

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
JUDICIAL REVIEW NO. E006 OF 2021

**IN THE MATTER OF AN APPLICATION BY JOSEPH
MBUGUA NGUGI TO APPLY FOR AN ORDER OF
CERTIORARI & PROHIBITION**

AND

**IN THE MATTER OF ARTICLE 23 AND ARTICLE 47
OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW
REFORMS ACT CHAPTER 26 OF THE LAWS OF
KENYA**

AND

**IN THE MATTER OF ORDER 53(1) OF THE CIVIL
PROCEDURE RULES**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NAKURU COUNTY GOVERNMENT.....

RESPONDENT

JOSEPH MBUGUA NGUGI..... EX PARTE

APPLICANT

JUDGMENT

1. By a Notice of Motion application dated 2nd August 2021, brought under the provisions of section 8 and 9 of the Law Reform Act, section 1A, 1B and 3A of the Civil Procedure Act, Order 53 Rule 3 of the Civil Procedure Rules, section 4, 5,7 and 8 of the Fair Administrative Action Act 2015 and all enabling provisions of the law, the ex-parte applicant, is seeking for the following orders that:

a)An order of Certiorari to quash the respondent's decision through its officials, agents, servants and or employees to impound

and ground the applicant's motor vehicle motor vehicle registration No. KCM 013A and to impose an illegal cess levy and towing charges on the application made on the 19th July 2021.

b) An order of Prohibition prohibiting the respondent from imposing, implementing and/or enforcing the illegal cess levy of Kenya shillings seventeen thousand (Shs. 2,500/-) and towing charges demanded from the applicant by the respondent.

c) That the costs of this application be awarded to the applicant.

2. The application is based on the ground thereto, the statutory statement and the verifying affidavit of the applicant annexed to the chamber summons application dated 2nd July 2021 and filed in this court on 23rd July 2021.

3. It is the applicant's averment that, he is the owner of a motor vehicle; Tata lorry registration number KCM 013A which he uses in his transportation business, to transport among other things sand to different counties.
4. That, on 19th July 2021, his driver was transporting sand from Narok County through Nakuru County when the respondent's officer impounded the said motor vehicle along Mai Mahiu Road alleging that the cess levy of, Kshs 2,500 had not being paid.
5. That, despite his driving producing a receipt issued by Narok County's representative showing that he had paid the cess levy, the respondent's representatives forcefully and without consent towed the said motor vehicle to Mai Mahiu Police Station where it is currently grounded.
6. Further, that in the process of towing the motor vehicle, the respondent's officials damaged it, assaulted the driver and stole his personal

belongings including; Kshs 6,250 and original receipts issued by Narok County Officials in payment of cess levy.

7. That the respondent's servants, agents and/or employees continue to harass, intimidate and vilify him using police officers to coerce him to pay the illegal cess levy and towing charges before the motor vehicle is released to him.

8. The applicant argues that the decision by the respondent to impound and ground his motor vehicle whilst demanding for payment of illegal cess levy and towing charges is illegal and unlawful for reasons that:

a) The Applicant has not been given a chance to answer to allegations if any levelled against him.

b) The Applicant had paid the requisite cess levy allowing him to transport sand on the material

day and was issued with a Receipt Serial No. 37192

c) In any event the Applicant has not been informed, officially, or otherwise of any contraventions of the law warranting him to pay the sum being demanded.

d) The actions of the Respondent are discriminatory since the Applicant's Motor vehicle was not the only one that was transporting sand at the material time.

e) The Respondent's agents, servants and or employees have not informed the Applicant, officially or otherwise if they intend to charge him in court with any offence that he may have committed and continue to ground his motor vehicle for no apparent reason;

f) The Respondent, due to the foregoing, intend to hold the Motor vehicle in question in perpetuity without affording the Applicant an

opportunity to defend himself why he should not pay the illegal cess levy and towing charges hence continuously injuring the Applicant economically;

g) It is equally unclear whether the Respondent's officials in their callous behaviour were acting for and on behalf of the Respondent or on their own accord and for their personal benefits; their actions borders on abuse of administrative authority;

h) The Supreme Court of Kenya has in Base Titanium Limited v County Government of Mombasa & another [2021] eKLR declared payment of Cess Levy to County Governments on roads managed and maintained by the National Government, Mai Mahiu road included, illegal.

9. Further, that the decision to ground his motor vehicle was unreasonable for reasons that: -

- a) *It is unreasonable to expect the Applicant to pay Cess Levy whilst he had already paid for the same and issued with a Receipt by Narok County Government hence cannot make another payment;*
- b) *It is unreasonable to expect the Applicant to pay for an illegal Cess levy and towing charges when he had already paid the requisite Cess Levy and issued with a Receipt thereof and when the Applicant had not consented to the illegal towing since the Motor vehicle was in sound mechanical condition at the time it was being towed.*
- c) *It is unreasonable for the Respondent to continue grounding the Applicant's motor vehicle without explaining to the Applicant the reason why the same should continue to be grounded and further without taking any legal*

action against the Applicant in the event that the Applicant has breached any law.

