RATING ACT

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 49 & 31 OF 2009 (CONSOLIDATED)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW REMEDY OF PROHIBITION AGAINST THE MUNICIPAL COUNCIL OF NAKURU

AND

IN THE MATTER OF VALUATION OF RATING ACT CAP 266 OF THE LAWS OF KENYA AND RATING ACT CAP 267 OF THE LAWS OF KENYA

AND

IN THE MATTER OF DRAFT VALUATION ROLL 2005 OF THE MUNICIPAL COUNCIL OF NAKURU

VERSUS

TOM WAMBUA REUBEN & 96 OTHERS…..EX-PARTE APPLICANTS

RULING

I have before me two applications brought by 169 rate payers (the Applicants) of the Municipal Council of Nakuru (the Council) under **Sections 8** and **9** of the **Law Reform Act Cap 26** of the **Laws of Kenya** and as well as under **Order 53 Ruled 3** of the **Civil Procedure Rules**. They seek an order of prohibition to prohibit the Council from implementing or levying rates based on the Draft Valuation Roll of 2005 or causing the said Roll to be signed, endorsed or certified by the Council Valuation Court or publishing a notice to the effect that the Roll has been signed, endorsed and/or certified. They also seek the costs of the applications.

The applications are based on the grounds that contrary to **Section 3** of the **Valuation for Rating Act**

(Cap 266 of the **Laws of Kenya**) which requires Valuation Rolls to be prepared every 5 years or such a longer period as the Minister may approve the Draft Valuation Roll of 2005 was prepared in the year 2002, after 13 years without the approval of the Minister; that contrary to **Section 7** of the **Rating Act (Cap 267) of the Laws of Kenya** the Council appointed valuers to prepare the Draft Valuation Roll without the Minister's approval and that the Draft Valuation Roll has not been signed by the valurer. For these three reasons, the Applicants argue, Draft Valuation Roll is null and void and the Valuation Court established to determine objections based on it will act in vain.

The other grounds relied on are that contrary to **Section 17** of the **Rating Act** which states that draft valuation roll becomes operational upon determination of all objections the Council has commenced charging rates on the basis of the Roll before the objections raised by the Applicants and others have been determined; that contrary to **Section 5** of the **Rating Act** the Council adopted a flat rate without the Minister's approval of the methodology of rating; that contrary to **Sections 11** and **12** of the **Rating Act** which states that rates are supposed to meet expenses and liabilities of the rating authority the Council has not prepared a budget and/or stated or explained to the Applicants the purpose of the intended increased rates.

The applications are supported by the affidavit of Tom Wambua Rueben and Gilbert Kabage Kariajae in which they have expounded on these grounds and the accompanying statements all of which were filed at leave stage.

Mr. Ojienda, teaming up with Mr. Mbeche, for the Council, challenged the competence of the applications on the grounds that they flout **Order 53** of the **Civil Procedure Rules**; that the Applicants have no locus standi to bring these applications; that the

Applicants are guilty of non-disclosure of material facts; that application No. 31 of 2009 is a representative action which was filed without leave of court and that on the face of application No. 31 of 2009 there are 17 applicants while 72 others have been sneaked in through an affidavit. I will first deal with these preliminary points.

On the first point, Mr. Ojienda submitted that contrary to **Order 53 Rule 1(2)** of the **Civil Procedure Rules** which requires an application for leave to be accompanied by a statement, a supporting affidavit and another affidavit verifying the facts in the supporting affidavit, the applications for leave in these matters were accompanied by statements in which the facts are stated and a verifying affidavits verifying those facts. He cited the case of **Republic Vs Hon The Chief Justice of Kenya & Others, Nairobi HC Misc. Appl. No. 764 of 2004** as authority for the proposition that statements should only contain the description of the parties, the grounds relied on and the reliefs sought and **Republic Vs Silvano Onema Owaki ex-parte Commissioner General KRA, Civil Appeal No. 45 of 2000 (CA KSM)** for the propositions that the verification under Order 53 Rule 1(2) is of the affidavit in support and not the statement and that the statement should contain nothing more than the name and description of the applicant, the relief sought and the grounds on which it is sought. This non-compliance, he said, renders the applications for leave fatally defective and he urged me to set aside the leave in which case these applications which are based on it will collapse.

