REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civ Misc Appli 149 of 1998

MBIUNI MWA ENVIRONMENT SAND HARVESTING CO-OP SOCIETY LTD………… 1ST APPLICANT

YIIKA MULTI-PURPOSE CO-OPERATIVE SOCIETY LIMTTED…………….………... 2ND APPLICANT

MASINGA SAND HARVESTING CO-OPERATIVE SOCIETY.......................................…... 3RD APPLICANT

NDITHINI SAND HARVESTING CO-OPERATIVE SOCIETY LIMTTED..……................… 4TH APPLIC ANT

VERSUS

COUNTY COUNCIL OF MASAKU…………....…….. RESPONDENT

IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 265

IN THE MATTER OF A DECISION DATED 26.6.98 MADE BY THE COUNTY

COUNCIL OF MASAKIJ TO IMPLEMENT (SAND) BY-LAWS 1998

Coram: J.W.Mwera, J.

Kilukumi Advocate for Applicant P. Mulwa advocate for respondent C.C. Muli

RULING

Herein involved are 4 co-operative societies, the applicants: Mbiuni Mwa Environment Sand Harvesting, Yiika Multi-purpose, Masinga Sand Harvesting and Ndithini Sand Harvesting, Their application for orders of Judicial Review under 0 53 r, 3 (1) Civil Procedure Rules as read with S.8 (2) Law Reform Act is directed towards a decision by the Respondent, the County Council of Masaku made on 26.6.98. It was to implement Sand By-Laws and as it shall unfold the applicants pray this court by way of Certiorari: to bring up that decision and quash it, A further prayer is to issue an order of prohibition against the Respondent so that it can no longer implement or continue to implement those By-Laws, which can simply be referred to as Sand By-Laws. Prayer 3 was for a declaration that the Sand By-Laws were null and void and finally that a perpetual injunction do issue against the Respondent by its agents servants or otherwise from interfering in the activities of the applicants by way of enforcing the Sand By-Laws.

There were 4 deponents, one from each of the applicant societies to support the application. The application was based on the grounds that the Respondent exceeded and/or lacked jurisdiction to make the Sand By-Laws; it acted ultra vires the Local Government Act from which the Respondent derives authority to make By-Laws. That that Act did not empower the Respondent to regulate sand removal, excavation or harvesting of common minerals like sand. that the sand by-laws were inconsistent and repugnant to other written laws and therefore unlawful. That the Respondent council did not publish a notice of the intention to make the by laws in one or more local newspapers circulating within its jurisdiction and that its decision to implement the by laws was in breach of the principles of natural justice; and finally that the Respondent was prompted by extraneous considerations in making these By-Laws while failing to consider the relevant matters. The application was filed by Mr. Kilukumi

Grounds in opposition to this notice of motion were not readily traceable on the file but Mr. P. Mulwa filed a replying affidavit by the clerk to the Respondent County Council and argued in opposition along the lines of this deposition. It may be pertinent to capture the contents of the statement of facts and the affidavits herein before generally outlining the arguments and the authorities cited in support thereof. Indeed this court issued leave to bring this application on 23.10.98 which leave operated as stay against the Respondent's decision aforesaid in regard to implementation of the sand by laws.

Each of the 4 deponents from the 4 applicants verified by affidavit the facts on which this application is based as true and according to the knowledge of each one of them. Each of the applicants and the Respondent were described in the statements. Each applicant was a body corporate under the provisions of the Co-operative Societies Act 1997 having perpetual succession a common seal and with power, to sue and be sued, The Respondent was also described as a body corporate by virtue of S.28(3) of the Local Government Act and it too has perpetual succession, a common seal and with power to sue and be sued.

