



REPUBLIC OF KENYA

High Court at Machakos

Civil Miscellaneous Application 161 of 2011

REPUBLIC.....APPLICANT

VERSUS

THE CLERK TOWN COUNCIL OF KANGUNDO.....RESPONDENT

EXPARTE

FRONTLINE HOUSING CO-OPERATIVE SOCIETY LTD.

RULING

This is a Judicial Review application filed by the applicant, Frontline Housing Cooperative Society Ltd. The application is filed against the Town Clerk of the Town Council of Kangundo, “*the respondent*”. The application is brought pursuant to the provisions of Order 53 rule 3 (1) of the Civil Procedure rules and Section 8 and 9 of the Law Reform Act. The application orders in terms;-

- An order of *certiorari* to remove into this court for purposes of being quashed the decision made by the Respondent to charge Transit Fee against the applicant’s members for the use of Kangungo-Nairobi road.
- An order of *prohibition* prohibiting the respondent from charging and or collecting Transit Fees from the applicant’s members.
- Costs.

The application was supported by the grounds set out in the copy of the Statutory Statement and the affidavit of **Daniel Maithya**, the Chairman of the Applicant. From all the documents the dispute seems to be that the applicant is a Cooperative Society duly registered with a membership of 27. They are engaged in transport business ferrying sand along Machakos-Kangundo-Nairobi road.

They have been paying cess fees to the local authorities from where the sand is harvested and or ferried at the rate of Kshs. 1300/= per trip from Machakos to Nairobi and Kshs. 1000/= from Makueni. However, from February, 2011 the respondent set up a barrier along the Kangundo-Nairobi road and had in complete contravention of the law, unlawfully been charging members of the applicant transit fee of Kshs. 700/= per trip for every vehicle ferrying sand under the guise of collecting funds to maintain and or repair the Kangundo-Nairobi road which mandate is not under the Town Council of Kangundo. In the premises the said Transit Fee charged by the respondent as aforesaid was illegal in that the same was not deliberated upon as required, approved by the Minister of Local Government and Gazetted before implementation. In any event the maintenance and or upkeep and repair of the major roads within urban and rural areas is under the rural and urban Roads Authorities. Finally, the charge of the said fees was also against the constitution in that it is charged in a discriminatory manner as it is only levied against the

members of the applicant and not any other person(s) engaged in transportation of any material along the said road.

However, the case for the respondent is that the applicant had brought the application in bad faith and to merely intimidate and embarrass it. The issues in contention were canvassed and deliberated upon by both parties and mutually agreed that the stated sum be levied. A fact the applicants have chosen to conceal. Prior to the respondent enforcing the charges, there existed a local ban on sand harvesting and transportation within its jurisdiction by NEMA due to degradation of environment, destruction of feeder roads and consequent drying up of rivers. However, the applicant was allowed to use road networks within Kangundo and Matungulu Districts to transport sand harvested in Kathiani, Mwala and Mbiuni areas within the County Council of Masaku. On 9th November 2010 a committee meeting of the respondent was held and introduced transit fees, reviewed the existing charges and fees on sand cess which were later adopted by full council. On 22nd November 2010 a stakeholder's meeting was held in respect of sand harvesting and transportation whereof it was agreed that the applicant continue paying the difference of Kshs. 500/= transit fees for sand ferried from Mwala and the Kshs. 700/= for sand ferried from Mbiuni. This was purely a commercial decision which the applicant has not disclosed as they needed to service their loans through which their vehicles had been financed and that it was temporary. Accordingly, it was insincere, dishonest and unreasonable for the applicant to turn around and hide behind an arrangement which was intended to enable it transact and service loans, this being a purely commercial arrangement. In the premises, the applicant has come to court with unclean hands. Finally, it takes the position that the application was defective as a wrong person had been sued and the decision sought to be quashed had not been placed before court as required by law.

When the application came before me on 5th July 2012 for *interpartes* hearing, parties agreed to canvass the same by way of written submissions. These submissions were subsequently filed and exchanged. I have carefully read and considered them.

This application is bound to fail on technicalities. However this is not the kind of technicalities that can be overlooked pursuant to the current constitutional dispensation. They are substantial and go to the root, competence and jurisdiction. They are not merely procedural.

Section 28 of the Local Government Act establishes Town Councils and County Councils. Section 28(3) thereof provides:-

“That every town council shall, under the name of “the county council of ...” or “the town council of...” As the case maybe, be each and severally a body corporate with perpetual succession and common seal (with power to alter such seal from time to time) and shall by such name be capable in law of suing and being sued and acquiring, holding and alienating land.

Section 129 of the Local Government Act Cap 265 laws of Kenya goes ahead to set out the role, status and duties of the town clerk. Yet instead of suing the Town Council of Kangundo, the applicant chose to sue the town clerk. This was clearly a fatal error. The argument by the applicant that it is the office which has been sued cannot hold water. It is obvious that if it was to succeed the occupant of the office may be held personally liable yet in whatever he did, he did so on behalf of the Town Council of Kangundo. The Town Clerk of the Town Council of Kangundo has been improperly sued yet the Town Council of Kangundo, which is a legal entity capable of suing and being sued in its own name, has not been joined in the proceedings. I would in the premises agree with the holding by **Lessit, J** in similar circumstances in the case of *Onesmus Masika Musola and 9 Others vs Town lerk and Another [2006] eKLR*. She held that the name of first defendant, who was the Town Clerk, and had improperly been sued in the suit. The suit was accordingly be struck out.

