REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Misc Civ Appli 1739 of 2004

RICHLANDS INSURANCE BROKERS LIMITED……....……..…APPLICANT

Versus

NAIROBI CITY COUNCIL……..RESPONDENT

JUDGMENT

The ex parte Applicant, Richlands Insurance Brokers Ltd filed the Notice of Motion dated 23rd December 2004 seeking the following orders;

1. (a) That an order of mandamus do issue directed at Nairobi

City Council requiring it to abide by the provisions of the relevant law and in particular the Trade and Premises By Laws 1991 and all other Laws and the Regulations and Rules made thereunder in relation to the amounts payable for the annual fee in respect of the Single Business permit;

(b) That an order of mandamus do issue directed to the Nairobi City Council requiring it to forthwith issue the Applicant with the Single Business Permits for the year 2005 for which the Applicant has already made payment of the legally payable annual fee of Kshs.20,000/=;

(c) That an order of mandamus do issue directed to the Nairobi City Council requesting it to credit the Applicant with the amount of overpayments or in the alternative refund the amount of such overpayment to the Applicant;

(d) That an order of prohibition be issued directed to the Nairobi City Council prohibiting it from demanding from the Applicant in respect of the annual fees for the Single Business Licence any amount in excess of the legally payable amount of Kshs.20,000/= per annum;

(e) That an order of prohibition be issued directed to the Nairobi City Council prohibiting it from harassing, intimidating or in any other manner whatsoever interfering with the Applicant's right to apply for and obtain a permit to operate its business of Insurance Brokers;

(f) That an order of prohibition be issued directed to the Nairobi City Council prohibiting it from

charging and or prosecuting the Applicant pursuant to the Notice of Prosecution dated 8th December 2004 or any other notice issued on the same or similar grounds so long as the Applicant has applied for and paid the amount of fees legally payable for the Single Business permit;

2. Any other relief or order that the court deems fit to grant;

3. Costs of the Application be provided for.

The Application is premised on the Statutory Statement and Verifying affidavit of the Durgesh Ramniklal Shah, dated 16th December 2004 and filed in court on the same date. The Applicant's Counsel also filed skeleton arguments on 27th January 2006. The Respondent filed grounds of opposition dated 30th May 2005 and skeleton arguments dated 24th March 2006 upon which the Respondent relied.

The factual background of the Applicant's case is that the Applicant carries on business as an Insurance Broker. The business is situate along Mpaka Road Westlands in a premises that measures 200 square metres on LR 1870/IX/138. In 1999 all businesses were required to trade under a Single Business permit and in the years 2000, 2001 and 2002, the Respondent demanded and received from the Applicants, Kshs.90,000/= per year for the permit.

Later on the Applicant learnt that the licence for a Single Business permit should be Kshs.20,000/= and when the Respondent's Assessment Officers were informed, the Applicant was allowed to pay the said sum for the years 2003 and 2004. However, in November 2004 a Mr. Karanja from the Respondent's Offices demanded that the Applicants pay Kshs.45,000/= per year for the permit. The Applicant declined to pay and the Respondent served the Applicant with a notification of offence dated 8th November 2004 in which Kshs.116,000/= was demanded which included underpayment for 2003 – 2004 and penalties. That is what prompted this Application.

It was submitted that the assessment of fees is governed by a classification and rules on the reverse of the Application form marked DRS 2. There are 90 categories of businesses and that the assessment depends on the nature of the business, and size and that the Applicant comes closest to categories 605, 610 and 615.

That category 605 comprises a business of 10 practitioners or those with international affiliation but the Applicant does not have 10 practitioners nor do they have any international affiliation.

Category 610 – A business with 3 to 10 practitioners but the Applicant is comprised of 2 practitioners and should be assessed under category 615 for that which the permit costs Kshs.20,000/= per year. That it was upto the Applicants to file the Application forms and based on information contained therein, the Respondent's Officers would categorize the business and assess the fees payable. That the Respondents have not justified the fees of Kshs.45,000/= charged.

In their submissions, the Respondents contended that the Applicants have sued a non-existent entity, in the name of Nairobi City Council. Mr. Kuria counsel for the Applicant, in response to the above submission exhibited documents in which the Respondent refers to itself interchangeably as Nairobi City Council or City Council of Nairobi and that that fact was not brought to the judge in the case of **NAIROBI CITY COUNCIL V CHRIS EVARARD & OTHERS MILIMANI CC 851/02** where the court held that **NAIROBI CITY COUNCIL** is not the same as **CITY COUNCIL OF NAIROBI.** Mr. Kuria submitted that the judge was not notified of the manner in which the Respondents had used the said name.

