REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (LAW COURTS)

JUDICIAL REVIEW 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

JUDGMENT

The ex parte applicants' application dated 15th February, 2011 seeks the following orders:

"1. An order of certiorari do issue removing into the High Court and quashing the entire decision of the 1st and 2nd Respondents contained at pages 3778 to 3780 of the Special Issue of the Kenya Gazette Vol. CXII-No. 102 dated 13th October, 2010 and published on 15th October, 2010 increasing advertising fees and charges.

2. An order of prohibition do issue, prohibiting the 1st and 2nd Respondents from implementing or enforcing the entire decision of the 1st and 2nd Respondents contained at pages 3778 to 3780 of the Special Issue of the Kenya Gazette Vol. CXII-No. 102 dated 13th October, 2010 and published on 15th October, 2010 increasing advertising fees and charges forthwith.

3. The costs of this application be paid by the 1st and 2nd Respondents."

The application was supported by a Statutory Statement and a Verifying Affidavit sworn by **Stanley Kinyanjui**, the Managing Director of a company known as Magnate Ventures Limited and the Secretary of the Outdoor Advertising Association of Kenya, hereinafter referred to as the "**the applicant**". The applicant is a stakeholder in the advertising industry as well as a rate payer in the City Council of Nairobi. The applicant is an association of over 27 outdoor advertising companies and is mandated with the duty of regulating outdoor advertising.

The 1st respondent is empowered under the **Local Government Act** to impose fees and charges on advertisements within its area of jurisdiction but with the consent of the 2nd respondent. The applicant stated that the imposition of fees and charges on advertisements by the 1st respondent has over the years been done in consultation with the applicant and advertisement fees and charges mutually agreed upon.

The applicant averred that on 11th December, 2001 the 1st respondent after consultations and agreement with the applicant set advertising fees and charges at **Kshs.3,150/=** per square metre with a minimum charge of **Kshs.20,000/=** per billboard. The 1st respondent has in consultation and agreements with the applicant made **"GUIDING PRINCIPLES FOR ADVERTISEMENTS"** which guide the assessment, levy and collection of advertising fees and charges and control of advertisements in the City of Nairobi.

The applicant further stated that in one consultative meeting held on 15th June, 2006 it was mutually agreed between the 1st respondents and members of the applicant that there would be continued cooperation and consultations on the issue of levy and payment of advertising fees and charges. Thereafter members of the applicant continued paying the mutually agreed advertising fees and charges.

The applicant's complaint is that on 13th October, 2010 the 1st and 2nd respondent unilaterally increased advertising fees and charges without compliance with the law or consultations with the applicant and demanded payment of the said increased advertising fees and charges forthwith. The applicant stated that the 1st respondent has been collecting 75% of the gross income of its members and will now collect 90% of the same, leaving the members of the applicant with a residue of 10% only. The applicant further lamented that the 1st respondent does not account to members of the applicant and/or the public for the exorbitant advertising fees and charges collected and the increment seems geared towards phasing out outdoor advertising business instead of collecting fees and charges or regulating the industry. It was contended that the increment was done arbitrarily, irrationally, unreasonably, in breach of statute and without hearing the applicant and is therefore illegal, null and void *ab initio.*

The applicant further contended that the 1st and 2nd respondents have acted unlawfully, in breach of the rules of natural justice and statute in failing to consult and agree with the applicant before increasing advertising fees and charges. Further, the respondents had also acted *ultra vires* their jurisdiction in

increasing advertising fees and charges without compliance with **The Local Government Act, The Valuation for Rating Act, The Rating Act** and **The Physical Planning Act.**

The applicant further averred that the respondents have failed and frustrated the applicant's legitimate expectations in increasing advertising fees and charges without regard to other sources of revenue available to the 1st respondent and in disregard of the applicant's members' budgetary considerations and financial circumstances. The respondents had also acted unfairly, in bad faith and maliciously in increasing the said charges, the applicant alleged.

For these reasons, the court was urged to grant the orders as stated hereinabove.

The 1st respondent filed a replying affidavit that was sworn by **Aduma J. Owuor**, the Acting Director of Legal Affairs. She stated that pursuant to **Section 148** of the **Local Government Act,** the 1st respondent has power to impose fees or charges either through by-laws or resolution for any service or facility provided by it in pursuance of or in connection with the discharge of its duties. The said power is exercised upon the approval of 2nd respondent.

Pursuant to its statutory mandate, the Council during a special meeting held on 14th April, 2010, by resolution set new fees and charges for the year 2010. Advertising fees were part of the newly set fees in the said resolution. In accordance with statute, the Council then forwarded the proposed new charges to the Minister for approval vide a letter dated 7th May, 2010.

Through a letter dated 12th October, 2010 the Minister communicated his approval of the new charges. Following the Minister's approval the new charges and fees were duly gazetted in the Gazette Notice of 15th October, 2010.

The Council added that over the years in exercise of the aforesaid powers and upon approval of the Minister, it has been charging and reviewing annual advertising fees for advertisements within its jurisdiction. In setting and reviewing advertising fees as well as regulating the business of advertising within the City, the Council is guided by among other things, the **"Guiding Principles for Advertisements"** referred to by the applicant. The said principles expressly reaffirm the Council's statutory mandate to impose fees and reserves the Council's right to review the fees from time to time as the Council deems appropriate subject only to the approval of the Minister, the deponent added. The Council further stated that it had never involved the applicants in the setting of advertising charges and is under no obligation to consult the applicant in setting the charges.

