



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CASE NO. 323 OF 2010

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI, MANDAMUS & PROHIBITION**

AND

**IN THE MATTER OF THE TRAFFIC ACT, CAP 403 & THE LOCAL GOVERNMENT ACT,
CAP 265**

AND

IN THE MATTER OF PART VIA OF THE TRAFFIC ACT, CAP 403

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDER

BETWEEN

**CITY COUNCIL OF NAIROBI1ST
RESPONDENT**

**THE MINISTER FOR LOCAL
GOVERNMENT2ND RESPONDENT**

**THE HONOURABLE ATTORNEY
GENERAL3RD RESPONDENT**

AND

**MATATU WELFARE ASSOCIATION.....1ST
INTERESTED PARTY**

**KENYA LOCAL GOVERNMENT WORKERS UNION.....2ND
INTERESTED PARTY**

**NAIROBI CENTRAL BUSINESS DISTRICT ASSOCIATION.....3RD
INTERESTED PARTY**

THIKA ROAD TRANSPORTERS SACCO SOCIETY LIMITED.....4TH

INTERESTED PARTY

**LIKANA ROUTE 114/115 MATATU CO-OPERATIVE SOCIETY LIMITED.....5TH
INTERESTED PARTY**

**GITHIGA TRAVELLERS SAVINGS & CREDIT CO-OPERATIVE SOCIETY LIMITED.....6TH
INTERESTED PARTY**

**NYAKATI MATATU INVESTORS SACCO SOCIETY LIMITED.....7TH
INTERESTED PARTY**

**2NK CO-OPERATIVE SAVING CREDIT SOCIETY LIMITED.....8TH
INTERESTED PARTY**

**LOPHA MULTIPURPOSE COOPERATIVE LIMITED.....9TH
INTERESTED PARTY**

**EXCLOOSIVE LIMITED10TH
INTERESTED PARTY**

**BROOMS LIMITED11TH
INTERESTED PARTY**

**JUST STUFF LIMITED.....12TH
INTERESTED PARTY**

**PORTA LOOS KENYA13TH
INTERESTED PARTY**

**UNIQUE LOOS LIMITED14TH
INTERESTED PARTY**

AND

**KAKA TRAVELLERS CO-OPERATIVE SAVINGS & CREDIT SOCIETY LIMITED.....EX-
PARTE APPLICANT**

JUDGEMENT

INTRODUCTION

This judgement has been necessitated by the notice of motion dated 4th November, 2010 which was filed in court on 5th November, 2010 by Kaka Travellers Co-operative Savings and Credit Society Limited (the ex-parte applicant). In the said application the ex-parte applicant seeks orders as follows:-

1. THAT by way of Judicial Review, an order of Certiorari do issue to remove to this Honourable Court for purposes of being quashed and to forthwith quash the 1st respondent's GAZETTE NOTICE NO. 12582 of 2010 published on 15th October, 2010.

2. THAT by way of Judicial Review, an order of prohibition do issue, prohibiting the 1st and 2nd Respondents or any person acting under their behest, direction and authority from demanding, directing, insisting upon or ordering that the Applicant, including any and all of its members, or any vehicle owned and lawfully operated by the Applicant's specified members (or such person or

persons as directed by the Court) to comply with the 1st Respondent's GAZETTE NOTICE NO. 12582 of 2010 published on 15th October, 2010.

3. THAT by way of Judicial Review, an order of prohibition do issue, prohibiting the 1st and 2nd Respondents or any person acting under their behest, direction and authority, from demanding, or imposing parking charges levied contrary to, and imposed contrary to the provisions of Part VIA of the Traffic Act, Chapter 403 of the Laws of Kenya, in respect of the Applicant's members specified vehicles operated in and parked at any time within the City of Nairobi.

4. THAT by way of Judicial Review, an order of Mandamus do issue, compelling the 2nd Respondent to produce and deliver to the Applicant, a copy of his letter Ref. No. MLG 204-01/IV/61 of 12th October, 2010, within such specified time as this Court may order and direct.

