



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 15 OF 2017

BETWEEN

MOMBASA COUNTY GOVERNMENT.....APPELLANT

AND

1. THE KENYA FERRY SERVICES

2. THE ATTORNEY GENERAL for and on behalf of

INTERGORNMENTAL RELATIONS

TECHNICAL COMMITTEE..... RESPONDENTS

AND

MYSFACE PROPERTIES LIMITED.....INTERESTED PARTY

*(Being an appeal from the decision of the High Court of Kenya at Mombasa (Anyara Emukule, J.) delivered on 28th November, 2016*

*in*

**Constitutional Petition No. 9 of 2016)**

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**JUDGMENT OF THE COURT**

1. The Constitution of Kenya, 2010 which is exalted for being friendlier than the repealed one brought with it the concept of devolvement of Government which was essentially meant to transfer some services hitherto offered by the National Government closer to the people. To this end, devolved Governments were created and with them came various responsibilities cascaded from the National Government. Some of the objectives of devolution that are relevant to this judgment as espoused under Article 174 of the Constitution are;

***“To promote social and economic development and the provision of proximate, easily accessible services; to facilitate the decentralization of state organs, their function and services from the capital of Kenya.”***

2. The appellant herein (Mombasa County Government) is one of the fourty seven county governments created under the above provision of the Constitution. One of the facilities the appellant believes was devolved to it was the operation of the ferry services. It is important to note that the ferry services were/are operated by the Kenya Ferry Services Limited (KFSL) (1st respondent) a State Corporation, within the Ministry of Transport and Infrastructure. The Ministry is certainly a ministry in the National Government. The core mandate of KFSL is *inter alia*, to acquire, maintain, operate and manage ferries, boats and other vessels for transporting of passengers, petroleum products and other cargo. Such services are offered at Likoni and Mtongwe channels in Mombasa. The Likoni channel links the National Truck Road, namely Lunga Lunga – Lamu Road and ferries people from north of Mombasa to the South and all the way to Tanzania and beyond. The ferry services also operate on international water and water resources as part of the country’s marine navigation system. It is common ground that the infrastructure that enables the ferries to operate, including the purchase of the ferries themselves, the rolling out of ramps, jetties, platoons etc. was done by the National Government.

3. The second respondent is the Attorney General of the Republic of Kenya whose mandate includes to advise, sue and defend on behalf of the National Government, and was sued in this matter as the advisor and defender of the Intergovernmental Relations Technical Committee, which is under the Ministry of Devolution and Planning.

4. According to the 1st and 2nd respondents the ferry services rendered must meet national and international requirements outlined in International treaties to which Kenya is a party, and the matter therefore transcends the local boundaries and geographical jurisdiction of the appellant. That is among other reasons, why the 1st and 2nd respondents were of the strong view that the operations of the said ferries is not a local government function but one for the National Government. In order to facilitate and ensure efficient running of this very important function, the National Government finances about 70% of the 1st respondent's recurrent budget and 100% of development expenditure. The shortfall 30% in recurrent expenditure is financed through revenue collected from facilities developed by the 1st respondent. These facilities include mainland bus terminus, mainland and Island ramps, office and commercial rental space and LED advertising large screen displays, and that is how Myspace Properties Limited (the 3rd respondent), who are contracted by the 1st respondent to collect the revenue generated by these facilities on its behalf, gets entangled in this dispute.

5. At the heart of the dispute, of course, is the revenue generated from the collections paid by the users of the ferry services. The county government sees this as a good source of revenue, while the National Government wants to hang on to the said revenue for the efficient running of the ferry services. On the other hand, the majority of people ferried through the Likoni and Mtongwe channels by these ferries are Mombasa residents who work on either side of the channel and live on the other. The motor vehicles which belong to the locals that use the said ferries daily pay toll charges. The county government (**appellant**) feels that the money paid by its people must remain in the county.

