REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

H.C. MISC. APPL. NO. 1517 OF 2001

JACQUELINE RESLEY ……. APPLICANT

V E R S U S

THE NAIROBI CITY COUNCIL …… RESPONDENT

J U D G M E N T

The Notice of Motion before me challenges by way of judicial review the decision of the Nairobi City Council to publish a draft valuation Roll 2001 and to levy the rates for 2002 based on the said roll. As the matter affects a large section of Nairobi population, I shall make my judgment in simple language to avoid misunderstanding or misinterpretation.

One Jacqueline Resley (**hereinafter** /referred to as **'The Applicant'**) is a registered owner of a plot of land bearing number L.R. 2951/281 Kabete situated in Nairobi.Her claim to be an owner of the said land is not contested or questioned in this matter either in the replying affidavit or in supplementary affidavit of one Mr. Joel Too sworn on behalf of the Nairobi City Council ***(herein after referred to as 'The City Council***). Despite that Mr. Omotii contended that the Applicant has no locus standi either to present or to prosecute this motion. He contended that she has described herself as '***a rateable owner'*** in the Notice of Objection filed by her, but has not substantiated her statement by producing Title Deed or any other relevant document. He relied on paragraph 1 of the Amended Statement filed in support of her Chamber Summons seeking ex-parte leave wherein she stated that she craved leave to produce her title deed at the substantive hearing of the application.He stressed that as title deed is not produced, she loses her locus standii.!!! Mr. Omotii's submissions although made seriously lacks the sincerity and credence. The Applicant did not produce the Title obviously and apparently when she found that her claim of ownership is not questioned. It is in short and in effect admitted. She has in my view clearly shown sufficient interest in this matter and has locus standii to present and prosecute this motion.

Before I deal with similar technical and misplaced contention raised by the Counsel, I must express my views that the members of the Bar should be discouraged to take up issues at least in the applications of this kind which are technical in nature and not based on facts and against the general principles of law well established in our jurisprudence.

Secondly Mr. Omotii submitted that this court has no discretion to grant leave to amend statement of facts at the time of hearing of an application for ex-parte leave. He forgot immediately that he has relied on the amended statement to substantiate his earlier submissions on locus standi.Anyway he relied on Order LIII rule 4 (2) of the Civil Procedure Rules to substantiate this contention. That sub-rule expressly provides for discretion to the court to allow amendment of statement under the circumstances stated therein. Mr. Omotii's views are that as specific discretion is given in that sub-rule, the court is thus barred from giving the leave for any amendment before the inter parte hearing. In my humble view, the interpretation sought by Mr. Omotii is against the principles of fairness and justice.The Court while granting an ex-parte order

is expected to be more vigilant and if any clarification or further facts are needed before the court can rightly arrive at the decision, those facts or clarifications must be on record. In any event the provisions of the aforesaid sub-rule definitely do not curtail the general powers of this court (which is a court vested with unlimited original jurisdiction and inherent powers) to grant leave to amend the pleadings at any stage of the proceedings. I shall, therefore, reject the second point raised by Mr. Omotii.

Now I shall proceed to consider the application on merits.

There emerged some undisputed or indisputable facts from the record of the application. The Applicant is a rateable owner of a plot of land situate within the area of City Council. On 31st October, 2001 the City Council published in a Daily Newspaper a notice under the Valuation for Rating Act (Cap 266) providing inter alia that the draft valuation Roll was laid down before the full council of the City Council on 9th October, 2001 and was open to public inspection. It also invited all the aggrieved persons to lodge an objection within 28 days of the date of publication of that notice.Another notice was published by the City Council in East African Standard of 14th December, 2001. This notice was under Section S. 15(1) and 16 (1) of the Rating Act (Cap 267) and provided inter alia that the City Council has levied the rates of 2002 which has become due on 1st January 2002 and payable on 31st May, 2002. Both these notices were issued by the Town Clerk of the City Council Mr. Godfrey Mate. For abundant caution, the Applicant and, as it seems, others filed their notices of objections. It can be safely assumed from the facts presented before me that the City Council has not considered the objections before the second notice was published.

However, the Applicant came before this court and has challenged the validity of the said notices and the decision of the City Council to publish the Valuation Roll of 2001 and levy the rates based on that Roll. Her prayers are reproduced. They are for:-

1. An order of Certiorari to remove into this Court and to quash the decision of The Nairobi City council to publish the Draft Valuation Roll for 2001 and to levy rates for 2002 with effect from the first day of January, 2002.

