



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI Miscellaneous Civil Application 2 of 2009**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MUNICIPAL COUNCIL OF NANYUKI .....RESPONDENT**

**D.R SOMBA MUSYA KIRUNGU....."EX-PARTE"**

**RULING**

Pursuant to leave given by this court on 27<sup>th</sup> March 2009, Dr. Somba Musya Kirungu, the exparte applicant herein took out the motion dated 16<sup>th</sup> April 2009 in which he sought for the following orders:

1. *1. That the honourable court be pleased to issue judicial review orders of CERTIORARI to have the respondent's notice dated 22<sup>nd</sup> January 2009 be removed to this court and be quashed.*
2. *2. That the honourable court be pleased to issue judicial review order of PROHIBITION to prohibit the respondent from demanding, receiving and collecting rates on the basis of the year 1995 Valuation Roll*
3. *3. That costs of these proceedings be borne by the Respondent .*

The exparte applicant swore the verifying affidavit which he filed in support of the motion. The Municipal Council of Nanyuki, opposed the motion by filing the replying and a further affidavit of Lucy W. Nyaga sworn on 24<sup>th</sup> June 2009.

When the motion came up for interpartes hearing, learned counsels recorded a consent order to file written submissions to dispose of the motion which they duly filed. I have considered the grounds set out on the face of the motion plus the facts deponed in the verifying affidavit and those set out on the face of the motion. I have also taken into account the facts deponed in the two replying affidavits plus the written submissions filed by learned counsels. What provoked the filing of this motion is the Respondent's notice dated 22<sup>nd</sup> January 2009, in which the Respondent wrote in part as follows:

*“Also take notice that no business premises will be issued with single business permit if the Land Lord has not cleared with the council in relation to:-*

1. *Plot rent and rates.*
2. *Occupation licence.*
3. *Completion certificate.”*

The ex parte applicant, being a ratable owner of property within the Respondent’s jurisdiction, is of the view that the aforesaid conditions run against the provisions of sections 16 and 17 of the Rating Act. (Cap. 267 Laws of Kenya), hence null and void. It is the applicant’s argument that the notice imposes a duty on a trader (tenant) to enforce payment of rates by ratable owners (Landlord) of Property. The applicant further argued that traders operating within the Respondent’s jurisdiction are obliged to take out single business permits under section 148 of the Local Government Act on condition that traders carries on a business subject to the Local Authority’s regulations and control. The applicant pointed out that the provisions of section 17 of the Rating Act (Cap. 267 Laws of Kenya), provided the manner in which recovery of outstanding land rates can be enforced by a local authority. It is said that the local authority is enjoined to issue a written demand on a prescribed form. In default of the demand, the local authority is bound to file recovery proceedings before the subordinate court. The notice is said not to disclose the property for which the rates are in arrears nor does it disclose any amount hence it cannot be deemed to be a notice to the tenant under S. 18 of Cap. 267 Laws of Kenya Since the notice is inconsistent to the provisions of S 18, the same is said to be null, void and ultra-vires those provisions.

The applicant further pointed out that the Respondent demands payment of Land rent before obtaining a single business permit yet land rent is payable to the central Government under section 74 and 76 of the Government Lands Act.

The applicant has accused the Respondent of applying the 1995 Valuation roll which lapsed on 31<sup>st</sup> December 2005 under S. 3 of the Valuation for Rating Act (Cap. 266 Laws of Kenya). It is averred that the Respondent had caused the draft valuation 2006 to be published for approval on objection in the daily newspapers. The applicant amongst other rate payers lodged objections prompting the Respondent to withdraw. Upon the withdrawal of the Draft Valuation Roll 2006, the Respondent applied for the extension of the 1995 valuation Roll. It is the submission of the Respondent that the Valuation roll of 1995 having expired sometimes in 2005, there was nothing capable of being extended hence the purported notice of extension is in itself a nullity and *void ab initio*. The Applicant was of the further view that the act of levying rates to the rate payers on the basis of the 1995 valuation roll which has expired is therefore a nullity and illegal.

