



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW APPLICATION NO. 3 OF 2013**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE**

**JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI**

**AND**

**IN THE MATTER OF THE RATING ACT CHAPTER 267 OF THE LAWS OF KENYA**

**AND THE VALUATION OF RATING ACT CHAPTR 266 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE DECISION OF MUNICIPAL COUNCIL OF VOI TO INCREASE  
LAND RATES**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**EX PARTE VOI RESIDENTS ASSOCIATION**

**AND**

**MUNICIPAL COUNCIL OF VOI.....RESPONDENT**

**JUDGMENT**

**APPLICATION**

1. On the 14<sup>th</sup> of January 2013 upon a Chamber Summons application dated 24<sup>th</sup> December 2012, the applicant was granted leave to institute judicial review proceedings for an Order of Certiorari and to quash the decision of the Respondent to increase land rates vide the Gazette Notice No. 10969 dated 30<sup>th</sup> July 2012 in respect to all the rate-able owners of properties within the Respondent's jurisdiction. Consequently, a Notice of Motion dated the 15<sup>th</sup> day of January, 2014 and supported by the affidavit sworn by EMILY MBASHU on 24<sup>th</sup> December 2013 and a further affidavit dated 10<sup>th</sup> April 2013 was filed before the court.

**THE APPLICANT'S CASE**

2. The facts relied upon by the Ex Parte Applicant, as set out by the deponent of the supporting affidavits, the Chairlady of the applicant Association, were that the objectives of the association is to protect the interests of the residents of Voi and to ensure that services are delivered to the expectations of the residents; that vide the Gazette Notice No. 10969 dated the 30<sup>th</sup> July 2012, the Respondent increased land rates which were exorbitant and unsustainable to the rate-able land owners of Voi and that this increment had not been justified and the council did not offer services as the town did not have a main sewer and garbage collection; that the Respondent increased the rates without reference to owners of the rate-able properties as required under the Rating Act, Cap 267; that a notice issued by the Respondent failed to call for objections within twenty eight (28) days from the rate-able land owners; and that this omission by the Respondent and failure to update the Valuation Roll after five (5) years is in contravention of the provisions under the Rating Act. The applicant further contended that the Respondent was in serious breach of the Rules of Natural Justice.

### **RESPONSE**

3. In response to the application, BAKARI PHILE, Town Clerk of the Respondent Council swore a replying affidavit dated 22<sup>nd</sup> February 2013 and a further replying affidavit dated 19<sup>th</sup> April 2013. He deponed that the council had sometime in the year 2004, in exercise of its powers under Section 143 of the Local Government Act, Cap 265 (partly repealed) and in liaison with the Ministry of Lands requested the Ministry to assist it in coming up with the Rates of Valuation Roll whereof several and extensive meetings between the Ministry of Lands, Ministry of Local Government and Ministry of Finance were undertaken until it was finally agreed that the Ministry of Lands though the Commissioner of Lands do assist the Council in the preparation of the new Valuation Roll and for that purpose a valuer named SARAH WANYANDE from the Commissioner of Lands was appointed to prepare the new Valuation Roll. The deponent further said the Council subsequently held a full council meeting and passed the following resolutions:

- a. That the council in preparation of the valuation roll shall adopt “site value” form of rating in accordance with Section 4(1) (b) of the Rating Act;
- b. That the valuer in preparing the Roll need neither value nor include in any such Roll the value of the land or assessment for improvements rate as provided by Section 6 of the Rating Act; and
- c. That the time of valuation for Voi Municipal council valuation roll shall be 31<sup>st</sup> December, 2005.

4. The deponent explained that failure of the Council to update the valuation Roll after 5 years was occasioned by the lack of finances on the part of the Council to raise the fees required whereof a resolution by the council was passed for extension of the period for valuation and the same was subsequently approved by the Minister of Local government. He averred that the Council did gazette and put up a notice to all rate-able owners to raise objections to the new rates as required by law. He pointed out that the applicants were registered as a society 5 months after the notice to raise objections was raised. He deponed that had the applicants raised their objections in time then they would have been dealt with by the Valuation Court as provided for by law.

