



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL, JUDICIAL REVIEW DIVISION**

**MISC. CIVIL APPLICATION NO. 18 OF 2016**

IN THE MATTER OF: APPLICATION BY KENYA AIRPORTS AUTHORITY FOR LEAVE TO  
APPLY FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF PROHIBITION

IN THE MATTER OF: ARTICLE 209(5) OF THE CONSTITUTION, THE VALUATION FOR RATING  
ACT, THE RATING ACT, THE VALUATION FOR RATING (PUBLIC LAND RULES)

IN THE MATTER OF: THE CIVIL PROCEDURE ACT AND THE LAW REFORM ACT

**BETWEEN**

REPUBLIC.....APPLICANT

**VERSUS**

KWALE COUNTY GOVERNMENT.....RESPONDENT

EX PARTE APPLICANT: KENYA AIRPORTS AUTHORITY

**RULING**

**THE PARTIES**

**The Applicant**

1. The Applicant in this matter is the Kenya Airports Authority, a statutory corporation established under Section 3(1) of the Kenya Airports Authority Act, (Cap 395, Laws of Kenya) to provide the functions and services delegated to it under Section 4(1) of the Act, and to exercise the powers donated to it under Section 12 of the Act.

**The Respondent**

2. The Respondent is one of the forty seven (47) counties established under Article 1(4)(b) of the Constitution regarding the sovereignty of the people at the national and county level and Article 6(1) that the territory of Kenya is divided into the counties specified in the First Schedule, and Article 176 that there shall be a county government for each county consisting of a county assembly and a county executive.

## THE APPLICATION

3. Following the grant of leave to commence judicial review proceedings for orders of certiorari, the ex parte Applicant filed on 16<sup>th</sup> March, 2016 a Notice of Motion dated 16<sup>th</sup> March, 2016 and sought –

(1) an order of prohibition do issue restraining the Government of the County of Kwale and/or its agents from levying, imposing, demanding and or recovering rates or any purported rates amounting to Kshs. 43,221,310/= allegedly imposed on the Kenya Airports Authority pursuant to Kwale County Finance Act and or any future rates in respect of Ukunda Airstrip and or aerodrome;

(2) an order of prohibition does issue restraining the Kwale County Government and or its agents from levying, imposing rates on the facilities of the Kenya Airports Authority contrary to the provisions of Article 209(5) of the Constitution.

4. The Application was supported by the grounds on the face of it, and reiterated in the Affidavit of Victor Arika, Verifying the Facts sworn on 14<sup>th</sup> March, 2016.

5. The Corporation's case is simply that being an agency of the national government, and holder or occupier of public land, it is exempt, and is not liable for payment of rates to the Government of the County of Kwale, the Respondent. The Government of the County of Kwale had issued Demand Notice Ref. LA Name: 321-Kwale County Government dated 9<sup>th</sup> September, 2015 to the Corporation for payment of the sums of Kshs. 43,221,310/= for Land Rates inclusive of arrears (Kshs. 796,200/=), accumulated penalty (Kshs. 29,485,910/=) and land rate arrears (Kshs. 12,739,200/=) on account of the parcel of land known as Diani Beach Plot No. 675.

6. The Corporation contends that Section 27 of the Valuation for Rating Act, (Cap 266 Laws of Kenya) prohibits imposition of rates in respect of land which is used or is bonafide intended to be used for education institution. In addition, the Corporation contends that Regulations (3) and (4) of the Valuation for Rating (Public Land) Rules exempt the Corporation from imposition of rates. Therefore the Corporation concludes, that the imposition of rates upon the Corporation's Airstrip (land) which has a school, and the aerodrome is not only in violation of Article 209(5) of the Constitution but that the decision violates Sections 25, 26 and 27 of the Valuation for Rating Act, and the said Rules (3) and (4) of the Valuation for Rating (Public Land) Rules and that for those reasons the application should be allowed.

