



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

JUDICIAL REVIEW & HUMAN RIGHTS DIVISION

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO. 650 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION

AND

IN THE MATTER OF ARTICLES 31, 40 AND 47 OF THE CONSTITUTION, FAIR ADMINISTRATIVE ACTION ACT, No. 4 of 2015, THE LAW REFORM ACT, CAP 26, ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010, THE CONSTITUTION OF KENYA, 2010 AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF THE LAW

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR- NAIROBI CITY

INSPECTORATE DEPARTMENT.....1ST RESPONDENT

COUNTY GOVERNMENT

OF NAIROBI COUNTY.....2ND RESPONDENT

EX PARTE: PRIDEINN HOTELS & INVESTMENTS LIMITED

JUDGEMENT

Introduction

1. The applicant herein, **Prideinn Hotels & Investments Limited**, by his Notice of Motion dated 19th January, 2017 seeks the following orders:

- i. An order of Prohibition to restrain the Respondents whether by themselves and or through their agents, employees, servants, officers and or anyone claiming under them from levying, charging motor vehicles’ parking fees, clamping, impounding, seizing and or confiscating the**

Applicant's and Applicant's customer's motor vehicles, motor cycles and auto mobiles parked inside the privately owned property known as Land Reference Number 209/76/13, in Parklands, Nairobi to compel payment of parking fees or penalties thereof.

ii. An order of Prohibition to restrain the Respondents whether by themselves and or through their agents, employees, servants, officers and or anyone claiming under them from harassing, intimidating, threatening, coercing and or blackmailing the Applicant's customers, employees, servants and or directors for favours, gifts and or benefits in lieu of unlawful levying, charging parking fees on automobile parked in Land Reference Number 209/76/13, in Parklands, Nairobi or clamping or seizing the said vehicles in recovery of parking fees or penalties.

iii. Costs.

Applicant's Case

2. According to the applicant, at all material times to this suit, **Pioneer Holdings (Africa) Limited** is the duly registered owner of all that property known as Grant Number I.R 18717/4 being Land Reference Number 209/76/13 situate in the Westland/Parklands area of Nairobi County and delineated on the Land Survey Plan Number 26444 and measuring One Decimal Two Seven Six (1.276) acres or thereabouts (hereinafter referred to as "the suit property") which according to the applicant was at all material times relevant to this suit a privately owned and developed property.

3. The applicant averred that **Pioneer Holdings (Africa) Limited** had caused to be erected and or developed on the said Land Reference Number 209/76/13 various premises for commercial use. Vide a Lease Agreement commencing on 1st May 2015, **Pioneer Holdings (Africa) Limited**, leased for a period of five years and three months to the Applicant herein all those premises erected on the said property and upon the execution of the said Lease Agreement, the Applicant took immediate occupation and possession of all those premises erected and or developed on the said property and has since then been in quiet and peaceful enjoyment thereof where it has set up hotel, restaurant and accommodation facilities where it trades in the name and style of Pride Inn Hotel and Restaurants with its hotel, restaurant, catering and accommodation services being offered to the members of the general public.

4. It was averred that in November 2016 or thereabouts, the Respondents through their agents and or officers and other people claiming under them entered into the aforesaid privately owned and run property and the premises erected thereon wherein they started harassing, blackmailing and coercing the Applicant's employees and managers. In addition, the Respondent's officers and or agents have been demanding for fully paid holidays, favours and other benefits at the Applicant's hotels located at various destinations countrywide but when the Applicant indicated its unwillingness to comply with the said demands and blackmails, the Respondents' officers and or agents issued threats and gone to the extent of clamping all the Applicant's motor vehicles parked within the said privately owned premises/property. It was disclosed that the aforesaid motor vehicles being clamped by the Respondents are the ones used to run the day to day business activities of the Applicant among them transporting supplies, fresh produce, food, equipment, the staff, managers, directors and customers and running routine errands.

5. These actions, it was disclosed have been ongoing for several weeks now despite the numerous pleas by the Applicant that the Respondents' officers and or agents are interfering with privately owned premises and privately run business activities and as such has occasioned great prejudice, irreparable loss and inconvenience to the business operations of the Applicant especially during this festive season when the Applicant is expected to be receiving customers and tourists both locally and internationally.

6. The applicant's case was that the Respondents' actions are in blatant breach of Articles 31, 40 and 47 of the Constitution that guarantees the Applicant's right to privacy, peaceful and quiet enjoyment of privately owned property and carrying out of lawful business activities and expeditious reasons and or explanations for decisions made respectively. Further, the Respondents' actions are *ultra vires* and beyond the scope of authority of the Respondents as they have no jurisdiction and or powers to interfere

and or clamp motor vehicles parked in privately owned business premises and or property hence their actions are unlawful, illegal and in breach of clear provisions of the Constitution.

7. It was asserted that the Respondents' actions of blackmailing and or demanding for free holiday trips and favours are not only criminal but are also in breach of the right of the Applicant to carry on its privately owned but lawful business operations peacefully and at a profit while their actions of getting into a privately owned property and business premises where legal and lawful business activities are legitimately being carried on amounts to a breach of the Applicant's right to privacy as enshrined in the Constitution.

