REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 332 OF 2019

REPUBLIC.....APPLICANT

VERSUS-

COUNTY GOVERNMENT OF NAIROBI.....1 ST RESPONDENT

DIRECTOR PARKING SERVICES.....2 ND RESPONDENT

COUNTY SECRETARY- COUNTY GOVERNMENT

OF NAIROBI.....3 RD RESPONDENT

AND

OLIVE TREE INVESTMENTS.....INTERESTED PARTY

EX-PARTE

1. MACKOS SACCO through JONATHAN MUTUA-CHAIRMAN

2. KANGUNEX SACCO through JONES MUINDI-CHAIRMAN

3. KINATWA SACCOO through CLINTON WAMBUA-CHAIRMAN

JUDGMENT

The application before court is the applicants' motion dated 4 December 2019 brought under section 8 and 9 of the Law Reform Act, cap. 26 and Order 53 Rule (3) of the Civil Procedure Rules. Apart from the order for costs, the only other prayer that the applicant seeks is framed as follows:

"1. That an order of certiorari do issue to bring to the High Court for quashing forthwith the decision of the 1st respondent through the 2nd respondent dated 3rd October 2019."

The motion is supported by the affidavit of Jones Maithya Muindi, the chairman of the 2nd applicant who swore the affidavit on his own behalf and on behalf of the rest of the applicants.

The applicants' case, according to this affidavit, is that the applicants are engaged in public transport business; they have a fleet of 250 vehicles plying between Nairobi city and Machakos, Kangundo and Kitui towns.

The vehicles' terminus at Nairobi is within the interested party's petrol service station called Oil Libya. It is at this station that they drop and pick their passengers and they have been doing this since 1998. Their operations at this station are based on a series of contracts exhibited to the affidavit; however, the only legible one is a contract made on 1 March 2018 which is captioned *"License (sic) to operate a Passenger Terminus and Booking Office at Oillibya Tom Mboya Service Station located on part of L.R. 209/677 as delineated on the attached plan."*

The licensor is indicated to be Libya Oil Kenya Limited while the licensee is Kinatwa Co-operative Savings and Credit Society Limited; the

contract period is for a term of three years from 1 December 2017 to 30 November 2020. The user is stated to be for purposes of operating "a passenger terminus and booking office."

By a notice dated 3 October 2019, the 2nd, respondents notified owners of petrol stations within the City of Nairobi to cease using their premises as termini for public service vehicles due to the danger such stations pose to the public, owing to the very nature of their business. The 2nd respondent's action, according to the applicants, is against the applicant's legitimate expectation considering that they have not been given alternative place from which to operate their business; they also complain that the notice has been issued without consulting them and therefore their right to be heard has been denied.

Citing the decision in **Kenya Revenue Authority & 2 Others vs Darasa Investments Ltd (2018) eKLR** it was also submitted on their behalf that the respondents' notice is subject to judicial review on grounds of irrationality and procedural impropriety. This is because the notice required the applicants to remove their vehicles immediately and that it generally referred to 'parking' without specifying the nature of the parking. Relying on the same decision, it was urged that the right to judicial review of administrative action is now enshrined in the Constitution. It was urged that although the decision by the respondents affected the applicants adversely, they were not given any written reasons why the decision was taken in the first place.

The decision in **Five Fourth Aviation Ltd vs Kenya Revenue Authority & 3 Others (2017) eKLR** was also cited for the proposition that judicial review is not concerned with the merits of the decision but the process through which the decision was arrived at. It is the applicants' case that natural justice and due process were not followed in their case.

Finally, the applicant's counsel urged that the respondents' decision was tainted with illegality, irrationality and procedural impropriety and in this regard he invoked the decision in **Republic versus Secretary of the Firearms Licensing Board & 2 Others ex parte Senator Johnson Muthama (2018) eKLR** where these grounds were defined.

Gladys Wanjiku, the Deputy Director Parking Services in Nairobi City County swore a replying affidavit in response to the applicants' application and stated that amongst the services County Governments are established to provide are transport services, public road transport and parking services.

