



**Roy Transmotors Limited & another v County Government of Mombasa; Energy
& Petroleum Regulatory Authority & 3 others (Interested Parties) (Petition
E008 of 2023) [2023] KEHC 22922 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22922 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E008 OF 2023
OA SEWE, J
SEPTEMBER 22, 2023**

BETWEEN

**ROY TRANSMOTORS LIMITED 1ST PETITIONER
EAST AFRICAN PETROLEUM TRANSPORTERS ASSOCIATION 2ND
PETITIONER**

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

AND

**ENERGY & PETROLEUM REGULATORY AUTHORITY INTERESTED PARTY
THE COUNCIL OF GOVERNORS INTERESTED PARTY
MINISTRY OF ENERGY & PETROLEUM INTERESTED PARTY
THE ATTORNEY GENERAL INTERESTED PARTY**

RULING

1. The Notice of Motion dated 9th February 2023 was filed by the petitioners under articles 20, 21, 22, 23(1) and (3), 40, 47, 50 and 258 of *the Constitution* of Kenya; Sections 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the *Fair Administrative Action Act* No. 4 of 2015, Sections 3, 9, 10 and 11 of the *Energy Act*, Sections 3, 4, 5, 6, 19, 20 and 35 of the *Intergovernmental Relations Act* No. 2 of 2012 and Rules 3, 4, 19, 23 and 26 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The petitioners thereby sought orders, inter alia, that:
 - (a) The Court be pleased to issue an order of injunction restraining the respondent either by itself, its agents, employees, directors or any persons or officers acting under its directions from holding, clamping, restraining movement, sanctioning, prosecuting and/or dealing in any way



with Motor Vehicles Registration Numbers KCP 819F/ZD 4057, KBV 520A/ZB 6702 and any other motor vehicle pending the hearing and determination of the Petition herein;

- (b) That the OCPD Mombasa be directed to provide security and/or any other assistance to ensure compliance with any orders issued herein;
 - (c) That costs of the application be provided for.
2. The application was premised on the grounds that the 2nd interested party in collaboration with the Commission on Revenue Allocation came up with a policy to ensure that once an organization has a certificate of clearance from any of the 47 counties, then such certificate should apply across the 47 counties to avoid double taxation. The petitioners were therefore aggrieved that the respondent clamped the 1st respondent's Motor Vehicles Registration No. KCP 819F/ZD 4057 and KBV 520A/ZB 6702 on 6th February 2023 and 7th February 2023, respectively, on the ground that the drivers thereof failed to produce clearance certificates issued by its Fire Department.
 3. The petitioners further complained that, as a result of the said clamping, Motor Vehicle Registration No. KBV 520A/ZB 6702 was grounded outside Vivo Energy Kenya along Kismayu Road; while Motor Vehicle Registration No. KCP 819F/ZD 4057 was grounded at Gapco Shimanzi area, which is a roadside parking; and therefore was under the risk of vandalism. They added that the vehicles had been clamped despite the dangers posed thereby; and that the 1st petitioner was losing revenue to the tune of Kshs. 115,000/= per day, in addition to Kshs. 600/= that it had to pay to the respondent as parking fees per day. Thus, they asserted that it was in the interest of justice and safety of the public that the orders sought herein be granted forthwith to avoid unnecessary damage.
 4. The application was supported by the affidavit of the 1st petitioner's Administrative Manager, Nairuti Fridah Makena, sworn on 8th February 2023, in which she reiterated the grounds set out herein above. She explained that the 1st petitioner is a limited liability company and a transporter within the East African Region; and that it is the owner of Motor Vehicles Registration No. KCP 819F/ZD 4057 and KBV 520A/ZB 6702. She further deposed that the 1st petitioner's County of domicile and primary operations are Nairobi City County and the County of Kisumu.
 5. Ms. Makena further deposed that, in the Mombasa County Finance Act, 2023, the respondent has purported to increase the fee payable for the Fire Certificate from Kshs. 7500/= to Kshs. 15,000/= and ignored the policy direction given by the 1st interested party to the effect that once an organization has a certificate from its county of business, such certificate should apply across all 47 counties for inter-county business transit to avoid double taxation. Annexed to the Supporting Affidavit was a Fire Prevention Certificate issued in respect of Motor Vehicle Registration No. KCP 819F/ZD 4057, which was set to expire on 31st December 2023; and that the other vehicle, Registration No. KBV 520A/ZB 6702 does not fall under the Fuel Tanker/LPG Tanker/CBO category as it is not used for purposes of transporting volatile/flammable products.
 6. At paragraph 8 of the Supporting Affidavit, Ms. Makena averred that the Mombasa County Finance Act, 2023 came into force on the 17th January 2023 without any notice or consultation with the National Government or the Transport Sector as required by *the Constitution*; and therefore that the petitioners have a prima facie case against the respondent. She urged that the application be allowed and the orders sought granted.
 7. The application was filed under a Certificate of Urgency and was accordingly certified as such; whereupon, directions were given that the respondent and the interested parties be served forthwith



