



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 562 OF 2014

FREDRICK KIRUMBA MUIRURIPETITIONER

VERSUS

THE COUNTY GOVERNMENT OF KIAMBU1ST RESPONDENT

THE KIAMBU COUNTY POLICE COMMANDER ...2ND RESPONDENT

JUDGMENT

1. The petitioner filed this petition together with an application under Certificate of Urgency in which he sought the release of his motor vehicle, KAX 489Z which had been impounded and detained by the 1st and 2nd respondent on 3rd November 2014 ostensibly because he had parked on a roadside in Kiambu Town without paying the requisite parking fees.
2. When the matter came up before me on 19th November 2014, I directed the 1st respondent to produce in Court the provisions of law that permitted it to charge parking fees in respect of the roadside in question, being along classified road number C64 in Kiambu Town which, according to the petitioner, falls within the jurisdiction of the Kenya National Highways Authority.
3. On 21st November 2014, the parties entered into a consent under which the petitioner's vehicle would be released to him unconditionally. They also agreed to meet and discuss other outstanding matters. The parties were, however, unable to agree to resolve the issues arising under the petition as a consequence of the impounding of the petitioner's vehicle, and they therefore agreed to file submissions in respect thereof and for the Court to determine the issues on the basis of the submissions.
4. In the petition dated 12th November 2014, the petitioner sought a declaration that the action of the respondent in impounding his vehicle was a violation of his constitutional rights under Articles 31(a) and (b) and 40 of the Constitution; a prohibitory injunction prohibiting the 1st respondent its agents, servants, or employees from trespassing onto any motor vehicle in the control of the petitioner at any time the vehicle is parked on the facilities provided by the Kenya National Highways Authority on any classified road under the Authority within the territorial jurisdiction of the respondent.

5. He also sought a mandatory injunction to compel the 1st respondent to deliver the said motor vehicle in good condition to the petitioner; and an order for compensation of the petitioner by the 1st respondent for the unlawful and unconstitutional trespass onto the motor vehicle registration no KAX 489Z in violation of the rights of the petitioner under article 31(a) and (b) and 40. He also sought compensation by way of general and exemplary damages, as well as special damages for the loss incurred upto 12th November 2014 amounting to Kshs52,500.
6. The basis of the petition was that on the 3rd of November 2014, the respondents had impounded the petitioner's motor vehicle registration number KAX 489Z which he had parked on the parking facility provided by the Kenya National Highways Authority along classified road number C64 in Kiambu Shopping Centre, clamped the vehicle, towed it to their premises, and detained it.
7. The petitioner alleged that he had been forced to hire an alternative vehicle for Ksh7,000 per day. He alleged that the actions of the respondents were conducted in a malevolent and spiteful manner and the agents of the respondents behaved in a high handed, malicious and aggressive manner and their actions caused him loss and damage and stopped the daily running of his business.
8. The petitioner contends that section 53(1) of the Kenya Roads Act 2007 provides that a local authority or any other person shall not exercise any power relating to the control, maintenance, development or protection of any road except where such power has been delegated by an authority established under the Act or by the Minister. It is his case that the 1st respondent did not have authority as required under Article 210(1) of the Constitution to levy any tax or licensing fee in respect of the road as it had not acquired any authority from the Kenya National Highways Authority or the Minister to do so in respect of the classified road no C64; and that it had not enacted legislation to impose fees as it had not enacted its Finance Act for the year 2014 - 2015, and its Finance Act for the 2013-2014 year was declared null and void by the Court on 17th April 2014.
9. The petitioner also filed a supplementary affidavit sworn on 27th January 2015 in which he maintains that he had parked his vehicle on the shoulders of the tarmac classified road C64 outside Kenya Commercial Bank entrance at Kiambu shopping centre, which road is under the control of the Kenya National Highways Authority, and the Authority has not licensed the 1st respondent to charge fees in respect thereof.
10. According to the petitioner, he used the motor vehicle to transport his ailing wife to hospital as she requires frequent medical attention. He claims that he was compelled to hire a motor vehicle for this purpose at a cost of Kshs7,000 per day. He has annexed receipts in respect of the vehicle hire from Townlink Cabs Limited for the period 5th - 21st November 2014. He has also annexed a document from Kiambu Physiotherapy Centre dated 11th November 2014 which indicates that Florence Njoki Kirumba requires physiotherapy three times a week. The petitioner therefore asks the Court to grant him the orders summarized at paragraph 4 and 5 above.

