



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

JUDICIAL REVIEW NO. 1 OF 2020

THE REPUBLIC.....APPLICANT

=VERSUS=

1. THE COUNTY GOVERNMENT OF NYAMIRA.....1ST RESPONDENT

2. NYAMIRA MUNICIPALITY.....2ND RESPONDENT

3. THE COUNTY EXECUTIVE MEMBER,

TRANSPORT, ROADS & PUBLIC WORKS.....3RD RESPONDENT

AND

KENNEDY MONGARE MOGAKA.....EX-PARTE APPLICANT

JUDGEMENT

By the Notice of Motion dated 6th July 2020 filed herein on 8th July 2020 the Ex-parte applicant seeks orders as follows: -

“1. (Spent)

a) A declaration does hereby issue that the Respondents decision to invite members of the public, stakeholders or any other interested person(s) to participate or raise any concern in the preparation of Nyamira Municipality Spatial Plan long after presiding over the illegal demolitions of the applicant's house and various properties of the people of Nyamira county is unreasonable, against common sense, made in bad faith and aimed at making a mockery of article 10 of the Constitution, to wit, public participation.

b) CERTIORARI to bring into the High Court for the purpose of quashing the decision of the Respondents communicated vide the Daily Nation Newspaper of the 13th June 2020 inviting the members of the public or any other interested person(s) to participate or raise any concern in the preparation of Nyamira Municipality spatial plan by writing to the 3rd Respondent through their email address zonchiri@nyamira.co.ke-

c) PROHIBITION prohibiting the Respondents either by themselves, their agents or servants from conducting any manner or form of public participation related to the preparation of the Nyamira spatial plan covering towns within Nyamira County until the hearing and determination of the matters before the Magistrates Court at Nyamira including but not limited to ELC NO 39 and 40 of 2020.

d) A declaration that the 3rd Respondent's decision to call for public participation through the impugned communication on the Daily Nation Newspaper of the 13th June 2020 after the conduct of demolitions within Nyamira Township ward and Keroka is an act in contravention and gross violation of the spirit of Article 10 of the Constitution, to wit, public participation and accountability.

2. THAT the leave so granted do act as a stay of the 3rd Respondent's public notice communicated vide. the Nation Newspaper of the 13th June, 2020 inviting the members of the public to participate or raise any concern in the preparation of Nvamira Municipality Spatial Plan.

3. THAT this Honourable Court be and is hereby pleased to issue directions necessary towards ensuring the expeditious disposal of this matter by way of video conferencing either through zoom or Skype during the COVID-19 interruption

period.

4. THAT in view of the COVID-19 pandemic, this Honourable Court be pleased to order the service of this Application either physically through electronic means to wit, email and/ or WhatsApp, whichever is possible

5. Costs be in cause.

6. Any other order that this Honourable Court will be pleased to issue in the circumstances.”

The application is premised on the following grounds: -

“(a) THAT on or about the 12th June, 2020 the Respondents jointly published a notice in the Nation Newspaper inviting stakeholders and members of the general public to participate or raise any of their concerns in the preparation of Nyamira Municipality spatial plan.

(b) THAT the notice invites the public or any other interested person(s) in the project who wishes to participate or raise any concern to forward the same in writing to the 3rd Respondent through their email address zonchiri@nyamira.co.ke

(c) THAT the notice inviting the members of the public for public participation/ seeking the views and concerns of the members of the public is an afterthought, a mockery of the constitutional values and principles of governance and which decision has been made to sanitize the already illegal demolitions that have since taken place within Nvamira County between the 20th May, 2020 and the 12th June, 2020.

(d) THAT since the 20th May, 2020 to the 12th June, 2020 the Respondents have presided over the illegal demolition of houses, trespass to private properties and malicious damage to people(s) private properties within the Nyamira Municipality provoking a myriad of suits being filed against the Respondents before the Magistrates Court in Nvamira.

(e) THAT the invitation of the Applicant and the members of the public to the purported public participation has occasioned grave confusion amongst the members of the public who have active matters before the Magistrate's Court challenging the demolitions conducted between the 20th May, 2020 and the 12th June, 2020 on the ground that the impugned demolitions were done without public participation and the decision is thus belated, distasteful against reason/common sense and is mischievous.

