



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Judicial Review 61 of 2011**

**REPUBLIC .....APPLICANT**

**VERSUS**

**ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT**

**DEPUTY PRIME MINISTER MINISTRY FOR LOCAL GOVERNMENT .....2<sup>ND</sup>  
RESPONDENT**

**CLERK TO KIAMBU COUNTY COUNCIL .....3<sup>RD</sup>  
RESPONDENT**

**AND**

**HON. DAVID MWAURA KIBURI .....1<sup>ST</sup>INTERESTED  
PARTY**

**WINN ENTERPRISES LTD .....2<sup>ND</sup>INTERESTED PARTY**

**EX-PARTE**

**COUNCILOR TITUS KIRATU & 377 OTHERS**

**JUDGEMENT**

The 378 ex-parte applicants in these proceedings are fresh produce traders based at Soko Mjinga, Kinale in Kiambu. They are led by Titus Kiratu the 1<sup>st</sup> ex-parte applicant who is the area councilor. The 1<sup>st</sup> respondent is the Attorney General of the Republic of Kenya. The 2<sup>nd</sup> respondent is the Deputy Prime Minister and the Minister for Local Government and is responsible for supervision of all local authorities in Kenya. The 3<sup>rd</sup> respondent is the clerk to Kiambu County Council which is established under the Local Government Act Cap 265 Laws of Kenya. The 1<sup>st</sup> interested party is Honourable David Mwaura Kiburi who is the Member of Parliament for Lari Constituency within Kiambu County. Winn Enterprises Limited is the 2<sup>nd</sup> interested party. For purposes of record, the 2<sup>nd</sup> interested party though duly served did not participate in these proceedings.

In the financial year 2009-2010 the Government of Kenya through the Economic Stimulus Programme (ESP) allocated funds to various projects in the country. One of the beneficiaries was the County Council of Kiambu which was allocated funds for the construction of a fresh produce market shed. The 3<sup>rd</sup>

respondent thereafter entered into the formalities of awarding a tender for the construction of the market and complying with other legal requirements. On 16<sup>th</sup> November, 2010 the 2<sup>nd</sup> respondent and the 2<sup>nd</sup> interested party entered into an agreement for the construction of a fresh produce market at a cost of Kshs 9,504,222.20. According to the agreement the 2<sup>nd</sup> interested party was to construct the sheds at Soko Mjinga, Kinale Market. After signing the agreement, the 2<sup>nd</sup> respondent wrote to the 3<sup>rd</sup> respondent vide letter dated 13<sup>th</sup> January, 2011 that the tender for the construction of Soko Mjinga, Kinale Fresh Produce Market sheds for Lari Constituency had been awarded to the 2<sup>nd</sup> interested party. The 3<sup>rd</sup> respondent was instructed through the said letter to ensure that all the formalities, including environment impact assessment, were complied with.

An Environmental Impact Assessment (EIA) report for the proposed Soko Mjinga, Kinale, Lari Constituency in the County Council of Kiambu was prepared. The report recommended the construction of the sheds at the proposed site. At page 18 of the EIA report the site is compared with alternative locations and the authors opine that:-

**“In comparison of the suitability of this site with other sites the site was considered ideal due to the following reasons:**

- **Minimal destruction of vegetation.**
- **Accessibility to the main highway (Nairobi-Nakuru).**
- **The project is in line with the Economic Stimulus Programme (ESP) for municipal and town council markets to upgrade to an ultra-Modern and Multi-purpose fresh produce and wholesale market.**
- **Strategic location of the site in terms of accessibility and infrastructure.**
- **Conformity of the proposed development with the existing and new developments within the area.”**

At page 14 of the report there is a drawing showing the geographical and administrative location of the proposed project. The drawing shows that the site is located besides the Nairobi-Nakuru highway.

On 27<sup>th</sup> January, 2011 the project was among the issues discussed in the ordinary full council meeting of the County Council of Kiambu. It is imperative to reproduce Minutes KCC/6/2011 for the purposes of this judgment. Under the heading: construction of Soko Mjinga market under the Economic Stimulus Project (ESP) it is stated that:-

**“The committee was informed that the council had earlier been requested to identify and forward proposals for funding of project by the government through ESP. Soko Mjinga was identified for upgrading to modern market in order to uplift economic status for the local community. The country clerk further informed members that the ESP approved the proposal and had already awarded the contract and what was remaining was for the contractor to take over the site.**

**Members deliberated on the issue and noted that the construction works should start immediately. They further distanced themselves from those advocating for the construction of the market to be re-located to Kirenga area.**

**After deliberations it was Resolved:-**

- (i) That construction of Soko Mjinga Market under the economic stimulus programme (ESP) be and is hereby approved.**
- (ii) That the council sets up a date to hand over construction site to the contractor so that he could**

