



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW CASE NO. 25 OF 2011

**IN THE MATTER OF AN APPLICATION BY PETER ODOYO AND STANLEY KINYANJUI
SUING ON BEHALF OF OUTDOOR ADVERTISING**

ASSOCIATION OF KENYA FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

**IN THE MATTER OF THE LOCAL GOVERNMENT ACT, CAP 265 OF THE LAWS OF
KENYA, THE VALUATION FOR RATING ACT, CAP 266 OF THE**

**LAWS OF KENYA, THE RATING ACT, CAP 267 OF THE LAWS OF KENYA AND THE
PHYSICAL PLANNING ACT, CAP 286 OF THE LAWS OF KENYA**

AND

IN THE MATTER OF OUTDOOR ADVERTISING ASSOCIATION OF KENYA

BETWEEN

REPUBLIC
APPLICANT

AND

CITY COUNCIL OF NAIROBI 1ST
RESPONDENT

THE MINISTER FOR LOCAL GOVERNMENT 2ND
RESPONDENT

EX PARTE

**PETER ODOYO AND STANLEY KINYANJUI SUING ON BEHALF OF OUTDOOR
ADVERTISING ASSOCIATION OF KENYA**

RULING

On 8th February, 2011 the ex parte applicants, hereinafter referred to as “**the applicants**”, were granted leave to apply for an order of certiorari to remove into this court for purpose of quashing the decision of the 1st and 2nd respondents published on 15th October, 2010 regarding increase of advertising fees and charges. They were also granted leave to apply for an order of prohibition to prohibit the respondents from enforcing the said decision. Although the applicants had prayed that grant of the leave do operate as a stay of implementation or enforcement of the said decision, the court directed that the prayer be argued inter partes.

The applicants, through their advocate, Mr. Anzala, argued that over the years increment of advertising charges had been done in consultation with them but the gazetted increment now being challenged was done arbitrarily, irrationally, unreasonably and in breach of statute. They stated that they are yet to make payment of the increased charges. They said that the respondents’ decision violated their legitimate expectation that they would be consulted prior to imposition of any increment of the advertising charges.

The applicants cited the case of **R v SECRETARY OF EDUCATION AND SCIENCE, ex parte AVON COUNTY COUNCIL [1991] 1 All ER 37** where it was held:

“That the court should have the power to order a stay of a decision of a local authority pending the conclusion of a challenge to the decision making process by way of judicial review I regard as apparent.”

They added that staying implementation of the said decision does not amount to nullification of the same, it is merely deferring the date of implementation of the decision until the proceedings are concluded. In any event, they would still be paying the fees and charges at the rates at which they have been remitting, the applicants stated.

The 1st respondent opposed the application. Mr. Orina submitted that the court's power to grant an order of stay is discretionary and in exercise of such power the court must be satisfied that, the applicants have moved with speed in seeking the order and further, grant of such an order will not unnecessarily put at ransom to the 1st respondent's duty to provide services to the public. He cited **REPUBLIC vs MINISTER FOR FINANCE & ANOTHER ex parte NYONG'O & 2 OTHERS, [2007] eKLR** where Nyamu J, (as he then was), stated:

“Refocusing on the issue of delay in seeking earlier intervention by the applicants the court must point out again as it has done before, that speed is the hallmark of judicial review.”

The 1st respondent further submitted that the applicants were aware of the impugned decision published on 15th October, 2010 but took no step to challenge the decision for four months. The impugned decision has already been implemented, counsel added.

I have considered the brief submissions made by counsel. The applicants have, pursuant to grant of leave as aforesaid, filed the substantive motion. They are arguing that the respondents' act of increasing advertising charges was unlawful for reasons as stated in their application. Whether the increment is lawful or not will be determined after conclusion of the hearing of the Notice of Motion. For now, the court is called upon to determine whether payment of the higher advertising charges and fees should be halted pending hearing and determination of the substantive motion or whether the applicants should continue to pay the revised charges as they await this court's final ruling on the issue in dispute.

Outdoor Advertising Association of Kenya has 27 corporate members. The increased charges were gazetted on 15th October, 2010 and were effective as from 1st January, 2011. The applicants did not state that they were not aware of the said gazette notice before 8th February, 2011 when they moved to court. They did not explain why they did not challenge the proposed increment before the effective date. I take it that in the absence of any challenge of the said charges the 1st respondent factored the expected increase of advertising charges in its budget. I agree with Mr. Orina that any challenge to the 1st respondent's decision ought to have been brought promptly to avoid unnecessary disruption to the 1st respondent's finances which will in turn adversely affect its service delivery to the City residents. As was rightly stated in **REPUBLIC vs MINISTER FOR FINANCE & ANOTHER ex parte NYONG'O & 2 OTHERS (Supra)**, decisions with financial implications must be challenged promptly failing which orders seeking to stay such decisions may not be granted even where otherwise deserved.

Lastly, in the event that upon determination of the applicants' case it turns out that the new rates are unlawful and therefore ought not to have been put in place, it will not be difficult to order refund to the 27 companies aforesaid. An order of refund would be difficult to implement if any refund was to be made to thousands of people. Not so in this case.

For the reasons aforesaid I decline to order stay of the impugned decision pending hearing and determination of the substantive motion. The applicants will bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – court clerk

Mr. Anzala for the applicant

No appearance for the respondents