



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.14 OF 2016**

**BETWEEN**

**IBRAHIM HUSSEIN, OMAR IBRAHIM AND ABUKAR JIMALE GABOW**

**(suing as officials of EASTLEIGH BUSINESS DISTRICT ASSOCIATION).....PETITIONER/APPLICANT**

**AND**

**NAIROBI CITY COUNTY .....**

**RESPONDENT**

**RULING**

**Introduction**

1. The Applicant describes itself as an association of Kenyan citizens who reside, work and carry on business/trade and or own property in Eastleigh area of Nairobi City County. They filed the present Application dated 12<sup>th</sup> January, 2016, together with a Petition against the Respondent, Nairobi City County, alleging various violations of their constitutional rights.

2. This Ruling relates to the said Notice of Motion Application in which the Applicant prays for orders that:

a. ...

b. *Pending the inter partes hearing and determination of this Application, the Respondent by itself, its agents or servants, or otherwise howsoever be and are hereby restrained, in any manner howsoever from collecting property rates, fees and charges imposed for business permits and licenses within Eastleigh area of Nairobi.*

c. *In the alternative, pending the hearing inter partes of this Application and determination of this Petition, this Honourable Court be pleased to issue a mandatory temporary order directing that the Petitioner/Applicant and the Respondent do jointly collect the property rates, fees and other charges for business permits granted within Eastleigh and deposit the same in an account jointly held by the Petitioner/Applicant and Respondent.*

d. *The costs of this Application be awarded to the Petitioner/Applicant.*

### **The Applicant's Case**

3. In its Affidavit in support, sworn on its behalf by Omar Ibrahim on 12<sup>th</sup> January, 2016, the Applicant's case is that the Respondent ordinarily issues to them business permits and licenses annually to allow them and others to conduct business and trade within Eastleigh area. That inspite of the Respondent collecting rates, imposing fees and other charges from them, it has failed and or neglected to regulate and manage inter alia public nuisance, environmental pollution, public road transport, trade development practices, county planning and development policies, refuse removal and solid waste disposal and sanitation management services within that area.

4. It is also its contention that in or about the month of November, 2015, they wrote letters to the Respondent to address their concerns but the same was ignored and or neglected and that in or about the month of December, 2015, through the Eastleigh North Ward, Nairobi County Assembly Representative, they again raised concerns about lack of service delivery by the Respondent but the same was similarly met with arrogance and neglect by the Respondent.

5. Further, that in or about the month of January, 2016, they wrote a protest letter to the Respondent against the actions of the Respondent's agents in regard to collection and allocation of a service lane between the 5<sup>th</sup> and 6<sup>th</sup> streets of 1<sup>st</sup> Avenue in Eastleigh to individuals but the said letter remains unanswered to date.

6. The Applicant's case is therefore that due to lack of action on the part of the Respondent, the business premises of its members have been obstructed by hawkers and matatus; the areas meant to be the loading and service zones have been occupied by hawkers; the drainage system is dysfunctional; there is open disposal of solid wastes and refuse and the service lane between the said 5<sup>th</sup> and 6<sup>th</sup> streets on Eastleigh 1<sup>st</sup> Avenue has been allocated to individuals thereby denying members of the Applicant Association access to water, sewer and emergency services.

7. The Applicant further states that instead of prohibiting or controlling peddling, hawking and street trade, the Respondent charges each hawker the sum of Kshs.50/= per day thereby legalising their operations and causing obstruction to the streets, footpaths and loading zones to the detriment of property and business owners, and workers in Eastleigh area.

8. Additionally, that the inept provision of service delivery and regulation of public nuisance, mismanagement of the environment, public road transport and trade development practices, non-adherence to the county planning and development policies, mismanagement of refuse and solid waste disposal and sanitation, is occasioned by breach of the constitutional and statutory duty on the part of the Respondent, its servants, employees and agents. Further, that the said conduct is an abuse of office and amounts to impunity, and that it has become absolutely necessary and urgent to have the Respondent held accountable for non-performance of its constitutional mandate to avert imminent health, environmental and socio-economic catastrophe.

9. In the Applicant's view, the orders it is seeking herein are justifiable and should therefore be granted in the interest of justice and for the purpose of upholding the supremacy of the Constitution, good governance, integrity, transparency and accountability by the Respondent.

### **The Respondent's Case**

10. In response to the Application, the Respondent filed an Affidavit in Reply sworn on 9<sup>th</sup> February, 2016, on its behalf by one, Robert Ayisi.

11. Mr. Ayisi, while acknowledging that the Respondent is under an obligation to provide a conducive trading environment by collection of garbage, unblocking of drainage systems among others, deponed that like in other areas within the City of Nairobi, the Respondent is facing a lot of challenges due to a number of factors such as the ever rising population, lack of co-operation by its residents, lack of

sufficient open spaces where garbage may be dumped, and lack of technical know-how on waste management.