### **SUBMISSIONS**

5. The applicants filed their written submissions on 6<sup>th</sup> June 2014 and highlighted the following;

- i. On the issue of failure to update the Valuation Roll after 5 years and failure to send notices to every rate-able owner of the rate-able properties comprised in the Valuation roll as required by law, it was submitted that section 3 of the Valuation for Rating Act stipulates that, **“Every local authority shall from time to time, but at least once in every five years or such longer period as the Minister may approve, cause a valuation to be made of every rate-able property within the area of the local authority in respect of which a rate on the value of land is, or is to be imposed, and the values to be entered in a valuation roll.”**

A valuation roll was prepared in 1992 which expired in 2002 and extended to 2005. The subsequent roll was prepared in 2006 and gazetted on 3<sup>rd</sup> August 2012 and were supposed to take effect on 1<sup>st</sup> September 2012. It was submitted that the valuation roll and rates were illegal as it breached Section 3 of the Valuation for Rating Act for coming into effect **twenty years** after the expiration of the old Valuation Roll of 1992. As a result of this delay, the rates imposed on the new roll have risen by 500% from the old one. It was averred that such increment was exorbitant as the Respondent Council did not offer garbage collection, main sewer and exhauster services.

ii. It was further submitted that as stipulated in Section 9 of the Valuation for Rating Act no notice was sent to the rate-able owners after the new valuation roll came into force on 30<sup>th</sup> August 2012. A decision to increase the rates ought to have involved the Ex-parte applicant failure to do so went against the principles of natural justice.

iii. Due to the 500% increase of the rates, the Ex-parte applicant has no capacity to pay the same. Referring to ***Council of Civil Service Union versus Minister for Civil Service (1985) A.C 374*** where Lord Diplock identified the three heads for grounds upon which an administrative action can be brought under Judicial Review as illegality, irrationality and procedural impropriety, it was submitted that the decision to implement the valuation roll without consultation to the rate-able owners and proper notice by the Respondent was illegal, irrational and lacked proper procedure.

6. The Respondent Council in its written submissions stated that:

i. It published a public notice for inspection of the new draft valuation roll in the Daily Nation Newspaper on the 26<sup>th</sup> of April 2012 calling for any objections from the public and any rate-able owner. Having received no objection, the roll was gazetted vide notice no. 10969 of 30<sup>th</sup> July 2012, which is the notice being challenged by the Ex-parte applicant.

ii. The Ex-parte applicant had sufficient time to object before the new rates became operational. However, they were not a registered entity at the time, only registering on 15<sup>th</sup> November 2012. It was their submission that this suit was a way of frustrating the council in its effort to charge rates and achieve its objectives of providing good and quality services.

iii. This court lacked jurisdiction to hear this matter as Section 10 (1) (b) of the Valuation for Rating Act provided that any **objections** should be dealt by the valuation court. Only after the objections have been heard by the valuation court do the applicants have a right of appeal to the High Court. They submitted that this suit was an abuse of the court process.

iv. The suit had been overtaken by events, as local authorities had now been replaced by the County Government. The County Government will develop its own legislation on how to charge rates to any rate-able property.

### **ISSUES TO BE DETERMINED**

7. The questions to be determined are –

a. whether there was adequate consultation with owners of rate-able property as a mode of giving effect to the right to be heard and to the fair administration action for the rate-payers as persons affected by the decision and the public at large in accordance with the principle of participation by the people under Article 10 of the Constitution;

b. whether the court has jurisdiction to deal with the matter; and

c. Whether the judicial review proceedings were overtaken by the event of the establishment of a county government under the new Constitution 2010, in place of the respondent municipal council.

## **DETERMINATION**

### ***The law***

8. As regards breach of the statutory provisions for 5-year review of the valuation roll and rates the power under the Valuation for Rating Act is for valuation of rate-able property “***from time to time, but at least once in every five years or such longer period as the Minister may approve***”. As there is power for the Minister to extend the intervening period, the question becomes whether there is reasonable explanation for the default in making the valuation roll within the prescribed period of ten years, and, therefore, for extension thereof. The explanation that failure was occasioned by financial constraints on the part of the council prompting it to seek extension of time from the Minister of Local Government was reasonable.