The Response

11. The 2nd respondent did not participate in these proceedings nor were any pleadings filed on his behalf.
12. The 1st respondent does not dispute the facts as set out by the petitioner in his affidavit sworn on 12th November 2014 with respect to the impounding of the motor vehicle. It also readily released it following the appearance in Court on 19th November 2014. Its position, however, is that it was entitled to impound the motor vehicle for failure by the petitioner to pay the requisite parking fees.
13. The 1st respondent's position is captured in the affidavit sworn on 19th December 2014 by Mr. John Gicaci, Chief Officer, Finance & Economic Planning, of the 1st respondent.

14. The 1st respondent concedes that the petitioner had parked his motor vehicle on 3rd November 2014 within Kiambu shopping centre in an area under the jurisdiction of the 1st respondent; that he failed to pay the requisite parking fees and consequently, the motor vehicle was impounded by the 1st respondent.
15. It contends, however, that the petitioner's rights which he alleges to have been infringed are not absolute and can be limited under Article 24. It is its case that it has a constitutional function over county transport, particularly parking, in accordance with Part 2 of the Fourth Schedule of the Constitution and Article 209(4) of the Constitution which gives it the authority to impose charges on services it provides, among which is parking services.
16. While conceding that Article 210 (1) provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation, it contends that this does not limit its powers granted under Article 209(4) to impose charges on services they provide, including charges for parking spaces. Its case is that Section 7 of the 6th Schedule of the Constitution and section 72 of the Traffic Act empowers it to designate parking places in Kiambu and charge fees for the parking service.
17. The 1st respondent contends that contrary to the petitioner's claim, the Kenya National Highways Authority has no mandate whatsoever under the Kenya Roads Act which establishes it with respect to parking fees. It contends that section 22 of the said Act which outlines the powers of the Authority does not include a power to levy parking fees anywhere in the country, which mandate is granted to the local authorities under the Traffic Act.
18. The 1st respondent further concedes that at the time the petitioner's motor vehicle was impounded, the Kiambu County Government Finance Act had been nullified by the High Court. It contends, however, that such nullification did not render the county powerless with regard to levying parking fees. Its contention is that county governments are entitled, under Article 175(b) of the Constitution, to have reliable sources of revenue to enable them govern and deliver services effectively. It is its contention therefore that the effect of the nullification of the Finance Act 2013 - 2014 was that it returned the county to the previous transitional state when a substantive Finance Act had not been passed.
19. It alleges that it was entitled to continue charging fees by dint of the provisions of section 23 of the County Government Public Finance Management Transition Act of 2013, under which revenue raising measures previously approved by the Minister for Local Government were to continue being in force until a new Act had been enacted by the County Assembly as provided for in the Public Finance Management Act. It claims that it was therefore entitled to rely on the previous by-laws relating to the imposition of parking charges, the **County Council of Kiambu Parking Places and Omnibus Station By-laws 2009**, approved on 15th February 2012 vide Gazette Notice No 2413. It is its case that the provisions of the Kiambu County Council By-laws provided that there shall be penalties for non-payment of parking fees which would include the impounding of vehicles and payment of fines and costs incidental thereto. It contends therefore that it was fully entitled to impound the petitioner's vehicle, and it only released it out of compassion for the petitioner's wife.

Determination

20. The petitioner's motor vehicle was returned to him following the consent order between him and the 1st respondent on 21st November 2014. Consequently, two issues remain for determination in this matter. The first is whether the 1st respondent could, in the absence of a Finance Act enacted pursuant to Article 201 of the Constitution, levy charges in respect of parking on classified roads within the county. The second issue, which is dependent on the response to the first, is whether there was a violation of the petitioner's rights under Articles 31(a) and (b) and 40 of the Constitution as a result of the impounding and detention of his motor vehicle for the period 3rd -

21st November 2014, and if the answer is in the affirmative, what relief to grant the petitioner.