(f) THAT the decision to invite members of the public to the purported public invitation by the Respondents has been made in bad faith as it is *sub judice* and is therefore likely to interfere with or influence the proceedings currently before the Magistrates Court at Nyamira.

(g) THAT the Respondents belated decision to invite members of the public to some exercise meant to satisfy the constitutional principle of public participation long and way after they have conducted illegal demolitions within Nyamira Town and Keroka town is meant to circumvent and make a mockery of the law and make meaningless the purpose, significance and import of public participation.

(h) THAT it flies against reason and is indeed a decision made in flagrant violation of the spirit of the constitution for the Respondents to use the constitution to sanitize their illegal and unconstitutional actions that have resulted to massive demolitions of the applicant's ancestral home, his father's graveside and the houses and properties of other members of the public.

(i) THAT the protection of the intention of the framers of the Constitution, the values and principles of governance, to wit, public participation demands a stop to the abuse of the process of public participation as desired and orchestrated by the Respondents.

(j) THAT unless the Respondents' are directed to immediately stop the purported process of public participation, they are certainly going to abuse the dignity of the court proceedings before the Magistrates Court at Nyamira, successfully circumvent their legal obligation and make the rule of law a hallowed constitutional promise.”

In opposing the application, the respondents through the firm of Nyachiro Nyagaka & Co. Advocates filed a replying affidavit sworn on 14th September 2020 by Jackson M. Mogusu the Nyamira Municipal Council Manager. In the affidavit the said Jackson M. Mogusu deposes that: -

“1. THAT I am the Municipal Manager of Nyamira Municipal Council and a male adult of sound mind and deposition, herein the third respondent in this instant suit hence competent and authorized to make and swear this affidavit on behalf of the respondent herein.

2. THAT I have read the applicants application dated 5/7/2020 together with its supporting affidavit and I wish to reply to the same as follows;

3. THAT in response to paragraph (a) and (b) of the applicant's affidavit in support of his application, I wish to respond as follows:

a) THAT indeed it is true that the respondent's herein published a notice in the Nation Newspaper inviting stakeholders and members of the general public to participate and raise concerns in the preparation of Nyamira Municipality spatial plan.

b) THAT the notice was meant to invite the public and the relevant stake holders and other interested parties, an initiative that was initiated by the respondents herein in compliance with Article 118 of the Constitution of Kenya.

4. THAT in response to paragraph (c) of the applicant's affidavit in support, I wish to state as follows;

a. THAT the applicant is being economical with the truth since the advertisement that was made vide tender reference no. CGN/RFP002/2019-2020 was before the alleged dates of 20th, May, 2020 and 12th June, 2020. (See annexure marked JM 1 copy of the advertisement).

b. THAT the 1st respondent being a creature of the constitution, under Article 176 of the Constitution of Kenya, can never and has never made a mockery of the constitution as alleged by the applicant herein.

c. That. the tender was awarded to the highest bidder and the spatial plan has been concluded before the order was served.

5. THAT in response to paragraph (d) of the applicant's affidavit in support of his application, I wish to state as follows; -

a. THAT after public participation was duly enrolled to the members of the public as required by the law, relevant notices were issued to the affected parties who had encroached the road reserves herein.

b. THAT at no point was there any illegal and/or unsanctioned demolition of the houses and/or trespass to private properties as alleged by the applicant, and that all the demolitions were sanctioned as in accordance with the plan.

6. THAT the alleged suits in the Magistrates court as alleged in paragraph (e) of the affidavit is a lie since the said suits were instituted against the respondent's herein after the respondents had duly advertised for public participation and thus those said suits that allege the parties had not been involved in public participation had already been overtaken by events.

7. THAT the contents of paragraph (f) of the applicant's affidavit in support of his application are premised on false hood and made in mala fides to malign the respondents herein for reasons unknown to the respondents herein.

8. THAT the respondents have never made a mockery of the constitution as they are a product of the constitution itself under article 176 of the constitution.

9. THAT the respondents have the best interest of its people at heart and such cannot embark on actions that will adversely affect its members as alleged by the applicant herein.

10. THAT in response to paragraph (h) of the applicant's affidavit in support of his application, the respondents aver that at no point, did they demolish the applicant's property as alleged and that his allegations are based on rumors and premised in bad faith.

11. THAT the applicant's application herein lacks merit, is meant to forum shop, the averments are premised on false hood and should therefore be dismissed with costs thereof.

