REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 16 OF 2015

HITMARK TRANSPORTERS SACCOSOCIETY LIMITED ………........……….PETITIONER

VERSUS

COUNTY GOVERNMENT OF MACHAKOS……….................................…1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL………..….................................….2ND RESPONDENT

RULING

The Application

The County Government of Machakos, the 1st Respondent herein, filed an application by way of a Notice of Motion dated 10th August 2015 seeking to discharge and/or set aside the consent order made by this Court on 12th May 2015. The said order resulted from a consent the 1st Respondent entered in Court with Hitmark Transporters Sacco Society Limited, the Petitioner herein. The grounds for the application are stated in the said application and the affidavit in support thereof sworn on 10th August 2015 by James M. Kathili its Chief Legal Officer.

The main grounds are that the officer who consented on behalf of the 1st Respondent did not have the authority to do so. Further, that the members of the Petitioner misrepresented to the officer who purportedly consented on behalf of the 1st Respondent that the number of vehicles in question were forty one, when in fact the number forty one referred to the members of the Petitioner, some of whom own more than one vehicle. Therefore, that the said officer consented on the basis that the number of vehicles in question would not have a serious financial impact in the short term, pending the hearing of the application and determination of the suit.

The 1st Respondent stated that the orders have occasioned it tremendous hardship, as it has lost and continues to lose a lot of revenue since they were made, and that this has prejudiced its operations and functions. Further, that other SACCOs involved in sand transportation have complied and continue to comply with the requirement to pay the new licence fees, and there is no reason why the members of the Petitioner should be treated exceptionally from the rest. The 1st Respondent attached a schedule indicating receipt numbers issued to vehicles paying the new licence fees.

The 1st Respondent's Advocates, B.M Musau & Co. Advocates, in addition filed submissions dated 25th September 2015. It was argued therein that despite the orders that were sought were "pending the interpartes hearing", the Petitioner drafted the orders to read "pending the hearing and determination of

the petition." It was argued that since the Respondent were not heard on the application, the orders could not therefore be issued pending the hearing and determination the petition herein**.** Further, that fair hearing entails hearing both sides, and that this is one of the fundamental rights that cannot be taken away as per Article 25 of the Constitution. Therefore, that the 1st Respondent is entitled to be heard on the Petitioner's Application.

It was further submitted that there is nothing on the court record to manifest authority to the officer who consented to the members of the Petitioner continued payment of a sum of Kshs.1,300/= for sand transportation per trip on behalf of the 1st Respondent. Reliance was placed on **Halsburys Laws of England 4th Edition Vol. 1** at paragraph 820 as cited in **General Tyres Sales vs H. Young & Co. E. A. Ltd(2002)eKLR**:-

> **"Where an act done by an agent is not within the scope of agents express or implied authority of falls outside the apparent scope of his authority the principal is not bound by or liable or that act, even if the opportunity to do it arose out of the agency and it was purported to be done on his behalf, unless he expressly adopted it by taking the benefit of it or otherwise."**

It was also contended that the officer who entered the consent was not of a senior level necessary to bind his employer. Reliance was placed in this regard on the following passage in **Halsbury's Laws of England 4th Edition Vol. 9(1)** at paragraph 1176:-

> **"The implied authority of an employee must, as a matter of course, vary according to the nature of employment, and need not necessarily include an authority to contract at all. Employees are of different grades and the authority to be implied of one may be more extensive than in the case of another holding a more subordinate position. The employee may be employed to perform a particular duty only, in which case he has no general authority to bind the employer by contract."**

It was further submitted that the order was obtained by fraud and misrepresentation and cannot therefore stand, as the consenting officer did not have knowledge of the number of vehicles concerned. Reliance was placed on the factors for setting aside a consent set out by the Court of Appeal in **Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited & Another (1998)eKLR** where the case of **Brooke Bond Liebig (T) Limited vs Mallya(1975)E.A.266**, was cited, to the effect that a consent order cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.

