



Republic v County Executive Committee Member for Trade, Industry, Tourism and Cooperative Development, Nyamira County & another; Machogu & 3 others (Exparte) (Judicial Review E017 of 2023) [2024] KEHC 6599 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
JUDICIAL REVIEW E017 OF 2023
WA OKWANY, J
MAY 23, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**THE COUNTY EXECUTIVE COMMITTEE MEMBER FOR TRADE,
INDUSTRY, TOURISM AND COOPERATIVE DEVELOPMENT, NYAMIRA
COUNTY 1ST RESPONDENT
COUNTY SECRETARY NYAMIRA COUNTY 2ND RESPONDENT**

AND

**CHARLES OCHARO MACHOGU EXPARTE
MARY KARAMBU EXPARTE
CHARLES NYANCHIENGA EXPARTE
SAMMY OURU MOENGA EXPARTE**

RULING

1. This ruling is in respect to the Application dated 18th December 2023. The Application was brought under Order 53 of the Civil Procedure Rules. The Applicants seek the following reliefs: -
 1. Spent
 2. That the Honourable Court be pleased to grant the ex-parte Applicants leave to apply for Judicial Review Orders of Prohibition, directing upon the 1st Respondents by himself or through his officers in Nyamira County and/or through any other Ministry and/or Department and/or any person working under him, prohibiting him from terminating the



allotment of government market stalls of Nyamira Bus Park, Nyabite Market, Kebirigo Market, Nyambambo, Nyansiongo, Keroka Market and Magombo Market within Nyamira County with effect from 24th December 2023.

3. That this Honourable Court be pleased to grant leave to the ex-parte Applicants to apply for Judicial Review orders of Certiorari to quash the Notice dated 24th November 2023 by the 1st Respondent terminating the allotment of government market stalls of Nyamira Bus Park, Nyabite Market, Kebirigo Market, Nyambambo, Nyansiongo, Keroka Market and Magombo Market within Nyamira County with effect from 24th December 2023.
 4. That the leave granted herein to apply for Judicial Review Orders of Prohibition and Certiorari does operate as a stay of the notice dated 24th November 2023 by the 1st Respondent to terminate the allotment of government market stalls of Nyamira Bus Park, Nyabite Market, Kebirigo Market, Nyambambo, Nyansiongo, Keroka Market and Magombo Market within Nyamira County with effect from 24th December 2023.
 5. That costs of this Application be provided for.
2. The Application is supported by the Affidavit of Charles Ocharo Machogu and premised on the following grounds: -
- a. That the Notice dated 24th November 2023 is in breach of the provisions of Section 115 of the [County Government Act](#) No. 17 of 2012, Consumer Rights of the [Constitution of Kenya](#), 2010.
 - b. That the said Notice violates the rights of people of Nyamira County to carry out business in the Government stall across the county which will also affect the consumers as from 24th December if the said Notice is implemented.
 - c. That the said Notice contravenes the provisions of Section 4 and 5 of the [Fair Administrative Action Act](#) No. 4 of 2015.
 - d. That the said decision to terminate the allotments of market stalls to the allottees will render thousands of the allottees jobless and it is from those stalls that they eke a living from.
 - e. That the Respondent has demonstrated bias in ordering that the current allottees lose their stalls and new applicants be made to apply for the subject stalls.
 - f. That the current allottees of the market stalls have invested in the said stalls, they have developed them with windows, doors, shelves, roofs, connected electricity and water and the 1st Respondent has not stated how they will be compensated posing a danger to security, law and order.
 - g. That the timing of this Notice is ill-advised as 24th December 2023 falls in the heart of the festive season, headed to January 2024 when schools will be reopening. The uncertainty over the reapplication process makes the allottees apprehensive if the Notice dated 24th November 2023 by the 1st Respondent is implemented.
 - h. That a number of allottees have taken short, medium, long term loans from the financial institutions. The allottees have used the said market stalls as security against those loans. If the subject notice is effected, it will put so many traders in awkward financial positions.
3. The Respondents opposed the Application through Grounds of Opposition dated 20th December 2023 and 1st Respondent's Replying Affidavit. The 1st Respondent observed that the Application was filed 6 days before the lapse of the Notice period which, in his view, means that the Applicants



were indolent and guilty of laches. He avers that the application is premature as it is based on mere speculation and does not disclose a prima facie cause for judicial review. He further states the Application does not meet the requirements of Order 53 (1) (2) (b) of the Civil Procedure Rules and that the 1st Applicant lacks the locus standi to institute Judicial Review Proceedings as he has not demonstrated that he has been remitting premiums and rates up to November 2023 in line with the allotment conditions.

