



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Civil Case 557 of 2009

IN THE MATTER OF THE MINING ACT CHAPTER 306 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 265 OF THE LAWS OF KENYA

AND

IN THE MATTER OF GAZETTE NOTICE NO 6645 OF 26TH JUNE 2009

BETWEEN

REPUBLICAPPLICANT

AND

THE MUNICIPAL COUNCIL OF MAVOKORESPONDENT

EX PARTE:

ATHI STORES LIMITED
UNIKEN ENTERPRISES

JUDGMENT

This cause revolves around the powers of Local Authorities to levy certain charges, and of relevance is section 148 of the Local Government Act Cap 265 of the Laws of Kenya, which provides that:

'(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 license;

(b) impose fees or charges for any service or facility provided or goods or documents supplied by the local authority or any of its officers in pursuance of or in connexion 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 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.

(3) Save where the contrary is expressly or by necessary implication in any written law provided, a local authority may authorize the remission in whole or in part of any fees due to it or charges imposed by it under this Act or any other written law?.

The **MUNICIPAL COUNCIL OF MAVOKO** ('the council') did, with the approval of the Minister for Local Government, issue gazette notice No. 5689 of 2001 on 17/8/2001, by virtue of which, it imposed fees and charges, with effect from 1st January of that year.

The schedule to the said notice specified as follows:

<i>'Occupation or business</i>	<i>fees and charges K.Shs.</i>
<i>Transfer of permit from one place to another</i>	<i>500</i>
<i>Sand staking-</i>	
<i>large-scale (per annum)</i>	<i>5,000</i>
<i>hawkers (per annum)</i>	<i>8,500'</i>
<i>Natural Murram/stone, cooping ballast,</i>	
<i>royalties from cement factories</i>	<i>20</i>
<i>quarry per ton cement manufacturers</i>	

Being aggrieved by the said decision, **ATHI STORES LIMITED** moved this court on 10/6/2003, in Miscellaneous Civil Case No. 518 OF 2003, seeking for orders to prohibit the **MUNICIPAL COUNCIL OF MAVOKO**, from levying any charges against the company concerning the mining of pozzolana, gypsum, limestone and any other minerals, not set out as a common mineral under section 2 of the Mining Act, and it also prayed for compensation in the sum of Kshs.533,000/= being what it claimed was disruption of its business operations. It relied on the ground that in levying the charges, the local authority had acted outside its powers.

The Hon. Dulu J., was of the view that *'the imposition of charges or transport cess appears to be a capricious action, possibly by overzealous technocrats, who have not been even bothered to give it some purported colour of legality,* and he proceeded to grant it an order to prohibit the council from levying any charges against it concerning the mining of Pozzolana, gypsum, limestone and any other mineral not set out as a common mineral under section 2 of the Mining Act. He however declined to grant compensation for the alleged disruption of business.

The aforementioned section 2 of the Mining provides inter alia that:

(1) In this Act, unless the context otherwise requires -

“mine” includes any open-cast mine, place, excavation or working whereon, wherein or whereby any operation in connexion with prospecting or mining is carried on;

“to mine” means intentionally to win minerals and includes any operations necessary for the purpose;

“minerals” means all minerals and mineral substances, other than mineral oil as defined in the Mineral Oil Act, and may be precious metals, precious stones or non-precious minerals, but save for the purposes of Part V of this Act and of the Mining (Safety) Regulations, does not include clay, murrum, limestone, sandstone or other stone or such other common mineral substances as the Minister may by notice in the Gazette declare not to be minerals for the purposes of this Act, always provided these do not contain any precious metal or precious stone in economically workable quantities’

“non-precious minerals” means all minerals other than precious metals or precious stones”

“precious metals” means gold, silver or metal of the platinoid group in the unmanufactured state, including ores containing such metal, but does not include ores containing any such metal in combination with another mineral where such metal cannot be worked apart from such mineral and the value of such metal is less than the cost of producing both the metal and the mineral;

“precious stones” means any diamond, emerald, opal, ruby, sapphire, turquoise and any other stones which the Minister may by notice in the Gazette declare to be included in this definition;’

On 26/6/2009 the **MUNICIPAL COUNCIL OF MAVOKO** which I shall now also refer to as ‘therespondent’)issued Gazette notice No. 6645 in the following terms:

‘IN EXERCISE of the powers conferred by section 148 of the Local Government Act, the Municipal Council of Mavoko has, with the approval of the Deputy Prime Minister for Local Government, revised the fees and charges listed hereunder with effect from 22nd May, 2009’ and it listed inter alia a charge of K.Shs.3000/- as the daily charges per lorry.

