



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**JUDICAL REVIEW NO. 7 OF 2012**

NYERI QUARRY TRANSPORTERS SELF HELP GROUP.....APPLICANT

**VERSUS**

MUNICIPAL COUNCIL OF NYERI.....1ST RESPONDENT

TOWN CLERK

MUNICIPAL COUNCIL OF NYERIU.....2ND RESPONDENT

**RULING**

This decision is the outcome of the Notice of Motion dated 27th February, 2012 taken out by **Nyeri Quarry Transporters Self Help Group** hereinafter, referred to as the Applicant. In the aforesaid Motion, the applicant sought for the following orders:

1. **THAT** the orders issued by this Honourable Court on 10th February 2012 be discharged, varied and/or set aside.
2. **THAT** in the alternative, the Honourable Court be pleased to order that the ex-parte applicant does deposit into court daily, the sum of Kshs. 95,775, or such other amount as the court may deem fit to order, being security for the continual loss of revenue sustained by the 1st Respondent during the currency of the order granted on 10th February, 2012.
3. **THAT** further, the Honourable Court be pleased to order Mr. Julius Macharia Munene and Joseph Gitonga Kamani to furnish a personal guarantee for the performance of the orders prayed for under prayer 2.
4. **THAT** the costs of this application be in the cause.

The Municipal Council of Nyeri and its town clerk were named as the 1st and 2nd Respondents. The Respondents opposed the Motion by filing the replying affidavit of Shadrack Mutua Mulanga.

I have considered the grounds set out on the face of the Motion and the facts deponed in the Verifying Affidavit and the Statement of Facts. I have taken into account the oral submissions from Learned Counsels who appeared in this matter. Mr. Wanyiri Kihoro, learned advocate for the Applicant argued the following grounds in support of the Motion. **First**, it is his submission that the By-laws were made without giving 14 days notice thus contravening **Section 203** of the **Local Government Act**. Mr. Mugambi, learned advocate for the Respondents urged this court to find that the Respondents gave sufficient notice by publishing a notice of intention to make By-laws on 8th June 2009. It is said that the notice invited objections and compliments from the public. I have considered the rival submissions and I

entirely agree with learned counsels that Local authorities are enjoined under **Sections 201 and 203** of the **Local Government Act Cap. 265 Laws of Kenya** to publish a notice of 14 days of intention to make By-laws. The question is, whether or not the Respondents complied with the aforesaid provision? Attached to the affidavit of Shadrack Mutua Mulanga, is a letter dated 29th June 2009, addressed to the Permanent Secretary, Ministry of Local Government in which the 2nd Respondent submitted for approval by the Minister, the Draft By-laws of the 1st Respondent. In paragraph 2 of the aforesaid letter it is stated as follows:

***“The By-laws were discussed at the Finance, Staff and General purposes committee meeting held on 4th June 2009 under minute. FSGP 30/2009 and later adopted by the special full council meeting of the same date under minute c/2009.”***

The letter further expressed itself in paragraph 5 as follows:

***“The council did not receive any written objection from the residents after the intention to make By-laws was published in the local daily.”***

It is not in dispute that the notice of intention to make By-laws was published in the Daily Nation of 8th June 2009. The last sentence of the notice clearly states as follows:

***“The council further informs the public that the objections and compliments arising from the intended By-laws must be lodged in writing to the clerk not later than 26th June 2009.”***

It is obvious from the above excerpt that the public were given about 18 days to lodge their compliments or objections. But my problem is that by the time of inviting members of the public to make their objections, the 1st Respondent had already passed and adopted the Draft By-laws. To be exact, those by-laws were discussed by the Finance Staff and General Purposes Committee meeting held on 4th June 2009 and adopted by the 1st Respondent's special full council on the same date. In my view, and from the information supplied, I am convinced that the Respondents did not comply with the provisions of **Sections 201 and 203** of the **Local Government Act** before causing the By-laws now being sought to be impugned to be approved by the Minister. I find the applicant's complaint to be well merited. There was no public participation before making the by laws.