for urgent consideration of the interim prayers. Thus, Prayers 2, 3 and 4 of the Notice of Motion dated 9th February 2023 are spent; interim orders having been granted pending hearing inter partes.

8. On behalf of the 2nd petitioner, a Supporting Affidavit was sworn by its Secretary General, Mr. Mohamed Abdulle, He confirmed that the 1st petitioner is a transporter within the East African Region; and that it is the owner of Motor Vehicles Motor Registration No. KCP 819F/ZD 4057 and KBV 520A/ZB 6702. Mr. Abdulle further confirmed that the 1st petitioner's counties of domicile and primary operations are Nairobi City County and the County of Kisumu. He also explained that the 2nd petitioner is an association of transporters within the East African region; of which the 1st petitioner is a member.
9. At paragraphs 10, 11 and 12, Mr. Abdulle averred that the 2nd interested party, in collaboration with the Commission on Revenue Allocation, came up with a policy to ensure that once an organization has a certificate from its county of business, such certificate should apply across the 47 counties especially for vehicles in transit, to avoid double taxation. He added that the 1st interested party is also on record as confirming that a certificate of clearance issued by any of the 47 counties in Kenya is sufficient to meet the requirements for a petroleum road transportation licence, which includes clearance from the Fire Department.
10. Mr. Abdulle further deposed that, by virtue of being a party to the 2nd interested party's Council, and in the spirit of ensuring synergy between and amongst the Counties as envisaged under the *Intergovernmental Relations Act*, the respondent is estopped from deliberately renegeing on policies made towards this end. In the rest of his affidavit, Mr. Abdulle reiterated the averments of the 1st petitioner in support of the Petition and urged that the orders prayed for by the petitioners in the subject application be granted.
11. In resisting the application, the respondent filed Grounds of Opposition dated 14th February 2023, contending that:
 - (a) The orders sought cannot be granted at this stage until the hearing and determination of the main petition as the matter at hand cannot be determined without considering the factual evidence.
 - (b) The orders sought cannot be granted at this stage as it will amount to hearing and determining the main suit itself.
 - (c) The orders being sought in the application bear a decided public law connotation as they lean more towards public interest as opposed to private party issues; and as such the general good tilts in favour of the respondent and the interested parties.
 - (d) The petitioners have not proved that they have a prima facie case to warrant temporary injunctive orders.
 - (e) The respondent and the Mombasa residents shall suffer irreparable harm if the Court issues the orders sought in the application considering that they have a bearing on, and are likely to affect, the respondent's source of revenue; which revenue is collected for the betterment of service delivery to the residents of the County of Mombasa.
 - (f) The petitioners have failed to prove any likely cause of irreparable harm that they shall suffer if the orders sought herein are not granted.
 - (g) The petitioners are guilty of laches.