9. The court has jurisdiction in the exercise of its supervisory jurisdiction over administrative tribunals. The proceedings before the court are not objection proceedings following the publication of valuation rates but rather proceedings for relief from breach of the rules of natural justice and fair administrative action under Article 47 of the Constitution. The court has clear jurisdiction in the matter. Article 165 (6) of the Constitution provides as follows:

***“165 (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”***

10. The suit is not overtaken by events because notwithstanding the coming into operation of county governments the rates fixed by the municipal council, if not challenged, would be remain payable as arrears of rates recoverable by the new County Government under sections 15-19 of the Rating Act, cap.267.

11. It would be prejudicial to rate-able owners of property to have rates established without compliance with the relevant statutes and in breach of rules of natural justice and fair administrative action levied upon their property for payment and recovery in default. Sections 9 and 10 of the Valuation for Rating Act, cap. 266, so far as material, provide for the process of consultation and participation of the people, as follows:

***“9. (1) When a draft valuation roll or draft supplementary valuation roll has been completed, the valuer shall sign the roll and insert therein the date of completion thereof, and shall transmit the roll to the town clerk.***

***(2) As soon as may be after a draft valuation roll or draft supplementary valuation roll has been transmitted to him by the valuer, the town clerk shall lay the roll before a meeting of the local authority, and the roll shall thereafter be available at the office of the local authority for public inspection, and any person may, during ordinary business hours, inspect it and take copies or extracts from it.***

***(3) The town clerk shall publish notice in respect of every draft valuation roll and draft supplementary valuation roll that it has been so laid and may be inspected, and such notice shall state the manner in which and the latest date by which objections to the same may be made.***

***(4) Every local authority shall, within twenty-one days after the laying before a meeting of the local authority of a draft valuation roll or draft supplementary valuation roll. send to every rateable owner of a rateable property comprised in the roll a notice of the valuation thereof inserted in the roll, whether or not the new valuation makes any change.***

***10. (1) Any person (including the local authority or any person generally or specially authorized in that behalf by the local authority) who is aggrieved—***

***(a) by the inclusion of any rateable property in, or by the omission of any rateable property***

from, any draft valuation roll or draft supplementary valuation roll: or

***(b) by any value ascribed in any draft valuation roll or draft supplementary valuation roll to any rateable property, or by any other statement made or omitted to be made in the same with respect to any rateable property, may lodge an objection with the town clerk at any time before the expiration of twenty-eight days from the date of publication of the notice referred to in section 9(3).***

### **On the facts**

12. On the merits of the case, the Newspaper advertisement of 26<sup>th</sup> April 2012 in **The Daily Nation** attached to the replying affidavit as 'BSP – 3(a)' expressed to be given pursuant to section 9 (1), 9(2) and 9(3) and 10 (1) of the Valuation for Rating Act published a notice to the public and all rate-able property owners for inspection of the draft valuation roll and calling for objections from the public or any rate-able property owner actually gave 28 days for objections to be lodged with the Town Clerk.

13. The Certificate of Registration of the applicant, **Voi Residents Association**, indicates that the association was registered on 15<sup>th</sup> November 2012. Its members could, however, as individual rate payers or members of the public, have lodged objections within the 28 day period after the 26<sup>th</sup> April 2012 before the Valuation Rates for 2012 dated 30<sup>th</sup> July 2012 was gazetted on 3<sup>rd</sup> August 2012.

14. It would appear to me that the people participation principle of the new Constitution requires broader consultation in terms of persons to be consulted beyond consultation with just the rate-able owners of rate-able property and the inclusion of the Public by the Newspaper advertisement of 26<sup>th</sup> April 2012 meets the need for such broad-based consultation, and it grants opportunity for '**any person**' in the wording of section 10 (1) to lodge an objection to the draft valuation roll. The public notice in **The Daily Nation** of 26<sup>th</sup> April 2012 was in the following terms:

#### **"VALUATION FOR RATING ACT CAP. 266**

#### **DRAFT VALUATION ROLL – 2006**

*Pursuant to provisions of Section 9(1), 9 (2), 9(3) and 10 (1) of Valuation for Rating Act, Notice is hereby given to the Public and all rate able property owners that:*