Whether the County Government was Entitled to Levy Parking Fees in Respect of Classified Road C64 Passing Through Kiambu Shopping Centre.

21. The argument advanced by the 1st respondent to support its argument in respect of this issue is that it has a constitutional function over county transport as provided in section 5(c) Part 2 of the Fourth Schedule to the Constitution. Its position is that this remains the position notwithstanding the fact that the Kiambu County Finance Act had been repealed. It was submitted on its behalf that the Constitution provides for transitional and consequential provisions to ensure that there is no vacuum with regard to the exercise of the County Government functions as provided under Article 262.
22. The 1st respondent contends therefore that in the present case, the laws existing prior to the enactment of the Constitution was the Local Government Act which was repealed upon announcement of the 2013 general elections in accordance with section 134 (1) of the County Government Act. Further, the Public Finance Management Act, 2012 further provided for the enactment of the County Finance Act to govern county financial matters. Since the Finance Act that had been enacted had been repealed in 2013, the effect was that the law in effect would be the law that was previously in force being **The County Council of Kiambu Parking Places and Omnibus Station By-laws**. Under these By-laws, according to the 1st respondent, it still maintained the powers to charge fees on transport services, including parking fees.
23. The 1st respondent submitted that the intention behind the County Governments Act was to ensure a smooth transition and provision of a new legal framework under the new constitutional dispensation to enable the County Governments exercise adopted functions of the defunct county councils. By dint of section 24 of the Interpretation and General Provisions Act, **The County Council of Kiambu Parking Places and Omnibus Station By-laws** remain in force notwithstanding the nullification of the Kiambu County Finance Act as well as the repeal of the Local Governments Act.
24. The petitioner's response on this issue is that the **County Council of Kiambu Parking Places and Omni Bus Station By-laws** cannot subsist in light of Sections 56 and 60 of the **Urban Areas and Cities Act** where a contrary intention appears in relation to the provisions of Section 24 of the Interpretation and General Provisions Act.
25. The starting point in considering the opposing positions of the parties is the Local Government Act (now repealed). Section 148 of this Act provided that:
- (1) A local authority may—*
- (a) charge fees for any licence or permit issued under this Act or any other written law or in respect of any person or matter, premises or trade, whom or which the local authority is empowered to control or license;*
- (b) impose fees or charges for any service or facility provided or goods or documents supplied by the local authority or any of its officers in pursuance of or in connection with the discharge of any duty or power of the local authority or otherwise.*
- (2) All fees or charges imposed by a local authority shall be regulated by by-law, or if not regulated by by-law, may be imposed by resolution of the local authority with the consent of the Minister and such consent may be given either in respect of specified fees or charges or may be given so as to allow a specified local authority to impose fees or charges by resolution in respect of a specified power or a particular matter.*

(3) Save where the contrary is expressly or by necessary implication in any written law provided, a local authority may authorize the remission in whole or in part of any fees due to it or charges imposed by it under this Act or any other written law. (Emphasis added)

26. In 2012, the County Government of Kiambu enacted, pursuant to the Local Government Act, the County Council of Kiambu Parking Places and Omnibus Stations By-Laws which came into force from the date of publication vide Gazette Notice No. 2413.

27. In July, 2012, the County Government Act was enacted to give effect to Chapter Eleven of the Constitution with respect to the powers, functions and responsibilities of county governments with respect to the delivery of services. Section 134 of this Act, which repealed the Local Government Act, provided as follows:

1. The Local Government Act is repealed upon the final announcement of all the results of the first elections held under the Constitution.

(2) All issues that may arise as a consequence of the repeal under subsection (1) shall be dealt with and discharged by the body responsible for matters relating to transition.

