



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION 79 OF 2010

***IN THE MATTER OF AN APPLICATION FOR ORDERS OF
JUDICIAL REVIEW OF CERTIORARI AND PROHIBITION***

AND

***IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 265 AND IN THE RATING ACT
CAP 267***

**REGISTERED TRUSTEES SUPREME COUNCIL OF KENYA
MUSLIM.....APPLICANT**

VERSUS

THE ATTORNEY GENERAL1ST RESPONDENT

**THE PERMANENT SECRETARY MINISTRY OF LOCAL GOVERNMENT....2ND
RESPONDENT**

CITY COUNCIL OF NAIROBI3RD RESPONDENT

RULING

The applicant is an umbrella body of all Muslims' organizations, institutions and individual Muslims registered under the Societies Act Cap 60 Laws of Kenya having its registered offices at Islamia House Mokta Dadah Street on LR. No.209/4338 within the City Council of Nairobi. On 6th June 1990 the then Minister for Local Government Hon. William Ntimama through legal notice No.389 of 1990 formulated rules in the exercise of powers conferred in him by section 27(2) of the Rating Act exempting charitable institutions from payment of rates. Subsequently through legal notice No.94 of 1993, the Minister exempted the applicant from the payment of rates by inserting the applicant's name in the schedule of charitable institutions. It is clear that charitable institutions were defined by the legal notice of 389 of 1990 as institutions, body of persons or irrevocable trusts for the time being granted exemptions as a charity by the Commission of Income Tax from the payment of tax upon its income pursuant to the provisions of the Income Tax. It is also undisputed that the applicant was exempted from paying taxes on their income by the letter dated 24th March 1991 by the Commissioner of Income Tax.

It is contended that the 3rd respondent has been issuing demand notes for the payments of rates contrary to the exemption granted to the applicant. On the 16th January 2007, applicant's officials acting on behalf of the applicant met with the Minister for Local Government and after the meeting the minister addressed a letter to the Town Clerk informing him to consider the application for the exemption as

requested and earlier granted. It is contended that the 3rd respondent made a decision that LR. NO.209/4338 was for commercial purposes and does not qualify for exemption for valuation of rates, consequently the applicants were not entitled to the exemption granted and/or sought. It is the contention of the applicant that it is a nonprofit organization relying on donor funds and that the income from the subject property is used in the daily running of the secretariat housed in the premises. What is in contention is that on 15th September 2010, the applicant received a legal notice No.00071 dated 7th September 2010 demanding rates and interests under section 17 of the Rating Act giving them a notice of payment in default legal procedures to be commenced for recovery. It is also contended that the 3rd respondent has failed to recognize the exemption granted by the Minister for Local Government in 1993. As a result the applicant filed the present matter wherein leave was granted resulting in the filing of the Notice of Motion under my determination seeking the following orders;

- a) That an Order of Certiorari do issue to remove to this Honourable Court for the purpose of being quashed the demand for Rates and Interest made by the 3rd Respondent contained in Legal Notice 00071 dated 07/09/2010 for plot no.209/4338 MOKTADADAH Street of Kshs.15,592,692/= being rates arrears with interest at the rate of 3 percent per month up to 30th September 2010.**
- b) THAT an order of prohibition do issue prohibiting the 3rd Respondent from demanding Kshs.15,592,692/= being Rates arrears up to 2010 together with interests at the rate of three per cent per month calculated up to 30th September 2010.**
- c) THAT an order of prohibition do issue prohibiting the 3rd Respondent from acting ultra vires the Provisions of the Rating Act Cap 267 Legal Notice No.389 of 1990 The Rating (exemption of charitable institutions from the payment of rates) Rules 1990 as amended vide Legal Notice No.94 of 1993 dated the 21st April 1993 in demanding rates payment for plot No.LR.NO.209 or any premises registered under Supreme Council of Kenya Muslims within the City Council of Nairobi.**
- d) THAT the Respondent be condemned to pay the costs and interests of this application.**

According to Legal Notice No.94 of 1993, the then Minister for Local Government in exercise of powers conferred by section 27(2) of the Rating Act exempted charitable institutions from the payment of rates. In that legal notice, the Minister listed and exempted various institutions including the applicant from payment of rates because the applicant was a charitable institution within the definition set out in Legal Notice No.389 of 1990.

