REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

Miscellaneous Civil Application 26 of 2012

REPUBLIC ……APPLICANT

VERSUS

THE TOWN COUNCIL OF MUTITO ANDEI…….....….....RESPONDENT

EX PARTE

SHADRACK MWAU

RULING

On 13th February, 2012, **Shadrack Mwau,** hereinafter "*the applicant*" sought leave to commence judicial review proceedings in the nature of *prohibition* against the Town Council of Mutito-Andei, hereinafter "*the respondent"*. He sought to prohibit the respondent from imposing parking fees on the authority of Kenya Gazette No. 11227 and applying the same to all Motorists plying Nairobi- Mombasa road within the jurisdiction of the Town Council of Mutito-Andei. He also prayed that leave so granted do operate as stay of any further implementation of the said by-law.

The salient facts leading to the application were that the respondent made by-laws concerning levying of packing fees in year 2004. The applicant and other businessmen operating in the area protested against the implementation of the by-laws and the respondent shelved its decision. However, the respondent by a Notice dated 27th January, 2012 decided to implement the by-laws and to include parking fees along Nairobi –Mombasa road from 7th February, 2012. There was then no by-law regulating the designation of parking places and fees payable along the said road. The Gazette Notice relied on No. 11227 only sought to increase parking fees for omnibus vehicles. The by-law notice relied could not therefore extend its purview to the main Nairobi-Mombasa road. In the premises the said notice by the respondent was illegal, unlawful and unenforceable as it even contravened the Traffic Act in its letter and spirit. The respondent had thus exceeded its mandate in relying on the irrelevant by-law to effect the charges along the highway.

In a nutshell what the applicant is saying is that on 26th March, 2004 the respondent Gazetted by-laws affecting the omnibus stations and when it was set to be implemented, there was hue and cry from transporters and business community in the area. The respondent was forced to shelve it. The by-law was aimed at providing and maintaining an omnibus station by the respondent to afford facilities for the arrival and departure of omnibuses. Those omnibuses were Public Service vehicles having a seating capacity of more than 7 passengers exclusive of the driver and included any motor vehicles having seating accommodation for not more than ten passengers exclusive of the driver, used to ferry passengers for hire or reward. Sometimes on 27th January, 2012, a notice was published by the respondent to the effect that all motor vehicles had to pay parking fees. On 8th February, 2012 all drivers of motor vehicles

which had been parked along the Nairobi -Mombasa road within the jurisdiction of the respondent were arrested for non-payment of the alleged parking fees but were all subsequently released and warned. The applicant who sells vegetables, curios and other chores along the said road was also arrested but subsequently released and warned. In his view, there was no by-law that regulated parking places or imposes parking fees along the road within the respondent's jurisdiction. The gazette Notice No. 11227 was only made to increase fees for parking in the omnibus stations. Therefore the application of irrelevant by-laws was not only oppressive to the applicant but also to the entire Mutitu-Andei business community as drivers were now intent on stopping elsewhere other than Mutitu –Andei Town.

The *ex parte* application came before **Dulu, J** on 13th February, 2012 for hearing. Leave sought was granted. However, the prayer for leave to operate as stay was declined as the effective date of implementation of the Notice had passed.

On 20th February, 2012, the applicant filed the substantive motion. In response to the motion the respondent through its Town Clerk, **Ambrose Maweu** deposed that the respondent had not made any by-laws to authorize the levying of parking fees along Mombasa- Nairobi road as claimed by the applicant, nor had it created any parking areas along the said road. Accordingly the complaint by the applicant was devoid of merit. Otherwise the by-laws complained of had already been implemented and the applicant cannot prohibit what has already been implemented.

As a follow up to what the respondent had deponed to in the replying affidavit, the respondent filed a Notice of Preliminary Objection on 14th May, 2012. The respondent stated in the said notice that-

"The remedy of prohibition is not available to the applicant since the by-law which he challenges has already been implemented the same having come into force on the 7th February, 2012 before this application was filed".

Thereafter, parties engaged in filing a flurry of affidavits countering each other's allegations. These were further affidavit filed by the respondent on 14th May, 2012 and further affidavit by the applicant filed on 8th June 2012. All these affidavits were filed without leave of court as required. Accordingly, they are struck out and expunged from the record.

When the application came up for *interpartes* hearing before me on 9th May, 2012, **Mr. Muema** and **Mr. Mungata** learned counsels holding brief for **Mr. Mutuku** and **Mr. Kasyoka,** learned counsels for the applicant and respondent respectively agreed to canvass the application by way of written submissions. They were to file and exchange the written submissions. In the end however, only the applicant was able to do it. I have carefully read and considered his submissions and cited authority.

This application is bound to fail on three grounds. Firstly, by his own admissions, the by-law sought to be *prohibited* has already been implemented and taken effect. In other words it has been operationalised. It has been said time and again that prohibition is meant to forbid a tribunal from acting in excess of jurisdiction or in contravention of the laws of the land but not correct the course, practice or procedure and prohibition does not lie where a decision has been made. As it were *prohibition* looks to the future as opposed to the past. In other words *prohibition* cannot be granted if what is sought to be prohibited has already taken place**. See Kenya National Examinations Council vs Republic, Civil Appeal No. 266 of 1996.** This is a Court of Appeal decision which is binding on me. The authority cited by the applicant, **De Kisima Farm Ltd KLR (E&L)1** in support of his argument to the contrary is a High Court decision by **Hancox J** (*as he then was*) which is not binding on me at all. I think that the reasoning in the Court of Appeal decisioin accords well with the current judicial thinking as to the scope of *prohibition* as a remedy. In the premises and as correctly pointed out by counsel for the respondent in his Notice of Preliminary, Objecting, the remedy of *prohibition* is not available to the applicant since the by-law which he challenges has already been implemented, the same having come into force on 7th February, 2012 before these proceedings were mounted.

Secondly, what useful purpose will be served by *prohibiting* the implementation of the by-law but leave

its existence intact? In other words, will the applicant be running to court every time that the respondent seeks to implement the by-law? After all as long as the by-law is not quashed, by perhaps an order of *certiorari*, there will be nothing to stop the respondent from implementing it. What the applicant should have sought to do was to seek to quash that by-law by orders of *certiorari* to the extent that he has not sought to do so, this court will be acting in vain in issuing an order of *prohibition*, and courts as it were do not act in vain.

Thirdly, the power or jurisdiction of this court to issue orders of judicial review is donated by sections 8 & 9 of the Law Reform Act. These sections must be called in aid of any application for judicial review. They are the sections that clothe this court with authority to issue those orders. Failure to cite them in the body of the application is fatal. Order 53 is merely a tool in aid of the said sections. It is procedural law. Otherwise the substantive law are the sections aforesaid. A perusal of the application shows that the applicant never cited those provisions in his *ex parte* application for leave as well as the substantive notice of motion, rendering the entire proceedings fatally defective.

One may of course argue that this is the sought of technicality that our current Constitution frowns upon and or that it is the kind of technicality that is curable by the "***double O***" principle. I beg to differ. An omission which goes to jurisdiction cannot be a mere technicality, since we all know that jurisdiction is everything. Without it a court has no business taking any further step in the matter. In any event, we are constantly reminded that judicial review is a special jurisdiction that is neither civil nor criminal. So that the above counter arguments may come to naught.

For all the above reasons, this application is dismissed with costs to the respondent. It is so ordered.

RULING DATED, SIGNED and **DELIVERED** at **MACHAKOS** his **30TH** day **JULY,** 20**12.**

ASIKE -MAKHANDIA

JUDGE