ATHI STORES LIMITED and **UNIKEN ENTERPRISES**, who are named as the ex parte applicants in this cause, have now moved this court seeking the following orders:

- **‘THAT orders of prohibition prohibiting the Respondent from levying any charges against the Applicant concerning the mining of Pozzolana, Gypsum, known as quarry cess fees and any other mineral not set out as a common mineral under Section 2 of the Mining Act. Cap. 306’.**
- **‘THAT orders of certiorari to bring for quashing to the High Court the decision of the Respondent contained in gazette notice no. 6645 of 26th June 2009 in so far as it relates to the Applicants concerning the levying of Quarry Cess Fees or murrum royalties, quarry royalties’.**

They also pray for costs.

Though as stated earlier, the two companies are named as the ex parte applicants, the depositions made in support of the application refer to only one applicant. Indeed **Stephen Nyaga** who has sworn in support of the application, and who deposes that he is *‘the Applicants Director and Partner respectively and duly authorised to swear this affidavit on its behalf’* after which he proceeds to make reference to an applicant in the singular, does not indicate which of the two companies he deposes on behalf of. It is however evident from his exhibits, which relate to only one of the companies, that he actually deposed on behalf of **ATHI STORES LIMITED**, and I will for that reason assume that the inclusion of **UNIKEN ENTERPRISES**, which was not even a party to the aforementioned suit (Miscellaneous Civil Case No. 518 OF 2003), is but an afterthought without any substance and I shall therefore dismiss it case against the respondent with costs. I shall in the circumstances treat **ATHI STORES LIMITED**, as the sole ex parte applicant herein, and shall henceforth refer to it as the ‘ex parte applicant’.

It relies on the grounds that:

- ***The MUNICIPAL COUNCIL OF MAVOKO, (which I shall now refer to as ‘the respondent’) is acting ultra vires its powers under the Local Government Act Cap 265 and the Mining Act Cap 306.***
- ***The said decision is severely hurting its operations.***
- ***The said decision is contrary to the decision in H.C. Misc. App. No. 518 of 2003.***
- ***The said decision is intended deliberately and in bad faith to circumvent the decision of the court of 20/6/2009 in the aforementioned case; and finally that***
- ***The decision is against the ex parte applicant’s legitimate expectations.***

Briefly, the ex parte applicant claims to have vast mining operations within Mavoko Municipality in Athi River, and that it has been in operation since 1971. It also claims to have acquired licenses for the mining of Pozzolana and Gypsum.

It feels aggrieved by the contents of the said notice and the imposition of the said fees and charges and is of the view that the said action is illegal, as in its view, the respondent is not empowered to levy such charges. It is also of the view that the respondent acted beyond its powers as provided for in the Local Government Act Cap. 205 and that in imposing the said levy, the respondent also acted contrary to the provisions of the Mining Act Cap. 306 and Trust Land Act, as the only minerals which fall under the control of a local authority are the “*common minerals*” only, which are defined in the Mining Act, while the management of all other minerals falls under the control of the Central Government, and that in view of the fact that the two minerals which it deals with are not common minerals, then the respondent’s action was illegal.

I am alive to the fact that the scope of Review covers all varieties of ultra vires and unlawful actions including unreasonableness, breach of natural justice and error of law, and while an order of Certiorari will issue to bring a decision to this court in order that it may be investigated and where this court establishes that the decision was ultra vires it will quash such a decision, an order of Prohibition, which is by its very nature prospective will issue to prohibit an inferior tribunal from doing something in excess of its jurisdiction and therefore to restrain it.

Though the ex parte applicant urges this court to find that the council acted in contravention of Justice Dulu’s orders, I find that that line cannot lie for Justice Dulu’s orders related to the levying of charges against the company concerning the mining of pozzolana, gypsum, limestone and any other mineral not set out as a common mineral under section 2 of the Mining Act. The contentious notice only deals with charges levied per lorry, without specification of the loads. There is no mention either of any minerals or the mining thereof, and in my humble opinion, there would be no connection as pertains to this cause, between the notices of the year 2001, and the one of the year 2006.

I need not emphasize the fact that local councils, whose members are peoples’ representatives, must be given a leeway to collect revenue, so long as they adhere to the laid down legal procedures.

There is no doubt that the issue of jurisdiction is paramount the council must be seen to have acted within its powers. I have perused the pleadings herein and in my view having demonstrated that it had passed the relevant resolutions and that it had obtained the authority of its Minister to levy the charges, I have no doubt in my mind that it acted within its mandate, and there would be no reason for me to find that it abused its powers, or that it acted in breach of the rules of natural justice, and there really is no basis for me to find that the decision to levy the said charges was against the ex parte applicant’s legitimate expectations.

All in all, I find that this application lacks in merit and I dismiss it with costs.

Dated and delivered at Nairobi this 25th day of May 2010.

JEANNE GACHECHE

Judge

Delivered in the presence of:

For the ex parte applicant – Mr. Mutiso

For the respondent- Mr. Kahonge