



**Republic v Cabinet Secretary, Ministry of Agriculture Livestock & Fisheries; Otieno
(Exparte Applicant); Agriculture & Food Authority (Interested Party) (Judicial Review
Miscellaneous Application 11 of 2020) [2023] KEHC 2359 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2359 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 11 OF 2020
RE ABURILI, J
MARCH 16, 2023
IN THE MATTER OF AN APPLICATION FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

BETWEEN

REPUBLIC APPLICANT

AND

**THE CABINET SECRETARY, MINISTRY OF AGRICULTURE LIVESTOCK &
FISHERIES RESPONDENT**

AND

JOHNSTONE OCHIENG OTIENO EXPARTE APPLICANT

AND

AGRICULTURE & FOOD AUTHORITY INTERESTED PARTY

JUDGMENT

1. The *ex-parte* applicant Johnstone Ochieng Otieno instituted these Judicial Review proceedings by way of a Notice of Motion dated August 11, 2020 seeking the following reliefs:
 - a. That the court removes into this court and quashes the decision and advertisement of the respondent inviting bids by way of an International Expression of Interest (IEOI) for that long terms leasing of five(5) sugar factories; Muhoroni Sugar Company Ltd, Miwani Sugar Company Ltd (in receivership), Sony Sugar Company Ltd and Chemelil Sugar Company Ltd as contained in the daily nation of July 10, 2020 and an order is issued prohibiting the respondent from making such or similar decision without due process.



- b. The court removes into this court and quashes the decision and advertisement of the respondent establishing, constituting and or appointing an interim management committee to run and or oversee the operation of the five(5) sugar factories; Muhoroni Sugar Company Ltd, Miwani Sugar Company Ltd (in receivership), Sony Sugar Company Ltd and Chemelil Sugar Company Ltd as contained in the Kenya Gazette no 5473 and published on August 7, 2020 and an order issued prohibiting the respondent from making such or similar decisions without due process.
 - c. Such further or other orders as the court shall deem fit and expedient to grant.
 - d. Costs of the application.
2. The application is premised on the grounds on the face of the notice of motion and the *ex-parte* applicants supporting affidavit of even date. He deposes that the respondent Cabinet Secretary has advertised and invited bids for the long term leasing of 5 sugar companies to wit; Muhoroni Sugar Company Ltd, Miwani Sugar Company Ltd (in receivership), Sony Sugar Company Ltd and Chemelil Sugar Company Ltd (hereinafter the companies) in the daily newspaper of July 10, 2020 without involving all or any of the stakeholders in the industry.
 3. That since the plan is going to adversely affect so many people with direct and indirect implications on the livelihood of the people, the action is therefore a threat on the rule of law as it was taken outside the Constitution, Statutory and Subsidiary Legislative framework.
 4. The *ex-parte* applicant deposes that the Lake Region Economic Block resolved that the implementation of the sugar taskforce report be stopped so that the National and County Governments would be involved. That the resolution was communicated to the respondent who chose to proceed with the implementation of the report by issuing the IEOI on July 10, 2020 through a newspaper advert.
 5. It was further deposed that by issuing the advertisement, the respondent also revoked the appointment of the Management Boards of some of the factories unilaterally and un-procedurally. He further deposes that the respondent had not conducted feasibility studies on the likelihood of the project and that there is no legal framework governing such long-term lease which has the effect of transferring public interest investment into the hands of private persons without public involvement.
 6. Further deposition was that the interim committee appointed under the interested party (AFA) cannot carry the mandate due to conflict of interest and that the respondent should be ordered to operate within the law.
 7. The respondent in opposition to the Notice of Motion filed a replying affidavit through Willis Audi, the Director, Sugar Directorate within the office of the Interested Party. He deposed that the national government pursuant to Article 186 of the Constitution made strategic decision to lease the factories on a long-term basis that transfer the rights of use to the lessee for remodeling and operation which task was assigned to the Interested Party to implement.
 8. That pursuant thereto, the Interested Party engaged investors with world-class experience to re-develop the factories into large sugar complexes and manage them for a period of 25 years. That the Interested Party then issued an IEOI for the lease pursuant to the provisions of the Public Procurement and Asset Disposal Act, 2015 (hereinafter PPADA), and that the privatization had begun earlier before the first approval by the Cabinet in the year 2009. That thereafter, there had been extensive public consultation with members of the said institutions.
 9. The Respondent further contended that public participation was done and all stake holders involved and that the government put in place the Sugar Stakeholder's Taskforce and enlisted representatives



