



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

H.C.C. (OS) NO. 18 OF 2017

IN THE MATTER OF COMPLIANCE OF THE RATING ACT CHAPTER 267 OF LAWS OF KENYA

AND

IN THE MATTER OF I. R. NO. 62648 – L.R. 337/1626 – MAVOKO

NZAMBA KITONGA.....PLAINTIFF

VERSUS

1. MACHAKOS COUNTY GOVERNMENT

2. NATIONAL LAND COMMISSION.....DEFENDANTS

COMMISSION FOR ADMINISTRATIVE JUSTICE.....INTERESTED PARTY

RULING

1. By an Originating Summons dated 26th July, 2017 and brought under Order 37 rule 14 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act the plaintiff seeks orders that:

- a) The 1st defendant issue the plaintiff with a rates payment receipt for rates paid by the plaintiff to the defendant for the year 2017 in respect of the property known as I.R. NO. 62648/LR NO. 37/1626 Mavoko.***
- b) That any penalties and interests wrongfully and unlawfully levied by the 1st defendant against I.R. NO. 62648/LR NO. 37/1626 Mavoko be declared illegal and null and void ab initio and be forthwith removed.***
- c) That the 1st defendant develop, install, promote and maintain a modern rates invoicing, collection receipting and record keeping system in compliance with the Rating Act, The Land Registration Act 2012, The Land Act, the Fair Administrative Actions Act and the Constitution of Kenya.***
- d) That the 1st defendant, its agents servants and or employees by way of a perpetual order of injunction be restrained from charging monthly rates penalties and interests against the plaintiff in respect of his property known as I.R. NO. 62648/LR NO. 37/1626 Mavoko in so far as he paid annual rates on or before 31st March of every year.***
- e) That the 2nd defendant and the interested party in terms of their constitutional mandate assist and guide the 1st defendant in the development of an effective and efficient rates collection management system.***
- f) That the 1st defendant be condemned to pay costs of these proceedings and any appropriate orders be made.***

2. It is the Plaintiff's case that the 1st Defendant has failed, refused and or neglected to issue receipts for rates paid to itself by the plaintiff in respect of the parcel of land known as I.R. NO. 62648/LR NO. 37/1626 Mavoko for the year 2017. That the 1st defendant has proceeded to unlawfully levy penalties and interests against the plaintiff despite payment of rates of KShs. 29,280.00 for the year 2017 into account number 01141549052000 Co-operative Bank Limited and that the same constitute an illegal charge against the said parcel of land. That unlike other counties, the 1st defendant has failed to develop, install promote and maintain a modern efficient and effective rates collection management system. That this has resulted in a haphazard, arbitrary, inefficient and inept rate collection management system which is oppressive to the plaintiff and other rate payers. That the 2nd defendant is constitutionally obligated to assist the 1st defendant in the development of modern, viable, efficient land management policies and systems. That the defendants are under a legal obligation to maintain

a fair and efficient rates collection system in terms of the Rating Act, the Land Registration Act, 2012, the Land Act, the Fair Administrative Actions Act and the Constitution of Kenya. That the interested party has previously directed the 1st defendant to abide by its statutory and constitutional mandate to no avail. That unless the 1st defendant is restrained it will continue to levy the unlawfully monthly penalties and interests. That this is subjecting the plaintiff to loss and suffering by being liable to be branded a debtor under the Credit Reference Bureau System. That the property will also be negatively impacted as a search thereof will disclose a charge of unpaid penalties and interests.

3. The 1st defendant filed a replying affidavit in response thereto on 14th August, 2017. It was contended that the constitution empowers it to levy rates and taxes on land within its territory. The alleged harassment or nuisance was denied by the 1st Defendant. It was stated that contrary to the plaintiff's assertions, the 1st Defendant has ensured that the process of its operation is professional and free from any form of harassment.

4. That on 1st April, 2014, the 1st defendant had a correspondence with the plaintiff where the plaintiff was informed that the outstanding amount for payment was KShs. 30,158.00. That the Government of Machakos is an independent legal entity and there is no co-relation between it and other counties and that there is no law which defined modernization of services and waiving of payment of taxes is a discretion reserved for the 1st defendant. That the Government of Machakos County has an account where payments are made being account number 01141549052000 Co-operative Bank. That once the Government of Machakos County calculates what is payable, the payee deposits the amount and presents a hard copy deposit slip as proof of payment. That the deposit slip is then stamped as an acknowledgement of receipt and as evidence of payment. That the County Government of Machakos then issues a receipt to the payee as proof that indeed payments have been effected. That the plaintiff has not provided proof of any payments made to the Government of Machakos County.

5. It was contended that the plaintiff's allegation is aimed at maligning the 1st defendant's reputation. That annexure NK6 is enough proof that the 1st defendant responds to emails and has provided its email address. That the allegations that the plaintiff wrote a letter to the 1st defendant on 16th February, 2017 informing them of money paid is not true. It was contended that the exhibit attached does not bear a receiving stamp to show that the 1st defendant actually received the letter. It was stated that the amount of money payable was KShs. 30,158.00 and not KShs. 29,280.00 and that the amount payable was for the year 2014 and not 2017 as alleged by the plaintiff. That if indeed any cheque was paid to the 1st defendant, a forwarding letter was supposed to be attached and the same should bear the official stamp of the 1st defendant.

