



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

*(Coram: Ojwang, J.)*

**PETITION NO. 48 OF 2011**

**IN THE MATTER OF A CONSTITUTIONAL PETITION BROUGHT PURSUANT TO  
ARTICLES**

**22(1), (2),(3),(4) & 23(1),(2),(3)(a),(b),(c),(d),(f) & 258(1),(2) OF THE CONSTITUTION OF THE  
REPUBLIC OF KENYA.**

**- AND -**

**IN THE MATTER OF THREATENED CONTRAVENTION OF THE FUNDAMENTAL  
RIGHTS & FREEDOMS OF DR. JOHN M. KHAMINWA**

**AS ENSHRINED AND PROTECTED UNDER ARTICLES 40(1),(2), 47,50 OF THE  
CONSTITUTION OF KENYA**

**- AND -**

**IN THE MATTER OF CITY COUNCIL OF NAIROBI TOWN CLERK'S NOTICE CONTAINED  
IN THE DAILY NATION (21<sup>ST</sup> APRIL, 2011)**

**TITLED "RATES PROPERTY DETAILS & AMOUNT OUTSTANDING AS PER OUR  
RECORDS" ISSUED UNDER THE**

**PROVISIONS OF THE RATING ACT (CAP. 267, LAWS OF KENYA)**

**- AND -**

**IN THE MATTER OF THE UNCONSTITUTIONALITY OF SECTIONS 3(1), 4(1), 16(2), 16(3)  
OF THE**

**RATING ACT (CAP. 267, LAWS OF KENYA)**

**- AND -**

IN THE MATTER OF THE LOCAL GOVERNMENT ACT (CAP. 265, LAWS OF KENYA) AND  
THE VALUATION FOR RATING

ACT (CAP. 266, LAWS OF KENYA)

-BETWEEN-

DR. JOHN M. KHAMINWA.....PETITIONER

- AND -

1. THE HON. THE ATTORNEY-GENERAL

2. CITY COUNCIL OF NAIROBI .....RESPONDENTS

3. THE TOWN CLERK, CITY COUNCIL OF NAIROBI

RULING

The main cause herein is a *petition* dated and filed on *3<sup>rd</sup> May, 2011*; and under its umbrella the petitioner has moved the Court by Originating Notice of Motion of even date, seeking *interim orders*. The instant application is brought by virtue of the Constitution of Kenya (Supervisory Jurisdiction & Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice & Procedure Rules, 2006, and Articles 22(1), (3), (4), 23(1), (2), (3)(a), (b), (c), (d), (f) and 258(1), (2) of the Constitution of Kenya. The main prayer at this stage is thus set out:

***“THAT this Honourable Court do issue a Conservatory Order by way of stay of execution of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ Notice as carried on page 54 of The Daily Nation Newspaper of 21<sup>st</sup> April, 2011 pending the hearing and determination of this application.”***

Even though this application came up *ex parte* in the first instance, it raised, at this stage, detailed interplays of *statute law and the Constitution*, and complex perspectives of *historical background* and *comparative jurisprudential experience*, such as would not open up the *prima facie* view without relatively detailed canvassing. Hence the necessity for this ruling on the *prima facie* position, for the purpose of setting the stage for an *inter partes* hearing.

The applicant saw, by chance, on *21<sup>st</sup> April, 2001* an advertisement in *The Daily Nation*, containing a notice issued by 2<sup>nd</sup> respondent and signed by 3<sup>rd</sup> respondent, carrying the names and property details of certain rate-payers as being in default, and thus, in debt to 2<sup>nd</sup> respondent for outstanding rates. The said notice was addressed to the general public, and listed the names of alleged defaulters, indicating that 2<sup>nd</sup> respondent would invoke the provisions of the *Rating Act (Cap. 267, Laws of Kenya)*, and commence recovery proceedings against these defaulters, and that such proceedings would result in the *sale of the properties* in question by way of auction, to recover the alleged outstanding rates. The said notice was not definitive as to the amounts claimed by 2<sup>nd</sup> respondent, and further checking was required to be effected with 2<sup>nd</sup> respondent’s Chief Valuer. In 2<sup>nd</sup> respondent’s listing, the petitioner’s properties appeared under entries Nos. 112 and 113, as the subject of outstanding rate-payment arrears in the sum of *Kshs. 7,804,546/=*; this payment-due was stated to be time-barred, as the limitation prescribed in the Rating Act is 12 years, and the rates-charge is calculated yearly and is due on the *1<sup>st</sup> day of January* every year.