- chaired by the County Government of Kisumu and the Lake Region Economic Block. A report was filed to that effect stating the desire for privatization of the factories. Subsequently, the president of the Republic of Kenya authorized implementation of the report.
10. He therefore deposes that the process of advertising and calling of bids was done in compliance with the law.
 11. Both parties filed and exchanged written submissions to canvass the application.
 12. On behalf of the applicant, it was submitted that the five sugar factories are within the jurisdictions of the counties and Section 6 of the *Agriculture and Food Authority Act* (hereinafter the AFA Act) as well as Section 29 of the *Crops Act* which stipulate that County Governments shall be responsible for agricultural matters within their jurisdictions and that in the instant case, failure by the respondent to consult the county governments in the IEOI was un –procedural and substantially ultra vires.
 13. It was further submitted that since there is no legal framework providing for long term leasing of parastatals, the entire process was not anchored in law as was held in *Daniel Ingida Aluvala & another v Council of Legal Education & another* (2017) eKLR and *Re Kisumu Muslim Association* Misc Application No 289 of 2003-Kisumu.
 14. It was submitted that under Section 9 of the *Crops Act*, the Cabinet Secretary is empowered to appoint an interim management committee with a secretariat to undertake the function of the authority for period of one year and that in the instant situation, the act of revoking the appointment of the members of the board was un-procedural and without the mandate of the board.
 15. On behalf of the ex parte applicant, Counsel submitted that the factories contracted farmers to cultivate sugar cane by contracts and reap several benefits from the said factories and that the advertisement of the IEOI by the Cabinet Secretary did not involve all stakeholders thus running foul Articles 1(1-4) and 147(c) of the *the Constitution*.
 16. Citing the cases of *Kenya Human Rights Commission v Attorney General and another* (2018) eKLR, *Doctors for Life International Vs the Speaker of the National Assembly and others* (2006) ZACC 11 and *Wilfred Mantbi Musyoka v County Assembly of Machakos; Governor-County Government of Machakos & 2 others (interested parties)* [2019] eKLR, counsel submitted that when a public authority purports to make a decision that will affect the public and certain stakeholders, the body ought to involve the relevant stakeholder in the decision making process.
 17. The respondent and the interested party identified the following two issues for determination: whether the respondents followed the due process for the IEOI carried out; and, whether the reliefs sought should be granted.
 18. On whether the due process was followed, learned counsel for the respondent and interested party submitted that the applicant ignored the fact that the Interested Party was a State corporation within the respondent and the government therefore had prerogative to implement its policies through any state corporation as provided by Section 6 of the AFA Act, 2013 which grants the interested party wide powers necessary for the fulfillment of any of its functions.
 19. That the advertisement of the IEOI was done in fulfillment of Section 89 of the PPADA and Regulations 83 and 114(1).
 20. It was submitted that the respondents acted as agent for the majority shareholders in leasing the assets within government approved programmes without altering the ownership structure or the factories' legal status. That the leasing was in compliance with the legally binding cabinet decision of 2 April



- 4, 2020 which had brought a number of suits which are pending determination and an injunction is already in force halting the process of leasing.
21. Counsel submitted that in proposing to lease the factories, the respondent was acting within the confines of the law and specifically the *Constitution*, Section 3 and 6 of the AFA Act, 2013, Section 8 of the *Crops Act*, *Privatization Act*, 2005 and the PPADA, 2015. In support of this contention, counsel cites the decision in the *Law Society of Kenya v Attorney General* Petition No 318 of 2012-Nairobi.
 22. On the reliefs sought, counsel cited the authority in *Republic vs National Employment Authority & 3 others ex-part Middle East Consultancy Services Ltd* ((2018) eKLR, which sets out the circumstances under which the court can allow a judicial review application.
 23. It was submitted that in light of the decision above, the applicant has not satisfied the threshold set for granting orders of certiorari and prohibition since the applicant did not delve into the merits of the decision-making process but just stated they want the advertisement quashed.