6. It was contended that the onus of proving that payments were done to the 1st defendant lies with the plaintiff and he has failed to do so. That the plaintiff is mixing issues as he is referring to years 2012, 2014 and 2017 whereas it is very specific that the amount which was supposed to be paid was for the year 2014 as per the correspondence (NK1). That the plaintiff has not attached any recent correspondence as alleged and that the only correspondence attached are for the year 2014 despite him making several referrals to the year 2017. That the amount was never paid and the 1st defendant informed the plaintiff about the same on 26th March, 2017 and the same continues to accrue interest to date. That it is a cardinal principle that who alleges must prove. That the plaintiff has not attached anything as a proof that indeed the outstanding payments have been made. That the plaintiff relies on some documents which cannot stand as they do not contain receiving stamp which is the only way of showing that payments were done to the 1st defendant. That failure by the plaintiff to furnish the 1st defendant with the payment receipts means that the plaintiff has not paid what is owed to them.

7. In rebuttal, the plaintiff filed a further affidavit on 27th September, 2017. He stated that James M. Kathili is not the proper person to respond on behalf of the 1st defendant as he appears to have no records regarding this matter and that one Jackson Kiio should have responded because previous correspondence was directed to him. That the said James has also totally misunderstood the nature of the case in that; the rates penalties are for the year 2017 as clearly shown in the defendant's statement of account dated 12th May, 2015 and the same does not show any unpaid arrears for previous years. That reference to the year 2014 was only meant to demonstrate that the defendant's poor record keeping system is historical and has occasioned the plaintiff suffering in the past. That there is therefore no dispute regarding rates for the year 2014, 2015 and 2016. That Mr. Kathili does not appear to have read the statements of account issued by his own sub-county administration. That the rates payable annually are KShs. 29,280.00. That these have been paid for the year 2017 into the 1st defendant bank account as shown in the bank slip annexed to the originating summons. That the account number given by the 1st defendant is the same one mentioned in his affidavit. That the amount of KShs. 30,158.00 includes the penalties of KShs. 1, 783.00 the subject matter of this case. That these and any other subsequent penalties have been unlawfully levied because no penalties can be levied if the principal rates have been paid.

8. He contended that the 1st defendant in a casual hearsay manner states that it calculates the rates payable to the payee who deposits the amount into the 1st defendant's bank account then the payee presents a hard copy of the banking slip as proof of payment and the deposit stamped as acknowledged of payments and a receipt issued. That the said information if true is only known to the 1st defendant. That there is no circular newspaper advertisement or manual issued to rates payers regarding the same. That the system is a functional figment of the deponent's imagination because if it existed, the officers of the 1st defendant would have replied his several letters and advised him accordingly. That the 1st defendant does not issue invoices or statements to rates payers to show the rates payable at the commencement of every year. That a rate payer has to look for contacts to seek favours from the staff of the 1st defendant to be advised of rates payable and the same breeds corruption. That the use of modern systems to collect rates is a matter of common sense in the public interest. That rate payers from all over the country with property in Machakos do not have to physically travel to the 1st defendant's offices to merely collect invoices or pay rates when modern technology is available. That this is not a privilege but rather it is a right owed to tax payers. That Kenya Revenue Authority and the Law Courts among others have these systems in place. That the email address which the deponent refers to was given to him in the year 2014. That he recently used it but did not receive any response and that is why in his letters to the 1st defendant he requested for its new email address. That he assumed it had abandoned the previous email address because his emails were not responded to. That the 1st defendant did not even respond to the letters he wrote to Jackson Kiio. That the defendant now says that those letters should have been stamped with the official stamp of the 1st defendant. That this is a contemptuous and ridiculous statement because he has no access to the 1st defendant's stamp and cannot travel to Athi-River merely to have a letter stamped. He stated that he has previously availed to the 1st defendant a copy of the bank slip evidencing payment of rates for the year 2017 in its bank account. That the interested party is joined because he lodged a similar complaint against the 1st defendant with itself in 2014 and it tried in vain to assist the 1st defendant to address its

haphazard and shambolic rates collection system. He restated that this case is about the removal of penalties unlawfully levied against him in respect of the subject property for alleged none payment of rates for the year 2017 when he had already paid the same and to compel the 1st defendant to develop a modern, efficient transparent and coherent rates collection system which does not inconvenience and condemn willing rates payers to cumbersome and outdated expensive procedures.

