



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**PETITION CASE NO.12 OF 2016**

**GLADYS NYAWIRA & OTHERS**

**T/A NYERURUMA SELF HELP GROUP.....PETITIONERS**

**VERSUS**

**THE COUNTY GOVERNMENT OF NYERI.....RESPONDENT**

**NYESUMA SACCO.....INTENDED INTERESTED PARTY**

**RULING**

On 24<sup>th</sup> November 2016, Mativo J determined the petition herein by making the following orders:-

1. That the respondent's decision contained in the letter dated 20<sup>th</sup> June 2016 addressed to the petitioners' and signed by one George Mwangi, sub County Administrator be and is hereby declared illegal, null and void and for all purposes the same is hereby revoked.
2. That the respondent and/or its servants/agents/persons acting or purporting to act for and on behalf of the respondent be and are hereby restrained from unlawfully and illegally cancelling/revoking the petitioners licence to pick and drop passengers as per their licence dated 31<sup>st</sup> May 2016.
3. That the petitioners licence/authority dated 31<sup>st</sup> May 2016 shall remain in force for all practical purposes unless and or until the same is legally revoked.
4. The petitioners shall bear the costs of this petition.

On 17<sup>th</sup> May 2018 Nyesuma Sacco (the applicant) filed a Notice of Motion seeking orders that:-

a.....

b. The Honourable court be pleased to order that the applicants/interested party herein be enjoined to these proceedings herein for purposes of seeking revision or review of the judgment entered herein on 24<sup>th</sup> November 2016.

The application is supported by the affidavit of Jackson Macharia sworn on 14<sup>th</sup> May 2018 and the annexures thereto. The grounds are to be found on the face of the application inter alia, that the judgment entered into on 24<sup>th</sup> November 2016 impacted negatively on the operations of the applicant and all its proprietors yet they were not aware of the proceedings neither were they participants and if not allowed they would be condemned unheard contrary to the rules of Natural Justice. Further that they were protected by the NTSA Act No.33/2012 Section 30, NTSA authority (Operations of PSVs) Regulations 2014, LN 23/2014 Articles 46 (1) (c) & 50 (1) & 149 of the Constitution, 2010.

Gladys Nyawira the chairperson of the petitioners swore a replying affidavit on 6<sup>th</sup> June 2018 where she contended that the applicants notice of motion was not only frivolous, vexatious but a non-starter as well; that the petition in which the judgment was delivered was about a specific issue – the unlawful and illegal cancelation of her members licence- which the court heard and determined as between her members and the County Government of Nyeri and the Judgment was binding between them that the applicants were free to bring their own suit against the county government if they were aggrieved by its actions –more importantly that this court was *functus officio* and there was nothing to hear.

The Respondent filed Grounds of Opposition on 21<sup>st</sup> June 2018, through the firm of Muriuki Ngunjiri Advocates. That the applicant was in violation of the doctrine of *functus officio*, that there was nothing pending between the petitioner and the respondent to necessitate the

joining of intended interested party, that the application had been brought with inordinate delay- a year after the judgment had been delivered, was prejudicial to the petitioners as it would result in unnecessary cost of litigation.

Mr. Ombongi appeared for the applicant, Mr. Karweru for the petitioners. Counsel made oral submissions.

#### **For the applicants**

It was argued that the applicants were condemned unheard- that if allowed to come on board they would be able to demonstrate that the petitioners did not deserve the orders they got and that their licence which they obtained through the orders of 24<sup>th</sup> November 2016 – ought to be revoked that this court was not *functus*, that any attempt by the applicants to file a separate suit would be by the classic *res judicata*- that the petitioner was misusing the judgment and creating acrimony at the matatu stage, occupying bays indiscriminately, grossly reducing fare, using threats and intimidation on the basis of the said judgment.

#### **For the Respondent**

It was argued that the application was misconceived, a fatal misdirection. That the applicant was seeking to be joined in an already determined suit where the rights of the parties had already been determined that the judgment simply restored the *status quo* before the illegal revocation of the petitioners licence and did not confer any new status to the petitioner; that the licence complained about had been issued by the County Government, whose powers to regulate the activities of the petitioners had not been divested by the judgment; the applicant were free to petition the issuing authority to revoke/review the terms of the said licence, and if the County Government refused to act then they had the recourse of coming to court to seek the appropriate orders; that the intended interested party was never a party in this suit- hence the principle of *res judicata* would not apply to it.

Further that the issue of routes allocated to the petitioners was not an issue to be determined by this court but by the regulatory authority to whom the applicant ought to have addressed their issues. That the NTSA was not a party to the suit and any issue related to their operations could not be introduced into the matter.

#### **For Respondent**

Mr. Macharia appeared for the County Government of Nyeri. He urged the court to note that Justice Mativo only concerned himself with the process in which the revocation of the petitioners' licence had been done. That the judgment was conclusive with regard to the issues between the parties before him and there was no room for reopening of the same. That joinder of interested parties comes in to help in the adjudication of issues.

Further that the applicant had not complied with order 45 of CPR i.e. if they were seeking review of the judgment.

#### **For the applicant in rejoinder**

It was argued that the applicant simply wanted to be joined into the suit so as to move the court; that the responses attacking the intended interested party were misplaced, that there was a valid reason why the County Government had nullified the petitioners licence, that the applicants were relying on the doctrine of natural justice, that the applicant was mentioned in the judgment and suffered consequences without being heard- that with regard to Order 45- the applicants had only learnt about the judgment from the conduct and utterances of the petitioner.

#### **Determination**

With that the court is supposed to determine whether the application brought by the applicants has merit.

