



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 35 of 2005

1. PETERSON NDAMBIRI KARAGU

2. DANIEL MURIUKI

3. JOHN KARANJA MWANGI

4. JOHN LOUIS MACHARIA

**5. FRANCIS MURIUKI MUCHIRA (Suing on behalf of Others).....
APPLICANTS/PLAINTIFFS**

VERSUS

**KERUGOYA/KUTUS MUNICIPAL COUNCIL
RESPONDENT/DEFENDANT**

R U L I N G

Peterson Ndambiri Karagu, Daniel Muriuki, John Louis Macharia, John Karanja Mwangi and Francis Muriuki Muchira, hereinafter referred to as the Plaintiffs/Applicants have brought this suit against the Defendant Kerugoya/ Kutus Municipal Council. In their plaint filed on 12th April 2005 the Plaintiffs seek to have the Defendant restrained from collecting single business permits, Cess, Market charges, hawking fees and any other charges, without offering services such as sewerage system, piped water/treatment works, tarmac roads, street lights, Public toilets, garbage collection, ambulance and fire fighting services, public parks & recreation facilities, Public Schools and health facilities.

In the alternative the Plaintiffs seek to be allowed to collect the said charges jointly with the Defendants for the purposes of making sure that the aforementioned services are provided.

By a Chamber Summons dated 28th September 2005 the Plaintiff/ Applicants sought interlocutory orders under order XXXIX rules 1 & 2 of the Civil Procedure Rules in the same terms as stated in their plaint pending further orders of the court and that the Defendant be restrained from enforcing the collection of the levies until suitable arrangements are made for the provision of the services.

On the 26th April 2006 the applicants/Plaintiffs filed another Chamber Summons under Order XXXIX rules 1 & 2 of the Civil Procedure Rules seeking orders that the Defendant/Respondent be restrained from arresting the applicants over single business permit until further orders of the court. The applicants also sought to deposit 50% of the fees in respect of the single business permit.

Both applications were argued together. It is the applicants' contention, that the Defendant/Respondent

has been collecting payments in respect of single business permits Cess, Market charges, hawking fees from the applicants but has failed to provide the services it is obliged to provide under sections 168, 178, 181 and 182 of the Local Government's Act. As a result the situation in Kutus township was pathetic as there are no public toilets, no sewerage system, no piped water, tarmac roads, street lighting, garbage collection, ambulance services or health facilities.

Efforts to discuss the matter with the Respondent had not produced any fruitful results hence the applications.

The Respondent opposes both the applications. It was submitted on behalf of the Respondent that it is empowered under section 148 of the local Government Act (Cap 265) to collect the charges and that to restrain the Respondent from collecting the charges would not only be a contravention of the law but would also be contrary to Public interest as it would severely compromise the Respondent's ability to offer services to the public.

The Respondent denied that it had failed to provide the required services or that the situation in Kutus was pathetic. It was further contended that the Plaintiffs had only paid 50% of the required charges for the year 2005, and have paid nothing in respect of the year 2006.

The applicants are seeking orders of interlocutory injunction. The principles upon which such an application can be granted were well enunciated in the celebrated case of **Giella v/s Cassman Bown & Co. Ltd [1973] EA 358** as follows:-

"First, an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience."

As indicated from the outset, the applicants' claim against the Respondent is essentially an injunction to restrain the Respondent from collecting the fees and levies because the Respondent have failed to provide the required services. The Respondent derives its power to levy fees and charges under section 148 of the Local Government Act which provides as follows:

148 (1) A local authority may:-

(a) charge fees for any licence or permit issued under this Act or any other written law or in respect of any person or matter, premises or trade, whom or which the local authority is empowered to control or licence;

(b) impose fees or charges for any service or facility provided or goods or documents supplied by the local authority or any of its officers in pursuance of or in connection with the discharge of any duty or power of the local authority or otherwise.

That Act also provides for corresponding duties upon the Respondent to provide services to people within its municipality. It should be noted in this regard that sections 168 to 176 of the Local Government Act (Cap 265) which provided a duty upon a local authority to establish and maintain sewerage and drainage work within its area was repealed by the Water Act No. 8 of 2002. Sections 178, 181 and 182 of the Local Government Act still remain in force. The Respondent would therefore still have statutory duties in respect of water supply, electricity supply and maintenance of public roads and streets within their areas. In this case the court is not being asked to compel the Respondent to perform its statutory duties under the Local Government Act. The court is instead being urged to take away or suspend the statutory power of the Respondent to levy fees and charges as provided under section 148 of the Local Government Act.

Nevertheless this court does not have the jurisdiction to take away statutory powers conferred on a body through an Act of Parliament. This court has only supervisory jurisdiction to ensure that such statutory powers are not ultra vires the constitution, and are exercised properly as provided in the statute and in

accordance with the rules of natural justice. Where a body fails to perform its statutory duties, this court has power to compel the body to perform its statutory duties as provided under the statute. As I have already stated this is not what this court is being asked to do. The fact that the applicants are paying fees and levies to the Respondent does not impose upon the Respondent a contractual obligation which this court can enforce through an interlocutory injunction. In my considered view therefore, the substantive claim of the Plaintiff/Applicants as laid out in their plaint does not show a prima facie case with a probability of success. The applicants having failed to satisfy the main principle upon which an interlocutory injunction can be granted, their applications dated 28th September 2005 and 26th April 2006 cannot stand. Both applications are accordingly dismissed.

Those shall be the orders of the court.

Dated signed and delivered this 22nd day of June 2006.

H. M. OKWENGU

JUDGE