



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC. CIVIL APPLICATION NO. 29 OF 2015

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI**

AND PROHIBITION AGAINST THE COUNTY GOVERNMENT OF MAKUENI

AND THE GOVERNOR OF MAKUENI COUNTY

AND

**IN THE MATTER OF ARTICLES 175(a), 176(1) AND 185 OF THE CONSTITUTION OF
KENYA 2010**

AND

**IN THE MATTER OF THE SECTIONS 30 AND 31 OF THE COUNTY GOVERNMENTS
ACT, CHAPTER 265 OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF THE GAZETTE NOTICE NO. 152 DATED 1ST DECEMBER, 2014
AND PUBLISHED ON 9TH JANUARY, 2015**

AND

**IN THE MATTER OF MACHAKOS CMCC NO. 64 OF 2015 GEORLINE ENTERPRISES
LTD VS COUNTY GOVERNMENT OF MAKUENI**

AND

**IN THE MATTER OF MACHAKOS CMCC NO. 68 OF 2015 ALEX KAMAU
WACHIRA VS COUNTY GOVERNMENT OF MAKUENI**

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MAKUENI.....1ST RESPONDENT

GOVERNOR COUNTY GOVERNMENT MAKUENI.....2ND RESPONDENT

EX-PARTE

1. GEORLINE ENTERPRISES LTD

2. ALEX KAMAU WACHIRA

JUDGMENT

1. By Notice of Motion dated 3rd March 2015, upon leave granted on 25th February 2015 to file Judicial Review proceedings, the ex parte applicants sought the following principal reliefs:-

1. An order of certiorari to move into court for purposes of quashing the Executive Order 2014 by the Governor of Makueni County dated 1st December 2014 and published on 9th January 2015 via Kenya Gazette Notice No. 152.

2. An order of prohibition directed at the County Government of Makueni, their employees, servants or agents from implementing the Executive Order 204 by the Governor of Makueni dated 1st December 2014 and published on 9th January 2015 via Kenya Gazette Notice No. 152.

2. The applicant had in the application for leave a further order that the grant of leave do operate as a stay of any further proceedings in Machakos CMCC No. 64 of 2015 *Georline Enterprises Ltd Vs County Government of Makueni*, and Machakos CMCC No. 68 of 2015 *Alex Kamau Wachira Vs County Government of Makueni* pending the hearing and determination of the application. This order for stay was granted by consent of the parties on 10th March 2015.

3. The grounds for the application were that:

a. The 2nd respondent had no power to impose a penalty on any person found harvesting and transporting sand for commercial purpose under Article 185 of the Constitution. That Article 185(1) of the Constitution provides that the legislative authority of a county is vested in, and exercised by its County Assembly and Article 185(4) (a) of the Constitution provides that a County Assembly may receive and approve plans and policies for the management and exploitation of the county resources.

b. Section 30 of the County Governments Act Cap 265 of the Laws of Kenya provides for the functions and responsibilities of a County Governor while Section 31 of the County Government provides for the powers of the Governor. Specifically, Section 30(2) (f) of the County Government Act provides that the 2nd respondent shall submit county plans and policies to the County Assembly for approval.

c. The 2nd respondent failed, refused and/or neglected to submit and seek approval of the Makueni County Assembly before publishing the Executive Order dated 1st December 2014 and Published on 9th January 2015 vide Gazette Notice No. 152.

- d. The acts and/or omissions of the 2nd respondent were ultra vires to Article 185(1) and 185(4)(a) of the Constitution and section 8(b) and 30(2)(a)(f)(g) of the County Government Act.
- e. It was only the County Assembly of Makueni that has power to impose a penalty through legislation in exercise of its legislative authority granted under Article 185(1) of the Constitution.
- f. The applicants carry out transport businesses including transporting sand within Makueni County and other parts of the country and have several customers within Makueni County whom they cannot access due to the Executive Order issued by the 2nd Respondent.
- g. The 1st applicants' motor vehicle registration KBY 095H and the 2nd applicants' motor vehicle KBY 835G were impounded by the officers, agents and/or employees of the 1st respondent on 29th January 2015 and 3rd February 2015 respectively while on their normal business of transportation of sand. This was in implementation of the aforementioned Executive Order.
- h. The applicants have filed Civil Suit No. 64 of 2015 and Civil Suit No. 68 of 2015 respectively at the Chief Magistrate's Court at Machakos against the 1st respondent for the release of the motor vehicles, compensation for unlawful impounding of their motor vehicles and loss of user.