6. The gravamen of this matter is who this revenue should go to. Should it be a preserve of the national government; should it go to the county government of Mombasa; should it be shared and if so, in what percentages? It is admitted that prior to 18th February, 2016, the 1st respondent was running the operations of the ferry. It was collecting the fees from the users and utilising some of that money to service the ferries, purchase spare parts, pay the workers, etc. However, on 18th February, 2016 to their utter shock and consternation, the appellant through its agents, invaded the facilities and forcefully took over the same and started collecting revenue from the users. Its agents intimidated the 1st respondent's workers and ejected its agents among them MySpace Properties (k) Limited (**3<sup>rd</sup> respondent**) and the appellant has to date continued to collect the revenue.

7. This act is what prompted the 1st respondent to move the High Court at Mombasa vide **Constitutional Petition No. 9 of 2016** under several Articles of the Constitution; Section 4, 23, 25, 26, 27 and 28 of the Intergovernmental Relation Act (Cap 59), Sections 4, 5 and 6 of the Fair Administrative Action Act, 2015, and the Ferries Act Cap 410 of the Laws of Kenya, claiming several reliefs. According to the 1st respondent, the appellant's actions were illegal, unlawful, arbitrary, unreasonable, irrational, null and void and hence unconstitutional. It was the 1st respondent's case that the property on which the offices, parking and waiting bays stand belong to it and not to the county government. The county government cannot, therefore, with any justification invade those premises and forcefully collect revenue from them. It could not also evict the interested party and another who had been contracted to manage and collect revenue from those facilities, and their actions therefore amounted to wrongful appropriation of the 1st respondent's property and revenue which was contrary to Article 40(1)(3) and (4) of the Constitution. According to the 1st respondent, it continues to lose Kshs. 4.5 million in monthly remittances on account of the appellant's unlawful acts.

It is the 1st respondent's case that its functions have not devolved to the appellant and they remain in its hands and that of the National Government pursuant to Article 186(3) of the Constitution which provides as follows:-

***“A function or power not assigned by this Constitution or national legislation to a county is a function or power of the National Government.”***

Furthermore, according to the 1st respondent, there was no consultation between it and the appellant on transfer of the ferry services and this was an affront to Article 187(1) of the Constitution; as well as Article 189(1) and (2) of the Constitution.

8. According to the 1st respondent, the appellant's impugned actions will affect the importers and exporters, promote double taxation, hurt local trade, create non trade barriers which will result in economic sabotage not only to Kenya but to the entire region; not to mention that the 1st respondent continues to lose revenue it should be legitimately earning from its investments on its own privately owned properties to the tune of Kshs. 4.5 million per month. The 1st respondent consequently prayed for the following orders:

***a) A Declaration that the Petitioner's fundamental right to the protection of its property held by law and protection from arbitrary deprivation by the respondent as well as its right to fair administrative action and fair hearing has been breached.***

***b) A Declaration that the respondent's actions to take over functions clearly set out by law from the petitioner is a breach of the powers, duties and obligations as set out under the provisions of the Ferries Act, Chapter 410, Companies Act, Chapter 486, Sessional Paper No. 3, Legal Notice No. 152 of 2013 and the Constitution of Kenya 2010.***

***c) A Declaration that the decision of the respondent contained in the letter dated 10th February 2016, to the effect that the petitioner hands over its functions is null and void.***

***d) A Declaration that the Ferries Act Cap 410, the power conferred to the Roads Authority and the law setting up the Petitioner as a limited liability company supersede and prevail over the Mombasa Port Authority Act and the intended Mombasa Ferries and Harbors Bill 2014, and a further Declaration that the Petitioner is not obliged to relinquish its functions.***

***e) A Prohibitory Order prohibiting the respondent whether by themselves, agents, servants or through from the Respondent from interfering, taking over, collecting rent or any other levies within the confines of the land belonging to the Petitioner, being land reference numbers M.S./1/1762 & Plot No. M.S.1763.***

*f) An Order prohibiting the respondent from taking over the Petitioners parking areas, waiting bays, terminus, rental space/buildings and advertising space and cease from enforcing any such County laws preventing third parties duly contracted by the Petitioner from carrying out their mandate and cease collecting payments therein.*

*g) An Order compelling the respondent to refund to the Petitioner all sums of money collected as rent, gate fees, and rental space fees and advertising space from the 18th day of February, 2016, till judgment herein and account for such sums or in the alternative, compensate the petitioner at the rates specified in contracts between it and its agents.*

