



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW

MISC. APPLICATION NO. 335 OF 2015

IN THE MATTER OF THE COUNTY GOVERNMENT ACT NO 17 OF 2012

GANAKI MULTIPURPOSE CO-OPERATIVE

SOCIETY LTD.....APPLICANT

-VERSUS-

THE HONOURABLE COUNTY SECRETARY

OF KIAMBU COUNTY.....1ST RESPONDENT

THE ADMINISTRATOR,

KIAMBAA SUB-COUNTY, KIAMBU COUNTY.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 25th October, 2015, the ex parte applicant herein, **Ganaki Multipurpose Co-Operative Society Ltd**, seeks the following orders:

1. That an order of certiorari do issue to remove to this honourable court and be quashed the 1st and 2nd respondents order dated 24th August 2015 and 7th September 2015 requiring the applicant and its vehicles to pay Kshs 2,400/= per *matatu*/bus.
2. That an order of certiorari do issue to remove to this honourable court to be quashed the 1st and 2nd respondents notice to the applicant dated 7th September 2015 levying of Kshs 2,400 per *matatu*/bus upon applicant and its vehicles with effect from 10th October 2015.
3. That an order of prohibition do issue to prohibit the respondents or any other party from harassing, frustrating and unnecessarily impounding the applicant's fleet of vehicles.
4. That an order of mandamus do issue to compel 1st and 2nd respondents to direct them to

stop their officers from harassing, frustrating, impounding and enforcing their levy as contained in their letters dated 24th August and 7th September 2015 against the applicant.

5. That the cost of this application be provided for.

Applicant's Case

2. According to the applicant, it operates along Kihara, Gachie Markets and Nairobi with all the vehicles under Ganaki Multipurpose Sacco Ltd, which are over one hundred (100) in number. In 2014 particularly in the month of February disputes with the 1st and 2nd respondent came to a head because of imposition of parking levies on non-existent bus parks and bays upon the applicant's fleet of vehicles. Thereafter negotiations and dialogue were initiated by the applicant to resolve the issue with the 1st and 2nd respondent but the latter were evasive and outrightly arrogant and arbitrarily and unprocedurally imposed their will.

3. According to the applicant, due to renegeing and unwillingness to resolve this issue within the confines of law particularly participatory role of all stakeholders which include the applicant, the 1st and 2nd respondents went ahead to issue notices to the effect that parking levies would be effected on any of the applicant's vehicles with effect from 10th October 2015, with dire consequences in case of default or non-compliance.

4. According to the applicant, the levies are arbitrary and unjustified as there are no bus parks or parking bays as required by law and that the 1st and 2nd respondent is intent on harassing and frustrating the applicant's business of commuter transport within Kiambu County.

5. The applicant, in response to the respondents' case denied that there are parking stages at Gachie Market and River Rori garage but averred that these are only earmarked places for the creation of parking stages and bays not yet constructed. It was therefore contended that the respondents were misleading the court as there are no parking bays or stages as alleged and there are standards set all over the county for parking bays. To the applicant, it was simply affirming that it is illegal to be issued with notices to pay fees for non-existent facilities a fact that can be attested on the ground.

6. The applicant therefore averred that from the minutes exhibited the respondents' intention was to infringe on the applicant's constitutional right as stakeholders in paying for non-existent facilities and services which is illegal and unconstitutional.

7. The applicant stressed that it was not contesting the legality of the *Kiambu Finance Act 2014* but the notices emanating from it since in its view, notices cannot issue demanding levies for non-existent facilities with the reason that the respondents are collecting revenues. It was contended that it is only the Central Government that has the ultimate powers to introduce new taxes and that even then, proper constitutional mechanism must be followed which was not followed in the instant case. To the applicant, the respondents cannot scuttle public participation involving it and then proceed to impose levies on non-existent facilities.

8. The applicant therefore contended that the orders sought herein were merited as the respondents' action amounted to an excess of the functions of the respondent as an administrative body and was also unconstitutional as it infringed on the applicant's rights of public participation a process the respondent deliberately scuttled.