5. The costs of the application be to the Applicant in any event.

The application was supported by a statement of facts, the verifying affidavit sworn on 29th October, 2010 by Moses Kuria Njuguna and the exhibits annexed thereto. All these documents had accompanied the chamber summons application for leave filed in court on 29th October, 2010 by the ex-parte applicant.

In the said application the City Council of Nairobi (hereinafter simply referred to as the Council), the Minister for Local Government (hereafter simply referred to as the Minister) and the Attorney General are named as the 1st, 2nd and 3rd respondents respectively. There are fourteen interested parties.

THE BACKGROUND OF THE CASE

Before proceeding to do anything else, I find it necessary to restate some facts for purposes of record. When the ex-parte applicant came to court on 29th October, 2010 he appeared before Maraga J (as he then was) who directed that this matter be consolidated with **H.C. Misc Civil Application No. 319 of 2010 Republic Vs. City Council of Nairobi & others ex-parte Henry Mwingirwa Nkure** in which similar prayers were being sought. **H.C. Misc Civil Application No. 319 of 2010** was made the operative file. On that day Maraga J granted leave to commence judicial review proceedings and directed that the leave so granted was to operate as stay of the implementation of the decision being challenged by the applicants in the consolidated case.

The ex-parte applicant was ordered to file the substantive notice of motion within ten days from the date of the grant of leave and the applicant complied with the order by filing the notice of motion on 5th November, 2010.

Through a consent order recorded on 15th November, 2010 it was ordered that the two files **H.C. J.R. No. 319/2010** and **H.C. J.R. No. 323/2010** be heard separately. The consolidation order made on 29th October, 2010 was therefore reviewed to that extent.

By a notice of appointment dated 15th November, 2010 the Attorney General came on record on his own his behalf. No appearance was made for the Minister although whoever has been appearing for the Attorney General in the proceedings has always indicated that he/she was also representing the Minister. Mr. Ogetto and Mr. Monari had from the beginning acted for the Council.

By a notice of appointment dated 23rd November, 2010 Ondieki and Ondieki Advocates brought in Matatu Welfare Association as the 1st interested party. The 2nd interested party is the Kenya Local Government Workers Union (KLGWU) who came on record on 5th November, 2010 by appointing Kipkorir, Titoo & Kiara Advocates to represent it. The Nairobi Central Business District Association is the 3rd interested party. A notice of appointment in this regard was filed by J. M. Nyaega and Company Advocates on 27th January, 2011. Timothy Muriuki who introduced himself as the Chairman of the 3rd

interested party swore an affidavit on 27th January, 2011 in support of the ex-parte applicant's application to set aside the consent order entered in **J.R. 319 of 2010**. Thereafter the 3rd interested party did not actively participate in this case.

The ex-parte applicants' advocates also act for the 4th to 9th interested parties. The 4th to 9th interested parties filed affidavits of enjoinder on 24th February, 2011. According to the affidavits of enjoinder Thika Road Transporters Sacco Society Limited, Likana Route 114/115 Matatu Coperative Society Limited, Githiga Travellers Savings and Credit Co-operative Society Limited, Nyakati Matatu Investors Sacco Society Limited, 2NK Co-operative Saving Credit Society Limited and Lopha Multipurpose Cooperative Society Limited are the 4th to 9th interested parties respectively.