In exercise of its legal mandate, Nairobi City County Government issued a Gazette Notice No. 4479 and published on 10 May 2017 gazetting certain areas in the city as termini for public service vehicles.

The notice was informed by the imminent danger the public were exposed to considering that petrol stations ordinarily deal in highly inflammable substances which pose a risk to waiting passengers and vehicles parked in those stations.

Again, there would a considerable movement of traffic and other activities within the petrol stations that are used as termini such that a minor collision or accident could spark a fire particularly at such times as when oil tanks deliver petroleum products at the petrol station. The applicants are incapable or containing fire accidents should they arise.

In any event, the interested party who is alleged to have entered into a contract with the applicants is only a licencee of the County Government, the 1st respondent, only licensed to operate a petrol service station and has neither power nor mandate to lease out its premises as a passenger termini or for any other purpose.

The respondents' case is that the impugned notice was issued in good faith and it is in the interest of the general public.

In the submissions filed on behalf of the respondents, their learned counsel reiterated the depositions made in the replying affidavit but added that the impugned notice was issued to stop an illegality.

According to the respondents, the applicants' actions of turning a petrol station into a termini amount to a violation of the law established under Traffic Act and Legal Notice No. 4479 of 10 May 2017; according to that gazette notice, the designated termini for all public service vehicles plying upcountry routes which would include, the Machakos, Kitui and Kangundo routes, is at Machakos Country bus station.

With the responsibility of maintaining traffic and order in the city center through such means as supervision of the parking of vehicles, regardless of whether they are public or private, the 2nd respondent was well within its mandate in issuing the impugned order; moreover, the notice was meant to restore public order and ensure the safety of the public at large. Counsel relied on the decision in **James Nyasora Nyarangi & 3 Others V Attorney General [20081 eKLR**, where it was held that the rights guaranteed in the Constitution are not absolute and that their limits are set by the rights of others and also the legitimate needs of the society, at large. It was also held in this case that it is generally acknowledged that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of the fundamental rights of individuals.

The learned counsel for the respondents relied on **Mapis Investment (K) Limited v Kenya Railways Corporation [2006] eKLR** in which the decisions **in Mistry Amar Singh v. Serwano Wofunira Kutubua 1963 EA 408** and **Scott v. Brown, Doerinq, McNab & Co (3), [1892] 2 QB 724** were cited with approval; in this latter decision Lord Lindley L.J. held at p. 728 that:

> ***"Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."***

Based on this holding, it was urged that since the applicant's actions are illegal, they cannot be a basis of a viable action against the respondents.

On the allegations of procedural impropriety, it was urged that the notice was issued procedurally because it was within the 2nd respondent's mandate to issue it and no hearing of whatever form was necessary; the notice, according to the respondents, was meant to stop perpetuation of an illegality.

As far as the question of costs is concerned, the learned counsel for the respondents invoked section 27 of the Civil Procedure Act, cap. 21 for the positon that costs ordinarily follow the event. He also relied on the Supreme Court of Uganda decision in **Impressa Ing Federice vs Nabwire (2001) 2 EA 383** where the principles underlying section 27 (1) of the Civil Procedure Act cap. 65 of Uganda were applied; these principles are first, that costs should follow the event unless the court orders otherwise; the provision gives the judge the discretion in awarding costs but that discretion has to be exercised judicially; secondly, a successful party can be denied costs if it is proved that but for his conduct, the action would not have been brought. The costs should follow the event even when the party succeeds only in the main purpose of the suit. Counsel also relied on the decision in **Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006** for the same proposition that generally, costs follow the event.

I have considered the applicants' application, the response thereto and the respective submissions by the parties.

The basic question that arises is whether the application meets the threshold for the intervention of this court in exercise of its supervisory jurisdiction by way of judicial review and whether it merits the grant of the prerogative order of judicial review.

Taking the applicants by their own word, the impugned notice should be quashed on the judicial review grounds of irrationality and procedural impropriety though later in his submissions the learned counsel for applicants added the ground of illegality as well.