## THE RESPONDENT'S CASE

7. The Corporation's application was opposed by the Respondent, **firstly**, through Grounds of Opposition dated and filed on 6<sup>th</sup> April, 2016 and **secondly**, by the Replying Affidavit of Robert Chaka Ngoro, the Respondent's Sub-County Revenue Officer sworn on 8<sup>th</sup> April, 2016 and filed on 11<sup>th</sup> April, 2016. The substance of the Respondent's reply is that the plots in respect of which the Respondent has raised rates do not belong to the Corporation, and are therefore not exempt from imposition of rates.

8. According to the Respondent, Plot No. 912 belongs to one Matano Tenesi and others, Plot No. 913 to Suleiman Hamisi and others and Plot No. 923 to Hamisi Matano and others. Of these plots, the Respondent contends no demand notices for payment of rates have been issued to the Corporation.

9. In any event, the Replying Affidavit of Robert Chaka Ngoro argued that the Respondent is clearly authorized by Article 209(5) of the Constitution to raise revenues by means of imposing rates, and that its demand notices were therefore in accord both with the law and the Constitution. This is the line of argument relied upon by counsel for the Respondents in their written submissions dated and filed on 20<sup>th</sup> May, 2016, as well as the authorities cited therein.

10. There was also the technical question raised in the Grounds of Opposition whether an order of prohibition can be sued out in judicial review independently of the order of certiorari. I will deal with this issue right away.

## OF WHETHER AN ORDER OF PROHIBITION MAY BE SUED OUT, INDEPENDENT OF THE ORDER OF CERTIORARI

11. Perhaps the best way to answer this question is to ask or define what is an order of prohibition? According to Black's Law Dictionary, a "*prohibition*" is

**"...a common law injunction to prevent an unlawful assumption of jurisdiction... It is a common law injunction against government's usurpation (as where one is called coram non iudice (before a Judge unauthorized to take cognizance of the affair), to answer a tribunal that has no legal cognizance of the cause. It arrests the proceedings of any tribunal, board or person exercising judicial functions in a manner or by means not within its jurisdiction or discretion" per Bishop J. Shipman – Handbook of Common Law Pleadings."**

12. As an aside, the years 1920 to 1933, were known as the years of "**Prohibition**". The manufacture, transport and sale of alcoholic beverages in the United States was forbidden by the Eighteenth (18<sup>th</sup>) Amendment to the Constitution, and was repealed by the Twenty-First (21<sup>st</sup>) Amendment.

13. However, according to **H.R. Wade and C.F. Forsyth** authors of **Administrative Law**, Eleventh Edition, "**the prohibitory order developed alongside the quashing order as part of the system of control imposed by the Court of the King's Bench.** It was a similar remedy but was **prospective** rather than **retrospective**...It lay to prohibit an inferior tribunal from doing something in excess of its jurisdiction. ...Later, like the quashing order, it developed into part of the regular mechanism of judicial control both of inferior tribunal and of administrative authorities generally. In a much cited case *Atkin LJ* said –

**"I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari. I think that prohibition will lie to restrain it from so exceeding its jurisdiction."**

14. The said authors cite such examples as prohibitory orders being issued against an electricity authority from proceeding with a scheme which was outside jurisdiction; to prevent the execution of a decision vitiated by a breach of the principles of natural justice; to prevent a housing authority (such as the County Government of Nairobi, or Mombasa), from demolition of a house(s) which is improperly condemned, to prevent a rent tribunal from proceeding with a case outside its jurisdiction.

15. In **R. vs. GREATER LONDON COUNCIL ex parte Blackburn [1976] ICLR 550 at page 559** Lord Denning MR said the order of prohibition is –

**"...available to prohibit administrative authorities from exceeding their powers or misusing them. In particular, it can prohibit a licensing authority from making rules or granting licences which permit conduct which is contrary to law."**

16. I therefore agree with the submission by counsel for the Corporation, that the judicial review order of prohibition is available to prohibit administrative authorities from exceeding their powers or their mandate and/or jurisdiction.