In addition, the 1st respondent stated that the applicants are guilty of laches as they had taken an inordinately long time to bring their claim with the result that the orders sought, if granted, would be prejudicial to the Council and the City residents since the Council has already made its financial plans having factored in the increased advertisement charges. The Council therefore urged the court not to grant the orders sought by the applicant.

Counsel for the parties filed their respective submissions which I have carefully perused. My views on the various issues raised by the parties are as follows.

1. <u>Was the 1st respondent in breach of statute in setting the fees and charges for outdoor advertising for the year 2010</u>?

Under **Section 148** of the **Local Government Act** the 1st respondent has power to impose fees or charges either through by-laws or resolution for any service or facility provided by it in pursuance of or in connection with the discharge of its duties. The salient parts of the section state that:

> **"148 (1) A local authority may –**

(a) charge fees for any licence or permit issued under this Act or any other written law or in respect of any person or matter, premises or trade, whom or which the local authority is empowered to control or licence; and

(b) impose fees or charges for any service or facility provided for goods or documents supplied by the local authority or any of its officers in pursuance of or in connection with the discharge of any duty or power of the local authority or otherwise.

(2) All fees or charges imposed by a local

authority shall be regulated by by-law, or if not regulated by by-law, may be imposed by a resolution of the local authority with the consent of the Minister and such consent may be given either in respect of specified fees or charges or may be given so as to allow a specified local authority to impose fees or charges by resolution in respect of a specified power or a particular matter."

There is sufficient evidence that the 1st respondent adhered to the requirements specified under **Section 148** quoted hereinabove. The Council forwarded the proposed new charges to the Minister for approval vide a letter dated 7th May, 2010 and the Minister gave his approval on 12th October, 2010. Following the Minister's approval the new charges and fees were duly gazetted in the Gazette Notice of 15th October, 2010.

The applicant's Counsel submitted that the exercise of the power stipulated under **Section 148** of the **Local Government Act** has to be fair. He cited the provisions of **Article 47(1)** of the **Constitution of Kenya, 2010** which provides that:

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

Counsel further submitted that the applicant ought to have been heard before the imposition of the new advertising fees and charges by the respondents. The applicants referred to **"The Guiding Principles for Advertisements"** which were annexed to the applicant's affidavit. My perusal of the guidelines do not reveal that the Council was under any obligation to consult the applicant before reviewing the advertisement fees and charges. The relevant part of the Guiding Principles headed **"Revenue collection"** reads as follows:

"The Council shall impose an annual fee for all advertisements payable in full before advertisement licence is granted. Licence fees will be paid for all erected structures, whether they have displayed advertisements or not. Licences renewal fees will be payable at the beginning of each calendar year. All unpaid for licences shall accrue 50% penalty. Legal action of any nature shall be taken against offenders or their agents. All the licence fees shall be paid prior to erection of structures for all new sites. All the structures erected prior to licencing shall be treated as illegal structures.

The Council shall reserve the right to review the fees from time to time as deemed appropriate, subject to the approval by the Minister for Local Government and consequent gazettement."

It is thus clear that the Council did not have to consult the applicant as alleged. That being the case the Council did not violate the letter and spirit of **Article 47(1)** of the **Constitution** as alleged by the applicant.

2. <u>Was the 1st respondent's decision arbitrary, irrational and unreasonable?</u>

The applicant contended that the Council's decision was arbitrary, irrational and unreasonable

because it purported to take away 90% of the applicant's income. The applicant further stated that the 1st respondent does not account to its members or to the public for the exorbitant advertising fees and charges which it collects.

It is not for this court to determine whether the new charges are excessive or not. The court can only consider whether in arriving at the said charges the appropriate process was followed. It has often been said that judicial review is not concerned with the merits of a decision but the decision making process thereof. In **CHIEF CONSTABLE OF NORTH WALES vs EVANS [1982] 1WLR 1155,** the court stated:

> **"The court will not, however, on a judicial review**
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> **application act as a 'Court of Appeal' from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would under the guise of preventing abuse of power be guilty itself of usurping power."**

There is no basis of stating that the increased charges are unreasonable. The Council has an obligation to render services to the people of Nairobi and in so doing it has to keep on reviewing various fees and charges from time to time. I agree with the 1st respondent's submission that the Council's services have to be commensurate to the fees it charges for its various services. That in effect means that if the Council is not permitted to reasonably increase the fees and charges that it is lawfully mandated to collect will not be able to improve its service delivery to the increasing number of people living in this City. As long as the Council adheres to the laid down process of reviewing its fees and charges as stipulated under **Section 148** of the **Local Government Act** it is unlikely that the court will interfere with such fees and charges.

3. Is the applicant guilty of laches?

The impugned Gazette Notice was published on 15th October, 2010. The increased charges were to take effect after a period of three months. The applicant did not move the court until 7th February, 2011 by which time the new rates had come into effect. I believe the window period of three months was sufficient to allow any person, including the applicant, to challenge the proposed new charges. After expiry of the three months the new fees and charges came into effect and the Council factored the expected increase of revenue in its budget. The applicant did not tell the court why its application was not made much earlier.

In **REPUBLIC vs MINISTER FOR FINANCE & ANOTHER ex parte NYONGO & 2 OTHERS [2007] eKLR**, it was held that decisions with financial implications must be challenged promptly failing which orders seeking to stay such decisions may not be granted even where otherwise deserved. I think the applicant's delay in moving the court disentitles it to the orders sought.

For these reasons the orders sought by the applicant are unmerited and the application dated 15th February, 2011 is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER, 2011.

D. MUSINGA

JUDGE

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In the presence of

Muriithi – Court Clerk

Mr. Anzala for the Applicant

No appearance for the Respondents