Still on this point of competence, Mr. Ojienda further submitted that some of the Applicants have not raised any objections to the Draft Valuation Roll and have therefore no locus standi to bring these applications. He further argued that the applications are also defective because some of the Applicants are limited liability companies which have come to court without first passing company resolutions to sue. He said if there were any such resolutions, they should have been exhibited or at least referred to. On the authority of the cases of **Affordable Home Africa Limited Vs Ian Henderson & Others, Milimani**

HCCC No. 524 of 2004 and **Kabundu Holdings Ltd Vs Ali Ahmed T/A Sky Club Restaurant, [2005] eKLR** he therefore urged me to strike out the Applications on that score.

In response to that, Mr. Kahiga, leading M/S Karanja, Kisila and Chebaskwony for the Applicants, submitted that the initial application in No. 31 of 2009 which was defective was withdrawn and a proper one filed. As regards the alleged incompetence, he submitted that **Order 53** of the **Civil Procedure Rules** does not state what form the statements accompanying the applications for leave should take. He said that the facts relied on are normally deposed to and verified in the verifying affidavit and although they are repeated in the statement, that does not cause any prejudice to the Respondents. He said the authorities relied on are distinguishable. In the circumstances he said the Applicants complied with **Order 53 Rule 1(2).**

Mr. Kahiga also dismissed the Council's contention that the applicants have no locus standi in this matter. He said the Applicants are ratepayers affected by the Council's illegal act which they seek to prohibit and are therefore entitled to make these applications. As they are seeking to prohibit an illegal exercise he cited the cases of **Kadamas Vs Municipal Council of Kisumu [1985] KLR** and **Kenya Examinations Council Vs Republic, Civil Appeal No. 266 of 1996** and submitted that prohibition is the effective order to seek. On the resolution to sue, he said the **Affordable Forms** and the **Kabundu Holdings** cases are distinguishable as they related to suits against fellow directors.

I have considered these rival submissions on the preliminary points raised and read the authorities cited. **Order 53 Rules 1(2)** talks of "affidavits verifying the facts relied on." It does not rule out one affidavit setting out the facts relied on and verifying them. Although I agree with Mr. Ojienda that putting the facts relied on in the statement accompanying the application for leave is irregular that is a minor irregularity that does not go into the substance of the matter and does not in any way prejudice the Respondents. I agree with Mr. Kahiga that the authorities Mr. Ojienda cited on this point are distinguishable. The application in the **Republic Vs Hon The Chief Justice** was dismissed because the facts relied on were set out in the accompanying statement and not in the verifying or supporting affidavit while in the **Konza Ranching** case no statement was filed at all. Neither of those situations was the case in these applications and those authorities are therefore distinguishable.

There is no dispute that the Applicants are ratepayers in the Municipal Council of Nakuru. Whether or not they have filed objections to the Draft Valuation Roll, they will be affected by that Roll. I therefore find that the have locus standi in this matter.

On the company resolutions, I agree with Mr. Kahiga that the authorities cited by Mr. Ojienda are distinguishable. In the **Affordable Forms** one of the directors had filed a suit in the name of the company without a board resolution and the others challenged his right to do so. In the **Kabundu Holdings** case the claim by the director who sued in the name of the company that he had a power of attorney from that company was found to be suspect. None of those situations arises in this case. At any rate how did the Council, not being in the board of any of those companies, know that there were no resolutions to sue? In the circumstances I also overrule this point.

The second preliminary point raised by Mr. Ojienda was that application No. 31 of 2009 is defective because it purports to be a representative action without leave of court as required by **Order 1 Rule 8** of the **Civil Procedure Rules** and the authority in the case of **Wanjiru Vs Standard Chartered Bank Kenya Ltd & Others, [2003] 2 EA 694.** On this point I agree with Mr. Kahiga that as was stated in **Commissioner of Lands =Vs= Kunste Hotel Limited Nakuru Civil Appeal N. 234 of 1995 C.A**, judicial review is a special jurisdiction to which the Civil Procedure Rules have no application He said the

other defect in that application is that there are 17 applicants and 72 others have been sneaked in through an affidavit that even if I were to ignore the 72 Applicants, I will still have to decide the case of the 17 Applicants named on the application. Therefore this point also fails.

The last point raised by Mr. Ojienda was that the Applicants are guilty of non-disclosure of material facts. He argued that the Applicants concealed from court **Gazette Notice No. 2241 of 31/03/2006** containing the Minister's approval of the methodology of the site value under **Section 4(1)(b)** of the **Rating Act,** that the Draft Valuation Roll has been in force since 2005 and that many ratepayers have complied with it by paying their rates in accordance with it. He said that through this non-disclosure, the Applicants unfairly obtained stay orders which have paralysed the operations of the Council.