17. In **KADAMAS VS. MUNICIPALITY OF KISUMU [1985] KLR 954**, the Court of Appeal held –

**"Prohibition lies not only for excess of or absence of jurisdiction, but also for departure from rules of natural justice; Halsbury's Laws of England, 4<sup>th</sup> Edition paragraph 130 at page 138. The High Court in deciding whether or not to grant an order of prohibition would not be fettered by the availability of an alternative remedy. Prohibition may issue against a local authority. R. vs. London City Council [1931]2KB 115."**

18. The inevitable conclusion from the above analysis of the common law is that **prohibition** is a standalone remedy just like certiorari and that the remedy is available to prohibit an administrative body from doing that which is illegal. That answers the major objection to the Application by the Respondent. The next, and issue to be determined, is whether the order of prohibition lies to prohibit the Respondent County Government of Kwale or any other County from raising rates upon land occupied by or intended for occupation by the Corporation.

### **OF WHETHER THE APPLICANT IS LIABLE TO PAY RATES TO THE RESPONDENT**

19. **Firstly**, this question is to be determined on the proper construction of constitutional provision for raising revenue granted to County Governments, to finance their operations, and services provided under Fourth Schedule of the Constitution as well as the functions and services provided by the national government. Also to be considered is the manner in which the national government functions and provides services.

20. Primarily, the national government functions and provides services through Ministries or Departments of Government for its core services such as keeping law and order through the Police, Army and other security and correctional agencies. Many other core services are organized into different agencies, for instance, wildlife under Kenya Wildlife Service (KWS), Forests, under the Forest Service, transport through the several road agencies, such as Kenya Highways Authority (“KENHA”), the Kenya Urban Roads Authority (“KURA”), the Kenya Rural Roads Authority (“KERRA”), aerodromes, and airports and Civil Aviation Authority through the Kenya Airports Authority, and ports and harbours, (through the Kenya Ports Authority). These agencies offer vital services which core or “**parent**” ministries or departments would ordinarily provide or render. Consequently said agencies enjoy the same or similar privileges as the national government would itself enjoy.

21. In the instant case, the dispute is over the demand for rates over a parcel of land known as Diani Beach Block/No. 675 of Plot 675. The Respondent County has strangely in the Replying Affidavit not referred to this plot. It has referred to three properties naming specific persons as owners of the plots. Whether or not the Applicant is the owner of these plots or only plot 675, is neither here nor there. The issue is whether the Applicant is liable to pay rates on such parcels of land.

22. Though the Respondent implicitly admits that the Applicant is not liable to pay rates in respect of any plot or lands it occupies or intends to occupy for purposes of its operations, the question of liability to pay rates still remains for determination. The corporation relies upon its semi-governmental structure and functions for non-liability to payment of rates. The Respondent cites Article 209(3) of the Constitution for the proposition that the Corporation is liable to pay rates. Article 209(3) allows a County to impose –

**“(a) property rates;**

**(b) entertainment taxes; and**

**(c) any other tax that it is authorized to impose by an Act of Parliament;**

**(4) The national and county governments may impose charges for the services they provide;**

**(5) The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.”**

23. Though Article 209(3) empowers a county government to impose rates upon any rateable owner as defined in the Rating Act (Cap 266, Laws of Kenya), and the Valuation for Rating Act (Cap 267, Laws of Kenya), Article 209(5) qualifies that power to the extent that the imposition of taxes such as rates, does not prejudice the national government’s economic policies or economic activities. The establishment and running of aerodromes, ports and similar activities, is made through economic policies and activities which are beneficial to both the national and county governments.

24. In the pursuit of such economic policies and activities, Rule 4 of the Public Land Rules exclude land used for certain public purposes from the valuation roll and liability to make any contribution in lieu of rates if the land is used exclusively for any of the purposes described – **museums, art galleries, ancient monuments, botanical gardens and arboreta, veterinary quarantine areas and outspans, all State Houses and Presidential Lodges, and aerodromes** within the Civil Aviation Act (Cap 394), and the Kenya Airports Authority excluding areas used for passenger reception or the handling or storage of goods, the offices of airlines companies or agencies, immigration and customs offices and premises, restaurants, lounges, bars, shops, hangars, workshops, posts and telecommunications installations and stores, police stations, animal holding grounds, freight holding grounds, freight sheds and dumps.