The applicants claimed that they were engaged in environmental conservation, regulating and controlling sand harvesting in Mbiuni, Masii, Masinga and Ndithini areas of Masaku District within the area of operation of the Respondent County Council. That the proceeds of sand sales are apportioned among the members of each co-operative society and also in financing community projects in the applicants' respective localities eg. building churches, schools, bridges, roads etc, Incorporation dates of each applicant were given. It was then stated that the Respondent made and decided to implement the Sand-By-Laws (marked as annexture A) without according the applicants the opportunity to be heard on the same. That after getting due ministerial approval and the decision to implement, the Respondent did implement the sand By-Laws complained of. That the Respondent had written letters to the applicants pursuant to the said implementation and soon thereafter arrested and had charged in a criminal court, officers of the applicant societies with alleged contravention of those By-Laws. It was further deponed that the Respondent did not publish in local newspapers its intention to make the By-Laws and that that contravened S. 203(1) of the Local Government Act. The statement added that the Respondent lacked jurisdiction. It acted ultra vires, and contravened S.202 of the Local Government Act. That it derogated from the provisions of the Co-operative Societies Act which created the applicants. That in all these the orders prayed ought to be granted.

The Respondent replied to all the foregoing, deponing that it acted within the Local Government Act (Cap 265). That the authority to make any By-Laws was geared towards matters of health, safety and well-being of inhabitants within its area of operations. That that authority was not exceeded. A copy of a cutting of the Kenya Times newspaper of 8.11.96 was annexed to the affidavit to demonstrate that the Respondent ad complied with publishing its intention to make the By-Laws complained of that when they were made, a ministerial sanction was sought and obtained before implementation. As such the affidavit in reply continued, the applicants' were never denied an opportunity to be heard on the intended By-Laws before they were made and no extraneous consideration affected the making of the By-Laws; that the common good of all the inhabitants of the areas in were guided the Respondent in putting in place these By-Laws. The Respondent denied that it contravened any other written laws e.g. the Co-operative Societies Act. That sand fell to be controlled by the Respondent in the realm of Trust Land and not in respect to individuals or individual registered bodies. As such the by laws did not override or derogate from the Trust Land (Removal of Common Minerals) Rules falling under S.37 of the Trust Land Act. The Respondent denied that it was bound by the Minerals Act (Cap 306) and concluded that the orders sought

could not issue, inter alia, because 053 was limited to mandamus, prohibition and certiorari only - nothing of declaration and injunctions.

In a broad sense this court desires to approach this application under some heads laid out on the following pattern; (I) The authority for the Respondent to make By-Laws

(ii)The areas to be covered by those By-Laws (iii) the sand-by-laws under attack (iv)

Related or relevant other provisions of law (v) the reliefs sought. Any other aspect may

Feature along the line. 'The arguments by counsel need not be set out separately but shall be incorporated in determination of this court. To be kept in mind at all times is the 053

Civil Procedure Rules under which this application is brought. It reads in the pertinent parts:

"053 1. 1). No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance this rule.

2). An application for which leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant the relief sought, and by affidavits verifying the facts relied on. The judge may in granting leave, impose such terms as to costs and as to giving security as he thinks fit.

3). The applicant shall give notice of the application for leave not later than the proceeding day to the registrar, and shall at the same time lodge with the registrar copies of the statement and affidavits:

Provided the court may extend the period or excuse the failure to the notice of the application for good cause shown.

4). The grant for leave under this rule t*o* apply for an order of prohibition or an order for certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the judge orders otherwise"

From the laying out of the content of this application above it has been shown inter alia that every aspect of 0 53 r 1 has been complied with. It features as per application that there is a prayer for an order of declaration but its fate shall be determined in the final analysis.

The case of KENYA NATIONAL EXAMINATION COUNCIL-VS.-REPUBLIC Ex parte GEOFFREY NJOROGE AND OTHERS CIVIL APPEAL NO. 266/96 (CA) (unreported) sets out the history of prerogative reliefs as prayed for in this application. Prerogative writs do not issue from the High Court any more but orders for mandamus, prohibition and certiorari do. Apparently it is not quite so much of the phraseology as it is in the substance. Prerogative writs were the forerunners of the prerogative orders that now serve the purpose and are enshrined in S.8 Law Reform Act (Cap 26). To obtain such orders an application for judicial review much be lodged proceeded with application for leave to move accordingly. The procedure is so well known to both sides in this matter and it has been duly followed. It need not detain us more (053 Civil Procedure Rules). We should therefore go to the second aspect of this application namely the authority of the Respondent council to make By-Laws. However in the light of the assertion by Mr. Kilukumi for the applicants that the Respondent exceeded its mandate in formulating the Sand By-Laws complained of, we may as well set out the parameters of the prerogative reliefs of prohibition and certiorari sought first.