2. An order of prohibition to prohibit the Nairobi City Council from Levying rates under the 2001 draft Valuation Roll for the City of Nairobi.

3. That all necessary and consequential orders or directions be given.

4. An order that the Respondent do pay the costs of these proceedings.

After the application was filed and brought to the notice of as well as served on the City Council, it realized that it had omitted to conform to the provisions of Section 30 of the Valuation of Rating Act (***herein after referred*** to as '***the valuation Act'***) and Section 26 of the Rating Act. It tried to overcome that invalid action by publishing the notices in Kenya Gazette of 25th January, 2002. They are:-

(1) Gazette Notice No. 472 under the Rating Act and dated 1st December, 2001 and

(2) Gazette Notice No. 473 under the Valuation Act and dated 11th October, 2001.

Except for the insertions of dates, they are similar to those published in Newspapers as stated earlier. The Newspaper notices bore no dates. I am not told why the notice levying the rates under the Rating Act precedes that under the Valuation Act.

The City Council has averred these facts of publication of notice and the purported rectification of its two omissions in the affidavits. It has further averred by way of a statement that it has been contemplating to constitute a valuation court since January, 2002 and that *"**when this court is set up, the Applicant's notice of objection dated 21 st November, 2001 and those of other objectors lodged before the publishing of Gazette Notices Numbers 472 and 473 will be deemed as duly lodged and will be considered on their merits"*** (emphasis mine).

Based on these facts the diverse submissions were made by respective counsel. Mr. Omotii during his submissions stated and I quote:-

"Newspaper notices complied with the provisions of both the

Acts when the no tices were gazetted on 25 th January, 2002.

Since the present applicant sent her objections prior to the Gazettment

the Respondent has confirmed that her objections and those of other

objectors submitted earlier will be duly considered by the valuation

cou rt when it will be constituted ."

With these so to say confessionary submissions, (***and I admit Mr. Omotii did not have any other option)*** and also on similar averments made in the replying affidavits, an irresistible and incontestable presumption could be drawn that the source and validity of the existence of the news paper notices are the gazette notices.

That is to say prior to 25th January, 2002 there were no notices to the rateable owners of Nairobi.

To add insult to injury, the City Council now, in a verbose and purportedly generous attitude, announces that the objections made prior to the Gazettment of the notices shall be considered by a Valuation Court which is still to be constituted!!!. It has admitted that the notices in the Newspapers prior to the Gazettment were not in existence and were invalid. Despite that, it now purports to impose an obligation on or to give a specific directive to the yet to be constituted valuation court. In short, it tries to tell the valuation court what to do when constituted absolutely forgetting that that court is a judicial tribunal and has to function independently without any interference or directions from outside.Can any law abiding or Law fearing person repose his/her trust in the valuation court who has been told what to do while in its embryo (if that is the state where it is.) To say the least, I am exasperated with the slip-slod and carefree manner in which the City council has purported to follow the provisions of both the Acts which affect the proprietory rights of Nairobi residents. It has exhibited total disregard of the spirit and provisions of those very important Acts.

Be that as it may, let me take up the submissions that by publishing the notices in Gazette the City Council has put in place all the procedures envisaged by the Acts. Let us see then what these two notices are all about.

Even though it is the later notice, I shall have to take up the notice no. 473 first, because it is supposed to be published prior to that under the Rating Act. It is under the Valuation Act.

I repeat it is published on 25th January, 2002 although it is dated 11th October, 2001.

It invites the aggrieved persons to lodge their objections within 28 days.

The last paragraph of the notice stipulates and I quote:

- " Parties aggrieved are requested particularly to note

that "no person shall be entitled to urge any objection

before the Valuation Court unless they shall have

first lodged such notice as aforesaid."

The notice mentioned is the notice of objection.

I go now to the second notice which is dated 1st December, 2001 and is simultaneously published with the first notice on 25th January, 2002.This notice is as aforesaid, under sections 15 (1) and 16(1) of the Rating Act and it pronounces that the rates are levied as published in Valuation roll of 2001. The rates have become due on **1st January, 2002** and are payable by 31st May, 2002. (*emphasis mine*).

It further states that the rates are a debt to the City Council. That means a liability of the rateable owner is created effective from 1st January, 2002. But that liability has been notified or intimated as per law only on 25th January, 2002. The notice is creating the debt ex- post facto or in simple words a liability is created retrospectively. A legal obligation which was not there on 1st January, 2002 is created on 25th January, 2002 by the Gazette Notice. That clearly offends the principles of natural justice.

