REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. APP. NO.355 OF 2014

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE KIAMBU COUNTY FINANCE ACT OF 2013

AND

IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

AND

KIAMBU COUNTY GOVERNMENT..... 1ST RESPONDENT

KIAMBU COUNTY GOVERNOR.....2ND RESPONDENT

KIAMBU COUNTY EXECUTIVE.....3RD RESPONDENT

KIAMBU COUNTY SECRETARY.....4TH RESPONDENT

AND

KIAMBU LIQUOR WELFARE GROUP.....INTERESTED PARTY

***EX-PARTE*: 1.DR. SAMUEL THINGURI WARUATHE**

2. BEATRICE WAIRIMI KAMAMIA

3. RICHARD NJOGU NDUNGE

(BEING OFFICIALS OF THE KENYA NATIONAL CHAMBER COMMERCE & INDUSTRY KIAMBU COUNTY)

JUDGEMENT

Introduction

1. By a Motion on Notice dated 19th September, 2014, the ex parte applicant herein, **Kenya National Chamber Commerce & Industry Kiambu County**, seeks the following orders:

> **1. That an order of certiorari does issue to the quash the decision and/or conduct of the Respondents whether by themselves, their agents, enforcement officers, employees, Police Officers or whosoever in harassing, arresting, intimidating, threatening and impounding as well as confiscating goods or property belonging to the Kiambu County traders, businessmen, industrialists, motorists and indeed the people of Kiambu at large in the pretext of enforcing the defunct/nullified Kiambu County Finance Act 2013 or otherwise imposing licences and business permits or collecting fees, charges, rents rates and/or levies without a proper legislative framework.**
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> **2. That an order of Prohibition does issue to prohibit the Respondents whether acting by themselves, their agents, enforcement officers, employees, Police Officer or whosoever from harassing, arresting, intimidating, threatening and impounding as well as confiscating goods or property belonging to the Kiambu County traders, businessmen, industrialists, motorists and indeed the people of Kiambu at large in the pretext of enforcing the defunct/nullified Kiambu County Finance Act 2013 and/or otherwise from imposing licences and business permits or collecting fees, charges, rates, rents and/or levies until a proper legislative framework to govern the collection of fees, charges, rents, rates or levies as well as licences and/or business permits has been established.**
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> **3. That the costs of this application be provided for.**

Applicant's Case

2. According to the ex parte applicant, on 17th April, 2014 this Court in Constitutional Petition Number 532 of 2013 as consolidated with others at the High Court of Kenya at Nairobi delivered a judgment wherein it declared the ***Kiambu Finance Act 2013*** (hereinafter referred to as "the Act") unconstitutional and accordingly declared it null and void.

3. However, despite the said declaration, it was contended that the Respondents without a colour of right, arbitrarily and with an air of impunity continued to impose licences, permits, fees, charges, rates, rents fines, levies etcetera premised on the said nullified Act 2013. Similarly, the Respondents continued to so demand licences, business permits, fees charges, rates fines levies etcetera notwithstanding that they had not enacted a legislative framework to empower them impose the same and to govern such collections.

4. It was further averred that the Respondents published for debate what they are termed, 'the Kiambu County Provisional Collection of Fees, Charges, Levies, Rents or Rates Bill' a clear manifestation that with the nullification of the 2013 Act, there was no law empowering the Respondents to collect fees, charges, levies, rents and/or rates or governing the collection thereof. To exacerbate the situation, the Respondents have in the most unreasonable, irrational, rash, callous and oppressive manner deployed 'enforcement officers' to arrest, harass, intimidate and even impound as well as confiscate the properties of traders, motorists, industrialist and the people of Kiambu County in the pretext of enforcing an illusory ***Kiambu County Finance Act*** or whichever.

5. The Applicants, while not opposing the Respondent's power to impose licences, business permits, fees, charges, levies, fines etcetera so long as the same is done within the ambit of the law and in particular within the framework of the Constitution as well as a properly enacted legislative framework were however aggrieved by what according to them was the Respondent's conduct, which conduct not only smacked of impropriety, illegality, unconstitutionality, irregularity and abuse of power but the same was unjust, contemptuous and in blatant disregard of court orders and the rule of law.

Respondent's Case

6. The Respondent's case on the other hand was that there was no evidence that **Dr. Waruathe** is the Chairman or that the *ex parte* Applicants are officials of the Kenya National Chamber of Commerce and Industry, Kiambu County Chapter; that there is no evidence that the institution of this suit has been authorised by the Kenya National Chambers of Commerce and Industry, Kiambu County Chapter; and that there is no evidence that the businessmen in Kiambu County, on whose behalf this suit is claimed to have been instituted by the *ex parte* Applicants are members of the Kenya National Chambers of Commerce and Industry, Kiambu County Chapter.