I will return to these grounds later but at the moment it is important to address what I think are preliminary issues that may very well determine the fate of the applicants' application.

According to the statement of facts and the affidavit sworn in their verification, the application is based on a contract between the applicants and the interested party. A copy of the contract exhibited to the affidavit in verification of the statement and in support of the motion shows that the contract is between Oil Libya Kenya Limited and Kinatwa Co-operative Savings and Credit Society Limited, the 3rd applicant; neither the 1st nor the 2nd applicants appear anywhere as parties to that contract in any capacity. In short, they are not privy to that contract and, assuming it is a legal contract, they cannot claim any rights, including the right to sue, accruing from that contract.

Being the other contracting party to that contract, the 3rd applicant would be the only party with a legal standing to sue on the on the contract; however, apart from being named as an applicant in this application, none of its representatives has pleaded on its own behalf. If it is a legal or juristic person as its name suggests, it can only plead through its alter ego or representative or agent; the same position would still obtain even if it is a co-operative society because according to section 12 of the Co-operative Societies Act, No. 12 of 1997, a registered co-operative society attains the status of a corporate body capable of suing and being sued in its own name, amongst its other characteristics. That section reads as follows:

> ***12. Co-operative society to be body corporate***
>
> ***Upon registration, every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with, its by-laws.***

The affidavits in verifying the facts in the statutory statement and supporting the motion have been sworn by Jones Maithya Muindi who describes himself as '*the bonafide chairman of the 2nd applicant'*. Although he purports to have express authority from the 'chairmen' of the 1st and 3rd applicants, there is no evidence that he has the authority of the 3rd applicant, as a body corporate to sue, swear any affidavit or plead on its behalf.

This implies that the application for leave was made without a verifying affidavit by the applicant contrary to the provisions of Order 53 Rule 1(2) which states as follows:

> (***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. (Emphasis added).***

Considering the mandatory terms in which this rule is couched, an application for leave would not be complete, and would not thereby be granted, if it is not accompanied by an affidavit or affidavits verifying the facts relied upon. For this reason, the purported motion before court is incompetent and an abuse of the process of this honourable court.

The second issue is with respect to the notice impugned notice; this notice is framed as follows:

> ***"NOTICE***
>
> ***TO: ALL PETROL STATION OWNERS***

3RD OCTOBER 2019

THIS IS TO NOTIFY ALL PETROL STATION OWNERS THAT, THE COUNTY WILL NO LONGER ALLOW PSVs (MATATU) TO PARK INSIDE THE PETROL STATION. THIS IS A DISASTER IN WAITING.

THIS NOTICE TAKES EFFECT IMMEDIATELY

SIGNED

TOM TINEGA

DIRECTOR PARKING SERVICES."

It is not clear from the applicants' affidavits how the notice was published but nothing much turns on that because it has not been denied that it was published in some shape or form.

Prior to this notice and, in particular, on 12 May 2017, the County Secretary, Nairobi City County had issued a notice in Gazette Notice No. 4479 gazetting specific areas within the city of Nairobi as omnibus and matatu termini for public service vehicles plying within the city and also those plying the routes to and out of the city.

This particular gazette notice was only brought to the attention of the court by the respondents in reply to the applicants' application. Despite its centrality to their application, the applicants did not disclose the existence of the notice at the time they sought for leave or even when they filed their substantive motion. The reason for the apparent suppression of this particular fact is fairly obvious: none of the areas gazetted as omnibus or matatu termini includes "*Oillibya Tom Mboya Service Station located on part of L.R. 209/677"* which the applicants want to retain as a terminus for their own vehicles. According to that gazette notice, the routes on which applicants' vehicles ply have been described as 'up country routes' and their terminus is indicated to be Machakos Country Bus Station.

It follows that the applicants not only suppressed a fact material to their application but they have also deliberately and persistently misled the court that they have not been given an alternative terminus or that they were required to move on a short notice.