The facts of the case

4. The verifying affidavit was sworn by Daniel Ngugi Mwai who stated that on 29th January 2015, the motor vehicle registration number KBY 095H registered in the name of the 1st applicant and Equity Bank was impounded by the County Government of Makueni; that on 3rd February 2015, the motor vehicle registration number KBY 835G registered in the name of the 2nd applicant and NIC Bank was impounded by the County Government of Makueni; that on diverse dates, the 1st respondent demanded that the applicants pay Kshs. 100,000/= each being the penalty imposed pursuant to the Executive Order 2014 by the Governor of Makueni County dated 1st December 2014 and published on 9th January 2015 vide Gazette notice No. 152; that the applicants declined to pay and instead filed Civil Suits No. 64 of 2015 and No. 68 of 2015 in the Chief Magistrate's Court at Machakos; that upon the applicants filing the suits, the 1st respondent in response to the plaintiffs' applications for the release of their motor vehicle therein, filed a copy of the Kenya Gazette Notice No. 152 containing the Executive Order imposing a penalty of Kshs. 100,000/= on any person found to be harvesting and transporting sand for commercial purposes within Makueni County that the Chief Magistrates' Court ordered that the plaintiffs/applicants to deposit Kshs. 100,000/= each with court as a condition precedent for the release of their respective motor vehicles, which they did; that the 1st respondent did not prefer any charges upon the applicants, their servants, agents and/or employees in any competent court of law but nonetheless continued to detain the two motor vehicles at its headquarters at Wote despite being served with the Court Order for release; that the vehicles were detained for a week after issuance of the Court Order; and that the penalties of Kshs.100,000/= have no legal basis and were oppressive.

Respondents' Case

5. In response to the application the 2nd respondent filed a replying affidavit dated 15.05.15. Therein the 1st respondent Governor stated that the application was non-starter as it offends the provisions of Order 53 Rule 4 of the Civil Procedure Rules 2010 and Section 9(6) of the Law Reform Act as the relief sought in the statement of facts was leave to apply for orders of certiorari and prohibition; that the application further offends the aforesaid provisions as the verifying affidavit was sworn in support of the applicant's application for leave to institute Judicial Review proceedings for an Order of Prohibition and Certiorari; that the application is misconceived, malicious and made in bad faith as the applicant only intends to interfere with the management of the 1st respondent's resources and functions bestowed upon him by the Constitution and the County Government Act 2012; that as the Governor of the 1st Respondent he was accountable for the management and use of county resources as provided for under section 30(3)(f) of the

County Governments Act 2012; that under Article 69(1)(a) of the Constitution of Kenya, the state is mandated to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits; that the obligations under Article 69 (1)(a) are replicated in the objects and principles of devolved governments under Article 174 of the Constitution of Kenya where the roles of the state on environment are decentralized; that the fourth schedule of the Constitution at Section 10 of part provides for the County Governments function of implementation of specific national government policies on natural resources and environmental conservation, including soil and water conservation and forestry; that the National Environment and Management Authority have not been joined in these proceedings for purposes of writ of prohibition; that the County Governor is empowered, by virtue of Section 30 of the County Government Act 2012 to sign and cause to be published in the gazette notice of all important formal decisions made by the Governor or by the Executive Committee; that it was by the aforesaid authority that he notified the public of suspension of harvesting of sand for commercial purposes within the Makueni County pursuant to the provisions of section 69(1) of the Constitution as read with schedule 4 of the Constitution and sections 30 and 31 of the County Governments Act, until a substantive legislation is passed to regulate the activity: that the decision was informed by the wanton and unregulated harvesting of sand within the County of Makueni which had resulted in gross environmental degradation resulting in severe water shortage and reduced agricultural activity; that the local communities were being exploited by harvesters by being paid negligible compensation for their labour, road access and resources; that the Executive Order attached to the applicants' affidavit was only a Notice and not a decision and hence an order of certiorari cannot issue; that no evidence has been tendered by the ex parte applicants to show that they have been licensed by the National Environment and Management Authority to carry out sand harvesting within the County; that he has received support in the County Assembly and the public for the regulation of sand harvesting within the County which was now captured in the Makueni County Sand Conservation and Utilization Act 2015 which was in force; that the Gazette Notice annexed to the application was obsolete as the same was superseded by the Makueni County Sand Conservation and Utilization Act 2015; and that the orders sought by the applicant were incapable of being granted by court as the applicant sought to quash an Executive Order which had been superseded by an Act of the County Assembly and prohibit the performance of which was provided for through legislation by virtue of Article 185(1) and (2) of the Constitution of Kenya.