In the grounds of opposition, the Respondent alleges that the Application is frivolous, vexatious and an abuse of the court process; is incompetent and fatally defective; that the Applicant has concealed material facts from the court; that the suit is time barred and that no prima facie case has been made out to justify the reliefs sought.

I have considered all the submissions by Counsel, skeleton arguments, grounds found in the Statutory Statement, Affidavit verifying the Statement and annextures thereto.

On whether the Applicant has sued the right entity, the Notice of Motion names "Nairobi City Council" as the Respondent.

Mr. Omoti in his skeleton arguments contends that the Respondent is not the institution incorporated under S.12 (3) of the Local Government Act to run the affairs of Nairobi City. Counsel also relied on the case of **NAIROBI CITY COUNCIL V CHRIS EVARARD & OTHERS HCC 851/02** (Milimani Commercial Court) in which Justice Mwera held that Nairobi City Council was not the same as City Council of Nairobi and struck out the suit. In reply to the Respondent's submissions, Mr. Kuria submitted that the Respondent is estopped from raising the objection that the wrong entity is sued because the Respondent describes itself as 'Nairobi City Council' as well as 'City Council of Nairobi'. I have seen the annextures by the Applicant, for example, the By Laws of the Respondent are referred to as "Nairobi City Council By Laws" receipts and even the Single Business permit and Regulation forms are all issued by Nairobi City Council. The confusion in the names is brought about by the Respondents themselves. Though that does not absolve the Applicant from suing the proper entity as per S.12 (3) of the Local Government Act, the Respondent would be trying to split hairs in raising such an objection. In any event, the Respondent will not suffer any prejudice as they are known by that same name of Nairobi City Council too. The defect in the citing the Respondent as Nairobi City Council is not fatal to this Application, all circumstances considered.

It is not disputed that to get a licence the Applicants have to present a licence Application form after filling in the relevant information required and the form is presented to the relevant department with the Respondents who categorize the business and assess what is payable. In doing so the Respondent have to consider the number of practitioners in a firm, nature of business, size of the business premises, number of employees etc. The Respondents officers verify the form, endorses the category to which the business belongs and the amount payable. After that, the Applicant pays the sum assessed and awaits the issuance of the permit.

In the instant case, after submission of the forms for assessment, Mr. Karanja an officer of the Respondent assessed the licence to be Kshs.45,000/= for the years 2003/4 as opposed to what the Applicant had been told to pay i.e. Kshs.20,000/=. Based on this undisputed facts, the issue is whether an Order of Mandamus and Prohibition can issue as prayed.

At this stage I must consider the scope and efficacy of the two orders. In the case of **KENYA NATIONAL EXAMINATION COUNCIL V R CA 266/1996**, the Court of Appeal considered when the orders of mandamus, prohibition and certiorari can issue. Halsburys Laws of England, 4th Ed Volume I page 111, paragraph 89 says this of mandamus;

"The order of mandamus is of a most extensive remedial nature, and is in form, a command issuing from the court of justice directed to any person, corporation or interior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient beneficial and effectual."

At paragraph 90, headed "**the mandate**" "**the order must command no more than the party against whom the Application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.**"

The Court of Appeal explained the principles contained in the above quotation from Halsburys Laws

to mean that mandamus compels performance of a duty imposed on a person by statute and if the person fails to perform it to the detriment of a party who has a legal right to expect the duty to be performed. In this case, the officer who assesses the fee payable had a public duty to do so. Infact the officer did assess the fees. It is only that the Applicants do not agree with his assessment. I find that officer cannot be deemed to have failed to perform his duty for which mandamus can issue.

Besides, the officer assessing the permit fees is left with some discretion to consider the fee payable based on the size of the business, the number of directors and, the number of employees. The officer is left with a discretion to assess under what category the business falls.

Indeed even the Applicant picked on three categories, 605, 610 and 615 and tried to see under which one the Applicant seems to fall or comes closest to. There is some discretion given to the Respondents on how to assess the fee payable and therefore the Applicant cannot expect that it will be such that the fee payable must be Kshs.20,000/= as they expected. Mandamus does not issue where the Applicant expects a duty to be performed in a certain way when one has discretion.

