



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

H.C.C. MISC. 159 OF 2002

KENYA NATIONAL CHAMBER OF COMMERCE PLAINTIFF

VERSUS

COUNTY COUNCIL OF MAKUENI DEFENDANT

R U L I N G

On 11th January, 2002 the respondent being county council of Makueni vide gazette notice no. 220 published the single business permit fee schedule for the year 2001 effective first July, 2001. The applicants herein being Kenya National Chamber of commerce and industry ltd., Thomas Mutuse, Samuel M. Muindi, Joseph M. Mateu and Benjamin Munywoki Mukula being the first to the 5th applicants became aggrieved by that notice. They moved to this court to apply for orders of Judicial review. They filed the notice to the registrar on 6.5.2002, filed a chamber summons application under order 53 rule 1(1) and 2 order 1 rule 8 of the CPR section 8(2) of the law reform Act cap 26 and section 3(1) of the Judicature Act. The reliefs being sought were leave to the applicants to file proceedings on their own behalf and on behalf of other members of the business community within Makueni District affected by Gazette Notice no. 220 of 11th January, 2002, leave to apply for an order of certiorari to quash the decision of the county council of Makueni to increase single business permit charges payable by members of the first applicant inter alia the 2nd, 3rd, 4th and 5th applicants for operating business in Makueni District, leave to apply for an order of prohibition to prevent the county council of Makueni from demanding the new fees as set out in gazette notice no. 220 of 11th January, 2002, that the grant of leave to operate as a stay of the enforcement of the new charges set out in gazette notice no. 220 of 11th January, 2002, that all directions be given and that costs of the application be provided for. The applicants appeared before court on 7.5.2002 before my brother Judge R. Kuloba who certified the application as being urgent, suspended arrests and ordered release of any persons arrested in that connection. The said orders were to remain in force for a period of 21 days and the rest of the prayers were ordered to be listed in the normal cause.

On 22.5.2002 they applicants appeared before my brother Judge Mr. Justice Mbitio who made orders granting leave to bring proceedings on behalf of the business community, granted leave to bring Judicial review proceedings, leave granted was to operate as stay of the new rates and the rates under schedule 7 to be paid pending the determination of the Judicial review proceedings, pending the determination of the Judicial review proceedings the respondent to stop arrests and prosecution of the applicants and members of the business community for rates and fees, costs in the course and the order to be advertised in the press.

The chamber summons filed on 7.5.2002 was accompanied by a verifying affidavit, statement of facts and annextures which were annexed to the statement of facts. There was no supporting affidavit in support of

the application to which the annexures should have been annexed, the verifying affidavit was sworn by Thomas M. Mutuse.

The substantive application was filed on 29.5.2002 by way of notice of motion. The reliefs being sought were an order of certiorari to issue to quash vide a gazette notice no. 220 of 11th January, 2002 the decision of the county council of Makueni to increase business permit charges payable by the members of the first applicant and members of the business community Makueni District, an order of prohibition do issue preventing the respondent from demanding the new fees as set out in gazette notice no. 220 of 11th January, 2002, an order of prohibition to issue preventing the respondent from causing the arrests and prosecution of members of the 1st applicant and the entire Makueni business community. That costs be provided for. It is noted that the substantive application also has grounds in support of the same set out in the body of the application numbered a-f. There is a supporting affidavit introduced for the first time with annexures annexed to it some of which were being introduced for the first time.

The substantive application was heard inter parties on 14.11.2002 and 29.11.2002 and this ruling is in respect of the substantive hearing. The grounds put forward by counsel for the applicants are that the increase of the fees payable from schedule 6 to schedule 9 is unjustifiable, they are in violation of the local government Act and they are contrary to the ministerial directives to the local authorities on how fees should be charged, the increase is oppressive to the applicants and they will have the effect of driving them out of their business, they were made contrary to the law of natural justice, that the action was purportedly taken under section 148 of the local government Act which is not supposed to be read in isolation but it has to be read in conjunction with section 203, 204 and 205. It is their submissions that it was cardinal upon the local authority to seek the views of the interested parties, stake holders and the business community which was never done. That the respondents had two options to take one of which was to publish an intention to enact by laws under section 203(3) in any of the local dailies with a wide circulation in the area. Such an action would enable the aggrieved people to lodge objection if they have any. The respondents herein just gave notice of the fees to be charged. That the respondents acted contrary to the ministerial directive marked TMM 3 which was to the effect that local authorities were required to adopt schedule 6 or 7 when levying fees and where there was a desire to levy fees in accordance to schedule 8 and above this had to be done in consultation with the local business community. The respondents herein did not comply with ministerial circular no. 1 of 2000 dated 20.4.2000. It is their submissions that failure to involve the local business community in choosing the schedule to be applied makes the action of the respondents invalid.