4. The 1st Respondent avers that the Applicants have not demonstrated that they will be denied the opportunity to reapply for stall allotment or that the reallocation would be marred by procedural flaws. The Respondents reiterated that all the existing fully compliant county stall allottees and active users would be accorded fair priority and preference in the reallocation applications.
5. The Applicants filed a further affidavit sworn by Charles Machogu in which they state that the Respondents did not comply with the requirements of Section 115 of the County Government Act, No. 17 of 2012 when issuing the impugned Notice. They also averred that the stall occupants mentioned in the impugned Notice will suffer prejudice if the prayers sought in the instant Application are not granted because there was no public participation before the Notice was issued.
6. The Application was canvassed by way of written submissions which I have considered.
7. The Applicants submitted that the Respondents should have afforded the members of the public a reasonable opportunity to give their views before issuing the impugned Notice. It was submitted that public participation was not a public relations exercise but that it ought to be meaningful and effective in order to ensure that the public's views are considered in any matter that affects them.
8. The Applicants further submitted that public participation is a key component of any legitimate process that results in any decision, policy or law affecting the people and that the Notice fell short of the constitutional dictates under Article 10 of the Constitution and Section 48 of the County Government Act.
9. On their part, the Respondents submitted that termination and re-allotment of user of county government-owned stalls was a regular exercise whose procedural validity required only issuance of prior notice; that by issuing the Notice, they acted in their capacity as the head lessor and adhered to public participation as the Notice invited the public to apply for a fresh allotment of the stalls; and that seeking to permanently bar and indefinitely preclude the County Government from terminating, reallocating and reorganizing the user of its own stalls was an absurdity that is unknown in law. It was further submitted that the present Judicial Review proceedings were premature in basis and substance and that the Applicants had not established a prima facie case for review and to establish a nexus between the impugned Notice and county planning. They added that only the latter that required public participation.
10. It was submitted that the allotment of the stalls under business tenancy did not constitute indefinite conferment of absolute title and that the County Government remained the absolute owner and allotter of the market stalls in question. Reference was made to the decision by the Court of Appeal in Abdulla Akiio & 2 Others v Kenya Urban Roads Authority (2018) eKLR where it was held that,

“The letters of allotment of the stalls were temporary, it was not an allocation of land as the letter clearly indicated the plot remained the property of City Council.”
11. It was also submitted that the orders of certiorari and prohibition as prayed by the Applicants were repugnant to the constitutional competencies of the County Government of Nyamira and that the



Applicants did not to plead any legal provisions that required public participation in the issuance of public notices for the lapsing of user of county government stalls because the same was non-existent.

Analysis and Determination

12. I have considered the pleadings filed herein and the parties' respective submissions. The main issue for determination is whether the Applicants have made out a case for the granting of the orders sought in the application.
13. The Application is predicated on the subject of public participation which is one of the national values and principles of governance provided for under Article 10 of the Constitution which stipulates as follows: -
 - (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them--
 - (a) applies or interprets this Constitution;
 - (b) enacts, applies or interprets any law; or
 - (c) makes or implements public policy decisions.
 - (2) The national values and principles of governance include--
 - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - (b) human dignity, equity, social justice, inclusiveness, equality,
 - (c) good governance, integrity, transparency and accountability; and
 - (d) sustainable development.
14. Article 196 states as follows: -
 - (1) A county assembly shall—
 - a. conduct its business in an open manner, and hold its sittings and those of its committees, in public; and
 - b. facilitate public participation and involvement in the legislative and other business of the assembly and its committees.
 - (2) A county assembly may not exclude the public, or any media, from any sitting unless in exceptional circumstances the speaker has determined that there are justifiable reasons for doing so.
 - (3) Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members.
15. Section 87 of the County Government Act, Cap 265 provides for public participation as follows:-
 87. Citizen participation in county governments shall be based upon the following principles—
 - a. Timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;



- b. Reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;
- c. protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;
- d. legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;
- e. reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;
- f. promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and
- g. recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.

16. Section 115 of the [County Government Act](#) provides as follows: -

115. Public participation in county planning

- (1) Public participation in the county planning processes shall be mandatory and be facilitated through—
 - a. mechanisms provided for in Part VIII of this [Act](#); and
 - b. provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including—
 - i. clear strategic environmental assessments;
 - ii. clear environmental impact assessment reports;
 - iii. expected development outcomes; and
 - iv. development options and their cost implications.
- (2) Each county assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the county and such laws and guidelines shall adhere to minimum national requirements.

