



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

JUDICIAL REVIEW

MISC APPLICATION NO. 1 OF 2018

ROYAL BALLON LTD.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF NAROKRESPONDENT

RULING

INTRODUCTION

1. The *ex-parte* applicant has applied for orders of certiorari to quash the decision of the respondent contained in the respondent's letters of 5/12/2017 and 7/12/2017. Both letters prohibited the *ex-parte* applicant from carrying out hot air balloon operations within Maasai Mara Reserve until the management plan of the respondent has been implemented. The *ex-parte* applicant's application is supported by several grounds set out on the face of notice of motion together with its statement of facts and a verifying affidavit. In addition, it is also supported by written submissions which has cited several authorities.

2. The respondent has filed a replying affidavit of Elizabeth Sanangoi Lolchoki dated 23/5/2018 and written submissions of its counsel in opposition to the application.

The case for the *Ex-parte* applicant

3. The *ex-parte* applicant is a limited liability company which has invested money in the business of transporting local and foreign tourists to Maasai Mara Reserve using hot air balloons, which are aircrafts that are licensed by Kenya Civil Aviation Authority (KCAA). In its statutory statement of facts, it has averred to the following major matters. It has stated that the issue of regulations that govern civil aviation is a matter that is allocated to the national government. It has further stated that the respondent is a local government, which is authorized to licence businesses which have been authorized to operate by the national government.

4. Furthermore, the *ex-parte* applicant has stated that the respondent is allocated by the 4th Schedule of the constitution to regulate and licence matters in relations to county roads, street lighting but not civil aviation, which is an exclusive matter for the national government.

5. The *ex-parte* applicant has supported his application by 27 grounds. The following are the major grounds. 1st the *ex-parte* applicant applied and obtained a licence to operate hot air balloon services at the Maasai Mara National Reserve from the Kenya Civil Aviation Authority vide its letter dated 26/10/2016. Similarly, the *ex-parte* applicant applied and was granted permission to carry on with its operations and storage of hot air balloons after it obtained approval from the National Environmental Management Nema(NEMA) vide its letter dated 30/1/2017.

6. Furthermore, the *ex-parte* applicant was issued with a single business permit by the respondent on 15/1/2013 after paying Shs.200,000/=. Additionally, on 12/5/2017, the *ex-parte* applicant was issued with a tourist licence by the respondent to carry on a regulated tourism and hospitality services. On 6/6/2017, the respondent issued a letter informing the *ex-parte* applicant that it did not have any objection on the operations of hot air balloons. On 7/12/2017, the *ex-parte* applicant was authorized by Kenya Civil Aviation Authority to perform commercial air operations.

7. After complying with those requirements from both the National and Narok County Governments, the *ex-parte* applicant was on 5/12/2017 issued with a letter from the respondent ordering it to stop its operations for two reasons. The first one being that it did not have a banking slip for its business permit. The second being that it did not have a minuted meeting document authorizing it to engage in that business. On 7/12/2017, the respondent issued to the *ex-parte* applicant letter prohibiting it from running its business within the Maasai Mara Reserve.

8. The decision of the respondent ordering the *ex-parte* applicant were made without affording the *ex-parte* applicant a right of hearing. The *ex-parte* applicant's application is supported by a verifying affidavit of Sherrif Ibrahim Abdel Wahab.

9. In its submissions, counsel for the *ex-parte* applicant filed written submissions in support of the orders of certiorari. Counsel cited a number of authorities including *Standard Resource Group Ltd v. Attorney General & 2 others (2016) eKLR*, in which the court stated that where a party appears in the proceedings but fails in its pleadings and in oral evidence to respond to the allegations raised against it, the court can only conclude that those facts are only uncontested. It also cited *Onyango v. The Attorney General (1987) KLR 711*, in which the court found that the applicant had been deprived of his right to remission of sentence without being heard.

10. The court ruled in the latter case that that was breach of the rules of natural justice and that it did not matter whether the same decisions could have been arrived at. Finally the court cited the relevant provisions of Fair Administrative Action Act of 2015 which requires a public authority to give written reasons for its action in situations where a right or a fundamental freedom of a person has been or is likely to be adversely affected by the administrative act. It is for these reasons that counsel for the *ex-parte* applicant urged the court to grant its application with costs.

The case for the respondent

11. The respondent through its county Secretary (Elizabeth Sanangoi Lolchoki) filed a 28 paragraphs replying affidavit in opposition to the application. Counsel for the respondent filed written submissions in opposition to the application of the *ex-parte* applicant. In her replying affidavit, the county secretary has averred that there was in force a moratorium against any new development in the Maasai Mara Reserve which still subsists. She has further averred that vide their letter of 24/10/2016 the respondent's director of tourism and wildlife notified Kenya Civil Aviation Authority(KCAA) of the existence of that moratorium. She pointed out that the operations of new hot air balloons applications would not be permitted until a new management plan had been implemented. That letter went further to state that all applications would only be passed through county assembly and its relevant committees.

