REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

MISC. CIVIL CASE 518 OF 2003

IN THE MATTER OF THE MINING ACT

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP. 265

B E T W E E N

REPUBLIC.....APPLICANT

V E R S U S

THE MUNICIPAL COUNCIL OF MAVOKO.....RESPONDENT

EX-PARTE - ATHI RIVER STORES LTD

J U D G M E N T

Before me is a Notice of Motion dated 10th June, 2003 filed by R.M. Mutiso & Company advocates on behalf of the applicant **ATHI RIVER STORES LTD.** The respondent is named as the **MUNICIPAL COUNCIL OF MAVOKO**. The application was filed under Order 53 rule 1 of the Civil Procedure Rules, and seeks for the following orders-

1. ***THAT the applicant be granted orders of prohibition prohibiting the Respondent from levying any charges against the Applicant 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.***

2. ***THAT the Respondent be ordered to pay Compensation to the applicant in the sum of Kshs.533,000/= for disruption of business operations.***

3. ***THAT the costs of the application be provided for.***

The grounds of the application are that the local authority ***(the respondent)*** is acting outside its powers in levying the charges. The application is grounded on an affidavit sworn on 20th May, 2003 by **ASHMAN PURI** the General Manager of the applicant filed with the Chamber Summons for leave, as well as a **STATEMENT** dated the same 20th May, 2003. There was also a further affidavit sworn on 23rd June, 2008 by **RAHIM JUNEJA** a General Manager of the applicant.

The applicant through their counsel also filed skeleton arguments. It was contended in the said skeleton arguments, inter alia, that the respondent began charging the applicant levies on minerals at the rate of Kshs.20,160/= per day and then impounded the respondent's truck registration Nos. KAP 472 N; KAK 196M; KAJ 923F; KAJ 924F; KAP 314E; and KAP 315E. As a consequence, the applicant paid the amount under duress in order to mitigate the loss due to stalled business, though the levies were illegal.

It was contended that though the respondent relied upon Legal Notice No. 5689 of 17th August, 2001, that Legal Notice did not empower the respondent to levy the said charge. Therefore the respondent was acting contrary to the provisions of the Local Government Act **(Cap. 265),** the Trust Land Act **(Cap. 288)**, and the Mining Act **(Cap. 306**), which under section 2(1) does not include in the definition of "***common minerals"*** the minerals mined by the applicant, which minerals fall under the control of the Central Government. It was contended therefore that the levying of charges on the applicant was ultra vires. Reliance was placed on the case of ***REPUBLIC –VS- CITY COUNCIL OF NAIROBI & ANOTHER – EX Parte*** Monier 200 Ltd (2005) eKLR – where the learned Judges held that the judicial review court was concerned with the process and not the decision, and that if Parliament intended to authorize the respondent ***(the local authority)*** to carry out any additional functions or give it more authority it would have passed the required legislation.

It was contended that the respondent's actions were unlawful and had also caused the applicant massive losses by impounding its trucks wherein the applicant incurred a loss of more than Kshs.400,000/= and was further obliged to pay the respondent Kshs.133,000/= for the period of illegal surcharge.

In response to the application, the respondent filed a replying affidavit sworn on 1st September, 2003 by **GIDEON MUINDI** the Town Clerk. It was deponed in the said affidavit that the respondent licenced the applicant to mine gypsum/limestone and that the respondent was merely charging the applicant transportation levy and that there was no contravention of the Mining Act or the Trust Land Act. It was deponed that the imposition of cess per trip per lorry was within the provisions of the Local Government Act **(Cap.265)** -section 148, as well as Legal Notice No. 5689 of 23rd July, 2001 published by the Minister. It was deponed that the said cess was for the repair and maintenance of the roads. It was also deponed that the applicants lorries were not just transporting pozzolana, gypsum, and limestone, but were also transporting unpurified sand.

In addition, the respondent filed skeleton submissions on 29th October, 2008. Reference was made to two affidavits and Gazette Notice No. 5689 published in the Kenya Gazette of 17th August, 2001, which was dated 23rd July, 2001. It was contended that the charges levied on the applicant were mere cess which was permitted under the said Gazette Notice and section 148 of the Local Government Act. It was contended that the said charges were not ultra vires, and that the applicant should not hide behind the definition of *"**commons minerals"*** under the Mining Act to avoid paying transport cess/fees.

It was also contended in the written submissions that the applicants deliberately suppressed or distorted certain relevant information, in that they exhibited documents relating to a totally different company. The applicants had also failed to disclose the availability of an alternative remedy which could be pursued through an ordinary plaint. Reliance was placed on the case of **KENYA TELECOMMUNICATIONS INVESTMENT GROUP LTD –VS- COMMUNICATION COMMISSION OF KENYA** – Nairobi High Court Miscellaneous Civil Application No. 1267 of 2003 where it was held that failure to disclose the existence of an alternative remedy and distortion of facts was fatal in judicial review proceedings. It was contended that the above reasoning was adopted in **RE KENYA NATIONAL FEDERATION OF COOPERATIVES & TWO OTHERS 2 EALR 129.**

In addition, it was contended that the applicants curiously had another prayer for compensation for Kshs.533,000/= which was outside the reliefs under judicial review proceedings which were limited to certiorari, prohibition and mandamus. Consequently, the whole application was incompetent.

On the request for prohibition, it was contended that the applicant appears to be seeking for injunctive orders for actions which had already been taken, while prohibition was meant to prevent ultra vires

actions for the future. Reliance was placed on the English case of **R –VS- ELECTRICITY COMMISSIONERS – EX parte Electricity Joint Committed Company Ltd [1924] IKB 171** – where Atkin LJ stated-

"***If the proceedings establish that the body complained of exceeded its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction***."