Brooms Limited, Just Stuff Limited, Porta Loos Kenya & Unique Loos Limited came on board as the 10th, 11th, 12th, 13th interested parties through a notice of appointment filed by Koskei Monda & Co Advocates. There was however a notice of appointment filed earlier by the same firm of advocates in which Excloosive Limited joined the case as an interested party. That notice of appointment was filed on 28th March, 2011. This particular notice of appointment did not give Excloosive Ltd a number. When the notice of appointment of advocates which brought in the interested parties numbered 10th to 13th was filed, Excloosive Ltd was named as the 9th interested party. This would mean that two interested parties namely Lopha Multi-purpose Co-operative Society Ltd and Excloosive Ltd are both named as the ninth interested party. From the way the notices of appointment of advocates were filed, it is clear that Lopha Multi-purpose Co-operative Society Ltd came on board before Excloosive Ltd and that means it should be the 9th interested party. It is also clear that Excloosive Ltd came on board before the 10th, 11th, 12th and 13th interested parties. For the purpose of this judgment I will therefore treat Excloosive Limited as the 10th interested party and Brooms Limited, Just Stuff Limited, Porta Loos Kenya and Unique Loos Limited will become the 11th, 12th, 13th and 14th interested parties respectively.

On 21st January, 2011 the parties in **Misc. J.R. Application No. 319 of 2010** reached an agreement. The ex-parte applicant herein however felt that the said consent had an impact upon these proceedings. It filed an application in these proceedings challenging that particular consent and Musinga J in a ruling delivered on 6th June, 2011 set aside the said consent order.

The Council did file a notice of preliminary objection on 29th November, 2010 but it later abandoned that application.

On 4th November, 2011 the advocates for the parties herein appeared before Warsame, J and Mr. Kinyanjui for the ex-parte applicant withdrew prayer No. 4 in the notice of motion dated 4th November, 2010. What therefore remain on record are prayers numbers 1, 2, 3 and 5 of the said notice of motion.

THE APPLICANT AND INTERESTED PARTIES' PAPERS

The sting of the bee that brought the ex-parte applicant to this court is found in **Gazette Notice No. 12582** which is in the **Special Issue of the Kenya Gazette Vol. CXII – No.102 dated 15th October, 2010**. The said Gazette Notice will henceforth be simply referred to as the Notice. Through the Notice the Council revised various charges for the services it offers. That is what has offended the ex-parte applicant and the interest parties.

The ex-parte applicant listed seven grounds in support of its application. The seven grounds are as follows:-

1. The Council acted illegally by:-

(a) Making by-laws in contravention of the provisions of the Traffic Act and as such contravened Section 202 of the Local Government Act; and

(b) Failing to advertise in the newspapers its intention to make by-laws as provided by Section 203(1) of the Local Government Act.

2. The ex-parte applicant's members were denied their right to natural justice in that:-

(a) The lack of notice of the making of the by-laws denied

them an opportunity of filing objections as provided by Section 203(3) of the Local Government Act;

(b) There was no notice of the full council meeting that passed the by-laws;

(c) There was no justification for the hiking of rates;

(d) There was no opportunity given to the ex-parte

applicants' members to make objection to the revised charges before they were published in the Kenya Gazette

(e) There was no notice in the Kenya Gazette as required

by Section 205(1) of the Local Government Act stating that the by-laws had been approved by Minister; and

(f) There was no publication of the by-laws and this contravened Section 205(2) of the Local Government Act.

3. The Council and the Minister acted in breach of the legitimate expectations of the ex-parte applicant's members in that the challenged decision was not arrived at fairly and due process was not followed.

4. The decision of the Council and the Minister was borne out of ill-will, malice and is out-rightly capricious.

5. The Council and the Minister acted ultra vires the provisions of the Traffic Act.

6. That if the Gazette Notice is left to stand the ex-parte applicant's members would be driven out of the streets of Nairobi by the Council in exercise of the powers granted to it by Section 182 of the Local Governments Act.

7. The applicant's right to information as provided by the constitution had been breached since the applicant had not been supplied with the letter dated 12th October, 2010 in which the Minister approved the revised charges.

At this stage it is important to note that ground No. 7 is no longer an issue since prayer No. 4 of the notice of motion was withdrawn on 4th November, 2011.