**begin the works.”**

However, on 25<sup>th</sup> February, 2011 the 2<sup>nd</sup> interested party was shown a construction site at Kirenga. Again for the purposes of this judgment I reproduce the proceedings of what took place on 25<sup>th</sup> February, 2011 as follows:-

**“THE MINUTES OF A MEETING BETWEEN COUNCIL OFFICERS AND WINN ENTERPRISES LIMITED HELD ON FRIDAY 25<sup>TH</sup> FEBRUARY, 2011 IN THE CLERK’S OFFICE STARTING AT 12.30 A.M. (sic)**

**PRESENT**

**J. K. KIRUTHI - COUNTY CLERK**

**FRED MWATHI - WORKS OFFICER**

**J. KINOO - ADM ASSISTANT TAKING MINUTES**

**JOSEPH KAMAU - REPRESENTING WINN ENTERPRISES LTD**

**CLLR STEPHEN WAMAE - CHAIR, TOWN PLANNING COMMITTEE**

**CLLR ALFRED THJARARA - AREA CLLR KIRENGA WARD**

**MIN ESP/MC/1/2011 HANDING OVER OF KIRENGA MARKET TO WINN ENTERPRISE LTD**

The County Clerk informed the meeting that the County Council of Kiambu had submitted to the Ministry Soko Mjinga for upgrading under Economic Stimulus Programme. Winn Enterprises Ltd were then awarded the tender for construction of Soko Mjinga market. He further informed the committee that he was later advised by the Director of Marketing, Ministry of Local Government vide letter Ref. MOLG/MDD/985/ESP CONST. 104(5) of 31<sup>st</sup> January, 2011 to change the site from Soko Mjinga to Kirenga market.

In the course of discussion, it was noted that the council did not have a copy of the BQ for construction of the market. Mr. Joseph Kamau who was representing Winn Enterprises Ltd was asked to avail the council with a copy.

Mr. Joseph Kamau said that his company was to move to site immediately and start site mobilization while awaiting the ground breaking ceremony by the council.

**Members thereafter proceeded to Kirenga site where the contractor was handed over the site.”**

The decision of 25<sup>th</sup> February, 2011 to change the construction site from Soko Mjinga, Kinale to Kirenga is what spurred the ex-parte applicants to action. On 21<sup>st</sup> March, 2011 the ex-parte applicants moved to this court and obtained leave to commence judicial review proceedings. Through the notice of motion dated 12<sup>th</sup> April, 2011 the ex-parte applicants pray for orders as follows:-

- 1. An order of Certiorari to remove and quash the Second Respondent ordering the change of location and the order to commence works for the construction of Economic Stimulus Programme (ESP) market at Kirenga Market instead of Soko Mjinga at Kinale Lari District of Kiambu County.**
- 2. An order of Mandamus directed at the First, Second and Third Respondents to order the ESP market to be constructed at Soko Mjinga Market at Kinale, Lari District of Kiambu County instead of Kirenga Market where the First Interested Party resides.**

**3. An Order of Prohibition prohibiting the First, Second and Third respondents by themselves, their agents or servants from handing over the site of the proposed ESP market to Winn contractors the second interested party herein in order to facilitate them to undertake commencement of work at Kirenga Market instead of Soko Mjinga, Kinale.**

**4. That costs be provided for.**

The application is supported by grounds on its face, a statutory statement and an affidavit sworn by the 1<sup>st</sup> ex-parte applicant and annexures thereto which were filed with the application for leave; a supplementary affidavit sworn by the 1<sup>st</sup> ex-parte applicant on 5<sup>th</sup> October, 2011; and another supplementary affidavit sworn by the same person on 13<sup>th</sup> February, 2012.

Having perused all the documents filed by the ex-parte applicants, I find that the main grounds for challenging the decision to transfer the site of the market from Soko Mjinga to Kirenga are contained in grounds 15 to 18 of THE GROUNDS RELIED UPON FOR THE RELIEF SOUGHT in the statutory statement as follows:-

**“15. That the 3<sup>rd</sup> Respondent handed over the site at Kirenga Market to the Second Interested Party on 25<sup>th</sup> February 2011 a decision that was contrary to the Resolution of the Full Council on the project which amounts to gross insubordination; undermining the authority of the Full Council; thus it is illegal, unlawful, null and void.**

**16. That the decision to transfer the market from Soko Mjinga in Kinale to Kirenga Market is capricious, unlawful and illegal as it breaches fundamental provisions of the Public Procurement and Disposal Act 2005; is being undertaken without compliance with the National Environment Act 1999; is against Public Policy, is vain politics and is actuated by malice, does not make any economic sense and its execution is against prudent expenditure of public resources; is discriminatory, selective, exclusive and misallocation of tax payers money.**