12. That the orders sought are not capable of being granted as they have been overtaken by events.

13. THAT I am informed by my Advocate on record that the order of prohibition cannot be granted to quash a decision which had already been made.

14. THAT further, I am informed by my Advocate on record that the orders of prohibition can be granted only to prevent the making of a contemplated decision.

15. THAT I am informed by my Advocate on record that the decision to advertise for the tender was made well within the jurisdiction of the respondents.

16. THAT the rules of natural justice were duly followed.

17. THAT the applicants herein application has been brought in malafides and ought to be dismissed with costs thereof.

18. THAT the alleged suits pending in the Magistrates Court at Nyamira are also premised on false hood, overtaken by events and a wastage of the Court's valuable time and resources.

19. THAT I swear this application in response to this application herein.

20. THAT the information deponed hereinabove is true to the best of my knowledge, information and belief.”

The application was heard by way of written submissions.

Counsel for the Ex-parte applicant framed three issues for determination and proceeded to submit along the lines of those issues. The first issue is: -

“(i) Whether the members of public were involved before the contested demolitions within Nyamira County and/or in the process of making decision to demolish.”

On this issue Counsel submitted that **Article 10 (2) (a)** of the **Constitution** outlines public participation as one of the national values and principles of governance by stating that: -

“The national values and principles of governances include – (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and public participation of the people.”

Citing the decision of Odunga J in Republic v County Government of Kiambu Ex-parte Robert Gakuru & another [2016] eKLR where he held inter alia: - **“In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the constitutional dictates.....”** Counsel submitted that the respondents herein conducted demolition of various properties within Nyamira County without involving the residents who were affected or giving them an opportunity to be heard and upon realizing the procedural impropriety of their conduct on 13th June 2020 purported to issue/publish an invitation in the local dailies for a public participation. Counsel submitted that by 13th June 2020 the demolitions had already taken place and various residents had already contested the same in court. Counsel contended therefore that the decision to invite members of the public to participate after the demolition is a mockery of the constitutional principle of public participation. He asserted that such a decision is irrational, unreasonable, unprocedural and made in bad faith. Counsel further submitted that the 1st respondent has a duty to exhort its constituents to participate in the process of decision making by disseminating information with respect to the intended action through use of as many forums as possible such as churches, mosques, temples, public barazas, national and vernacular radio stations and other venues where the public are known to converge. Counsel contended there was no public participation and urged this court to find merit in the ex-parte applicant’s applications. Counsel cited the definition of public participation by Ngcobo J in the South African case of **Doctors for Life International v Speaker of the National Assembly and others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** cited with approval by Odunga J in **Republic v County Government of Kiambu Ex-parte Robert Gakuru & another (supra)** that:

“ The phrase” public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participating is defined as “(a) taking part with others (in an action or matter);the active involvement of members of a community or organization in decisions which affect them”. According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something...”

Counsel urged that the respondents have not demonstrated before this court that they carried out public participation as envisaged in law and hence this application ought to be allowed.

Issue No. 2 – Whether the Judicial Review Orders are warranted

On this issue Counsel submitted that the Ex-parte applicant was affected adversely by the decision to demolish properties without following due process and that the decision to invite members of the public to a public participation after the event is irregular, unprocedural and without basis in law. Counsel submitted that the Ex-parte applicant has suffered economically, financially and psychologically as a result of the impugned administrative decision; that the unprocedural decision made in bad faith has violated the Ex-parte applicant’s right to property enshrined in **Article 40 of the Constitution** and as such the Ex-parte application falls within the purview of **“sufficient interest”** which was held by Mativo J in **Republic v Kenya Revenue Authority, Commissioner Ex-parte Keycorp Real Advisory Limited [2019] e KLR** requires to be established before judicial review orders can be granted.

Counsel further submitted that ignoring public participation is a serious issue and there are no better terms to define a decision of a public body which is devoid of public participation other than illegal unfair and irrational and hence the remedies sought are warranted and ought to be granted as prayed.

