



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)

CIVIL APPEAL NO. 61 OF 2018

BETWEEN

MUNAWAR SHUTTLE LIMITED.....APPELLANT

AND

COUNTY GOVERNMENT OF KILIFI.....1ST RESPONDENT

AL WAHIM EXPRESS SHUTTLE COMPANY LIMITED2ND RESPONDENT

001 INVESTMENT3RD RESPONDENT

(Being an appeal from the Judgment and Order of the High Court of Kenya

at Malindi (W. Korir, J.) dated 19th April, 2018

in

H.C.CONST.Pet. No. 6 of 2017)

JUDGMENT OF THE COURT

1. The appellant, Munawar Shuttle Limited, a company carrying on the business of public transport in Malindi, has appealed against the judgment of the High Court at Malindi (*W. Korir, J.*) delivered on 19th April 2018 dismissing its constitutional petition challenging the validity of directives given on 9th March 2017 by the County Government of Kilifi (the County), the 1st respondent, concerning the management and operations of Malindi Bus Park, also referred to as Malindi New Stage.
2. At the heart of the dispute is a stall identified as terminal 11200 or 2B at the Modern Bus Park in Malindi town. According to the appellant, which operates Matatu business between Malindi and Mombasa, that stall was allocated and leased to it by the County for its exclusive use. It asserted that from its long usage of that stall, it had established years of public goodwill from its customers who are accustomed to boarding its vehicles from that stall. It complained that the County had wrongly allowed the appellant's competitors in the matatu business, namely Al- Waheem Express Shuttle Co. Ltd and 001 Investment, the 2nd and 3rd respondents respectively, to use the stall to its economic detriment.
3. The record shows that the struggle over the stall between the appellant and the 2nd and 3rd respondents appears to have invited chaos with claims of harassment of passengers and destruction of passengers' luggage as the touting for passengers intensified.
4. According to the County, numerous consultative meetings were held with all stakeholders, including the parties hereto, with a view to seeking "a way forward as to how the picking and dropping point for the Malindi-Mombasa route will be managed noting that there was chaos at the podium used by 11seater" but a solution was not found.
5. On 9th March 2017, in a notice titled, "Operations for Malindi-Mombasa Matatu Route" addressed to "all public service vehicle operators Malindi New Bus Park", the County observed that several attempts towards a conducive working environment between "the PSV saccos operating at the New Malindi Bus Park by employing various boarding methods" had not been successful; that in accordance with its

constitutional mandate to manage public transport in its area of jurisdiction and in an endeavor of ensuring “*a peaceful boarding and healthy working environment at the bus park*”, it was directing that:

“1. The Malindi bus park shall be managed by the newly formed Malindi bus park management committee whose membership has been drawn from all Saccos operating in the park, The Kenya Police service, Sub county Administration and the Department of Road Transport & Public works.

2. The Malindi – Mombasa shuttles (11seater) shall operate under one podium on a 1:1:1 ratio basis.

3. The Malindi – Mombasa Express matatus (14 seaters) shall continue to operate from one podium as before.

4. That peaceful environment shall be maintained in the bus park and respect for passengers and their property shall be upheld.

The changes will take effect from the date of this letter. Kindly be informed.

Your cooperation will be highly appreciated

Yours in service.

C.K. Kazungu

Chief Officer

Department of Roads, Transport and

Public Works”

6. The appellant’s reaction was twofold: First, on the same day, 9th March 2017, the appellant filed suit before the Principal Magistrates’ court at Malindi, Civil Suit No. 42 of 2017, against the 2nd and 3rd respondents seeking, among other reliefs, a permanent injunction to restrain them from “*parking, loading, dropping or in any other way dealing with their vehicles passengers good or services within the immediate area of the vicinity of stall No. 2B which is traditionally reserved and assigned to the [appellant]*”. Simultaneously with the plaint, the appellant filed an application before the Magistrates’ court seeking a temporary restraining order against the 2nd and 3rd respondents from accessing stall 2B at Malindi Modern Bus Park pending the hearing of the suit.

7. Secondly, on 22nd March 2017, the appellant filed before the High Court at Malindi, Constitutional Petition No. 6 of 2017, from which the present appeal arises, seeking declarations that the directive issued by the County on 9th March 2017: is unconstitutional, null and void; infringes or violates the appellant’s fundamental rights and freedoms, particularly economic and social rights, consumer rights, and rights to fair administrative action under Articles 43, 46 and 47 of the Constitution of Kenya. In the same petition, the appellant applied for an order to prohibit the respondents from restricting the operations of the appellant at the bus park by implementing the directive as well as a conservatory order.