There is no merit in this contention. One cannot conceal what one does not know or have. Until a copy of that Gazette Notice was exhibited in the replying affidavit, there is nothing to show that the Applicants had or knew of it. This point must also fail and with that I overrule the entire preliminary objection.

On the merits of the application Mr. Kahiga submitted that the Draft Valuation Roll is null and void for procedural impropriety and breach of the rules of natural justice. He said that **Section 3** of the **Valuation for Rating Act** requires that:-

"Every local authority shall from time to time, but at least once in every ten years or such longer period as the Minster may approve, cause a valuation to be made of every rateable property within the area of the local authority in respect of which a rate on the value of land is, or is to be, imposed, and the values to be entered in a valuation roll"

As admitted in the replying affidavit the Council's last Valuation Roll was prepared in 1992 and expired in 2002. When the Council discovered that, without first seeking or obtaining the Ministerial approval, in its meetings of 4th and 24th May 2005 the Council's Finance, Staff and General Purposes Committee resolved to advertise for valuers to prepare a new Draft Valuation Roll and extended the expired Valuation Roll until the updated one was completed. He contended that the Council's position as stated in paragraphs 21 and 22 of the replying affidavit that it did not require Ministerial approval to prepare a Valuation Roll after ten years is, in view of **Section 3** of the **Valuation Rating Act**, clearly untenable. He submitted that the approval the Minister gave that "the time of valuation for Municipal Council of Nakuru's Valuation Roll shall be 31st December 2004" was under Section 2 of the Valuation for Rating Act and not the one required by Section 3. That approval is therefore irrelevant and does not assist the Council. He also submitted that the Council's purported extension of the 1992 Valuation Roll which had expired was illegal and an exercise in futility. This is because neither the Council nor the Minister has powers to extend a valuation roll.

Mr. Kahiga also termed the approval given by the Minister vide Gazette Notice No.2245 purporting to set the time of valuation for the Municipal Council of Nakuru's Valuation Roll to be 31st December 2004, as an exercise in futility on the ground that the Minister has no such a power under **Section 6** of the **Valuation for Rating Act**. He said Section 6 deals with the contents of the Draft Valuation Roll and Supplementary Rolls as opposed to the time of valuation. He referred me to **Section 2** of the **Valuation Rating Act** and submitted that the time for valuation is the time set aside to enable a council undertake a valuation. Even if he is wrong on this he said that the Minister's purported approval does not and cannot supplant the one required under **Section 3** of the **Valuation for Rating Act**.

Turning to the valuation rate, Mr. Kahiga submitted that **Section 15** of the **Rating Act** requires that before a new rate for a financial year is applied the rating authority ought to give 30 days notice. Having

not given that notice he said the Council's demand for payment of rates on the basis of the Draft Valuation Roll which applies a flat rate is illegal. At any rate, he said, objections having been raised the Council is obliged by **Section 17** of the **Valuation for Rating Act** to wait until they are all determined before demanding rates on the basis of the Draft Valuation Roll. For these reasons he said the Draft Valuation Roll is null and void and cannot be the basis of demanding rates from the Applicants. As authority for this proposition he cited the case of **Jacquline Resley Vs Nairobi City council Misc. Application No. 1654 of 2004, [2006] eKLR.** He also cited the case of **Onyango Vs Attorney General [1986-89] EA 456** and said that to allow the Draft Valuation Roll to be operational before the objections are determined would be subverting the principles of natural justice. In the circumstances he said **Section 18** of the **Valuation for Rating Act** does not apply in this respect.

The last point taken by Mr. Kahiga is on the appointment of the valuers. In this regard he submitted that contrary to **Section 7** of the **Rating Act** which requires a resolution appointing valuers to be passed by the Council and approved by the Minister, the Minister purported to approve vide Gazette Notice No. 8190 the appointment of Francis Oketch, G. K. Mutugi and Dr. D. H. A. Olima without the Council's resolution. Similarly the appointment of R. K. Kinyanjui vide Gazette Notice No. 2239 is void for want of the Council's resolution. Besides the appointment of Apex Valuers Ltd without competitive bidding, he dismissed the argument that the named people were officers of Apex Valuers Ltd and submitted that those people cannot be substituted for Apex Valuers Ltd without violating the **Public Procurement and Disposal Act No. 3 of 2005** and the Valuation for Rating Act and urged me to allow the applications with costs to the Applicants.