It is the contention of the 3rd respondent that the applicant's document of title in respect of LR. NO.209/4338 on special conditions No.4, the land and the building thereon shall only be used for business purposes or for combined purposes of business and residence, therefore they are not charitable institutions within the meaning of legal notice No.389 of 14th September 1990. It is also contended that the applicant has not applied for change of user from business or commercial to a place of worship as required under the Physical Planning Act Cap 289 of the laws of Kenya to warrant exemption under the said Notice. It is also contended by the 3rd respondent that the applicant is running shops and offices and who are paying tenants, thus the subject property is a commercial place which is ratable. The 1st and the 2nd respondent supported the position taken by the 3rd respondent in that applicant is not entitled to any exemption as purportedly granted and enforced by themselves.

I have considered the submissions and the authorities filed by the parties herein. The question for my determination is whether the applicant is entitled to the orders sought. In determining that issue I must be alive to the guiding principles in granting judicial review orders. Judicial review orders is not concerned with merits or demerits of the decision making authority but with the process that was used to reach the decision. The valuation for rating act cap 266 is very clear on what properties are exempted from valuation. It is the contention of the respondents that applicant's property does not qualify for rates exemption because the title has special conditions which expressly provides for payment of rates. Section 27(1) (e) of Cap 266 states;

“No valuation for the purposes of any rate shall be made in respect of any land which is used or is bonafide intended to be used within a reasonable time, directly and exclusively of the following purposes.....charitable institutions”.

Section 27(2) of Cap 266 further states; **“the minister may make rules for purposes of this section.”**

No doubt the said minister for Local govern through legal notice no.389 of 1990 formulated rules in exercise of the powers conferred by section 27(2) of the said Act. Indeed it is uncontested that the applicant was exempted from valuation in 1993. It has been submitted by the respondents that a line should be drawn between commercial fund raising and fundraising of voluntary kind. In my understanding section 27(2) donates or gives power to the Minister in charge of Local Government to grant exemptions from valuation and from payment of rates. Before the Minister exercises his powers he must put in place the building rules and conditions for the rating exemptions in respect of charitable institutions from payment of rates. The then Minister for Local Government formulated the rules which were the guiding principles in exercise of his powers in respect of exemption of valuation and payment of rates. Rule No.3 as formulated by the Minister states as follows;

“any charitable institution from time to time specified in the schedule to these rules shall, while any land is invested in it for any tenure whatsoever and so long as it continues to be a charitable institution be exempted from the payment of any form of rates which may be levied under the provisions of the Act.”

It is not the case of the respondent that the applicant is not a charitable institution or organization. It is also not the case of the respondents that the applicant has since changed its status from a non-profit organization to a profit making institution. It is also clear that the land in question was vested in the applicant at the time the Minister granted the exemption. The applicant bought the subject property on 20th June 1978, therefore it is manifestly clear that at the time the minister formulated the rules and granted exemption to the applicant, the property was vested and/or belonged to the applicant. Another fundamental issue is that the applicant applied to the minister in writing setting forth in detail the reasons for seeking the exemption which was considered and determined by the then Minister in their favour. Under rule 4(2);

“The minister may grant or refuse to grant the exemption applied for and such grant or refusal shall be final.”

It is important to note that the Minister had two options in respect of the application made by the applicant. He had the liberty or powers to grant or refuse the exemption applied for. It is also of paramount importance to note that once a minister has granted or refused, his decision was to be final. The word used is *“shall be final”*. In this case there is no evidence that the applicant has ceased to be a charitable institution or has violated any law or procedure set under the relevant laws of this country. There is no application by the 3rd respondent to overturn the decision of the minister granting the applicant exemption from valuation and payment of rates in respect of its properties. There is no evidence also to show that the applicant deviated from the purpose for which the exemption was granted to show that they have abused or misused the purpose for which the exemption was granted by the Minister. I agree that a charity can only exist for exclusive charitable purpose, but it can carry out activities which are for purposes of getting in, raising or earning money for the charity. In my view shops being used for the sale of clothing and which attracts rental income cannot be said to be in conflict with the purposes for which the exemption was granted.