10. The applicant averred that due to the injudicious, egregious and wanton way the decision to impound his motor vehicle and the basis for and how the cess levy was reached without giving him a chance to present his case, he has been left with no option but to bring the current proceedings against the respondent.

11. However, the application was opposed by the Respondent vide a replying affidavit dated, 18th August 2021 sworn by Daniel Kamau Karuiru, the respondent's Senior Sergeant Reinforcement Officer. He avers that, the Finance Act allows the respondent to charge and collect cess from minerals harvested and/or obtained from the County while the Mining Act, 2016 allows for payment of fees/charges/royalties for minerals collected.

12. That, the respondent has erected barriers at various exit points within the County and all motor vehicles ferrying minerals from Nakuru County pay cess of Kshs 2,200. That on 19th July 2021, several motor vehicles ferrying sand were stopped at the barrier and paid the cess amount.

13. However, the applicant's motor vehicle registration number KCM 013A was stopped with the intention of confirming that sand cess had been paid since the applicant's driver had a habit of displaying the cess receipts through the windscreen while moving at high speeds. That the driver stopped the motor vehicle at the frontage of the office and produced a post-dated receipt, dated 9th August 2021, from the County Government of Narok, yet the sand ferried had been loaded from a quarry at Mai Mahiu within Nakuru County.

14. That upon asking the applicant's driver to pay the requisite cess fee, the driver became rude,

discourteous and ill-mannered. That he refused to move the motor vehicle and threw the ignition keys at the respondent's agents and stated that he would pay cess elsewhere. That, the said motor vehicle was blocking and obstructing other drivers.

15. As a result of the applicant's driver's behaviour the respondent's officers were prompted to instruct Spy Africa Ltd Company to tow the motor vehicle to Mai Mahiu Police Station where they booked the offences of obstruction and failing to pay cess charges in the Occurrence Book.

16. Further, at no time was the applicant's driver assaulted but was only directed to produce the receipts. That, the driver voluntarily surrendered the receipts in his possession and that his personal belongings were never confiscated.

17. The respondent averred that the suit is fatally defective as it does not disclose the decision or action sought to be quashed or the contemplated

decision or action to be prohibited. Further judicial review is not concerned with the merits of the decision but the decision making process. Yet, the applicant is challenging the conduct of demanding for payment of cess and not the process leading to creation of the same.

18. Furthermore, that the applicant has not placed any evidence before the court to show that he was given unfair treatment from the decision making process. That, the application is outside the purview of judicial review and is therefore an abuse of the court process and should be dismissed.

19. The application was disposed of by filing of submissions. However, the applicant did not file any submission and opted to rely on the grounds in the application. The respondent in its written submissions dated 19th October 2022, argued that in an application for judicial review, the court must satisfy itself that the applicant has demonstrated the

respondent's action was marred with illegality, irrationality and procedural impropriety as stated in the case of; Council of Civil Servants Union vs Minister for the Civil Service [1985] 2 AC.

20. Further in the case of; Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others (1997) eKLR the Court of Appeal stated that the prerogative writ of certiorari can quash a decision already made and will be issued if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with.

21. That the Court further stated that prohibition looks to the future to prohibit a tribunal from acting contrary to the rules of natural justice but the order would not be effective against a decision that has already been made whether in excess or lack of jurisdiction, or whether in the violation of the rules of natural justice.

22. That the application is defective and lacks merit for failing to disclose the decision or action sought to be quashed or the contemplated decision to be prohibited. That Article 209 of the Constitution of Kenya 2010 empowers a County government to impose charges on services rendered. That the respondent offered the Applicant's driver the quarry to harvest sand from and he was therefore expected to pay cess for the same at Kshs 2,200 as clearly stipulated in the Nakuru County Finance Act, 2019. That, the cess being charged is for harvesting of sand within the jurisdiction of the Respondent and not for use of the roads of the Respondent as claimed by the Applicant.

23. It was reiterated that; judicial review is concerned with the process leading to the making of the decision. Reliance was placed on the cases of *Ernest B.M Oranga v Kakamega County Commissioner of Cooperatives & 6 Others [2016] eKLR* where it cited

the case of; *Municipal Council of Mombasa Versus Republic & Another (2002) eKLR*, wherein the Court held that, it is only be concerned with the process leading to the making of the decision, how it was arrived at, if those who made the decision had jurisdiction to make it, if the persons affected by the decision were heard before it was made, if in making the decision, the decision - maker took into irrelevant matters. Further reliance was placed on the case of; *County Government of Mombasa: Clerk County Assembly of Mombasa & 6 Others (Interested Parties) Ex Parte Patrick Kabundu & 2 Others (2020) eKLR*

24. The respondent further submitted that the applicant failed to place any material or evidence before the Court to demonstrate that he was given an unfair treatment arising from a decision-making process which he was subjected to by the respondent. That the application is superfluous and

ill-conceived and only seeks to unjustly scuttle the respondent's mandate of imposing charges on services rendered.