On his part Mr. Ojienda teaming up with Mr. Mbeche for the Council submitted that contrary to the Applicants' claims, the Minister's approval of the extension of time beyond the statutory limit of 10 years to cause a valuation to be made of every rateable property was given vide **Gazette Notice No. 2245 of 31.03.2006**. He said the Minister also approved under **Section 4(1)(b)** of the **Rating Act** the methodology of the site value vide **Gazette Notice No. 2241 of 31.03.2006**. These sections do not require the approvals to take any particular form and that the Minister's said approvals therefore suffice. In the circumstances, he said, the Applicants' hullabaloo that **Section 3** of the **Valuation for Rating Act** and **Section 3** of the **Rating Act** were not complied with has absolutely no basis.

On the valuers who carried out the valuations, Mr. Ojienda submitted that Apex Valuers Ltd which won the tender to carry out the valuation of the rateable properties being a juristic person, it had to act through its officers. Messrs Francis Oketch, G.K. Mutugi Dr. W.H.A. Olima and R.M.Kinyanjui are officers of that entity and that is why the Minister approved their appointment as stated in **Gazette Notice Nos. 8190** and **2239** of **13th October 2006** and **31st March 2006** respectively. This, he said, is clear from Apex Valuers Ltd's letter dated 21st April, 2005 annexed to the replying affidavit as **Ex. 9** which gave their names.

Mr. Ojienda further submitted that although this court has jurisdiction to issue prerogative orders under the Law Reform Act, it should not issue orders that will lead to absurdities. He cited the case of **Republic Vs Judicial Service Commission ex-parte Pareno [2004] 1 KLR** and submitted that "the remedy of judicial review is not concerned with reviewing the merits of the decision in respect of which an application for judicial review is made, but with the review of the decision making process itself." Citing the case of **Capri Holdings Ltd Vs The Commissioner of Lands, Nrb Misc. Appl. No. 167 of 2001** he said prohibition is available or lies not only for excess of jurisdiction or absence of it but also for the departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings. What the Applicants want to achieve in this case by prohibition, is a back door gimmick to quash those approvals and appointments. He contended that if the Minister's said approval and appointment of the officers of Apex Valuers Ltd were in any way irregular, then the Applicants should have applied for an order of certiorari to quash them. Their plea should therefore be dismissed.

Under the **Wednesbury Principle**, Mr. Ojienda further contended, the decisions of bodies, which perform public duties or functions, will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no reasonable person or body properly directing itself on the relevant law and acting reasonably would have reached that decision.

Mr. Ojienda further contended that once a Draft Valuation Roll has been signed under **Section 9(2)** of the **Valuation for Rating Act** and laid before the full council meeting, it becomes valid. What the Valuation Court does thereafter is to amend and adjust figures in accordance with its decisions on objections and once the adjustments are complete, that is, once all the objections are determined and the Valuation Court issues a certificate under **Section 17(2),** the Roll ceases to be a draft roll and is transformed into the new valuation roll. He argued that in its full meeting of 28th September, 2007, as is clear from Min. 31 of that meeting, the Council approved the Draft Valuation Roll after which the Town Clerk gazetted it under **GN No. 10214 of 19. 10. 2007** and invited objections, if any. With that Gazette Notice, as stated in **Section 18(1)** of the **Valuation for Rating Act**, the Draft Roll became operational and extinguished the old one. If the Applicants were unhappy with it they should have sought an order of certiorari within 6 months to quash it but they did not. Instead many ratepayers, including some of the Applicants, filed objections some of which have been determined. Having subjected themselves to that process they should have appealed under Section 19 or filed a reference under **Section 20** of the **Valuation for Rating Act**. Having not done so they should not be allowed to stop the valuation process at this late hour. He cited the case of **Republic Vs Hon The Chief Justice of Kenya & Others, Nairobi HC Misc. Appl. No. 764 of 2004** in support of this contention**.**

Lastly Mr. Ojienda distinguished the two cases of **Jacqueline Resley Vs Nairobi City Council** and concluded that in the interest of the more than 4 million residents of Nakuru, public policy demands the operations of the Council should not be paralysed and urged me to dismiss the applications with costs for two counsel.

I have carefully considered these rival submissions. In a nutshell the points they raise are whether or not the order sought of prohibition is available to the Applicants and whether or not the Council's valuation process is null and void for flouting the law.

On the first point, I agree with Mr. Ojienda that as was stated in the case of **Capri Holdings Ltd Vs The Commissioner of Lands, Nrb Misc. Appl. No. 167 of 2001** prohibition is not available or does not lie to correct the cause, practice or procedure of an inferior tribunal or a wrong decision. What is required in such a situation is an order of certiorari to quash what has been done and the same has to be sought within the statutory period of six months. In this case, however, the order of prohibition is not sought to correct or quash any decision. It is sought to nub in the bud what the Applicants term an illegal valuation process. As that process is not complete, I find and hold that the Applicants are entitled to seek that order. Whether or not they will get it remains to be seen.

