



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CASE NO. 37 OF 2010

REPUBLICAPPLICANT

AND

THE CITY COUNCIL OF NAIROBIRESPONDENT

RULING

On 12.02.2010, the ex parte applicants, Kenya Taxi Cabs Association suing through, Peter Waweru Mburu, Laban Maina, Peter Kuria Wanjama, Lawrence Maina Kimani and Job Nzioka moved this court by way of chamber summons seeking leave of the court to commence Judicial Review proceedings seeking orders of certiorari mandamus and prohibition. They sought to challenge the decision of the Town Clerk contained in the letter dated 05.01.2010 on licensing of Taxi Cabs for the year 2010, an internal memo of 15.01.2010 and the decision to divide the Central Business District into 4 zones. The court granted leave and directed that the same do operate as stay of the implementation of the respondent new licensing and inspection Rules. The letter of 05.01.2010 and the memo dated 18.01.2010

By notice of motion dated 14.05.2010 brought under Order 53 Rule 1(4) Civil Procedure Rules and the inherent powers of the court, the respondent prays that this court's order of leave and stay which were first made on 12.02.2010 and extended from time to time, be vacated.

The application is based on grounds found on the face of the application and the supporting affidavit of Stephen Mburu, the City Engineer of the respondent. He deponed that the respondent is mandated by virtue of Section 162 of the Local Government of Act Cap 265 Laws of Kenya, and Section 118A of the Traffic Act Cap 403 and the City Council of Nairobi (Taxi Cabs By Laws, 2007), to regulate and control taxi business within its jurisdiction. That the respondent informed the taxi operators of the intention to make changes to licensing of cabs for the year 2010, vide letter dated 05.01.101 SKM2. That all taxi operators were invited to a meeting on 13.01.2010 to deliberate on the proposed changes and all stake holders were also represented (minutes, SKM3). That the ex parte applicants wrote to the respondent expressing approval of the proposed charges as per their letter of 14.01.2010 (SKM4). That the changes are supported by the 2007 By Laws and council resolutions by the applicants (SKM5). That the exparte applicants have no genuine grievance and they concealed material facts from the court when they sought leave and stay. That the ex parte applicants are not challenging the By Laws and in any event, some of the tax operators have already complied with the changes and the stay order is therefore discriminative. The respondent exhibited some photographs of those who have complied (SKM6), in total 184 taxi operators have complied (list is SK7). That some of the ex parte applicants have been intimidating and harassing those who have complied. Mr. Omotii submitted that the stay order can not be complied with because the other taxi owners have substantially complied with the By Laws and the directions given by the respondent. Further, that the exparte applicants did not provide the registration

numbers of their vehicles. The respondent was ready to undertake as to damages and urged that it is in the public interest that the stay order be vacated.

Peter Waweru Mburu swore the affidavit dated 19.05.2010 opposing the respondent's notice of motion. He deposes that if the proposed requirements for inspection of taxis contained in the internal memo for 18.01.2010 were clearly spelt out in the Act and the By Laws 2007, then there could have been no need to have them promulgated and enforced as the respondent purported to. That the meeting of 02.06.2010 did not contemplate taxi cab licensing and regulations and no solution was made concerning taxi cabs licensing. That the respondent has not disclosed what material facts have been concealed by the ex parte applicants. He further deposed that the changes in licensing of taxi cab operations goes beyond mere implementation of the existing laws. It is the ex parte applicant's view that this application was filed to pre-empt the contempt proceedings that had been commenced.

It is true that the court will set aside leave and stay in deserving cases but the general practice is that the court is always slow to do that. In **AGAKHAN EDUCATION SERVICES KENYA VS REPUBLIC, EX PARTE, ALI SEIF CA 257 OF 2003** the Court of Appeal observed that the jurisdiction to set aside leave is exercised sparingly because the courts do not normally give leave as a matter of course.

The main ground upon which the respondent brings this application is that the ex parte applicants withheld material facts from the court. I do agree that in Judicial Review failure to make a full and frank disclosure of material facts would entitle the court to set aside orders of leave or stay. Michael Fordham in his Judicial Review Handbook, says that

“Judicial Review claimants have always been under an important duty to make full and frank disclosure to the court of material facts and known impediments to Judicial Review” (10.3)

It is alleged at paragraph 15 of the affidavit of Stephen Mburu that material facts were withheld from the court but he did not disclose the nature of the facts. It is Mr. Omotii who says in his submissions that the applicant failed to disclose that they attended the meeting where the new requirements were discussed and that the applicants were in agreement with what was discussed at the said meeting. The applicants had in fact disclosed in the verifying affidavit of Peter Mburu at paragraph 13, and thereafter they wrote a memorandum of the outstanding issues to the Town Clerk. The applicants did not withhold those facts. The respondents have not demonstrated that any material facts were withheld.

As to whether or not the respondent acted within their mandate under the Act and By Laws, that is a matter for the substantive motion. That is what the applicants have challenged. According to the applicants, there are requirements introduced by the memo of 18/01/2010 vide letter of 05.01.2010 that are not covered by the By-Laws which is the basis of the challenge. That should await the hearing of the main notice of motion.

It is the applicant's contention that this application was filed to pre-empt their application dated 04.05.2010 seeking to cite the respondent's officers for contempt of this court's order. The orders of leave and stay were issued on 12.02.2010. On 13.05.2010, the applicants also filed chamber summons seeking leave of the court to commence contempt proceedings and the said leave was granted and the notice of motion was filed on 14.05.2010. Four days later, Mr. Omotii filed this application seeking to set aside leave. The respondent's application was made over three months since the order of leave and stay was granted. The notice of motion had been served and there had been no reaction by the respondent. Mr. Kibe had even come to court for directions to be taken on the hearing of the substantive notice of motion but Mr. Omotii had not appeared. One can only conclude like the applicants have done, that the notice of motion by the respondent is meant to pre-empt and avoid the contempt proceedings.

The upshot is that I find no merit and substance in the application dated 14.05.2010 and in my view it is brought in bad faith. It is dismissed with costs to the ex parte applicants, let the respondent file their replying papers in preparation for the hearing of the main notice of motion as directed by the court instead

of engaging itself in applications that will distract the process.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE 2010.

R.P.V. WENDOH

JUDGE

PRESENT

Mr. Kibe for ex parte Applicants

Mr. Omoti for Respondent

Court Clerk, Muturi