7. According to the Respondent, it had not imposed licenses, business permits fees charges, rates, rents, fines and levies in reliance upon the nullified ***Kiambu Finance Act, 2013***. To the contrary, the clamping notice dated 11th September, 2014 in respect of motor vehicle KBL 826 F was issued upon the owner's failure and/or refusal to pay for the use of the 1st Respondent's parking space hence the owner's failure and/or refusal to pay for the use of the 1st Respondent's parking space was not attribute to the reasons advanced by the *ex parte* Applicants.

8. It was further contended that the Respondent had neither demanded nor had the Applicants exhibited any evidence of demands by the Respondents for licenses, business permits, fees charges, rates, fines and levies in reliance upon the nullified ***Kiambu Finance Act, 2013***.

9. To the Respondent, the *ex parte* Applicants' claim that they are entitled to the use of the 1st Respondent's facilities and services for free for as long as there is no Finance Act is not correct and is a recipe for anarchy and impunity. It was its position that the notices of impounded goods exhibited relate to businesses that were regulated and controlled even before the nullified ***Kiambu Finance Act, 2013***; that it was unreasonable and unconscionable of the *ex-parte* Applicants to demand that businesses be run in Kiambu County without regulation and control; that there was no evidence whatsoever that the authors of the complaint letters or recipients of the notices of impounded goods are members of the Kenya National Chambers of Commerce and Industry, Kiambu County Chapter and/or have authorised the *ex parte* Applicants to institute this suit on their behalf,; and that the *ex parte* Applicants were unreasonably replying upon the Decree made on 17th April 2014 in Petition No. 532 of 2013 as a justification for lawlessness and impunity.

9. It was submitted on behalf of the Respondents that Article 209(3) and (4) of the Constitution empower them to impose property rates, entertainment taxes and any other tax it is authorised to impose by an Act of Parliament. Further it is empowered to impose charges for services they provide including parking fees. It was therefore its position that it did not act in excess of jurisdiction.

10. It was further contended that the applicants had not exhibited any decision capable of being quashed.

Determination

11. I have considered the foregoing.

12. It was contended that the authors of the complaint letters or recipients of the notices of impounded goods are not members of the Kenya National Chambers of Commerce and Industry, Kiambu County Chapter and/or have authorised the *ex parte* Applicants to institute this suit on their behalf.

13. The issue of standing was dealt with by **Nyamu, J** (as he then was) in **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** as follows:

> **"The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if**

they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others…Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law…The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue….Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase "person aggrieved" was treated as a question of fact – "grievances are not to be measured in pounds and pence"…Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest…In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them…The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are "persons directly affected". I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan."

14. Whereas it is true that from the documents exhibited by the applicants there is none that purports that the applicants are in fact officials of Kenya National Chamber of Commerce and Industry, Kiambu County Chapter, Article 3(1) of the Constitution obliges every person to respect, uphold and defend the Constitution. Similarly Article 258(1) empowers every person to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention. The applicants herein contend

that in the absence of legislation the Respondent has no power to impose the impugned levies. In the circumstances of this case, I am unable to accede to the Respondent's position that the applicants had no business instituting these proceedings.

15. Whereas it is true that Article 209(3) and (4) empowers a County to impose taxes, rates and charges specified thereunder, Article 210(1) of the Constitution provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. It is therefore clear that whereas the Constitution empowers the Counties to impose taxes, rates and other charges, the same Constitution requires an enabling legislation to effectuate the said power. Such legislation is necessary since the power to impose rates, taxes and levies is not an arbitrary power but is required to be in compliance with the Constitution including Article 196(1)(b) of the Constitution which enjoins the County Assemblies to facilitate public participation and involvement in the legislative and other business of the assembly and its committees. Therefore Article 209(3) and (4) ought not to be read in isolation but must be read together with the other provisions of the Constitution including Article 210(1) in line with the rule of harmony, rule of completeness and the exhaustiveness and the rule of paramountcy of the written Constitution that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. See **Uganda Law Society vs. Attorney General [2006] 1 EA 401.**

16. I therefore wish to disabuse the Respondent's notion that even if there was no legislation in existence, the Respondent could impose the said rates, taxes and charges.

17. Having so found, it is however not axiomatic that as long as the grounds exist the Court must grant the said orders. The decision whether or not to grant them is an exercise of judicial discretion and whether or not the Court will grant them depends on the circumstances of the case. This position is recognised in ***Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270** where the learned authors state:

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."**

18. In other words, judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. Being a discretionary jurisdiction, it must be exercised judicially and judiciously based on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. It can therefore withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been

realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

19. In this case the Court is aware that subsequent to ***Kiambu Finance Act, 2013*** there was enacted ***Kiambu Finance Act, 2014***. In my view, it would nolonger be efficacious to grant the orders sought in this application.

20. It follows that this application is dismissed but with no order as to costs.

Dated at Nairobi this day 25th June, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ngania for the Respondent

Cc Patricia