Although all the interested parties supported the ex-parte applicant's case, it is important to bring out the grounds put forward by the 10th to 14th interested parties in support of their position. I say so because these interested parties are challenging the introduction of charges in respect to the sanitary services sector whereas the ex-parte applicant and the other interested parties have concentrated on attacking the revision of the parking charges. Those grounds are found in the affidavit of enjoinder sworn on 6th April, 2011 by Moses Nderitu Gachemi who introduced himself as the Managing Director of Exclusive Ltd (the 10th interested party). Their arguments are:-

1. That the charges levied against them were newly introduced and they had not been involved in

any consultations with the Council prior to the introduction of the charges;

2. That the action of the Council was unjust, capricious, dictatorial and unconstitutional in that:-

a. There was no notice of the proposed charges so as to afford the interested parties an opportunity to file objections,

b. The charge is ambiguous in that:-

(i) It does not indicate whether the charges are payable when the units have been hired out or are in storage, and

(ii) It does not indicate whether the charges are payable when the mobile toilet unit is situated within a private institution;

c. The levy is unreasonable and in contravention of the law in that the Council does not offer any service in exchange for the levy.

THE RESPONDENTS' REPLY

What did the respondents say in reply to the ex-parte applicant's case? The Council's reply is contained in a replying affidavit sworn on 21st October, 2011 by Aduma J. Owuor the Acting Legal Affairs Director of the Council and a further affidavit sworn by the same officer on 10th November, 2011.

In summary the Council argues that the ex-parte applicant's prayers should not be granted for the following reasons:-

1. That the ex-parte applicant and the interested parties who have filed papers have complained about parking fees and mobile toilet charges only and yet they pray for the quashing of the entire Notice which also contains revised charges for other services. For this reason the Council argues that the application is bad in law since the court cannot grant that which has not been prayed for.

2. That the application is a complaint about the new charges being high and such a complaint is not a subject of judicial review proceedings;

3. That the Council imposed the parking and mobile toilet charges in accordance with Section 148 and 76 of the Local Government Act and there was no need for a notice under Section 203 of the same Act;

4. That the Council sought approval of the new charges by the Minister who approved the revised charges;

5. That the due process of the law was followed and the ex-parte applicant cannot allege breach of legitimate expectations.

6. That there was justification for the revision of the charges in that the Council has a budget deficit of close to Kshs.1 billion and there was also need to decongest the city hence the need to discourage motorists from parking in the city by revising charges upwards;

7. That the Traffic Act was not applicable in the revision of the charges and the Council cannot be said to have acted ultra vires; and

8. That quashing the Notice would invalidate all the transactions that the Council has undertaken since its publication thereby bringing the operations of the Council to a halt.

The Minister and Attorney General opposed the application through grounds of opposition dated 12th August, 2011 and filed on 15th August, 2011. The grounds of opposition are:-

- 1. That there is no factual or legal basis for the issuance of the orders sought against the Minister**
- 2. That there is no claim against the Attorney General who has been wrongly enjoined in these proceedings.**
- 3. That the Minister does not implement the decisions of the Council but provides policy guidance which guidance is not justifiable under the doctrine of separation of powers being an exclusively executive function.**
- 4. That the Minister has no legal obligation to give copies of its letter to the Council to the interested party and to that extent cannot be compelled to give the ex-parte applicant copies of any such letters.**
- 5. That the present application is a judicial review application founded on administrative law which is distinct from the jurisdiction of the court when hearing and determining cases hinged on constitutional matters.**

It is clear that the 4th ground of the said grounds of opposition was a direct response to the 4th prayer in the ex-parte applicant's notice of motion. As already noted however, the 4th prayer was withdrawn by the ex-parte applicant on 4th November, 2011.

THE ISSUES AND ANALYSIS

Several issues have been raised in this application and I will do my best and try to address all of them. Counsel for the ex-parte applicant submitted at length on the issue of locus standi. I have looked at the respondents' replies and I do not see them challenging the ex-parte applicant's standing. For purposes of the record I will state that the ex-parte applicant and the interested parties have demonstrated that they have sufficient interest in some of the charges contained in the challenged Notice and they are therefore properly before this court. The next course of action is to consider the contested issues.