8. The appellant claimed in the petition that in violation of Article 43 of the Constitution of Kenya, the County had failed to provide a conducive trading environment; failed to make laws and policies to regulate the use of packing areas; had allowed its county executive to give directives not backed by law or policy or regulations; that the directive is unconstitutional and illegal because it is not backed by legislative or policy framework and is contrary to the requirements of Sections 5, 8 and 34 of the County Government Act and Section 4 of the Fair Administrative Action Act, 2015; and that the directive restricts the boarding of passengers to the appellant’s vehicles in that passengers cannot board the appellant’s vehicles until the vehicles of the 2nd and 3rd respondent are filled up which defeats the principle of fair trade practices and equity.

9. In response, the County averred in its grounds of opposition that the petition was an abuse of the process of the court as the appellant had instituted Civil Suit No. 42 of 2017 over the same matter. In its replying affidavit, the County’s Chief Officer in charge of transport, Kenneth Kazungu, deposed that consultative meetings between all stakeholders had failed to present a solution; that it was within the mandate of the County to provide a conducive business environment; that the County had not interfered with the right of passengers to choose transporters and the directive does not restrict passengers choice of operators but rather instilled an orderly manner in which passengers are able to board vehicles without harassment from the various operators clamoring for passengers; that the appellant and the 2nd and 3rd respondent were participants in the Malindi Bus Park Management Committee meetings and their input was considered; that in any event the stall in question is not leased to the appellant which sublets it from another party.

10. The 2nd and 3rd respondents in answer to the petition stated that the appellant is a member of the committee that was formed to attempt to resolve the problems facing operations at the Bus Park; that the appellant was privy to the meeting that gave rise to the directive given by the County; that the petition was in bad faith and amounted to forum shopping, was an abuse of the process of the court “*as it was filed on the morning of 22nd March 2017 when another case filed by the [appellant] seeking injunction was coming for hearing of the application*”; that the petition was aimed at circumventing the ruling of the magistrate’s court.

11. After considering the petition, the affidavits, as well as the written submissions presented before him, the learned Judge concluded that the appellant had failed to establish breach of any of its constitutional rights and dismissed the petition.

12. **Mr. Y.M. Aboubakar**, learned counsel for the appellant, in urging the grounds of appeal in the memorandum of appeal submitted, through written and oral submissions, that the Judge failed to appreciate that as lessee of the stall from the County, the appellant was protected by the contractual obligations arising between a tenant and landlord and the County breached that right by its directives; that the directive also curtailed the appellant's free exchange of its transport services with its customers; and the appellant's economic rights were violated by the County allowing third parties to operate from the appellant's private and exclusive parking area; that the result is a reduction in the earnings of members of the appellant "which has the impact of that member and or his or her family going hungry for lack of adequate food of acceptable quality." To that extent, it was submitted, members of the appellant were affected economically and Article 43 of the Constitution was thereby violated.

13. Counsel urged that the appellant was justified under Article 22(2) of the Constitution, in crusading the rights of passengers as the effect of the directive was to violate passengers' right to services of reasonable quality in that the directive had the effect of restricting their right to choose matatus as they had to wait until other matatus had boarded passengers and left and few passengers could wait.

14. Counsel also faulted the Judge for concluding that the appellant's rights under Article 47 of the Constitution and the Fair Administrative Actions Act were not violated on account of having participated in meetings intended at resolving the dispute. According to counsel, "it is not shown that the appellant's representative agreed with the resolution". Counsel concluded by submitting that the Judge failed to appreciate that the directive was illegal.

15. The respondents filed written submissions in opposition to the appeal. Learned Counsel **Ms. Wasi** appearing for the County and holding brief for the firm of Onchangu Kemunto & Associates for the 2nd and 3rd respondents submitted that the County has the mandate under the Constitution and Kilifi County Transport Act to manage public transport in its area of jurisdiction; that prior to the directive of 9th March 2017, following complaints by customers, several meetings were convened and consultations held with all stakeholders, including the appellant and the 2nd and 3rd respondents. The Judge was therefore right in holding that Article 43 of the Constitution was not violated.

16. It was submitted that contrary to the claim, the appellant was not entitled to the exclusive use of the terminal in question; that the appellant is seeking the exclusive use of the same to the detriment of other public transport companies operating in the same park; that there is nothing in the directive that restricts passengers from accessing the appellant's vehicles and there was no violation or infringement of its socio-economic rights as contended.

17. We have considered the appeal and the submissions. In dismissing the appellant's petition, the learned Judge held that the appellant "failed to establish breach of any of its constitutional rights." The question for our determination is whether the learned Judge erred in concluding that the appellant failed to prove that the directive by the County dated 9th March 2017 violated its constitutional rights under Articles 43 and 47 of the Constitution.