In essence the Sand By-Laws were made by the Respondent pursuant to authority given to it by the Local Government Act (Cap 265). Because this is delegated legislation, it is subject to judicial control especially when the validity of that delegated legislation is in issue. Courts have authority to supervise bodies and tribunals and indeed inferior courts whose duties include deciding on private and public rights in a quasi-judicial or judicial manner. While acting in that capacity a given body or tribunal ought to

observe strictly the need to keep within the law allowing it to act the way it does and in accordance with principles of natural justice. Failure to do so calls into play application for judicial review so that proper and valid decisions are taken and implemented. Mandamus is not featuring in this application. Only prohibition and certiorari do. While mandamus when issued is directed to an individual, body, tribunal or inferior court requiring the performance of some specified thing in the nature of a public duty appertaining to his or their office, CERTIORARI is an order directed to an individual, body, tribunal or inferior court in regard to a decision it has made. Certiorari is to quash such a decision if it is in excess of jurisdiction or it is contrary to the rules of natural justice such as denying one a right to hearing or where there is bias or interest, where an error of law appears on the face of the record or the decision was obtained by fraud or collusion. The applicants pray for certiorari here on the argument that it was in excess of jurisdiction and that they were not given an opportunity to be heard. On the other hand an order of PROHIBITION prevents the recipient from acting or continuing to act in excess of jurisdiction or contrary to the rules of natural justice, the proposed recipient here the respondent council in both prayers must have legal authority to determine questions affecting the rights of subjects and must have the duty to act judicially. It is not in doubt that the Respondent falls in this category.

THE AUTHORITY TO MAKE BY-LAWS

The Respondent made the Sand-By-Laws 1998 under the statutory authority and pertinent sections in the Local Government Act are SS.201, 202 and 203. The relevant parts thereof are set out here:

"S.201 (1) Subject to Section 2002.. a local authority may from time to time make By-Laws in respect of all such matters as are necessary or desirable for the maintenance of health, safety and well being of the inhabitants of its area or any part thereof and for good rule and government of such area or any part thereof and for the prevention and suppression of nuisances therein and more particularly, but without prejudice to the generality of the foregoing-

3) for controlling any of the things which it is empowered by or under this Act to do, establish, maintain or carry on ; and

b) for controlling or regulating any of the things which, and any of the persons whom, it is empowered by or under this Act to control or regulate; and

c) for prohibiting or preventing by prohibition any of the things which it is empowered by or under this Act to prohibit: and

d) For requiring or compelling the doing of any of Ihe things which it is empowered by or under this Act to require or compel.

This section empowers the Respondent to make By-Laws desirable or necessary

I. for maintenance of the health, safety and well-being of inhabitants of its area

II. for the good rule and government of the area

III. for the prevention and suppression of nuisances in its area.

The County Council may achieve all these by the By-Laws which will control and regulate things and people in its area as empowered by the Local Government Act and/or prohibiting preventing, requiring or compelling the doing of things in its area of operation.

This S. 201 is subject to S.202 which says:

"202 (1) A local authority shall not in exercise of the general power conferred by section (l) of section 201 to make by laws for the maintenance of health, safety and well-being of the inhabitants or for good rule and government or of prevention and suppression of nuisances, make any by-laws under that

subsection as respects its area of jurisdiction or any part thereof, if such by-law could be made as respects the same are or such part thereof under any written law other than this Act whether by that local authority or any any other local authority

2. Where any inconsistency or repugnancy exists between any by-law made under this Act by the council of a county as respects any county division or any part thereof and any by-law made under this Act by the council of that county division as respects the county division or such part thereof, then as respects that county division or part thereof and to the extent of such inconsistency or repugnancy, the by-law which first came into operation or where both such by-laws came into operation on the same day, the by-laws made by the council of the county shall prevail.