Analysis And Determination.

24. This being a judicial review application, the prayers sought by the applicant are two namely-*certiorari* and prohibition although the applicant combined the two prayers into one, which is not in order.
25. In their book; *Administrative Law*, Sir W Wade & C Forsyth at Page 605 note that:

“I can see no difference in principle between *Certiorari* and Prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari. I think that prohibition will lie to restrain it from so exceeding its jurisdiction.

Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but *ultra vires*. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. *Certiorari* and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself.”

26. In view of the above, I must therefore establish whether in the circumstances of this judicial review proceeding, such prayers are open and available to the *ex parte* applicant. A plethora of judicial pronouncements are clear on the scope of judicial review proceedings. In *Republic v Kenya National Examination Council Ex parte Gathenji and others*- Civil Appeal No 266 of 1996, the Court of Appeal stated *inter alia* that:

“An order of *certiorari* can only quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision-making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal.”



27. In *Republic v Director of Immigration Services & 2 others Ex parte Olamilekan Gbenga Fasuyi & 2 others* (2018) eKLR it was held that:

“...It is common ground that the prayers sought are Judicial Review remedies and the rules governing grant of judicial review orders do apply. Judicial Review is about the decision-making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. Judicial Review is the review by a judge of the High court of a decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction- reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of Law. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the process followed by the decision-maker are proper, and the decision is within the confines of the Law, a Court will not interfere.”

28. In the instant case, the applicant seeks to impugn the decision of the respondent and the interested party to lease the named factories citing lack of involvement of stakeholders in the process of such leasing. As pleaded, the interested party has already placed out bids to potential investors to express their interest in entering into the long terms operation of the factories.

29. The respondent and the interested party vehemently deny this allegation stating that they involved all the stakeholders and that the report was forwarded to his Excellency the President who approved the same and allowed the leasing process.

30. It is now clear by the institution of these proceedings that the decision to lease out the said factories did not go down well with the majority of cane farmers in the region, including the *ex parte* applicant who then filed a number of suits spread across courts in the country in the sugar growing areas seeking to stop the sugar factories leasing process. The status of these cases was however not disclosed to this court at the time of hearing and or taking directions on the disposal of this matter. I have taken the liberty to look up some of them which I will revert to later in this judgement.

31. The duty of this court then is to determine whether the respondent and the interested party herein carried out public participation and whether the absence of public participation is a ground to impugn the process already in motion through judicial review proceedings.

32. The *ex parte* applicant deposed and submitted that the respondents and the interested Party's decision affects him substantially hence the reliefs sought. He also deposed that he is not opposed to the long-term lease provided that the same is done in compliance with the law.

33. Fair administrative action is a right guaranteed under Article 47 of the *Constitution*. Sub-articles 1 and 2 provide that:

1 Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2 If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.



34. Pursuant to the provisions of Article 47 of the *Constitution*, Parliament enacted the *Fair Administrative Action Act* (FAA) –the Act which is the substantive law now governing the institution of judicial review applications. Section 7(2)(a) of the said Act provides that:
- a the person who made the decision–
 - i ...;
 - ii ...;
 - iii acted pursuant to delegated power in contravention of any law prohibiting such delegation;
 - iv ...; or
- SUBPARA v
- denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;
35. The respondent and interested party contended and deposed that the IEOI was issued pursuant to the provisions of the Public Procurement and Asset Disposal (PPADA) and the mandate of the Interested Party-Agriculture and Food Authority-AFA as stipulated in Section 6 of the *Agriculture and Food Authority Act* which provides for powers of the Authority as follows:
- a enter into contracts;
 - b manage, control and administer its assets in such manner and for such purposes as best promote the purpose for which the Authority is established;
 - c ...;
 - d ...;
 - e enter into association with such other bodies or organizations within or outside Kenya as it may consider desirable or appropriate and in furtherance of the purposes for which the Authority is established;
 - f ...;
 - g ...;
 - h undertake any activity necessary for the fulfilment of any of its functions.
36. The exparte applicant does not contest the fact that the respondent and the interested party had power to enter unto such an engagement but that the exparte applicant's views as well as that of other farmers were not taken into account.
37. According to the advertisement put up by the respondent, the IEOI was to close on August 3, 2020 and it invited views from interested parties to request clarification before the date of submission.
38. Clearly, the respondent was open to sharing information on the advertisement had the applicant requested for some information. There is also no evidence that the applicant was denied the information that he requested for.
39. I am also alive to the facts as disclosed in these proceedings that following the advertisement of the IEOI, several suits were filed in court challenging the decision to lease the factories which suits are at