Lastly, it was submitted by the 1st Respondent that the Petitioner did not meet the threshold for granting of an injunction in this matter, as laid down in the case of **Giella vs Cassman Brown (1973) EA 358.** Further, that the Petitioner did not demonstrate a *prima facie* case since the 1st Respondent carried out its constitutional mandate in enacting the legislation that brought about the new levies. It was contended that the Petitioner's cannot be heard to say that they should be specially treated yet the other sand transporters are able to pay new levies, and such action would be discriminatory of the rest of the sand transporters.

The Response

The Petitioner's response to the application was in a replying affidavit sworn on 17th August 2015 by John Miriti Mburia, Daniel Kimani Muita and David Ngunyi Kimani, who stated that they are members of the Petitioner and authorized to swear the affidavit. They deponed that the order sought to be set aside or discharged was entered by consent, and that the 1st Respondent was represented by an advocate of the High Court whose firm had duly entered appearance on 4th May 2015.

Further, that the 1st Respondent cannot be heard to say that it was not aware of what transpired in court,

as the pleadings filed in court were served on them and were within their knowledge. The Petitioner denied that there was misrepresentation by any of its members as all issues were enumerated in its pleadings, each of its members identified, as well as the vehicles they owned.

The Petitioner stated that its complaint is on the constitutionality of various pieces of legislation which the 1st Respondent seeks to enforce, and that what it is seeking is a return of the *status quo*. Further, that even though compliance by others has happened, it does not remove the right of the Petitioner to ventilate its issues as guaranteed in the Constitution.

Submissions dated 9th November 2015 were also filed by the Petitioner's Advocate, Waiganjo Wachira & Co Advocates. It was submitted therein that

the advocate who appeared in court for hearing works as an employee of Machakos County as an advocate, and that he presented himself in court as such. Therefore, that he was expected to undertake all the normal duties which any advocate should, which includes making a consent order on behalf of its client.

Further, that the 1st Respondent was in a better position to know the scope of its employee's authority, and the 1st Respondent could have prevented the said Advocate from attending court. Reliance was placed on the decision in **Royal British Bank vs Turquard Ltd** for the position that a third party dealing with a company in good faith is entitled to assume that the company has complied with its internal procedures and formalities, unless he had actual knowledge of them or there are suspicious circumstances putting him on inquiry.

It was submitted that the Petitioner entered into a consent order with the Respondent's advocate in good faith and without notice of any indiscretion, and that the said consent order should be upheld in the interest of justice. Further, that the 1st Respondent is alleging illegality in the making of the consent, but has not furnished evidence to show that the said advocate had no authority to act as such.

On the issue of the alleged misrepresentation by the Petitioner, it was submitted that in the Petitioner's supporting affidavit dated 23rd April 2015, a list of the members of the Petitioner and the lorries which each of them owns and carries out their transport business with was attached. Further, that the material facts as to the number of members and the vehicles they each own has not changed and has at all times being consistent, and that there was no fraud or misrepresentation by the Petitioner.

The Petitioner further submitted that the factors for setting aside a consent order are well enumerated in the case of **Brooke Bond Liebig (T) Limited vs Mallya** as cited in **Kenya Commercial Bank vs Benjoh Almalgamated Limited & Another, (1998) eKLR** , and that in the present case there is no suggestion of fraud or collusion, all material facts were known to the parties, who consented to the compromise in clear and unequivocal terms as to leave no room for any possibility of mistake or misapprehension.

Lastly, it was submitted that the Petitioner has met the threshold for granting injunctions as outlined in **Giella vs Cassman Brown (1973) EA 358**, and had demonstrated a *prima facie* case with a probability of success as their constitutional right was contravened. Further, that the Petitioner is not asking for special treatment from other sand transporters, but rather that the levies charged are detrimental on their business. It was also submitted that the Petitioner will suffer an irreparable injury as the new levies are too high and will drive most of the members of the Petitioner out of business.