I shall adopt the observation made by Lord Green N.R. in the case of Craig V. Kanseen (1943) I AII E.R. 108 at 11B.

> ***"…… the idea that an order can validly be***
>
> ***made against a man who has had no notification of any***
>
> ***intention to apply for it is one which is never adopted in***
>
> ***England. To say that an order of that kind is to be treated***
>
> ***as a mere irregularity and not something which is affected***
>
> ***by a fundamental vice, is an argument which, in my opinion,***
>
> ***cannot be sustained."***

Furthermore here is a situation wherein the City Council publishes a draft Valuation roll and levies the rates thereon on the same day. The intimation or requirement of lodging of the objections thus is thrown out of the window. Effectively there are no objections received before the levy of rates .

The provisions of the Valuation Act and Rating Act definitely and clearly do not envisage the procedure now purported to have been followed by the City Council.

In order to have the clearer view of the provisions of those Act I reiterate them here. Sections 9, 10, 11, 16 & 17 of the Valuation Act:-

> **9. (1)** ***When a draft valuation roll or draft supplementary***
>
> ***valuation roll has been completed, the valuer shall sign***
>
> ***the roll and insert therein the date of completion thereof,***
>
> ***and shall transmit the roll to the town clerk.***
>
> **(2)** ***As soon as may be after a draft valuatio n roll or draft***
>
> ***supplementary valuation roll has been transmitted to him***
>
> ***by the valuer, the town clerk shall lay the roll before a meeting***

of the local authority for public inspection, and any person may, during ordinary business hours, inspect it and take copies or extracts from it.

(3) The town clerk shall publish notice in respect of every draft valuation roll and draft supplementary valuation roll that it has been so laid and may be inspected, and such notice shall state the manner in which a nd the latest date by which objections to the same may be made.

(4) Every local authority shall, within twenty - one days after the laying before a meeting of the local authority of a draft valuation roll or draft supplementary valuation roll, send to every ra teable owner of a rateable property comprised in the roll a notice of the valuation thereof inserted in the roll, whether or not the new valuation makes any change.

10. *(1) Any person including the local authority or any person generally or specially authorized in that behalf by the local authority who is aggrieved -*

(*a)* *by the inclusion of any rateable property in, or by the omission of any rateable property from, any draft valuation roll or draft supplementary valuation roll; or*

(*b)* *by any value ascribed in any draft valuation roll or draft supplementary valuation roll to any rateable property, or by any other statement made or omitted to be made in the same with respect to any rateable property, with the Town Clerk at*

any time before the expiration of twe ntyeight days from the date of publication of the notice referred to in section 9 (3).

(2). No person shall be entitled to urge an objection before a valuation court unless he has first lodged the notice of objection; but it shall be competent for a valuation court to agree to consider an objection although notice thereof has not been given in accordance with this section.

(3). The Town clerk shall, within twenty - one days after the date on which a notice of objection is lodged with him, send a co py thereof to the rateable owner of the rateable property to which the objection relates, if that person is not the maker of the objection.

11. (1) If on the expiration of the period of twenty eight days referred to in section 10 (1), no objections have been received, or if all objections duly received have been withdrawn before the day fixed for the first sitting of the valuation court, the town clerk shall endorse upon the draft valuation roll or draft supplementary valuation roll and sign a certificate to that effect.

16. (1) Every valuation court shall, at sittings duly called by the clerk, consider the objections made under section 10.

(2) Not less than seven days before the day fixed for the consideration by a valuation of any objection, the c lerk shall

send notice of the date to the persons mentioned in subsection (3);

but it shall be lawful for a valuation court to hear any objection at shorter notice if all the persons entitled to be heard on the objection consent.

(*3)* ***On the consideration of a n objection the local authority and the persons who lodged the objection and the rateable owner of the rateable property which is the subject of the objection may appear and be heard, either in person or by an advocate or accredited representative, and may examine any witness before the court, and may call witnesses.***

(4) After hearing the persons mentioned in subsection (3), or such of them as desire to be heard, the valuation court shall confirm or may amend the draft valuation roll or draft supplemen tary valuation roll, by way of reduction, increase, addition or omission, as to it may seem just.