*h) An Order compelling the respondent to refund to the Petitioner all the monies they have collected or been collecting from the Matatu/Bus terminus, Business Stalls and Advertising Media space/ LED Large Screen Displayers from 18th February 2016, to the date of judgment or compensate the Petitioner at the rates specified in the contracts between the Petitioner and its agents.*

*i) The cost of and consequent upon this Petition be paid and borne by the Respondent and all other or such reliefs as this Honourable Court may deem just and fit or appropriate to grant.”*

The petition was supported by the affidavits of Elijah Kitur sworn on 15th March, 2016 and 25th April 2016 which principally reiterates the contents of the petition which we have summarized above.

9. In response to the petition and said affidavits, the appellate through its County Secretary, **Francis Thoya** deposed that the appellant is vested with powers to manage transport and parking within the county of Mombasa including management of bus/matatu termini and collection of necessary parking charges; collect levies, issue permits for advertisements and exercise any other powers and functions set out in law or developed pursuant to implementation of the Constitution of Kenya, 2010. It is the appellant's position that the functions complained of were devolved to it and the 1st respondent should therefore hand over the same without creating a fuss. The gist of the appellant's response is at paragraph 28 of Mr. Thoya's affidavit which states:

*“That I want to categorically state that the respondent did not take over or purport to take over the running or management of the ferries at Likoni, or any of the petitioner's responsibilities, but simply discharged its devolved functions as clearly set out in Part 2 of the Fourth Schedule of the Constitution.”*

The appellant urged the High Court to dismiss the petition.

10. Parties filed their comprehensive submissions before the trial court, after which the court (Emukule, J.) rendered the now impugned judgment on 28th November 2016 in which he granted reliefs as follows: -

*(1) A declaration that the petitioner's right to the protection of its property held by law and protected from arbitrary deprivation by the respondent as well as its right to fair administrative action was breached by the Respondent.*

*(2) A declaration that the respondent's actions to take over the ancillary activities, powers, duties, and obligations of the Petitioner are inconsistent with the Ferries Act Chapter 410, the Companies Act (Cap. 486, now repealed), Legal Notice Number 152 of 2013 and therefore the Constitution of Kenya, 2010;*

*(3) A declaration that the respondent's proposed law called Mombasa Port Authority Bill and Mombasa Ports and Harbours Bill 2014 is inconsistent with the provisions of Article 201 and 209(5) of the Constitution of Kenya, 2010, and is and would consequently be null and void in terms of Article 2(4), thereof;*

*(4) An order directing the respondent, its servants, agents or other persons to granting the personnel of the Petitioner to take over the operations of the Petitioner's facilities ancillary to functions of the Petitioner as the Likoni Ferry Operator;*

*(5) An order that pending agreement between the national government and the respondent, prohibiting the respondent from interfering, taking over, collecting rent, or any other levies within the confines of the facilities erected and situate on plot No MS/1/1762 and MS/1/1763.*

*(6) Pending agreement between the national government and the respondent, an order prohibiting the respondent from taking parking areas, waiting bays, termini, rental space and buildings and advertising space currently or hereafter contracted by the Petitioner to third parties;*

*(7) An order that the respondent shall account and refund to the petitioner all the sums of money collected as rents, gate fees and rental space fees and advertising space from 1st February, 2016 till the judgment herein, and from the date of judgment with interest (at the rate of Kshs.1,500,000/- in respect of business stalls, bus/matatu termini next to the mainland ramp), Kshs.1,040,000/- per month (in respect of advertising and media space, and LED Screen Displayers, escalated to Kshs.1,812,000/-;*

*(8) An order for compensation by way of damages at the average rate of kshs.2,580,000/- per month in respect of lost revenue from motor vehicles, tuk tuks, motor cycles, bicycles, and using the petitioner's landing facilities, and termini;*

*(9) The respondent shall also pay the petitioner the costs occasioned by the unconstitutional and unlawful acts of the respondent;*

*(10) The petitioner shall hand over to the Petitioner (sic) the complete operation of the Likoni Channel Ferry together with all*

