



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS APPLICATION NO. 326 OF 2013

**IN THE MATTER OF AN APPLICATION BY THE ARCH DIOCESE OF NAIROBI FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF AN ORDER OF PROHIBITION,
DIRECTED AT NAIROBI CITY COUNCIL**

AND

IN THE MATTER OF THE CHIEF LICENSING OFFICER

AND IN THE MATTER OF PAYMENT OF SINGLE BUSINESS PERMIT

AND

**IN THE MATTER OF NAIROBI CITY COUNCIL BY LAWS (BY LAW NO 8 OF THE NAIROBI
COUNTY BY-LAWS), SECTION 112 OF THE LICENSING LAWS (REPEALS AND
AMENDMENTS) ACT NO 17 OF 2006, AND THE LOCAL GOVERNMENT ACT CAP 265
LAWS OF KENYA**

ARCH DIOCESE OF NAIROBI

REGISTERED TRUSTEESAPPLICANT

VERSUS

THE NAIROBI CITY COUNTY.....RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 1st October, 2014 filed in this Court on 30th October 2013, the ex parte applicant herein, **Arch Diocese Of Nairobi Registered Trustees**, seek the following orders:
 1. **An order of Prohibition against the City Council of Nairobi, through any persons(s), agents or servants/officers from collecting Single Business Permit Fees from the Respondent's affiliated institutions.**
 2. **An order of Prohibition against the City Council of Nairobi, through any person(s), agents or servants/officers from harassing or arresting the Applicant's agents or servants while purporting to collect Single Business Permit Fees.**

3. **The costs of this application be provided for.**

Ex Parte Applicant's Case

4. The application is based on the Statement filed on 16th September, 2013 and the verifying affidavits sworn by **Fr Antony Mwituria**, the procurator of the Applicant on 16th September, 2013.
5. According to the deponent, the Applicant herein is a Trust established under **The Trustees (Perpetual Succession) Act** (Cap 64 Laws) of Kenya and whose main objective is to promote the spiritual and social welfare of the community as a whole and to achieve its objective the Applicant has established various institutions in order to deliver the community services which institutions have been established solely on donor funding and offer services to the most needy people in the community. According to him, any fees charged by these institutions are only meant to sustain and supplement the donor funding and are in no way meant for profit making.
6. Prior to 2001 the Respondent kept demanding the payment of Business Permit Fees and vide a letter dated 20th February 2001 the then Permanent Secretary in the Ministry of Education clarified to the Respondent that the Applicant and or its affiliated institutions is not a business entity and as such should not be asked to pay for the Business Permit Fees. Pursuant to the said letter the demand notices from the Respondent abated until 2007 when the Respondent issued notices to one of the Applicant's affiliated institutions – Hekima College. However, the Applicants Advocates in response wrote to the Respondent clarifying that the Applicant was not a business entity and as such ought to be exempted from payment of the Business permit Fees.
7. Subsequently in 2008 a notice was issued to another of the Applicant's affiliated institutions Thomas Burke Schools and another one to St. Joseph Mukasa Dispensary. Once again the advocates of the Applicant wrote to the Respondent who responded vide a letter dated 14th August 2009 promising to consult and revert to the Applicant on the issue and to date the Respondent is yet to revert. The said advocates also wrote to the Respondent seeking to have the Applicant and or its affiliated institutions exempted from the payment of rates but the said letter elicited no response.
8. Notwithstanding the above position the Respondent continues to demand the payment of business permit fees to various institutions affiliated to the Applicant and each time the advocates of the Applicant sought to clarify the issues the letters remained unanswered. In March 2013 the Respondent visited Vendramini Education Centre an institution affiliated to the Applicant and issued the Demand notice prompting the Applicant's advocate to again write to the Respondent. Oblivious to the previous correspondence the Respondent agents or servants and/or officer on 1st August 2013 again issued a demand notice for the payment of the Business Permit fees to Vendramini Education Centre and further threatened to arrest the Applicant's and or its affiliated institutions Servants if the fail to pay for the said Business Permit Fees.
9. In the deponent's view, the said demands amount to harassment to the Applicant and or its affiliated institutions and it is just and equitable that the Respondent is prohibited from making demands for payment of Single Business Permit Fees and if an order of Prohibition is not granted the Applicant and or its affiliated institution will continue operating in fear and apprehension.

Respondent's Case

10. In response to the application, the Respondent filed a replying affidavit sworn by **P N Kinyanjui**, its Chief Licensing Officer on 12th November, 2013.
11. According to the deponent, the letter from then their Permanent Secretary in the Ministry of Education merely advised but the same is not binding on the Respondent.
12. In his view, the Respondent acted within its lawful mandate and admitted that the Respondent has sent various notices to the Applicants to pay up the single business permit which the Respondent is entitled to since the Applicant does not qualify to be exempted from paying single business permit fees as the fees structure obtained from one of the schools is inconsistent with Applicants contention that it offers service to community.
13. He therefore averred that the Applicants application is misconceived, abuse of Court process and

devoid of merit on the grounds that the Respondent has at all times discharged its statutory duty; that in discharging the said mandate it has not exceeded its authority to warrant an order of Prohibition; that the Respondent in its absolute discretion may exempt any charitable organization from paying single business permit fees; that the Applicant has not made any formal application to enable the Applicant exercise its discretion; and that the Respondent in the discharge of its lawful mandate has not breached the rules of natural justice for such orders to be granted.

