



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Civil Appeal 171 of 2001**

**MUNICIPAL COUNCIL OF MACHAKOS.....APPELLANT**

**V E R S U S**

**FREDRICK MUTUA MULINGE**

**(t/a MACHAKOS UNIFORMS).....RESPONDENT**

**J U D G M E N T**

1. The lower court entered judgment for the Respondent herein (who was the plaintiff) in the following terms -

(i) A permanent injunction to restrain the Appellant (who was the defendant), either by itself or through its servants and agents, from interfering in any manner whatsoever with the Respondent's business known as ***Machakos Uniforms*** situated at Kiwanjani Plaza, Machakos Town, and in particular from preventing the Respondent and/or his servants or agents from broadcasting audio-cassettes bearing information on his business.

(ii) Refund to the Respondent the sum of KShs 220/00 paid as pound fee for the Respondent's advertising equipment "which had been unlawfully impounded".

(iii) Costs of the suit and interest thereon.

2. It appears that the main issue before the trial court was whether the license granted by the Appellant to the Respondent authorized the latter to advertise his business by way of audio-cassettes playing on loud-speakers. The lower court decided this issue in favour of the Respondent.

3. The Appellant then appealed to this court against the decree of the lower court. Some 16 grounds of appeal are set out in the memorandum of appeal. I have perused those grounds. I have also read through the proceedings and judgment of the trial court.

4. I have considered the submissions of the learned counsels appearing. No authorities were cited.

5. The numerous grounds of appeal were argued in clusters, and I will consider them in the same format.

**Grounds 1,2,3,4,5,6,7,8,10 and 11**

6. These grounds attacked the trial court's holding that the Respondent did not contravene the Appellant's

by-laws by advertising his business and wares through playing audio-cassettes by loud-speakers at the window of his shop. Also attached is the holding by the lower court that the Respondent had paid to the Appellant a fee for advertising by public address system.

7. Exhibit 2 shows that the Respondent paid a licence fee of KShs 900/00. Out of this amount KSh 600/00 was for advertisement by a sign-board not exceeding 4 ½ square feet. KShs 300/00 was for conservancy (cleanliness). It is to be noted that elsewhere in the by-laws there was provision for fees for advertisement by a public address system in the sum of KShs 1,200/00. The Respondent did not claim that he paid this sum. The advertisement he paid for was by a bill-board of a certain dimension, not by a public address system.

8. That the Respondent was indeed advertising by a public-address system could not have been in doubt. The Respondent himself admitted this fact when he said that he was advertising by a loud-speaker mounted on a window of his shop overlooking a bus-park with the intention of reaching all his customers. There were also the testimonies of the Appellant's enforcement officers who were attracted to the loud-speakers they impounded by the noise that they emitted.

9. So, the Respondent was clearly advertising by a public address system, a mode he had not been licensed for. He was also committing the nuisance of noise. That there was no complaint by a member of the public in this regard does not take away anything from the testimonies of the enforcement officers that the loud-speakers were emitting an un-acceptable level of noise. This was against the provisions of **sections 162 and 163 of the Local Government Act, Cap 265** and also against the Appellant's by-laws made under **Part XIV of the Act**. Those by-laws were the **General Nuisance By-laws, 1996**, particularly **Part II, para 3(1) (a) & (b)** thereof.

#### **Ground 9**

10. The trial court held that it was not for the Respondent to peruse the Appellant's by-laws to know what kind of advertisement he had paid for. With respect, this was a serious misdirection which offended the maxim that ignorance of the law is no defence. The by-laws were in the public domain after gazettment. Everyone was thus deemed to be aware of them.

#### **Grounds 12, 13, 14, 15 and 16**

11. The trial court correctly found that the Appellant was empowered to make, and indeed had made, by-laws on nuisance, fees and charges. The court also observed correctly, that breach of those by-laws would attract penalties.

12. I have already found that the lower court erred in finding that it was not for the Respondent to read the by-laws to know whether his licence permitted him to advertise by public-address system.

13. The judgment of the lower court thus was not supported by the evidence placed before the court and appeared to ignore the Appellant's by-laws that had been duly enacted and gazetted.

14. In the result therefore this appeal is allowed in its entirety. The judgment of the lower court is set aside and an order dismissing the Plaintiff's suit with costs is substituted. The Appellant shall have the costs of this appeal. Those shall be the orders of the court.

13. The delay in preparation of this judgment is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained my full health.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF SEPTEMBER 2012**

**H. P. G. WAWERU**  
**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS**

**28<sup>TH</sup> DAY OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**

.....

**JUDGE**