1. WHETHER THE RULE OF LAW SHOULD BE DISREGARDED FOR THE SAKE OF HARMONY

In the first place the Council claims that quashing the Notice will invalidate all the transactions undertaken since the publication of the Notice thereby bringing its operations to a halt. The answer to this submission is very simple. When Parliament vested certain powers on the Council, it did so on the clear understanding that the Council would operate within the law which gave it those powers. If and when the Council decides to act outside the law, it is the duty of this court to bring back the Council into the path of the law by way of judicial review. The Council cannot be allowed to claim that chaos would arise were this court to find that the Notice was illegal and decides to quash it. I think more damage would be done were the court to allow an illegal decision to stand. Such a position would result in chaos in that public bodies could easily decide to operate outside the law laid down by Parliament. The importance of sticking to the law was well captured by Alnashir Visram & M K Ibrahim JJs (as they then were) in **Jacqueline Resley Vs. City Council of Nairobi (2006) eKLR** when they stated that:-

“It is our humble view that in this case there is an apparent disregard of statutory provisions by the respondent, which are of a fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised. Where the framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid.”

I entirely agree with the proposition that public bodies must operate within the mandate given to

them by Parliament. Any other view would be anathema to the operations of a just and democratic society.

2. WHETHER THE APPLICANTS' APPLICATION IS BAD IN LAW

Secondly it was argued by the Council that since the ex-parte applicant had prayed for the quashing of the entire Notice, the application becomes bad in law. The Council was of the view that the ex-parte applicant should have asked for the quashing of the parking charges alone. In support of this argument the Council cites the fact that in the statutory statement, the verifying affidavit and the exhibits the ex-parte applicant has concentrated on the parking charges. The ex-parte applicant countered this argument by stating that there is no way it could have targeted the parking charges only and leave the other sections of the Notice unchallenged. On this issue I find that two questions need to be answered namely:-

- (a) Whether in targeting the entire Notice the ex-parte applicant's application becomes bad in law; and
- (b) Whether it was possible for the ex-parte applicant to target the parking charges for quashing and leave the other charges standing.

On the first issue I would say that the Council's argument is valid to some extent. The ex-parte applicant in the first place did not demonstrate why it wanted the other charges contained in the Notice quashed. It only managed to demonstrate that it had an interest in the quashing of the parking charges. It did not show why it wanted charges related to other sectors quashed. The Council's argument is also supported by the provision of **Rule 4(1) of Order 53 of the Civil Procedure Rules, 2010** which provides that:-

“Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.”

My understanding of the above quoted rule is that parties should confine themselves to the papers they have filed in court. Although one of the orders prayed for by the ex-parte applicant is the quashing of the entire Notice, the grounds in support of the application and the affidavits confine themselves to the parking charges.

Can one therefore say that the application is bad in law because of disconnect between the relief sought and the grounds in support of the application? I do not think so. First it would be contrary to the provisions of the **Constitution (Article 159(2)(d))** to use this disconnect to deny the ex-parte applicant the opportunity of being heard and being given answers on the substantive issues raised in the application. The second reason will be found in my answer as to whether it was possible for the ex-parte applicant to target the quashing of the parking charges alone and let the other sections of the notice live.

Counsel for the Council submitted that it was possible for the parking charges to be attacked without attacking the entire Notice. He referred the court to the decision in the case of **REPUBLIC VS JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 2 OTHERS Ex-parte George Saitoti [2006] eKLR** in which the court quashed all the references to the ex-parte applicant in the report but left all the other parts of the report intact. He also argued that the Notice that the ex-parte applicant is challenging in this case has already been severed by Musinga, J in the case of **REPUBLIC VS CITY COUNCIL OF NAIROBI & Another Ex-parte Peter Odoyo and Another, Nairobi H. C. J. R. No. 25 of 2011**. In the said case of **Ex-parte Peter Odoyo** the ex-parte applicants had moved to court to challenge the advertising charges which were contained in the Notice which is the subject of the case before me. Musinga, J held that the said charges had been revised by the Council in accordance with the law.

