



REPUBLIC OF KENYA

High Court at Garissa

Petition 4 of 2012

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
OF THE INDIVIDUAL UNDER CHAPTER 4 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)
HIGH COURT PRACTICE AND PROCEDURE RULES 2006**

**IN THE MATTER OF THE RELOCATION OF PUBLIC SERVICE VEHICLES OPERATED BY
MEMBERS OF THE PETITIONER FROM KISMAYU ROAD NEAR OASIS HOTEL TO
SOUTH C NEXT TO THE TOWN HALL WITHIN GARISSA MUNICIPALITY**

BETWEEN

GARISSA MADOGO MATATU SAVINGS AND

CREDIT CO-OPERATIVE SOCIETY LIMITED.....PETITIONER

AND

MUNICIPAL COUNCIL OF GARISSA.....RESPONDENT

RULING

1. The Petitioner is challenging the action of the Respondent in relocating the vehicles belonging to the members of the Petitioner from Kismayu Road near Oasis Hotel where they have been operating from to a new place known as South C near the Town Hall within the Municipality of Garissa. Filed alongside this petition is the Petitioner's application brought under certificate of urgency seeking interim and/or conservatory orders to restrain the Respondent from harassing and relocating public service vehicles belonging to the members of the Petitioner from Kismayu Road near Oasis Hotel to South C next to the Town Hall within Garissa Municipality pending hearing and determination of this application and ultimately pending the hearing and determination of the petition and costs of the application. The application is brought under Rules 11, 12, 20 and 21 of the Constitution of Kenya (supervisory and protection of fundamental rights and freedoms of the individual) High Court Practice and Procedure Rules 2006, Articles 40 and 47 of the Constitution of Kenya 2010 and all other enabling provisions of the Law. Interim orders were granted and have been in force since 21st September 2012.

Petitioner's case

2. The Petitioner's case is contained in the grounds in support of the application found on the face of the

application and the supporting affidavit. Briefly the Petitioner is saying that its members have been operating public service vehicles (PSV) between Garissa Town and Madogo within the Garissa County and have been picking and dropping passengers at Kismayu Road next to Oasis Hotel; that the Respondent has arbitrarily decided to relocate them to South C area next to the Respondent's offices and that that decision is unreasonable, unfair, unprocedural and unlawful; that the respondent did not give a written explanation for the decision and members of the Petitioner were not consulted despite being directly affected by the decision; that the new location is insecure, does not have amenities such as lights, public toilets and shades; that members of the Petitioner have been paying and continue to pay daily parking fees of Kshs 70 per vehicle but the Respondent has failed to provide amenities; that the Respondent has persistently continued to harass members of the petitioner including arbitrarily removing number plates from their vehicles without justification thereby denying them their right to property contrary to Article 40 of the Constitution and that the respondent has been unjustly demanding Kshs 56,000 as Trade Licence from the members of the petitioner.

3. In addition to the grounds learned counsel for the Petitioner made oral submissions during the hearing of this application. He submitted that the property rights include money as defined by Article 260 of the Constitution and that money earned by the members of the Petitioner will be affected by the relocation of picking and dropping passengers to the proposed site; that the aim of relocating PSV belonging to the members of the Petitioner is to replace them with taxis and cabs; that no plans or architectural plans are attached to the application to show the designated areas for picking and dropping passengers; that the by-laws relied on by the Respondent are illegal because there is no evidence that they have been gazetted; that there is no evidence to show how big the new site is and that the letters attached to the replying affidavit and marked 'MAS 4' and 'MAS 5' have not been signed and therefore have no probative value and that issues as to whether the Petitioner has demonstrated any rights under the Constitution can only be canvassed and determined at the full hearing.

Respondent's case

4. The respondent's case is that it has the mandate under the Local Government Act, Transport Licensing Act and Transport Licensing Board Regulations to plan and zone the Garissa Town with a view to ensuring that various activities including public transport are carried out in specific places that are safe and secure, streamlined and regulated; that pursuant to that mandate, the respondent passed various by-laws in 2008 to require permits for those engaging in transport business, prohibiting obstruction of free passage in any street and prohibiting any Omnibus including public passenger vehicles from commencing or terminating journeys in any place except the designated areas; that the said by-laws were passed procedurally with participation of Garissa residents through their representatives and were gazetted long before the petitioner was registered; that public service vehicles have been carrying on business within Garissa Town in a disorganized manner and at non-designated places leading to congestion, nuisance by hawkers, miraa traders, food vendors, touting and hooting vehicles and mushrooming of illegal structures; that the unplanned manner of operation is a threat to security and is against public interest.

