



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**MISC CIVIL APPLI 488 OF 2006**

**JOSEPH MAKAU NDAMBUKI.....APPLICANT**

**Versus**

**THE CITY COUNCIL OF NAIROBI.....RESPONDENT**

**JUDGMENT**

This is an Application for Judicial Review orders. The ex parte Applicant, Joseph Makau Ndambuki filed the Application against the City Council of Nairobi, the Respondent herein seeking the following orders:-

- 1) A order of certiorari to remove into the High Court for purposes of quashing the decision of the Respondent denying the Respondent a scrap metal dealer trading licence;
- 2) An order of certiorari to remove to the High Court for purposes of quashing the decision of the Respondent to evict the Applicant from these premises known as plot No. Lunga Lunga Road 06;
- 3) An order of mandamus to compel the Respondent to issue the Applicant with a trading licence.
- 4) An order of mandamus compelling the Respondent to release to the Applicant his merchandise impounded from the premises known as Lunga Lunga Road 06 on the 5<sup>th</sup> May 2006;
- 5) An order of prohibition stopping the Respondent from interfering with the Applicant's quiet possession and enjoyment of those premises known as Lunga Lunga Road, 06.

The Motion is supported by the Verifying Affidavit of the Applicant and a Statutory Statement, both dated 4<sup>th</sup> September 2006 and filed skeleton arguments on 13<sup>th</sup> June 2007. The grounds upon which the Application is premised are found in the Statement and they are as follows:

- that the Respondent did not give the Applicant a hearing;
- that the Respondents decision contravenes S.165 of the Local Authority Act; (there is no Act as Local Authority Act it must be the Local Government Act)
- the decision of the Respondent is made in bad faith, is capricious and prejudicial;
- that it is made without jurisdiction and therefore ultra vires;

- that it is contrary to legitimate expectation and against public good and public policy.

The Application was opposed and Hillary Wambugu, the Director of City inspectorate of the Respondent swore an Affidavit dated 15<sup>th</sup> February 2007. Mr. Omotii Counsel for the Respondent also filed skeleton arguments on 31<sup>st</sup> May 2007.

Brief facts of this case are that the Applicant carries on business of scrap metal at premises known as Lunga Lunga Road, 06 which he has done for over 10 years. In 2004, he registered a business name of Makueni Metal Scrap and he applied for a single Business Permit to the Respondent and it was duly granted. The licence renewed in 2005 (JMM 1). Towards end of 2005, he submitted an application for a licence for the year 2006 and the Respondent declined to issue the same and did not tell him the reasons for the refusal. Before he got communication he approached a Mr. Sang of Nairobi Municipal Council Makadara Division Viwandani Ward Commandant, who advised him to carry on the business pending the processing of the permit.

However on 5<sup>th</sup> May 2006 the Respondent officers visited the Applicant's premises, broke the doors removed his merchandise alleging that he was not licensed. That none of his neighbours who carry out similar business were never interfered with and it is his view that the Respondent has a vendetta against him which he does not know. That has been subjected to harassment, prosecution in CRC 10294/06 when he was charged and fined 1,000/= and CRC 7016/05 where he was acquitted but the merchandise was not released. (JNM VI a & b)). Despite demands, the Respondent has continued to withhold his goods and continued with harassing the Applicant and this is what prompted him to file CC 6904 A of 2006 at Milimani Commercial Court seeking restraining orders against the Respondent from entering the premises and seeking an order that he be given a license. The court declined to grant orders and he was advised to go on appeal. (JMM 5)

In opposing the Application, Hillary Wambugu deponed that the Applicant is in breach of the law by continuing to trade without a licence for 2006 and failed to appeal to the Magistrate's Court as required by S. 165 (3) Local Government Act, before he could come to this court. That the 2006 licence was refused because the premises did not accord with Public Health, Safety and Planning perimeters of the Respondent and if the court granted the relief sought, it would be substituting the Respondent's decision with its own decision which is contrary to law. He denied the allegations of bad faith, harassment and bias but said that if the Applicant was charged severally, it is because he has been violating the law. Lastly that the decision that is impugned has not been exhibited and order cannot be granted.

Mr. Omotii added in his submissions that failure to exhibit the decision refusing of licence and the decision to evict the Applicant the Application is rendered fatal because if the decision was informal that should have been deponed to in the Affidavit pursuant to Order 53 Rules 7 (1) Civil Procedure Rules. Counsel also urged that the Respondent's powers under S.165 of the Local Government Act Chapter 265 are discretionary while S. 165 (3) provides for machinery of appeal to the magistrates court which the Applicant has not exhausted.

I have now considered the statutory statement, the Affidavits filed by both Applicant and Respondent and the skeleton arguments filed on behalf of both parties.

Under Order 53 Rule 7(1) of the Civil Procedure Rules, the Applicant is required to lodge a copy of the decision which is sought to be quashed by an order of certiorari accompanied by an affidavit. If the Applicant is unable to lodge the said decision with the court, the Applicant is required to give a satisfactory account to the court as to why he could not lodge it.