6. The applicants filed a further affidavit dated 17.06.15 in response to the 2nd respondent. Therein he averred that neither the Constitution nor the County Government Act donates any power to the Governor to impose penalty on anyone. That section 30(3) of the County Government Act only gives the Governor the function of accountability and management of County resources but the legislative function; Article 69 and 174 of the Constitution does not grant power to the Governor to impose penalties; they have applied for orders of certiorari which look into the process of how the power is exercised; The National Environment and Management Authority were not party to the publication of the Executive Order 2014 by the Governor of Makueni County on 9th January 2015 via Gazette Notice No. 152 and that is the reason they were not enjoined as party to the application; Section 30(2)(l) of the County Government Act cannot supersede section 185(1) and 185(4) of the Constitution granting County Assembly legislative authority of the County and that therefore, imposing a penalty of Kshs.100,000/= was usurping the functions of the County Assembly; A gazette is an official newspaper published by a particular organization containing important information about decisions made. Section 30(2)(l) allows the governor to gazette decisions thus the Executive Order 2014 was the decision published via Gazette Notice No 152 that the applicant seek to quash; the applicants' motor vehicles were impounded on transit from Kajiado County where they have a permit to buy sand; and that Makueni County Sand Conservation and Utilization Act 2015 was passed long after impounding of the applicants' motor vehicle and cannot be applied retrospectively.

Submissions

7. Counsel for the ex-parte applicants, Mr. Kinuthia, submitted as follows:

“I refer the Court to page 36 – Gazette Notice. Governor imposed a penalty of ksh.100,000/- for any person found harvesting sand. The Governor has made law, as legislature. The 2nd

respondent has no power to impose penalty under Article 185 of the Constitution. Legislative authority of the County is vested and exercised by the County Assembly. Section 30 of the County Government Act cap 265. Section 31 of the Act provides for the powers of the Governor. Neither of the sections gives Governor power to impose a penalty. Section 30(2) (f) – Governor must present plans and policies for approval. We submit that the 2nd respondent actions are ultra vires Article 185 (1), Article 185 (4) (a) and sections 8(b) and 30 (2) (a) (f) and (g) of the County Government Act. It is only the County Assembly of Makueni that has power to impose a penalty in exercise of its legislative authority under Article 185 (1) of the Constitution.”

8. In reply Counsel for the Respondents, Ms. Mogire, emphasized the discretion of the court to grant or refuse Judicial Review orders and urged that the court should give effect to the gazette notice as an effort by the County Government to address the problem of environmental degradation:

“On certiorari to quash the executive order of the Governor- section 30 (2) (1) of the County Government Act which gives the Governor authority to publish notices of important decisions. It was done pending the enactment of law which the County Government done: The Makueni Sand Conservation and Utilization act of 2015 annexed to the supplementary affidavit annexure KK5 which was assented to on 13th February 2015. The County Government is enjoined by the Constitution to protect the environment under Article 69 and 174 of the Constitution. We have annexed photographs showing environmental degradation. I rely on **Keitany v. Retirement benefits Appeals Tribunal and Anor.** (2013) eKLR citing R v. Judicial Service Commission ex parte Pareno [2004] 1KLR 203 that Judicial Review orders are discretionary. Court should weigh the need to protect environment, the powers of the Governor and the constitutional duty to conserve the environment. The act to be protected has been overtaken by events. It would be prejudicial if the applicant is allowed to harvest sand. Applicant has not annexed any licence from National Environmental Management Authority (NEMA) to harvest sand.”

Issue for determination

9. The only issue for determination in this application is whether the Executive Order of the Governor of Makueni was within the law. In consequence of the court’s finding on the issue consideration of the prayers for Orders of certiorari and prohibition will follow.

