REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 85 OF 2015

MOLO GROUP SHUTTLE LTD……..……..APPELLANT

-VERSUS-

SUB-COUNTY ADMINISTRATOR NAIVASHA…….……..1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU……..…..……2ND RESPONDENT

R U L I N G

Introduction

1. The Appellants' Notice of Motion filed on 1st September, 2015 contains five prayers of which the 1st and 2nd now stand spent. The substantive prayers outstanding for the consideration of the court are prayers 3 and 4 which are in the following terms:

> **"3. THAT until the hearing and determination of the Applicant's appeal against the Respondents, there be orders of temporary injunction against the Respondents, their servants/agents and all those persons allied to the Respondents restraining them from evicting, barring, barricading and/or removing the Plaintiff's matatu shuttle vehicles from their licenced area of operation at the Kinangop stage Naivasha and or interfering with the Plaintiff's business of transporting goods, parcels and passengers within Naivasha sub-county and a copy of the orders hereof be served upon the Naivasha Traffic Base Commander to ensure compliance.**
>
> **4. THAT an order of stay of proceedings be hereby issued to stay NAIVASHA CMCC 487 OF 2015 until the hearing and determination of this appeal or until further orders of the court."**

2. The application is supported by the affidavits sworn by **Wilson Guchu Peter** who describes himself as a director of the Appellants Company. The Respondents filed a Replying Affidavit in opposition to the Notice of Motion through the 1st Respondent Julius Nyaata. The undisputed background to the Notice of Motion stated briefly.

3. The Respondents are charged with the duty of licensing, controlling and regulating the transport business in the Naivasha Sub-County pursuant to the Constitution and relevant statutes. The Appellants on the other hand operate the business of providing transportation services for goods, parcels and passengers in the sub-county and Nakuru town. For this purpose they hold a licence from the

Respondents authorizing them to operate from Kinangop Matatu terminus in Naivasha. The said licence was issued on 29th July 2015 and will expire on 31st December 2015.

4. By a notice dated 28th July 2015 the Respondents communicated a resolution to effect the relocation of matatu/omnibus operators to various termii requiring interalia that:

> **"All matatus/maruti/Nissan operating from Naivasha to Gilgil, Nakuru, Nyahururu, Eldoret, Kericho, Kitale to relocate to the main bus park."**

5. Equally, matatus or omnibuses operating from Naivasha to Nairobi, Kinangop and Thika would operate from Kinangop stage, Naivasha while matatus and omnibuses from Naivasha, Narok and South Lake were to relocate to Karagita stage Naivasha. The effective date was 7 days of the notice. On 5th August 2015 the Appellants who were aggrieved by the above-said notice filed a suit in the Chief Magistrate's Court seeking a declaratory relief and perpetual injunction against the Respondents. Filed contemporaneously with the plaint was a Notice of Motion brought under Certificate of Urgency and expressed to be brought primarily under Order 40 Rule 2 and 4 (1) and (2) of the Civil Procedure Rules.

6. The Notice of Motion prayed for a temporary injunction to restrain the Respondents essentially from enforcing the notice and for a mandatory injunction compelling the Respondents to basically provide the continued legal facilitation of the Appellants' business operations. On the date set for interpartes hearing of the said application, the Respondents raised a preliminary objection to the effect, *interalia*, that the suit being one for the enforcement of article 47 of the Constitution should have been filed before the High Court.

The Appeal

7. In his subsequent ruling the learned Chief Magistrate observed that the proper forum before which the Appellants should have agitated the matter is the High Court. Finding he had no jurisdiction, the learned Chief Magistrate proceeded to dismiss the application. His decision prompted the appeal before this court, and the Appellants instant Notice of Motion. The parties filed written submissions in respect of the said application.

The Appellants' Submissions

8. In summary, the Appellants' submissions assert that the principles to be considered in the grant of a temporary injunction under Order 42 Rule 6 (6) of the Civil Procedure Rules are materially similar to those applicable to the grant of stay pending appeal under Order 42 Rule 6 (2), namely that the application has been made without delay, that substantial loss may result to the Applicant if the order sought is denied and, finally that the Applicant ought to give security for the performance of the decree or order.