12. Furthermore, the respondent averred that it sent another letter dated 24/10/2016 to the National Environmental Management Authority (NEMA) expressing its concerns that the proliferation of balloon activities was far beyond the capacity of Maasai Mara Reserve and for that reason it requested NEMA not to issue any licences for balloon operations until Maasai Mara management plan had been implemented.

13. Furthermore, she has averred that notwithstanding the respondent's direct moratorium, the *ex-parte* through underhand tactics had in collusion with its county officials sought and illegally obtained a letter of no objection purportedly dated 24/10/2016. In regard to that letter, she has pointed out that it had 2 anomalies. First, it was signed by an employee of the respondent who lacked capacity to issue such a letter. Second, the letter was unprocedurally issued since there were no recorded minutes of the respondent's officials/committees, which are the only ones that would have authorized the issuance of such a letter.

14. Furthermore, the respondent has averred that it did not countermand the approvals granted by NEMA and KCAA. It simply refused the *ex-parte* applicant to illegally operate within the Maasai Mara Reserve. The respondent has finally averred that its letters of 5th and 7th December, 2017 were reasonable and procedurally fair and was: "within its mandate under paragraph 4(i) & 7(b), (d) of part 2 of the Fourth schedule of the Constitution that require it to manage and preserve the Maasai Mara National Game Reserve and regulate trade and tourism within its jurisdiction."

15. Mr. Kemboy, counsel for the respondent filed written submissions supported by various authorities. He submitted that based on *Municipal Council of Mombasa v. Republic and Another (2002) eKLR*, that judicial review is concerned with the decision making process and not with the merits of the decision itself. He also cited *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (1948)1 KB 233* in support of its contention that the decision of the respondent was reasonable. Finally, counsel has highlighted the contents of the respondent's affidavit, which conduct he submits was reasonable.

Issues for determination

16. In the light of the affidavit evidence and submissions of both counsel, I find the following to be the issues for determination.

1. Whether or not the respondent accorded the *ex-parte* applicant a fair hearing before ordering it to stop its balloon operations.
2. Whether or not the *ex-parte* applicant has made out a case for the grant of orders of certiorari.
3. Who bears the costs of this application?

Issue No. 1

17. I find from the affidavit evidence of both parties that NEMA and KCAA had approved the operations of the *ex-parte* applicant. The respondent is in agreement that NEMA and KCAA approved the operations of hot air balloons in Maasai Mara Reserve. This is common ground to both. The point in contention is whether the respondent's letters to both NEMA and KCAA countermanded their approvals. One such letter addressed to NEMA and KCAA stated that there was in force a moratorium in Maasai Mara Reserve until a new management plan had been implemented. Secondly, the respondent also contends that the letter written by its chief officer in the department of tourism was not supported by minutes of the respondent. The position of the respondent is that NEMA and KCAA should not have licensed the operations of *ex-parte* applicant by virtue of those two reasons stated in those two letters.

18. I find that the conduct of the respondent amounted to countermanding the approvals of NEMA and KCAA. The issue of licensing by NEMA and KCAA are national functions. The County Government's role in the matter is limited to control and management of the Maasai

Mara Reserve. The Fourth schedule to the Constitution does not authorize the respondent to countermand the approvals of those national bodies. It therefore follows that County Government acted without jurisdiction. Its conduct is ultra vires. Secondly, it breached the rules of natural justice.

19. The instant case is similar to the USA case of *Gibbons v. Ogden* 22 US (9 wheat) 1(1824), in which the Supreme Court ruled unconstitutional a New York state law that required the defendant to obtain a licence to operate steamboat services, in respect of which the defendant had already been licensed under federal law. Although Kenya is a unitary state, it has features of federalism in its 2010 Constitution.

Issue No. 2

20. In countermanding the approvals of those 2 bodies the respondent did not accord the *ex-parte* applicant with a fair hearing as required by Administrative Action Act of 2015. In the circumstances, I find that the respondent failed to accord the *ex-parte* applicant a fair hearing before stopping its operations.

21. The upshot of the foregoing is that the *ex-parte* applicant's application succeeds and its application is hereby allowed in terms of prayer 1 and 2 of its notice of motion dated 26/5/2018.

22. The *ex-parte* applicant will have the costs of this application.

Ruling delivered in open court this 25th day of October, 2018 in the presence of Mr. Matagaro holding brief for Mr. Munyori for the applicant and Ms Adallah holding brief for Mr. Kemboi for the respondent.

J. M. Bwonwonga

Judge

25/10/2018