The Issues and Determination

I have carefully considered the pleadings and submissions filed herein, and find that the issue for determination is whether the consent entered herein and subsequent order can be set aside. The applicable law for setting aside a decree or order of the court is section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows:

“Any person who considers himself aggrieved—

> **(*a*) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
>
> **(*b*) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”**

Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a decree or order can be set aside as follows:

> **“ (1) Any person considering himself aggrieved—**
>
> **(*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
>
> **(*b*) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

The applicability of these provisions to consent orders was decided on by the Court of Appeal in **Munyiri vs Ndunguya (1985) KLR 370,** where it was held that the only remedy available to parties who want to get out of a consent order is to set aside the consent order by way of review or by bringing a fresh suit in court. The Court of Appeal also affirmed in the case of **Tropical Food Products International Ltd -vs- The Eastern and Southern African Trade and Development Bank, Civil Appeal No. 253 of 2002** that the High Court has the jurisdiction to review, vary or set aside a consent under Order 45 Rule 1 of the Civil Procedure Rules and section 80 of the Civil Procedure Act.

In addition on the ground of sufficient reason to review or set aside a consent order, various factors have been laid down by judicial decisions in this regard. In **Brooke Bond Liebig Ltd vs Mallya (1975) E.A 266** it was that a court can review a consent judgment on the same grounds that would justify the varying and rescinding of a contract between the parties. These grounds have been restated in various court decisions as follows: instances where the consent judgment was obtained by fraud or collusion; or by an agreement contrary to the policy of the court; if consent was given without sufficient material facts or in misapprehension or ignorance of material facts; or in general for a reason which would enable the court to set aside an agreement. See in this regard the decisions in **Brooke Bond Liebig Ltd vs Mallya (1975) E.A 266** and **Flora Wasike vs Destimo Wamboko (1988) KLR 429.**

In the present application, this Court on 12th May 2015 recorded a consent between the 1st Respondent and the Petitioner, wherein prayers 2, 3 and 4 of the Petitioner’s application by way of a Notice of Motion dated 23rd April 2015 were allowed, pending the hearing and determination of this Petition. The said prayers 2, 3 and 4 sought the following orders:

1. **“That pending interpartes hearing of the application, the Court be pleased to issue a temporary conservatory order suspending the operation of section 11 of the Machakos County Sand Harvesting Act 2014 and Part XVI(16) Sand Harvesting, of the Machakos County Finance Act 2014 in so far as it imposes fees for sand transportation as per the 8th Schedule thereto part 4 (i), (ii), (iii) and (iv) inclusive of the penalty in default of payment imposed therein.**
2. **That pending interpartes hearing of the application the members of the Petitioner be**

allowed to continue to pay to the 1st Respondent a sum of Kenya Shillings (Kshs) 1,300 for sand transportation per trip by the Petitioners and their affiliates as contained in the schedule to the application herein.

3. **That pending interpartes hearing of the application the Court be pleased to issue a temporary conservatory order restraining the respondents or any other state organ or authority or persons from arresting, detaining or charging members of the Petitioner their agents/employees, the Petitioner's members' lorries/trucks as is contained in the schedule to the application herein."**

It was further consented by the said parties on 12th May 2015 as follows:

> **"The members of the Petitioner be exempted from operation of section 11 of the Machakos County Sand Harvesting Act 2014 and Part XVI(16) Sand Harvesting of the Machakos County Finance Act 2014 in so far as it imposes fees for sand transportation as per the 8th Schedule thereto Part 4 (i), (ii), (iii) and (iv) inclusive of the penalty in default of payment imposed therein"**

An order giving effect to this consent was subsequently issued by this Court on 12th May 2015.

I shall now proceed to consider the various grounds raised for the setting aside of the said consent order. The first ground raised by the 1st Respondent was that the consent was entered on its behalf by an officer who had no authority to do. I have perused the Court record and note that on 4th May 2015, a Memorandum of Appearance dated 4th May 2015 was filed by the Machakos County Law Office of the Machakos County Government for the 1st Respondent. While I note that there is no provision in law for a county law office to represent county governments in legal proceedings, the Machakos County Government as a corporate and juristic body under section 6 of the County Government Act can enter appearance in legal proceedings on its own behalf. Therefore, I find that the 1st Respondent did enter appearance on 4th May 2015.