9. In this regard it was argued that the Appellants would suffer substantial loss if the injunction prayed for is declined as that would result in their eviction for their licensed area of operation "*leading to loss …..…of clientele goodwill and loss of legitimate expectation to operate within their licenced area*." (sic)

10. In supporting this submission the Appellants cite the case of **Otieno –Vs- Anor (No. 2) [1987] KLR and Mukoma –Vs- Abuoga [1988] KLR 645** to reiterate the principle that: "**The object of granting an injunction pending appeal is to safeguard the rights of the Appellant and to prevent the appeal if successful for being rendered nugatory**." (**See Otieno's case**).

11. They further urged the court not to make any order for an undertaking in damages, there being no decree in the lower court, or licence fees outstanding in favour of the Respondents. For this proposition they relied on the case of **Ruben & 9 Others –Vs- Nderito & Anor [1989) KLR 460** where the court exhorted against fettering of an appellant's exercise or his undoubted right of appeal by imposition of an order for security or undertaking in damages.

12. The Appellants point to the memorandum of appeal and contend that the lower court erred in finding that the Appellants could only challenge the Respondents decision by way of Judicial review and not via an ordinary suit, that the remedies in their plaint are not available in judicial review (See the **Senior Resident Magistrate's Lamu Court –Vs- Abubakar Mohammed & 11 others exparte, County Council of Lamu High Court Civil Application 209 of 2003 (UR**); that moreover, a declaratory suit is an alternative to judicial review proceedings (**See Ngige –Vs- Chomba & 3 Others [2004] 1 KLR** and finally that the lower court did not give reasons for its ruling.

The Respondents' Submissions

13. In their rather lengthy submissions the Respondents contend that they were legally entitled to raise a preliminary objection on the court's jurisdiction as they did before the learned Chief Magistrate (See **The Owners of the motor vessel "Lillian S" –Vs- Caltex Oil Ltd 1989 KLR 1**). The Respondents dispute the Appellants' assertion that the preliminary objection was based on the declaratory nature of relief sought in the plaint, which is barred under the provisions of Order 3 Rule 9 of the Civil Procedure Rules, but rather on grounds that the suit raises complaints in respect of an administrative action, and therefore under Section 8 (2) of the Law Reform Act and the Fair Administrative Action Act, the correct forum is the High Court.

14. Several authorities were cited in support of the dismissal of the application in the lower court for want of jurisdiction. Regarding the principles that guide the grant of an injunction pending appeal, the Respondents placed reliance on the case of **Patricia Njeri & 3 Others –Vs- National Museum of Kenya [2004] eKLR** where the said principles were spelt as follows:

1) That the grant of such injunction is a discretionary matter.

2) That the discretion will be exercised against an Applicant whose appeal is frivolous.

3) That discretion should be refused where it would inflict greater hardship than it would obviate.

4) The Applicant must demonstrate that refusal of the order will render the appeal nugatory.

5)The court should be guided by the principles in Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358.

15. The Respondents argue that the Appellants have failed to bring the instant Notice of Motion within these principles, also that the second prayer was not canvassed and the same should be dismissed.

Analysis and Determination

16. I have considered all the material canvassed before me by the parties as well as the available pleadings and legal authorities. It is my considered view, firstly that the Respondents were entitled to raise their preliminary objection on the question of jurisdiction at the earliest opportunity. In the case of "(**The Owners of the Motor vessel Lillian S**" above) the court observed *interalia*:-

> **"In the instant appeal the Appellant questioned the court's jurisdiction at the first opportunity…… This court has in an interlocutory ruling held that the Appellant was entitled to so challenge the jurisdiction of the court. That being so it was incumbent upon the superior court to dispose of that issue forthwith and before entertaining the claim further."**

In addition the court observed that such question must be decided on the evidence before the court at the time.

17. It is clear from a reading of the learned Chief Magistrate's ruling that he picked up and grappled with the question of jurisdiction as soon as it was raised by the Respondents. This is what he stated in his ruling:-

"One issue that ranks high is one of jurisdiction. Does this court have the requisite authority to entertain this application? To properly adjudicate on this issue the minutes of a meeting held on 26th May, 2015 at Naivasha Town Hall where stakeholders in the Transport industry were in attendance ought to be scrutinized and a finding made as to whether the same contained a resolution and if the answer is in the positive then whether an aggrieved party can seek redress in this forum."