different stages of determination and is important that this court does not prejudice the merits of those matters. There is, however, no order for the consolidation of those matters with the instant matter and therefore this application must be determined on its own merits.

40. There is no doubt that the acts complained of in this matter is failure by the respondent to carry out public consultations with farmers who are likely to be affected by the advertisement and the intended long term leasing of the named sugar factories.
41. On this assertion, the respondent and the interested party contend that the process is governed by the Public Procurement and Asset Disposal Act PPADA and that therefore, there is no need to carry out public participation.
42. Clearly, if the advertisement is governed by the PPADA, there are frameworks provided within the Act to address instances where the procuring entity fails to carry out any step in the bidding process, such as an appeal to the Public Procurement Administrative Review Board established under Part XV of the Act.
43. Section 3 of the PPAD Act that:

“Guiding principles of Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

 - a The national values and principles provided for under Article 10;
 - b The equality and freedom from discrimination provided for under article 27;
 - c Affirmative action programmes provided for under articles 55 and 56;
 - d Principles of integrity under the Leadership and Integrity Act, 2012 (No 19 of 2012);
 - e The principles of public finance under article 201;
 - f The values and principles of public service as provided for under Article 232;
 - g Principles governing the procurement profession, international norms;
 - h Maximization of value for money;
 - i Promotion of local industry, sustainable development and protection of the environment; and
 - j Promotion of citizen contractors.
44. In this case, the ex parte applicant has not shown that he has already approached the PPARB in relation to the alleged issue of IEOI for a resolution of the dispute. A similar scenario arose in Musyoki v Agriculture and Food Authority & another (Constitutional Petition E 262 of 2020) [2022] KEHC 525 (KLR) wherein the petitioner challenged the process of issuing out the IEOI. The petitioner in that case had stated that he was not opposed to the process of issuing the IEOI if the law had been complied with.
45. In dismissing the petition, Ong’udi J held as follows and I concur that:

“(82) It is not disputed that the impugned procurement was advertised. The Petitioner has stated at paragraph 18 of his Petition that the international



Expression of Interest (IEOI) advert was in the Daily Nation, and The Standard Newspapers of 10th July 2020 and on the Authority's website as well as on the Public Procurement Portal. This was done in line with the requirements of *inter alia* Section 89 of the [Public Procurement and Asset Disposal Act](#), 2015, and Regulations 83 & 114(1) of the Act's Regulations 2020."

46. Another striking similarity between the above Musyoki petition and this judicial review application is the disposition in paragraph 7 of the *exparte* applicant's affidavit in support of the application where the applicant deposed that the respondent can carry out the intended lease if done within the law and taking into account the interest of all stakeholders.
47. I find that the interested party having placed the advertisement in the newspapers of nationwide circulation coupled with the Kenya gazette notice issued by the respondent and the said information being available on their websites, the public was duly notified of the intention to undertake the long-term leasing of the named sugar factories with the consequence that the applicant was at liberty to lodge his complaint as provided for in the advertisement.
48. For the above reasons, I find that the *exparte* applicant, just like the petitioner in the Musyoki petition, has not demonstrated that he is entitled to the reliefs sought.
49. I am satisfied that the respondent and interested party did advertise the process of leasing out the sugar factories named herein and that any party who was aggrieved had the opportunity to raise any issues thereto for consideration. I find no merit in the notice of motion application dated August 13, 2020. I hereby dismiss it.
50. On costs, I observe that this is a public interest matter. I therefore order that each party shall bear their own costs of this application and the application for leave to apply. I so order.
51. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS THIS 16TH DAY OF MARCH, 2023

R E ABURILI

JUDGE