5. The Respondent further submits that it has purchased a property for the purpose of building a bus park from where the public service vehicles will operate from; that the bus park is paved, secure and fully equipped with modern facilities, lavatories, restrooms, benches and shopping outlets; the process of building the bus park and the operationalizing the same was open and all stakeholders including the members of the petitioner were involved; that the orders sought are detrimental to the respondent's interest because the respondent is unable to collect Kshs 70 for parking fee unless the public service vehicles are directed to operate from the bus park; that the respondent did not remove number plates and the petition is without merit; that no prejudice will arise to the petitioner if its members are directed to operate from the bus park.

6. In addition to the grounds in the replying affidavit, learned counsel for the Respondent made oral submissions that the Respondent did not attach plans because they have asked the court to visit the proposed site and make its own observations; that it is in the public interest that everyone complies with the Respondent's by-laws; that the claim that the Respondent intends to replace the members of the Petitioner's with taxis are baseless and that the Petitioner is asking the court to assist its members in

breaching the by-laws they do not wish to comply with and this would set a bad precedent. The Respondent asked the court dismiss the application and to set aside interim orders.

Determination of issues

7. The orders sought by the Petitioner are interim pending hearing and determination of the Petition. The gist of the Petitioner's case is violation of the rights of its members. They rely on Articles 40 and 47 of the Constitution. From my reading of the pleadings, it is my understanding that this application raises the following two major issues:

a) Whether the Petitioner is entitled to conservatory orders

b) Whether the Respondent's decision to relocate the members of the Petitioner to a new bus park is unprocedural, illegal and unlawful

8. Article 47 (1) and (2) of the Constitution 2010 reads as follows: "(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action." It is in relying on this Article that the Petitioner is saying that while it has no dispute with the Respondent's responsibility to plan the decision to relocate them to the new bus park was taken arbitrarily and without consultation. The Respondent is saying that the decision to relocate the Petitioner's members is lawful and procedural as it was taken pursuant to by-laws. The Petitioner is saying that the by-laws relied on are not gazetted and therefore are illegal. The Respondent is also saying that the Petitioner has not met the threshold of interlocutory injunction set down in **Giella v. Cassman Brown [1973] E.A 358** in that it has not established a prima facie case with a probability of success, that its members will suffer irreparable loss if orders are not granted and which side does the balance of convenience lie. The Respondent has cited several authorities to support its case.

9. My careful reading and analysis of this application reveals that it is a type of application which would, if orders sought are not granted, affect the outcome of the main suit in a way that would close the Petitioner out before all issues are heard and a determination made. I also note that the issues being canvassed at this preliminary stage are the same issues to be determined during the hearing of the Petition. It is because of this that I, with utmost care, would hesitate to analyse the issues raised in detail. I am alive to the fact that the Respondent is mandated under the law to plan and re-organise the Municipality for various reasons including public security and orderliness of carrying out businesses. I am also alive to the fact that public interest carries more weight than individual or private interest. This court would not want to be an impediment to proper planning of the Municipality of Garissa in accordance with the law. This court will also not stand aside and watch blatant infringement of rights of others in the course of that planning if there is evidence to establish those rights exist and there is infringement of the same. However, at this preliminary stage, this court is not able to determine if the by-laws relied on by the Respondent are legal or not, whether the new bus park has amenities or not and whether the decision to relocate members of the Petitioner was taken arbitrarily without regard to those it will directly affect, among other issues raised in this Petition. I am aware counsel for the Respondent submitted in the course of his submissions that the court should visit the scene. While this may be good idea if only to inform the court's decision, this is not something that could be undertaken without advance notice and planning. There are security concerns and time allocation issues that require planning beforehand.

10. With the above in mind, I am hesitant to make orders that may have the effect of disposing of this case at this preliminary stage. After carefully consideration rival submissions I am persuaded to find and hold, which I hereby do, that the Petition raises arguable issues under Article 47 of the Constitution and it is not frivolous. This court will be able to make appropriate orders after all the facts have been presented to court. In making those final orders this court will be alive to the requirement to balance the rights of the Petitioner and the responsibility of the Respondent to plan and re-organize the Municipality.

11. The application dated 21st September 2012 is hereby allowed in terms of prayer three (3) granting

conservatory orders to restrain the Respondent from harassing and relocating public service vehicles belonging to the members of the Petitioner from Kismayu Road near Oasis Hotel to South C next to Town Hall within Garissa Municipality pending hearing and determination of this Petition. To avoid a situation where parties fail to take immediate action to have a matter fully heard and determined, and given the nature of this Petition, I direct both counsel to draw and agree on the issues and exchange all documents to pave way for hearing of this matter as soon as the judicial calendar can allow. At this stage I make an order that costs of this application be in the cause. Those are the orders of this court.

Stella N. Mutuku, Judge

Dated, signed and delivered the 7th day of November 2012.