As I have said Mr. Kahiga submitted that the Draft Valuation Roll in this case is null and void for procedural impropriety, that is, violation of **Section 3** of the **Valuation for Rating Act, Section 7** of the **Rating Act** and breach of the rules of natural justice. He dismissed the approval the Minister gave vide **Gazette Notice No. 2245 of 31.03.2006** that "the time of valuation for Municipal Council of Nakuru's Valuation Roll shall be 31st December 2004" as the one required under **Section 2** and not under **Section 3** of the **Valuation for Rating Act.** He also contended that it is not the full Council Meeting which passed the resolution seeking that extension.

I find no merit in both of these contentions. Contrary to Mr. Kahiga's submission, from his clients' own exhibits, I find that M/s Apex Valuers Ltd were appointed through a competitive process as required by **Section 27(1)** as read with **Section 29(1)** of the **Public Procurement and Disposal Act No. 3 of 2005** and I accept the names it gave as its valuers. Those are the valuers the Minister approved the appointment of and had them gazetted. I reject Mr. Kahiga's contention that the valuers were not appointed by a resolution of the Council as required by **Section 7** of the **Rating Act** because it is not a ground in either of the two applications. He only brought it up in his written and oral submissions.

Section 3 of the **Valuation for Rating Act** is very clear. It requires that:-

"Every local authority shall from time to time, but at least once in every ten years or such longer period as the Minster may approve, cause a valuation to be made of every rateable property within the area of the local authority in respect of which a rate on the value of land is, or is to be, imposed, and the values to be entered in a valuation roll."

It does not state that the request to the Minister has to be made by a resolution of the council. Therefore Mr. Kahiga's contention that the Council should have passed a resolution in its full meeting requesting for the extension is clearly untenable. I find and hold that the request made to the Minister, on 24th May 2004, vide Minute 31 of the Finance, Staff and General Purposes Committee of the Council was in order.

The section does not require the Minister's approval to take any particular form. Although the Minister's said approval in this case is not happily worded, even a cursory perusal of it as well as that of the said Minute makes it quite clear that that approval was sought and given under **Section 3** and not **Section 2** of the **Valuation for Rating Act**. At any rate **Section 2** of the **Valuation for Rating Act** is only a definition Section. There is no requirement demanded of anybody under it. Mr. Kahiga's contention therefore that the approval the Minister gave vide **Gazette Notice No. 2245 of 31.03.2006** is in compliance with that section is clearly untenable.

Counsel for the Applicants also made heavy weather of the effect of the Draft Valuation Roll. This is clearly as a result of misapprehension of the provisions of the Valuation for Rating Act. Section 3, as pointed out, authorizes "Every local authority… from time to time, but at least once in every ten years or such longer period as the Minster may approve, [to] cause a valuation to be made of every rateable property within the area of the local authority in respect of which a rate on the value of land is, or is to be, imposed, and the values to be entered in a valuation roll."Section 4 authorises the local authorities to bring onto the Valuation Roll any new properties or those that may have been omitted by a supplementary valuation roll to be prepared after a valuation is carried out under **Section 5** unless, at the request of a local authority, the Minister dispenses with the valuation. **Section 8** provides for the basis of the valuations.

Upon completion of the valuation or where the same has been dispensed with, **Section 9** requires the valuer to prepare and sign a Draft Valuation Roll and transmit it to the Town Clerk who shall lay it before a meeting of the local authority and thereafter publish a notice of it and invite objections to it, if any. Mr. Kahiga contended that the Draft Valuation Roll was not signed. As he only exhibited parts of that Roll I am unable to determine the correctness of that contention and I therefore reject it. After the Draft Valuation Roll is laid before the a meeting of the local authority, the same is, under **Section 18** deemed to be the valuation roll with effect from the commencement of the financial year for which it has been

prepared and to be the basis for imposition of rates. Any objections to it do not have to be determined before it can be the basis for demanding new rates. The Applicants' contention therefore that the Council has no legal right to demand rates on the basis of the Draft Valuation Roll is clearly legally untenable. Any amounts found to be in excess after determination of objections or appeals there from is recoverable with interest from the local authority under **Section 28**.

For these reasons I find no merit in both of these applications and I accordingly dismiss them with costs. I do not certify costs of two counsel.

DATED and delivered this 30th day of June, 2009.

D. K. MARAGA

JUDGE.