



**Republic v Governor, County Government of Mombasa & 3 others; Mberemberu
Miraa Farmers Cooperative Union & 4 others (Exparte Applicants) (Judicial Review
Application E012 of 2024) [2024] KEHC 7054 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7054 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION E012 OF 2024

OA SEWE, J

JUNE 7, 2024

**IN THE MATTER OF ARTICLES 10, 42, 46, 47, 48, 186,
189 AND 191 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE CROPS ACT NO. 16 OF 2023

AND

IN THE MATTER OF THE CROPS (MIRAA) REGULATIONS OF 2022

AND

IN THE MATTER OF AGRICULTURE AND FOOD AUTHORITY ACT NO. 13 OF 2013

AND

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

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE
TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS**

BETWEEN

REPUBLIC APPLICANT



AND

THE GOVERNOR, COUNTY GOVERNMENT OF MOMBASA 1ST
RESPONDENT

THE COUNTY SECRETARY, COUNTY GOVERNMENT OF
MOMBASA 2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

HON ALEXANDER MUNYI MUNDIGI 4TH RESPONDENT

AND

MBEREMBERU MIRAA FARMERS COOPERATIVE UNION EXPARTE
APPLICANT

JERVASIUS NOMBEKOTHE EXPARTE APPLICANT

NELSON KARIUKI MAGARA EXPARTE APPLICANT

EZEKIEL NJIRU NYAGA EXPARTE APPLICANT

CYPRUS NJUE NGERANWA EXPARTE APPLICANT

RULING

- 1 The Chamber Summons dated 24th May 2024 was filed by 5 *ex parte* applicants. It was filed pursuant to Sections 8 and 9 of the [Law Reform Act](#), Chapter 26 of the Laws of Kenya, and Order 53 Rules 1, 2 and 4 of the [Civil Procedure Rules](#), among other provisions of the law for orders that:
 - (a) Leave be granted to the applicants to apply for an Order of Prohibition directed against the 1st and 2nd respondents prohibiting them, their agents and assigns from executing/implementing the 1st respondent's Executive Order No 1 of 2024 issued on 22nd May 2024 against the applicants and their members.
 - (b) That leave so granted to the applicants operate as stay against the execution/implementation of the 1st respondent's Executive Order No 1 of 2024 issued on 22nd May 2024 against the applicants and their members.
 - (c) That further leave be granted to the applicants to apply for an order of Certiorari quashing the 1st respondent's Executive Order No 1 of 2024 issued on 22nd May 2024 against the applicants and their members.
 - (d) The costs of the application be provided for.
- 2 The application was premised on the grounds that, on the 22nd May 2024, the 1st respondent issued Executive Order No 1 of 2024 entitled Prohibition on the Entry, Transportation, Distribution, Sale and Use of Muguka and its Products within Mombasa County. The applicants contend that the Executive Order was circulated and served upon them through social media on 23rd May 2024 with directives to all Mombasa County Departments to implement it with immediate effect, notwithstanding that there is ongoing public participation hearing on Miraa before the Committee on Trade of the National Senate of the Republic of Kenya.



- 3 The applicants further averred that the unilateral Executive Order directly affects Tana River County, Kilifi County, Kwale County and Lamu County, all of which are only accessible through Mombasa County; and therefore that the Executive Order is in restraint of trade in the neighbouring counties. They asserted that the actions by the 1st and 2nd respondents are not only unreasonable but also in abuse of office and in disregard of the law and the applicant's right to fair administrative action as guaranteed by Article 47 of the Constitution, particularly the requirement that they be involved in the decision-making process on matters that affect their lives and day to day activities.
- 4 The application was supported by the Statutory Statement filed therewith in which the applicants pointed out that in the Agriculture and Food Authority Act No 13 of 2013 there is no crop known as "Muguka"; and that the Act the Regulations thereunder only refer to "Miraa". They further stated that Miraa is not categorized as a psychotropic substance in the Schedule to the Act and therefore, in issuing the impugned Executive Order, the 1st respondent ignored the protection of Miraa under the existing national legislation and the Constitution.
- 5 The applicants further contended that the Executive Order was deliberately issued in advance of the ongoing public participation hearing on Miraa before the Senate Committee on Trade where the 1st applicant's chairman was due to make his presentation on behalf of the members of the cooperative society. They added that, as of 24th May 2024 the product was going to waste and thousands of farmers rendered destitute. The applicants therefore asserted that the impugned Executive Order is ill-informed, discriminatory and ultra vires the powers of the 1st respondent and is therefore amenable to judicial review.
- 6 The application was resisted by the respondents; to which end they filed a Notice of Preliminary Objection dated 29th May 2024 seeking that the application be dismissed with costs on the following grounds:
 - (a) The applicants lack proper *locus standi* to bring the application.
 - (b) The application is inconsistent with Order 53 of the Civil Procedure Rules.
 - (c) The Court lacks the requisite jurisdiction to hear and determine the application.
- 7 The applicants filed a Supplementary Affidavit sworn on 31st May 2024 in which they reiterated the assertions set out in the Statutory Statement and added that the 1st and 2nd respondents are in contempt of the orders issued by the High Court in Embu (Hon. Njuguna, J.) by unilaterally increasing cess for Miraa from Kshs 60,000/= per truck to Kshs 6,000/= per box, totaling to Kshs 3,000,000/= per truck. They averred that any further levies by the 1st and 2nd respondents would amount to gross abuse of their powers and a violation of the applicants' rights under the Constitution.
- 8 The application was filed *ex parte* under a Certificate of Urgency, whereupon the Court made an order for it to be served on the respondents. It was thereafter heard inter partes on 31st May 2024. Mr. Kamunda for the applicants reiterated the substance of the application and the grounds in support thereof as set out in the Notice of Motion, the Statutory Statement and the Supplementary Affidavit. He pointed out that the Notice of Preliminary Objection filed by the 1st and 2nd respondents had been overtaken by events.
- 9 Counsel further submitted that, even though the Embu High Court had given a conservatory order, it was still impossible for his clients to deliver their produce to Mombasa because the 1st respondent had imposed excessive cess on Miraa. He accordingly prayed that the respondents be restrained from imposing the increased cess and that an order be made that the situation obtaining prior to the



