invoke Article 35(1) of the Constitution which guarantees the right to access to information held by the State as the Respondents are part of the State as defined in Article 260 of the Constitution.
18. They place reliance on Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others [2013] eKLR, where the court held that State Organs have an obligation to provide information to citizens as of right and that the information may only be withheld if there is a threat to a legitimate aim such as threat to national security.
19. They submit that 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 as was held by the courts in the case of Municipal Council of Mombasa v Republic, Umoja Consultants Ltd (2002) eKLR and Pastoli v Kabale District Local Government Canal & Others (2008).
20. The Applicants contend that due to the opaqueness as to how the list of successful applicants was achieved, it is trite that this court intervenes by quashing the impugned allocation.
21. It is their submission that the market stalls were not allocated to the Applicants who had applied and qualified pursuant to the 1st Respondent's declaration in 2005 but were unprocedurally and irregularly eliminated with priority being lent *pari passu* to the 2015 applicants.
22. In the case of Republic vs Principal Secretary, Ministry of Internal Security & another *Ex parte* Schon Noorani & Another [2018] eKLR the requirements for an order of mandamus to issue were explained as follows:

Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays.

The eight factors that must be present for the writ to issue are: -

- a. There must be a public legal duty to act;
- b. The duty must be owed to the Applicants;
- c. There must be a clear right to the performance of that duty, meaning that:
- d. The Applicants have satisfied all conditions precedent; and
- e. There must have been:
 - i. A prior demand for performance;
 - ii. A reasonable time to comply with the demand, unless there was outright refusal; and



- iii. An express refusal, or an implied refusal through unreasonable delay; iv. No other adequate remedy is available to the Applicants;
 - iv. The Order sought must be of some practical value or effect;
 - v. There is no equitable bar to the relief sought;
 - vi. On a balance of convenience, mandamus should lie
23. It is the Applicants case that the 1st Respondent declined to avail to them the list of successful applicants and the minutes of the meeting leading to the allocation of the market stalls thus infringing their rights and exceeding its statutory and administrative power and have not offered any plausible explanation or rationale as to why the Applicants, who were considered qualified in 2005, were omitted from the allocation in 2020.
24. They posit that there is no threat to a legitimate aim, such as a threat to national security if the information is disclosed and neither has the 1st Respondent established such a national security threat.
25. It is their submission that they were not issued with any application forms and had no way of knowing about any timelines. The Ex parte Applicants' being faulted for a process they were not aware of and had no way for knowing is unfair and irrational.

The Respondents' case;

26. In opposition to the Application, the Respondents filed their Replying Affidavit by Mary Wanjiku Ndungu sworn on 20th February, 2024 and written submissions dated 26th February, 2024.
27. The Respondents posit that the instant suit concerns the allocation of the 295 Market stalls which allocation already took place and thus the matter before this court has been overtaken by events.
28. It is the Respondents' case that at the time of allocation of stalls, the State Department for Housing and Urban Development through Slum Upgrading Department did not delegate its authority but supervised the allocation process through a select committee inclusive of 2 representatives from Settlement Executive Committee; 3 Representatives from Soweto Zone 'A' Housing Savings Cooperative; 3 no. representatives from the High rise Housing Cooperatives; 2 no. representative of the office of the Ministry of interior and Coordination; 5 No. representatives from the State Department of Housing and Urban Development; a representative of the area MP and MCA.
29. It is their case that the allocation process followed stringent set criteria that was focused on safeguarding the rights of the real beneficiaries. The criteria ensured priority was given to the rightful beneficiaries during the stalls' allocation.
30. They argue that the market stalls were earmarked to benefit the residents of Kibera Soweto East Zone 'A' as enumerated in 2005, who after applying for the stalls and met set criteria were to attend balloting 18th March, 2020.
31. Due to the emerging issues on Covid-19 Pandemic and subsequent Ministry of Health guidelines and hostility between the 2005 enumerated member's faction and the 2015 enumerated member's faction this necessitated an amicable solution to ensure harmony among the residents of Kibera Soweto East and to avert future disputes.
32. On 3rd November, 2020 a meeting was held attended by the area Member of Parliament Representative (MP), Representative of the area Member of County Assemblies (MCA), Settlement Executive



Committee, the Kibera Soweto East "A" Housing Cooperative, Soweto High-rise Cooperative, Ministry of Interior and Coordination and the State Department of Housing and Urban Development resolved that the stalls were to be shared on a 50-50 basis.