18. Referring to the said minutes the learned magistrate observed that representatives of the stake holders present at the said meeting appended their signatures there to. He stated:

"**there was none who raised any objection and this informs how a notice was generated requiring the operators to move to their respective positions…..Considering this a notice or order form a state servant (of devolved government) if there is any party aggrieved then the correct forum would be to move to the High Court to seek an order to quash the notice as being unlawful…."**

19. This excerpt in my view debunks two contentions by the Appellants, namely, that the learned magistrate did not give reasons for his decisions (see grounds **h** and **i** of the instant Notice of Motion, and secondly that the court held "**that the Appellant should have proceeded to file judicial review proceedings against the Respondents as opposed to filing of a suit**." On the contrary the learned Chief Magistrate did not explicitly mention Judicial Review proceedings.

20. Scanning through the remaining grounds in the support of the instant Notice of Motion it seems to me that grounds e, f, g, k, l m, n, and q are the most substantial as they raise issues concerning the arguability of the appeal, substantial loss or the possibility of a successful appeal being rendered nugatory, security for damages and the matter of prejudice. Whether these grounds have been made out and that they satisfy the requirements in the grant of an injunction pending appeal is the next question for consideration.

21. Order 42 Rule 6 (6) of the Civil Procedure Rules is in the following terms:-

"Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

In the case of **Ruben & 9 Others –Vs- Nderito & Anor [1989) KLR 460** the Court of Appeal granted injunctive orders pending appeal to the Appellant after observing that:

"On the material before us, we are satisfied that the intended appeal raises a serious question for submissions to this court on appeal. Secondly, in this case there is a very real possibility of the appeal being rendered nugatory if the reliefs sought by the Plaintiffs are not granted."

22. The considerations above are also the requirements for grant of stay pending appeal under Rule 5 (2) (b) of the Court of Appeal Rules, and is perhaps the basis for the assertion by the Appellants that the principles that apply to the grant of stay pending execution are similar to those that govern the grant of injunctions pending appeal. Rule 5 (2) (b) states that:

"Subject to subrule (1) the institution of an appeal shall not operate to suspend any sentence or stay execution but court may-

a) …….

b) in any civil proceedings where notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, or injunction or stay any further proceedings on such terms as it may think just.."

23. In comparison, there is no requirement under Order 42 Rule (6) (2) of the Civil Procedure Rules however for the Appellant before the High Court to establish an arguable appeal in order to justify the grant of an order to stay execution. Rule 5 (2) (b) which was extensively considered in **Equity Bank Ltd –Vs- West Link MBO Limited [2013] eKLR (Civil Application 78 of 2011 (UR. 53/2011)** where it was stated *interalia* that:

> **"This Court's jurisdiction to grant interim orders of stay … in exercise of its inherent powers … is deeply entrenched in its operations and has been applied over a long period of time. That jurisdiction is of fundamental importance and without it the Court's effectiveness would be greatly compromised."**

24. It would seem however that the High Court in exercising its jurisdiction under Order 42 Rule 6 (6) of the Civil Procedure Rules has applied the test laid down by the Court of Appeal in the exercise of its discretion in regard to applications for injunction pending appeal (**See Muriithi J in Julius Musili Kyunga –Vs- KCB Ltd & Anor [2012] eKLR**).

25. **Visram J** (as he then was), in my humble view distilled the applicable principles in **Patricia Njeri & 3 Others**. The learned Judge stated:

> **"The Appellants did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application?**
>
> **In the Venture Capital case (Venture Capital and Credit Ltd –Vs- Consolidated Bank of Kenya Ltd Civil Application No. Nairobi 349 of 2003 (UR)) the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be "exercised judicially and not in a whimsical or arbitrary fashion." This discretion is guided by certain principles some of which are as follows:**
>
> > **a) The discretion will be exercised against an Applicant whose appeal is frivolous (See Madhupaper International Limited –Vs- Kerr [1985] KLR 840 which cited Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal (J. K. Industries –Vs-KCB 1982 – 88) KLR 1088 (also cited in Venture Capital.**
> >
> > **b) The discretion should be refused where it would inflict greater hardship that it would avoid (See Madhupaper supra).**
> >
> > **c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See Butt –Vs- Rent Restriction Tribunal [1982] KLR 417 (cited also in Venture Capital).**
> >
> > **d) The Court should also be guided by the principles in Giella –Vs- Cassman Brown & Company Ltd [1973] EA 358 as set out in the case of Shitukha Mwamodo & Others (1986) KLR 445 (also cited in Venture Capital)."**