Material non-disclosure disentitles the applicant not only the judicial review reliefs sought but also leave to file the substantive motion for these reliefs. Recently, I addressed this question in a decision I delivered in **High Court Judicial Review No. 2 of 2020, Republic vs. County Director of Education, Nairobi County & 2 Others ex parte Charles New Nyamote** where I noted that it is trite that suppression or non-disclosure of material facts in an *ex parte* application would automatically result to setting aside of any order that the applicant may have obtained and which he has taken advantage of. In that case I cited and followed the English case of ***King versus The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington ex parte Princess Edmond De Polignac (1917) 1 K.B 486*** where it was held that an order granted upon an affidavit which was not candid and did not fairly state the facts but stated them in such a way as to mislead and deceive the court, there is power inherent in the court, in order to protect itself and prevent an abuse of its process, to discharge the order and refuse to proceed further with the examination of the merits of the case.

It was also held in the same case that the rule of the court requiring *uberrimae fidei* on the part of an applicant for an *ex parte* injunction applied equally to the case of an application for a rule nisi for a writ of prohibition; the order for prohibition in this case was refused because the applicant was held to have suppressed material facts when she appeared before court *ex parte*.

Lord Cozens-Hardy M.R. stated at page 504:

It is a case in which it seems to me there was plainly a suppression of what was material, and we cannot be too strict in regard to that which to the best of my belief has been a long established rule of the Court in applications of this nature and has been recognised as the rule. The authorities in the books are so strong and so numerous that I only propose to mention one which has been referred to here, a case of high authority, Daglish v. Jarvie (1850) 2 Mac. & G. 231 which was decided by Lord Longdale and Rolfe B. The head note, which I think states the rule quite accurately, is this: "It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to the injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward." Then there is an observation in the course of the argument by Lord Langdale:

"It is quite clear that every fact must be stated, or, even if there is evidence enough to sustain the injunction, it will be dissolved." That is to say he would not decide upon the merits, but said that if an applicant does not act with uberrima fides and put every material fact before the court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but he must come again on a fresh application."

The learned judge continued:

"I have nothing to add to what Lord Langadale has said upon the general merits of the case; but upon one point it seems to me proper to add thus much, namely, that the application for special injunction is very much governed by the same principles which govern insurances, matter which are said to require the utmost degree of good faith, 'uberrima fides.'…so here, if the party applying for a special injunction, abstains from stating facts which the Court thinks are most material to enable it form its judgment, he disentitles himself to that relief which he asks the court to grant. I think, therefore the injunction must fall to the ground." That is merely one and perhaps rather a weighty authority in favour of the general proposition which I think has been established, <u>that on an ex parte application uberrima fides is required, and unless that can be established, there is anything like</u>

deception practised on the Court, the court ought not to go into the merits of the case, but simply say "we will not listen to your application because of what you have done." (Emphasis added).

The proposition that *ubberima fides* is required not only in applications for injunctions but also in every other application of ex parte nature was emphasised by Warrington L.J. in the same matter; he noted as follows:

"It is well settled that a person who makes an ex parte application to the Court- that is to say, in the absence of the person who will be affected by that which the Court is asked to do-is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."

The application before court is the main motion for grant of the substantive judicial review order of certiorari and therefore the question whether leave should be granted or not is not an issue. But in determining the main motion before court, I cannot close my eyes to the fact that in obtaining leave, the applicants suppressed facts that are material to their application and to that extent their application is tainted and ought to fall even on that ground alone.

And even if the applicants' motion was to be considered on merits, it does not stand a chance because, first, the factual basis upon which it is based is misleading; it is misleading because it has emerged that since May 2017, the applicants have not only been aware of the designated terminus for their vehicles but they have also all along known that "*Oillibya Tom Mboya Service Station located on part of L.R. 209/677"* is not such a designated terminus.