The rule reads:-

**“7 (1) in the case of an Application for an order of certiorari to remove any proceedings for the purpose of them being quashed, the Applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record unless, before the hearing of the motion he has lodged a copy thereof verified by Affidavit with the Registrar, or accounts for his failure to do so to**

**the satisfaction of the High Court.”**

The Applicant has neither lodged the decision denying him a licence nor the decision ordering his eviction. Despite the fact that the Respondents raised that issue in their replying Affidavit, the Applicant did not address it nor did the Applicant give any satisfactory explanation to the court as to the failure to lodge the same. It is only counsel Mrs. who tried to explain in reply that the decision was informal but that information is from the bar, not an Affidavit sworn by the Applicant. The Court of Appeal in the case of **SAMSON KIRERE M'RUCHIU V MINISTER FOR LANDS & SETTLEMENT CA 21/1999**, considered the effect of failure to lodge the impugned decision or failure to give satisfactory explanation to the court. The court said of Order 53 Rule 7(1),

**“Compliance with the above provision is a precondition seeking an order of certiorari. An Applicant who fails to comply with the requirements of that provision disentitles himself to a hearing of his Motion under Order 53 Rule 3 of the Civil Procedure Rules. It would appear to us that the failure to comply with Rule 7 (1) above does not render the Application incompetent ab initio but renders proceedings continued in violation thereof a nullity. We say so advisedly as a copy of the decision sought to be quashed may be lodged before the hearing of the Motion for an order of certiorari.”**

In the instant case, the Applicant having failed to lodge both decisions that he seeks to be quashed, or give a satisfactory explanation of why he could not lodge them, this Application is rendered a nullity and orders of certiorari that are sought cannot lie and the Notice of Motion would therefore be struck out on that basis alone. This is because the other orders of mandamus and prohibition are dependant on the grant of an order of certiorari and can only issue if the impugned decision is quashed. They would not be available.

In the event that my above finding is wrong, is there any merit in the Application? I think I should start by considering the scope of Judicial Review.

The supreme court practice 1997 Vol 53/1-14/6 states;

**“The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the Application for Judicial Review is made, but the decision making process itself.**

**It is important to remember in any case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or part of individual judges for that of the authority constituted by law to leave the matters in question.**

**The court will not on a Judicial Review Application act as a “Court of Appeal” from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power be guilty itself of power”.**

In the instant case, the Applicant complains that when he applied for renewal of his licence the same was refused and no reasons were given for the said refusal. Unfortunately without this court seeing the actual decision, if at all one was made, this court cannot tell whether reasons were given or not. S.165 of the Local Government Act empowers the Local Authority to grant or renew a licence which it is empowered to grant under the Act or any other law and in the event of refusal the Respondent may specify the grounds upon which a licence has been denied. The various grounds for denial of a licence are listed under S. 165 for example if the licence is contrary to public interest or contrary to the needs of the area. Under the circumstances it is not possible to tell whether reasons were given or not and whether the Respondent breach of S. 165 of the Local Government Act. In absence of the decision the court

cannot confirm whether or not the breach has been occasioned and order of certiorari cannot therefore lie.

The Applicant also complained that the Applicant's legitimate expectation that the licence would be renewed or reasons be given for its denial was also breached. The applicant also expected to be treated like other neighbours whose licences were renewed. Again this boils down to the same issue of the unavailability of the decision that are under challenge. All the allegations made by the Applicant, that is, of the Respondent having acted in bad faith or capriciously could only be supported by the decisions of the Respondent and in their absence, the court cannot make any such finding.

It was the Respondent's contention that the Applicants should have appealed to the District Magistrate's Court as provided under S. 165 (3) of the Local Government Act instead of coming to the High Court for Judicial Review. Availability of an alternative remedy is no bar to one filing a Judicial Review Application. This is because an appeal would consider the merits of the decision whereas Judicial Review would look at the decision making process. In this case, in absence of the decisions that were made, the better remedy was an appeal to the District Magistrate's Court. Judicial Review is a discretionary remedy and I doubt that it would be the most effective remedy in the circumstances.

Earlier in this judgment I have found that the decisions that were impugned were not lodged with the court and there was nothing for the court to look at to confirm whether or not a decisions were made and the that fact no explanation was given in lieu thereof. The orders of certiorari cannot issue.

The Applicant also seeks orders of mandamus to compel the Respondent to issue the applicant with a trading licence and to compel the Respondent to release the Applicant's merchandise impounded on 5<sup>th</sup> May 2006. The order of mandamus can only issue if the decisions to refuse the licence has been quashed. But since there is no order to quash the decisions, an order of mandamus if made, would be in vain.

Besides an order of mandamus will not issue if the decision making body enjoys discretionary powers. S.165 of the Local Government Act gives the Respondent a wide discretion in the decision process. Granting an order directing the Resopondent to issue a licence would be substituting the decision of the Respondent with that of the court. In **KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266** and **Supreme Court Practice 1997 (supra)**. The Court of Appeal quoted **HALSBURYS LAWS OF EVICTION 4<sup>th</sup> Ed Vol I** where the treatise says of mandamus:-

**“The order of mandamus is of a most extensive remedial nature and is in form a command issuing from the High Court of Justice directed to any person 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. 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”**

If the court were to order that the Respondent issue a licence it would be abusing or usurping the discretionary powers given to the Respondent under S. 165 of the Local Government Act.

In the instant case the Applicant admitted that at the time the goods were impounded he was still carrying on the business without a licence the same having been refused earlier. It seems the Respondent was justified in its action of impounding the goods because the Applicant was continuing to trade without a licence and hence in breach of the Local Government Act.

Lastly the Applicant prays for an order of prohibition. An order of prohibition issues from the High Court to stop a decision which is yet to be made in excess of or without jurisdiction. It does not lie to bar a decision that is already made. In this case, the Respondents have already interfered with the Applicants quiet possession of the plot on Lunga Lunga where the Applicant used to conduct his business. Besides the Applicant has not shown whose premises they are, do they belong to him or to the Respondents? An order of prohibition would not lie in the circumstances.

Having considered the merits of the case I come to the conclusion that none of the orders sought in the Application would have been issued anyway. The Notice of Motion dated 25<sup>th</sup> September 2006 is hereby struck out with costs to the Respondent.

Dated and delivered this 11<sup>th</sup> day of December 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of:

Mr. Kenyatta holding brief ro Mr. Omotii

Daniel: Court Clerk