



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CONSTITUTIONAL PETITION NO. 1 OF 2018

NAROK LINE SERVICES.....PETITIONER

VERSUS

NAROK COUNTY GOVERNMENT.....RESPONDENT

NAROK STAR SHUTTLE.....INTERESTED PARTY

RULING

The case for the petitioner

1. The petitioner through its application dated 12/6/2018 sought the following orders from this court.

1. spent

2. An order restraining the directors, agents, employees and/all servants of the interested party from interfering with the lawful operations of the petitioner including blocking the petitioner from relocating to its leased, premises on plot No. 167 within Narok Town.

3. Subject to prayer 2, an order to issue to the Narok police County Commander to provide security to ensure compliance with the order of the court.

4. An order to compel the respondent to issue to the petitioner with a single business permit to facilitate its operations.

5. An order providing for the provisions of costs.

2. The application is brought under articles 10, 23, 27,39,40,47, 48, 50 and 165 of the 2010 Constitution, the Fair Administrative Actions Act 2015, the Law Reforms Act, the Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution (Practice and Procedure Rules 2013) and all other enabling powers and provisions of the law.

3. The application is supported by eight grounds that are set out on the face of the notice of motion. Additionally, there is a 13 paragraphs supporting affidavit of its chairman (Andrew Kigochi Mwangi). The major grounds in support of the application are as follows.

4. First, the respondent has failed to issue the petitioner with a single business permit licence which has hindered its operations while incurring huge bills of expenses such as rent and operational costs.

5. The petitioner has stated that in December, 2013, the petitioner entered into a lease agreement with the Postal Corporation of Kenya at Narok Post office in respect of plot No. 167. It has further stated that previously the petitioner shared an office with the interested party on plot No. 61 in Narok town. Furthermore, the attempt by the petitioner to relocate to its new premises led the interested party in filing Civil Case No. 33 of 2018 in the magistrate's court on 23/2/2018. In that suit, the interested party sought an injunction to restrain the petitioner from operating its business within the town on plot No. 61.

6. Furthermore, after hearing both parties, the court dismissed the suit of the interested on 3/4/2018. Notwithstanding, the dismissal of its application the interested party has harassed, threatened and restrained the petitioner from relocating to its leased premises in addition to attacking the petitioner's employees and malicious damage to its property.

7. In addition to the foregoing, the directors, agents and servants of the interested party have continued to disfigure the petitioner's branding of their offices and have incited rowdy youths to frustrate the petitioner from moving to its new premises.

8. Furthermore, the petitioner's application in its supporting affidavit has deponed to the following major matters. In paragraphs 4, 5, 6 and 11, the petitioner has replicated its grounds in support of the notice of motion. Second, the petitioner has deponed that on 12/4/2018 its advocates wrote a letter to the county secretary of the respondent requesting to be issued with a miscellaneous receipt and single business permit licence to enable it commence its operations. In that letter, they informed the county secretary of the ruling that dismissed the application of the interested party against it.

9. Third, on 24/4/2018, the petitioner made an application to the County Government requesting to be allocated parking slots/booking office at the new Narok but terminus to enable it operate its business. Finally, on 3/5/2018, the petitioner wrote to the County Commissioner Narok County informing him of the ongoing dispute between Narok Star Shuttle (Interested party) and the petitioner.

Submissions of counsel for the petitioner

10. In addition to its affidavit evidence, counsel for the petitioner has filed written submissions in support of the petition. Based on *Giella v. Cassman Brown and Co. Ltd (1973) EA 358 and Mrao Ltd v. First American Bank of Kenya Ltd and 2 others (2003)eKLR*, counsel has submitted that the petitioner is entitled to an order of a temporary injunction because it has made out a *prima facie* case which, if it is refused is likely to suffer irreparable damage. Finally, counsel has submitted that the interested party's directors, agents and servants have forcefully closed the petitioner's leased premises by placing a padlock, which has the effect of blocking the petitioner from relocating to its leased premises on plot No. 167 within Narok town.

11. Finally, he has submitted that the balance of convenience is in favour of the petitioner. Counsel has therefore urged the court to allow the application.

The case for the respondent

12. The respondent through Mulaimu Mavusyu, acting chief revenue officer filed a 22 paragraphs replying affidavit. He has deponed to the following major matters. First, he has deponed that he is in charge of revenue collection and management in the county including processing of all business permits within Narok town. Second, he has deponed that the current petition has been instituted in an attempt to involve the respondent in the internal wrangles with the interested party. It was also his evidence that at the beginning of this year the respondent embarked on streamlining the process of issuing stickers and business permits to matatu owners. As a result, they held five meetings with matatu owners. Following that meeting the following guidelines were agreed upon.

1. It was agreed that all transport companies were to assign a representative to collect the requisite fee of Sh. 2000/= per month per vehicle.

2. It was also agreed that each representative was to be given a green light to go and bank the collected funds into the Narok Government Revenue collection account.

13. Furthermore, as regards issuance of business permits, the procedure is that the saccos were to pay a bill of Shs. 21,000/= per year to licence the running of their operations within the town. He has further deponed that the applicant and the interested party have always been represented by one entity under the umbrella of Narok Star Shuttle Sacco Limited. In the instant application, payments were being made through the office of the interested party in particular through Mr. Robert Ole Taga.