*ancillary facilities within fourteen (14) days of the date of this judgment.”*

11. It is those orders that the appellant has challenged before this Court vide its memorandum of appeal dated 28th March 2017 in which it has proffered a prolix of 31 grounds, most of which are substantially repetitive. Principally, the learned Judge is faulted for either having failed to interpret some provisions of law in tandem with the appellant’s counsel’s understanding of the same or failing to apply the law correctly and hence arriving at the wrong conclusion. The provisions of law in question include: - Article 191 (4), (5) and (6) of the Constitution; Article 187 as read with Part II (paragraph) 5(e) of the Fourth Schedule of the Constitution; paragraph 18(f) of the Fourth Schedule, Article 1 of the Convention on the High Seas, signed in 1958 (we were not told whether Kenya has ratified the same or not); section 7(1) and (2) and 15 of the Sixth Schedule and Article 2 read together with the Ferries Act (Cap 410). The learned Judge is also faulted of finding that there was a conflict between the Mombasa Port Authority Bill, 2014 and the Ferries Act.

12. On points of fact, the learned Judge was faulted for finding that the Likoni Channel was open sea and thus a shipping route, which would make it an international waterway to be excluded from the ambit of the County Government. The appellant also faulted the learned Judge for his finding that Article 40 of the Constitution applied to 1st respondent’s properties. Learned counsel for the appellant was of the view that the National Government’s property cannot be protected against the County Government. According to counsel, the Ferries Act (Cap 410) does not give the 1st respondent the mandate to undertake functions of ferries, advertisement and regulation of markets and stalls. These grounds are amplified in the appellant’s written submissions filed on 14th December 2017, on which the appellant’s counsel placed full reliance.

13. As expected, the 1st respondent opposed the appeal vide its written submissions filed on 11th December, 2017. **Mr. Akango**, learned counsel for the 1st respondent relied wholly on the said submissions. **Mr. Wachira** and **Mr. Ngaine** learned counsel for the 2nd respondent and interested party respectively adopted the 1st respondent’s submissions fully. In his submissions, Mr. Akango contended that some of the issues raised in this appeal were not in the petition before the High Court and the learned Judge was not therefore availed opportunity to address his mind to them and make a determination one way or other. Such issues included the subject of conflict of laws where as now contended by the appellant, some national legislation is said to be in conflict with county legislation pursuant to Article 191 of the Constitution of Kenya.

A look at the record before us does confirm that the issue of conflict of laws was actually not before the trial court, and is being raised for the first time before us. In that regard, therefore, our view is that we should not delve into the same. It nonetheless suffices for us to state that if there is any county legislation that falls into conflict with the Companies Act and the State Corporations Act - Cap 446 (from which 1st respondent draws life), then such county legislation would have to give way in deference to national legislation. We shall revert to this issue later.

14. Counsel for the respondents also invited us to take judicial notice of the fact that by dint of the Ferries Act, Cap 410, the 1st respondent is the institution that is mandated to provide ferry services at the Likoni Channel and not the appellant. We however note that the said legislation which was enacted in the 1930s bears no mention of the 1st respondent. We shall hereafter give a short history of how the 1st respondent found itself charged with the responsibility of running the ferries. The respondent further contended that under Article 187(1), a function or power at one level of Government may be transferred to the other level but only by agreement between the governments and not forcefully as happened in this case.

15. Counsel posited further that that the transitional authority pursuant to section 15 of the Sixth Schedule of the Constitution as read together with Section 23 and 24 of the Transition to Devolved Government Act, 2012 approved the transfer of the functions specified in the Schedule to the County Governments with effect from 9th August 2013, vide Gazette No. 116 under Legal Notice No. 152 of 2013.

The said Legal Notice transferred to the appellant functions in respect of;

***“ferries and harbours including development, maintenance and operations of ferries and harbours operating in INLAND LAKES and WATERS (Emphasis added).***

According to the respondents, the Likoni Channel falls in the realm of international waterways and is part of the Kenya Marine Navigational System and is not part of **“inland lakes and waters”**. Consequently, operation of the Likoni Ferry is a function of the National Government and not the county government unless transferred as provided for under Article 187(1) of the Constitution which is not the case here. Lastly, counsel urged us to find that although the issue of the developments and facilities erected on both sides of the Channel was not raised before the trial court, that the same are erected on the 1st respondent’s private property and the appellant should not be allowed to encroach on the same or appropriate to itself any revenue generated from the said facilities. The respondents therefore urged us to dismiss this appeal with costs.