There is another reason why they are challenging the action taken by the respondents which is because the notice for new fees was gazetted on 11th January, 2002 and yet it purports to have a retrospective effect by being back dated to July, 2001. Immediately after publication the council embarked on arresting and prosecution of those who had not complied. It is their submission that the respondents having failed to comply with the law they cannot enforce their action. That their application is proper as they sought leave and were granted leave to file a representative action and they were also granted leave to apply for Judicial proceedings. It is further their submissions that the respondents have not suffered any loss because they were given an authority to charge fees according to schedule 7 but they have failed to do so as nobody has been brought to court for failing to pay fees according to schedule 7, that the respondents cannot challenge the orders granted when they did not challenge them before the Judge who made the same. Lastly that they rely on Nairobi Miscellaneous application no. 197 of 2001 between Nation Chambers of commerce and Industry Ltd. and 3 others to apply for order of certiorari and prohibition versus county council of Nyandarua where my brother Judge Mr. Justice Waki made findings at page 8 of the said ruling that:-

“(i) the resolution of the council were proper.

(ii) to become valid and operational they required the consent of the minister for local government either generally or as relates to the specific charges intended to be increased.

(iii) That no consent of the minister had been annexed in that regard and the gazette notice no. 7712 published on 10.11.2000 does not refer to the ministers consent.

(iv) The resolution therefore remain inchoate and cannot therefore be used to impose the increased charges referred to; until they are validated by the ministers consent the only valid charges in existence would be those under column 7 of the schedule which are not challenged by the businessmen and can be enforced by the council.”

On the basis of the foregoing findings my learned brother Judge found that the complaint of the businessmen that the law was not followed to the letter in changing tariffs was a valid one. He added it is upto the council to provide, evidence of approval of its resolution by the minister until then the order sought in the notice of motion dated 26th March, 2001 were granted with costs to applicants.

On the basis of the above authority the applicants content that the action by a provincial local government officer does not amount to a ministerial approval. They content there was no ministerial approval for the action taken by the respondents and so the gazette notice complained of involving increase of the fees complained of was in valid and of no effect. They urge this court to allow their application with costs to them.

The respondents have opposed the application on the grounds set out in the replying affidavit, oral submissions in court, annexures and legal authorities supplied and the major points relied upon by them are:-

1. That the format used on the heading for the notice to the Registrar, chamber summons application, verifying affidavit and the substantive notice of motion is wrong.

(ii) When the applicants appeared before court for the first time on 7.5.2002 leave was not granted to operate as stay and this meant that the issue of leave to operate as stay was to be considered during the substantive application hearing and instead of that being the case the applicants went before another Judge and obtained orders among them one for leave to operate as stay which was obtained without a material disclosure to the court that leave to operate as stay had been declined in the first instance.

(iii) The prayers sought in the substantive notice of motion are not similar to those sought in the chamber summons when leave was being sought as there were two payers in the chamber summons while the substantive notice of motion has 3 prayers.

(iv) Order 53 CPR requires that grounds in support of the application be set out in the statement while herein the grounds were set out in the body of the application being introduced for the first time.

(v) The notice of motion was not accompanied by the statement of facts as required by order 53 CPR and instead it was accompanied by an affidavit which had not been introduced at the time the chamber summons seeking leave was presented to the court. (vi) The substantive notice of motion also has no verifying affidavit as it is required by law.

The respondents referred the court to the **case of Farmers Bus Service and others versus The Transport Licensing Appeal Tribunal (1959) EA 779** where it was ruled that once leave to apply for Judicial review has been granted the heading of the substantive application should be headed Republic versus so and so exparte so and so.

Turning to the second leg of the application it is also contended that the same cannot stand.

(i) The respondent council acted under section 148 of the local government act and passed resolutions attached to the replying affidavit which received the approval of the relevant minister.

(ii) That the respondents were operating at a loss and had to adopt a higher budget.

(iii) They issued public notices pinned in all Markets followed by gazette notice no. 220 of

11.1.2002. It is their submissions that the notices they pinned in all the local markets acted as advertisements in the local dailies. (iv) It is their submissions that the traders started paying the new fees without any problem but then trouble makers caused them to stop paying the new rates. It is their stand that applicants should have moved the court to have the whole local government Act struck out.

(v) That the authority relied upon by the applicants involving Nyandarua County Council is immaterial because Nyandarua county council did not show proof that they had passed resolutions which resolution had met the approval of the local government minister.