It has been argued by the Council that if this court decides to quash the entire Notice then it will be acting

as an appellate court in respect of the decision of Musinga J in the **Ex-parte Peter Odoyo** case. The Council also argues that if the entire Notice is quashed the court will end up deciding **Republic vs. Minister for Local Government & 2 others Ex-parte Nairobi Markets Traders Society, Nairobi H.C.J.R. No. 328 of 2010** in which the ex-parte applicant is asking for the quashing of charges contained in the Notice but relating to a different sector. I find myself convinced by the position taken by the Council that indeed it is possible to attack the parking charges alone and leave the other charges intact. If I do not take this route the only outcome would be to dismiss the ex-parte applicant's case since quashing the entire Notice would amount to acting as an appellate court over the decision of Musinga J. The law has not blessed me with such jurisdiction. I would also end up determining **Ex-parte Nairobi Markets Traders Society** without hearing the parties in that case. In **Ex-parte Peter Odoyo**, Musinga J clearly demonstrated that it was possible to address a particular class of fees and charges by upholding the Council's increment of advertising fees and charges. I will therefore take this most reasonable road already travelled by Musinga J so that if at the end of the day I find the ex-parte applicant's case successful, the only remedy will be to quash the parking charges and leave the other charges intact.

Where then does that leave the case of the 10th to 14th interested parties? It is already noted that these interested parties are complaining about the charges for mobile sanitary services. They are not therefore complaining about parking charges like the ex-parte applicant and the other interested parties. I think the answer to this question is not hard to find. The 10th to 14th interested parties are here because the court directed the ex-parte applicant to advertise about this case so that anybody who was interested in the outcome of the case could come and be joined as a party. In the enjoinder affidavit filed by Excloosive Limited (the 10th interested party) sworn by Moses Gachemi Nderitu on 6th April, 2011 the 10th interested party has clearly explained why the mobile sanitary services charges are opposed. Excloosive Limited's case is the same with that of the 11th to 14th interested parties. All these interested parties (10th to 14th) are represented by the same firm of advocates. It is clear from the said affidavit of enjoinder that they are in support of the ex-parte applicant's application. Applying the reasoning I have applied to the ex-parte applicant's case, I am of the view that should these interested parties succeed then the court can go ahead and quash the charges relevant to these interested parties' sector.

3. WHETHER THE NOTICE THE EX-PARTE APPLICANT SEEKS TO QUASH NO LONGER EXISTS

Having dealt with the second issue and the sub-issues therein I will now move to address the third issue. There was an argument by the Council that since the parking charges in the challenged Notice had been amended by Gazette Notice No. 1747 dated 15th February, 2011 then a prayer asking the court to quash the parking charges contained in the challenged Notice amounts to asking the court to quash a thing that does not exist. This argument cannot be allowed to hold. In the first place Gazette Notice No. 1747 of 2011 which purported to amend the challenged notice was published after the court had stayed the implementation of the parking charges. Agreeing with the submission by the Council would amount to allowing the implementation of the disputed charges without giving the ex-parte applicant a hearing. In fact amendment of the notice by the Council borders on contempt of court since the amendment was effected without the leave of the court which was by then seized with the matter. Secondly, the legality of the particular charges in dispute has been surrendered to the court for determination. It is the duty of this court to decide whether the disputed charges should stand. If this court decides that the disputed charges should not be allowed to remain in place, then once those charges are quashed, the gazette notice which purported to amend them automatically dies. It goes without saying that out of nothing comes nothing.