17. The principles of good governance outlined in our Constitution cannot be overlooked and it is the duty of this Court to ensure that those principles are adhered to by state officers and public bodies in the discharge of their public duties. In the Namibian case of *S v Acheson* 1991 (2) SA 805 (Nm HC) at 813, Mahomed, Ag. JA opined that: -

“The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a



mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.” (emphasis added)

18. Thus, public participation is the cornerstone of our democracy as it promotes good governance. Public participation was defined in *Robert N. Gakuru & Others v Governor Kiambu County & 3 Others* [2014] eKLR where the High Court referred to the South African decision in *Doctors for Life International v. Speaker of the National Assembly & Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) as follows: -

“According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.”

19. Public participation entails a consultative process where stakeholders engage in discussions geared towards an effective decision-making process. It aims at ensuring that members of the public are consulted and included in the decision-making process.

20. *Black’s Law Dictionary* 10th Edn. defines consultation as:-

“The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.”

21. From the above foregoing definitions and authorities, it is clear that the importance of public participation cannot be gainsaid, particularly where the decision of an administrative body of the government is likely to affect a section of the population who have an interest in the outcome of such decisions. This means that the people must be given a reasonable opportunity to have a say in such decisions.

22. While the principle public participation stands at the helm of this Application, the flip side is the role of the Executive, in this case, Nyamira County Government whose mandate and functions are outlined under Article 186 and assigned in part 2 of the 4th Schedule of the *Constitution*. In considering the parties’ rival arguments, the Court must be careful to satisfy itself that the grounds in the Application make out a proper case for the granting of orders for Judicial Review.

23. In the Ugandan case of *Pastoli v Kabale District Local Government Canal & Others* (2008) 2 EA 300 at pages 300-304, the court outlined the parameters and considerations that must be made in an Application for Judicial Review and held thus: -

“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. 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 provision of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or acts 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. 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 to act 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 legislature instrument by which such authority exercises jurisdiction to make a decision."

24. Judicial Review is a legal mechanism through which courts can consider and review the administrative actions of other arms of the government or decision-making bodies to determine their lawfulness. It provides a system of checks and balances within the 3 arms of the government. As stated in the case above, it is confined to determining whether a decision was legal, rational and procedurally correct as required by the law.
25. In the instant case, the question that arises is whether the decision, by the County Government of Nyamira, to issue the impugned Notice was illegal, irrational and marred with procedural impropriety.
26. It was not disputed that the 1st Respondent issued a Notice dated 24th November 2023 in which it notified all County Government Stall Occupants and Allottees that their allotments would lapse on 24th December 2023 and that they were required to make fresh applications to the CEC Trade, Tourism, Industry and Cooperative Development, Nyamira County (the 1st Respondent herein). Below is an excerpt of the impugned Notice:

To all County Government Stalls Occupants/Allottees

Nyamira County

RE: Allocation of Government Market Stalls Notice

This is to notify all occupants/allottee of County Government market stall in Nyamira Bus Park, Nyabite Market, Kebirigo, Ekerenyo, Nyambambo, Nyansiongo, Keroka and Magombo markets within Nyamira County that all allotments shall lapse with effect from 24/12/2023.

All interested applicants are therefore requested to make application in a prescribed format to the Chief Trade, Tourism, Industry and Cooperative Development, P.O. Box 434-40500 Nyamira.....

Those in arrears are asked to clear their balances.....

Dennis Otuko

Chief Officer

Trade, Tourism, Industry and Cooperative Development,

Nyamira County

27. My understanding of the above Notice is that the County Government decided to terminate all the previous allotments and open the re-allotment to the public. The Applicants are however apprehensive that the Notice was issued with the ill-motive to lock them out of the re-application process. They stated that there was no guarantee that they would be re-allocated the same stalls that they currently occupy despite having heavily invested in them. They stated that the County Government should have consulted them before issuing the Notice in line with the principle of public participation.
28. The Respondents on their part argued that the public Notice did not in any way bar the existing allottees from making fresh applications for reallotment and that the County Government of Nyamira reserved the right to re-allocate the use of government-owned stalls to members of the public as the head lessor.