Issue No. 3 – Whether it is in the interest of justice to grant the orders sought

Counsel reiterated his submission that the decision to demolish the Ex-parte applicant’s property without properly and or even involving him at all infringes on his right to property and fair administrative action and **Article 23 (3) of the Constitution and Section 7 of the Fair Administrative Action Act** provide elaborative recourse for such infringement. Relying on the dicta in the case of **Joyce Cherop Kaspondoy & 609 others v Kenya Power & Lighting Company [2019] eKLR** Counsel submitted that it is in the interest of justice and in promoting the spirit of constitutionalism that the application ought to be granted as prayed. Counsel therefore urged this court to exercise its wide discretion in favour of the ex-parte applicant and in so saying Counsel relied on the case of **Republic v Independent Electoral & Boundaries Commission (IEBC) Ex-parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** where the court borrowing from **Halsbury’s Laws of England 4th Edition Vol. 1 (1) paragraph 12 page 270** stated: -

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition, mandatory orders (formerly known as orders of mandamus)....are all discretionary. The Court has a wide

discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully.....”

Counsel for the Respondents also framed three issues and submitted as follows:-

Issue No. 1: Whether the Notice dated 12th June 2020 inviting stakeholders and members of the general public to participate or raise concerns in preparation of Nyamira Municipality Spatial plan was in line with the law.

On this issue Counsel submitted that public participation is provided for under Sections 87, 91 and 115 of the County Government Act. Counsel submitted that the Notice dated 12th June 2020 was but a request for proposal for consultancy services for preparation of Nyamira County Spatial Plan [2020 – 2030].

Issue No. 2: Whether the application dated 6th July 2020 is merited for the issuance of judicial review orders.

On this issue Counsel cited the case of **Municipal Council of Mombasa v Republic Exparte Umoja Consultants Ltd (2002) e KLR and the case of Pastoli v Kabale District Local Government and others [2008] EA 300** cited with approval by Gacheru J in the case of **Samuel Njoroge Gitukui & 4 others v Attorney General & another [2017] e KLR** where the Court of Appeal stated:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e. the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself – such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of judicial review.”

Counsel also relied on the case of **Republic v Kenya Revenue Authority Ex-parte Yaya Towers Ltd [2008] e KLR** where 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 reviews 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....”

Counsel contended that based on the provisions of the County Government Act and the decisions cited above it is clear that the notice dated 12th June 2020 was issued procedurally and the judicial review orders sought cannot therefore issue and the application should be dismissed.

Issue No. 3: Who bears the costs

Counsel submitted that as the application does not meet the threshold it ought to be dismissed and the costs awarded to the respondents as costs follow the event.

I have carefully considered the application, the grounds thereof, the supporting and replying affidavits, the annexures thereto, the rival submissions of Counsel for the parties, the authorities cited and the law. Whether or not the Ex-parte applicant’s property was demolished and whether or not members of the public were involved before the impugned demolitions were carried out are not issues before this court as the same are live issues pending hearing and determination in the Land Court. From the submissions of Counsel for the Ex-parte applicant it is evident that the two issues (demolition) and the lack of predemolition public participation are intrinsically intertwined and incapable of being separated. I do not therefore have jurisdiction to determine issue (i) as framed by Counsel for the exparte applicant.

What is for determination by this court is whether the notice alleged to have been published in the dailies of 13th June 2020 invited members of the public to public participation and whether it amounts to a decision which is unprocedural, irrational and illegal as to warrant this court to grant the orders sought.

It cannot be gainsaid that public participation is now part of the legal fabric of the Kenyan society. This since it was entrenched in our law as one of the national values and principles of governance by **Article 10 (2) (a) of the Constitution** which states: -

“The national values and principles of governance include—

(a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and public participation of the people;.....”

In the case of **British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The affected party) Petition No. 5 of 2017 [2019] eKLR** the Supreme Court underscored the centrality of public participation as follows: -

“[85] Public participation has been entrenched in our Constitution as a national value and a principle of governance under Article 10 of the constitution and is binding on all state organs, State Officers, Public Officers and all persons whenever any of them; (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or makes implements public policy decisions. As aptly stated by the Appellate Court, public participation is anchored on the principle of the sovereignty of the people that permeates the Constitution in accordance with Article (14) of the Constitution is exercised at both National and County levels.”

Accordingly, no public body and not even the national or the county government can embark on any project affecting the citizens/people of this country without subjecting the project or issue to public participation. To do so would be unprocedural and could amount to an illegality. In the South African case of **Doctors for Life International v Speaker of the National Assembly and others (supra)** cited by Odunga J in **Republic v County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR** Ngcobo J considered the meaning of public participation and held: -

“..... The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “[a] taking part with other (in an action or matter);

.....the active involvement of members of a community or organization in decisions which affect them.” According to their plain and ordinary meaning the words public involvement or public participation refer to the process by which the public participates in something.”