issuance of the Executive Order be observed pending the hearing and determination of the substantive application, upon leave being granted.

10. Mr. Tajbhai, on his part, submitted that the application has been overtaken by events; and that what the applicants now seek in connection with the cess chargeable was not pleaded in their application. He submitted that the payment of cess on such products has been there from time immemorial and is not the subject of the instant application.
11. Order 53 Rule 1 of the *Civil Procedure Rules*, the Court has the discretion to grant such an application *ex parte*. The aforementioned provision states:
 - (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
 - (2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.
 - (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.
 - (4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise...”
12. In some instances, as recognized by Order 53 Rule 1(4) above, courts have insisted on hearing the parties before granting leave; and the rationale for this was well explicated in Mombasa HCMCA No 384 of 1996: *Republic v County Council of Kwale & another, Ex Parte Kondo and 57 others* thus:

“The purpose of application for leave to apply for Judicial Review is firstly to eliminate at an early stage any applications for Judicial Review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial Review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with the administrative action while proceedings for Judicial Review of it were actually pending even though misconceived...Leave may only be granted therefore if on the material available before the court the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised Judicially”.
13. The impugned Executive Order is dated 22nd May 2024. It is therefore indubitable that the Chamber Summons was filed within the period prescribed for it in Rule 2 of Order 53. A perusal of the Statement of Facts further raises issues as to whether or not the impugned Executive Order is *ultra vires*. In particular, the applicants contend that Muguka is not a psychotropic substance. In the premises, I am



satisfied that the applicants have demonstrated that he has an arguable case; a case that is fit for further investigation by the Court, and is consequently entitled to leave.

14 As to whether an order of stay is warranted, the parties are in agreement that a conservatory order has already been issued by the High Court in Embu; and therefore prayer 2 of the Chamber Summons dated 24th May 2024 has been rendered moot. That notwithstanding, the applicants urged the Court to grant orders restoring the status quo ante in terms of the cess payable. They contended that the County Government of Mombasa has since increased the cess payable to Kshs 6,000/= per box, which, in their view, is so excessive as to negate the effect of the conservatory order.

15 It is noteworthy however that that prayer is nowhere in the application dated 24th May 2024. Since it has the effect of completely changing the complexion of the said application, it is my considered finding that the prayer is untenable. It is a cardinal rule that parties are bound by their pleadings. The Court of Appeal restated the principle in *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR thus:

“It is well established in our jurisdiction that the court will not grant a remedy which has not been applied for and that it will not determine issues which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case as is pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”

16 The prayer for a status quo ante with regard to the cess payable for Miraa is therefore declined.

17 In the result, the applicant’s Chamber Summons dated 14th April 2022 is hereby allowed on the following terms:

- (a) Leave be and is hereby granted to the applicants to apply for an Order of Prohibition directed against the 1st and 2nd respondents prohibiting them, their agents and assigns from executing/ implementing the 1st respondent’s Executive Order No 1 of 2024 issued on 22nd May 2024 against the applicants and their members.
- (b) That leave be granted to the applicants to apply for an order of Certiorari to quash the 1st respondent’s Executive Order No 1 of 2024 issued on 22nd May 2024 against the applicants and their members.
- (c) The substantive application to be filed within 14 days from the date hereof.
- (d) The costs of the application to be costs in the substantive application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 7TH DAY OF JUNE 2024

OLGA SEWE

JUDGE