(3) Nothing in this Act contained shall be deemed to empower a local authority to make by-laws overriding or derogating from the provisions of any other written law for the time being in force in Kenya"

S.202 re-emphasises the areas for which the respondent here like other local authorities should make by-law for; health, safety and well-being of the inhabitants; good rule and government; prevention and suppression of nuisances. But the local authority shall not make by-laws to operate in its area under the Local Government Act, if such by laws could be made under any other written law. This is the point that this court heard to the effect that because harvesting, sand or otherwise removal of sand from the areas covered by Masaku County Council could be made under the Trust Land Act about which much will be said later, the Respondent should not have made the Sand By-Laws under the Local Government Act.

The argument had it that the Respondent is enjoined by this Act not to make By-Laws overriding or derogating from any other written law being in force in Kenya, in connection with this point reference was made for instance to the Co-operative Development Act No. 12 of 1997.

20 'Then S. 203 of the Local Government Act reads:

"203. (1) At least fourteen days before the making by any local authority of any by-law under this Act, notice of intention to make such by-laws and of the general purport thereof shall be given in one or more local newspapers circulating in the area to which the by-laws are intended to apply provided

This section applies to notice to the inhabitants of the area for which the council wishes to make By-Laws to know of such intention together with the general purport of such By-Laws. The inhabitants are thus called upon to consider that and may be heard in objection or otherwise. S. 203 gives notice for the right to be heard before the By-Laws are made. That notice is for 14 days and must be in the local press, if the notice is short or not given then the local inhabitants can challenge any By-Laws if the council proceeds to make any. This point also came out when Mr. Kilukumi posited that there was no such notice and Mr. P. Mulwa insisted that there was one. Again this will unfold presently.

<u>AREAS TO BE COVERED:</u>

The 1998' Sand By-Laws were made under S. 201 of the Local Government Act.

They defined the council as the County Council of Masaku, the Respondent, and in essence the areas which it operates in. It is not in doubt that these area covers also Mbiuni, Masii, Masinga and Ndithini where the applicants claimed that they carry on (heir activities.

"Sand" means sand and sand loyalties" (Sic). It is not quite clear what the last part of the definition means for no party clarified it to court however the respondent put a licensing officer in charge of issuing licences to individuals, companies and co-operative societies like the applicants:

"........... To remove sand from the land in the council jurisdiction on Payment of fees specified in (the) By-Laws............ "

THE SAID BY LAWS 1998

Were they made within the Local Government Act as the Respondent stated in the preamble thereto? This court hardly thinks so. Under S.201 of that Act the By-Laws that the Respondent is empowered to make must be necessary or desirable for the maintenance of the health safety and well-being of the inhabitants of its area, They must also be for the good rule and government in that area as well as for the suppression and prevention of nuisances. Do the By-Laws on removal of sand fall in that ambit? This court doubts it. The purposes for which the Respondent is empowered to make By-Laws are not defined or described in the Local Government Act. But the clear interpretation of health, safety good rule and government suppression and prevention of nuisances is obvious. Mr. P. Mulwa repeated the reposition of Mr. Mbondo in his affidavit in reply that the By-Laws were made so that some of the proceeds gained by the applicants from removal and sale of sand could be remitted to the council by way of levy which in turn could apply them to provide basic services in the area e.g roads, schools and churches for the benefit of the applicants and other inhabitants in the affected areas. This court does not wish to narrow the meaning of "the well-being of the inhabitants" but it is not convinced that the sand bylaws should be stretched in operation to cover this aspect of the inhabitants. It is not justified. In defining the Respondent's residual and incidental powers to make By-Laws courts ought to do so reasonably. But "........ the courts will not strain the language of the Statutes to enable a Corporation to engage in activities not contemplated by the Legislature." (pp309, Hart on Local Government and Administration, 9th Edn).

Accordingly this court holds the view that, the Respondent made the sand-bylaws Ultra vires the Local Government (Cap 265) yet it is a well-known principle that subsidiary legislation should never exceed the parameters and indeed the spirit of the Act under which the legislation is made. Subsidiary legislation shall be consistent and not inconsistent with the provisions of the Act giving power to a body to make such legislation. It shall be recalled that for orders of certiorari and prohibition to lie it must be shown that the act complained of was taken by a body in excess of its jurisdiction. Could the sand by- laws be made under any other written law? That is our next point of focus.