26. With the above principles in mind I have examined the Appellants submissions with regard to the possible weight of their appeal. This is what is stated *interalia* at page 5 and 6 of their submissions:-

> **"In the final analysis, the Applicant has annexed to the application a Memorandum of Appeal which raises substantial points of law and if an injunction is not granted at this stage, then the Applicant's appeal which has merit will be rendered nugatory. The main ground of appeal is that the learned trial magistrate erred in law by declaring that the only way in which learned trial magistrate erred in law by declaring that the only way in which the Appellant could challenge a decision made by the Respondents was through judicial review and not by way of**

an ordinary suit. It is still worth noting that the Appellant/Applicant has raised a ground of appeal indicating that there were moot questions of law and fact as to whether there was any decision made by the Respondents before issuance of the notice to vacate the matatu terminus.

Further, the Appellant's Memorandum of Appeal (Annexture W.P.G. 4a) has still raised the ground that the learned trial magistrate never gave reasons in his ruling as to why he had no jurisdiction to entertain the Appellant's suit seeking declaratory orders and an injunction."

27. In an attempt to demonstrate their main ground of appeal, the Appellants cited the case of **Senior Resident Magistrate's Lamu Court –Vs- Abubakar Mohammed & 11 others exparte, County Council of Lamu High Court Civil Application 209 of 2003 (UR**) to contend that the remedies sought in the lower court suit are not available through judicial review. It cannot be contested that that was the position in 2003. It is also correct to assert that a suit cannot be defeated merely because it seeks declaratory prayers. That a declaratory suit is an alternative to judicial review is a moot point in 2015 in light of new laws enacted since **Ngige -Versus- Chomba** in 2004.

28. The two decisions above were made before the promulgation of the new Constitution which has introduced a whole new range of rights and attendant reliefs, including injunctions, declarations and judicial review by way of constitutional Petitions, and the Fair Administrative Action Act, the latter which also contemplates redress by way of judicial review as a way of enforcing the citizens' right to fair administrative action (Article 47). Section 11 (1) therein provides for a wide range of reliefs. It provides interalia:-

"(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order-

(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;

(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;

(d) prohibiting the administrator from acting in particular manner;

(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

(g) ……..;

(h) ……..;

(i) ……..;

(j) ……."

29. Under this Act therefore judicial review encompasses declarations and injunctions. I think the

objection taken to the so-called ordinary suit in the lower court, was not merely that it contained declaratory prayers, but rather, that the suit was brought to challenge an administrative decision by the Respondents and therefore should have been laid before the High Court. As stated in the Appellants submissions: "**It is still worth noting that there were moot questions of law and fact as to whether there was any decision made by the Respondents before the issuance of the notice to vacate the matatu terminus**."

30. Notwithstanding the prayers in the Appellants' plaint, I think it is important to look at the body of the plaint itself in order to deduce the nature of the suit. What then is the cause of action pleaded therein? On the face of it, lack of consensus or consultation (paragraph 6), arbitrary action and discrimination by the Respondents (paragraph 9), illegality, unreasonableness failure to take into consideration fair administrative procedures including right to be heard (paragraph 10), and malice (paragraph 12, 13).

31. A closer look at the plaint prayers (a) & (b) reveals that the Appellants consider the impugned notice irregular and devoid of "**legally laid down procedures of fair administrative action**." (sic) In essence therefore what the Appellants were seeking was a two stage declaration to the effect that a) the notice was irregular because b) it was contrary to principles of fair administrative action; and in addition an injunctive order to permanently restrain the Respondents from enforcing the same by evicting the Appellants from their so-called licenced area of operation. The plaint as drafted bears all the hallmarks of a judicial review action.