(*5)* ***Where a valuation court has amended a draft valuation roll or draft supplementary valuation roll in accordance with subsection (4) it shall be lawful for the court to make any further amendment of the roll, as to it may seem proper, in consequence of such first - mentioned amendments:***

Provided that -

(*i)* ***no such further amendment by way of increase or addition shall be made unless any rateable owner concerned has been given at least fourteen days' previous notice of the proposed amendment and of the date of the sitting of the court at which such amendment will be considered; and***

(ii) every such rateable owner may lodge an objection to such further amendment writing, so as to reach the clerk not less than three days before such date.

6. The valuation court shall consider the

objections made under paragraph (ii)

of the proviso to subsection (5), and the

provisions of section 10 (2) shall apply,

mutatis mutandis, i n respect of those objections.

17. (1) As soon as may be after all objections have

been heard and determined, and after any amendments

have been made in a draft valuation roll or draft

supplementary valuation roll, the chairman of the valuation

cou rt shall endorse upon the same and sign a certificate to that effect.

(2) A draft valuation roll, on being signed and certified by the Chairman

of a valuation court under subsection (1), or by the town clerk under section 11,

shall be the valuation roll for the area in respect of which it was made.

(3) ***A draft supplementary valuation roll, on being signed and certified***

by the Chairman or a valuation court under subsection (1), or by the town

clerk under section 11, shall be the supplementary valuation roll for the

area in respect of which it was made, and shall be deemed thereafter for

the purposes of this Act to be part of, and to be included in, the valuation roll.

(4) The town clerk shall publish notice that the valuation or supplementary

valuation roll has been signed and certified under this section, and the notice

shall state the manner in which, and the latest date by which, appeals may be made.

Section 15 of the Rating Act stipulates as hereunder:-

15.(1) Every rate levied by the rating authority under this Act shall

become due on the first day of January in the financial year for which

it is levied and shall become payable on such day in the same financial

year as shall be fixed by the rating authority, of which day, and of the

amount of which rate, the rating authority shall publish at least thirty

days' notice.

(2). ***For the purposes of the Act, the valuation roll or any supplementary valuation in force on the day on which any rate is payable shall be conclusive evidence of all matte rs included in such roll.***

The above provisions read with earlier provisions of the Valuation Act clearly show that the legislature envisaged a fair and reasonable procedure to be undertaken by a local authority before and after the Draft Valuation roll is made, published and acted upon. Section 3 of the Valuation Act provides that the local authority should make Valuation of the properties within its area at least once every ten years. During this period the authority can put all the required machineries in place before draft valuation Roll is published and objections invited.

Any authority should reasonably expect that some of the rateable owners shall object to the Draft Valuation Roll and the tribunal to hear those should be constituted appropriately and as per the spirit of the Acts, all efforts having been made or shown to have been made so that before the date by which the rates are payable the objections are heard and/or determined. The least the City Council should have done was to set up the prerequisites of establishing the valuation court. A simple reading together of all the provisions relating to the procedure of valuations and imposition of rates supports my observation. Any ratepayer shall reasonably expect City Council to follow that procedure.

Despite all the omissions and invalid actions by the City Council Mr. Omotii relied heavily on section 18 of the Valuation Act and vigorously stressed that the City Council can go ahead with levying rate non fulfillment of the provisions of law by the City Council notwithstanding.

The City Council apart from laying the Draft Valuation Roll before its full council (this fact I am presuming from the statement made in the notices although nothing is before this court) has not observed any provision of either of the Acts. It is also contended that there is no time limit provided in Valuation Act for the constitution of the Valuation Court and thus the City Council cannot be taken into account for its non-constitution. He grudgingly conceded , however, that when there is no time provided, it should be done within reasonable time but fell short of what, in his view, is that reasonable time.I am also not told how far the City Council has gone in constituting the Court or how soon it is expected to do so. It simply waves a placard that it has all the intention to constitute one. However, on the other hand it definitely expects all the rate payers to pay the new rates levied under the aforesaid circumstances. I am also told that in any event the constitution of the Valuation court is an administrative action and this court has no power to tell the City council when to constitute one. This submission is made against the contentions that this court has power to declare the other actions of the City Council invalid like decision to publish a Valuation Roll or to levy the rates but is told to keep off the issue of constitution of a court which, if it was constituted properly as per the procedure laid down in and spirit of the two Acts, could have saved this court the agony of hearing and determining this application.Nothing can be more absurd or farther (when this point is made) from the real purposes for which the powers of Judicial review are vested in this court.