Secondly, it has not been demonstrated that the legality or the validity of Gazette Notice No. 4479 of 12 May 2017 has been challenged or, better still, has been revoked in any proceedings. There is no doubt that the notice issued in October 2019 is consistent with the Gazette Notice of May 2017 reminding petrol service station owners that their premises are not termini for public service vehicles; termini for such vehicles have been designated. It follows that the notice of October 2019 has a sound legal basis and its validity cannot be questioned without any reference to the Gazette Notice No. 4479 of May 2017; in other words, even if there were grounds to quash the notice of October 2019, the quashing order would be in vain as long as the Gazette Notice remains intact.

Thirdly, the issuance of the Gazette Notice of May 2017 and the notice of October 2019 falls within functions of the 1st respondent; it is a function entrusted to the it by an instrument no less potent than the Constitution; this in the Fourth Schedule to the Constitution, where the distribution of functions between the National Government and the County Governments is defined. According to Clause 5, in Part II of that Schedule, the County Governments have been given 14 functions and the necessary powers to perform them; the fifth function is what is pertinent to the question at hand; it reads as follows:

The functions and powers of the county are—

5. County transport, including—

(a) county roads;

(b) street lighting;

(c) traffic and parking

(d) public road transport; and

(e) ferries and harbours, excluding the regulation of international and national shipping and matters related thereto. (Emphasis added).

It is clear that the 1st respondent is not only enjoined to manage all matters pertaining to traffic, parking and public transport, amongst its other functions, but it has also been given powers by the Constitution to take such measures or actions as are necessary to ensure the ensure the performance of these functions. If both the notices respectively issued or published in May 2017 and October 2019 are viewed from this perspective, it should not be difficult to conclude that they are based on a sound legal basis.

It follows that there is no basis for faulting the respondents' action on any of the grounds for judicial review of illegality, irrationality or procedural impropriety. Lest we forget, these grounds were classified by Lord Diplock's classic dictum in **Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410**; in that case he outlined three heads which he referred to as "*the grounds upon which administrative action is subject to control by judicial review*". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future

of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

No evidence has been provided to demonstrate that in issuing the notices they have issued, and in particular the notice of October 2019, the respondents have not understood correctly the law that regulates performance of their functions; to the contrary, all I see is that they have given effect to it.

I am not also satisfied that the impugned notice is irrational for the simple reason that it is consistent with the law. Under no circumstances can anyone find a decision taken to protect not only the members of the public but also the applicants' membership from the danger associated a fire outbreak at a petrol station is "*so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*"; I am not prepared to come to that conclusion myself.

As far as the ground of "procedural impropriety" is concerned, it is clear that as early as May 2017, the applicants were informed where their designated terminus was. As earlier noted, they have not complained about the gazette notice designating their terminus but have, instead, chosen to operate from their own undesignated terminus in clear breach of the Gazette Notice of May 2017. The purported contract upon which their action is based was entered into in December 2017 long after the respondent's Gazette Notice of May, 2017 was published; there can never be any better proof of illegality on the part of the respondents than this. Besides being illegal, that contract could also not bind the 1st respondent because it was not privy to it.

It is intriguing that even in these circumstances, the applicants are bold enough to suggest that they ought to have been given a 'hearing' before the 2019 notice was issued.

To summarise my position on this point, I would say that it has not been proved and, of course, I am not satisfied, that in issuing the impugned notice, the respondents failed to observe any procedural rules of any legislative instrument by which the 1st respondent's jurisdiction is conferred or under any of the provisions of the Fair Administrative Action Act No. 4 of 2014.

In conclusion, I can only reiterate the words of Lord Hailsham in **Chief Constable of the North Wales Police vs Evans (1982) 1 WLR 1155** at page 1160E-H) that the remedy of judicial review is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial and administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making decisions. It is intended to see that the relevant authorities use their powers in a proper manner and not substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that the lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law.

In the final analysis, I find no merits at all in the applicants' motion dated 4 December 2019; it is hereby dismissed with costs. It is so ordered.

DATED, SIGNED AND DELIVERED ON 16TH APRIL 2021.

Ngaah Jairus

JUDGE