In this court's view the Respondent could have or cause the sand By-Laws to be made under the I'rust Land Act (Cap 288). Trust land falls under the jurisdiction of local authorities like the Respondent to oversee its use, management or otherwise for the local communities. However the historical background of this law need not be gone into. But suffice it to say that it covers use of some staled assets or resources in the trust land. These include sand. Sand falls in what the I'rust Land Act defines as "Common Mineral." This "means clay, country rock, gravel, lime sand, shale, shingle, murram, mineral water, brine, dolomite, kaolin, building dimension stone, constructural stone (for ballast and aggregate and allied uses) ornamental stone, sodium and potassium, compounds (except sodium compounds forming part of Lake Magadi Saline deposit) pyrophyllite (Kisii stone), state and surface salt"

By that Act the local council like the Respondent here sets in place divisions and their boards to regulate control license and in anyway deal with various matters affecting trust land including sand. To do this rules are made and in respect of our subject there are the TRUST LAND (REMOVAL OF COMMON MINERALS) RULES. These Rules state inter alia that no person shall remove common minerals, which include sand from any land within special areas without a valid licence. And "special areas" means the areas of land the boundaries of which are for the time being set out to the Trust Land Act as it was before 1.6.63. The Licensing Officer is empowered to give licences to Africans living in areas where they would, as individuals or groups desire to remove common minerals at a fee of Sh.5/= per month irrespective of the quantity of the minerals removed. Those rules go on to give power to the licensing officer on regulation of licence issuance and allocation of the areas from which the common minerals including sand shall be removed. But if a local African desires to take common minerals for his own use in accordance with native (Sic) law and custom, no licence is required. So all in all the Respondent could have applied the Trust Land Act to make the sand By-Laws and not purport to do so under the Local Government Act. The latter has no room for such.

OTHER RELATED/RELEVANT LEGISLATION

This court has just found that the Trust Land Act would be relevant in the case of removal of the sand -

the subject of this application. The court also had sight of the Mining Act (Cap 409) and the Lakes and Rivers Act (Cap 409). While the former confines itself to mining, the minerals and related activities excluding common minerals, the latter Act focuses on dredging lakes and rivers for whatever purpose. None touches on sand.

The court heard that the sand By-Laws and the requirements therein to facilitate proper operation thereof tendered to override or derogate from provisions of existing written law and the Co-operative Development Act No. 12 of 1997 was cited. Mr. *P.* Mulwa put up the argument that the sand by laws did not do anything of the sort. Reading the By-Laws and appreciation of the Co-operative Development Act and in particular some specific parts and sections brought out quite clearly a discourse to be part of.

For instance part or parts of By-law No, 5 came in for examination.

The council has the sole discretion to review this from time to time:

(a) Any person, company or co-operative society which is given authority by the council to operate sand business shall remit to the council 20% of total collection as a development levy for the area where the sand is harvested and any damage or disturbance caused by them

(b) Any person, company of (sic) co-operative society shall if required by the council, submit all their books or monthly revenue returns showing the amount collected, the number of the lorries and tonnage to the council scrutiny.

(c)............................

Beginning with the production of books and other returns to the council, that bylaw appears to override or derogate from provisions of" the other written law, while as it was said earlier, subsidiary legislation must only fall in the ambit of the Act which authorizes it and not go beyond it or even impinge on other principal law. The Cooperative Development Act is such - principal legislation and it says of production of books and other documents:

"S. 26 Any officer, agent, servant or member of a co-operative society who is required by the Registrar, or by a person authorised in writing by him so to do shall, at such place and time as the Registrar may direct produce all moneys, securities, books accounts and documents belonging to or relating to the affairs of such society which are in the custody of such officer, agent, servant or member.'"

This provision is mandatory in that to produce books, documents and even money of a registered society to anybody anywhere, one requires the written authority of" the Registrar of Societies or any person he has authorised to issue such directions. The sand By-Laws repose sole discretion in the council to call up books and documents from the applicants as and when the council wants. Besides putting the applicants in a dilemma this court's view is that the sand By-Laws purport to override the Co-operative Development Act - a written law in operation. That cannot be (see S.202 (3) Local Government Act above).

