REPUBLIC OF KENYA

High Court at Nakuru

Judicial Review 122 of 2011

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

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT

AND

IN THE MATTER OF THE WILDLIFE (CONSERVATION AND MANAGEMENT) ACT

AND

IN THE MATTER OF GAZETTE NOTICE NO. 16729 OF 24TH DECEMBER 2010

BETWEEN

MADA HOLDINGS LIMITED T/A FIG TREE CAMP.....APPLICANT

VERSUS

COUNTY COUNCIL OF NAROK.....RESPONDENT

RULING

Pursuant to leave granted on 2nd November, 2011 allowing the applicant to commence judicial review proceedings, the *ex parte* applicant filed the notice of motion dated 14th November, 2011 seeking the following orders:

(1)An order of certiorari to quash Gazette Notice No. 16729 of 24th December, 2010 which reviewed the park entry fees applicable to establishments situated outside the Maasai Mara Game Reserve.

(2) An order of prohibition stopping the respondent from charging the applicant park entry fees as prescribed by the aforesaid gazette notice No. 16729 of 24th December, 2010.

Sometime in 1979 Mada Holdings Ltd t/a Fig Tree Camp (hereinafter called “the Applicant”) constructed its business premises within the Maasai Mara Game Reserve. Boundaries of the reserve were revised in the 1980s as a result of which the applicant's drive way and parking area fell within the national reserve while its accommodation quarters fell outside the reserve. The applicant contends that prior to the revision of the boundary, patrons of establishments located outside and inside the reserve have always

paid the same amount of parking fees.

By Gazette Notice No. 16729 of 24th December, 2010 the respondent revised the entry fees to the reserve introducing a requirement that the entry fees paid by the non-resident patrons of the establishments located inside the reserve would be different from those paid by non-resident patrons with establishments located outside the reserve. Resident would pay US $70 while non-residents were to pay US $80.

The applicant contends that these charges are not only discriminatory but also that the respondent acted in contravention of the rules of natural justice for failing to accord it a chance to be heard before revising the charges, yet the respondent ought to have known that the revision would adversely affect it; that before the charges were effected patrons of establishments located outside and inside the reserve were paying the same amounts of entry fees; and that the new charges are calculated to favour establishment operating inside the reserve and may drive competitors out of market.

The application is contested on the grounds that the applicant is a private individual and as such cannot bring an application for Judicial review; that the applicant is not the only person affected by the decision; and that the applicant has not demonstrated that the decision-making process was in excess of the respondent's powers, or discriminatory or that it contravened the rules of natural justice. It maintains that the decision was made in consultation with all the stakeholders in the tourism industry, including the applicant.

From the submissions the broad issues for the court's determination are:-

1. Whether the applicant had a right to be heard before the respondent passed its decision.

2. Whether the applicant or its representatives were heard before the decision was made?

3. Whether the decision of the respondent was discriminatory?

4. Whether the decision was made in contravention of the law?

5. Whether the respondent had the powers or exceeded the power to make the rules? and

6. What orders, if any, should the court grant?

The remedy of judicial review is concerned not with private rights or merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. (see **Republic** V. **Secretary of state for Education and Science** *ex parte* **Avon County Council** (1991) 1 ALL ER 282 at 285). The point was more succinctly made in English case of **Chief Constable of North Wales Police** V. **Evan** (1982) 1 W.L.R. 1155, by Lord Hailsham of St. Marylebone stated thus:

"The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches, on a matter which it is authorised by law to decide for itself, a conclusion which is correct in the eyes of the court."

Thus, a decision of an inferior court or public authority may be quashed (by an order of *certiorari*) where the inferior court or authority acted without or in excess of its jurisdiction or where it failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record or the decision is unreasonable in the **Wednesbury** sense.

In **Mirugi Kariuki** v. **Attorney General** civil appeal No. 70 of 1991, the Court of Appeal held:-

"The court should not depart from the principles of natural justice when discretion being exercised and that the mere fact that the exercise of discretion is being exercised affects the legal rights or

interests makes it judicial".

The respondent herein was exercising its statutory power under the Local Government Act, when it revised the park entry fees in question. The exercise of that power was judicial in nature. In the light of the foregoing authorities, it was obliged to hear all those who were likely to be affected by its decision including the applicant or its representative. It matters not that the applicant is a private individual. Once it is demonstrated that the applicant has sufficient interest in the issue over which the public body is exercising discretion, or where the exercise of that discretion is likely to adversely affect the interests of the individual or even where it is shown that the individual has a legitimate expectation to be consulted before the discretionary power is exercised, the public body is obliged to consult. See **Commissioner of Land** V. **Kunste Hotel Ltd** (1995-1998) EA 1 CAK where the Court of Appeal observed:-

"The appellant was exercising his statutory power under the Government Lands Act, when he decided to allot the subject plot to the interested party. The exercise of that discretion clearly affected the legal rights of Kunste Hotel Limited. The exercise of that power was therefore judicial in nature and he was therefore obliged to hear all those who were likely to be affected by its decision..... It is, therefore, our view and we so hold, that the appellant should have consulted the hotel before he decided to allot the plot to the interested party."

