



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
JUDICIAL REVIEW NO. 18 OF 2011

REPUBLIC..... APPLICANT

=VERSUS=

THE MUNICIPAL COUNCIL OF KAPSABET.....RESPONDENT

EXPARTE LIT GEN. AUGUSTINE CHERUIYOT

RULING

The applicant, **Gen Augustine K. Cheruiyot**, by his chamber summons dated 21st March, 2011, seeks leave to apply for orders of certiorari and prohibition under Sections 8 & 9 of the Law Reform Act (Cap 26 Laws of Kenya) and Order 53 rule 1 of the Civil Procedure Rules. The order of certiorari is sought to remove into this court for purposes of quashing the notices dated 12th January, 2011 and 27th January, 2011, namely, the Stock Auction and Sale Public Notice and the Stock Auction fees Notices, issued by the Municipal Council of Kapsabet (hereinafter "**the respondent**"). The order of prohibition is sought to prohibit the respondent from continuing to implement the respondent's Stock Auction and Sales By-Laws, 2004. If the leave is granted, the applicant prays that the same does operate as a stay of the continued implementation of the said notices.

The application is predicated on the following grounds as expressed in the body of the application:-

- (a) *That the respondent is acting in an ultra vires manner.*
- (b) *That the respondent is implementing by-laws that have not been duly gazette in the Kenya gazette contrary to section 205 of the Local government Act (Cap 265 Laws of Kenya).*
- (c) *That the implementation of the notices and the by-laws by the respondent offends section 27 of the Interpretation and general Provisions Act (Cap 2 of the Laws of Kenya).*

(d) ***That the Stock auction and Sales public notice dated 12th January, 2011 offends section 201 (2), (a) of the Local Government Act aforesaid.***

(e) ***That the Municipal Council of Kapsabet Stock Auction and Sales By Laws, 2004 are unenforceable for want of compliance with section 201 A of the same Act.***

(f) ***That the By-Laws are undated hence a nullity as the date they were made is unknown.***

(g) ***That the respondent is acting unreasonably by exercising discretion to levy fees in an arbitrary manner.***

The application is supported by a verifying affidavit of the applicant and Statutory Statements drawn by his advocates. The statement is a rehash of the above grounds of the application. In the verifying affidavit, the applicant has deponed, *inter alia*, that he has carried on stock trade since 1978 to date,; that he used to pay Kshs 200/= as fees per auction day but the respondent increased the same to 150/= per head of cattle sold which increment the applicant considers unreasonable; that the respondent relies on its stock auction and sales By laws of 2004 which levy sentences which are ultra vires the parent Act (i.e Section 201 (2) (a) of the L.G.A.); that the said By Laws were not published in the Kenya Gazette as required by the same Act; that the by-Laws are undated and the respondent has no mandate to enforce them; that the said by laws were not resubmitted to the Minister for Local Government for fresh approval contrary to section 201 A of the same Act and in the premises, the respondent is acting ultra-vires the Act. Annexed to the affidavit are copies of various documents including the notices dated 12th January,2011 and the respondent's Stock Auction and Sales By laws.

The application is opposed and there is a replying affidavit sworn by **Joel Pkemoi** , the respondent's Ag. Town Clerk. It is deposed in the affidavit, *inter alia*, that the By-Laws, challenged by the applicant were duly approved by the Ministry of Local Government and were also duly gazetted; that the order of prohibition if granted would operate punitively and would ground the operations of the respondent; that the applicant has infact filed a suit against the respondent which suit is pending before the High Court and the filing of this application is an abuse of the process of the court. Annexed to the affidavit are copies of, *inter alia*, the respondent's Single Permits and control of trade By-Laws, Gazette Notice No. 1625 of 4th March, 2005 and a plaint in Eldoret HCCC No. 26 of 2011.

The application was canvassed before me on 29th March,2011 by **Mr. Kigamwa**, learned counsel for the applicant and **Mr. Kitur** learned counsel for the respondent. Counsel reiterated the stand-points taken by their clients in their respective affidavits.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. The respondent's Stock Auction and Sales By-Laws of 2004 are challenged by the applicant on various grounds. There is objection that the same are undated. That may very well be true. However, the By-Laws would not be enforced on the date they were made. They would only be enforced after the approval of the Minister for Local government. It is therefore the date of approval which is pertinent. The Stock Auction and Sales by-Laws of 2004, of the respondent were approved on the 23rd December, 2004, and could only be enforced on or after that date. I am not persuaded therefore that the said By-Laws are a nullity for want of a date on which they were made when there is no doubt as to when they were approved.

The applicant further objects that the respondent is implementing By-Laws which have not been duly gazette. That challenge is not well taken in view of Gazette Notice No. 1625 of 4th March, 2005. Related to that objection is the challenge that the respondent's Stock Auction and Sales Public Notice dated 12th January, 2011 offends section 201 (2) (a) of the Local Government Act. The offending aspect of the said notice being the imposition of a fine of Kshs 2,000/= for a first offence and imprisonment of upto six

months and a subsequent offence a fine of Kshs 3,000/= and imprisonment of upto 9 months.

The penalties provided in the By-Laws are as follows:-

“ 9, Every person who is guilty of an offence under these By-Laws shall be liable on conviction to a fine not exceeding two thousand shillings for the first offence and in respect of a second subsequent offence, a fine not exceeding three thousand shillings or imprisonment for a term not exceeding six months in respect of a first offence and not exceeding nine months in respect of a second or subsequent offence, or both such fines and such terms of imprisonment.”

A plain reading of the notice of 12th January, 2011 shows that the same was lifted from the respondent's said By-Laws. The relevant provisions of the Local Government Act read as follows:-

“201 (2) A local authority may by By-Laws, prescribe all or any of the following penalties which may be imposed for breach of any By-Law made by it under this Act, that is to say:-

(a) A fine not exceeding two thousand shillings in respect of a first offence and not exceeding three thousand shillings in respect of a second or subsequent offence or imprisonment for a period not exceeding six months in respect of a first offence and not exceeding nine months in respect of a second or subsequent offence or both fines and such periods of imprisonment; and

(b) In addition to the penalty provided in the preceding paragraph, in the case of continuing breach of any such, by law, a fine not exceeding twenty shillings for every day during which the offence continues:

“Provided that any by-law which under this paragraph prescribes a fine for each day during which an offence continues shall also provide that the aggregate of any such fines imposed shall not, in the case of any one continuing breach of the By-Law in question, exceed two thousand shillings;.....”

Once again it is plain that the bylaw lifted its penalty provision from the parent Act. In view of the plain language of the bylaw and the parent Act, I detect no conflict. The penalties as published by the respondent are not *ultra vires* the Act. I cannot therefore say that the respondent is acting in an *ultra vires* manner as alleged by the applicant.

The applicant has further alleged that by Section 201 A of the Local Government Act all By-Laws, Licenses, Fees, Permits and other charges imposed by every local authority previously had to be resubmitted to the minister for fresh approval which the respondent had failed to do in respect of Stock Auction and Sales. Prima facie, that argument is attractive. However, the section does not state the penalty or sanction for the failure to seek fresh approval. The section does not plainly invalidate the by-laws, licenses, fees permits and other charges not freshly approved.

I cannot therefore say that the respondent's By-Laws cannot be enforced for want of a fresh approval. The requirement for a fresh approval did not create a right which the applicant may enforce by these proceedings.

In my view of my finding on the significance of the approval date rather than the date the By-Laws were made, I find no merit in the applicant's reliance upon Section 27 of Interpretation and General Provisions Act (cap 2 Laws of Kenya).

For the above reasons, I find and hold that the applicant has not demonstrated an arguable case for leave to commence judicial review proceedings. There is another reason why leave would be refused. The applicant has commenced Eldoret HCCC No. 26 of 2011 against the respondent. In that case he seeks: -

“a declaration that the acts of the defendant in interfering in his trade are unlawful coupled with a perpetual injunction restraining the defendant whether by itself, it’s servants and/or agents from interfering with the plaintiff’s Stock Auctions as carried out on the land parcel known as Nandi/Chepterit/241 together with compensation, for loss of business.”

In paragraph 6(c) of his plaint the applicant avers as follows:-

“(c) The acts of the defendant are ultra vires its powers under the Local Government Act (Cap 265)”

The said paragraph sums up the applicant’s judicial review application. It is against public policy to maintain parallel proceedings to achieve the same results. That is speculating with the judicial process and should be discouraged.

In the end the chamber Summons dated 21st March, 2011 is declined with costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF MAY, 2011

F. AZANGALALA

JUDGE

Read in the absence of:-

The parties and their advocates.

F. AZANGALALA

JUDGE