4. WHETHER THE RESPONDENTS' ACTIONS WERE ULTRA VIRES

I now move to the fourth issue which in my view will decide this case. Under this issue the questions to be answered are:-

(a) Were the ex-parte applicant and the interested parties entitled to a hearing before revision of the charges and if so, were they given a hearing?

- (b) Were the legitimate expectations of the ex-parte applicant and interested parties that due process would be followed in the revision of the charges breached?
- (c) Did the respondents act in breach of the Local Government Act?
- (d) Did the respondents contravene the Traffic Act?

There is an interlink between the said questions and the best way to address them is by looking at the arguments put forward by the parties on these issues and deciding on those issues as I move along.

I will start by reproducing the Notice in question so that it can be clearly understood under which law the charges were increased. The Notice states as follows:-

**“THE LOCAL GOVERNMENT ACT
(Cap. 265)
THE CITY COUNCIL OF NAIROBI
FEES AND CHARGES, 2010**

IN EXERCISE of the powers conferred by section 148 of the Local Government Act and Cap. 266 and Cap. 267 of the Valuation for Rating and the Rating Act, the City Council of Nairobi, with the approval of the Deputy Prime Minister and Minister for Local Government, has revised house rents, fees and charges effective 2010 (Letter Ref. No. MLG 204-01/IV/61 of 12th October, 2010.”

The Valuation for Rating Act and the Rating Act are not relevant to this case. The starting point would therefore be Section 148 of the Local Government Act which states as follows:-

“148(1) A local authority may-

- (a) 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 license;**
 - (b) impose fees or charges for any service or facility provided or goods or documents supplied by the local authority or any of its officers in pursuance of or in connection with the discharge of any duty or power of the local authority or otherwise .**
- (2) All fees or charges imposed by a local authority shall be regulated by by-law, or if not regulated by by-law, may be imposed by resolution of the local authority with the consent of the Minister and such consent may be given either in respect of specified fees or charges or may be given so as to allow a specified local authority to impose fees or charges by resolution in respect of a specified power or a particular matter.**
- (3) Save where the contrary is expressly or by necessary implication in any written law provided a local authority may authorize the remission in whole or in part of any fees due to it or charges imposed by it under this Act or any other written law.”**

By dint of Section 148(2), fees or charges imposed by a local authority shall be regulated by by-law but if not regulated by by-law, may be imposed by a resolution of the local authority. The Council therefore had two options when deciding to revise the charges and it went ahead and exercised one of those two options. The Council cannot be faulted for exercising one of the options provided by section 148(2) of the Local Government Act. I will revert back to this issue when deciding whether the respondents breached the Traffic Act when revising the parking charges.

The next question would then be whether the Council followed the law in revising the charges. In my view Musinga J sufficiently and correctly addressed the issue when he stated at page 9 of his judgement in the **Ex-parte Peter Odoyo** case that;-

“There is sufficient evidence that the 1st Respondent adhered to the requirements specified under Section 148 quoted hereinabove. The Council forwarded the proposed new charges to the Minister for approval vide a letter dated 7th May, 2010 and the Minister gave his approval on 12th October, 2010. Following the Minister’s approval the fees were duly gazette in the Gazette Notice of 15th October, 2010.”

The Council cannot therefore be accused of revising the charges in contravention of the Local Government Act. The procedure for making by-laws could not be used in the circumstances since the Council had opted to increase the fees and charges through a resolution of the Council. The argument that the Council ought to have followed the procedure for making by-laws therefore fails.

The 10th to 14th interested parties argued that they ought to have been consulted before the mobile sanitary services charges were introduced. They also argued that the charges are ambiguous. There is no provision in the Local Government Act for consultation with stakeholders before the introduction of charges or increment of the same. In a just and democratic society, consultations would assist in getting all the parties on board thereby resulting in avoidance of litigation like this one. Maybe the Council should in future seriously consider wide consultations before introducing or revising charges. It can however be argued on behalf of the Council that the interested parties were represented by the councilors who passed the resolution. Whatever the case, the non-consultation of the interested parties did not break any law.

