



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. CASE NO. 356 OF 2013

**IN THE MATTER OF AN APPLICATION BY WAINAINA KIGATHI MUNGAI FOR
JUDICIAL REVIEW ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI**

AND

**IN THE MATTER OF THE RATING ACT, CAP 267 LAWS OF KENYA, SECTIONS 1A, 1B &
3A OF THE CIVIL PROCEDURE ACT CAP 21, LAWS OF KENYA & ARTICLE 40 OF THE
CONSTITUTION**

REPUBLICAPPLICANT

VERSUS

NAIROBI CITY COUNTY1ST RESPONDENT

INTERIM COUNTY SECRETARY,

NAIROBI CITY COUNTY.....2ND RESPONDENT

AND

EX PARTE: WAINAINA KIGATHI MUNGAI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 28th October, 2013, the ex parte applicant herein, **Wainaina Kigathi Mungai** seeks the following orders:
1. **THAT** an order of Certiorari be and is hereby granted to quash the decision of the 2nd Respondent made on Thursday 3rd October 2013 to place the Applicant's property being L.R. No. 7785/74 situated in old Runda Estate under Nairobi County Management.
2. **THAT** an order of Mandamus do issue to compel the Respondents to remove the Notice erected on the suit premises being L.R. No. 7785/74 situated in old Runda Estate and on the public entrance on Ruaka Road in Runda Estate and to compel the 2nd Respondent to issue the Applicant with a Rates Clearance Certificate in respect of the suit premises being L.R. No. 7785/74 situated in old Runda Estate, Nairobi.
3. **THAT** an Order of Prohibition do issue to prohibit the Respondent their servants and/or agents, from placing under county management, selling, erecting notices on, dealing with,

trespassing or in any other way alienating or interfering with the Applicant's quiet and peaceful possession and enjoyment of the suit property being L.R. No. 7785/74 situated in old Runda Estate.

4. **THAT the costs of this Motion and these proceedings be borne by the Respondents.**

Ex Parte Applicant's Case

2. The application was supported by the supporting affidavit sworn by the applicant on 10th October, 2013.
3. According to the applicant, he is the registered proprietor of the suit property being L.R. No. 7785/74 situated in old Runda Estate, Nairobi (hereinafter referred to as the suit property) and that he has been diligently paying the Land Rent and Rates in respect of the same property. Despite that the Respondents have still been demanding from him Land Rent arrears and charging penalties.
4. He deposed that over the years, he has on numerous occasions furnished the Respondents with proof of payment and demanded that the Respondent gives credit for all the payments made and reconcile its accounts in respect of the suit property. However, the 1st Respondent has refused and/or ignored to do so with a detailed statement of account showing a breakdown of the principal amount allegedly owed, the penalties levied, the interested and any other charges levied on the property. Further the 1st Respondent has failed to issue him with a Rates Clearance Certificate claiming that the property has arrears of payment of rates.
5. Instead the Respondents have now threatened to sell the suit property for an alleged debt of Kshs. 10,172,024/= on account of alleged outstanding rates payments and penalties thereon an action which the applicant contended was made unilaterally by the Respondents as having requested for a detailed statement of account from 1st Respondent, the Applicant was awaiting to be furnished with the same only for the Respondents to forcefully erect the aforesaid Notice/Billboard on his property.
6. It was the applicant's case that despite his protestations to the Respondent's servants and or agents, he was never given an opportunity to be heard and his rights as a resident and land owner in the County of Nairobi were totally ignored and disregarded contrary to the principles of natural justice and the constitution. To him, the said decision made by the Respondents to sell his property is in contravention of the **Valuation Act** and the same is actually a guise to illegally and unlawfully sell the Applicant's premises based on fraudulent and erroneous tabulations by the Respondents. Further, the threat made by the Respondents to sell his property is meant to harass and intimidate him to pay the fraudulent and erroneous tabulations by the Respondents which, in his view, is an act of extortion.
7. The Applicant asserted that the Respondents are attempting to compel him to make the payments once again without accounting to him for the Payments made which decision is therefore illegal, null and void *ab-initio* as the accuracy and legality of the amount being demanded by the Respondents as arrears in rates payments and penalties is disputed and yet to be determined.
8. It was therefore averred that the Respondents have acted *ultra vires*, maliciously and unreasonably and failed to exercise their discretion if any judicially and the Applicant was apprehensive the Respondents would proceed to sale his property by illegal and fraudulent means which property they have threatened to sell pursuant to inaccurate and misleading alleged arrears of rates payments, penalties and interest unless restrained by this Honourable Court.