32. The complaints appear to belong to the arena public administrative law rather than private rights, resonating particularly with the actions envisaged by the Fair Administrative Action Act. The Fair Administrative Action Act defines "**administrative action**" to include:

> **"(i) the powers, functions and duties exercised by authorities or quasi judicial tribunals; or**
>
> **(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;**

On the other hand the term "**administrato**r" is defined as

> **a person who takes an administrative action or who makes an administrative decision."**

33. A litigant might also challenge administrative decisions for illegality irrationality, procedural impropriety, under the Law Reform Act via Order 53 of Civil Procedure Rules. (See **Pastoli –Vs- Kabale District Local Government Council** and others [2008] 2 EA 300. In **Municipal Council of Mombasa –Vs- Republic and Umoja Construction Ltd Civil Appeal No. 185 of 2001 (UR**) it was held that:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was mad and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters….."**

34. And in **R V the Commissioner of Lands Exparte Lake Flowers Ltd Nairobi HC Misc. Application No. 1235 of 1998** the court further observed that:-

> **"Availability of other remedies is no bar to the granting of judicial relief but can however be an important factor in exercising the discretion whether or not to grant the relief….The court will be called upon to intervene in situations where authorities and persons act in bad faith abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant consideration or act contrary to legitimate expectations……"**

35. Some, if not all of the grounds above can be discerned from the Appellants' plaint, grounds on face of

application and the supporting affidavits. The plaint does not appear to plead any other additional cause of action. Paragraph 15 of the Appellant's supporting affidavit alludes to a "**contractual relationship**" between the parties. But this is not pleaded in the plaint or raised in the written submissions.

36. While not determining the point with finality therefore, I must agree with the Respondents, in light of the foregoing, that the Appellants' complaint is one in respect of an administrative action taken by public officials in exercise of their statutory power.

37. Secondly, that where the law provides a specific procedure for seeking redress that procedure must be followed strictly (**See Section 7 of the Fair Administrative Action Act and The Speaker of National Assembly –Vs- Karume [2008] 1 KLR 426 (EP**). There exist multiple avenues provided under the Constitution, Fair Administrative Act, the Law Reform Act for the challenge of an administrative action. However if a party decides to approach the court as the Appellants have done, the lower court would have no authority as yet under Article 23 (2) of the Constitution, while its jurisdiction is ousted under the Law Reform Act. (See also **Section 9 (1) of the Fair Administrative Action Act**.) In the result, I am very skeptical that the Appellants' appeal is arguable. The Appellants however are entitled to pursue their appeal to the final determination of the court.

38. On the second principle, it is my view that exercising discretion in the Appellants' favour may likely inflict more hardship than it would avoid in light of the stated objects of the relocation of matatus and omnibuses: the alleviation of traffic congestion in the town of Naivasha.

39. As to the question whether a successful appeal would be rendered nugatory if the orders are denied, I am not persuaded that the Appellants would be unable to operate effectively if moved to a new terminus, or be subsequently unable to return to their preferred terminus if their appeal succeeds. Any lost business can be computed and compensated by way of damages. The Appellants' licence has not been cancelled nor is it demonstrated that the new terminus is somehow inferior or disadvantageous to the Appellants' business. Other players have also been relocated there as well.

40. Turning to the well known principles of **Giella –Vs- Cassman Brown & Co. Limited [1973] EA 358** the Applicants have not established a *prima facie* case. A *prima facie* case was described **Mrao Ltd -Vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR**. The Court stated:-

> **"The power of the Court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence…….**
>
> **So what is a prima facie case? I would say in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"**

41. As observed, the appeal which is the basis of the application is doubtful. Secondly damages would compensate the Appellants adequately should the appeal succeed, and certainly, the balance of convenience appears to tilt in favour of the public interest, namely the control and decongestion of traffic in the town centre, than the convenience or the profits of one operator. For all the foregoing reasons I must find that this application is unmerited. It is dismissed with costs.

Delivered and signed at Naivasha this **23rd** day of **October**, **2015.**

In the presence of:

.....For Appellants

..... For Respondents

Court Assistant Stephen

C. W. MEOLI

JUDGE