16. We have considered the entire record before us, the submission by counsel and the relevant applicable law. Having done so, the law enjoins us to make our own independent conclusions (See Rule 29(1)(a) of the Court of Appeal Rules.

From the record, and as submitted by learned counsel for the 1st respondent, this entire appeal rests on the issue as to whether the operation of the Likoni Ferry is a National Government function; or whether the function devolved to the county government upon the enactment of the Constitution of Kenya 2010 and subsequent subsidiary legislation, or does it remain the function of the National Government. The appellant claims it is a devolved function but the respondents hold a contrary view. It is this singular issue that we are called upon to resolve. Any other issues arising from this one are peripheral and will naturally fall into place once the major issue is determined.

17. To put this matter in proper perspective, it is necessary to give a short history pertaining to the operation and management of the Likoni and other ferries in the Mombasa County. Ferry services at Likoni Mombasa started in 1937. The ferries have remained the one and only link to the south coast. The operations are situated on the gateway to the port of Mombasa.

The ferries at Likoni were initially ran by Kenya Bus Services Ltd, on a franchise arrangement with the Municipal Council of Mombasa. The bus company also operated a network of buses around town and in Nairobi.

The earlier operations were done using pontoons driven by motor boats.

It was not until 1957 that the era of modern ferries surfaced. The company continued operating for about 32 years until 1989 when it decided to pull out. It is then that the Government of Kenya decided to take over the operations of the ferries.

The Government therefore bought all the ferry crafts including **Pwani, Mvita, St. Michael, Pombo and Mtongwe 1** at a price of Ksh 10.5m. The staff was similarly retained at their existing terms and conditions of service.

The National Government then asked Kenya Ports Authority to run the services on its behalf. Kenya Ports Authority on their part changed one of its subsidiary company's Buntia Estates Ltd to Kenya Ferry Services Ltd and commenced operations on 1st November, 1989. In 1990 the government bought four new ferries namely Mv's Nyayo, Harambee, Kilindini and Mtongwe 2 at a cost of Shs 376 million to supplement the existing fleet. Through financial assistance by way of advances from Kenya Ports Authority and the Exchequer, the company was able to sustain its operations during its infancy. In 1998 the government formalized the ownership of the company through a National Assembly Sessional Paper No.3 of the same year, by transforming the contributions of both the government and Kenya Ports Authority into equity. Share capital was thus increased from Shs.2 million to Shs 500 million. The company is now owned 80% by the government and 20% by Kenya Ports Authority.

18. It is clear from the above history that the predecessor of the appellant voluntarily handed over the operations of the ferry to the National Government. As at the time the appellant came into existence as a devolved government, the ferry was squarely in the hands of the 1st respondent, an independent juridical person whose shareholders are the National Government and the Kenya Ports Authority, which is a State Corporation and a body totally independent of the appellant. The mandate of the Kenya Ports Authority is to manage and operate the port of Mombasa and all scheduled sea ports along Kenya's Coastline. There is therefore a clear correlation between KPA and the 1st respondent as they both deal with Kenya's International Waterways and this would consequently ensure smooth running of the Kenya Ports and Waterways.

19. Was this function devolved to the appellant on devolution? This takes us to Article 186(1) of the Constitution which assigned or distributed functions between the National Government and the County Government. The distribution or assignment is set out in the Fourth Schedule of the Constitution. In the list of the functions assigned to the National Government at section 18 of the Fourth Schedule is;

***“18 Transport and Communications including in particular***

***(a) Road traffic***

***(b) The construction and operation of national trunk roads;***

***(f) Marine navigation.”***

On the other hand, Part 2 of the Fourth Schedule, section 5 assigns the following functions to county governments.