The first thing to note is that no specific legal provision was cited by the applicant to indicate under which provisions of the law they were seeking to move this court. It is a plain Notice of Motion. It is not brought under any specific provisions of the law.

Secondly none of the parties cited any authorities. For that reason, I went to eKLR to find assistance on what constitutes an interested party.

In **Raila Amolo Odinga & Another Vs IEBC & 3 Others (2017) eKLR** the Supreme Court in considering an application by an interested party to be joined in the election petition the court stated: -

*“An applicant for joinder has to satisfy the court that he or she has fulfilled the legal requirements for joinder”*

The court cited Rule 25 of the Supreme Court Rules 2012 which provides for the application for leave by a person “ *at any time in any proceedings before the court*” to be enjoined as an interested party- that the interested party would have to show **any prejudice it would suffer if the intervention was denied.**( emphasis mine). The application was dismissed inter alia because the applicant did not demonstrate his compliance with the legal requirements, and that he was introducing not only new issues but new parties to the suit.

These principles are applicable in this case.

The applicants brought in the issue of the NTSA who was not a party to the suit, and the rules and regulations under the Authority established under that law.

More importantly, an interested party will apply to be joined in “proceedings before the court”. There must be proceedings before the court to which the interested party intends to contribute towards resolution of the issues therein.

In **Trusted Society of Human Rights Alliance -Vs-Mumo Matemo & 5 Others (2015) eKLR** the Supreme Court defined an interested party as one who has a *stake or interest directly* in the case.

“.....an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made either way. Such a person feels that his or her interest will not be articulated well unless he himself or she herself appears in the proceedings, and champions his or her own cause”.

It is very clear from the above rendition that for a party to be referred to as an Interested Party there must be live proceedings, live issues affecting the party being litigated, whose outcomes expected to affect the party. It is about an ongoing case, where the party can participate by articulating its case, about decision that will be made not already made,

In this case, the issues between the petitioner and the respondent have already been litigated and finalized. There are no live proceedings to which the applicant can be enjoined. There is nothing pending between the parties to which the interested party can contribute.

The applicants contended that they had been mentioned in the matter and adversely affected yet they were not heard. This is what the judge said

*I am clear in my mind that focus lies on the conduct and manner in which George Mwangi revoked the licence granted by Respondent to the petitioners. There is nothing to show that he observed the rules of natural justice. First, the persons alleged to have complained against the petitioners were not disclosed nor did the Respondent furnish details of the alleged complaints to the petitioners to enable them to respond to the complaints. **The Respondent talked of Nyesuma Sacco as having complained. The report dated 16.6.2016 dwelt on persons who had been expelled from the Sacco and mentioned alleged loan default and discussed nothing about the contested bay or the alleged “reasons” that prompted the Respondent to cancel the license.(emphasis added)***

*Even if the alleged complainants existed, (which has not been proved) the petitioners were never supplied with details of the complaint or afforded an opportunity to face the complainants and cross-examine them on the complaints and adduce evidence to rebut the allegations. George Mwangi cannot allege to have received complaints (if at all he did) and proceed to act as the prosecutor, judge and executor. His actions are a clear breach of the well-established rules of natural justice, totally unfair, illegal, oppressive and an infringement on the rights of the petitioners who are constitutionally entitled to a decision that is procedurally fair and just. The decision affects them adversely and as such they are entitled to a fair process. **See Gladys Nyawira & others v County Government of Nyeri [2016] eKLR***

The applicant has issues with the manner in which the petitioners conduct themselves- pursuant to them being issued with a licence to operate their matatu business on some routes. It is clear that was not an issue before Justice Mativo. One can see the issues before Mativo Judge as are well set out in the orders/declarations sought by the petitioners: -

- i. A declaration that the unilateral decision by the Respondents officer, George Mwangi vide a letter dated 20/6/2016 is biased, capricious knee jack, oppressive against all the rules of natural justice and the right to a fair hearing and contrite constitution and is therefore illegal and unconstitutional.*
- ii. That the Respondent be prohibited from unlawfully and illegally cancelling the petitioners’ licence to drop and pick passengers as per its licences dated 31/5/2016 without following due process.*
- iii. A declaration that decision of the Respondent constitutes entrenchment of unfair trade practice and is injurious to the economic rights of the petitioners and is against public policy where the citizens of Kenya should enjoy the lowest fees chargeable for any service rendered by all service providers, especially in the essential sector like transport.*
- iv. Costs of the petition plus interest.*

The judgment simply upheld the licence issued to petitioner on 31<sup>st</sup> May 2016 which as the Judge pointed out was subject to laws and regulations of the County Government and the government was only restrained from revoking the same illegally.

If the petitioners’ were using the licence to violate the known rules and regulations of the PSV Industry then there are be other ways and means of dealing with the same through the requisite laid down procedures. The applicants have recourse to file their own suit. Their fear that the matter will be *res judicata* is unfounded unless they have facts of their involvement this petition that they are not disclosing. (It is noted that they appeared before the respondent with some complaint) They have cited the NTSA Act, the NTSA Regulatory Authority, and the County Government. Nothing stops them from going through all those processes to resolve their dispute and if it fails, to come to court and seek the appropriate orders.

As the matter stands, I must agree with submissions by the petitioners and respondent, this application is misconceived. There is no suit to be enjoined to, the court is functus, the issues between the parties have been determined as between them and the applicants must find their own suit. The application is dismissed with costs to the petitioners and respondent.

**Dated delivered and signed at Nyeri this 31<sup>st</sup> Day of January 2019.**

**Mumbua T Matheka**

**Judge**

In the presence of:

Ms. Jerusha- Court Assistant

Mr.Ombongi for applicant present

No appearance for other parties.

**Mumbua T Matheka**

**Judge**

**31/1/19**