Prayer (1a) Seeks an order of mandamus to issue to the Respondent to abide by provisions of the Trade and Premises By Laws 1991. In my considered view, the officer responsible for assessment of the fee payable has already preformed his duty and assessed the fee payable at Kshs.45,000/= which the Applicants do not agree with. Since the duty is already performed there would be nothing for which the Respondent will be compelled to perform and that order cannot be granted.

For an order of mandamus to issue, there has to be a demand followed by a refusal to perform the duty.

I have considered the facts placed before the court by the Applicants and there is no evidence to show that the Applicants demanded the performance of any statutory duty which the Respondents declined to do or refused to perform. In the case of **THE DISTRICT COMMISSIONER KIAMBU V R & OTHERS CA 2/1960** the court held inter alia that "**a distinct demand for action and its refusal is as a general rule prerequisite for the grant of an order of mandamus."**

Prayer 1 (b) seeks that the Respondent do forthwith issue the Applicant with a licence for the year 2005 upon payment of Kshs.20,000/=. Again I find that that order cannot be granted because the Applicant is seeking to substitute the Respondent's decision assessing permit fees at Kshs.45,000/= with the court's decision to assess the permit fees at Kshs.20,000/=. In Judicial Review, it is never the court's duty to substitute the decision of the tribunal or officers with the court's decision. All the court does is to review the process of decision making. It does not deal with the merits of the decision because it would be sitting on appeal which is out the purview of Judicial Review. In the case of **SUBA & OTHERS V EGERTON UNIVERSITY (1996) KLR 29,** Justice Mbito said inter alia that;

"The court's role is to see that the law has been followed and not to substitute its decisions for those of the persons empowered by Parliament to run such institutions."

I am in total agreement with Justice Mbito's observation and for that reason prayer 1(b) of the Notice of Motion cannot be granted.

In prayer 1 (c), the Applicant seeks a refund of some money allegedly paid, over and above the sum required to be paid by them. I do agree with the Respondent's submission that that prayer is vague having failed to state how much the court was supposed to order to be refunded.

Further, this is a Judicial Review Application and no oral evidence would be tendered to support the claim for a refund. In any event, this being a Judicial Review Application there are only 3 remedies that this court can award, mandamus, certiorari and prohibition (S. 8 of the Law Reform Act). An order for refund would lie else where, may be in the civil courts.

When can an order of prohibition issue? In the **KENYA NATIONAL EXAMINATION CASE**, the

Court of Appeal quoting from Halsburys Laws of England said that it is an order from the High Court that is directed at an inferior tribunal forbidding that tribunal to continue proceedings, in excess of jurisdiction or in contravention of the laws of the land. It also lies where rules of natural justice have been breached but does not lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits.

In prayer 1 (d) of the Notice of Motion, the Applicant seeks an order of prohibition directed at the Respondent prohibiting them from demanding fees in excess of Kshs.20,000/=. The Applicant is seeking to prohibit a decision which is already made. That is not the scope of an order of prohibition. It has to prevent a decision that is contemplated or to be made in future.

In the **KENYA NATIONAL EXAMINATION CASE,** the Court of Appeal held inter alia;

"the point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That in our understanding is the efficacy and scope of an order of prohibition"

In prayer 1(e) and (f) of the Notice of Motion, the Applicant seeks to have the Respondents prohibited from harassing or intimidating the Applicants, interfering with the right to apply for a single business licence, and that the Respondents be prohibited from charging the Respondents pursuant to the Notice of prosecution dated 8th December 2004. As held above, the decision sought to be prohibited has already been made. There is nothing to be stopped by an order of prohibition. The assessment has been made and if the Applicant does not comply, the Respondents have a right to issue the notice of prosecution. The Applicant in my view needed to apply for an order of certiorari which can quash the decision of the Respondents but none was sought. The decision of the Respondent to assess having been made, cannot be prohibited and likewise, there being a failure to comply with the assessment the Respondents have a right to proceed and enforce the payment of the fees if no appeal is preferred by the Applicant.

For all the above reasons, I do find and hold that the Applicant's Notice of Motion dated 23rd December 2004 is without merit. The orders sought cannot be granted and the Notice of Motion is hereby dismissed with each party bearing its own costs. I make this order on costs because the Respondents are the source of the confusion on really how much is to be paid for the permit by the Applicants, Kshs. 90,000/=, 45,000/= or 20,000/=. Orders accordingly.

Dated and delivered this 28th day of March 2007.

R.P.V. WENDOH

JUDGE