Mr. Omotii also contended that rateable owners and the applicant in particular shall not suffer any prejudice if they pay the demanded rate. He relied on section 28 of the Valuation Act which stipulates for refund of the excess rates paid if the Valuation court, if and when constituted, determines in their favour.

That may be so, but, in this case, I shall not hear this from a City Council which has openly and fragrantly breached the spirit and provisions of laws, has acted capriciously and in total violation of the principles of natural justice and which has also stated before this court that it shall have to ground to a halt all its services if the new rates are not paid.Does there lurk a malafide or ulterior motive in imposing the new rate? Any person may be forgiven if he holds that view.

In any case I shall have to go back to the notices. The notices which are questioned by the Applicant admittedly are illegal and void ab initio and the City Council cannot now deny that the Gazette notices do nothing but to act upon those invalid notices ex post facto . Either way, the notices are invalid, improper

and void and cannot be relied upon or acted upon by the City Council.

While determining this application, I feel the same way as ought to have been felt by Court of Appeal when hearing and determining the civil appeal NO. 39/1997 between R.V. The Commissioner of Co-operatives & another.Instead of admitting the mistakes the City Council went on to commit further invalid acts. This City Council thus has to be prevented from so doing in the cause of fair play and justice.

I can simply sum up thus that the City Council acted unlawfully, which is admitted by it, by publishing notices in newspapers. The Applicant and/or any other person affected by it was entitled to have it set aside ex debito justitae . That action was a nullity and was not curable and could not be cured by publishing the very notices in Gazette for reasons stated hereinabove. The applicant was entitled to set aside those notices without much ado.

To the facts of these cases I can assimilate the observations made by Lord Denning in the case of Macfay V. United African Ltd. (1961) 3 ALL E.R. 1169 at 1172. He stated thus and I quote.

> ***"If an act is void, then it is in law a nullity and not a mere***
>
> ***irregularity. It is not onl y bad but incurably bad. ……..***
>
> ***And every proceeding which is founded on it is also bad and***
>
> ***incurably bad. You cannot put something on nothing and expect***
>
> ***it to stay there. It will collapse."***

The courts have refrained from categorizing the actions which are irregularity and those which are nullity, and I shall make specific mention to the following passage of Lord Diplock in the case of Isaacs V. Robertson (1984) 3 AII E.R. 140 at 143.

> "***The Judges in cases that have drawn distinction***
>
> ***betwee n the two types of orders have cautiously refrained***
>
> ***from seeking to lay down a comprehensive definition of defects***
>
> ***that bring an order into the category that attracts ex debito justitiae***
>
> ***the right to have it set aside, save that specifically it includes orders***
>
> ***that have been obtained in breach of rules of natural justice."***

The above observations have been adopted with approval by our Court of appeal in Omega Enterprises (K) Ltd v/s KT D C & 2 Others Civil Appeal No. 59/**93** (*Unreported)*.

This applicant has come before me with her own grievances. She is definitely included in the list of rateable owners who are also asked to pay the levied rate. The city Council has sought to bring in this matter the other rateable owners by stating that their objections filed earlier to the gazettment of notices also will be deemed to have been duly filed. They are thus sought to be included in this matter by the City Council. In any case, the applicant has come before this court to challenge the validity of the notices of the newspapers and consequently the publication of Valuation roll 2001 and levying of rates for 2002 based on that roll.She has all the right to do so and to seek the remedies available to her. If by so doing the effect of her remedy spills over and benefits also other rateable owners, so be it. It shall be as a direct result of the prayers validly and successfully sought by the applicant. It is also a well embedded principle that the court's right to make appropriate orders asked for shall not be taken away without express provisions and that principle also applies to remedies by way of certiorari, mandamus and prohibition

When I have found that all the notices published by the city Council are invalid I have to grant the prayers as made by the applicant. The upshot is that I grant prayer nos 1, 2 & 4 of the notice of motion dated 11th January, 2002.

In simple words I make following orders:-

1. The decision of the Nairobi City council to publish the Draft Valuation Roll for 2001 and levy rates for 2002 with effect from 1st day of January, 2002 is quashed.

2. The Nairobi city council is prohibited to levy rates for 2002 based on the valuation Roll of 2001.

3. The Nairobi City Council can and shall levy rates on the basis of old rates.

4. The Nairobi City council shall pay to the applicant costs of the application.

Dated and delivered at Nairobi this 11th day of March, 2002.

K. H. RAWAL

J U D G E