On 12th May 2015 the record shows that an advocate by the name of Mr. Nthiwa appeared for and entered the impugned consent on behalf of the 1st Respondent. The position of an advocate having ostensible authority to enter consent for a party in Court has been reaffirmed in various decisions. In **Kenya Commercial Bank Ltd. -v-Specialised Engineering Company Ltd. 1982 KLR 485** which was upheld by the Court of Appeal in **M & E. Consulting Engineers Limited v Lake Basin Development Authority & Another [2015] Eklr,** it was stated as follows in this regard:

> **"1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.**
>
> 2. **A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.**
>
> 3. **An advocate has general authority to compromise on behalf of his client, as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.**
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> 4. **The fact that a material fact within the knowledge of the client was not communicated to the advocate when he gave his consent to a court order is not sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if the advocate concedes he would not have given his consent had he known these facts.**

5. **The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds.”**

The 1st Respondent’s arguments that the officer who entered the consent with the Petitioner on 12th May 2015 had no express or implied authority to do so cannot therefore lie, in the absence of any evidence of their communication to the Petitioner of that lack of authority, or of any fraud or collusion on the part of the said officer.

Likewise, the ground that the Petitioner made misrepresentations to the said officer does not to have any basis, as the Petitioner has shown that they attached an annexture marked “HS2” to its affidavit in support of the Notice of Motion dated 23rd April 2015, in which it listed all their members and all the motor vehicles each one of them owns. This annexture is on the Court record, and had been served on the 1st Respondent as at the time the consent was entered into on 12th May 2015, as shown by the Affidavit of Service filed in Court on 12th May 2015 sworn on 8th May 2015 by Tabitha Mbugua, a licenced Court Process Server.

These findings notwithstanding, I am of the view that there are credible concerns raised by the 1st Respondent as to the policy of this Court as regards the interpretation, suspension and invalidation of statutes. These concerns were raised in the arguments made by the 1st Respondent as to the selective application of the material County laws to the Petitioner, and that a *prima facie* case had not been established for the suspension of the said County laws.

The policy that guides this Court as regards county legislation is set out in Article 185 of the Constitution, which provides that legislative authority of a county is vested in and is exercised by its County Assembly, which is empowered to may make any laws that are necessary for the performance of the functions and exercise of the powers of the County Government . The procedures for enactment are in this regard provided for in sections 21 to 25 of the County Government Act.

The procedure of invalidating a County Act can only be done by a County Assembly by way of enactment of a later Act, but subject to this procedure, it is only the High Court that can rule on any challenge made to the validity of an Act at the first instance. See in this regard the text by **Francis Bennion on Statutory Interpretation, 3rd Edition** section 47 at pages 163-168 and Article 165(3)(d) of the Constitution.

While the Court can make a determination in this regard either at an interlocutory stage or at the final stage of the hearing of a challenge to the validity of an Act, the Court is obliged to do so only upon consideration of the arguments put forward either as to defects in the enactment procedure of the Act, or its invalidity on grounds of the constitutionality.

It is therefore not only against public policy but also the policy of this Court to suspend or invalidate an Act in the absence of the establishment of reasonable grounds, and without the Court having the opportunity to consider and apply its mind to the applicable Constitutional principles. Parties cannot therefore consent to and abrogate to themselves the right and/or duty to determine such suspension or invalidation, or indeed any other constitutional right without a hearing.

Odunga J. had the occasion to review various decisions on this point when considering a petition and application for suspension of the Security Laws Amendment Act in **Coalition for Reform and Democracy (CORD) & Another v Republic of Kenya & Another [2015] eKLR**, and held as follows at paragraphs 120 to 124 of his decision:

> “**Before delving into the merits of the application, an issue of jurisdiction in my view was alluded to though not specifically. The issue was to the effect that this Court has no power to grant conservatory orders where the constitutionality of legislation is under challenge….. In**

support of this contention, reliance was placed on Kizito Mark Ngaywa vs. Minister of State for Internal Security and Provincial Administration & Anor (supra), and Susan Wambui Kaguru & Ors vs. Attorney General Another (Supra). In the *Kizito Case*, Ibrahim, J (as he then was) referred to his own decision made on 6th October 2010 in Mombasa High Court Petition No. 669 of 2009 – Bishop Joseph Kimani & Others vs. Attorney General & Ors in which he pronounced himself as follows:

> **"It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stage actually show that the operation of the legislative provision are a danger to life and limb at that very moment…It is my view the principle of presumption of Constitutionality of Legislation in (sic) imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law. I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation of statutes, statutory provisions or even Regulations should be wholly avoided except where the national interest demand and the situation is certain… I am still of the view that "there is no place for conservatory or interim order in petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void." It is even more premature at this stage where the application has not been heard or is not being heard to seek such conservatory orders. The applications must be heard first."**

Majanja, J on his part in Susan Wambui Kaguru & Ors vs. Attorney General Another (Supra) expressed himself *inter alia* as follows:

> **"I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with their delegated sovereign authority. The question for the court is to consider whether these laws are within the four corners of the Constitution. No doubt serious legal arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so."**

Emphasis seems to have been placed on the underlined sentence in *Bishop Joseph Kimani's Case*. However, it is my view that the learned Judge's decision ought to be read as a whole. If that is done what clearly comes out is that the power to suspend legislation during peace time ought to be exercised with care, prudence and judicious wisdom where it is shown that the operation of the legislative provision are a danger to life and limb at that very moment and where the national interest demand and the situation is certain. On my part I would modify that view by adding to the phrase "a danger to life and limb" the words "or where there is imminent danger to the Bill of Rights" since Article 19(1) of the Constitution provides that the "Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies" and Article 21(a) provides that "it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights." Similarly Majanja, J did not rule out entirely the possibility of grant of conservatory orders. What the learned Judge held was that at the stage of the application for conservatory order he could not make an interim declaration which would effectively undo the legislative will *unless there are strong and cogent reasons to do so*. [Emphasis mine]. In other words where there are strong and cogent reasons conservatory orders may be

granted."

I agree with the position set out by the various Judges that strong and cogent reasons and a Constitutional basis must be shown, before legislation can be suspended at an interlocutory stage, and it is my finding that such suspension to be effected by consent of the parties in the absence of a hearing.

In addition, certain principles on statutory interpretation guide this Court in applying laws made by Parliament and County Assemblies, as are provided for in the text by **Francis Bennion on Statutory Interpretation, 3rd Edition** at sections 263 to 270. Two principles that are of relevance in this application are firstly that law should be just, and should further the ends of justice. The law in this regard should achieve fairness and should not be discriminatory. Furthermore, it is also an interpretative principle of statutory law that the law should be coherent and consistent, in the sense that a law should provide equal treatment and a remedy for all cases that are on the same footing.

The effect of the consent reached by the 1st Respondent and Petitioner on 12th May 2015 had the effect of a law of the Machakos County being complied with by only a section of the public that was affected by it, and not by others. This was as a result of the terms of the consent that members of the Petitioner were exempted from paying the fees and penalties imposed by the 8th Schedule of the Machakos County Finance Act, which provisions however continued to apply to the other persons affected by the said Act. This particular part of the consent cannot therefore be upheld as it is not only manifestly discriminatory, but also results in an inconsistent application of the said law.

I accordingly allow the 1st Respondent's Notice of Motion dated 10th August 2015 for the foregoing reasons, and hereby order as follows:

1. The consent between the 1st Respondent and Petitioner recorded herein on 12th May 2015, and the consequential order issued on the 12thMay 2015 be and is hereby set aside.
2. The Petitioner's Notice of Motion dated 23rd April 2015 shall proceed to full hearing for determination on its merits.
3. The 1st Respondent is granted leave to file and serve a Replying Affidavit to the Petitioner's Notice of Motion dated 23rd April 2015 within 30 days of the date of this ruling.
4. The costs of the 1st Respondent's Notice of Motion dated 10th August 2015 shall be in the cause.

Dated, signed and delivered in open court at Machakos this 2nd day of December, 2015.

P. NYAMWEYA

JUDGE