Mr. Wanyiri Kihoro, also argued that the by-laws which were passed by the 1st Respondent and approved by the Minister was inconsistent with **Articles 49 and 50** of the **Constitution**. It is said the **By-law No.3** created an offence that attracts a prison term of six (6) months. In **By-law No.5 (vi)** the punishment imposed is a fine of Kshs. 2000 in default a jail term of six (6) months. It is the applicants submission that the Local Government Act did not give power to the Local authority to impose a Jail term and that is why the by-law is said to be in contravention of **Article 49** of the **Constitution**. Mr. Wanyiri further argued that the By-law does not give the person convicted a right of appeal as enshrined by the Constitution. In sum, the Applicants argue that the 1st Respondent contravened **Section 202 (3)** of the **Local Government Act** which prohibited local authorities from making by-laws which violates the Constitution and other written laws. It was pointed out that the By-law also contravened the Criminal Procedure Code. The Applicants' advocate further argued that **By-law 7 (iii)** involves police officers and police stations in the enforcement of the by-law. This, it is argued, meant that the By-law was no longer civic thus contravening the Police Act. Mr. Mugambi, argued that the Applicants have failed to show how their rights enshrined under **Articles 49 and 50** of the **Constitution** were breached. Having considered the competing arguments, I think the 1st Respondent cannot be said to have contravened the law by passing by-laws which prescribed a fine and a jail term. I have looked at **Section 201 (2)** of the **Local Government Act** and I am satisfied the 1st Respondent was authorized to pass such laws. I also find that the by-law did not take away the right of appeal. The fact that the by-law did not expressly state that an aggrieved person has a right of appeal did not in itself mean the right of appeal was taken away. With respect, I agree with the submissions of Mr. Mugambi that the Applicants have not clearly shown how their rights under **Articles 49 and 50** of the **Constitution** were breached. I see no merit in this ground.

The third and final ground ably argued by learned counsels from both sides is the question touching on the capacity of the Applicants to file this matter. The Respondents raised the issue as a Preliminary point of law. It is the submission of Mr. Mugambi that the Applicants not being, a body corporate recognised by law lacks the capacity to sue or being sued. Mr. Mugambi further pointed out that the persons who filed the application did not file a written authority from the members of the Nyeri Quarry Transporters Self-Help Group. Mr. Wainyiri Kihoro was of the view that the Applicant is a registered Self Help Group with huge membership. He urged this court to rule that the list supplied to court is sufficient to establish the actual names of applicants. The learned advocate cited the Provisions of **Article 159** of the **Constitution** to buttress the Applicant's submission against the Preliminary Objection. I have considered the rival submissions over this issue. It is clear in my mind that the Applicant is a registered member of the association, by the Ministry of Gender, Children and Social Development as a Self Help Group. In my humble understanding, I do not think the self help group has the capacity to sue or defend a suit by its name. The law is clear that the self help group can only institute or defend an action by individual names or by a representative suit where a few members can authorize others to do so in writing. That was not the case here. The applicant was challenged to provide the written authority authorizing Julius Macharia Munene to plead or defend on behalf of the members of Nyeri Quarry Transporters Self Help Group but unfortunately none was supplied. What the applicant did was to provide a registration certificate for the self help group and a list accompanying the certificate. That in my view did not sufficiently answer the preliminary objection. The provisions of **Article 159** of the **Constitution** enjoins courts not to decide cases on technicalities. It is unfortunate that the objection this court is now dealing with is not a simple technicality. The objection goes to the root of the case. Capacity to sue or to defend is a very serious issue which the constitution did not intend to be ignored. Parties must know their true accusers or those to sue. The Applicant is not recognized by law as a body corporate with capacity to sue or defend. With respect, I agree with the submissions of Mr. Mugambi that the action should be ordered struck out. If Applicant was a body corporate capable of suing, I would have granted the orders as proposed herein above, but unfortunately it is not. I hereby uphold the Preliminary Objection. The motion dated 27th February, 2012 is hereby ordered struck out. Since there is no existent personality known in law, I see no need to give costs.

**Dated, Signed and delivered in open court this 21st day of February, 2014.**

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**J.K.SERGON**

**JUDGE**

**In the presence of:**

Mr. Kiboi for the Respondent

N/A W.Kihoro for Applicant