As stated earlier there is no evidence to show the applicant is not carrying out charitable purpose and that the letting out of its premises is for profit intention. In my view the basis of section 27(1) is to grant exemption to certain pieces of land from valuation on the ground that the property is exclusively used for charitable work. It is also my view that the title document especially condition 4 which expressly provides for payment of rates cannot be used to overturn the decision of the Minister granting the applicant the exemption of payment of rates.

At the time the Minister granted exemption, the said property was exclusively owned by the applicant. The said condition was not imported by the applicant or was not inserted after the exemption by the Minister. The said condition was in existence and it must have been considered by the minister at the time he made his decision. In demanding rates from the applicant, the 3rd respondent is acting ultra vires the provisions of law, legal notices granting the exemptions and above all acting unreasonably without any basis or justifications.

In the case of the Minister for Civil Service 1985 1AC 375 it was held' as follows;

“—for a legitimate expectation to arise, the decision must affect (the) other person by depriving him of some benefits or advantage which either,

(i) He had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which has been given an opportunity to comment; or

(ii) He has received assurance from the decision maker will, not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”

Unreasonableness as a ground in Judicial Review is described by Lord Diplock in the same Judgement – it is also referred to as irrationality.

“By irrationality’ I mean what can by now be succinctly referred to as “*wednesbury unreasonableness*”---. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

It has been contended by the respondents that the subject premises generates rental income for the applicant. If one can separate out the activities of what amounts charitable and non charitable, it is important to show that the said premises would not qualify for the reliefs of exemptions granted by the Minister. It is also important to show that the usage of the premises is not incidental to the main purpose of applicant.

It is the contention of the applicant that it is a charitable institutions and the rental income directly facilitates the purpose and its core objective as a charitable institution. In my view there must be practicable link between the shops and the main purpose of charity in this case applicant. If the distinction is to depend upon whether the applicant is conducting a non commercial or commercial business, the distinction is very difficult to draw and would produce great difficulty. In my view one can say that merely raising money from a charitable organizations owned premises is not contrary to the purpose for which the exemption was granted. In my view the income from the premises of the applicant directly or indirectly facilitates its objectives and purposes as a charitable institution. The alleged shops are incidental to the main purposes or is conducive to the main charitable purpose(s) of the applicant. It is something that helps a charity in carrying out its charitable purpose. In my view the use of the premises for subsidiary objects is within the charities regulating document - that is, objects which it has powers to carry out and which are therefore not unlawful.

It is a fair inference that purchases of goods from the applicant’s shops may be motivated by a desire to help the charity. In my view no body or trust can be a charity unless its objects are exclusively charitable and if it is using premises of which it is in occupation for purposes for which it is entitled to use them and not in breach of trust, it must be using them for some purpose or purposes of charity. It is also my view that section 27 clearly contemplates that a charity may be properly using premises which it occupies for purposes which to an outsider are not charitable purposes of the charity. The guiding factor is whether the funds generated from the premises would be used for the purpose of the charity.

It is therefore my determination that parcel No.LR.NO.209/4338 is wholly or mainly for charitable

purposes and it is not right for the 3rd respondent to demand rates when the applicants were rightly and legitimately granted an exemption by the then Minister for Local Government. The applicant is entitled to rating relief or exemption in respect of the said premises which is wholly ancillary to or directly facilitates the carrying out its charitable objects. It is perfectly plain that the 3rd respondent misconstrued its powers and exceeding its authority in demanding rates from the applicant. In sum I am in total agreement with the advocate of the applicant that the 3rd respondent is not entitled to demand rates from the applicant. Consequently, the application is allowed with costs against the respondents.

Dated, signed and delivered at Nairobi this 8th day of February, 2012.

M. WARSAME
JUDGE