12. He deponed further that prior to the inception of the present Petition, the Respondent had embarked on formulating a strategic plan (2015-2025) to address the problems that its residents are currently facing (the Applicant included), and that the problems highlighted above are not unique to Eastleigh residents and traders alone.

13. Additionally, Mr. Ayisi deponed that after the filing of the present Petition, the Respondent, in conjunction with the Applicant's representatives, on 15<sup>th</sup> January, 2016, constituted a task-force to specifically address the issues raised by the Applicant. That after the formation of the taskforce, there have been a series of consultative meetings and site visits to fast-track operations with the sole purpose of having a long-lasting solution in respect of the specific issues that the Applicant has complained of.

14. In that context, the Task Force members made the following resolutions and agreed on actions to be undertaken by the Respondent i.e. collection of all garbage that has blocked the drainage system, covering of manholes, the business community to stop draining water into sewer lines erected, all illegal structures on the service lanes to be removed, removal of all hawkers from the streets of Eastleigh and to stop charging the hawkers a daily fee of Kshs.50/=, the County to establish vacant spaces where markets stalls can be erected and allocated to deserving hawkers, litter bins to be provided to residents and traders, the business community to stop supplying hawkers with merchandise and who then ply their trade on entries of business premises and Traffic Marshalls to be deployed along Eastleigh streets to control traffic among other activities.

15. It was stated further that the Respondent has embarked on a major project to clear up the streets by collecting garbage on a daily basis and that some hawkers have voluntarily vacated the streets and the resisting ones have been evicted. The Respondent's further contention was that the removal of hawkers is an ongoing exercise as some may go back to the streets and so, to address that issue, its enforcement arm had been instructed to remain vigilant to ensure that the hawkers are kept off the streets of Eastleigh as a lasting solution is being sought.

16. In the Respondent's view, should the orders sought in the present Application be granted, then that would amount to denying it much needed revenue and would in turn hamper service delivery and would also open up a floodgate of similar cases seeking the same orders which would effectively be killing the spirit of devolution. As such, the Respondent contended that it had demonstrated its willingness to deliver quality services and it was only fair and just that it be given room to implement its strategic plan even if that would require the Court's supervision.

17. For the above reasons, it prays that the Application be dismissed.

### **Determination**

18. The key issue for determination is whether this Court should allow the Application and grant the orders sought therein and in addressing that question, I note that at the core of the Application, is the fact that this Court is being called upon to grant orders to stop the County of Nairobi from collecting property rates, fees and charges imposed for business permits and licences within Eastleigh area of Nairobi or in the alternative, to grant orders to direct Nairobi City County to collect property rates, fees and other charges for business permits granted within Eastleigh jointly with the Applicant and to deposit the same in an account jointly held by the Applicant and the Nairobi City County.

19. As I understand it, under **Article 23 (3) (b)** of the **Constitution**, one of the remedies available to a party claiming violation of constitutional rights is an injunction. In the context of the Constitution therefore, an injunction by its very nature is intended to restrain a respondent from either continuing actions that amount to a violation of a fundamental right and freedom or to restrain a threat thereto. Injunctions are also equitable remedies that are granted at the discretion of the Court. The principles for granting such injunctions were laid down in the celebrated case of **Giella vs Cassman Brown and**

Company LTD (1973) EA 358 where the Court held as follows:

***“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (E.A. Industries vs Trufoods (1972) EA 420.” (Emphasis added)***

20. Whereas those are principles generally applicable to civil matters, I have no hesitation in applying them to injunction applications under **Article 23(3)(b)** aforesaid but tailored to meet constitutional expectations on a case to case basis. Applying those principles to the Application before me, I note that this Court is being called upon to determine the question of the exercise of county Government functions by the Nairobi City County and in doing so, I appreciate the intention behind the introduction of a devolved system of Government in Kenya hence **Article 176** of the **Constitution** which stipulates that:

1. ***There shall be a county government for each county, consisting of a county assembly and a county executive.***
2. ***Every county government shall decentralise its functions and the provision of its services to the extent that it is efficient and practicable to do so.***

21. On the question of County Government funds, **Article 207 (1)** of the **Constitution** provides that:

***There shall be established a Revenue Fund for each county government, into which shall be paid all money raised or received by or on behalf of the county government, except money reasonably excluded by an Act of Parliament.***

22. Further, I appreciate that the role in regard to County finances vests with County Treasuries as established under **Section 103** of the **Public Finance Management Act, No 18 of 2012**. In that regard, **Section 104** thereof provides for the functions of County Treasuries in the following terms:

1. ***Subject to the Constitution, a County Treasury shall monitor, evaluate and oversee the management of public finances and economic affairs of the county government including—***
  - a. ***developing and implementing financial and economic policies in the county;***
  - b. ***preparing the annual budget for the county and co-ordinating the preparation of estimates of revenue and expenditure of the county government;***
  - c. ***co-ordinating the implementation of the budget of the county government;***
  - d. ***mobilising resources for funding the budgetary requirements of the county government and putting in place mechanisms to raise revenue and resources;***
  - e. ***managing the county government's public debt and other obligations and developing a framework of debt control for the county;***
  - f. ***consolidating the annual appropriation accounts and other financial statements of the county government in a format determined by the Accounting Standards Board;***
  - g. ***acting as custodian of the inventory of the county government's assets except where provided otherwise by other legislation or the Constitution;***
  - h. ***ensuring compliance with accounting standards prescribed and published by the Accounting Standards Board from time to time;***

- i. *ensuring proper management and control of, and accounting for the finances of the county government and its entities in order to promote efficient and effective use of the county's budgetary resources;*
- j. *maintaining proper accounts and other records in respect of the County Revenue Fund, the County Emergencies Fund and other public funds administered by the county government;*
- k. *monitoring the county government's entities to ensure compliance with this Act and effective management of their funds, efficiency and transparency and, in particular, proper accountability for the expenditure of those funds;*
  - *assisting county government entities in developing their capacity for efficient, effective and transparent financial management, upon request;*
- m. *providing the National Treasury with information which it may require to carry out its responsibilities under the Constitution and this Act;*
  - *issuing circulars with respect to financial matters relating to county government entities;*
  - *advising the county government entities, the County Executive Committee and the county assembly on financial matters;*
- p. *strengthening financial and fiscal relations between the national government and county governments in performing their functions;*
- q. *reporting regularly to the county assembly on the implementation of the annual county budget; and*
- r. *taking any other action to further the implementation of this Act in relation to the county.*

23. In a nutshell and from the foregoing, it is evident that the question as to how collection of revenue of funds is to be done are matters within the mandate of the Counties which mandate is exercised by the County Treasuries as can be deduced above. On that basis alone, I shall decline the invitation by the Applicant herein, to direct that the Nairobi City County Government should be restrained from collecting property rates, fees and other charges for business permits within Eastleigh area. Neither is there any basis for that County Government jointly with the Applicant to do so and to deposit such monies in an account jointly held by the Applicant and the said County Government. Granting the aforesaid order would in my view go against the spirit of the Constitution and the **Public Service Management Act**. No injunction should be issued in violation of the law and in that regard; no prima facie case has been made out by the Applicant.

24. Further to my finding above, whereas the Applicant's grievance is that the Nairobi City County has failed in its duties to provide a conducive trading environment such as the collection of garbage, unblocking of drainage system and control of traffic within the Eastleigh area among others, I note that the Nairobi City County took the initiative on 15<sup>th</sup> January, 2015, three days after the filing of the present Petition, in an attempt to address the Applicant's concerns. This can be seen from the attachments to the Respondent's Replying Affidavit which show the issues discussed among which are:

- i. Removal of hawkers from the streets of Eastleigh.
- ii. Collection of garbage that has blocked drainage systems.
- iii. Opening blocked service lanes.
- iv. Repairing existing street lights that are not working.
- v. Demolition of all encroachments to sewer lines and drainages.
- vi. Identification and reshuffling of staff that have been harassing residents.
- vii. Deploying of Traffic Marshalls.

25. I note further that it is uncontroverted that the Respondent prior to the inception of this Petition had embarked on formulating a strategic plan, 2015-2025, to address inter-alia the issues raised by the Applicant. In that context, to grant orders for the stoppage of the collection of property rates, fees and other charges imposed for business permits granted within Eastleigh area of Nairobi would not be appropriate.

26. I additionally must agree with the Respondent's contention that stopping the collection of the aforesaid monies by the Nairobi City County would jeopardise the budgetary allocations by the County Government and hamper service delivery among others. The Applicant's members would, like all other residents of Nairobi, suffer undue hardship and inconvenience in the circumstances. In the event, while any loss occasioned to the Applicants can be measured (they are involved in quantifiable business enterprises), the loss to the larger population of Nairobi City would be far more immense and on a balance of convenience, the scales of justice must tilt in favour of the Respondent.

### **Conclusion**

27. While i acknowledge that **Article 23 (3)** of the **Constitution** vests this Court with the discretionary powers to grant appropriate relief, I am not satisfied that in the present case the circumstances warrant the grant of the orders sought.

### **Disposition**

28. From my findings above, the Application dated 12<sup>th</sup> January, 2016 is hereby dismissed.

29. Let each Party bear its own costs and the Petition should be fixed for hearing and determination forthwith.

30. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF APRIL, 2016**

**ISAAC LENAOLA**

**JUDGE**

### **In the presence of:**

Muriuki – Court clerk

Mr. Owino for Petitioners

Mr. Aburao for Respondent

### **Order**

Ruling duly read.

**ISAAC LENAOLA**

**JUDGE**

### **Further Order**

Responses and Submissions to be filed within 30 days for directions on 23/5/2016.

**ISAAC LENAOLA**

**JUDGE**