



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 472 of 2012

CECILIA WAIRIMU NJOROGE AND 19 OTHERS..... PLAINTIFFS

VERSUS

THE CITY COUNCIL OF NAIROBI..... DEFENDANT

R U L I N G

1. The Plaintiffs have sought against the Defendant the following reliefs in their plaint dated 20th September 2012 -

“ (a) A declaration to issue that he city council of Nairobi (omnibus station) by laws 2007, its predecessors and/or fees and/or charges other than a single business permit paid by matatu operators effective 1.1.1999 to date are arbitrary, oppressive, discriminatory, unlawful, unconstitutional hence null and void.

(b) A mandatory injunction compelling the Defendant to tender in Court a true account of all the fees and/or charges above KShs 5,000 per year provided for by the standard annex 1 single business permit fees schedule updated 1999 and/or the schedule to the local government (single business permit) rules 2008 paid by matatu operators within the territorial jurisdiction of the defendant effective of 1.1.1999 to date for the purposes of refunding the monies acquired discriminatively and its rekindle to the concerned matatu operators, though this honourable Court.

(C) A prohibitory injunction prohibiting the Defendant, its agents, servants and/or any other person(s) claiming from them from claiming and/or towing of matatu vehicles, arresting matatu operators, charging in a criminal court any matatu operator, charging in a criminal court any matatu operator for non-payment of seasonal parking fees and/or charges, seeking to be paid, directly or indirectly receiving any monies from matatu operators, in the name of seasonal, daily or monthly parking fees until the hearing and determination of this suit and/or until further orders of this honourable court.

(d) A mandatory injunction compelling the defendants to produce in court their city council of Nairobi omnibus stations by law 2007.

(e) General and aggravated damages for negligence of statutory duty and/or for intimidation and/or conspiracy calculated to earn the defendant unlawful or undue profit.

(f) Special damages to be assessed by the honourable court.

(g) Exemplary damages to vindicate the strength of the law.

(h) Cost of this suit and any other or further relief the honourable Court may deem fit to grant”.

2. The Defendant entered appearance on 10th October 2012 and filed defence on 18th October 2012. It has sought dismissal of the Plaintiffs’ suit with costs.

3. On 26th November 2012 the Plaintiff’s filed **notice of motion dated 23rd November 2012** seeking the following main orders –

“A

B That the memorandum of appearance dated 10th October 2012 and filed in court on the same day and the defendants statements of defence dated 17th October 2012 and filed in court on 18th October 2012 and/or any other document filed of rand/or on behalf of the defendant by the firm of KOCEYO & Co. Advocates be expunged from the records in this suit.

c That all imposition(s) of fees and/or charges for the use of the defendants parking spaces by matatu operators other than the lawful annual single business permit of KShs 5,000/- and/or the city council of Nairobi parking places and omnibus stations by-law 2007 and/or its predecessor are discriminative, unlawful, unconstitutional and hence null and void.

D That a prohibitory injunction do issue prohibiting the defendants, its agents, servants and/or any other person(s) claiming from them from impounding, and/towing of matatu motor vehicles, arresting matatu operator, charging in a criminal court any matatu operator for non-payment of seasonal and/or monthly parking fees and/or charges, seeking to be paid, directly or indirectly receiving any monies from matatu vehicle operators in the name of parking fees SAVE ONLY for the lawful 5,000 annual single business permit, pending the hearing and determination of this application and/or the main suit and/or until further orders of the honourable court.

E That the Defendant herein do forthwith file in court and in case within 14 days of the service of the order, the proper accounts of all the fees and/or charges for seasonal parking and/or monthly parking paid to it by matatu vehicle operators within its territorial jurisdiction effective 1/1/1999 to date save only for the fees paid in form of a single business permit.

F That the Defendant herein do tabulate the accounts to be filed in court in prayer (D) herein above in a manner that will illustrate the following:-

- i) Motor vehicle (matatu vehicle) Registration Number.**
- ii) Owner and address of each or several matatu vehicles**
- iii) Amount paid in years seriatim starting with the year 1999 to date.**
- iv) Total amount paid by each matatu vehicle operator(s) above the lawful KShs 5,000 per year**

G That the information tabulated in prayer (F) herein above be supported by copies of duplicate receipts and be filed under oath.

H That the accounts once taken and upon hearing this application the defendant pays to the respective matatu vehicle operators(s) the amounts discriminately paid by every one of them and its rekindle and which payment to be done within a time frame the court may deem fit and just.

I That a mandatory injunction do issue compelling the defendants to file in court their city council of Nairobi parking places and omnibus stations by law 2007 and the city council of Nairobi (designated parking places) by-law 2007 within 14 days of service of this order and the same be declared unconstitutional hence null and void.

J That this suit be deemed as proved upon the hearing and determination of the legal arguments in this application.

K That the honourable court be pleased to certify this matter as raising a substantial question of law under clause (3)(b) and (3)(d)(ii) of the Article 165 of the Constitution of Kenya 2010 and place the file before the Chief Justice for directions.

.....”

4. There are 54 grounds for the application many of them containing several sub-grounds. The application is supported by an affidavit sworn by JAMES GACHERU KARIUKI, the 8th Plaintiff. He has the authority of the other Plaintiffs to plead, appear and act in the suit on their behalf.

5. Despite service upon it the Defendant did not file any papers in response to the application. Nor was there appearance for it at the hearing of the application.

6. I have considered the submissions by the 8th Plaintiff on behalf of the Plaintiffs. The only prayers in the application that the court can legitimately deal with at this stage are **B** and **K**. Prayers **C, D, E, F, G, H** and **I** will depend on whether the declaration sought in relief (a) of the plaint is grant. That relief, as well as the other reliefs in the plaint, can only be canvassed at the trial of the action. Prayer **J** is of course an attempt to circumvent a proper trial of the action and cannot be permitted. There are various matters of fact that have been pleaded in the plaint which must first be established by evidence in a trial before the various legal arguments revolving around those issues of fact can be tackled.

7. Prayer **B** of the application seeks and order to expunge from the record the memorandum of appearance and statement of defence filed by M/s Koceyo & Co., Advocates on behalf of the Defendant. The ground for this prayer appears to be that the services of the said advocates were not duly procured in accordance with the **Public Procurement and Disposal Act, 2005**. That Act, I believe, and the rules made thereunder, provide the procedure for challenging any public procurement or disposal, particularly by persons who may have tendered for such procurement or disposal.

8. In the present case, the representation of the Defendant by counsel ought not to be a matter to concern the Plaintiffs. The Defendant is entitled to be represented by counsel of its own choice. If there was breach of any law or regulation governing procurement of legal services by the Defendant under the Public Procurement and Disposal Act, 2005, that is not a matter to be taken up here but elsewhere under the procedures set out in the said Act. I therefore decline prayer B of the application.

9. As regards prayer **K** of the application, the constitutional issue raised in this suit is whether the **City Council of Nairobi (Omnibus Stations) By-laws, 2007** under which fees and charges, other than a single business permit, are levied upon matatu operators, is arbitrary, oppressive and discriminative and hence null and void.

10. Bearing in mind the number of public service vehicles (matatu) that do business within the City of Nairobi, and hence the public interest involved, I hereby certify that the suit raises a substantial question of law under **Article 165(3)(b)** and **(d)** of the Constitution of Kenya. I therefore refer this matter to the Hon the Chief Justice for him to act as provided in **Article 165 (4)** of the Constitution.

11. Costs of this application shall be in the cause. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF APRIL 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL 2013