33. The Respondents argue that the following strict criteria was agreed upon during the said meeting; -
- a. For one to be allocated a stall, he or she must have been enumerated in the years 2005 or 2015 as a beneficiary.
 - b. The enumerated beneficiary must have saved with his or her Cooperative Society for at least ten (10) per cent of the purchase price for the stall.
 - c. The members must be, at the time of allocation, actually residing and doing business in Soweto East Zone "A" Village.
 - d. Priority was to be given to those who were doing business on Road Reserves, along pedestrian walk ways and/or on the Market perimeter wall.
 - e. One must not have sold their enumeration cards to third parties.
 - f. One must not be a proxy beneficiary.
 - g. If the beneficiary was living within Canaan Estate, he or she must have been up to date with their mortgage repayments and not in any arrears.
 - h. Each family was to benefit only once.
34. It is their case that the 2015 enumerated members were issued with application forms on 6th November, 2020, filled them and returned on or before 12th November, 2020.
35. The application forms were processed and a list of all applicants generated by the market stalls allocation committee, adopted and letters of offer issued.
36. It is argued that the Applicants' names could not be included in the list of beneficiaries because they were time barred and did not meet the set required qualifications as outlined by the meeting of 3rd November, 2020.
37. Allocation and occupation of the stalls by the bonafide members took place and stalls were handed over to the beneficiaries of the two societies on 18th December, 2020.
38. In addition to the 10% market price paid on allocation, more than half of the beneficiaries have already paid for the market stalls in full and they now own the same unconditionally.
39. They contend that granting the orders sought by the Applicants will affect parties who are not parties in this application (Soweto Highrise Cooperative Society) and even those who have already fully paid for their stalls.
40. It is their case that the Applicants' savings through the housing cooperatives have not been lost in perspective of slum upgrading projects. The applicants stand a chance of benefiting in subsequent redevelopment project of the Government within Kibera Soweto Zone 'B: or any other project under the state Department of Housing and Urban Development.
41. It is also their case that Applicant (Sammy Matheka) filled the application form for a market stall in Kibera Soweto East Zone 'A' was not successful, since he had already appeared and benefitted in the Railway project (LOI-224) list and Benson Irungu had rent arrears at Decanting Site Estate a housing provision by slum upgrading project during application hence did not meet the set criteria.



42. They posit that the Applicants' actions are frivolous and vexatious and intended to defeat the whole project and thus urge this court to dismiss the application.
43. It is their submission that equity does not aid the indolent. The information sought is in the public domain, and the Respondents have no obligation to disclose it. That the information sought in relation to other persons does not fall within the realm of Article 35 of the *Constitution*.
44. The Respondents further argue that the Applicant ought to have sought for the information before the institution of the Application and not simultaneously with it.
45. They place reliance in the case of *Nairobi Law Monthly vs Kengen* (2013) e KLR) which stated that in order to enforce the right to access information as stipulated under Article 35 a person must demonstrate that the information sought is required for the exercise or protection of another fundamental right or freedom. In that regard, the learned judge held that;

“The Petitioner needs to show that it requires the information from the Respondents for the exercise or protection of another right. In this case, its rights to freedom of expression and of the media. Our courts have not yet had occasion to interpret the phrase ‘for the exercise or protection of another right’. However, the Constitutional Court of South Africa, in interpreting a similar provision of the *Constitution* of South Africa, has ruled that the information sought in an application for disclosure of information, must be such as is required for the protection or exercise of another fundamental right.”

46. In *Nairobi Law Monthly vs Kengen* (supra) Ngugi J held as follows;

“It is however, recognized that there may be need to restrict access to some information, and some exceptions to the information that can be disclosed. In this regard, Article 19(3) of ICCPR provides that;

“The exercise for the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

For respect of the rights or reputations of others;

For the protection of national security or of public order (order public), or of public health or morals’.