(vi) That they were not bound to rely on the ministerial circular directing that the local community be consulted as there is no provisions in the whole local government Act where by the local community are to be consulted in any way. It is their submissions that the local community is consulted through the elected local councillors who are their representatives. It is further their submissions that they followed the correct procedure by passing resolutions having them approved followed by gazette. That section 208 of the local government Act gave them Powers to levy fees within their area of jurisdiction.

In reply counsel for the applicants reiterated their earlier submissions and stressed the following points.

(i) That the format used was the correct one as it had been used in the authority they cited to court earlier on, their stand is that they followed order 53 CPR to the letter.

(ii) That no. (i) above notwithstanding it is trite law that a defect in procedure does not spell death for a matter and if there is any defect noted in their application the same can be excused by this court and they urge this court not to rely on technicalities to defeat their application.

(iii) That the issue of leave was never canvassed before justice Kuloba and refused. All that he dealt with was to certify that the application was urgent in his capacity as a duty Judge and then refer the matter to the Judge who was to deal with the application substantively.

(iv) That there is no need to seek to have the whole local government Act struck out as they were not seeking to oust the jurisdiction of the council. All that they are saying is that the council did not act within the law and so the action is wrong. It is their stand that section 148 of the local government Act cannot be read in isolation and it has to be read in conjunction with other provision of the same Act.

That the Act specifically talks of the council getting consent from the minister and not an official from the ministry as was the case herein. They also contend strongly that it is wrong to bring into existence any law which is retrospective in nature as the gazette notice of January, 2002 purports to do.

(v) That it is still their stand that the legality of the order granted by Justice Mbiti cannot be attacked at this stage as the respondents have not moved the court for review.

On the courts assessment of the facts in this application it is clear that the main grievances of the applicants in summary are:-

1. The grieving gazette notice has a retrospective effect contrary to law. Counsel for the respondent did not offer any submissions on this aspect. Neither did they quote any provision of law which empowers them to make rules, with retrospective effect. It is the finding of this court that the purpose for requiring publication is to ensure that fee or levies were to become effective from the date of publication and it was therefore wrong to back date the effective date of the new levies or fees to July 2001 where as the publication was in the year 2002. This was a genuine and valid complaint.

The second complaint was that the council acted arbitrarily contrary to the ministerial circular annexed

already referred to in this ruling which gave guidelines that the councils were to seek views from those concerned. The respondents answer to this was that the law under which they were acting does not require them to seek the views of the business community. It is the finding of this court that a ministerial circular is not a regulation, in order to be given the force of law. What was required for the minister to do if he wanted that policy to be adopted was to make regulations under the relevant section 148 whereby the regulations require that the community to be consulted. In the absence of such a regulation the respondents were not obligated to take into consideration the ministerial circular relied upon by the applicants. I agree with the submissions of the respondents that the local business community is represented by the elected councillors and since they are the ones who passed the by law approving the fees complained of it is clear that they councillors represented the views of the business community they represent and so the ministerial circular though not a regulation was not violated in any way. The 3rd complaint of the applicants was that the action complained of did not receive the ministerial approval as it is required by law. The stand of the respondents was that the approval was there. This was the holding in the authority cited to the court by applicants decided by my brother Judge Mr. Justice Waki. The respondents agree that ministerial approval is essential. I have had occasion to peruse the replying affidavit of the respondents sworn by Daniel Muia Maithya filed on 7.6.2002 and I find that all it does is that it attacks the competence of the notice of motion under review. It also talks of there having been minutes of the meetings in which the new levies were discussed and approved but it does not mention the date when the minister approved the same.

An annexure DMM3 signed by a Mr. Muthuri C. M. for Provincial Local Government Officer does not quote the date when the Minister approved the estimated or the reference number of the Minister's approval. In any case DMM 3 talks of approval of estimates and not approval of the fees and levies structures which appeared in the gazette notice. Secondly the gazette notice itself does not quote the date the Minister approved the minutes. It is the finding of this court that this was a genuine complaint. The 4th complaint was that there was no publication of the intention to enact by laws in one of the local dailies with a wide circulation in the area. Counsel for the Respondents submitted that they pinned notices in the markets in their area of Jurisdiction but he did not submit that that satisfies the requirements of the Act. The requirement of the Act is to have that intention published in the Kenya gazette or the registered daily news papers having circulation in the area like Daily Nation, Standard, Kenya times etc. for wide publication and for the community to take note of the same and raise objections if any. It follows that pinning of notices in markets does not satisfy the requirements of the Act. It is the finding of this court that this complaint was genuine.