9. It is the plaintiff's submission that Article 174 (a) and (b) binds the County Governments to be accountable in the exercise of power and to promote social and economic development and the provision of easily accessible services. That Article 175 (b) speaks of reliable sources of revenue. Chapter 13 part 1 of the Constitution is devoted to outlining values of Public Service including efficiency, effectiveness and economical use of resources. That it also adverts to the service being responsive, prompt, transparent and to be accountable for administrative acts. That it states that the Public Service must give fair accurate and timely information to the public. He also cited Article 47 which he stated directs for the provision of fair, expeditious efficient and reasonable administrative action and Article 46 on consumer rights mandates the right to goods and services of reasonable quality. In support of his case, the plaintiff relied on **Nairobi H.C JR No. 406 of 2015 S. N. v. The Cabinet Secretary for Ministry of Interior and Coordination of National Management Services, Nairobi H.C. Petition No. 404 of 2017 Kenya Human Rights Commission v. NGO Co-ordination Board and Others** and **H.C.C Petition No. 304 of 2015; David Ngige Thaikeu and others v. the Principal Secretary Ministry of Lands and others**. The plaintiff submitted that although he has obviously suffered great inconvenience, pain, agony and expenses, the main objective of his case is to seek justice for rates and tax payers of the County.

10. The 1st defendant submitted that Article 209 (3) of the Constitution empowers the county government to impose property rates, entertain taxes and any other tax that is authorized to impose by an Act of Parliament and that it acted constitutionally. That Article 210 (1) provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation with the effect that a County Government can only impose, waive or vary tax or licensing fee upon enactment of a legislation to that effect. In support of its case the 1st defendant relied on **Cereal Growers Association & another v. County Government of Narok & 10 others (2014) eKLR, Republic v. Nairobi City County Ex parte Registered Trustees of Sir Ali Muslim Club (2017) e KLR, Republic v. Kombo & 3 others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 (2008) 3KLR (EP) 478, Muslim for Human Rights (MUHURI) & another v. Inspector General of Police & 5 others (2015) eKLR** and **Nairobi Metropolitan PSV Saccos Union Limited & 25 others v. County of Nairobi Government & 3 others (2013) eKLR**. On the issue of costs the 1st defendant cited **Cecilia Karuru Ngayu v. Barclays Bank of Kenya & another (2016) eKLR, Republic v. Rosemary Wairimu Munene (Ex parte Applicant) v. Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004** and **Ethics and Anti-Corruption Commission v. Nderitu Wachira & 2 others (2016) eKLR**.

11. I have considered the summons, response and the rival submissions. It is clear from the summons that the plaintiff's grievance is in relation to the rates and penalties for the year 2017 and not 2014 that the 1st defendant is referring to. It is further clear from the payment request annexed to the plaintiff's affidavit and dated 12th May, 2017, that the land rates of KShs. 29,280.00 and penalties of KShs. 1,783.00 demanded is for the year 2017 and totaling to KShs.31,063.00. The plaintiff further annexed a banking slip from Co-operative Bank which reveal that KShs. 29,280.00 was deposited to account number 01141549052000 being the same account the 1st defendant indicated as the correct account number for the payments. The same was made on 15th February, 2017. While the 1st defendant's claim that the plaintiff did not make payment for the rates and went further to penalize the plaintiff, the documents indicate that the plaintiff made payment. In the circumstances I find that he to ought not to be penalized for late payment and the same is thus unlawful. The plaintiff is of the view that the said discrepancy arose due to the 1st defendant's failure to embrace modern technology. The Plaintiff has demonstrated that indeed he has been desirous of paying his taxes to the 1st Defendant as per the several correspondences. The 1st Defendant's conduct is rather lackadaisical and disinterested yet the Plaintiff has raised a very germane issue of the need to ensure that the process of payment of rates is transparent and seamless. The Applicant has nudged the 1st Defendant to embrace technology and keep pace with other entities that are advanced in the way they conduct their affairs. The 1st defendant therefore should appreciate the Plaintiff's good suggestions but not to give him a cold shoulder and claim that it is independent and knows what it is doing. I am satisfied that the Plaintiff has proved his case on a balance of probabilities and is therefore entitled to some of the prayers sought. The 1st Defendant has not dislodged the Plaintiff's assertions that the 1st Defendant's sure way to offering efficient services to the citizens is by way of embracing technology. While I am in agreement with the plaintiff that the same is necessary for efficiency, I am unable to compel the 1st defendant to do so this not being a Judicial Review matter and secondly, it has not been demonstrated that the 1st defendant has deliberately failed to do so.

12. In the result I find the Plaintiff's Application has merit and is allowed in the following terms:

a) The 1st defendant do issue the plaintiff with a rates payment receipt for rates paid by the plaintiff to the 1st defendant for the year 2017 in respect of the property known as I.R. NO. 62648/LR NO. 37/1626 Mavoko.

b) The penalties and interests levied by the 1st defendant against I.R. NO. 62648/LR NO. 37/1626 Mavoko in the year 2017 be and is hereby declared illegal and null and void ab initio and be forthwith removed.

c) The 1st defendant, its agents servants and or employees are restrained from charging monthly rates penalties and interests against the plaintiff in respect of his property known as I.R. NO. 62648/LR NO. 37/1626 Mavoko in so far as he has paid annual rates on or before the 31st March of every year.

d) Each party to meet their own costs.

It is so ordered.

Dated and delivered at Machakos this 17th day of July, 2019.

D. K. KEMEI

JUDGE