



REPUBLIC OF KENYA

High Court at Nyeri

Judicial Review 7 of 2012

REPUBLIC.....APPLICANT
versus

MUNICIPAL COUNCIL OF NYERI

TOWN CLERK MUNICIPAL COUNCIL OF NYERI.....RESPONDENT

EXPARTE

NYERI QUARRY TRANSPORTERS SELF HELP GROUP

RULING

1. The exparte applicant herein under a certificate of urgency dated 8th February 2012 filed Chamber Summons for leave to apply for Judicial Review for orders of certiorari prohibiting and mandamus against the Respondents herein.

2. On the same date Justice J. K. Serگون delivered the application aforesaid in the following terms.

1. Leave of 21 days be and is hereby issued for an order of certiorari to remove into High Court and quash the decision of the Municipal Council of Nyeri to enforce the sale of sand and quarrying activities By laws 2009 and any part connected thereto of the fees and charges notice dated 22nd June 2011.

2. That leave of 21 days be and is hereby issued for AN ORDER of PROHIBITION prohibiting the Municipal Council of Nyeri from implementing the sale of sand and quarrying Activities By-Laws 2009 or any by laws in the quarrying sand murram and related trades in the Nyeri Municipality all which are not procedural and processed after following the laid down procedures in law Government Act and regulation made thereto.

3. That leave of 21 days be and is hereby issued for AN ORDER of MANDAMUS directed at the Municipal Council of Nyeri for strict observance of section 202(1)(2)(3) of the Local Government Act in the making of all By Laws more specifically those connected to the quarrying and sand trades in the Municipality.

3. On 27th February 2012 the exparte applicant filed a substantive application herein and served the same upon the respondents.

4. The Respondents in reply thereto filed a notice of preliminary objection on 19th March 2012 in which they stated

a. The exparte applicant is not a legal person recognized by law therefore lacks capacity to sue or be sued.

b. The two respondents who have sworn the affidavits attached thereto.

5. Together with the notice the respondent also filed an application on the same date under certificate of urgency a notice of motion under Order 53 rule (3) of the Civil Procedure Rules and section 1A 1B and 3A of the Civil Procedures Act for order

1. That the order issued by this honourable court on 10th February 2012 be discharged varied or set aside.

2. That in the alternative the honourable court be pleased to order that the exparte applicant does deposit into court daily the sum Ksh. 95,755/- or such other amount as the court may deem fit to order being security for the continual loss of revenue sustained by the 1 st Respondent during the currency order granted on 10th February 2012.

6. The Substantive application was heard before Justice Sergon and ruling thereon fixed for 28th September 2012 with an order that notice of motion dated 19th March 2012 to abide the outcome of the said ruling.

7. On 8th March 2013 the respondent/applicant appeared before this court when I directed that the application be served for interparte hearing on 18th March 2012 when it was ordered that the same be heard on 6th May 2012.

8. The exparte applicant having been duly served with hearing notice and affidavit of service to that effect filed did not attend court so the matter proceeded exparte.

SUBMISSIONS

9. It was submitted by Mr. Mugambi Advocate for the Respondent/applicant that the applicant operations are affected by the order of prohibition stopping it from collecting cess.

10. It was further submitted that the three orders of leave were granted but they were not granted as stay pending the hearing of notice of motion.

11. It was therefore submitted that the order of prohibition granted does not have the effect of prohibition against the applicant/respondent.

12. I have looked at the proceedings before Justice Sergon and note that stay was not granted. This has been confirmed by Julius Macharia Munene the chairman of the exparte applicant in paragraph 5 of the affidavit dated 28th March 2012. wherein the same states as follows:

“That the exparte application dated on 8th February 2012 and filed in court on the same day we sought the prerogative orders of certiorari, mandamus and prohibition and also stay orders before the hearing of the judicial review proceedings but the later was not granted by the court meaning that neither the court nor the exparte applicants have impeded the collection or operations of the 1st respondent/applicant”.

13. I have also noted that the said orders were for 21 days and from record it is clear that they were never extended when the substantive application was heard by Justice Sergon.

14. I have therefore considered the application herein in light of the matters stated herein and taking into account the fact that the grant of leave herein does not mean that that the case will succeed I allow the application herein and order that the exparte applicant continue to pay to the applicant herein daily cess money or in the alternative the said daily sum to be deposited in a joint account operated by the exparte

applicant and the respondent/applicant pending the ruling herein.

Dated and delivered at Nyeri this 16th day of May 2013.

J. WAKIAGA

JUDGE

Mr. Waniri Kihoro for the exparte – applicant

N/A for Mr. Mugambi.

Court: The ruling is read in open court in the presence of Mr. Kihoro. The Matter to be mentioned on 17th September 2013 for further directions.

J. WAKIAGA

JUDGE