REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 328 of 2010

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

BETWEEN

REPUBLIC.....APPLICANT

AND

THE MINISTER FOR LOCAL GOVERNMENT.....1ST RESPONDENT

THE CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

EX-PARTE APPLICANTS

JUDY WAMBUI GITAU

PATRICK MUTISYA MUTHIANI &

LIVINGSTONE MANENE

(Being the officials of Nairobi Markets Society)

JUDGMENT

Through the Amended Notice of Motion dated 17th December 2010, Judy Wambui Gitau, Patricia Mutisya Muthiani, and Livingstone Manene in their capacity as officials of the Nairobi Markets Traders society commenced Judicial Review proceedings against the Minister for Local Government, the City Council of Nairobi and the Hon. Attorney General ***(1st,2nd& 3rd Respondents respectively)*** seeking an order of Certiorari in the following terms:

(1) AN ORDER OF CERTIORARI to remove into the High Court for the purpose of it being quashed the order/decision made by the Minister for Local Government under Section 148 of the Local Government Act Cap 266 and Cap 267 of valuation for Rating and Rating Act approving the revised house rents, fees and charges effective 2010 published in the special issue of Kenya Gazette Notice No.12582 published on 15th October 2010 through letter Ref. No.MLG.204-01/IV/61 of 12th October 2010.

(2) AN ORDER OF CERTIORARI to remove into the High Court for the purpose of it being quashed the order/decision made by the City Council of Nairobi to revise house rents, fees and charges as approved by the Minister for Local Government through letter Ref. No. MLG.204-01/IV/61 of 12th October 2010 and which increaments were published in the Kenya Gazette Notice No.12582 of 15th October 2010.

The application is premised on grounds stated in the statutory statement dated 4th November 2010 and is supported by the verifying affidavit sworn by Judy Wambui Gitau on even date.

The Exparte Applicants (Applicants) are officials of a society representing small scale traders who have rented stalls (suit premises) in various markets owned by the City Council of Nairobi (2nd Respondent) wherein they conduct various types of businesses. It therefore follows that the real Applicant in this case is the Nairobi Markets Traders society (the society) who instituted these proceedings on behalf of its members through its officials. I have found it necessary to make this distinction to avoid any confusion regarding the identity of the Exparte Applicant in order to clarify that reference to the Applicant in the course of this judgment will be a reference to the society and not to its officials who are named herein as the Exparte Applicants.

Having made that brief clarification, I now wish to turn to the brief facts of the case.

The Applicant claims that its members had been paying varying monthly rent to the 2nd Respondent depending on their type of business but that the 2nd Respondent unilaterally made a decision to increase the rent payable by 100% without notice or consultation with its members. The decision had been approved by the Minister for Local Government and published in a special issue of the Kenya Gazette as **Notice No.12582 of 15th October 2010.** TheApplicant complains that the decision to increase rent to the suit premises was made unilaterally, was unreasonable ,oppressive and unjust as the increment was too high and was likely to put its members out of business thus affecting their livelihood. The Applicant also claims that the failure of the 1st and 2nd Respondents to discuss with it on behalf of its members the proposed increments before making their respective decisions on the matter was a breach of the rules of natural justice.

It was also the Applicants contention that the increment was unjustified since the 2nd Respondent had stopped rendering basic services to its members like providing security, cleaners and garbage collection.

The application is opposed. The 1st and 3rd Respondents opposed the motion through a replying affidavit sworn by the Minister for Local Government Hon. Musalia Mudavadi on 9th June 2011. On behalf of the 2nd Respondent, Mr. J.N. Kariuki the 2nd Respondent's Director of Social Services & Housing swore a Replying affidavit on 14th December 2010 which was filed on 15th December 2010.

In his replying affidavit, the 1st Respondent deponed that he approved the increase of fees and charges as proposed by the 2nd Respondent in its special full council meeting of 14th April 2010 in accordance with his statutory mandate under Section 148(2) of the Local Government Act, Cap.265 Laws of Kenya (the Act).