28. Contemporaneously with the County Governments Act, the Urban Areas and Cities Act was enacted to give effect to Article 184 of the Constitution. Its object was to provide for the, classification, governance and management of urban areas and cities; to provide for the criteria of establishing urban areas, to provide for the principle of governance and participation of residents and for connected purposes. Section 56 of this Act provides that:

All directions, resolutions, orders and authorizations given by By-laws made, and licenses or permits issued by the local authorities established, under the Local Government Act and subsisting or valid immediately before the commencement of this Act shall be deemed to have been given, issued or made by the boards established pursuant to this Act, as the case may be, until their expiry, amendment or repeal.

29. The powers of local authorities are also recognized under the Traffic Act, which also acknowledges the status of such powers as are provided for under their By-laws. Section 72A of the Act provides that:

(1) A local authority may, by By-laws—

(a) designate parking places on roads, within its area of jurisdiction for vehicles or vehicles of any particular class or description, having regard to both the interests of traffic and the interests of owners and occupiers of adjoining property;

(b) prescribe the manner in which vehicles shall stand in or be driven into or out of the designated parking place;

(c) provide that a vehicle may not be left continuously in the designated parking place for longer than a specified period;

(d) provide that a vehicle which has been taken away from the space in which it was left in the designated parking place shall not again be left in that designated parking place until after the expiration of such interval as may be prescribed;

(e) empower an inspector, or police officer or any specified person to effect the moving, in case of emergency, of vehicles left in a designated parking place, or the moving of vehicles left in a designated parking place in contravention of this Part or any by-laws made thereunder, to suspend the use of a parking place or any part thereof when expedient and to provide for the temporary removal of a parking meter;

(f) provide for the reservation of spaces in a parking place for the exclusive use of Ministers, Assistant Ministers, Permanent Secretaries of Ministries and heads of diplomatic missions;

(g) provide for the removal from a parking place, and the safe custody, of any vehicle in respect of which any requirement of this Part has been contravened in relation to a parking place, and for the recovery of the cost of removal and safe custody;

(h) prohibiting or restricting the carrying on of trades or other activities or the doing of any other thing within a designated parking place;

(i) prescribe anything which under this Part may be prescribed;

(j) make such incidental or consequential provision as appears to the local authority requisite for the purpose of the satisfactory operation of a parking place or for giving effect to the provisions and purposes of this Part.

(2) The procedure for the making, approval and publication of by-laws made under subsection (1) shall be that prescribed in the Local Government Act (Cap. 265), and, for the purposes of their enforcement and the disposal of fines imposed for their contravention, such by-laws shall be deemed to be by-laws made by the same local authority under that Act.

(3) Notwithstanding anything to the contrary contained in any written law, bylaws made by a local authority under subsection (1) may provide for the use of clamps on motor vehicles parked elsewhere than in a designated parking place.

30. Section 72B states that:

1. **There shall be paid to the local authority in respect of a vehicle left in a designated parking place charges calculated in accordance with this section or in such other manner as the local authority may by by-laws prescribe.**
2.

31. Section 72G of the Traffic Act stipulates that:

(1) Where-

(a) a vehicle is left in a designated parking place, and any initial charge or excess charge which is thereby incurred is not duly paid; or

(b) a vehicle is left in a designated parking place and any of the provisions of this Part or of any by-laws made thereunder relating to the manner in which vehicles shall stand in or be driven into or out of parking places is thereby contravened; or

(c) a vehicle is left in a designated parking place otherwise than as authorized by this Part or by any by-laws made thereunder, the owner of the vehicle and the driver of the vehicle shall each be guilty of an offence and liable to a fine not exceeding five thousand shillings, or in the case of a second or subsequent offence to a fine not exceeding ten thousand shillings:

32. At section 72J the Act states that:

Without prejudice to its powers to make By-laws under section 72A, a local authority may

- a. ***provide parking places on roads or on other places under its control, within its area of jurisdiction, for vehicles or vehicles of any particular class or description (including the provision of omnibus stations), having regard to both the interests of traffic and the interests of owners and occupiers of adjoining property;***

(b) by By-laws provide in relation to such parking places for any matter which under section 72A(1) may be provided for in relation to designated parking places (other than the matter mentioned in paragraph (e) of that subsection), and impose charges for the use of parking places so provided and provide penalties for the contravention of the by-laws, and subsection (2) of that section shall apply in respect of any such By-laws.