**17. That the applicants are aggrieved by the decision to transfer the market from Soko Mjinga to Kirenga market.**

**18. That the action by the respondents and the interested parties infringes upon the legitimate expectations of the applicants.”**

The respondents and the 1<sup>st</sup> interested party vehemently opposed the application. The 2<sup>nd</sup> respondent opposed the application through a replying affidavit sworn by the Permanent Secretary, Ministry of Local Government Professor Karega Mutahi. The 3<sup>rd</sup> respondent's opposition came through the affidavit of Joseph Kuria Kiruthi. The 1<sup>st</sup> interested party opposed the application through a replying affidavit he swore on 23<sup>rd</sup> September, 2011.

Through the 3<sup>rd</sup> respondent's replying affidavit, the 3<sup>rd</sup> respondent avers that he did not make any decision which can be quashed by this court. He avers that Soko Mjinga, Kinale is a gazetted forest area and there is no way that a market could be constructed there.

The 1<sup>st</sup> interested party attacks the application by arguing that the same is defective since it takes the form of a representative suit and yet no written authority has been exhibited in support of its representative nature. He also argues that the duty of identifying, allocating and siting of community projects is bestowed upon ESPM a national statutory body with each constituency having a local committee and the decision to relocate the market project from Kinale to Kirenga was made at the full meeting of the ESPM and the CPTC held on 12<sup>th</sup> October, 2009. He further avers that there is no Government land at Kinale since the area is a gazetted forest. He swore that the Lari C.D.F.C. bought 2 acres of land on 7<sup>th</sup> February, 2011 for purposes of constructing the sheds.

In summary therefore the respondents and 1<sup>st</sup> interested party argue that there is no decision made which can be quashed by this court. They also argue that there is no land at Kinale upon which the market can be constructed. Finally they submit that the application is bad in law and is an abuse of the court process.

The ex-parte applicants responded to the submission that there is no land at Kinale for the construction of the market by stating that two acres of land had been set aside for the construction of the market.

Having carefully considered the papers filed in this matter, I am of the view that the issues for determination are:-

- (a) Whether the 3<sup>rd</sup> respondent made a decision capable of being quashed;
- (b) If the answer to (a) is in the affirmative then the next issue is whether the decision made is unlawful and illegal;
- (c) Are the remedies prayed for available to the ex-parte applicants? and
- (d) Who should meet the costs of the application?

Looking through the documents filed in this matter, it is clear that a decision was made by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to construct market sheds at Soko Mjinga, Kinale. On 25<sup>th</sup> February, 2011 the 3<sup>rd</sup> respondent allegedly acting on the instructions of the 2<sup>nd</sup> respondent changed the construction site from Kinale to Kirenga. He then went ahead and handed over the site at Kirenga to the 2<sup>nd</sup> interested party. It is therefore quite clear that the 3<sup>rd</sup> respondent made a decision to relocate the construction site from Kinale to Kirenga. There is, therefore, a decision capable of being challenged by way of judicial review.

Was the decision made by the 3<sup>rd</sup> respondent in concert with the 2<sup>nd</sup> respondent unlawful? Going through the history of the project, it is clear that the same was supposed to be implemented by the 2<sup>nd</sup> respondent who in turn delegated the supervision to the 3<sup>rd</sup> respondent. The bodies involved in any decision concerning the project were the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The claim by the 1<sup>st</sup> interested party that a body known as ESPM was responsible for making the decision on where the project was to be located cannot be believed. The 2<sup>nd</sup> respondent could not have written to the 3<sup>rd</sup> respondent the letter dated 13<sup>th</sup> January, 2011 instructing it to comply with all the formalities if the 3<sup>rd</sup> respondent was not the implementing agency.

The question would still remain whether the decision taken by the 3<sup>rd</sup> respondent and a few other people on 25<sup>th</sup> February, 2012 was legal. Who makes decisions in a local authority? The business of a local authority is conducted at its meetings as provided by Section 78 of the Local Government Act Cap 265 which provides that:-

**“78(1) The names of the members present at a meeting of a local authority shall be recorded.**

**(2) Save as otherwise provided by this Act or any other written law, all acts, matters and things authorised or required to be done by a local authority and all questions that may come before a local authority, shall be done and decided by the majority of the members present and voting thereon at any meeting of the local authority at which there are present not less than one-half of the members or such larger proportion thereof as such local authority may from time to time by standing order fix.”**