Respondents' Case

9. In response to the application, the Respondents filed a replying affidavit sworn by **Bernard Njau Njehia**, the acting Assistant Chief Accountant on 24th February, 2014.
10. According to the deponent, part of his duties and responsibilities includes but is not limited to collecting property Rates and or initiate recovery measures against rate payers who are in default of their obligations to pay property rates to the 1st Respondent. According to him, the rates collected by the 1st Respondent is applied to render public service to the residents and or visitors to the City County of Nairobi such as the *ex-parte* Applicant herein.

11. It was deposed that in or around October 2013 while carrying out his usual duties of evaluating the status of the rates payment, he found out that the rates in respect of the suit property were in arrears to the tune of Kshs 10,172,024/=. According to him, the records of the 1st Respondent indicated that the suit property was registered as L.R. No. 7785/74 situated in old Runda Estate fell under Nairobi County Management was registered in the name of the *ex-parte* Applicant. He then prepared a listing of the properties that had rent arrears as at 9th October 2013 for purposes of recovery action and the *ex-parte* Applicant's property was in the said defaulter's list with rates arrears of Kshs 10,172,024/= as at the material date.
12. Consequently, the 1st Respondent clamped down or caused to be clamped the subject property pursuant to powers conferred to it under Section 26 of the **Rating Act** Cap 267 of the Laws of Kenya.
13. Despite Clamping the subject property and/or Notices issued, it was contended, the *ex-parte* Applicant persisted with his refusal, failure and/or neglect to pay the Rates whose balance as at 20th February 2014 had escalated to Kshs 10,859,501/= hence the allegations that the Applicant has made any payment are not true. To the deponent, the purported payments receipt produced by the Applicant is not a Receipt but a mere Payment Request by the Respondent directed at the *Ex-parte* Applicant to pay as distinguished with a copy of a Payment Receipt over Property Number 209/4401/248 dated 10th February 2014. To the deponent, a Payment Receipt is electronically printed on the Payment Request using a Teller's Terminal upon payment.
14. The Respondents' position was therefore that the Applicant's Rate Payer's account is reconciled and the balance shown therein reflects the arrears in Rates as at the date shown hence the *Ex-parte* Applicant is not entitled to a Rates Clearance Certificate. It was reiterated that all payments made by the *Ex-parte* Applicant have been fully accounted for and there were no threats of sale of the *Ex-parte* Applicant's property but a mere lawful clamp down in a lawful process of Rates recovery as provided for in Sections 18 and 26 of the **Rating Act** Cap 227 hence all decisions and actions taken by the Respondent are lawful, reasonable and properly directed at the *Ex-parte* Applicant upon his default to pay the rates due and payable to the county.
15. In the Respondents' view, the *ex-parte* Applicant has approached the court with unclean hands as he continues enjoying public services from the Respondent county without paying the Rates as required by the law hence this application is a mischievous attempt by the Applicant to be shielded by the courts from meeting his overdue obligations and the court should not allow him to use it as a haven for rates defaulters.
16. It was the Respondents' case that the prerogative orders sought are not available to the Applicant as there is no *ultra vires* act on the part of the Respondents as alleged or at all and the application is an abuse of the court process.