Determination

10. It is trite law that certiorari will issue to quash acts that are *ultra vires* or in excess of authority and that Prohibition will issue whenever something remains to be done pursuant to an unlawful exercise of power, which can be restrained by an order of prohibition. See generally, the decision of **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge**, Civil Appeal No. 266 of 1996.

11. As regards the prayer for Certiorari, it is clear in accordance with the principle of separation of powers that the power to make law in the County Government is reserved for the County Assembly under Article 185 (1) of the Constitution which provides as follows:

“185. (1) The legislative authority of a county is vested in, and exercised by, its county assembly.

(2) A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.

(3) A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.

(4) A county assembly may receive and approve plans and policies for—

(a) the management and exploitation of the county's resources; and

(b) the development and management of its infrastructure and institutions.”

12. All the Governor has under the Constitution is the executive authority through the County Executive of which he heads in accordance with Article 179, so far as material as follows:

“179. (1) The executive authority of the county is vested in, and exercised by, a county executive committee.

(2) The county executive committee consists of—

(a) the county governor and the deputy county governor; and

(b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.”

13. As decision made without jurisdiction is a nullity and must be declared so by the quashing order of Certiorari.

14. The court agrees that the issue of photographs of sand harvesting, whether the sand the subject of proceedings from which the application arises was harvested in Makueni County and whether the applicant had NEMA licence to harvest sand are issues for determination by the lower court in the two suits and not the subject of the Judicial Review application, as Judicial Review looks at the decision making process not the merits of the case. It is the validity of the law made by the Governor by Executive Order which is in question; not its motivation, good or bad, well intentioned or not.

15. As the Governor of Makueni as part of the areas of Kenya where environmental degradation by sand harvesting is acute, the 1st respondent may perfectly be understood, indeed commended, in seeking to discharge his County's Article 69 obligation by pursuing measures for the protection of the environment. However, the Zeal for such measures must be within constitutional limits of separation of powers between the Executive and the legislature at the County level as the Rule of Law principle under Article 10 of the Constitution, which binds all persons including state organs and officers, is a prerequisite of all lawful action.

16. As regards the order of Prohibition, it was held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge**, supra, that:

“Prohibition looks to the future 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...”

17. With respect the prohibition is not sought to prohibit of the making of an *ultra vires* decision, but rather the implementation of a decision made without authority. There is clearly something – the enforcement or implementation of the illegal decision of the 1st respondent – upon which the order of Prohibition may act upon. The Executive Order of the Governor having been made without jurisdiction is a nullity. It must be quashed by Certiorari. As a complementary order, to prevent the respondent, their servants and officers from enforcing the illegal Executive Order, an order of Prohibition must issue. As the Executive Order may be enforced by the 2nd Respondent's officers despite its having been declared a nullity and quashed, it cannot be said that nothing remains to be done pursuant to the Executive Order. The Court must issue an order prohibiting its enforcement or implementation; such an order is the proper province of Prohibition.

18. That must be the import of the decision of **David Mugo vs. The Republic Civil Appeal No. 265 of 1997** in which the Court of Appeal said:

“The learned judge held that since the Court Brokers Licensing Board had ceased to exist as a result of repeal of Cap. 20, the appellants’ application for certiorari was merely technical and academic. With respect here the judge fell in error of law. Certiorari was sought to quash the Board’s decision revoking the appellant’s licence. It (certiorari) was not to keep the Board in continuous existence. Where the body or authority against which certiorari is sought has ceased to exist or has become functus officio, ***but a decision it (body or authority) made is still enforceable certiorari must issue to quash or nullify that decision, if it is bad.***”

See Odunga, J. in **Republic V Kajiado North District Ngong Land Disputes Tribunal & Another Ex-Parte Caroline Wambui Ngunjiri & 2 Others (2014) Eklr**

Orders

19. Accordingly, for the reasons set out above, the Notice of Motion dated 3rd March 2015 is granted as prayed in terms of Prayers Nos. 1 and 2 thereof, with costs to the ex parte applicants to be paid by the Respondents.

DATED AND DELIVERED THIS 10TH DAY OF MARCH 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of:-

Mr. Kinuthia for the Ex parte Applicant

Mr. Muumbi for Ms. Mogire for the Respondent

Ms. Doreen – Court Assistant