**5(a) County roads;**

**“ ...**

***(e) Ferries and harbours, excluding the regulation of international and national shipping and matters related thereto.”***

This provision appears to be what the appellant is pegging its claim on. Those provisions of the Constitution are paramount and supersede any domestic legislation. That notwithstanding, the Constitution of Kenya 2010 by dint of section 15 of the sixth Schedule as read with section 23 and 24 of the Transition to Devolved Government Act, 2012, the Transition Authority approved the transfer of the functions specified in the Schedule to legal notice number 152 of 2013, to the appellant. Paragraphs 5 of the said Schedule reads: -

***“5. County transport including .....***

***(d) Ferries and harbours including development, maintenance and operation of ferries and harbours operating in inland lakes and waters”.*** (Emphasis added)

20. One may ask, is the above provision a derogation of section 5(e) of Part 2 of the Fourth Schedule? In our view, it is not; and in any event, if it was, then the schedule would carry the day as it is part of the Constitution and therefore supersedes other subsidiary legislation. In the schedule, the county government function explicitly excludes regulation of international shipping and matters related thereto. This would mean an exclusion to all activities carried out in International Waterways. The legal notice on the other hand uses the word ***“includes development and maintenance of the ferries and harbours operating in the inland lakes and waters”***. This clearly excludes international waters.

21. The elephant in the room therefore is whether the Likoni Channel is included in ***“inland lakes and waters”*** or it is part of International Waterways. In our view, the Likoni Channel is not an inland lake or waters. It is part of the Indian Ocean which is an International

Waterway. We take judicial notice of the fact that international ships pass through the Likoni Channel before they go to dock at the Kilindini Harbour. It is therefore part of the International Waterways which the Constitution assigned to the National Government. We do not see how the appellant can claim the mandate to manage Likoni Channel which is without a doubt an International Waterway, and part of the country's marine navigational system. We also note that the road leading to Likoni is actually not a county road as it connects Mombasa Island to the South Coast and goes all the way to Lunga Lunga and Tanzania. It is not certainly one of the county roads contemplated in section 5 (a) of Part 2 of the Fourth Schedule. The said road and the Likoni Channel, are part and parcel of this country's national economic development. Furthermore, the use of International Waters and water resources is a direct function of the National Government by dint of section 2 of the Fourth Schedule. Being an International Waterway, the Likoni Channel is not just governed by National legislation but also by the relevant International Treaties and Conventions to which Kenya is a party.

22. Earlier, in this judgment in our brief history, we observed that the ferries that transport people and motor vehicles across the channel are bought by, and are therefore the property of the National Government through the 1st respondent. The personnel charged with the responsibility of overseeing the operations of the ferries were employees of the 1st respondent. We are not certain whether they were chased away by the appellant after it unlawfully took over operations of the ferries. There was no evidence to suggest that the appellant was more efficient than the 1st respondent in managing the ferries. On the contrary, and without saying much, we are of the view that the appellant's hands are full with other more mundane but equally important functions like maintaining the county roads; management of traffic, drainage and the management of the over soaring mounds of garbage.

23. On the other issue of the management of the parking bays and other properties on either of the channel, it is not in dispute that the said properties, i.e. plots no. MS/1/1762 and MS /1/1763 are owned by the 1st respondent, which in law has capacity to own property. Any structures that have been erected on those properties naturally belong to the 1st respondent. The 1st respondent being a juridical person also enjoys protection in respect to its right to property under Article 40 of the Constitution. The 1st respondent is entitled to any revenue generated from those properties, subject of course to any licenses or permits that the appellant is authorized to levy on them.

24. Lastly on the submission that the appeal was defective, the 1st respondent had the option of moving the Court to strike out the same pursuant to Rule 84 of the Rules of this Court. Having failed to do so, the Court cannot at this point be called upon to strike out the appeal.

25. For all the foregoing reasons, we are not persuaded that this appeal has merit. In the circumstances, we dismiss it with costs to the 1st respondent and uphold the Judgment dated 28th, November 2016 and the orders granted therein. We also order that the appellant shall hand over to the 1st respondent the operations and management of the facilities in question within 14 days from the date hereof. It is so ordered.

**Dated and delivered at Mombasa this 19th day of April, 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**