25. The case of Republic v National Employment Authority & 3 others Ex parte Middle East Consultancy Services Limited (2018) eKLR was cited where the court highlighted instances when it may be reluctant to grant the prerogative writs of mandamus, prohibition and certiorari as where the applicant's own conduct has been unmeritorious or unreasonable for instance unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration or where the judge considers that an alternative remedy could have been pursued.

26. That the applicant has not acted in good faith and is using the court process to avoid payment of cess. Further, that the respondent has not acted in

contravention of the rules of natural justice and the orders of prohibition are unnecessary. That the respondent should not be condemned to pay costs as it ably discharged its mandate as stipulated by the Constitution, and the County Governments Act.

27. Further, section 27 (1) of the Civil Procedure Act gives the court unfettered discretion to determine whom and out of what property and the extent that costs are to be paid as stated in the case of; Cecilia Karuru Ngayu vs Barclays Bank of Kenya (2016) eKLR.

28. Having considered the arguments advanced by the respective parties and I find that, the main issue herein is whether the applicant has met the threshold of grant of the orders sought. In that regard, the elements of judicial review provide inter alia that; the decision or act complained of is or be tainted with illegality, irrationality and procedural impropriety as observed in Ernest B.M Oranga v

Kakamega County Commissioner of Cooperatives & 6
Others [2016] eKLR.

29. Further the writ of certiorari is issued to quash a decision made without or in excess of jurisdiction as was held by the Court of Appeal in of Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge [1997] eKLR. The question that arises herein is; what is the decision made by the respondent which the applicant want quashed?

30. Furthermore, the writ of prohibition looks at the future, thus where a decision is already made prohibition order will not issue. The applicant complains that a decision has been made he pays the cess levy; how then will the writ of prohibition assist to remedy that decision?

31. Indeed, it is settled law that, the grant of judicial review remedies is discretionary. They will not be granted to impede an Authority's mandate to discharge its functions or where an alternative

remedy available or avoid statutory laid down processes. In Republic v National Employment Authority & 3 others Ex parte Middle East Consultancy Services Limited (2018) eKLR the court stated that:

“65. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include ... where the applicant has not acted in good faith, or where a remedy would impede the authority’s ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued...

66. The grant of the orders of Certiorari, Mandamus and Prohibition is discretionary. The Court is entitled to take into account the nature

of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that a serious issue arises, namely, whether or not the ex parte applicant is using Court processes to avoid the statutory laid down process.

32. In the instant matter the facts reveal that, the applicant is a businessman who carries on business in different counties; Nakuru County included. The business involves inter alia transport of sand. On the material date he was transporting sand from allegedly Narok County to Kiambu County vide Nakuru County. The question that arises is: where was the sand harvested, in Narok or Nakuru County? Evidence will be required to be adduced to establish the same.

33. Furthermore, an issue has arisen as to whether the receipt the applicant produced in support of

payment of cess levy was post-dated and/or was issued by Narok County or should have been issued by the respondent. In a nutshell, whether the applicant had paid the lawful cess levy required to be paid for the harvested sand.

34. It is noteworthy that, the receipt produced by the applicant as JM2- shows an amount of Kshs 1,500 yet he avers he paid Kshs 2,500 as deposed at paragraph 3 under heading of “Facts in the Statutory Statement:”. In the same vein are issues of unlawfully towing the motor vehicle to Mai Mahiu Police Station and/or damaging it while towing, alleged violently assaulting the applicant’s driver or handcuffing him and stealing his personal effects including Kshs 6,250, I.D, original receipt as recoded in the O.B 24/19/7/21. Furthermore, the refusal to release the vehicle causing the applicant economic loss. All these issue ought to be canvassed

35. However, it suffices to note on the other hand the respondent has not charged the applicant with any criminal offence. It therefore not in vain when he terms the respondent actions as illegal, unlawful and unreasonable, in that he was not accorded an opportunity to be heard, nor informed of law contravened.

36. In that regard I find that this matter does not meet the threshold of judicial review. The remedies available can be canvassed through civil or criminal proceedings. In fact, the argument of the applicant is that, Supreme Court of Kenya in Base Titanium Limited v County Government of Mombasa & another [2021] eKLR declared cess levy illegal.

37. In conclusion and at the risk of repeating what is already stated, there is need for the petitioner to adduce evidence to show inter alia:

- a) *He has already paid Cess Levy and is not duty bound to more, any other or further payment.*
- b) *That the motor vehicle is thus unlawfully impounded and/or in impounding the vehicle the respondent acted unlawfully, without authority or outside its mandate.*
- c) *Rebut the conduct of the applicant' driver alluded through a replying affidavit.*
- d) *That Cess Levy sought is illegal.*
- e) *There is no alternative remedy available to them except judicial review.*

38. In my considered opinion all these issues speak more to the merit of the matter, than the process of decision making (if any). Consequently, I find that the petition lacks in merit and is dismissed accordingly.

39. No costs are awarded as the respondent should have either released the vehicle or charge the applicant if he has committed any offence.

40. It is so ordered

Dated, delivered and signed on this 16th day of May
2023

GRACE L. NZIOKA
JUDGE

In the presence of:

Mr. Njeru for the applicant

N/A for the respondent

Ms. Ogutu court assistant