Reliance was also placed on the case of **KENYA NATIONAL EXAMINATION COUNCIL -VS- REPUBLIC – Ex Parte Gathenji & Others (1996) LLR 483**, where the Court of Appeal stated-

"***What does an order of prohibition do and when will it issue? It is an order from the High Court to an inferior tribunal or body which forbids that tribunal or body to continue proceedings, therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of its jurisdiction or the absence of it but also for a 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,….. it is said that prohibition looks for the future so that if a tribunal had to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made. It can only prevent the making of contemplated decisions."***

It was contended that since the applicant did not seek to quash the decision to charge fees or cess through certiorari, orders of prohibition cannot be granted. In addition, the fact that the applicant was seeking for compensation showed that the most appropriate proceedings would have been through a normal suit for injunction and prayer for damages.

I have considered the application, documents filed and submission made on behalf of both parties. I have also considered the authorities cited.

I will first of all deal with the issue of request for payment of Kshs.533,000 for disruption of business operations. Under section 8 and 9 of the Law Reform Act (***Cap. 26 Laws of Kenya),*** and Order LIII of the Civil Procedure Rules judicial review remedies are limited to certiorari, prohibition and mandamus. This court cannot, under its judicial review jurisdiction, grant compensation for loss of business. Therefore, this court cannot grant that prayer in these judicial review proceedings. That prayer must fail, and I dismiss the same.

The respondent has argued that because of the inclusion of that prayer in the application, the whole application is defective and cannot stand and therefore has to be dismissed. I cannot dismiss the whole application on that account of including an inappropriate prayer alone. In my view, the whole application cannot, and was not rendered defective because of that prayer, since the other prayer for prohibition, which is a substantive prayer for determination under the judicial review jurisdiction of this court, still stands. I will therefore not find the application defective on that account. The case of **KENYA TELECOMMUNICATIONS INVESTMENT GROUP LTD –VS- TELECOMMUNICATION COMMISSION OF KENYA – Nairobi High Court Misc. Application No. 1267 of 2006** was determined on the basis of documents and contents thereof which were by statute and Rules required to be filed, not the prayers sought. It was held in that case that the verifying affidavit should have contained the facts relied upon, and therefore the objection was upheld. I find and hold that the inclusion of a prayer outside the judicial review jurisdiction of the court, per se, does not make the application fatally defective.

An issue has been raised about the identity of the party who has come to court and the party in the documents exhibited and find no basis to sustain an objection on that issue. The party ***(applicant)*** appears to be the same.

I now turn to the prayer for prohibition. It has been argued that since a prayer for certiorari was not sought prohibition cannot issue. In **KENYA NATIONAL EXAMINATIONS COUNCIL -VS- REPUBLIC** – **Ex Parte Gathenji (1996) LRR 483 and THE COMMISSIONER OF LANDS -VS-** Civil Appeal No. 252 of 1996, the efficacy of an order of prohibition was given.

In the former case the Court of Appeal held-

"***Prohibition looks for the future. Prohibition cannot quash a decision which has already been made. It can only prevent the making of contemplated decisions."***

Therefore, in my view, such an order can be granted by the court to prevent an anticipated unlawful act. It cannot cure an unlawful act already committed or a decision already made.

Though the applicant complains in affidavits filed about impounding of motor vehicles, what they ask to be prohibited is the levying of charges 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. The affidavit sworn by **ASHMAN PURI**, the General Manager of the applicant, on 10th June, 2003 alludes to Legal Notice No. 5698 of 17th August, 2001, annexed as "**AP5**". It is deponed that the said gazette notice does not authorize the respondent to charge the levy they purport to levy.

I have perused the said gazette Notice. It only refers in its relevant part to-

"***Natural Murram/stone, cooping/ballast, royalties from cement factories per ton cement manufacturers."***

The respondents, on their part, in the replying affidavit sworn by **GIDEON MUINDI** the Town Clerk of the Respondent, on 1st September 2003, deponed under paragraphs 8 to 12 that they were charging transportation cess based on the number of trips per lorry under the Local Government Act (**Cap. 265)** in order to maintain roads.

They rely on the same Legal Notice No. 5689 dated 23rd July, 2001. They also depone that the applicants lorries do not carry only pozzolana, gypsum and limestone. They do not point at the specific item in the Legal Notice on which the transport cess per trip has been imposed, by decision of the respondent or the Minister.

My perusal of the whole Legal Notice does not disclose any item that covers charging of cess per trip for the vehicles of the applicant. On the basis of this Legal Notice No. 5689 of 2001, it is my finding that there is no clause that allows the respondent to levy the transport levy per trip nor is there a decision of the respondent to that effect. It is therefore an illegal levy being imposed with no legal basis at all, not even a purported legal basis. Since there is no decision in the Legal Notice that imposed the levy, there cannot be any requirement for asking for orders of certiorari, before asking for prohibition. Prohibition orders can issue for the future illegal conduct of the respondent. Therefore, in my view, the prohibition orders sought herein can be granted. I will grant the same. If the act complained of was in the Legal Notice, there would of course be a necessity of considering the quashing of the of the respondent as contained in the Legal Notice. As things are, imposition of charges or transport cess appears to be a capricious action, possibly by overzealous technocrats, who have not even bothered to give it some purported colour of legality. Their actions cannot be the same as a decision of the respondent, which would have to be quashed by certiorari. Asking for certiorari orders would be superfluous.

Consequently, I order as follows-

1. The applicant be and is hereby granted orders of prohibition prohibiting the Respondent from levying any charges against the Applicant 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.

2. ***I decline to grant compensation for disruption of business.***

3. ***The respondent will pay the costs of these proceedings.***

Dated and delivered at Nairobi this 22nd day of June, 2009.

George Dulu

Judge.