33. What emerges from the above provisions of the law is that local authorities had, prior to the enactment of the legislation with respect to counties, the exclusive mandate to set and regulate any matters pertaining to parking in areas that fell within their jurisdiction. The County Government Act repealed the Local Government Act. It provided for the enactment of legislation to provide for the charges in respect of services rendered by the county. However, in respect of the Kiambu County Finance Act, pursuant to orders of the Court, the Finance Act 2013 was ruled to be null and void. The question is whether the nullification of the Act left a vacuum, so that in respect of parking charges, the County could not collect parking fees and similar charges hitherto provided for under the **County Council of Kiambu Parking Places and Omni Bus Station By-laws** which had been enacted under the repealed Local Government Act.

34. In my view, the law could not have been intended to create a vacuum that would render it impossible for local authorities or, with the new governance structures, county governments, to collect revenue for the provision of services within the county. Thus, section 24 of the Interpretation and General Provisions Act provides for situations similar to the present one by providing as follows:

Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.

35. The above issue must therefore be resolved in favour of the 1st respondent. Following the nullification of the Finance Act 2013, the By-laws that were in force prior to the enactment of the Act remained the basis for charging parking fees in the county. The contention by the petitioner that section 56 and 60 of the Urban Areas and Cities Act evince a contrary intention with regard to the subsistence of the County Council of Kiambu By-laws is, in the circumstances, untenable. Section 56 of the said Act provides that:

All directions, resolutions, orders and authorizations given by by-laws made, and licenses or permits issued by the local authorities established, under the Local Government Act and subsisting or valid immediately before the commencement of this Act shall be deemed to have been given, issued or made by the boards established pursuant to this Act, as the case may be, until their expiry, amendment or repeal.

36. Section 60 of the Urban Areas and Cities Act makes provision with respect to the municipalities of Mombasa and Kisumu, and therefore has no relevance to the present matter.

37. It is therefore my finding and I do hold that the County Government of Kiambu was entitled to rely on the By-laws in the absence of legislation imposing parking fees, the Finance Act 2013 having been nullified. As section 5 of Part 2 of the Fourth Schedule provides that county transport, including county roads, street lighting and, of relevance to this case, traffic and parking, fall within the jurisdiction of the county government, the petitioner was under an obligation to pay the parking fees demanded by the respondent.

38. Having found that the respondent was entitled to charge the parking fees, I must answer the second issue also in favour of the respondent: since it towed away the petitioner's vehicle upon his failure to pay the requisite charges within an area subject to such charges, then it acted lawfully, and there was therefore no violation of the petitioner's rights under the Constitution.
39. What, in my view, gives rise to a matter such as this is a failure by the 1st respondent to communicate information, and a misapprehension of the law by the petitioner. The respondent has an obligation to ensure that those resident within its jurisdiction understand the position with regard to taxation and fees for the various services that it renders. Had there been involvement of the citizen in planning and budgeting for the county as contemplated in the Constitution, the 2013 Finance Act would have been enacted in accordance with the law. Upon its nullification, the residents of the county would have known that this nullification did not give them a free pass with respect to services: such services as the county government provided still needed to be paid for, and the fallback position in law were the previous by-laws.
40. On the part of the petitioner, he had misapprehended the position to be that without the Finance Act 2013, there would be no basis for charging any fees for services within the county. It must be appreciated that certain obligations must be met if the governance structure is to survive, and this includes the levying of fees and other charges by the respondent.
41. In the circumstances, this petition must fail. In light, however, of my observations with respect to the failure of the 1st respondent, there shall be no order as to costs.

Dated, Delivered and Signed at Nairobi this 30th day of July 2015

MUMBI NGUGI

JUDGE

Mr. Muiruri present in person.

Mr. Muchiri instructed by the firm of Kimani Kiarie & Associates Advocates for the 1st respondent.