The County Council of Kiambu in a meeting held on 27<sup>th</sup> January, 2011 agreed with the decision of the 2<sup>nd</sup> respondent that the market was to be constructed at Soko Mjinga, Kinale. On 25<sup>th</sup> February, 2011 three council officers, two councilors and a stranger (Joseph Kamau) unilaterally overturned the decision of a full council meeting. This act was unlawful, illegal and an abuse of power. The people of the County

Council of Kiambu had spoken through their representatives in the full council meeting of 27<sup>th</sup> January, 2011 and their desire was to have the market constructed at Soko Mjinga, Kinale. It cannot be assumed that those who met on 25<sup>th</sup> February, 2011 belonged to one of the committees or sub-committees of the Council since there is no evidence to support such a presumption. A committee, joint committee or sub-committee cannot in any case undo what a full council meeting has done. The purported action of the group of six which relocated the market from Kinale to Kirenga was unlawful. There is a claim in the minutes of the meeting of 25<sup>th</sup> February, 2011 to the effect that the 2<sup>nd</sup> respondent had instructed the 3<sup>rd</sup> respondent to relocate the market to Kirenga. If indeed the clerk had instructions from the 2<sup>nd</sup> respondent then the clerk ought to have placed the information before a full council meeting so that the council could decide the next course of action.

Is land for the construction of the market available at Kinale? This is not a question that this court can answer. The respondents and the 1<sup>st</sup> interested party claimed that the proposed site at Kinale is a gazetted forest. The ex-parte applicants swore that land is available at Kinale. I do not find it within the province of this court sitting in its judicial review capacity to conclusively determine whether land is available at Kinale or not. However, I must state that in the supporting affidavit sworn on 17<sup>th</sup> March, 2011 the 1<sup>st</sup> ex-parte seems to agree that there is no land at Kinale. I quote paragraph 9 of the said affidavit to illustrate this point:-

**“THAT the process of excision and degazettment of the proposed market commenced in the year 1994 and is still in progress to date.....”**

The question of the day would then be: If land was not available at Kinale then why did the 2<sup>nd</sup> and 3<sup>rd</sup> respondents decide that the construction takes place at Kinale? That is a question which only the 2<sup>nd</sup> and 3<sup>rd</sup> respondents can answer. Whatever the case, even if the 2<sup>nd</sup> respondent had belatedly discovered there was no land at Kinale, then it ought to have gotten back to the 3<sup>rd</sup> respondent and the 3<sup>rd</sup> respondent would have offered an alternative site for the construction of the market sheds. The matter would have been dealt with by a full council meeting. The decision of a full council meeting cannot be brushed aside by civil servants and a few councilors.

In any case the decision to move the market to Kirenga without an Environment Impact Assessment report being prepared breached the Environment Management and Coordination Act. I am surprised that the 2<sup>nd</sup> interested party could have accepted to start work at a different site and yet the agreement it signed with the 2<sup>nd</sup> respondent clearly stated that the market sheds were to be constructed at Soko Mjinga, Kinale. The 2<sup>nd</sup> respondent and the 2<sup>nd</sup> interested party acted in breach of the agreement by changing the site without putting the new agreement in writing.

Are the prayers sought available to the ex-parte applicants? The ex-parte applicants seek to quash the decision made to change the location of the market from Kinale to Kirenga. The said application is allowed in terms of prayer 1 of the notice of motion.

In prayer No. 2 the ex-parte applicants pray for an order of mandamus directed at the respondents to construct the market at Soko Mjinga, Kinale. On this prayer I agree with the respondents that allowing the same may amount to this court assisting in the commission of an illegality. It is not known if land is available at Kinale. The court cannot order the respondents to perform an act which may result in the breach of the law. The 2<sup>nd</sup> prayer therefore fails. As for prayer No.3 the ex-parte applicants have asked me to prohibit the respondents from constructing the market at Kirenga. Having allowed the first prayer, it goes without saying that this prayer must succeed on condition that the same does not bar the council from deciding in future to construct the market sheds at Kirenga.

Having quashed the decision to construct the market at Kirenga, I must give directions as to what should follow. I direct that the issue of construction of a fresh produce market be tabled by the clerk as an agenda in the next full council meeting so that the council will make a decision as to where to locate the fresh produce market. All markets including Kinale and Kirenga within the County Council of Kiambu should

be considered by the council. The said matter should be placed before the council meeting within 30 days from the date of this judgement. Thereafter the council should forward its decision plus the full minutes of the meeting to the 2<sup>nd</sup> respondent to implement the decision of the people of the County Council of Kiambu.

These proceedings were public spirited in nature and public spirited litigations are anchored on good faith. Such proceedings take care of the public interest in the decisions made by public bodies. As such, I direct each party to meet own costs of these proceedings.

Dated and signed at Nairobi this 9<sup>th</sup> day of October , 2012

**W. K. KORIR, J**