The decision of the respondents to charge transit fees was reached upon mutual agreement between the applicant and the respondents after the District Environment Committee (DEC), Kangundo/Matungulu met and imposed a ban on commercial sand harvesting in Kangundo and Matungulu areas. This deposition has not been denied or controverted by the applicant. The applicants agreed to regulate themselves and protect the environment as sand harvesting led to the degradation of the environment and

destruction of the road network by heavy trucks ferrying sand.

Because of the ban, transporters ferrying sand from outside the council's area of jurisdiction but using the council's road network including the applicant expressed concern that the total ban was affecting their business. They requested that they be allowed to use the roads on condition that they transport sand from outside the council's jurisdiction and pay the council transit fees and it was agreed later the applicants objected to the arrangement claiming that the amount charged was high and that most of their trucks were acquired on loan and the ban was affecting their business. After a lengthy discussion, it was agreed in favour of the applicant that it continues to pay the difference of 500/= transit fees for sand ferried from Mwala and 700/= for sand ferried from Mbiuni until the matter is revisited by all concerned parties. Again these dispositions have not been controverted by the applicant.

The reduction of the transit fees for the applicant was a temporary measure by the respondent, meant to help the applicants to service their loans. I would in the premises agree with submissions of the counsel for the respondent that it is therefore insincere/dishonest and unreasonable for the applicant to turn around and hide behind the arrangement that was intended to benefit them. He who seeks equity must come to court with clean hands. The applicant cannot for these reasons be seen to be a party with clean hands and equity must frown upon such conduct.

Judicial review orders are discretionary. So that even if a party proves that he is entitled to such order, the court will still deny him if it is satisfied that the applicant's conduct does not meet with its approval. In other, words the court will still deny a party who has made a case for the issuance of an order of judicial review if it frowns upon his conduct. That is the situation I find myself in, in this case.

Order 53 rule 7(1) of the Civil Procedure Rules provides that in the case of an application for an order of *certiorari* to remove any proceedings for the purposes of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he had lodged a copy thereof verified by affidavit with the Registrar or accounts for his failure to do so to the satisfaction of the High Court.

The provisions of Order 53 make it mandatory for a decision sought to be quashed to be placed before the court. The applicants no doubt, has not placed the decision allegedly made by respondent to charge transit fee against the applicant's members for use of Kangundo/Nairobi Road and neither has it given an account for its failure to do so.

The application seeking orders of *certiorari* is therefore defective as the decision the applicant is seeking to be quashed is not before court. An order of *certiorari* quashes a decision. Now if there is no such decision, as is the case here, then if such order was to issue, the court will be acting in vain. It may well be that no such decision was arrived at. It matters not that both the applicant and respondent concede that there is indeed such decision. The court cannot act on assumptions and or speculation. The court needs to see the decision sought to be quashed. I am in full agreement with **Okwengu, J** (*as she then was*) holding in the case of *Republic vs Kirinyaga Disputes Exparte Jeremiah Wagundu Bundi* [2006] eKLR that;

“the Provisions of Order 53 rule 7 of Civil Procedure Rules makes it mandatory unless otherwise excused by the court for the applicant to lodge a copy of the award of Kirinyiga District Tribunal and Kerogoya Senior Resident Magistrates Award Case No. 54 of 1998 verified by affidavit with the Registrar. Moreover the applicant did not give any explanation of this failure. This means that it was not open to the ex-parte applicant to question the validity of the award of the tribunal which he sought to have quashed by Order of certiorari.”

Finally, can the order of prohibition issue?

“Prohibition is an order of the High Court, directed at an inferior tribunal or body which forbids a tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention to the laws of the land. It lies only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not however lie to correct the course practice or procedure or an inferior

tribunal or wrong decision on the merits of the proceedings.”

Prohibition is neither means of reviewing errors that have already occurred nor of inquiring into past irregularities. The order looks to the future as opposed to the past and is meant to contain or stop an anticipated event and is unavailable for a decision already made. The *ex-parte* applicants cannot purport to seek orders to prohibit the respondent from charging and or collecting levy fees from the applicant when the respondents have already decided to levy the said fees.

As held in the case of *Kenya National Examinations Council vs Republic Ex-parte Geoffrey Gathenji & 9 Others (U.R)*.

“When a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which has already been made. It can only prevent the making of a contemplated decision.

It is clear from the foregoing that the applicant does not qualify for the orders sought in the application. The application is dismissed with costs.

DATED at MACHAKOS this 22ND day of NOVEMBER, 2012.

**ASIKE-MAKHANDIA
JUDGE**

DATED, SIGNED and DELIVERED at MACHAKOS this 14TH day of DECEMBER, 2012.

**GEORGE DULU
JUDGE**