The respondent on its part is of the view that the minister for Local Government has wide powers in the process of preparation of valuation rolls and supplementary Valuation rolls. It is the submission of the Respondent that sections 16, 17 and 18 of the Rating Act Cap. 267 Laws of Kenya are irrelevant to this case. The respondent has alleged that the notice sought to be quashed is only a demand notice issued

pursuant to 17(1) of the Rating Act (Cap 267 Laws of Kenya). It is the position of the Respondent that the notice cannot be quashed since the Minister's decision to extend the 1995 valuation Roll has not been challenged.

Upon a careful consideration of the material placed before this court and the written submissions, it is obvious that the Respondent does not deny that it issued the notice dated 22/1/2009 in which it stated that no business premises will be issued with a single business permit if the landlord has not cleared interalia Rent and rates. It is not also in dispute that the Minister for Local Government approved the extension of municipal council of Nanyuki's valuation Roll of 1995 for 2½ years pursuant to S. 3 of the Valuation for Rating Act. Three questions have arisen for my determination. First, is whether or not the aforesaid notice is ultra-vires sections 16, 17 and 18 of the Rating Act (Cap 267 Laws of Kenya) sections 74 and 76 of the Government Lands Act (Cap. 280 Laws of Kenya) and S. 148 of the Local Government Act. Secondly, whether or not the enforcement of the 1995 valuation roll is a nullity and ultra-vires section 3 of the valuation for the Rating Act (Cap. 266 Laws of Kenya). Thirdly, whether or not the aforesaid notice is unreasonable and made in bad faith.

I will begin by dealing with the first issue. I have already stated that there is no denial that the notice of 22<sup>nd</sup> January 2009 was issued by the Respondent. Under S. 148 of the Local Government Act, all traders within the jurisdiction of a given Local Authority are obliged to obtain single business permits on condition that they (traders) carry on business subject to the said local authority's regulation and control. The Respondent herein has by the offending notice subjected traders who are largely tenants to ensure that their Landlords pay land rates and rent before they can be given single business permits. Under S. 17 of the Rating Act (Cap. 267 Laws of Kenya), the power to recover outstanding land rates is the preserve of the local authority. The manner of enforcing collection of the unpaid rates is specified. Under S. 18(1) of the Rating Act, the local authority is also empowered to issue a notice to a tenant (trader) requiring payment of outstanding rates. In short, the procedure of giving notification and the recovery of outstanding rates is so elaborate. The notice issued by the Respondent dated 22<sup>nd</sup> January 2009 does not meet the requirements of the law. The same in my view cannot amount to a notice envisaged under S. 18(1) of the Rating Act. The same is therefore ultravires the law. On the face of it, the notice sets out conditions which may deny many traders rights to do business because of failing to obtain single business permit due to their inability to settle the landlord's outstanding rates. In my view the notice appear to be unreasonable for two reasons: First, the same does not specify the outstanding amount of rates nor the relevant period. Secondly, there is an elaborate process of enforcing recovery of the rate arrears without making it a condition before issuing the single business permit. In the process of dealing with the first issue, I have managed to determine the third issue.

Having disposed of the first and third issues, let me now turn my attention to the second issue which relates to the question as to whether or not the enforcement of the 1995 Valuation Roll is ultra-vires S. 3 of the Valuation for Rating Act. There is no doubt that the 1995 valuation Roll came into operation in 1995 and expired in 2005 by dint of S. 3 of the Valuation for Rating Act (Cap 266 Laws of Kenya). The

Minister approved the extension of the aforesaid valuation roll by his notice dated 30<sup>th</sup> August 2007. That extension has not been challenged in these proceedings. The Respondent, in the absence of any challenge, was right to base its rates on the 1995 valuation Roll which was subsequently extended by the Minister in exercise of his unfettered discretion under section 3 of the Valuation for Rating Act (Cap. 266 Laws of Kenya). This ground must therefore fail.

In the end I allow the motion dated 16<sup>th</sup> April 2009 in terms of prayer 1. Prayer 2 is dismissed. Costs shall be given to the Exparte Applicant.

Dated and delivered this 17<sup>th</sup> day of March 2010.

**J.K. SERGON**

**JUDGE**

In open court in the presence of Mr. Ng'ang'a h/b Mwangi for Respondent and Mr. Mwangi h/b Gichure for applicant.

**J.K. SERGON**

**JUDGE**