Subclause (9) of By-Laws recited above i.e. 20% levy to go towards development of the area from which sand is being removed seems to go counter to S.42 of the Cooperative Act:

"42. The property and funds of a Co-operative Society shall only be applied for the benefit of the society- and its members in accordance with

The provisions of this Act, the rules made hereunder and the By-Laws of the society."

Those are clear and mandatory provisions of some principal legislation and no delegated legislation as here purported can say otherwise. Given, the Respondent has all the best intentions for its habitants but then the law should be followed in catering for the benefits and interests of those inhabitants. The sand By-Laws do not seem to fall in that pattern.

The court then heard that the applicants were not given the right of hearing when the Respondent intended to make the sand By-Laws (S.203 Local Government Act).

It was deponed to by she Respondent's clerk thus:

"6: That before making the said By-Laws the respondent published a notice of intention to make the By-Laws in the Kenya Times on Friday, November 8. 1996 giving interested parties or persons twelve (12) days to file the objections in accordance with the Local Government Act (a copy of the said publication is attached hereto and marked - SMI)"

The following paragraph was to the effect that only !he 3rd applicant i.e, Masinga Sand Harvesting Co-operative Society Limited filed objections which were sent to the Minister to Local Government together with the By-Laws for approval.

The notice referred to read that the Respondent was notifying;

"...... for general information the public pursuant to Section 203 of the Local Government Act Cap. 265. Laws of Kenya. The County Council of Masaku intends to make the following By-Laws upon expiry of fourteen (14) days of the date of the publication of this notice. The By-Laws are

1. Sand By-Laws

2………………..”

In accordance with S.203 of the Local Government Act the notice ought to be for at least 14 days. The Respondent claims that such a notice was published in a newspaper of 8.11.96 and from the affidavit in reply (above) on 12 days notice was given. This was inadequate and it amounts to no notice at all. The notice of intention ought to go out for a minimum of 14 days - not less.

Secondly the law requires that the notice should give the general purport for such intended by-laws. From the publication of 8.11.96 the sand by-laws appear among a host of others and at no point is the general purport of the intended by laws singly or the whole lot is set out. In essence the claimed notice violated S. 203 (above) in every respect. Considering it in totality, there was no notice sent out to the parties to be affected by the by-laws, to be heard. They were denied the right to be heard.

Assuming that only the 3rd applicant filed objections and that that was valid, which this court does not think, such objections once received by the council ought to be discussed and determined. One can add a minute to that effect must be recorded and or the purport of the objections incorporated in the deliberations of the council before the recommended By-Laws are forwarded to the Minister for approval. But it beats good thinking when it was deponed to that the objections from the 3rd Applicant were sent along with the bylaws to the Minister. What has the Minister to do with the objections vis-a-vis the By-Laws? On the whole it is reiterated that S.203 of the Local Government Act was not followed.

Having done its best to consider this application in the aspects as by the foregoing, the conclusion is that both certiorari and prohibition should issue against the Respondent. It acted in excess of jurisdiction and contrary to the rules of natural justice, the order of certiorari is to bring up the decision of the Respondent to make and implement the sand By-Laws complained of and have it quashed. It is so quashed, the order of prohibition is to prevent the Respondent from continuing to implement the decision to enforce the sand-by-laws, it is so ordered.

This court was asked to issue a declaration that these by laws are null and void and an injunction that the Respondent should stop interfering with the sand affairs of applicants by purporting to enforce the sand by laws.

This court may issue the declaration and injunction prayed for having considered the nature of the matters for the prerogative orders, the nature of the persons against whom the relief may be granted and the

circumstances of the case. But.

"........... if the court should conclude that the grant of an appropriate prerogative order will effectively give- the applicant the relief he seeks or should have, it would lean against the grant of declaration or injunction and simply grant the appropriate prerogative order" (See Rules of the Supreme Court of England 053 r 14 - 53/14/43 1999 Edition)

In this court's discretion on granting the orders of certiorari and prohibition it is satisfied that they effectively give the applicants the relief they seek. The Sand By-Laws remain but as good as a dead letter. The Respondent may choose what to do with them or how to reactivate them in a legal way.

Orders accordingly. Costs to the applicants.

Delivered on 16th June 1999.

J W. MWERA JUDGE