



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 360 OF 2015

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF PROHIBITION AND MANDAMUS**

AND

IN THE MATTER OF THE PROVISIONS OF COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER OF THE PROVISIONS OF NAIROBI CITY FINANCE ACT, 2013

AND

**IN THE MATTER OF THE POWER AND FUNCTIONS OF NAIROBI CITY COUNTY
GOVERNMENT TO COLLECT LAND AND PROPERTY RATES TO FINANCE ITS
OBLIGATIONS**

**IN THE MATTER OF THE REFUSAL BY THE KAREN & LANGATA DISTRICT
ASSOCIATION TO REMIT PROPERTY RATES COLLECTED BY IT TO THE COUNTY
GOVERNMENT OF NAIROBI**

AND

**IN THE MATTER OF THE DECISION BY THE HON. JUSTICE ODUNGA IN REPUBLIC V.
THE NAIROBI CITY COUNTY (JUDICIAL REVIEW MISC. CIVIL APPLICATION NO 113
OF 2014 AS CONSOLIDATED WITH JUDICIAL REVIEW APPLICATION NOS. 109 & 119 OF
2014**

EX PARTE

NAIROBI CITY COUNTY GOVERNMENT.....APPLICANT

VERSUS

KAREN & LANGATA DISTRICT ASSOCIATIONRESPONDENT

RULING

Introduction

1. By a Chamber Summons dated 19th October, 2015, the applicant herein, **Nairobi City County Government**, seeks the following orders:

1. **That the application be certified urgent and be heard ex parte at the first instance owing to its extreme urgency.**
2. **That the Applicant be granted leave to apply for judicial review order of prohibition to prohibit Karen & Langata District Association, the Respondent herein, from levying, demanding, receiving and/or collecting property rates from its membership or any other property owner within Nairobi City County.**
3. **That the Applicant be granted leave to apply for judicial review order of Mandamus to remove into this court and compel Karen & Langata Districts Association to remit the sum of Kshs 1,096,213,273.00 collected from its membership**
4. **That leave so granted do operate as stay of the action of the Respondent of levying, demanding, receiving and/or collecting property rates from its membership without obtaining an express and written authority from Nairobi City County Government.**
5. **That the honourable court do grant such further and other consequential orders, writs, declarations and directions as this honorable court may consider appropriate for the purpose of enforcing of any of the provisions of Nairobi City County Finance Act and Constitution of Kenya.**
6. **That the cost of this application be provided for**

Applicant's Case

2. According to the applicant, it is a County Government, established under Article 176 of the Constitution as a distinct and interdependent level of Government from the national government as enunciated and propounded by the provisions Article t (1), 6(2) and Schedule 1 of the Constitution of Kenya, 2010 (hereinafter referred to as "the Constitution") and under Article 209 (3) of the Constitution a county government may impose, "(a) property rates; (b) Entertainment taxes; and (c) any other tax that is authorized to impose by an Act of Parliament" while Article 210 (1) of the Constitution permits county government to impose property rates, as a species of tax to finance its functions and powers.

3. It was contended by the applicant that as Article 185 (1) of the Constitution vests legislative authority of a county in the county assembly, the County assembly is mandated to make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule. Accordingly, the applicant is a distinct level of government from national government, with exclusive constitutional functions vested in it which powers include the power to levy land and property rates.

4. It was averred that in a bid to meet its constitutional powers and obligations of raising taxes to finance its operations, the Applicant herein enacted the **Nairobi City County Finance Act, 2013** (hereinafter referred to as "the Finance Act") to provide for the various taxes, fees and charges for services, and for other revenue raising measures by the Applicant and that all the taxes collected by dint of this Act are payable to the Applicant herein.

5. It was further averred that section 3 of the **Finance Act** provides that:

"All by-laws directions, resolution, orders an authorizations on or relating to financial management, under Local Government Act including the collection and administration of taxes, fees and charge given or issued by the defunct Nairobi City Council and subsisting or valid immediately before the cessation of the application of the Local Government Act (now repealed) shall be deemed to have given, issued or made by or under the authority of the county

assembly until the expiry, amendment or repeal of those directions, resolutions, orders and authorizations on financial management and shall continue, with the necessary modifications, apply to the payment and the administration on the taxes, fees, charges and other levies under this Act.”

6. To the applicant, by a Constitutional Petition dated 11th September 2014 (No, 274 of 2014 Karen & Langata District Association vs. Nairobi City County) as consolidated with J.R Nos. 109 of 2014, 113 of 2014 and 119 of 2014) various Applicants including Karen & Langata District Association, the Respondents herein, moved the court for judicial review orders whose upshot was to the Applicant herein from implementing the provisions of the ***Nairobi City County Finance Act***. However by decision dated and delivered on 21st September 2015, this Court dismissed the above Petition as consolidated with JR Nos. 109 of 2014 and 113 of 2014 and 119 of 2014 and found at paragraph 126 thereof that the ***Nairobi County Finance Act 2013*** was enacted properly and legally.