Applicant's Submissions

14. On behalf of the Applicant, it was submitted that by virtue of by-law 8 of the City County, the respondent is empowered to reduce and/or exempt fees chargeable to charitable institutions such as the applicant as a way of supporting their noble endeavours of providing essential services to the community. According to the Applicant, the Respondent in abdicating its role as provided under the said by-law and in failing to take into account the powers conferred upon it and in further failing to understand and enhance and support the ex parte applicant's noble cause to the community and to the respondent itself, has resorted to harassing the applicant.
15. It was submitted that despite the applicant's efforts to engage the Respondent on the issue of the business permit and waiver of the same, the Respondent has failed to respond despite promise to do so. The Court was urged to take into account the nature of the activities the appellant undertakes and the fact that as a consequence it has been exempted from certain charges and penalties a position supported by the Permanent Secretary Ministry of Education.
16. Relying on section 2 of the repealed *Trade Licencing Act* and *Black's Law Dictionary*, 8th Edn. It was submitted that the activities undertaken by the applicant cannot be considered to be business in order for them to be required to take out single business permit.
17. It was submitted by **Mr Olemba** learned counsel for the applicant that in light of the various letters written by the Applicant to the Respondent the Respondent cannot claim that the Applicant has not made an application for exemption. It was further submitted that the copy of the fees structure exhibited by the Respondent cannot constitute fees by an organisation seeking profit since the fee is minimal to aid what is given by the donors.

Respondent's Submissions

18. On behalf of the Respondent it was submitted that under by-law 6 of 2007 the Respondent is empowered in absolute discretion to exempt a charitable organisation. In the instant case, the applicant has not made any formal application for consideration by the Respondent
19. It was submitted that the correspondence do not constitute a formal application. However, even if they were to be so construed, it was submitted that it is an exercise which the Respondent has to consider. According to counsel inquiries were being made and the said correspondences would be replied to in due course. However, that does not constitute acknowledgement of exemption for fees.

Determination

20. I have considered the foregoing.
21. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** and held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality....Irrationality is when there is such gross unreasonableness in the

decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

22. In this case it is not contended that the Respondent has no power to impose tax on profit making organisations. The first limb of the application is that in the circumstances of the nature of the activities carried on by the Applicant the Respondent ought to exercise its discretion favourably and exempt the Applicant from payment of the said single business permit charges.
23. Although the Applicant is not expressly seeking an order of mandamus the effect of granting the orders sought herein would be to in effect compel the Respondent to grant the Applicant an exemption from payment of single business permits fees. However as was held in Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR it was held by the Court of Appeal that:

“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.” [Emphasis mine].

24. It follows that this Court cannot in these proceedings grant an order whose effect would be to compel the Respondent to exercise its undoubted discretion in a certain way.
25. However it is trite law that where a statute gives a statutory or public body discretion, that discretion ought to be properly exercised. In Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240 it was held as follows:

“On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are --- essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his landregardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe

to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...
“

26. It is now trite that there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. This Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.**
27. It is also the law that concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful and unlawful behaviour might be constituted by an outright refusal to consider the relevant matter; a misdirection on a point of law; taking into account some wholly irrelevant or extraneous consideration; and wholly omitting to take into account a relevant consideration. See **Republic vs. Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another Ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400; Padfield vs. Minister of Agriculture and Fisheries [1968] HL and Associated Provincial Picture Houses Ltd vs. Wednesbury Corp (CA 1948.**
28. In the instant case the Respondent has apparently not exercised its discretion with regard to exemption of the Applicant from paying single business fees. Its reason for not doing so is that the applicant has not made a formal application. However, it is clear that requests for exemptions have been made. In my view the reasons given by the Respondent for failing to exercise its discretion are unreasonable. See **Kamani vs. Kenya Anti-Corruption Commission [2007] 1 EA 112.** The Respondent ought to exercise its discretion on the matter and give the Applicant its reasons therefor expeditiously as expected under Article 47 of the Constitution. This Court is entitled to interfere with the Respondent's deafening silence over the matter. Without exercising the discretion and giving the Applicant the reasons therefor, it is not possible for the Applicant to decide whether or not to challenge the said decision.
29. The other issue raised is that the Applicant's activities do not amount to business since they are non-profit making activities. According to it, the charges it levies are minimal and are meant to complement the donor support. Whether or not the charges levied by the Applicant do not amount to profit is a matter of fact. It would depend on a number of considerations to be taken into account. Based on the affidavit evidence filed in this Court, it would be pretentious for the Court to make a definitive finding as to what the said charges constitute. However, that factor is a relevant factor for consideration by the Respondent in deciding whether or not to exempt the Applicants from paying single business permit fees.

Order

30. Consequently, the order which commend itself to me and which I hereby grant is that the Respondents do consider the Applicant's application and furnish the Applicant with the decision and reasons therefor within 30 days. In default of so doing, the Respondent shall be deemed to have granted the said exemption in which event the Respondent through any persons(s), agents or servants/officers shall be prohibited from collecting Single Business Permit Fees from the Applicant's affiliated institutions and/or harassing or arresting the Applicant's agents or servants while purporting to collect the said fees.
31. I have noticed that the application was not properly intitled in that instead of being brought in the name of the Republic as is the procedure in judicial review the same was brought in the name of the ex parte applicant. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779, Mohamed Ahmed vs. R [1957] EA 523 and Jotham Mulati**

Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486.

32. In the premises there will be no order as to costs.

Dated at Nairobi this day 21st day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Maina for Mr Olembo for the Applicant

Cc Kevin