The scope of exceptions to disclosure of information should, however, be limited, and such exceptions should be clear. Narrow and subject to strict “harm” and “public interest” tests, and to the rights and interests of others.

In considering restrictions or exceptions to the right to information in Kenya, regard must be had to the express provisions of Article 24 of the *Constitution*.”

47. The Respondents buttress the allegations of violation of Constitutional rights in Article 27, 40 and 47 and argue that the said allegations need to be backed by presenting to the court the manner in which they have been violated as was held in *Annarita Karimi Njeru vs. Attorney General* [1979] KLR 154; [1976-80] 1 KLR 1272:

“If a person is seeking redress from the High Court in a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that



he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they have been infringed.”

48. Reliance is also placed in the case of *Kemrajh Harrikissoon vs. Attorney General of Trinidad and Tobago* [1979] 3 WLR 63 where it was held that:

“The notion that whenever there is a 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 Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), 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 applicants 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 unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

49. It is their submission that Applicants have failed to prove that there were other people allocated stalls who did not meet the set criteria. The Applicants’ actions are frivolous and vexatious and intended to defeat the whole project and thus the 1st Respondent urges this court to dismiss the application. The entire project is projected to benefit and uplift the livelihoods of many people and it is not fair that their welfare is jeopardized by the selfish interests of one or two individuals.
50. The Respondents pray that the application is dismissed with costs.

The Interested Party’s case;

51. In opposition to the Applicants’ Application, the Interested Party filed its Replying Affidavit by Jackline Onyango Otieno sworn on 5th March, 2024 and written submission dated 11th November, 2024.
52. It is their case that the instant application is an abuse of this court’s process, having been filed by the 3 Applicants for their own selfish motives and not for or on behalf of 43 other Applicants as alleged in the application
53. They argue that the allocation of the 295 Market Stalls already took place in the year 2020 and thus this matter is overtaken by events.
54. They further argue that at the time of allocation of Stalls, process which followed stringent set criteria the State Department for Housing and Urban Development, through Slum Upgrading Department, did not delegate its authority but supervised the allocation process through a Select Committee inclusive of 2 representatives from Settlement Executive Committee; 3 representatives from Soweto Zone ‘A’ Housing Cooperative Society Limited; 3 representatives from the Soweto High Rise Cooperatives Society Limited; 2 representative of the office of the Ministry of interior and Coordination; 5 No. representatives from the State Department of Housing and Urban Development; a representative of the area Member of National Assembly and the area Member of County Assembly.



55. It is also their case that Stalls were earmarked to benefit the residents of Kibera Soweto East Zone 'A' and Soweto High Rise as enumerated in 2005, who after applying for the Stalls and met set criteria. They argue that the Applicants in the instant suit did not meet the set criteria.
56. The Interested Party posits that granting the orders sought by the Applicants will affect beneficiaries who are not parties to this application (members of Soweto High Rise Cooperative Society Ltd).
57. They aver that due process was duly followed and they are not aware of any malpractices or any Government official involved in corrupt deals during allocation of the Stalls as alleged by the Applicants.
58. It is their submission that even after being supplied with the list of those who were allocated the Market Stalls, the Applicants did nothing with the list. They did not bother to seek court's leave to enjoin the 295 beneficiaries of the subject Market Stalls.
59. The Interested Party argues that this court cannot take away the Stalls from the present owners and allocate the same to the Applicant as sought by the Applicants in prayer No. 3 in the instant application.
60. It is submitted that the Applicants have not denied the averment by the Interested Party's Chairman, at Paragraph 13 of his replying affidavit where he deponed that "...more than half of the beneficiaries have already paid for the Stalls in full and they now own the same".
61. The Interested Party argues that the application before this court should fail for the following reasons: -
 - a. The Applicants do not deny the fact it was the responsibility of the 1st Respondent to allocate the subject Market Stalls to bona fide beneficiaries.
 - b. The Applicants have not singled out any of the beneficiaries listed who was not entitled to apply for and get allocated the Stalls or who was allocated any Stalls corruptly or irregularly.
 - c. The Interested Party has stated that the Applicants simply failed to meet the criteria which was put in place for one to meet before being allocated the Stalls. The set criteria is captured at Paragraph 11 of the Replying Affidavit of the Interested Party.
 - d. The 1st Applicant, for example, has not denied the averment by the Interested Party that he was not qualified to be allocated any of the Stalls because he had already benefitted from another similar project (Railway Project Stalls).
 - e. The 2nd Applicant had rent arrears at the Decanting Site Estate. The Applicant has not denied these facts, which disqualified him from being allocated the subject Stalls.
 - f. The 3rd Applicant was not qualified to get any of the Stalls because she still owed mortgage arrears at the Decanting Site Estate, an averment (fact) she has not denied.
62. They place reliance in the case of Zachariah Wagunza & Another vs Office of the Registrar Academic, Kenyatta University & 2 Other [2013] eKLR, the court (Odunga J. as he then was) said the following on the remedy of judicial review: -
 - "24. In Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is



