



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS APPLICATION 82 OF 2012

IN THE MATTER OF THE LOCAL GOVERNMENT ACT
AND

IN THE MATTER OF ARTICLE 27, 40 & 47 OF THE CONSTITUTION OF THE REPUBLIC
OF KENYA, 2010

AND

IN THE MATTER OF THE LAW REFORM ACT
AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO SEEK JUDICIAL REVIEW
ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

BETWEEN

ABDI MOHAMED GUHAD t/a TALEH HOTEL APPLICANT

AND

1. THE TOWN COUNCIL OF MUTITO ANDEI

2. THE MINISTER FOR LOCAL GOVERNMENT RESPONDENTS

RULING

This is an application by way of Chamber Summons dated 26th April 2012, filed by Abdi Mohamed Guhad t/a Taleh Hotel. The application was filed under Order 53 Rule 1(1), (2), (3) and (4) of the Civil Procedure Rules and Section 9 of the Law Reform Act (Cap 26), as well as section 3A of the Civil Procedure Act (Cap 21). It has four prayers as follows:-

- 1. That this application be heard as a matter of urgency and be set down for hearing forthwith.**
- 2. That the honourable court be pleased to grant the applicant leave to bring judicial review proceedings against the respondents for orders of certiorari, prohibition and mandamus.**
- 3. That the said leave does operate as a stay of the respondents' action to trespass on the applicant's private property to collect parking fees from his clients.**
- 4. That the costs of this application be provided for.**

On 30th April 2012, I granted leave to file judicial review proceedings, but ordered that the request for stay be heard *inter-partes*.

The application has grounds on the face of the Chamber Summons. The grounds are that the applicant has been running his business by the name Taleh Hotel for the past one year. That in April 2012 the 1st respondent, vide a letter informed the applicant that it would levy parking fees within the business premises of the applicant under section 148 of the Local Government Act (Cap 265). That such a move was an abuse of power. That Article 40 of the Constitution of Kenya guaranteed the applicant quiet and peaceful enjoyment of his property and fair and lawful administrative action. That the letter was *ultra vires*, made *mala fides* and unconstitutional, and needed to be interrogated by this court to guard against impunity.

The application was filed with a verifying affidavit sworn by the applicant on 26th April 2012, as well as a statutory statement. Copies of several documents were filed with the statutory statement.

The application is opposed by the 1st respondent. Though they claim to have filed a replying affidavit and a further affidavit, what is on the file is only the further affidavit sworn on 23rd May 2012 by Ambrose Maweu, the Town Clerk. The said affidavit annexed a report from the District Surveyor, which had a sketch plan of the parking area in dispute.

On the hearing date Mr Juma, who appeared for the applicant addressed the court. Counsel submitted that the applicant operated a hotel business at Mtito Andei. It was on private land that fronted the Nairobi-Mombasa highway. It had a perimeter wall and drivers or customers park therein. However, the 1st respondent had from 20/4/2012 started collecting parking fees. The result was that the customers of the applicant were forced to go to other hotels which were not put under similar conditions. Counsel submitted that section 148 of the Local Government Act allowed local authorities to levy parking charges, but not on private land. Counsel referred to the surveyor's report filed by the 1st respondent, which confirmed that the buildings were not on the road reserve. Counsel urged the court to grant the stay orders sought.

Mr Kasyoka, for the 1st respondent, submitted that the parking fees was not being charged on private land. Counsel submitted that the disputed parking area was on the road reserve. Counsel denied the existence of a perimeter wall. Counsel argued that there was no discrimination against the applicant, as the parking charges applied to the whole of Mtito Andei area. Counsel submitted that the applicant had not shown any legal reason why the council should be prevented from collecting parking fees. The request for stay orders was therefore not justified.

This is a request for stay orders. An applicant has a burden to establish the legal basis why stay should be granted, and what loss he will suffer if stay is not granted. The information given by the applicant is scanty. Though they filed many documents, they did not file a sketch that describes their plot or premises. Even after the 1st respondent filed the report of the District Surveyor, they did not file a response thereto. In failing to give necessary details on the extent of their private plot, and the parking area, this court is left to do guesswork. As at now, there is nothing that the court can rely on except the report of the District Surveyor Kibwezi dated 18th May 2012 and the sketch annexed thereto. The parking

area indicated thereto, appears to fall within the road reserve. There being no other information given by the applicant at this stage, the pendulum has to swing against them. They have not shown where their private land starts and where it ends. I find no basis to grant the stay requested.

Consequently, I dismiss the prayer for stay. Costs in the cause.

Dated and delivered at Machakos this **4th** day of **July** 2012.

George Dulu

Judge

In presence of:-

Court clerk – Nyalo

N/A for Applicant

Mr Kasyoka for 1st Respondent