In support of the 1st Respondents case, the Minister averred that before giving his approval, he was provided with copies of minutes of stakeholder meetings held on 30th January 2010 and 11th February 2010 where the issue of increase of fees, rents and other charges was discussed. He annexed minutes of the said stakeholder meetings as exhibits marked **"MMI".**

Mr. Kariuki on behalf of the 2nd Respondent deposed in his replying affidavit that the 2nd Respondent adhered to all laid down procedures before revising the rent charges upwards and did not act unreasonably, or unilaterally as alleged by the Applicant. The 2nd Respondent averred that in making its decision to increase rent and fees on its facilities, it did not violate the rules of natural justice nor did it

abuse its powers under the Act Cap.265 Laws of Kenya.

At Paragraph 4 & 5, the deponent averred that the Applicant was not recognized by the 2nd Respondent and that the recognized body representing market traders was the Permanent Markets Association which had been consulted before the impugned decision was made.

To further advance their respective cases, the Applicant and the Respondents filed written submissions which they opted not to orally highlight in court.

Having carefully considered the pleadings filed herein and the submissions made by the parties, I find that it is not disputed that in revising the rent and charges for its facilities including market stalls occupied by members of the Applicant and in granting approval for such adjustments, the 2nd and 1st Respondent respectively acted in the exercise of their statutory mandates under Section 148 of the Local Government Act.

What is contested is whether in making its decision to increase the rentalchargesand in approving the said increments as shown in the Gazette notice **No.12582 of 15th October 2010**, the 1st and 2nd Respondents violated the rules of natural justice by not consulting the Applicant on behalf of its members before making their respective decisions.

The other issue for determination is whether the 2nd Respondent acted unilaterally, unreasonably and oppressively in making its decision as according to the Applicant, the rate of increment was too high and had the potential of running its members out of business.

On the first issue regarding whether the 1st and 2nd Respondent violated the rules of natural justice in making the impugned decision, the 2nd Respondent has submitted that it was not aware of the existence of the Applicant by the time it convened meetings with its stakeholders to discuss the proposed increments. It is the 2nd Respondent's case that having not been aware of its existence, the 2nd Respondent could not have involved the Applicant in its deliberations on the matter with its stakeholders.

The 1st Respondent on his part claimed that he was satisfied that stakeholders had been consulted before he was asked to approve the rental fees and other charges proposed in the City Council's resolution of 14th April 2010. He was provided with minutes of two stakeholder meetings held by the 2nd Respondent on 30th January 2010 and 11th February 2010.

The Applicant though served with the 1st Respondent's replying affidavit did not file a further affidavit to deny that such stakeholder meetings actually took place.

The rules of natural justice are fundamental principles in our justice system. They are contained in two cardinal principles which require that no man shall be condemned unheard and that no man shall be a judge in his own cause.

In this case, I find that the claim by the Applicant that the 2nd Respondent violated the rules of natural justice by failing to consult it before making its impugned decision is farfetched and unmerited in the light of evidence tendered by the Applicant itself showing that by April 2010 when the 2nd Respondent decided to increase the rental charges affecting the suit premises, the Applicant was in law non-existent. The Certificate of Registration No.32637 annexed to the Applicant's verifying affidavit shows that the Applicant was registered as a society on 9th September 2010.

In the circumstances, the 2nd Respondent cannot be faulted for not having consulted the Applicant since it could not have consulted a non-existent body. The 2nd Respondent's claim that the recognized umbrella body at the time representing the interests of market traders was the Permanent Markets Association which it had consulted was not controverted by the Applicant.

As for the 1st Respondent, I am persuaded to find that his role in this matter did not require him to make a decision on the imposition or adjustments of rental fees and other charges by Local Authorities. His role was limited to approving a decision already made by the 2nd Respondent and having been furnished with evidence that the 2nd Respondent's stakeholders had been consulted in meetings held on 30th January and 11th February 2010, he was not under any obligation to consult the said stakeholders afresh before approving the revised rates .

In view of the foregoing, I am persuaded to find that in making their respective decisions, the Respondents did not violate the rules of natural justice as alleged by the Applicant.