The petitioner avers that such an amount of rates-arrears is mostly composed of *compound interest on*

**the principal rate-sum**, on a month-to-month basis; and that such a mode of imposing the rates-burden is unconstitutional, as “it seeks to levy a penalty and sentence upon the applicant without being given the opportunity to be heard by a fair and unbiased tribunal and/or court”.

The petitioner believes that the said notice published by 2<sup>nd</sup> respondent in **The Daily Nation** of **21<sup>st</sup> April, 2011** “is irregular, [and should be held] null and void and ... set aside as [it][offends] the provisions of Section 26(1) of the Rating Act, as .... [it] has not been placed in the **Kenya Gazette**”.

The applicant believes that the provisions of the Rating Act, in particular s.16 (3) thereof which confers power to charge compound interest on a monthly basis by way of penalty or sentence, is “*a violation of the constitutional provisions that stipulate that a party is not to be subjected to a penalty or sentence or prejudice unheard*”, and an infringement of the constitutional provisions for the application of rules of natural justice.

The petitioner states that “the non-negotiability of the imposition of penal interest is a creature of s.16 (3) of the Rating Act which, hence, violates the applicant’s rights to fair administrative action, [and] fair hearing secured under Articles 47 and 50... of the Constitution”.

The petitioner states that s.17 (2) of the Rating Act infringes the doctrine of the separation of powers, by providing that a Subordinate Court of the First Class is the relevant Court for rates-demand proceedings, there being no regard to the **pecuniary jurisdiction** of such a Court, regardless of the value of the rates-claim; in this regard, the exercise of judicial authority has been usurped by the legislature, contrary to Article 160(1) of the Constitution; and so, s.17(2) of the Rating Act is **ultra vires** Article 160 (1) of the Constitution.

The petitioner believes that 3<sup>rd</sup> respondent, by virtue of s.17 (6) of the Rating Act, is set to deprive him of his property, “*in the event that the Subordinate Court adjudges against him*”, and in this way his property will have been “*arbitrarily acquired for a debt recoverable by other modes of execution*”.

The petitioner pleads that no prejudice shall befall 2<sup>nd</sup> and 3<sup>rd</sup> respondents if the Orders sought are granted, as 2<sup>nd</sup> respondent has a variety of sources of funding, “*whereas the applicant stands to suffer ...immense loss and damage if the threat to dispose...[his] property is carried out....*”

The petitioner provided evidence by his affidavit sworn on **3<sup>rd</sup> May, 2011**; and, *inter alia*, he deposes that he had not, prior to **21<sup>st</sup> April, 2011** received any formal demand from 2<sup>nd</sup> respondent, in respect of outstanding rates; and when he visited 2<sup>nd</sup> respondent’s offices, he obtained a print-out showing that for his property known as L.R. No. 196/28 the outstanding rates amounted to Kshs. 702,500/=, and for his other property, L.R. No. 196/29 the amount outstanding was Kshs. 629,567/=; meaning that the actual principal amount owing was only **Kshs. 1,332,067/=**, the remaining balance of **Kshs. 6,069,150/=** being **penalty interest** which 2<sup>nd</sup> respondent has imposed, entirely on its own, relying on the terms of s.16(3) of the Rating Act.

The applicant avers that, upon receiving the print-out showing his alleged indebtedness to 2<sup>nd</sup> respondent, he had immediately prepared a banker’s cheque, for the sum of Kshs. 500,000/= in favour of 2<sup>nd</sup> respondent, paid on account.