8. The applicant contended that in light of the foregoing, the Respondents' actions of clamping privately owned motor vehicles in privately owned premises/property are aimed at ruining, interrupting and grinding to a halt the lawful business operations of the Applicant during this festive season thus ensuring maximum losses unless the Applicant herein gives in to the Respondents' demands for free holiday trips and benefits.

9. To the applicant, the said actions are *ultra vires* and beyond their scope of authority unnecessary, malicious and influenced by extraneous considerations, factors and ill will. Further it is vexatious, scandalous, spiteful, and malicious for the Respondents to clamp motor vehicles meant for running the day to day operations of the Applicant parked in a privately owned property without giving any valid reasons and or justifications whatsoever.

10. To the applicant, it is against public policy and public interest for the Respondents to breach the privacy and or interfere by clamping privately owned motor vehicles parked within a privately owned property and premises used for carrying on the legal and lawful business activities taking place within the said privately owned property and premises.

11. The applicant therefore sought the orders sought in this Motion.

12. The application was unopposed.

Determinations

13. Having considered the above matters this is the view I form of the matter.

14. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others** (supra) in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a

specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

15. Under the Respondents’ Bylaws it is only an offence to park in a designated space without payment of fees. In other words parking on undesignated space does not amount to an offence in order to invite punishment such as the clamping of the offending vehicles.

16. In this case the applicant has contended that the suit property is a private property hence not designated parking space. This allegation has not been controverted as the Respondents have not responded to these proceedings. In other words the Respondents have not justified their action on any positive law. It is now trite that for an executive decision to be justified, it must be based on some legally recognised provision or policy. Executive power must therefore be properly exercised within the lawful bounds or parameters and ought not to be misused or abused. According to **Prof Sir William Wade** in his learned work *Administrative Law*:

“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...”

17. The powers of an executive authority, it is trite, must be conferred by the Statute under which the said authority exercises its powers which instrument must necessarily set out its powers expressly. Unless such powers are expressly donated by the parent instrument, it cannot purport to exercise any powers not

conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

18. Therefore where the law exhaustively provides for the powers of an executive body or authority, the body or authority must operate within those limits and ought not to expand its powers through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies or executive authorities. Whereas, if the legislature gives great powers to them, the courts must allow them to them, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**.

19. In this case it is clear that the Respondents have not justified their action against the applicant. The Respondents have broken most of the rules under the Bill of Rights. They has violated the right to property under Article 40, the right to privacy under Article 31, the right to fair administrative action under Article 47 and economic and social rights under Article 43 of the Constitution. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** the Court held that:

“...judicial review...has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.”

20. That this Court sitting as a judicial review court has the power to enforce the provisions of the Constitution has been appreciated in South Africa, whose constitutional provisions are similar to ours, in **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1**, where it was held that:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

21. Apart from that by demanding for fully paid holidays, favours and other benefits at the Applicant’s hotels located at various destinations countrywide under the threats that the applicant’s business would be crippled, the Respondents’ officers and or agents have abused their power. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240** while citing **Reg vs. Secretary of State for the Environment Ex Parte NottinghamShire Country Council [1986] AC:**

“A power which is abused should be treated as a power which has not been lawfully

exercised...A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: "I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law." The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: "Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers." Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston*, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief."

22. Executive power, it is trite, must be properly exercised within the lawful bounds or parameters and ought not to be misused or abused. According to **Prof Sir William Wade** in his learned work *Administrative Law*:

"The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them..."

23. Based on the only evidence before me, I find that the Respondents have no power to levy fees on the suit property. Accordingly they have no justification in clamping the applicant's vehicles. By purporting to do so the respondents exceeded their jurisdiction and abused their powers hence their decision must be quashed.

24. I therefore find merit in the Notice of Motion dated 19th January, 2017.

Order

25. Consequently I issue the following orders:

i. An order of Prohibition restraining the Respondents whether by themselves and or through their agents, employees, servants, officers and or anyone claiming under them from levying, charging motor vehicles' parking fees, clamping, impounding, seizing and or confiscating the Applicant's and Applicant's customer's motor vehicles, motor cycles and auto mobiles parked inside the privately owned property known as Land Reference Number 209/76/13, in Parklands, Nairobi to compel payment of parking fees or penalties thereof as long as the said premises remain an undesignated.

ii. An order of Prohibition restraining the Respondents whether by themselves and or through their agents, employees, servants, officers and or anyone claiming under them from harassing, intimidating, threatening, coercing and or blackmailing the Applicant's customers, employees, servants and or directors for favours, gifts and or benefits in lieu of unlawful levying, charging parking fees on automobile parked in Land Reference Number 209/76/13, in Parklands, Nairobi or clamping or seizing the said vehicles in recovery of parking fees or penalties as long as the said premises remain an undesignated.

26. The applicant will have half the costs of these proceedings.

27. It is so ordered.

Dated at Nairobi this 27th day of March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wageche for the applicant

CA Mwangi