



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISCELLANEOUS JR APPLICATION NO. 244 OF 2011

IN THE MATTER OF ORDER 53 RULE 3 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE KENYA AIRPORTS AUTHORITY ACT, CHAPTER 265 LAWS OF KENYA

AND

IN THE MATTE OF AN APPLICATION BY EMIRAT4S AIRLINES FOR JUDICIAL REVIEW

EMIRATES AIRLINESAPPLICANT

VERSUS

THE CITY COUNCIL OF NAIROBIRESPONDENT

JUDGMENT

Through a notice of motion dated 24th March, 2011 Emirates Airlines (the applicant) prays for orders to issue against the decision of the City Council of Nairobi (the respondent) as follows:-

1. An Order of Certiorari to remove into the High Court for the purpose of quashing the summons, Charge Sheet and all proceedings relating to Criminal Case No. 20409 of 2010 currently before the City Council Court in REPUBLIC VS. DIRECTOR/MANAGER EMIRATES AIRPORT SERVICES.

2. An Order of prohibition issued to the Respondent or any of its employees, agents and/or servants from commencing any further criminal or any other proceedings against the Applicant or any of its employees and/or servants in relation to the purported unpaid Business Permit fees ranging back to the year 2003 or thereabout in relation to the Applicant's Airport office situate in Unit 1 Terminal of the Jomo Kenyatta International Airport which office is only used for the checking in and processing of passengers on the Licence by the Kenya Airports Authority upon payment of the Licence Fees to the said Authority which Fees is paid to date.

3. An Order for costs

The application is supported by a statutory statement dated 2nd November, 2010 and a verifying affidavit sworn by Lloyd Mahowe on 2nd November, 2010.

The applicant came to court after its Managing Director was summoned to appear before the City Council Court to answer charges following the failure by the applicant to pay business fees to the respondent. It is the applicant's case that it is not under any legal obligation to pay business permit fees for the period 2003 to date to the respondent since it regularly pays fees to Kenya Airports Authority in compliance with the Kenya Airports Authority Act, Cap 395.

The respondent did not file any papers in response to the application. I am however under a duty to consider the applicant's application and decide whether it is merited.

From the documents filed in court it is clear that the applicant has an office within Jomo Kenyatta International Airport which falls under the jurisdiction of the Kenya Airports Authority (K.A.A) as provided by Section 12 of the Kenya Airports Authority Act. The applicant regularly pays licence fees to K.A.A. There is evidence of such payment.

The applicant now says that once it has paid licence fees to K.A.A. it has no legal obligation to pay single business permit fees to the respondent. The same position is held by K.A.A. as can be seen from the letter dated 16th June, 2010 addressed to the respondent by John Tito the Chief Legal Officer of K.A.A.

It is the applicant's case that K.A.A. has the full responsibilities for all the business operations conducted within aerodromes. In support of this argument it quotes Section 8(2) (d) of Kenya Airports Authority Act which provides that the board of K.A.A. is mandated to:-

“grant on such terms and conditions as the Authority deems fit, authority to carry on any trade or business at aerodromes.”

The applicant also relies on Section 12(3)(e) of the same Act which provides that the K.A.A. has the mandate to:-

“determine, impose and levy rates, charges, dues or fees for any service performed by the Authority, or for use by any person of the facilities provided by the Authority, or for the grant to any person of a licence, permit or certificate, subject to the approval of the Minister.”

The applicant has supported its case with the decision of Lenaola, J in **NAIROBI H.C. MISC. CIVIL APPL. NO. 1624 OF 1999 REPUBLIC VS. THE CITY COUNCIL OF NAIROBI & THE MINISTER FOR LOCAL GOVERNMENT EX-PARTE THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS & THE LAW SOCIETY OF KENYA**. In quashing a notice by the respondents introducing licence and permit fees for the members of the ex-parte applicants Lenaola, J at page 10 of his judgment held that :-

“The Notice purported to burden the Applicants' membership with an extra license for the same thing – one called the annual licence and another one called the business permit. It does not matter that they are called “license” or “permit” the effect would be that an advocate or an accountant are burdened twice aside from the fact that they must also pay for their annual practising certificate.”

Although this case was not defended, I will have to look at the law that allows the respondent to charge fees for permits. Section 148(1)(a) of the Local government Act provides that:-

“A Local authority may charge fees for any licence or permit issued under this Act or any other written law or in respect of any person or matter, premises or trade, whom or which the local authority is empowered to control or licence.”

Section 163A (1) of the same Act provides that:-

“A local authority may on receipt of an application under this Act grant a business permit to allow the conduct of a business or trade, including a profession or occupation within its area:

Provided that in the case of a business, trade or profession or occupation regulated by the provisions of any other written law, a person shall prior to submission of an application for a business permit pursuant to this subsection, satisfy all the requirements of that other written law.”

In my understanding, the respondent has been given powers to levy charges for any licences or permits it issues for any trade. Even where those trades are governed by other statutes the respondent still has power to issue business permits so long as the applicant for the licence has met the conditions set by the particular statute.

The applicant before me argues that it has paid licence fees as provided by the Kenya Airports Authority Act. The applicant has however not pointed out to me the specific provision in the Act which ousts the jurisdiction of the respondent to issue business permits. If indeed Parliament intended to deny the respondent the power to collect business permit fees from businesses operating within aerodromes it would have clearly said so. In fact there is an example in Section 13(1)(a) of this particular Act in which parliament clearly ousted the application of certain provisions of the Land Control Act in the following words:-

“13(1) where land is required by the Authority for purposes of the Authority, it may either –

(a) If such land is not public land, acquire such land through negotiation and agreement with the registered owner thereof:

Provided that notwithstanding the provisions of Section 6 of the land control Act, the ensuring transaction shall not require the consent of a land control board if the land to be acquired is agricultural land.”

In my view the respondent acted within its mandate when it demanded business permit fees from the applicant. The applicant cannot be allowed to hide under the Kenya Airports Authority Act in an attempt to evade its obligation of paying business permit fees as a law abiding citizen of the City of Nairobi. Having said so it follows that the Managing Director of the applicant is properly charged before the City Council Court. The applicant’s application fails and the same is therefore dismissed. Since the case was not defended, there is no order as to costs.

Dated and signed at Nairobi this 31st day of January 2012.

W. K. KORIR
JUDGE