- (h) More harm will be occasioned upon the residents of Mombasa than the petitioners herein if any of the orders prayed for are granted at this juncture.
 - (i) The petitioners have been paying the alleged fee or levy, and therefore no irreparable harm shall be occasioned upon them.
 - (j) The Mombasa County Finance Act, 2023 is in force and the County Government Budgetary expenditure is dependent on the monies collected and levied as per the Act. Therefore, allowing the present application will cripple the operations of the County.
 - (k) In arriving at its ruling, the Court should consider the vast implications of allowing the application; not only to the County Government of Mombasa but also to the residents of the County.
12. The application was urged by way of written submissions, pursuant to the directions given herein on the 22nd March 2023. Accordingly, Mr. Otieno, learned counsel for the petitioner, relied on his written submissions dated 15th May 2023. He reiterated the provisions of Article 23(3) of *the Constitution* and submitted that the Court can grant any relief subject to it being appropriate. He added that it matters not at what stage the relief is sought; or that the party to whom the orders are directed is the Government or the taxman. Counsel urged the Court to be guided by the principles set out in Article 159 of *the Constitution* as well as the cases of *Giella v Cassman Brown and Company Ltd* [1973] EA 358 and *Royal Media Services Ltd v A.G. & 2 Others*, High Court Petition No. 346 of 2012. He accordingly prayed that the orders sought be granted pending the hearing and determination of the Petition to protect the petitioner from further losses.
13. On behalf of the respondent, written submissions dated 30th May 2023 were filed herein by Mr. Tajbhai in which he proposed the following two issues for determination:
- (a) Whether the charges and fees are payable;
 - (b) Who shall suffer more prejudice for non-payment of the charges and fees?
14. Accordingly, Mr. Tajbhai submitted that the payment of fees, charges and levies is a civic responsibility of every citizen in this country; and that it is these fees, charges, levies and taxes that enable various governmental institutions to operate in order for them to provide services to the general public. Counsel further submitted that the fee and charge imposed on the petitioner herein is that of an annual inspection for fuel tankers/CBO tankers/LPG tankers and that the reason behind the charge is to equip the County Government of Mombasa to provide fire-fighting and rescue services. He therefore urged the position that any disruption of such services by way of non-payment would have an adverse ripple effect on the residents of Mombasa.
15. Counsel also submitted that, since the order sought is more public oriented, caution ought to be exercised to balance the petitioner's interest with the public good. He relied on *Judicial Service Commission v Speaker of the National Assembly & Another* [2013] eKLR and *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* for the proposition that the public interest angle must always be taken into consideration in applications of this nature. He consequently prayed for the dismissal of the petitioner's application dated 9th February 2023.



16. This being an interlocutory application, there is need for caution so as to not delve into the merits of the Petition prematurely. Thus, in the *Muslim for Human Rights & 2 Others v Attorney General & 2 Others* [2011] eKLR it was held:

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either party. The principle is similar to that in temporary or interlocutory injunctions in civil matters...”

17. Similarly, in Nairobi High Court Petition No. 16 of 2011: *Centre for Rights Education & Awareness (CREAW) & 7 Others vs. Attorney General*, the view was expressed that:

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.”

18. In the same vein, the Supreme Court had the following to say in *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others* (supra):

“Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case or “high probability of success” in the Applicant’s case for order of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cases.”

19. In the premises, it is now settled that an applicant for conservatory orders for purposes of Article 22 and 23(3)(c) of *the Constitution* must satisfy the Court as to the following three considerations:

- (a) That he/she has a prima facie case with a high likelihood of success;
- (b) That the Petition will be rendered nugatory;
- (c) That public interest weighs in his/her favour.

20. What amounts to a prima facie case was set out in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 thus:

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”



21. And, in *Kevin K Mwiti & others v Kenya School of Law & others* (supra), it was held that:

“A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law.

22. The petitioner’s basic contention is that the respondent, unless restrained, is intent on subverting the directive of the 1st interested party as per the letter dated December 13, 2022, by which the 1st interested party stated:

“...The Energy and Petroleum Regulatory Authority confirms that a fire certificate from the Chief Officer of any of the forty-seven (47) Counties in Kenya is sufficient to meet the requirements for a Petroleum Road Transportation Licence...”

23. There appears to be no dispute that the 2nd interested party, in collaboration with the Commission on Revenue Allocation, came up with a policy to ensure that once an organization has a certificate from its county of business, such certificate should apply across the 47 counties especially for vehicles in transit, to avoid double taxation. A letter dated December 13, 2022 written by the 1st interested party was annexed to the 1st petitioner’s Supporting Affidavit; and it is evidently a confirmation by the 1st interested party that a certificate of clearance issued by any of the 47 counties in Kenya is sufficient to meet the requirements for a petroleum road transportation licence.

24. In the circumstances, while it remains to be seen whether or not the respondent is entitled, by law, to demand that the petitioners obtain an additional Fire Certificate from its Fire Department, I am satisfied that a prima facie case for purposes of rule 23(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 has been made out by the applicant to warrant the issuance of the orders sought.

25. In the result, I find merit in the petitioner’s application dated 9th February 2023. The same is hereby allowed and orders granted as hereunder:

- (a) That an order of injunction be and is hereby issued restraining the respondent either by itself, its agents, employees, directors or any persons or officers acting under its directions from holding, clamping, restraining movement, sanctioning, prosecuting and/or dealing in any way with Motor Vehicles Registration Numbers KCP 819F/ZD 4057, KBV 520A/ZB 6702 and any other motor vehicle pending the hearing and determination of the Petition herein;
- (b) That the OCPD Mombasa be directed to provide security and/or any other assistance to ensure compliance with any orders issued herein;
- (c) That costs of the application be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023.



OLGA SEWE
JUDGE