The foregoing statements and evidence form the reference-point, in relation to which learned counsel, **Dr. Khaminwa** made detailed submissions to support his case for interlocutory relief.

Counsel urged that the notion of compound interest, as a basis for rates-demand by the local authority, was penal: and so it was inherently inconsistent with the individual’s **property rights**; with the Constitution’s guarantees of **hearing** and **natural justice**, before an individual was subjected to such deprivation and sanction; with the Constitution’s guarantees of **fair administrative action**; it was **unreasonable and oppressive** to exact such compound interest against the individual; such a rates - demand offended the principle of **proportionality** between rights and imposed burdens.

If there was a rational principle in the Judiciary’s assignment and limitation of **pecuniary jurisdiction** under the Magistrates Courts Act (Cap. 10, Laws of Kenya), how did the Rating Act give an exception,

allowing all rates-claim matters, regardless of the amounts of money involved, to be resolved exclusively by a Subordinate Court of the First Class? Counsel urged that this provision of the Rating Act is not only offensive to the protective principles of the Constitution, for individual rights, but also grossly offended the principle of the separation of powers, which dictated that matters of the domain of justice were the preserve of the judicial organ; and if this argument is accepted, then the provision of the Rating Act, by virtue of which the petitioner is now being compelled to pay outstanding rates with compound interest, should be declared null.

Counsel urged that the “*privative character*” of the Rating Act, now manifesting itself in 2<sup>nd</sup> respondent’s decision to auction the petitioner’s property, offended the Constitution in a double sense: by detracting from the Constitution’s protection of the right to own property (Article 40), and by derogating from the declarations of international law which has been declared to be part and parcel of the law of Kenya (Art. 2(5) and (6) of the Constitution). In this regard, the Universal Declaration of Human Rights, 1948 thus declares in Article 17:

**“1. Everyone has the right to own property alone as well as in association with others.**

**“2. No one shall be arbitrarily deprived of his property.”**

**Dr. Khaminwa** submitted that the imposition of inflated compound interests upon rates payable, and the exacting of the same, on pain of outright forfeiture of the properties in question by way of mandatory public auction, amounts to ***arbitrary taking*** of private property, without following any fair procedure; without reasonable grounds; capriciously; and without giving a hearing to the person affected. Such a taking of private property, counsel urged, negates the ***legitimate expectations*** of the proprietor, and contravenes the principle of proportionality as between penal decisions and the deserts of the affected individual.

The affected property in the instant case, counsel submitted, is ***matrimonial property***, and therefore, property holding a status of special social value to the petitioner; in fairness, in such a case, the respondents ought not to make recourse to compulsory taking, they should instead seek out ways of ***getting paid***: and in this context, the threatened sale is illegitimate and contrary to goals of justice.

Counsel submitted that the foregoing principles in relation to justice and fairness, good governance and respect for individual rights, must now be seen as the ***medium of play of the legal process***, quite in departure from old doctrines that extolled repressive constructions of law. The comparative judicial experience, it emerges, vindicates the more progressive interpretations of law which also characterize the ***Constitution of Kenya, 2010***.

In the Privy Council case from Trinidad and Tobago, ***Alleyne-Forte v. Attorney-General & Another*** [1997]4LRC 338, the question was how a balance was to be struck between the interests of a car-owner, and the police authorities who, in the name of the public interest, had towed it away from its parking; and the Judicial Committee held (***Lord Nicholls***, at p.342):

**“A person whose car is removed may, if he wishes, challenge the lawfulness of the police action in court proceedings, and recover the charges paid and obtain damages for unauthorized interference with his car. Having regard to the comparatively modest amounts involved, and the fact that the payments are not fines for criminal offences, the balance which has been struck in dealing with the intractable problem of car parking in public places cannot be regarded as unfair, despite the absence of a simpler, cheaper alternative remedy whereunder the police must prove the lawfulness of their actions”.**

The principle drawn from that case is that, the legal process should be marked by a ***fair balance between the general interest of the community, and the individual***.

In the English case, **R v. Poole Justices, ex parte Fleet** [1983]2All E.R. 897, which concerned **non-payment of rates**, the question was, the proper procedure of applying **penalty** against a defaulter; and **Forbes, J** thus held (at p.900):

**“...it seems to me to be a duty on the justices, on such an application under s.103 (1) (a) of the General Rate Act, 1967 to inquire in the applicant’s presence whether his failure to pay was due to wilful refusal or culpable neglect.”**

Clearly, the principle to be drawn from that case is that the rating authority has to keep in **responsible and dutiful communication** with the rate-payer, and where any burdensome obligation or penalty will fall on the rate-payer, the circumstances occasioning any default ought to be ventilated – and that means a **hearing** is to be accorded the rate-payer. In the instant case, learned counsel, **Dr. Khaminwa** submitted, there had been **no inquiry as to the cause** of the petitioner’s failure to pay-up the outstanding rates.

Just as with the foregoing comparative case-examples, the South African case, **First National Bank of SA Ltd. t/a Wesbank v. Commissioner for South African Revenue Services and Another** [2003] 1LRC187, underlines the **balancing act** to be sought where there are competing claims of the individual and the public interest. The Constitutional Court, in that case, held (p.190):

**“Comparative law demonstrates two important principles, viz that (a) there are appropriate circumstances where it is permissible for legislation, in the broader public interest, to deprive persons of property without payment of compensation and (b) for the validity of such deprivation, there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve.”**

Counsel urged that this Court should intervene in principle, to protect the subject against the punitive aspect of the Rating Act, which was being relied on by 2<sup>nd</sup> respondent to take the petitioner’s property. The principle founding that argument is found in F.A.R. Bennion, **Statutory Interpretation** 4<sup>th</sup> ed. (London: Butterworths, 2002), at p.840:

**“In the field of statute law, the courts’ dislike of inflicting inconvenience mainly arises from the coercive nature of legislation. An Act usually intrudes on the property, time or freedom of the subject. The courts, in their capacity as the subject’s protectors, feel that this intrusion, while no doubt necessary in the interests of society generally, should be accomplished without inflicting unnecessary inconvenience.”**

Principles of a similar kind include the concept of **proportionality**, which is thus defined in Butterworths Core Text Series on **European Union Law**, 3<sup>rd</sup> ed. (p.148):

**“The principle of proportionality...requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused are not to be disproportionate to the aims pursued”.**

The same work defines also the kindred principle of **legitimate expectations** (at p.149):

**“The principle of legitimate expectations means that, in the absence of an overriding matter of public interest, Community measures must not violate the legitimate expectations of the parties concerned....However, this expectation must be a reasonable one....”**

Learned counsel submitted that the respondent’s notice on rates-default published in **The Daily Nation** of **21<sup>st</sup> April, 2011** did not constitute a valid method for disposing of the applicant’s property by public auction, for in a relevant decision, **Resley v. Nairobi City Council** [2001] LLR 1823 (HCK), in which the respondent had published rating notices in a daily newspaper, the Court (**Rawal, J**) thus held:

**“The attempt to retrospectively validate the notices in the daily newspaper by publication of notices in the Kenya Gazette was against the principle of natural justice, since it attempted to create a liability on 25<sup>th</sup> January, 2002 applied retrospectively to 1<sup>st</sup> January, 2002, and without giving the rate-[payers] a real opportunity to be heard by the valuation court, which had not been constituted within a reasonable time.....Such an administrative act was not merely an irregularity but a nullity.”**

From the petitioner’s prayers, the affidavit evidence and the submissions, there is a **prima facie** basis for making certain inferences, as follows:

**(a) the respondents have not exercised efficiency in their record-keeping on the collection of rates within the area under their management jurisdiction;**

**(b) the applicant in particular had not been kept informed of his rates-indebtedness to 2<sup>nd</sup> respondent;**

**(c) suddenly, in the course of April, 2011 the 2<sup>nd</sup> and 3<sup>rd</sup> respondents expressed their intention to dispense penalty in respect of unpaid rates;**

**(d) 2<sup>nd</sup> and 3<sup>rd</sup> respondents substantially inflated the amounts payable as outstanding rates, by apply compound interests upon the same;**

**(e) 2<sup>nd</sup> and 3<sup>rd</sup> respondents believed the amounts and timing of their rates-demands were lawful and founded on the Rating Act (Cap. 267, Laws of Kenya);**

**(f) 2<sup>nd</sup> and 3<sup>rd</sup> respondents believed that once they published a notice in The Daily Nation of 21<sup>st</sup> April, 2011, they were covered by law as they proceed to claim the properties of the rate-payers including the petitioner herein;**

**(g) if 2<sup>nd</sup> and 3<sup>rd</sup> respondents proceed as they have notified, the petitioner is likely to lose his property, and thereby suffer irreparable damage;**

**(h) the petitioner challenges the decision taken by 2<sup>nd</sup> and 3<sup>rd</sup> respondents, among other things, for being contrary to the fundamental guarantees of the Constitution. In considering this point, it is important to consider the general character and the specific terms of the fundamental-rights guarantees of the Constitution. This Court, in Joseph Kimani Gathungu v. The Attorney-General, the International Criminal Court and Others, Mombasa H.C. Const. Ref. Application No. 12 of 2010 thus stated:**

**“A scrutiny of the several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of 2010 is dominated by a ‘social orientation’, and as its main theme, ‘rights, welfare, empowerment’, and the Constitution offers these values as the reference-point in governance functions”;**

**(i) such a design of the Constitution is, in my opinion, manifestly derogated from by the Rating Act,**

**and the powers exercised thereunder by 2<sup>nd</sup> respondent, when 2<sup>nd</sup> respondent, without due notice or any hearing for rate-payers, proliferates by compound-interest charges, its demand upon a rate-payer, and on that basis precipitates an unavoidable taking and auctioning of the rate-payer's property;**

**(j) whereas the Constitution's fundamental-rights content is more directly concerned with limited government, and checks-and-balances to the main centres of public power, the real invasion of the individual's economic and social integrity, legitimate expectations, family and psychological space, comes more often from agencies such as 2<sup>nd</sup> respondent, which by relying on laws ill-aligned to the new Constitution, readily nullify property and other private rights, by means of auctions and sales, such as those which are being threatened against the petitioner/applicant herein;**

**(k) such laws, upon which a public agency relies in denying guaranteed individual rights, upon being identified before the High Court, in proper proceedings, merit being struck out as unconstitutional.**

I will make orders as follows, at this *ex parte* stage:

**(1) The petitioner's Originating Notice of Motion of 3<sup>rd</sup> May, 2011 is certified as urgent, and heard accordingly, in the terms of prayer No. 1.**

**(2) I hereby issue a conservatory order by way of stay of execution of 2<sup>nd</sup> and 3<sup>rd</sup> respondents' Notice published in The Daily Nation of 21<sup>st</sup> April, 2001 at page 54, pending the hearing and determination of the applicant's petition dated 3<sup>rd</sup> May, 2011.**

**(3) Service of these proceedings shall be effected within seven days of the date hereof.**

**(4) The Deputy Registrar shall have the file herein transferred to the High Court of Kenya at Nairobi, for the hearing and determination, on the basis of priority, of the petition.**

**(5) Costs shall be in the cause.**

**DATED and DELIVERED at MOMBASA this 6<sup>th</sup> day of May, 2011.**

.....

**J. B. OJWANG**

**JUDGE**

Coram: Ojwang, J.

Court Clerk: Ibrahim

For the Petitioner/Applicant: Dr. Khaminwa