29. My finding is that the decision, by the County Government, was proper, and cannot, in the circumstances of this case be said to be tainted with illegality, irrationality and procedural impropriety. I further find that while the Applicants apprehension of the possibility of being locked out of the stalls that they currently own cannot be overlooked, they did not present any evidence to show that the County Government will not give them priority consideration during the reallocation of the stalls.
30. I therefore find that the present Application is premature and the fears expressed therein unfounded in view of the fact that no adverse action has so far been taken against them. I am of the view that the Applicants should have waited for the lapse of the notice and made fresh applications for allotments before calling upon the Respondents to abide by their undertaking to give them priority consideration. In such a scenario, the Applicants would be justified in seeking to quash any decisions made by the Respondents, through Judicial Review, should they fail to allocate them the stalls.
31. It is my further finding that it is only at the final stage of allotments that the Applicants would have tangible grounds for complaining that there was no public participation during the allotments and that they were specifically and intentionally locked out or denied an opportunity to benefit from the reallocation.
32. I find that by issuing the Notice, the Respondents acted within their mandate as assigned in the 4th Schedule of the Constitution and that the Notice ensured fairness and openness to the stall allottees including the Applicants herein.
33. This Court is at this stage of the stall allocation process careful not to exercise its jurisdiction in a manner that would unnecessarily usurp or curtail the activities of the County Government. While the Court must always protect the rights of the citizens by ensuring strict adherence to the principle of public participation, it cannot arrive at conclusions based on mere apprehension or speculation. In Chief Constable of North Wales Police v Evans (1982) 3 ALL ER at pg. 141 Lord Hailsham L.C. explained the purpose of the remedy of judicial review as follows:-
- “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 individual judges for that of the authority constituted by law to decide the matters in question.”
34. Similarly, Republic v. Ministry for Agriculture, Livestock, Fisheries and Irrigation; Agriculture and Food Authority & another (Interested Parties) Ex-parte Susan Wanjiku & 80 others [2021] eKLR the High Court referred to the case of Chief Constable of North Wales Police v. Evans (1982) 1 WLR 1155 at pg. 1173 and held thus: -
- “It is trite that a judicial review court will not interfere in any way with the exercise of any power which has been conferred on a body unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. It has been said that if the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power, be guilty itself of usurping power. (Emphasis added)
35. I have considered the manner in which the County Government conducted itself by issuing a Notice of its intention to re-allocate government-owned stalls. As opposed to arbitrarily evicting the current stall owners and whimsically allocating the stalls to the people of its choice, the County Government



opted to issue a prior Notice and to invite all interested parties including the current owners to apply for re-allocation.

36. While the principles of public participation are fundamental to good governance, I find that in the present case, there was no need for the County to call for public participation in discharging its administrative function under Schedule IV of the Constitution by issuing a Notice to inform the Applicants of the lapse of their allotments. To the contrary, I find that they within their legal mandate when issuing the Notice to the public. The said Schedule IV stipulates as follows on the functions of the County Government as follows: -

The Constitution of Kenya

Schedule IV

Part 2- County Governments

The functions and powers of the county are—

7. Trade development and regulation, including—
 - a. markets;
 - b. trade licences (excluding regulation of professions);
 - c. fair trading practices;
 - d. local tourism; and
 - e. cooperative societies.
8. County planning and development, including—
 - a. statistics;
 - b. land survey and mapping;
 - c. boundaries and fencing;
 - d. housing; and
 - e. electricity and gas reticulation and energy regulation.

37. My finding is that the Applicants did not tender evidence to show that the County Government intended to lock them out of the reallocation process or were driven by ill-motive or bias in issuing the impugned Notice. I find that the Applicants' complaint, at this Notice stage of the allotment of stalls, is unfounded and premature.

38. I further note that even though the Notice in question was in respect to all the County Government market stalls allottees, there were only four (4) Applicants in this case. What is not clear is if the Applicants were the only allottees targeted by the Notice or if they were representatives of the other traders/allottees affected by the Notice. It is noteworthy that the Applicants did not file any consent from the other traders allowing them to file the suit on their behalf. I find that it will not be proper to issue orders that will stand in the way of the County Government when executing its constitutional mandate.

39. Having found that the County Government acted within the law when issuing the Notice, I find that the instant Application lacks merit and I therefore dismiss it.



40. The County Government is however cautioned to strictly adhere to the national values and principles of governance enshrined under the *Constitution* including public participation during the re-allotment process. The County Government is advised to issue adequate and reasonable Notice to all the traders and to adopt an all-inclusive process when considering the applications for re-allotment and further, to abide by its undertaking to accord fair priority and preference consideration to all the all the qualified current market stall owners including the Applicants herein.
41. Each party shall bear its own costs in this Application.
42. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS
23RD DAY OF MAY 2024.**

W. A. OKWANY

JUDGE