I agree fully with the holding of Odunga J that: -

“.....the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say.....”

I do also agree with his holdings that: -

“What amounts to a reasonable opportunity will depend on the circumstances of each case.....” and also that “public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the constitutional dictates.....”

These findings were echoed by the Court of Appeal in the case of **Legal Advice Centre & 2 Others v County Government of Mombasa & 4 Others (2018) e KLR** where it held: -

“42. Public participation should always be real and not treated as a mere formality for the purposes of fulfilling the constitutional requirement. It is not a public relations exercise. See Robert N Gakuru & others v Governor Kiambu County & 3 others (supra). Whether the mode or degree of public participation is adequate can only be determined on a case by case basis..... This position was aptly set out by a three Judge bench of the High Court in Institute of Social Accountability & Another v National Assembly & 4 others [2015] eKLR in the following manner: -

“The issue as to whether there was public participation is not merely a matter of form but one of substance. The court must look at the process to determine whether it meets constitutional muster.”

43. It is now settled, that what matters in determining whether the constitutional threshold of public participation has been met is that at the end of the day a reasonable opportunity is offered to the members of the public and/or all interested parties to know about the issue/project and to have an adequate say on the same. See this court’s decision in Nairobi Metropolitan PSV Saccos Union Limited and 25 others v County of Nairobi Government & 3 others [2014] e KLR.”

Applying the above principles and holdings of the Supreme Court and the Court of Appeal to this case it is clear that public participation conducted post/after implementation of the issue or project does not fit the bill of public participation at all and I agree with Counsel for the applicant that it would amount to a mockery and abuse of that principle hence making the decision one liable to be quashed by this court. That said it is my finding that the Ex-parte applicant has not demonstrated that on 13th June 2020 the respondents indeed published a notice with the intention of inviting residents to public participation in regard to demolitions after the same had taken place. This is because the Ex-parte applicant has not satisfied this court of the existence of such a decision or notice inviting the residents to take part in public participation after the event complained of. At paragraph 12 of the verifying affidavit the Ex-parte applicant deposes: -

“12. THAT long after the Respondents have caused untold damage to my late mother’s home and several other properties within Nyamira Township ward and Keroka, on the 13th June 2020 through an Avert on the Nation Newspaper, they brazenly invited the members if the public or any other interested person (s) to participate or raise any concern in the preparation of Nyamira Municipality spatial plan. (Annexed hereto and marked KM8 is a excerpt of page 5 of the Saturday Nation Newspaper of the 13th June, 2020).”

I have perused the annexures to the verifying affidavit but I could not find the excerpt of page 5 of the Saturday Nation Newspaper of the 13th June, 2020 otherwise referred to as annexure marked “KM8”. The said notice is the crux of the matter in this case and the omission to annex it can only mean that it either does not exist or that it was not a notice inviting residents to public participation as alleged. It also means that grounds (a) (b) (c) (d) (e) (f) (g) (h) (i) and (j) on the face of the application are unsupported. Whereas the deponent of the replying affidavit admitted that the respondents published a notice in the Nation Newspaper he deposes that the same was to invite the public to participate and raise concerns in the preparation of the Nyamira Municipality Spatial plan and was issued pursuant to **Article 118 of the Constitution**. At paragraph 49 he refers to that notice as the one marked annexure JM1 which the Ex-parte applicant concedes at paragraph 3 of his further affidavit not to be an invitation to public participation. At paragraph 4 of the further affidavit the exparte applicant makes reference to annexure KM8 which as I have stated he did not annex. It is my finding therefore that the exparte applicant has not demonstrated any nexus between the notice published by the respondents on 12th June 2020 which is marked as annexure JM1 to the replying affidavit, the demolitions and the impugned public participation and in the premises I find that the orders sought are not merited and proceed to dismiss the application.

Costs are in the discretion of the court but the discretion of the court must always be exercised judicially. The proceedings before me are in no way public spirited and do not amount to public interest litigation as to warrant this court to order that each party bear their own costs. The costs must in the circumstances of this case follow the cause and in this case the same are awarded to the respondents.

Signed, dated and delivered electronically at Nyamira this 4th day of February 2021.

E. N. MAINA

JUDGE