Respondents' Case

9. In opposing the application, the Respondents averred that it was not in dispute that the applicant's members do indeed operate their vehicles within the jurisdiction of the County Government of Kiambu (hereinafter referred to as "the County") and that the County through the sub county administrator Kiambaa had been involved in discussion with the ex parte applicants.

10. According to the respondents, based on the ex parte applicants minutes, MIN-01/01/2015 of committee meeting held on 24th September 2015, the County had created two parking stages, including one at Gachie Market and the other at River Rori Garage. The applicant was therefore accused of misguiding the court by stating that the County had failed to create parking bays and parking spaces for use by the ex parte applicant.

11. The respondents averred that despite the creation of the said parking stages the ex parte applicant and its members had refused/neglected and or failed to pay the requisite parking fees on the grounds that the parking stages were not to their desired standard. As a result of these actions the 2nd respondent and his officers wrote to the ex parte applicant informing them of the charges for using the county parking stages and the consequences of non-payment of the parking fees. The said notices, according to the respondents were grounded on section 6 of the **Kiambu County Finance Act** of 2014 and the fourth schedule to the same that prescribes parking fees and penalties.

12. The respondents disclosed that there was in existence Petition 603 of 2014 between **Robert Gakuru & Jomofoster Welfare Association vs. the County Government of Kiambu**, pending before this Court in which **Kiambu Finance Act** was sought to be declared unconstitutional. It was therefore the respondent's position that the said Act was in force as it had not been set aside or declared a nullity.

13. According to the respondents, the said Act, to which the County Government of Kiambu relied on to charge parking fees, drew its authority to set charges for parking from section 5(c) of the Fourth Schedule of the Constitution of Kenya and asserted that compliance with the law is not optional and an individual or an organization cannot set conditions for complying with the law. In the respondent's view, the notices complained of by the applicant were no more than a reproduction of the Fourth Schedule of the **Kiambu Finance Act** and not new laws that were created at the whims of a County Government Official. They therefore were of the view that a reproduction of the law does not require public participation as contended by the applicant as it merely seeks to inform the parties of the law that exists and which a party is deemed to be aware of at the point the law is gazette.

14. It was the respondents' position that the applicant was well aware that the parking fees are a form of revenue which would be used to improve the standards of services offered by the County Government, but yet they continued to refuse and or neglected to pay their fees, which act hindered the County Government from operating at maximum efficiency.

15. To the respondents, judicial review orders are meant to curb excess in administrative functions of public officers and bodies. Further, the **Kiambu Finance Act**, from which the notices were derived, was enacted by following the laid down procedures provided in the **County Government Act** and other statutory provisions hence the issuance of the said notice was in no way arbitrary, unprocedural neither was it an illegality as alluded to by the ex parte applicant.

16. It was the respondents' contention that the instant application does not meet the threshold required to have the court exercise its discretion to grant the judicial review orders sought.

Determinations

17. I have considered the instant application, the affidavits filed in support of and in opposition thereto and the submissions on record.

18. Although the applicant denied that it was not challenging the **Kiambu County Finance Act, 2014**, it did not escape this Court's notice that in its affidavit, the applicant introduced the issue of the failure by the Respondents to comply with the principle of public participation. However, as rightly contended by the respondents, public participation would only be an issue at the stage prior to the enactment of an Act and once the same is passed with its schedules, it cannot be successfully argued that the notices whose effect are to implement the provisions of the Act and its schedules ought to have been subjected to public participation as well.

19. With respect to *Kiambu County Finance Act, 2014*, this Court on 23rd day of May 2016 in Petition 603 of 2014 between **Robert Gakuru & Jomofoster Welfare Association vs. the County Government of Kiambu** which was consolidated with similar petitions, dismissed the challenges to the said Act.

20. The petitioner however contended that the Respondents were imposing parking charges in respect of parking bays which were non-existent. However this was one of the grounds which was the subject of the above mentioned petition as consolidated and this Court expressed itself *inter alia* as follows:

“Article 209(3) and (4) of the Constitution empowers a County to impose taxes, rates and charges specified thereunder. These are property rates, entertainment rates and any other tax that it is authorised to impose by an Act of Parliament. The County Governments are also authorised to impose charges for the services they provide. Therefore if the County Government maintains roads within its area, it may well be entitled to impose charges for the maintenance thereof. To that extent it is not necessarily unlawful for County Government of Kiambu to impose or levy parking fees, business permits, single business permits and/or business or trade license fees. As to whether the County Government of Kiambu offers services in respect of which the said charges are levied cannot be determined based on the material placed before me.”

21. In this application the applicant asserted that it was illegal to be issued with notices to pay fees for non-existent facilities a fact that can be attested on the ground. However, save in cases where it is alleged that the decision being challenged is irrational or contrary to the doctrine of proportionality, judicial review is mainly concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**. In other words, going by the applicant’s own case, the matters which have been raised in these proceedings are not matters which properly belong to the realm of judicial review but ought to be canvassed before civil courts which are better placed to take evidence and make its decision where there are conflicting averments of facts as is the case in this application.

22. That the County has the power to impose parking fees and or charges was appreciated by this Court in **Petition No. 532 of 2013 Consolidated with Petition Nos. 12 of 2014, 35, 36 of 2014, 42 of 2014, & 72 of 2014 and Judicial Review Miscellaneous Application No. 61 of 2014**, where it expressed itself as hereunder:

“It is therefore clear that the County Assembly may not impose property rates and entertainment taxes unless otherwise authorised by an Act of Parliament and this position is emphasised by the provisions of Article 210(1) of the Constitution which expressly provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. County Governments are however empowered to impose charges on services they provide. Such service would include parking and market fees... Further the levying of such taxes ought not to be such as to prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour. Tariffs and pricing of services must however comply with the provisions of section 120 of the *County Government Act*. The Court however is not entitled to interfere with the Tariffs and pricing of services simply on the ground that the Court would have decided otherwise since the Court ought not to substitute its opinion for that of the County Government. As long as the provisions of the Constitution and the relevant legal provisions are complied with and the applicable principles are taken into account, the Court ought not to interfere.”

23. The power of the Respondent to levy parking fees clearly appears in section 6(1) of the Act which provides that:

“A person who uses County parking shall be charged a fee specified in Part 1 of the Fourth Schedule.”

24. As long as that section remains, this Court cannot issue orders whose effect would be to render the said provision inoperative or a dead letter of the law. I would adopt the reasoning of **Lenaola J in Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others vs. County of Nairobi Government & 3 Others Petition No. 486 of 2013** where he stated that:-

“I must also state that this Court cannot direct the 1st Respondent on how to exercise its duty of levying parking fees. The 1st Respondent has the option of legislating on the calculation of parking fees and in its wisdom it has done that taking into consideration public views, its policies as well as the revenue it ought to raise.”

25. I further associate myself with the decision of **Githua, J in Jipe Kindegarden Limited vs. City Council of Nairobi [2012] eKLR** in which the learned Judge held that:

“The law is that the Court cannot issue orders of prohibition to prevent public bodies like the Respondent or inferior tribunals from performing their statutory duties and functions when the same are executed in accordance with the law. The supervisory jurisdiction of the High Court can only be exercised where it is proved that public entities or inferior tribunals have either abused their powers in the exercise of their statutory duties, have acted without or in excess of their jurisdiction or have breached the rules of natural justice *inter alia* occasioning legal injury to the person complaining of the aforesaid acts.”

26. In this case, to grant the orders sought herein would amount to nullifying the provisions of the **Kiambu County Finance Act, 2014** when there is no express prayer seeking such orders in these proceedings. Having considered the issues raised before me as well as the material upon which the said issues are based, I find that this application is unmerited.

Order

27. Consequently, the Notice of Motion dated 25th October, 2015 fails and is dismissed with costs to the Respondents.

28. Orders accordingly.

Dated at Nairobi this 29th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Walubengo for Mr Ngare for the applicant

Mr Ranja for the 1st and 2nd Respondent

Cc Mwangi