14. He has further deponed that it is the petitioner who has refused to follow the established procedures for the issuance of a single business permit. The procedure requires first and foremost that a potential applicant must identify premises for putting up a booking office. Having done that they must move to the second step of inviting the inspectorate team from the revenue collection office to approve such premises and thereafter issue the potential applicant with a single business permit invoice which indicates the amount of money payable.

15. The third step is that once payment has been made a miscellaneous receipt is issued and a single business permit is processed in favour of the applicant. He has further deponed that the applicant has stated that the interested party's agents have restricted the petitioner from accessing their business premises, which he states that the inspectorate team will not be able to access it even if they were to be invited.

16. He has also deponed that in a meeting of stakeholders held on 11/5/2018, it was resolved that all matatu saccos should move to the main stage by 17/5/2018. And each sacco was required to meet the cost of putting up offices at the main stage.

17. Furthermore, he has deponed that the petitioner has not followed the regulations set out by the respondent. He has also stated that the petitioner should not be allowed to force either the court or the respondent.

18. Following the advice of his counsel, which he believes to be true that the petitioner has recourse against the interested party by filing an application for contempt of court. Finally, he has deponed that the application of the petitioner should be dismissed as he has a remedy in filing contempt proceedings against the interested party.

19. The respondent's counsel filed written submissions in opposition to the petitioner's application. It was his submission that the joinder of the interested party amounted to a misjoinder as set out in Order 1 Rule 3 of the 2010 Civil Procedure Rules and has urged the court to strike out the interested party from this petition.

20. Furthermore, counsel of the respondent has urged the court to find that the petitioner has no cause of action against the respondent. The petitioner has not complied with the procedures to be followed before one is granted a single business permit licence. In this regard, he has not shown the premises that he intends to use as an office. Secondly, the intended business premises must be inspected by the inspectorate team which is within the revenue office. It is for these reasons that he also urges the court to dismiss the petitioner's case.

21. As regards the suit between the petitioner and the interested party, which was dismissed by the magisterial court, the respondent submits that the petitioner should pursue his remedies by filing contempt of court proceedings against the interested party. It is for this reason that respondent submits that the respondent should not be dragged into the legal wrangles between the interested party and the petitioner.

22. As regards costs, he urges the court to award costs in favour of the 1st respondent.

The case for the interested party.

23. The interested party did not file any replying affidavit, instead it filed written submissions in opposition to the petition. Counsel for the interested party has submitted based on *Mrao v. First American Bank of Kenya Ltd and 2 Others (2003) KLR 125* that the petitioner has not made out a prima facie case to warrant an order being made in his favour. In that case, the Court of Appeal pronounced itself as follows:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to a court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

24. Counsel for the interested party has also submitted that the petitioner has not demonstrated it will suffer irreparable damage. Counsel has submitted that the value of the loss allegedly suffered by the petitioner is quantifiable and measurable and can be compensated by damages.

25. Finally, counsel for the interested party has submitted that injunctive relief cannot be granted because if it is granted it would lead to traffic obstruction in town. He therefore urges the court to dismiss the petition.

Issues for determination

26. In the light of the foregoing affidavit evidence, the submission of the three counsel and the applicable law, I find the following to be the issues for determination:

1. Whether or not the petition is entitled to a compulsive order to issue against the respondent.
2. Whether or not the petitioner is entitled to the orders sought.
3. Who bears the costs of this application?

Issue No. 1

27. There is unchallenged affidavit evidence of the petitioner that the petitioner has not followed the procedure that is laid down before one obtains a single business permit. First, he has not identified business premises from where he will be operating. The business premises which he claims to use for his business premises are a subject of dispute between the petitioner and the interested party. The petitioner admits that it was denied access by the interested party. It therefore follows that there are not new premises which have been obtained by the petitioner. In the circumstances, I find that the petitioner is not entitled to an order to compel the respondent to issue it with a business permit.

Issue No. 2

28. In addition to granting an order to compel the issuance of a single business permit to it, the petitioner also seeks injunctive relief against the directors, agents and servants of the interested party from interfering with its lawful operations in respect of plot No. 167 within Narok town. In this regard, the petitioner has not demonstrated that he has a prima facie case against the interested party to warrant the grant of an injunction. Additionally, he has failed to prove that he stands to suffer irreparable loss if the injunction is not granted. I agree with the submissions of the interested party that if the petitioner suffers loss, that loss can be compensated by way of damages. In those circumstances, I find that the petitioner is not entitled to an order of injunction to restrain the directors, agents and servants of the interested party.

29. From the evidence, it is clear that there is a dispute between the interested party and the petitioner that may be remedied through filing and prosecuting contempt proceedings in the civil suit in the magisterial court namely Civil Case No. 33/2018, that was decided on 23/2/2018. It therefore follows that the petitioner is not entitled to an order to direct the Narok County Commander to ensure that security is provided as prayed for by the petitioner.

Issue No. 3

30. In terms of section 27 of the Civil Procedure Act (Cap 21) Laws of Kenya, costs follow the event. It therefore follows that the respondent and the interested party are entitled to the costs of this application.

31. The upshot of the foregoing is that the petitioner's petition dated 12/6/2018 is hereby dismissed in its entirety with costs to the respondent and the interested party.

Ruling delivered in open court this 30th day of October, 2018.

In the presence of Mr. Masikonde holding brief for Mr. Lempaa for the petitioner and Ms Adallah holding brief for Mr. Kemboy for the respondent and Mr. Meingati for the interested party.

J. M. Bwonwonga

Judge

30/10/2018