On the claim that the two Respondent's decisions were arbitrary, unilateral, unreasonable and oppressive, I find that the Applicants based their claim on the contention that the rental increments to the market stalls was too high or excessive.

Going by the material placed before the court, I do not find any evidence to show or suggest that the 2nd Respondent's decision was made either arbitrarily or unilaterally.

There is evidence to prove that the decision followed two stakeholder meetings and was made in a resolution passed in a special full council meeting convened by the 2nd Respondent. It is common knowledge that full council meetings held by Local authorities are consultative forums which involve duly elected councilors who are representatives of the people living or carrying on businesses in the Local Authority concerned. The Applicant is a society comprised of persons who operate different businesses in the City of Nairobi. Though Section 148 of the Act does not provide that any consultations be done before increments on rents and other charges are made, it can be argued that the Applicants interests were represented by the councilors who were present in the full council meeting in which the resolution to revise the rental charges upwards was passed. The process of revising the rental charges was participatory and it cannot therefore be said that the decision was unilaterally or arbitrarily made or that it was oppressive.

Regarding the claim that the revised rents were too high or excessive, It is my view that this court cannot embark on a determination of whether the adjustments of the rental charges were excessive or not since doing so would be tantamount to considering the correctness or the merits of the said decision. This court can only consider whether in arriving at the rental charges, the 2nd Respondent followed the prescribed statutory procedure or due process. I make this finding because the remedy of judicial review goes to review not the merits of the decision being challenged but the process by which that decision was made. The court when reviewing a decision cannot substitute its opinion for that of the authority concerned.

The statutory mandate and procedure for imposing and revising rental charges and other fees is found in Section 148 of the Local Government Act which states as follows:

(1). A local Authority may-

(a) charge fees for any licence or permit issued under this Act or any other written law or in respect of any person or matter, premises or trade, whom or which the local authority is empowered to control or license;

(b) impose fees or charges for any service or facility provided or goods or documents supplied by the local authority or any of its officers in pursuance of or in connexion with the discharge of any duty or power of the local authority or otherwise.

(2) All fees or charges imposed by a local authority shall be regulated by by-law, or if not regulated by by-law, may be imposed by resolution of the local authority with the consent of the Minister and such consent may be given either in respect of specified fees or charges or may be given so as to allow a specified local authority to impose fees or charges by resolution in respect of a specified power or a particular matter".

This section clearly shows that all fees or charges by a Local Authority may be regulated by its by-laws or if not regulated by Bye –laws may be imposed by a resolution of the Local Authority with the consent or approval by the minister.

The 2nd Respondent imposed the rental charges challenged by the Applicants in this case through a resolution in a special full council meeting and this resolution was approved by the minister vide letter dated 12th October 2010 – see exhibit marked **"MM2".** There is therefore no doubt that the Respondents had the mandate to increase rental charges on the premises rented by the Applicant's members and that they followed the process prescribed by the law in reaching their decision.

In view of the foregoing, is the Applicant then entitled to the relief sought in this case?

The Applicant has sought an order of Certiorari to quash the decisions of the 1st and 2nd Respondent.

It is trite law that the remedy of certiorari issues to quash decisions which have been made either in excess of or without jurisdiction, or in breach of the rules of natural justice.

As stated earlier, it is clear from the material placed before me that in this case the 1st and 2nd Respondents made the impugned decisions within their jurisdiction and in accordance with the provisions of Section 148 of the Act. There is also no evidence to demonstrate that the said decisions had been made in violation of the rules of natural justice.

In the end, it is my finding that the Applicant has failed to demonstrate that it is deserving of the relief sought in this case. I consequently find no merit in the Notice of Motion amended on 17th December 2010 and it is hereby dismissed with no orders as to costs.

Dated, **Signed**and**Delivered** by me at Nairobi this **6th** day of **November** 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk

Mr. Amadi holding brief Gatumuta for Applicant
N/A for 1st Respondent
N/A for 2nd Respondent
N/A for 3rd Respondent