The foregoing notwithstanding the respondents have argued that the application is bound to fail for lack of or failure to comply with the laid down rules in order 53 of the CPR. The points raised by them are already on the record elsewhere in this ruling. I have taken an over view picture of the complaints raised by the respondents and considered them in the light of the provisions of order 53 of the CPR and the findings of this court is that though the applicants had genuine grievances their application cannot pass the test set in order 53 of the Civil Procedure Rules. It is correctly submitted by counsel for the respondents that the procedure under order 53 CPR and the law reform Act is unique in itself. It is also special and other provisions of the civil procedure Act cannot be imported into it. I do agree that there are errors noted in the proceedings before this court which go to the root of the entire application destroying it in the process. I also agree with the submissions of the respondent's counsel that there are no safety valves in order 53 CPR. It is either complied with or not complied with. I now proceed to enumerate the errors noted as here under: -

1. **Heading: This was settled in the case of Farmers Bus Service and others versus the Transport Licensing Appeal Tribunal (1959) EA 779** where the directive is that when seeking leave the applicant has to apply in his name but after leave has been granted the substantive application has to be brought in the name of the republic. This was not the case here. The heading does not comply with the approved heading in the case cited of Farmers Bus. It is the finding of this court that the heading of the substantive application was wrong and it matters not that a sister court has overlooked this fact in another authority relied on by this court.

2. **Similarity of reliefs sought in both the chamber summons seeking leave and the substantive**

application. It is a requirement under order 53 Civil Procedure Rules that reliefs intended to be sought when seeking leave are the same ones to form the basis of the main reliefs in the substantive application. A perusal of the two applications herein shows that the chamber summons had only two reliefs while the substantive application has 3 reliefs. It is evidently clear that the 3rd relief in the substantive application is new or fresh and the same was presented without leave first having been obtained in respect of the same and this is irregular.

3. Accompanying documents

Order 53 Civil Procedure Rules requires that when seeking a process of this nature the applicant is required to lodge with the court when seeking leave the following documents

- (i) Notice to the registrar which was complied with and regularly filed.
- (ii) Statement setting out the description of the parties, the reliefs sought and the grounds upon which the relief is being sought
- (iii) Verifying affidavit
- (iv) Affidavits together with annexures.

Any new affidavits or documents have to be introduced with the leave of the court. It is a further requirement of this rule that the documents lodged with the court when seeking leave are the same ones which are to accompany the filing of the substantive notice of motion. A perusal of the record shows that this procedure was not complied with because:-

- (i) The substantive notice of motion has grounds in the body of the application marked a – f which grounds were not in the body of the chamber summons application. These grounds are erroneously put in the body of the application when the law requires that they be contained in a statement of facts
- (ii) The substantive application is not accompanied by a statement. The statement which was presented to court when applying for leave should have accompanied the substantive application.
- (iii) An affidavit with some annexures were introduced to accompany the substantive application which affidavit had not been lodged together with the chamber summons application when seeking leave. It means that those papers were introduced without leave of court and were therefore irregularly on record. Also no verifying affidavit accompanied the substantive application.

3. Mixing up of procedures

As noted earlier on the procedure under order 53 Civil Procedure Rules is unique to itself and it is not supposed to be mixed up with other procedures under the civil process. It is noted that leave to file a representative action was incorporated in the application for leave to apply for judicial review. That procedure is not provided for under Order 53 Civil Procedure Rules. It follows that this was erroneous. It should have been applied for under a separate application before presenting the application to court for leave to apply for judicial review.

There were other errors committed by the court whereby the relief for stopping arrest and prosecution of defaulters and an order directing the respondent council to charge and levy fees using a particular schedule granted by the courts which handled the matter in the first instance were granted without a basis.

The requirements of order 53 Civil Procedure Rules is that when leave is being sought it is only leave which can be dealt with and the issue of stay. The other reliefs besides those provided for under Order 53 Civil Procedure Rules are not to be considered . Herein additional reliefs were granted alongside leave to apply for judicial review. I do appreciate that no effort was made by the respondent to try and upset those orders and I also note that this is not an application for review and thirdly this court has not been asked to

review those orders. However since they touch on lack of form this court is not precluded from saying that they were granted without jurisdiction as the procedure is not provided for under Order 53 Civil Procedure Rules.

Counsel for the applicants has urged the court to go for the substance and overlook the technicalities. I have considered this fact and I agree with the submission of the respondent's counsel that there is no safety valve or a saving rule under order 53 CPR whereby a court can ignore irregularities. It is therefore the finding of this court that although the applicants had genuine complaints their action is bound to fail for failure to comply with the provisions of Order 53 Civil Procedure Rules as set out above in this ruling.

The application is therefore dismissed with costs to the respondents.

Dated, read and delivered at Machakos this 21st day of February 2003.

R. NAMBUYE

JUDGE