to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60 ”

63. It is their submission that in allocating the Market Stalls to the beneficiaries who got them, the 1st Respondent was doing his public duty bestowed upon him by the law and the Constitution.
64. Reliance is also placed in the case of SDV Transami Kenya Limited & 19 Others vs-Attorney General & 2 Others [2016] eKLR, the court (Muriithi J) said the following in a similar situation: -
- “(179) There is a public law duty of Court not to interfere with the constitutional functioning of public bodies trace- able to the constitutional doctrine of Separation of Powers. As a consequence, I, respectfully, agree that there is a duty not to hamstring public bodies in exercise of their constitutional or statutory mandates”
65. It is their case that Applicants have not demonstrated that the 1st Respondent breached any law, or how the 1st Respondent violated any decision-making process, or acted outside his powers or reached any decision that is unlawful and such the application should be dismissed with costs.

Analysis and Determination

66. These are the issues for determination;
- a. Whether or not this court has jurisdiction to hear this suit.
 - b. Whether or not the applicant has made out a case for the grant of the orders sought.

Whether or not this court has jurisdiction to hear this suit.

67. The following facts are undisputed;
- A. That the suit is related to the issue of the allocation of market stalls.
 - B. That the dispute revolves around the question of the ownership of the stalls.
 - C. That there is a question of possession of the stalls which has an impact on the ownership and possession of the interested parties.
 - D. That the stalls are located on a parcel of land that is within the county of Nairobi.
 - E. That the Respondents are in charge of matters to do with stalls allocation.
68. Article 162 of the Constitution of Kenya provides that;
- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause
 - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and



- (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
69. Section 13 of the *Environment and Land Court Act* provides that;
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other written law relating to environment and land. (e) any other dispute relating to environment and land.
70. The orders that the Applicants are seeking can be granted by the Environment and Land court in exercise of its prerogative powers under Section 13(7) (b) of the *Environment and land court Act* which provides as follows;
- Section 13 (7) (b) of The Environment and Labour Court provides that in exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
- a. ...
- b. prerogative orders;
70. The law is now settled by the Supreme Court in its decision made on 26th May, 2017 in the case of Republic v Karisa Chengo & 2 others [2017] eKLR in which it upheld this Court's decision that a Judge of the specialized courts of Environment & Land (ELC) and Employment & Labour Relations (ELRC) have no jurisdiction to hear and determine matters reserved for the High Court and vice versa. After extensive analysis of the law, the appointment and swearing in of Judges, the apex Court held:
- “It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the *Constitution*, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2)”
70. This court is satisfied that what is before it is a matter that should be heard and determined by the Environment and Land court as a result of which this court lacks the jurisdiction to determine the 2nd issue.

Disposition;

70. This court lacks jurisdiction to hear and determine in this suit.

Order;

1. This suit is hereby transferred to the Environmental Land Court for hearing and determination.



2. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2025.

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J.M. CHIGITI (SC)

JUDGE