In the circumstances of this dispute, the applicant was bound to be affected by the decision of the respondent, its premises having been divided right in the middle by the revised boundary. The respondent therefore ought to have heard it before introducing the new park entry charges. Had the respondent heard the applicant, the former's decision might have been different.

Turning to the second issue, though it is contended that the decision was made in consultation with all stakeholders in the Tourism industry, including the applicant, there is no evidence whatsoever to support that contention. The form or the date of the consultation were not provided. On the contrary, the applicant has adduced evidence to the effect that it or its representative, Kenya Association of Hotel Keepers & Caterers was not consulted. Indeed the respondent, in its replying affidavit, has not addressed the issue of consultation. Without any evidence, to the contrary, it is reasonable to conclude that the applicant was not consulted.

Having found that the applicant or its representative ought to have been consulted and that it was not consulted, it is not necessary, for me to consider whether or not the decision was discriminatory. An applicant does not have to prove more than one ground to get the decision reviewed. See **Kenya National Examination Council** v. **Republic,** *ex parte* **Geoffrey Gathenji Njoroge & others** civil appeal No. 266 of 1996. Be that as it may, I find nothing discriminatory with categorization of fees if the categorization is made to apply across the board. There is no evidence that any of the patrons with establishments outside the reserve are getting favourable treatment. Without that evidence, the alleged discrimination cannot avail the applicant the orders sought.

On the issue of the orders that this court should grant, if any, the applicant is seeking an order of *certiorari* to bring to this court and to quash the Gazette notice No. 16729 of 24th December, 2010 which reviewed the park entry fees applicable to establishments situated outside the Maasai Mara Game Reserve. It is also seeking an order of prohibition to restrain the respondent from charging it the revised park entry fees.

Under **Order 53 rule 2** of the **Civil Procedure Rules** as read with **Section 9(3)** of the **Law Reform Act, chapter 26** of the **Laws of Kenya**, an application for leave to apply for *certiorari* must be made not later than six months after the date of the judgment, order, decree, conviction or other proceeding sought to be quashed.

It has been held in numerous authorities that the time to apply for *certiorari* cannot be extended. In **Aga Khan Educational Service Kenya** V. **Ali Seif & 3 others** C.A No. 257 of 2003, for instance, the Court of Appeal held:

"...Unless the case is an obvious one, such as where an order of *certiorari* is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set aside. ……...should it turn out at the hearing of the motion itself that six months had elapsed before leave was granted, the motion would then fail".

The instant application was brought on 2nd November, 2011 to quash a decision made on or before 24th December, 2010, a period of more than ten (10) months, after the statutory period of six months within which an order of *certiorari* can be sought had lapsed. There is no provision in law for extension of time within which to seek for the certiorari. This being the case, an order of certiorari cannot issue against the respondent. (See **Aga Khan Education Service Kenya** V. **Ali Seif & 3 others** (supra)).

Unlike an order of certiorari, there is no time limit within which to institute an application for an order of prohibition. However, an application seeking that order should be made within a reasonable time.

An order of prohibition is issued by the High court and directed to an inferior tribunal or body forbidding it to continue proceedings therein in excess of its jurisdiction or incontravention of the laws of the land, or even where the tribunal departs from the rules of natural justice. See **Kenya National Examination Council** v. **Republic ex parte Geoffrey Gathenji Njoroge & others** (supra).

In this application, I have found that the respondent departed from the rules of natural justice in making the decision to vary the fees the applicant was paying. Even though that decision cannot be quashed by *certiorari*, for the reasons already explained, the respondent, can in my view, be prevented from implementing the decision if it is shown that the decision has not been implemented. This is so because unlike certiorari that looks into the past, prohibition looks into the future.

The decision by the respondents to vary the park entry fees, has to date not been implemented against the respondent because of the orders of stay granted at the leave stage. The new rate, for these reasons, I believe have not been implemented. It is that implementation that has been sought to be prohibited.

The upshot of the foregoing is that the motion has merit. Consequently, an order of prohibition shall and is hereby issued stopping the respondent from charging the applicant the park entry fees prescribed by Gazette Notice No. 16729 of 24th December, 2010. For the avoidance of doubt, this order is only in respect of the applicant herein. I award costs to the applicant

Dated, Signed and Delivered at Nakuru this 17th day of October, 2012.

W. OUKO

JUDGE