Applicant's rejoinder

17. In a rejoinder, the applicant swore a supplementary affidavit on 7th March, 2014.
18. According to this affidavit, the applicant reiterated the contents of the supporting affidavit and added that the deponent of the replying affidavit did not demonstrate by way of any exhibit how the said arrears were tabulated and arrived at. To him the said affidavit was contradictory on whether his account had been reconciled or that he had not made any payments.
19. According to him, 1st Respondent is now attempting to shift the burden of proof to him to prove the total sum that he has remitted to them as rates payments yet it is the custodian of the records and the applicant can only confirm the payments upon receipt of a detailed statement of account from the 1st Respondent. It was further contended that the allegation that he is required to pay the sum of Kshs 68,000/= as rates annually is incorrect since the rates payable annually has all along been Kshs 34,000/= and it was only this year (2014) that the same has been increased to Kshs 68,000/=.

Applicant's Submissions

20. On behalf of the Applicant it was submitted, while reiterating the contents of the supporting affidavit, that whereas the 1st Respondent is empowered under the **Rating Act** to levy rates and

impose by-laws relating to the payment thereof, the demand made by the 1st Respondent in the instant case is irrational and unreasonable and cannot be justified at all in light of the fact that to date the Respondents have blatantly failed and/or refused to furnish the Applicant with a detailed statement of account showing a breakdown of the principal amount allegedly owed, the penalties levied, the interest and any other charges levied on the property. Citing **Republic vs. City Council of Nairobi ex parte Callfast Services Ltd NBI JR Misc. Appl. No. 276 of 2010 [2013] eKLR** a case in which the decision in **Keroche Industries Ltd vs. Kenya Revenue Authority & Others [2007] KLR 240** was cited with approval, it was submitted that “*whereas the demand of payment of fees by the Respondents may not be in excess of its jurisdiction, the fact that the said fees has never been demanded by the Respondent in the past which has given the ex parte applicants legitimate expectations that they are only liable to pay the taxes to the Authority is a ground for restraining the Respondent from demanding such payment with respect to the taxes that accrued in the past unless and until the Respondent gives a reasonable notice of the change in their past policy. To suddenly demand such payments amounts to abuse of power on the part of the Respondent.*”

21. It was submitted that whereas the Respondent stated in the letter dated 24th May, 2013 that he has been paying the rates since 2005, his property was allegedly entered into the valuation roll in 1992. Yet, the Respondents who are making retrospective demands have totally refused to furnish the ex parte applicant with any demand notice prior to 2005 or a statement of account since 1992.

Respondents' Submissions

22. On behalf of the Respondent, it was submitted while reiterating the contents of the replying affidavits that the application is too general without any documentary and or any other form of evidence required to persuade the Court to grant the orders prayed.
23. In view of the foregoing, it was submitted that the judicial review orders of certiorari, mandamus and prohibition sought by the applicant should not be granted by the Court as to do so could block the county government from carrying out its mandate of collecting rates from property owners within the city and in effect gag the respondent from carrying out their proper administrative functions as required of their offices under the law and the Constitution of Kenya 2010 in providing improved and efficient services to the residents of Nairobi County.

Determinations

24. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** and held:

“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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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.”

25. It must however be appreciated that the onus is on a person seeking judicial review orders to show that it is necessary since these are not orders that are lightly made. The onus lies with an applicant seeking the grant of judicial review orders to establish that it is essential for it to issue. A judicial review order is an order of serious nature and cannot and should not be granted lightly. There should be concrete grounds warranting the grant of the orders sought. See **R vs. Commissioner of Police Ex Parte Ben Nyamweya HCMA No. 1404 of 1998, Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, and **East African Community vs. Railways African Union (Kenya) and Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**.
26. In this case the applicant contends that the respondents seek to recover rates from the applicant yet the Respondent has not furnished the Applicant with the statements showing how much the applicant owes. To the applicant it has paid the rates but the Respondent has failed to furnish it with the rates clearing certificates.
27. Since it is the applicant who alleges that he does not owe the rates demanded by the Respondents under sections 107 and 109 of the ***Evidence Act***, Cap 80 Laws of Kenya, the onus was on the applicant to show that the Respondent's action was illegal, irrational or procedurally improper. From the evidence on record, this Court is unable to find that the Respondents' action was unlawful. The Applicant has failed to place before this Court material upon which the Court can find that no rates are due from the applicant to the Respondents. He has not exhibited any documents showing the rates remitted by him to the Respondents. This Court cannot be expected to make orders favourable to the applicant on bare allegations.
28. The applicant has also alleged the Respondents' action is in breach of the rules of natural justice in that he was never afforded an opportunity of being heard before the action was taken. According to the Respondents the clamping of the applicant's property was done pursuant to section 26 of the ***Rating Act***. That section provides:
29. Although the Respondent has contended that the aforesaid section was complied with there was no evidence adduced to prove the said contention. Article 47 of the Constitution provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