18. We begin with the alleged violation of economic and social rights under Article 43 of the Constitution. That Article safeguards, among other rights, the right of every person to the highest attainable standard of health; accessible and adequate housing and to reasonable standard of sanitation; to be free from hunger and to have adequate food of acceptable quality. As the Court stated in **Kenya Airports Authority vs. Mitu- Bell Welfare Society & 2 others [2016] eKLR**, "the importance of socio-economic rights cannot be underestimated as they relate to human development."

19. The appellant averred in its petition that the County failed, neglected or ignored to ensure it provides a conducive trading environment in violation of the appellant's rights under Article 43 of the Constitution. The particulars provided in the petition were that the County failed to take cognizance of its functions under the Fourth Schedule of the Constitution, that it failed to make laws to regulate the use of parking areas, and that it failed to make policies to ensure the appellant enjoys the rights under Article 43. According to the appellant, those failures resulted in chaos, uncertainty and unfair trade practices in the use of Malindi Public Bus Park. The appellant pleaded further that to the extent that the directive of 9th March 2017 was issued by the County "without a legislative or policy framework" it was unconstitutional and illegal.

20. Article 186 of the Constitution provides for the respective functions and powers of national and county governments. Article 186 (1) states that:

"1. Except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule."

21. Section 18 of Part One of the Fourth Schedule to the Constitution outlines the functions of the national Government while Section 5 of Part Two thereof provides that the function of county Governments shall include:

"County transport, including-

a. County roads;

b. street lighting;

c. traffic and parking;

d. public road transport; and

e. ferries and harbours, excluding the regulation of international and national shipping and matters related thereto."

22. It is clear therefore that the County has a constitutional mandate with regard to county transport including the regulation of traffic, parking and public road transport within the County’s territory. (See the High Court decision in **City Riders Sacco & 11 others vs. County Government of Nairobi & 3 others [2016] eKLR**).

23. It was therefore within the power of the County to issue the directive of 9th March 2017 relating to the parking at the Bus Park and the contention that the directive was made without any constitutional or legislative basis has no merit.

24. In our view, no cogent evidence was presented before the court to support the claim that the directive violated the appellant’s constitutional rights under Articles 43. There is no evidence that the directives restricted the rights of passengers to board the appellants vehicles until those of the 2nd and 3rd respondents had been filled up.

25. It was incumbent upon the appellant, not only to specify the manner in which those rights were allegedly violated (as held by the Court in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**), but also to present evidence in support of those claims. Counsel for the appellant was at pains to explain that to the extent that the directive purportedly had the effect of reducing the appellant’s business, their members’ income was affected and Article 43 thereby violated. There was however no evidence to support the claim that the appellant was entitled, exclusively, to the use of the stall or that indeed the directive had the effect of preventing customers from boarding the appellant’s vehicles.

26. As to the alleged violation of Article 47 of Fair Administrative action, the Judge stated:

“It is apparent that the problem that the directive sought to solve was a protracted one. Passengers had complained about the way they were treated whenever they wanted to board the eleven-seater matatus. Several meetings were held in which the Petitioner and the 2nd and 3rd respondents were engaged in an attempt to find a lasting solution for the problem. Several systems were tried prior to the issuance of the impugned directive. There was no satisfactory solution to that problem.

A perusal of the minutes of the meeting held on 15th February, 2017 shows the constitution of a committee of the members of the bus park. Included in the committee is Mr. Mohamed A. Said representing Munawar Shuttle, the Petitioner herein.”

And later:

“The minutes therefore indicate that the Petitioner was represented in the process that led to the making of the decision. The Petitioner cannot thus be heard to complain of breach of Article 47 of the Constitution and the provisions of the Fair administrative Action Act, 2015.”

27. There is sufficient material in the record of appeal on the basis of which the learned Judge reached the conclusion that there was stakeholder consultation, including the appellant, in deliberations prior to the issue of the directive on 9th March 2017. Indeed, the appellant’s counsel in his written submissions tacitly acknowledges the appellant’s participation in those fora but asserts that the appellant was dragged into the meetings by the County and that *“it is not shown that the appellant’s representatives agreed with the resolution.”* It is of course one thing to be consulted, it is another to have one’s way upon such consultation.

28. All in all, we agree with the learned Judge that the appellant did not discharge its burden of proof to establish that its constitutional rights were violated. Consequently, this appeal fails and is hereby dismissed. Each party shall bear its own costs of the appeal.

Dated and delivered at Nairobi this 24th day of April, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR