



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW CASE NO. 323 OF 2010**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF  
CERTIORARI, MANDAMUS & PROHIBITION**

**AND**

**IN THE MATTER OF THE TRAFFIC ACT, CAP 403 & THE LOCAL GOVERNMENT ACT,  
CAP 265**

**AND**

**IN THE MATTER OF PART VIA OF THE TRAFFIC ACT, CAP 403**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS**

**BETWEEN**

**REPUBLIC**

**VERSUS**

**CITY COUNCIL OF NAIROBI .....1<sup>ST</sup>**

**RESPONDENT**  
**THE MINISTER FOR LOCAL GOVERNMENT.....2<sup>ND</sup>**  
**RESPONDENT**  
**THE HONOURABLE ATTORNEY GENERAL..... 3<sup>RD</sup>**  
**RESPONDENT**

**AND**

**MATATU WELFARE ASSOCIATION .....1<sup>ST</sup>**  
**INTERESTED PARTY**  
**THE KENYA LOCAL GOVERNMENT WORKERS UNION .....2<sup>ND</sup>**  
**INTERESTED PARTY**

**AND**

**KAKA TRAVELLERS CO OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED .....EX**  
**PARTE APPLICANT**

**RULING**

This ruling is in respect of an application dated 24<sup>th</sup> January, 2011. The application sought the following orders:

- “1. This motion be certified as urgent and heard ex parte in the first instance owing to its extreme and demonstrated urgency.**
- 2. Direction be issued on the hearing of this Motion in light of the Constitutional issues raised and arising within these pending Judicial Review Proceedings.**
- 3. An injunction do forthwith issue, restraining the 1<sup>st</sup> respondent (City Council of Nairobi), by itself, its Clerk, Deputy Clerk, its officials, Parking Attendants, contracted company or companies, or any person, servant, and/or agent howsoever of the 1<sup>st</sup> respondent, acting under or at its behest, from imposing, charging, levying or demanding from the applicant, the Applicant’s members, or member of the public the daily Parking fee of Ksh.250/= or any sum exceeding the sum of Ksh.140/= chargeable per motor vehicle per day within the City of Nairobi under the zonal jurisdiction of the City Council of Nairobi pending the hearing and determination of this Notice of Motion.**
- 4. An injunction do forthwith issue, restraining the 1<sup>st</sup> respondent (City Council of Nairobi), by itself, its Clerk, Deputy Clerk, its officials, Parking Attendants, contracted company or companies, or any person, servant, and/or agent howsoever of the 1<sup>st</sup> respondent, acting under or at its behest, from imposing, charging, levying or demanding from the applicant, the Applicant’s members, or member of the public the daily Parking fee of Ksh.250/= or any sum exceeding the sum of Ksh.140/= chargeable per motor vehicle per day within the City of Nairobi under the zonal jurisdiction of the City Council of Nairobi pending the hearing and determination of the Constitutional issues raised in this Notice of Motion or as the Honourable Court may direct.**
- 5. Leave be granted to the ex parte applicant to advertise in 2 local daily newspapers the**

pendency of these proceedings and such orders herein made and in the public interest, such members of the public as may elect to be enjoined herein as Interested parties do so within 14 days of the making of this order.

6. Leave be granted to the ex parte applicant to forthwith advertise the issuance of the orders herein made in the Daily Nation newspaper and the Standard newspaper.

7. Pending the hearing and determination of this notice of motion there be a stay of execution of paragraph 1 of the order issued on 21<sup>st</sup> January 2011 in Nairobi High Court Judicial Review Misc. Case No. 319 of 2010.

8. The court issues such declarations as are necessary in respect of paragraph 1 of the order issued on 21<sup>st</sup> January 2011 in Nairobi High Court Judicial Review Misc. Case No. 319 of 2010.

9. The costs of this motion be to the applicant in any event.”

This court was also asked to make a declaration and issue expedient orders on the following questions:

“(a) Whether paragraph 1 of the Consent Order issued on 21<sup>st</sup> January 2011 in Nairobi High Court Judicial Review Misc. Case No. 319 of 2010 is binding on any other person, including the Ex Parte Applicant herein and its members, other than HENRY MWINGIRWA NKURE.

(b) Whether paragraph 1 of the Consent Order issued on 21<sup>st</sup> January 2011 in Nairobi High Court Judicial Review Misc. Case no. 319 of 2010 is a violation of the Ex Parte Applicant herein Constitutional right under Article 47(1) of the Constitution of Kenya, 2010 to the administrative action of the 1<sup>st</sup> respondent herein to impose the daily parking fee of kshs.250/= on it and its members and whether such a levy is “...lawful, reasonable, and procedurally fair.”

(c) Whether the Ex Parte Applicant’s Constitutional right to a fair trial under Article 25(c) of the Constitution of Kenya, 2010 has been breached or is likely to be breached by the imposition of the arbitrary parking fee of Kshs.250/= by the 1<sup>st</sup> respondent which is outside the Gazette Notice 12582 of 2010 subject of these proceedings and whether such an order in paragraph 1 of the Consent Order issued on 21<sup>st</sup> January 2011 in Nairobi High Court Judicial Review Misc. Case No. 319 of 2010 materially alters the status quo in regard to the subject matter and issues pending before this court as to prejudice the fair adjudication of these proceedings.

(d) Whether the public has a sufficient interest in the outcome of these proceedings as to necessitate the orders sought in respect of the proceedings as such, and whether Article 35(2) of the Constitution of Kenya 2010 affords the public the right to the correct information regarding the lawfulness of parking charges imposed on them by the 1<sup>st</sup> respondent.

(e) Whether by dint of article 35(2) of the Constitution of Kenya 2010 the Ex Parte Applicant, its members, and members of the public directly affected by the implementation of paragraph 1 of the consent order issued on 21<sup>st</sup> January 2011 in Nairobi High Court Judicial Review Misc. Case No. 319 of 2010 are entitled to a correction of the distortion presented to them by the 1<sup>st</sup> respondent on the applicable charges.”

On 31<sup>st</sup> January, 2011 the court delivered a ruling in respect of prayers 3, 4, 5, 6 and 7 of the said application. On 3<sup>rd</sup> February, 2011 the 1<sup>st</sup> respondent filed an application seeking stay of the orders issued on 31<sup>st</sup> January, 2011 pending hearing and determination of an intended appeal.

This matter is closely related to HC MISC 319 of 2010 and the two matters had initially been consolidated but on 15<sup>th</sup> November 2010 the order of consolidation was vacated by consent and it was agreed that this matter be heard separately.

On 15<sup>th</sup> February, 2011 counsel for the two parties in the two matters entered into a consent in the following terms:

**“By consent the application by way of Notice of Motion dated 3/2/2011 by the 1<sup>st</sup> respondent be and is hereby withdrawn with costs to the first ex parte applicant. The ex parte applicant’s Notice of Motion dated 24/1/2011 be heard on 24/2/2011 in lieu of the substantive Notice of Motion in the judicial review application dated 5/11/2011.”**

In view of the aforesaid consent, the court is now required to make declaratory orders on the legal and constitutional issues as stated hereinabove.

The genesis of these two matters was an administrative decision taken by the City Council of Nairobi, the first respondent, sometimes in October 2010 to increase motor vehicle parking fees from Kshs.70/= to Kshs.300/= per day. As a result, Kaka Travellers Co-operative Savings and Credit Society Ltd, the ex parte applicant, moved to court to challenge that decision.

In HC MISC. APPLICATION NO. 319 of 2010, **Henry Mwingirwa Nkure** also sought more or less the same orders.

On 17<sup>th</sup> January, 2011 counsel in the above matter filed a consent which was in the following terms:

- “1. That the parking fees for private cars at the Central Business District (CBD) be revised downwards from the gazetted Kshs.300.00 to Kshs.250.00.**
- 2. That the respondent do pay the applicant costs to be agreed by the parties within seven (7) days from the date of filing this consent.**
- 3. That this matter be marked as settled between the applicant and the respondent in J.R. 319 OF 2010.**
- 4. That for the avoidance of doubt this consent does not affect J.R. No. 323 of 2010.**

**(SIGNED)  
KURAUKA & CO.  
ADVOCATES FOR THE APPLICANT**

**(SIGNED)  
OGETTO, OTACHI & CO  
ADVOCATES FOR THE RESPONDENT**

**(SIGNED)  
KIPKORIR, TITOO & KIARA  
ADVOCATES FOR THE LOCAL GOVERNMENT WORKERS UNION”**

Vide the ruling delivered on 31<sup>st</sup> January, 2011 the increment of the parking fees was halted.

On 11<sup>th</sup> April, 2011 counsel argued the remaining issues in the application dated 24<sup>th</sup> January, 2011. Written submissions were also filed. I will proceed to determine the issues raised as hereunder.

**1. Whether paragraph 1 of the consent order issued on 21<sup>st</sup> January, 2011 in HC. Misc. Application No. 319 of 2010 is binding on any other person, including the ex parte applicant herein and its members other than Henry Mwingirwa Nkure**

It is important to point out that Misc. Application No. 319 of 2010 was not a representative suit. The orders sought therein were by one Henry Mwingirwa Nkure. Paragraph 1 of the consent order stated that the parking fees for private cars within the Central Business District would be revised downwards from the gazetted sum of Kshs.300/= to Kshs.250/= a day. In Misc. Application No. 323 of 2010 the ex parte applicant herein had sought, *inter alia*, to quash the gazette notice vide which the increment of the parking fees from Kshs.70/= to Kshs.300/= had been made. At the time of recording the consent the issues raised in this matter had not been determined.

It is trite law that a consent order is only binding upon the parties to that consent. The applicant in Misc. App. No. 319 of 2010 could not therefore purport to have consented to the proposed increment of parking fees for and on behalf of all Nairobian or other motorists who occasionally drive to and park their motor vehicles within the Central Business District of the City. If that was a representative suit then perhaps the said consent would be binding on other persons apart from Mr. Nkure. The consent is not therefore binding upon persons apart from Henry Mwingirwa Nkure.

**2. Whether paragraph 1 of the said consent is a violation of the ex parte applicant's constitutional right under Article 47(1) of the Constitution of Kenya, 2010**

The said Article states as follows:

**“47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”**

It is the applicant's contention that the aforesaid consent violated his rights as guaranteed by the aforesaid **Article 47(1)**. I agree that paragraph one of the consent was not lawful to the extent that it was wrongfully intended to apply to all motorists in Nairobi when indeed the parties knew that the increment of the parking fees was being challenged in this matter. It was also not reasonable and neither was it procedurally fair. Every administrative action is supposed to be undertaken in a lawful and transparent manner. A consent cannot validate that which is otherwise procedurally improper.

**3. Whether the ex parte applicant's constitutional right to a fair trial has been breached or is likely to be breached by the said consent.**

Article 25(c) states as follows:

**“Despite any other provision in this constitution the following rights and fundamental freedoms shall not be limited –**

**(a) .....**

(b) .....

(c) **a right to a fair trial**

**Article 50(1)** further states:

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

One of the prayers sought by the applicant was an order of certiorari to remove into this court for purposes of being quashed Gazette Notice No. 12582 of 2010 published on 15<sup>th</sup> October, 2010 which increased the parking charges to Kshs.300/= a day. The applicant also sought an order of prohibition against the city Council of Nairobi and the Minister for Local Government or any other person acting under their behest, direction or authority, from demanding that the applicant and its members pay for their vehicles such parking fees as prescribed in the said gazette notice. The applicant also sought to prohibit the City Council of Nairobi and the Minister for Local Government from imposing parking charges that are levied contrary to the provisions of **Part VIA** of the **Traffic Act Cap 403** of the **Laws of Kenya**.

**Section 72(b) of the Traffic Act** states as hereunder:

**“72(B) (1) There shall be paid to the local authority in respect of a vehicle left in a designated parking place charges calculated in accordance with this section or in such other manner as the local authority may by by-laws prescribe.**

**(2) There shall be a prescribed standard period for each designated parking place, and, subject to this section, the amount of the charge for a vehicle left in the parking place for a time not exceeding the standard period, called the initial charge, shall be such amount, called the standard amount, as may be prescribed, and the initial charge shall be payable on the leaving of the vehicle in the parking place:**

**Provided that –**

**(i) if it is so prescribed, the initial charge for a vehicle for a time not exceeding one-half of the standard period shall be one-half of the standard amount; and**

**(ii) where paragraph (i) has effect, and it is further so prescribed, then, if before the end of the prescribed period a further payment of one-half of the standard amount is made, the two payments shall be treated as a single payment of an initial charge of the standard amount made on the leaving of the vehicle.**

**(3) .....**

**(4) A parking meter of a type approved by the Minister shall be provided for each space in a designated parking place, and shall be erected as close to that space as is practicable; and –**

**(a) payment of the initial charge shall be made by the insertion of coins in the parking meter and turning the handle of the parking meter to its full extend so as to indicate the length of time paid**

for;

**(b) subject to paragraph (c), if, at any time while a vehicle is left in the parking place, the specified indication appears in the parking meter for the space in which the vehicle is left, it shall be presumed unless the contrary is proved that the initial charge has been duly paid and that the period for which payment was made by the initial charge has already expired;**

**(c) if it is proved at the time for which the vehicle has been left in the parking place is less than the standard period or (where proviso (i) to subsection (2) has effect) less than half the standard period, paragraph (b) shall not have effect but it shall be presumed unless the contrary it proved that the initial charge has not been duly paid for the vehicle.**

**(5) Notwithstanding anything contained in this section, a local authority may, by by-laws, prescribe other methods for the payment of parking fees in respect of a vehicle left in each designated parking place.”**

There are many other provisions in **Part VIA** relating to parking spaces and charges thereof but which are not quite relevant for purposes of this application.

The City Council of Nairobi did not demonstrate that it had fully complied with the provisions of **Section 72(4)** which requires installation of parking meters duly approved by the Minister for Local Government. In my view, such meters are necessary for efficient, open and transparent levying of parking charges in the Central Business District of Nairobi. If such meters were available motorists would be charged according to the time spent on a parking place as required. The City Council may have published some by-laws prescribing other methods for payment of parking fees. If so, the same were not disclosed to the court.

To the extent that the aforesaid consent purported to determine the parking fees without any interrogation as to whether the set charges were in compliance with the provisions of **Part VIA** of the **Traffic Act**, I am persuaded that the ex parte applicant’s constitutional right to a fair trial was violated because the consent was intended to deny him an opportunity of challenging the proposed parking rates.

#### **4. Whether the public has sufficient interest in the outcome of these proceedings and whether Article 35(2) of the Constitution affords the public the right to correct information regarding the lawfulness of parking charges imposed on them.**

That there is great public interest in the outcome of these proceedings is not in doubt. The City Council of Nairobi is by law entitled to offer reasonable services to the city dwellers. To do so it has to collect all lawful revenue from persons living and/or conducting business within its area of jurisdiction. Such payments include parking fees. However, parking fees must be charged in accordance with the provisions of the law, in this case Part VIA of the Traffic Act and/or such by-laws as may exist from time to time.

On the other hand, motorists expect to be charged reasonable parking fees. They also expect to get value for their money in terms of the parking facilities including safety of their vehicles. Any unreasonable increment of parking charges will be resisted by the public. And likewise, the City Council of Nairobi has to keep on reviewing not only parking charges but also other sources of revenue so as to be able to finance its operations. An acceptable balance must be struck. Public interest consideration in a matter of this nature cannot therefore be overlooked.

In the case of **FENDER vs MILD MAY [1938] AC 1 at page 22**, it was held:

**“One of the constant principles of public policy in this country, which it is the duty of the courts to maintain, is that of freedom of contract; but it is certain that there are some classes of contract, whose characteristics are such that their enforcements by the courts is barred by a paramount principle of public policy. Generally, it may be stated that such prohibition is imposed in the interest of the safety of the state, or the economic or social well being of the state and its people as a whole. It is therefore necessary, when the enforcement of a contract is challenged, to ascertain the existence and exact limits of the principle of public policy contended for, and then to consider whether the particular contract falls within those limits.”**

I think the above can be said of the impugned consent order.

**Article 35** of the Constitution guarantees access to information. It states as follows:

**“35(1) Every citizen has the right of access to –**

**(a) information held by the state; and**

**(b) information held by another person required for the exercise or protection of any right or fundamental freedom.**

**(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.”**

The applicant’s contention is that the public has an interest in the correct information regarding the fees levied by the 1<sup>st</sup> respondent. The applicant therefore argues that the provisions of **Article 35(2)** are applicable herein.

I do not agree with the interpretation of the said article adopted by the applicant. What **Article 35(2)** guarantees is the right to a person to correct, for example by way of a reply or a rejoinder any untrue, false, misleading or incorrect information that has been given or stated by other persons and which affects him or her.

Whereas I agree that members of the public are directly affected by implementation of the impugned consent order and are therefore entitled to know whether the stipulated charges are lawful or not, I do not think whether that quest can be hinged on the provisions of **Article 35** of the **Constitution**.

In conclusion, I must state that the court is mandated to uphold the constitution and administer substantial justice without undue regard to procedural technicalities. **Article 165(3) (b)** grants this court jurisdiction to determine the question as to whether a right or a fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The court has therefore endeavoured to discharge that mandate by pronouncing itself on the issues that were raised by the applicant herein. It is hoped that the City Council of Nairobi will reconsider its decision and employ the appropriate provisions of the law in effecting lawful parking charges.

Having come to the conclusion that the impugned consent violates various provisions of the constitution the same is vacated. Each party shall bear its own costs of this application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JUNE, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Nazi – Court Clerk**

**Mr. Kinyanjui for the Ex Parte Applicant and holding brief for Mr. Monda for the 10<sup>th</sup> – 17<sup>th</sup>  
Interested Party**

**Mr. Orina for the 1<sup>st</sup> Respondent**

**Mr. Ondieki for 1<sup>st</sup> Interested Party**