*The draft valuation Roll of 2006 was completed and laid before Full Council in accordance with Valuation for Rating Act cap. 266. The Draft Valuation roll is available for public inspection at Municipal Council Offices during ordinary business hours i.e. 8.00 a.m. to 4.30 p.m. from Monday to Friday.*

*Interested parties can take copies and or extracts at their own cost.*

*Any person aggrieved:*

*a. By the inclusion of any rateable property or by the omission of any rateable property from, a ny draft valuation roll; or*

*b. By any value ascribed in any draft valuation roll to any rateable property, or by any other statement made or omitted to be made in the same with respect to any rateable property, may lodge an objection with the Town Clerk at any time before the expiration of 28 (twenty eight) days from the date of the publication.*

*Objection against an entry should be made by dully filing an objection form obtainable from the cash office at Ksh.1000/- (non refundable)*

*If on the expiration of the period of 28 days no objections shall have been received, the Town Clerk shall endorse upon the draft valuation and sign a certificate to that effect.*

**B.S. PHILE**

**TOWN CLERK**

**MUNICIPAL COUNCIL OF VOI**

15. The meeting of the respondents with the applicants on 10<sup>th</sup> November 2012 after the valuation roll had become operational does not qualify as consultation, although the further replying affidavit of 19<sup>th</sup> April 2013 offers this as a forum of consultation, saying:

***“4. That the [ex parte applicants] herein were adequately involved in the preparation of the Valuation Roll through advertisement as provided under the Rating Act whereof [they] failed to raise objections. Further that the applicants did engage the respondents in a meeting after the valuation Roll was operational and on the 10<sup>th</sup> November 2012 where the issue of the rates was discussed at length and their concerns taken into account by the Respondent and it was unanimously agreed that the Respondent was to write to the Ministry for Local Government for further advise a proposal that the respondent is still following up on. I annex herewith and mark as ‘BSP- 1(a) and (b) a copy of the Minutes between the Applicant s and the Respondents herein and the Certificate of Registration of the Applicants.” (sic)***

16. For consultation and people participation to have any meaningful effect it must be done prior and not subsequent to the taking of a decision or doing (or refraining from doing) of an action for which consultation and people participation are necessary. In this case, however, the applicant’s individual members were given an opportunity to be heard under the statutory scheme of sections 9 and 10 of the Valuation for Rating Act.

## **CONCLUSION**

17. The court considers that as the Minister responsible has power to extend the time for the review of valuation roll and a reasonable explanation was given based on lack of financial provision required for the valuation, there is no merit in the complaint that the respondent breached statutory duty to undertake a valuation every 10 years. Moreover, I am not convinced that a valuation roll developed outside the stipulated period may be quashed merely for the reason that it was carried out after the lapse of the prescribed 10 years or extension thereof.

18. The respondent had faithfully implemented the provisions of the Valuation for Rating Act in its provision as to publication of the notice inviting objections to the Draft valuation roll. For its unregistered status the association could not have lodged objections in its name but its individual members were at liberty as members of the public and rate payers to file objections. Having failed to do so, the respondent was within its statutory powers to implement the new valuation roll.

19. The contention in the Statement that the respondent did not send notices to every rate-able owner of rate-able property comprised in the valuation roll as required by law is unmeritorious because the newspaper advertisement of 26<sup>th</sup> April 2012 did invite both the public and owners of rate-able property to inspect the valuation roll and to file objections if aggrieved thereby within 28 days as prescribed under the Valuation for Rating Act.

## **ORDERS**

20. Accordingly, for the reasons set out above, the ex parte applicant’s Notice of Motion dated 15<sup>th</sup> January 2013 is dismissed. In view of the public nature of the proceedings, there shall be no order as to costs.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 24<sup>TH</sup> DAY OF JUNE, 2016.**

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**JUDGE**

**In the presence of: -**

Mrs Kariuki holding brief for Mr Khatib for the Ex Parte applicant

No appearance for the Respondent

Mr Silas Kaunda- Court Assistant.