The other argument is that the charges are ambiguous. The respondents did not make any direct reply to this argument. I have looked at the charges and I do not see any ambiguity. If the interested parties believe the charges are ambiguous, they can always seek clarification from the Council.

There was an argument that there is no service being provided by the Council to support the introduction of the charges in the mobile sanitary services sector. Although some residents of Nairobi may doubt the service delivery by the Council, the truth of the matter is that it does provide services. For example the interested parties use Council maintained roads to move their mobile toilet units from one place to another place.

The ex-parte applicant and all the interested parties argued that the revision and introduction of rates was not justified. The Council attempted to justify the revised fees and charges through the replying affidavit of Aduma Owuor. The Council argued that the ex-parte applicant and interested parties were alleging that the increments were high and that was not an issue for judicial review. The applicants in the Ex-parte Peter Odoyo case had raised the argument that the increments were high and Musinga J answered them thus:-

“It is not for this court to determine whether the new charges are excessive or not. The court can only consider whether in arriving at the said charges the appropriate process was followed. It has often been said that judicial review is not concerned with the merits of a decision but the decision making process thereof.”

That would be the appropriate answer to the arguments of the ex-parte applicant and the interested parties in this case. Whether the revised fees and charges were excessive or not cannot be addressed through judicial review. This particular argument by the ex-parte applicant and the interested parties therefore fail.

At this stage what remains to be addressed is’ the claim by the ex-parte applicant and the 4th to 9th interested parties that the fees and charges were revised in breach of **Part VIA of the Traffic Act. Section 72A of the Traffic Act** gives powers to local authorities to make by-laws for designated parking places. It opens as follows:-

“72A. (1) A local authority may by by-laws-
(a) designate parking places on roads.....”

It continues in subsection (2) thus:

“The procedure for the making of, approval and publication of by-laws made under subsection (1) shall be that prescribed in the Local Government Act, and, for the purposes of their enforcement and disposal of fines imposed for their contravention, such by-laws shall be deemed to be by-laws made by the same local authority under that Act.”

Section 72B talks of charges for use of designated parking places and subsection (1) provides that:-

“There shall be paid to the local authority in respect of a vehicle left in a designated parking place charges calculated in accordance with this section or in such other manner as the local authority may by by-laws prescribe.”

The section then goes ahead to prescribe how parking charges are to be calculated. The same section, in my understanding, gives the Council another option of calculating parking charges. The second option can only be exercised through the making of by-laws. The Council did not follow any of the two options provided by the Traffic Act. The Traffic Act which donated power to local authorities to impose parking charges provided that the said parking charges should be imposed by way of by-laws made in accordance with the Local Government Act. The Traffic Act does not offer the local authorities any other option. In my view therefore the only way the Council could have revised the charges was through by-laws. The option of imposing charges through resolution which is provided by Section 148 of the Local Government Act was not available in this case. The submission by counsel for the Council that the Traffic Act was not applicable in this case is therefore untenable. On this alone the ex-parte applicant and the 4th to 9th interested parties should succeed.

THE DECISION

From the above analysis, it follows that the case for the 10th to 14th interested parties fails. The charges introduced by the Notice in respect of the mobile sanitary services sector will remain in force and the Council is at liberty to enforce the said charges.

As for the parking charges, I am convinced by the ex-parte applicant that the same were revised in contravention of the provisions of Part VIA of the Traffic Act. I therefore allow the notice of motion dated 4th November, 2010 in terms of prayers 1, 2 and 3 but only to the extent that the challenged Notice refers to parking charges. In short, only the portions of the Notice which revised the parking charges are quashed.

THE COSTS

The ex-parte applicant and 1st to 9th interested parties will have costs from the 1st respondent. The 10th to 14th interested parties will meet their own costs.

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

W. K. KORIR
JUDGE