



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CASE NO. 479 OF 2014

IN THE MATTER OF AN APPLICATION BY BUMASUTRA TRANSPORTERS WELFARE SOCIETY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 AND THE KIAMBU COUNTY FINANCE ACT 2014

AND

IN THE MATTER OF BUMASUTRA TRANSPORTERS WELFARE SOCIETY

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

COUNTY GOVERNMENT OF KIAMBU..... RESPONDENT

EX-PARTE BUMASUTRA TRANSPORTERS WELFARE SOCIETY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 15th January, 2014, the *ex parte* applicant herein, **Bumasutra Transporters Welfare Society** (hereinafter referred to as “the Society”), seeks the following orders:

1. **An Order of *certiorari* be and is hereby issued to remove into this Court and quash the entire decision by the Respondent communicated by the notice dated 17th of December 2014.**
2. **An Order of Prohibition be and is hereby issued prohibiting the Respondent from prohibiting the implementation of the decision communicated by the notice dated the 17th of December 2014**
3. **Costs of this application be paid by the Respondent.**

Applicant’s Case

2. The application was supported by affidavit sworn by **Fredrick Muhungura, Paul Njung'e Ngige** and **John Mugwe Mwaura**, as officials of the ex parte applicant on 29th December, 2014 and 5th January, 2015.
3. According to the deponents, the Society, which comprises over 190 members who are all businessmen dealing with transportation of quarry products such as stones, ballast, sand, quarry chips and murram, was registered in 2013 with its registered office in Limuru, Kiambu County.
4. According to them they have over the years paid charges to their respective county governments for the transportation of their said products from quarries situate in various counties. However on 18th December, 2014 their truck drivers were served by a notice dated 17th December, 2014 signed by the Lari Sub County Administrator communicating the Respondent's decision to start levying charges in form of transportation infrastructure maintenance fees on all transporters and dealers of quarry products. To them this decision was illegal and contrary to the statute as it was ultra vires **Kiambu County Finance Act, 2014** (hereinafter referred to as "the Act"), the Act donating the power for collection of revenue and the applicable levies. It was further contended that the decision was unreasonable and irrational, was arbitrary in as much as the levies were to be imposed on all transporters irrespective of whether they were transporting their products from the Kiambu County or through the County.
5. It was disclosed that the Respondent effected service of the notice dated 17th of December 2014 by serving the same on the applicant's registered office in Limuru and by giving it to our track/ lorry drivers while on transit and that subsequent to the notice 17th of December 2014, the Respondent proceeded to set up a levy centre on Mai-Mahiu road, Kiambu County, which is a few kilometres from the boundary between the County Government of Nakuru and the County Government of Kiambu and on the 2nd of January 2015, the Respondent implemented its decision by charging infrastructure maintenance fees on all transporters and dealers of quarry products, red soil, manure, carbon dioxide and diatomite including the applicants on the grounds that the applicants were transporters of quarry products yet on the material date they were transporting quarry products from the County Government of Nakuru, after paying the requisite fees. The said decision was implemented under threat of dire consequences including criminal and civil proceedings in default of compliance.
6. According to the deponent, the implementation of the Respondent's decision was done regardless of the fact the Act clearly stipulates that the infrastructure maintenance fees is only applicable to those persons transporting quarry products from the County Government of Kiambu or through the County Government of Kiambu and not to those person transporting quarry products into the County Government of Kiambu from other areas.
7. To them, the applicant as a society is licensed by County Government of Kiambu to operate its business within the County Government of Kiambu and thus by virtue of the provision of the Act it is exempt from paying infrastructure maintenance fees.
8. According to the applicant, it stood to suffer irreparable loss as it was paying to the county government over Kenya Shillings One Million per day (1,000,000/=) per day yet the Applicant does not operate a quarry within the County or remove any products from a quarry within the county which is against the rights of protection against unfair taxation processes as enshrined by the Constitution. Further and in addition, the Respondent the Respondent was yet to pass any subsidiary legislation to give the Act the full effect.

Respondent's Case

9. In response to the petition, the Respondent filed a replying affidavit sworn by **John Gicaci**, its Chief Officer in the department responsible for finance and planning.

10. According to him, Kiambu County enacts the **Finance Act** in every financial year to provide the legal and statutory basis of levying of charges and fees for services which the county provides to its residents and it is necessary to enact a legal framework to comply with the provisions of Article 210(1) of the Constitution which provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation.

11. To him, the infrastructure maintenance fee on the transportation of quarry products, red soil or manure is an express stipulation of Section 14 of the Act and that the above fee applies to all transporters of such products provided that they ferry their cargo through any territory of Kiambu County with the rates payable being clearly specified in part 1 of the Ninth Schedule of the Act.

12. It was therefore his view that the impugned notice dated 17th December 2014 merely replicated the rates already stipulated by the Ninth Schedule to the Act and did not extend the scope of Section 14 and part 1 of the Ninth Schedule to the Act, hence was not *intra vires* (sic) the provisions of the Act. According to him, the Respondent was entitled to commence collection of the infrastructure maintenance fees on 25th November, 2014 when the Act came into operation thereby rendering the impugned notice mere courtesy by the Respondent to transporters and dealers of quarry products. He contended that contrary to the unfounded allegations of the Petitioner, the Notice was not made in a manner to frustrate but instead to faithfully implement the Act and that the legal basis for collection of infrastructure maintenance fees is Section 14 and part 1 of the Ninth Schedule to the Act, which provisions have been strictly captured by the impugned Notice. To the respondent, the Petitioners were, therefore, indirectly challenging Section 14 Part 1 of the Ninth Schedule to the Act through this judicial review process.

13. He contended that a nullification of the impugned notice will be tantamount to an indirect judicial invalidation of the relevant provisions of the Act, since the notice merely communicates provisions that already exist in the Act, which provisions could have been implemented even without issuance of the notice, there is no decision to warrant a judicial review inquiry. He asserted that the notice of impending enforcement of existing and operative provisions of law is not an actual determination that should be challenged in the manner herein.

14. It was the respondent's position that contrary to the argument, the collection of infrastructure maintenance fees is not dependent on the enactment of any subsidiary legislation to give **Kiambu County Finance Act, 2014** the "full effect" considering that the rates payable are already prescribed by the Ninth Schedule. Further, the Constitution of Kenya does not expressly forbid double taxation across county boundaries but instead requires counties to exercise their revenue raising powers in a rational manner not to jeopardize cross-border economic activity hence the rates charged by both the County Governments of Nakuru and Kiambu collectively have not and will not hinder the trade quarry products across their boundaries. It was the respondent's case that it is unreasonable to require the Respondent to avoid levying infrastructure maintenance fees on the grounds that a neighbouring county has already done so since the fees collected by the County of Nakuru from the Respondents are for maintenance of infrastructure in Nakuru and those collected by the Respondent are for maintenance of infrastructure in Kiambu County. In any case there is no law or agreement between Counties stipulating that infrastructure maintenance fees can only be levied by the Counties where the quarry is located.

15. According to the respondent the Applicant overstated the amount of money it was currently paying to the Respondent as infrastructure maintenance fees for product imported into Kiambu and the issuance of a business permit to the Applicant does not preclude it from payment of infrastructure maintenance fees or any other charges incidental to operation of its business in Kiambu County. The respondent, it was contended is not under an obligation to grant every member of the public personal hearing before enforcing the provisions of a law that has already been subjected to extensive public participation and that requiring every member of the public who might be affected by enforcement of a single provision an already gazette law be given a hearing will render public administration impossible.

16. Therefore the respondent asserted that the issuance of the notice was neither arbitrary nor improper. Nor was it unreasonableness or irrational since the intent of issuing the notice was to ensure payment of statutory dues required to keep roads and other necessary infrastructure in good condition for the benefit of the Applicant. To the respondent, the fees charged by the Respondent were reasonable in themselves and in regard to the huge profits generated by the Applicant in its business. Further, the fees were a bargain considering that the Applicant's trucks cause most of the damage to roads within its areas of operation in Kiambu. The notice was issued in good faith and was not aimed at frustrating the Applicant as alleged as it was directed at all transporters and dealers of quarry products and not the Applicant specifically. In addition, the proper procedure for issuance of such notices was followed by the Respondent and it was improper for the Applicant to claim otherwise without tendering any concrete evidence to that effect.

17. It was contended that the Applicant did not have a legitimate expectation that they would transport quarry products into Kiambu County without paying the requisite fees for the maintenance of infrastructure used and in any case the notice was within the Applicant's legitimate expectation as it clearly enforced provision of the Act, a legislation whose operation was in the Applicant's knowledge.

18. On consultation, it was contended that considering that the Applicant was just registered in 2013 and acquired a business permit on 18th September, 2014, it was implausible that it had consulted with the Respondent "over the years". In any case the Respondent was not required to consult the members of the Applicant before issuance of the notice as the same was merely in strict enforcement of the provisions of an Act that had undergone the widest public participation possible. In any event, to achieve consensus and ensure most of the residents were consulted, the County Government appointed a Task Force that coordinated the collection and collation of views from residents of the County and consultations with members of the public were done at the sub-county level. Having failed to participate in these consultations, it was improper and unfair for the Applicant to now challenge what amounts to implementation of the promulgated Act and it was unreasonable for the Applicant to expect its members to be personally consulted every time the Respondent enforces existing provisions of existing law as the issuance of the notice in furtherance of the Act was done in a manner that was expeditious, efficient, lawful, reasonable and procedurally fair as required by Article 47 of the Constitution hence there was no right or fundamental freedom of the Applicant that was or was likely to be adversely affected by the issuance of the notice to necessitate the giving by the Respondent of written reasons for the same.

19. It was further noted that though the *ex parte* Applicant was suing through its officials **Fredrick Muhungura, Paul Njung'e Ngige** and John **Mugwe Mwaure** they failed to attach an authority to plead, act and appear on its behalf hence it was impossible for the Court to determine whether the various officials listed had actually been authorized to bring this suit on behalf of Bumasure Transporters Welfare Society as the applicant did not attach a resolution to institute these legal proceedings.

20. The Respondent contended that it would suffer great prejudice if this court suspended the collection of infrastructure maintenance fees as the Applicant's drivers would damage roads and other facilities without paying the requisite fees for their upkeep and that the continued collection of infrastructure maintenance fees from the Applicant was in public interest as the Applicant was getting value for its money in terms of well-maintained roads and other facilities necessary for its business.

21. The respondent therefore averred that the Applicant had not proved arbitrariness, unreasonableness, procedural unfairness, illegality or breach of principles of natural justice to justify the issuance of the judicial review orders sought and as there was no merit in the application filed herein, the same should be dismissed with costs.

Determination

22. I have considered the application, the affidavit in support of and in opposition to the

application as well as the submissions made by the parties.

23. The issue for determination before the Court is not the legality of the *Kiambu County Finance Act, 2014* but whether the decision to levy infrastructure and maintenance fee on the applicant was in compliance with section 14(1) of the said Act.

24. Section 14(1) of the said Act provides as follows:

A person who operates a quarry or transports quarry products, red soil, or manure from or through the County shall pay a fee specified in Part I of the Ninth Schedule for the maintenance of infrastructure.

25. It is therefore clear that a person is only obliged to pay maintenance of infrastructure fee where (1) he/she operates a quarry in the County; or (2) transports quarry products, red soil, or manure from the County; or (3) transports quarry products, red soil or manure through the County. It is therefore clear that the provision excludes persons who transport quarry products, red soil, or manure ***into*** the County.

26. The applicant contends that on the 2nd of January 2015, the Respondent implemented its decision by charging infrastructure maintenance fees on all transporters and dealers of quarry products, red soil, manure, carbon dioxide and diatomite including the applicants on the grounds that the applicants were transporters of quarry products yet on the material date they were transporting quarry products from the County Government of Nakuru, after paying the requisite fees. The applicant was however not clear whether it was passing through Kiambu County and was transporting the said products into the county. If it was passing through the County then under the aforesaid provision, it was liable to pay the said levies. However, if it was transporting the said products into the county to levy the said charges against it would have been *ultra vires* section 14(1) of the said Act.

27. As this Court has held time and again where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, 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 its actions; and it must not misdirect itself in fact or law. Most importantly it must operate within the law and exercise only those powers which are donated to it by the law or the legal instrument creating it. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

28. In my view, the failure to adhere and observe the express provisions of a statute or legislative Instrument by which an authority exercises jurisdiction to make a decision would render the decision illegal and illegality is one of the grounds upon which the Court is entitled to quash a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.**

29. I am however not convinced that it was necessary to pass another subsidiary legislation to give the Act the full effect before levying the charges specified in Part I of the Ninth Schedule. Similarly, in this decision I have refrained from making a decision on the legality or constitutionality of the *Kiambu County Finance Act, 2014* as the orders sought in the instant application are not directed at the Act itself but to the notice dated 17th December, 2014.

Order

30. In the premises whereas I decline to quash the entire decision by the Respondent communicated by the notice dated 17th of December 2014, I however prohibit the Respondent from levying

maintenance of infrastructure fees on transportation of quarry products, red soil, or manure into Kiambu County in purported exercise of the powers conferred under section 14(1) of the ***Kiambu County Finance Act, 2014***.

31. As the applicant was not specific on whether the said products were being transported into the County or through the County, there will be no order as to costs.

Dated at Nairobi this day 22nd May, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kinyanjui for the Applicant

Mr Ranja for Mr Wanyama for the Respondent

Cc Patricia