



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL CASE NO. 528 OF 2016

**IN THE MATTER OF AN APPLICATION BY THE ARCHDIOCESE OF NAIROBI KENYA
REGISTERED TRUSTEES, THE APPLICANT, FOR JUDICIAL REVIEW ORDERS OF
PROHIBITION DIRECTED AT THE NAIROBI CITY COUNTY**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

THE NATIONAL THE TRUSTEES (PERPETUAL SUCCESSION)

ACT CAP. 164

AND

IN THE MATTER OF THE COUNTY GOVERNMENT'S ACT

AND

IN THE MATTER OF THE NAIROBI CITY COUNTY, CITY BY LAWS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NAIROBI CITY COUNTY.....RESPONDENT

ARCHDIOCESE OF NAIROBI KENYA

REGISTERED TRUSTEES.....EX PARTE APPLICANT

JUDGEMENT

Introduction

1. The applicant herein, **Archdiocese of Nairobi Kenya Registered Trustees**, by his Notice of Motion

dated 9th November, 2016 seeks the following orders:

- 1. That the Ex parte Applicant be granted orders of Prohibition to prohibit or restrain the Respondent, its servants, agents, or anyone acting under its instructions from demanding from the ex parte applicant, its guests or visitors payment of a county parking fee in respect of motor vehicles parked in the ex parte applicant's parcel of land known as land reference number 209/1949.**
- 2. That the Ex parte Applicant be granted orders of prohibition to prohibit or restrain the respondent, its servants, agents, or anyone acting under its instructions from interfering with the Ex parte Applicant's vehicles or those of its agents or visitors that may be parked in the ex parte applicant's parcel of land known as LR No. 209/1949.**
- 3. That the ex parte applicant be at liberty to apply to the honourable court for all necessary and or consequential orders that the honourable court may deem fit to grant.**
- 4. That the costs of this application be provided for.**

Applicant's Case

2. According to the applicant, on 13th October, 2016, the respondent through its agents, representatives and officials from the Clamping Unit illegally and without any right invaded all that parcel of land registered known as L.R. No. 209/1949 (hereinafter referred to as "the suit land") belonging to the applicant and on which the applicant has built a school known as St. Peter Claver's Primary School and proceeded to illegally clamp motor vehicles parked thereat and in so doing, disrupted learning in the said St. Peter Claver's Primary School and the various activities taking place in the said compound.

3. According to the applicant, the suit land is wholly owned by the applicant and in addition to the school, it has also built thereon offices for St. Peter Claver's Catholic Church and also the priest's residence. It was revealed that the land is clearly fenced with a stone wall and an entrance gate and is visibly clear to all and sundry that it is private property. It was however averred that this was not the first time that the said invasion for the same reasons was happening in the suit parcel of land as the respondent through its agents, representatives and officials from the Clamping Unit had previously invaded the said compound on 29th June, 2011, 7th June, 2012 and 17th March, 2015.

4. The applicant averred that it had by itself and through its St. Peter Claver's Catholic Parish Nairobi previously written to the respondent (then called City Council of Nairobi) via the letters dated 29th January, 2010 and 13th July, 2011 respectively but the respondent has failed and/or neglected to address the said issue of invasion.

5. According to the applicant, at the time of the issuance of the title deed the applicant was then known as Holy Ghost Fathers Kenya Registered Trustees and which name was subsequently changed to the current name of the applicant which is Archdiocese of Nairobi Kenya Registered Trustees. Further the management of the said school was previously in the hands of the Respondent but via a letter dated 26th June, 2014 as written by its Governor, the respondent acceded to transfer the management of the said school to the respondent and which process is currently underway.

6. It was the applicant's case that the suit land being the private property of the applicant, the respondent, its servants, agents, or anyone acting under its instructions cannot interfere with or demand county parking fees from the applicant's vehicles or those of its guests or visitors that may be parked in the applicant's parcel of land.

7. To the applicant, the respondent, its servants, agents, or anyone acting under its instructions is only mandated under Rule 2 of the Nairobi City County, City By Laws of charge parking fees on those vehicles parked in places designated as public parking spaces within the Nairobi City County which the

suit land is not. It was therefore contended that by the respondent, its servants, agents or anyone acting under its instructions demanding from the applicant, its guests or visitors payment of a county parking fee in respect of motor vehicles parked in the applicant's parcel of land, they were acting *ultra vires* their mandate and also abusing their power and mandate as regards the collection of parking fees. It was further averred that it was unreasonable and an illegality for the respondent, its servant, agents, or anyone acting under its instructions that despite being aware that the subject parcel of land is the private property of the applicant they had been invading the said property harassing and demanding parking fees from the applicant, its guests or visitors in respect of motor vehicles parked on the said applicant's land.

8. The applicant therefore sought the orders sought in this Motion.

9. The application was unopposed.

Determinations

10. Having considered the above matters this is the view I form of the matter.

11. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others** (supra) in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural

justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

12. It is true that under the Respondent’s Bylaws it is only an offence to park in a designated space without payment of fees. In other words parking on undesignated space does not amount to an offence in order to invite punishment such as the clamping and towing of the offending vehicles.

13. In this case the applicant has contended that the suit property is not a designated parking space. This allegation has not been controverted as the Respondent has not responded to these proceedings. In other words the Respondent has not justified its action on any positive law. It is now trite that for an executive decision to be justified, it must be based on some legally recognised provision or policy. Executive power must therefore be properly exercised within the lawful bounds or parameters and ought not to be misused or abused. According to **Prof Sir William Wade** in his learned work *Administrative Law*:

“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...”

14. It is trite that an executive body or authority has no inherent powers. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525**, Madan, J (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon (supra); Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461.**

15. It is therefore clear that the powers of an executive authority must be conferred by the Statute under

which the said authority exercises its powers which instrument must necessarily set out its powers expressly. Unless such powers are expressly donated by the parent instrument, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

16. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies or executive authorities. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**.

17. Where an executive authority operates outside its sphere, the Court would be entitled to intervene. It is however now well settled that:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**.

18. In this case it is clear that the Respondent has not justified its action against the applicant. Based on the only evidence before me, I find that the Respondent has no power to levy fees on the suit property. By purporting to do so the respondent exceeded its jurisdiction and its decision must therefore be quashed.

19. Having considered the instant application it is my view and I so hold that the Notice of Motion dated 9th November, 2016 is merited.

Order

20. In the premises an order of prohibition is hereby issued prohibiting the Respondent, its servants, agents, or anyone acting under its instructions from demanding from the ex parte applicant, its guests or visitors payment of a county parking fee in respect of motor vehicles parked in the ex parte applicant's parcel of land known as land reference number 209/1949 as long as the said premises remain an

undesignated.

21. I also issue an order of prohibition prohibiting the respondent, its servants, agents, or anyone acting under its instructions from interfering with the Ex parte Applicant's vehicles or those of its agents or visitors that may be parked in the ex parte applicant's parcel of land known as LR No. 209/1949 as long as the suit property is remains undesignated.

22. The applicant will have half the costs of these proceedings.

23. It is so ordered.

Dated at Nairobi this 17th day of February, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kiongera for the applicant

CA Mwangi