30. However, as was held by Seaton, JSC in the Uganda Case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85**:

“The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat not ei qui negat incumbit probatio*. It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons..... As applied to judicial proceedings the phrase “burden of proof” has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence.... The *onus probandi* rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced.” See **Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L)**; **Trevor Price vs. Kelsall [1975] EA 752 at 761**; **Phippson on Evidence 12th Ed Para 91**; **Phippson at Para 95**.

31. Similarly, the Supreme Court of Uganda in **Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA NO. 9 of 1990 [1992] V KALR 30** was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved

- by the respondents would be to impose an unnecessary burden on them.
32. Therefore with respect to the issue whether or not a notice was duly given to the applicant the onus lay on the Respondent to prove the same since the applicant could not prove a negative. It was sufficient for the applicant to aver that no such notice was given to him. In this there is no evidence that the Respondent complied with the aforesaid provision in taking the action in question which was undoubtedly an administrative action. Whereas the Respondent is no doubt entitled to collect rates, that right and power must be exercised in accordance with the law. In the absence of any evidence that the applicant was furnished with the reasons for the impugned action, this Court is left with no option but to find that the Respondent's action was tainted with procedural impropriety.
33. With respect to the issue of legitimate expectation, in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others** (supra) stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. However, the legal position is that legitimate expectation cannot override the law. This was the position in **Republic vs. Kenya Revenue Authority ex parte Aberdare Freight Services Limited [2004] 2 KLR 530** where it was held:

“...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. Judicial resort to estoppel in these circumstances may prejudice the interests of third parties. Purported authorisation, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims... Legitimate expectation is founded upon a basic principle of fairness that legitimate expectation ought not be thwarted – that in judging a case a judge should achieve justice, weigh the relative “strength of expectation” of the parties. For a legitimate expectation to arise the decision must affect the other person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker not to be withdrawn without giving him first an opportunity of advancing reasons for contending that they should be withdrawn... A representation giving rise to legitimate expectation must however be based on full disclosure by the applicant. Thus where he does not put all his cards face up on the table it would not be entitled to rely on the representation. In this case any legitimate expectation has clearly been taken away firstly by the conduct of the applicant and the provisions of the Statute Act and therefore there is no discretion.”

34. I have not seen any evidence that the Respondent promised or assured the applicant that the applicant would not pay the rates on its property. The mere fact that the same had not been demanded for a long time may only entitle the Applicant to a reasonable notice to pay the same but does not entitle the applicant to evade the payment of rates which are legally due.
35. Having considered the foregoing and in light of my finding that the provisions of Article 47 of the Constitution as read with section 26 of the ***Rating Act*** were not complied with I hereby grant an order of certiorari removing into this Court for the purposes of being quashed the decision of the 2nd Respondent made on Thursday 3rd October 2013 to place the Applicant's property being L.R. No. 7785/74 situated in old Runda Estate under Nairobi County Management which decision is hereby quashed. I further grant an order of mandamus compelling the Respondents to remove the Notice erected on the suit premises being L.R. No. 7785/74 situated in old Runda Estate and on the public entrance on Ruaka Road in Runda Estate. I however decline to compel the 2nd Respondent to issue the Applicant with a Rates Clearance Certificate in respect of the said premises. The prayer for prohibition is similar declined.
36. The costs of this application are awarded to the applicant.

Dated at Nairobi this day 10th day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mungai for the Applicant

Miss Kamau for Mr Mogaka for the 1st Respondent

Cc Kevin