7. In the applicant’s view:

- a. The ***Nairobi City County Finance Act***, 2013 was enacted to; inter alia enable the Nairobi City County Government to collect land and property rates within Nairobi County.
- b. This Act was assented to 4th September 2013 and came into force on 31st March 2014.
- c. This Act applies to all properties located in Nairobi County including Karen & Langata District, where the Respondent Association operates.
- d. There is no court order declaring this Act as unconstitutional.
- e. There is no court order staying the operations of any Section of Act.
- f. Property owners have constitutional and statutory duty of paying property rates in respect of any property located in Nairobi to the Applicant in accordance with this Act.
- g. By dint of the provisions of this Act, no entity other than the Applicant is allowed to collect property rates in Nairobi City County.

8. The applicant however contended that the Respondent Association has declined, refused and or absconded in its duty of remitting property rates collected from its members in respect of the properties situate in Nairobi City County; an act which flies in the face of the provisions of the ***Nairobi City County Finance Act***, with the result that the Respondent Association owes the Applicant a staggering sum of Kshs 1,096,213,273.00/=

9. To the applicant, despite the absence of a court order staying the operation of the ***Nairobi County Finance Act***, 2013, the same having come into force on 31st March, 2014, the Respondent Association has usurped the role of the Applicant of collecting land and property rates and has embarked on the illegal and subversive act of collecting property rates from its members without authority from the Applicant.

Determinations

10. I have considered the application, the verifying affidavit and the statement of facts filed herein as well as the submissions of counsel.

11. The requirement for leave was explained by a three judge bench comprising **Bosire, Mboghli-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte**

Nzioka [2006] 1 EA 321, Nyamu, J (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353**.

12. Waki, J (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

13. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

14. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

“If he [the Applicant] fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers...”

15. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, the Court stated:

“Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court’s discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the

possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him.... Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.”

16. This position was appreciated by **Majanja, J** in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between Vania Investments Pool Limited and Capital Markets Authority & Others* in which the learned Judge expressed himself as follows:

“I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in *Oceanfreight Transport Company Ltd vs. Purity Gathoni and Another Nairobi HC Misc. Appl JR No. 249 of 2011 [2014] eKLR*, “In my view, the reference to an “arguable case” in *W’Njuguna’s Case* is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view.” The duty of the court to consider the facts is not lessened by the mere conclusion that the case is frivolous, or that leave is underserved by examining the facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose.”

17. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. This duty is not satisfied by merely throwing at the Court the grounds upon which judicial review orders are granted but by showing on a *prima facie* basis that there exist facts which support the said grounds.

18. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and *Prohibition* was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which

imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

19. In this case the applicant has not shown that the Respondent is intending to usurp its powers in the collection of rates. In my view there is no reason why residents cannot form an association to protect their interests including for the purposes of pooling resources geared towards the settlement of revenue due to the government be it county or national. If the collected revenue is collected but not remitted, the government has recourse against the persons liable to pay taxes since such an association is not a governmental agency.

20. Similarly, it has not been shown that the Respondent is under any legal obligation to remit the amount paid to it to the Applicant. The applicant has not disclosed that there exist any nexus between it and the Respondent in order to oblige the Respondent to remit the sum it allegedly holds. In my view the Applicant has a legal recourse available to those who default in payment of rates.

21. Section 9(2) of the *Fair Administrative Action Act*, No. 4 of 2015 provides:

The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

22. Subsection (3) thereof provides:

The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

23. Subsection (4) of the said section however provides:

Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

24. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. In this case the applicant has not shown that it has exhausted available legal recourse in order to justify it instituting these proceedings. It seems that the applicant has resorted to these proceedings for expediency. To do so in my view amounts to taking short cuts instead of following the law. Parties and their legal advisers ought to take seriously the advice of the Court of Appeal in James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220 that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch. Similarly, in Macharia vs. Wanyoike [1981] KLR 45, the Court was of the view that, that a pleading by way of the proposed short-cut method may or may not be an out of

place is perhaps a worthwhile proposition for the rules making body on grounds of expedience or as a time-saving device; but experience has repeatedly shown that short-cuts invariably result in being more expensive and time-absorbing in the end and that it may be specifically argued that in relation to the precaution against delay, a short-cut may be accepted or applied to expedite but not to delay; but a short-cut in breach of a fundamental rule creating or occasioning remedial action cannot escape the stigma of 'delay'. Lastly, on this point it was held in **Lehmann's (East Africa) Ltd vs. R Lehmann & Co. Ltd [1973] EA 167** that:

“The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than seek to make the best of an unsatisfactory position.”

25. In this case the applicant has not shown the reason why the Court ought to exempt it from pursuing its rates in the normal manner. Judicial review it ought to be remembered is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of.

26. In the premises, I decline to exercise my discretion in favour of the applicant as sought herein. It follows that without leave being granted these proceedings are rendered still-born and are hereby struck out but with no order as to costs.

Dated at Nairobi this 29th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Onyango for Mr Munje for the Applicant

Cc Patricia