25. It is not clear what exactly is entailed by this exclusion provision. **Firstly**, all these excluded areas may or may not be government or public land. If it is public land, it is most probably intended to be used for purposes of the corporation – as a government agency. **Secondly**, for the exclusion to operate, the county would require to isolate with specificity what areas belong to airline companies, or agencies, posts and telecommunications installations and stores. Besides, Police Stations, animal holding grounds would invariably belong to the national government. How could they be excluded? Freight sheds, dumps and hangars would be specifically identified for purposes of valuation for rating purposes. **Thirdly**, the areas covered by exclusion provision are invariably within the lands controlled by the Applicant.

26. Counsel for the Respondents referred to my decision in **DILEEP MANUBHAI PATEL & 3 OTHERS VS. MUNICIPAL COUNCIL OF NAKURU & ANOTHER [2014]eKLR**, that

**“it is the duty and obligation of every person liable to pay tax, to pay that respective tax, for that is the price of modern civilization, and in particular of living in planned urban areas, townships and cities. It is the price of collective benefits of the provision of clean water, public lighting, roads and ancillary facilities and maintenance thereof...”**

27. The emphasis in that case is upon **“persons liable to pay tax”**. The Applicant’s case is that being an agency of the national government vested with the duty to operate the country’s aerodromes, and therefore vital artery for both domestic and international travel, the land upon which its facilities are erected shall not be subject to payment of land rates. The exclusion referred to in Rule 4, must therefore refer to land which is held by the agencies and organizations named, even if such land were within the overall jurisdiction of the airports authority, such as the Applicant corporation herein.

28. Gratuitously, I should add that Section 23 of the Rating Act, (Cap 267, Laws of Kenya) provides as follows –

**“(1) There shall be paid to the rating authority –**

**(a) by the Government in respect of Government land; and**

**(b) by the Community in respect of land vested in the community or any officer or authority of the community an annual contribution in lieu of any rates levied under this Act, for each and every financial year.”**

29. For this purpose the Section 3(1) of the Valuation for Rating Act, (Cap 266, Laws of Kenya), requires a valuer for the purposes of assessing the contribution in lieu of rates payable to a local authority in respect of Government land under the Rating Act (Cap 267, Laws of Kenya), to prepare a draft public land valuation roll which shall be separate from, but at the same time as the valuation roll for rateable property in the area of the local authority. The onus is therefore upon the Respondent to demand contribution in lieu of rates, in terms of Section 23 of the Rating Act, in respect of land held by the Applicant herein.

## **CONCLUSION**

30. There is no doubt that in terms of Article 209(5) of the Constitution, the Respondent has authority to

impose rates. The imposition is limited by Article 209(5) that such tax do not prejudice the economic policies and activities of the national government. Those policies as enacted in Rule 4 of the Valuation for Rates (Public Land) Rules, exempt the Applicant from payment of rates. The Demand Notice LA Name: KWALE GOVERNMENT, UPN 321-02350, BLOCK DIANI BEACH PLOT 675 for rates of Khs. 43,221,310 is therefore illegal.

31. Though no order of certiorari was sought, the justice of the case requires the demand notice for payment of rates be quashed. There shall therefore issue an order to bring up to this court and to quash by order of certiorari, the said Demand Notice. There shall also issue an order of prohibition to prohibit the Government of the County of Kwale from demanding or issuing Demand Notices to Kenya Airports Authority for payment of the sum of Kshs. 43,221,310/= or any other sum in respect of Ukunda Airstrip and/or aerodrome, now in use or intended to be used for the said or ancillary purposes.

32. I direct that these parties being various arms and agencies of government of the Republic of Kenya, each party shall bear its own costs.

33. There shall be orders accordingly.

**Dated, Signed and Delivered in Mombasa this 12<sup>th</sup> day of July, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

Mr. Wafula for Applicant

Mr. Mwanguya holding brief Ms. Jadi for Respondent

Mr. S. Kaunda Court Assistant