



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 23 OF 2011**  
**(CORAM: OKWENGU, MAKHANDIA & SICHALE JJ.A)**

**BETWEEN**

**REPUBLIC.....APPELLANT**

**VERSUS**

**HON. KITUKU- RESIDENT MAGISTRATE LAMU.....1<sup>ST</sup> RESPONDENT**

**LAMU COUNTY COUNCIL.....2<sup>ND</sup> RESPONDENT**

**EX PARTE;**

- 1. SHELA HOUSE MANAGEMENT LIMITED**
- 2. LAMU ADVENTURES LIMITED**
- 3. MANDA CONSERVATION AND SAFARIS LIMITED**
- 4. NEW FELSINA TRADING COMPANY LIMITED**
- 5. CELIA KECK**
- 6. JOHNNY BRINKMANN..... APPELLANTS**

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Malindi*

*(H. Omondi J) dated 10<sup>th</sup> November 2010*

*In*

*High Court Judicial Review Case No 15 of 2010)*

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**JUDGMENT OF THE COURT**

[1] The genesis of this appeal is Gazette Notice No 2053 (hereinafter referred to as “Gazette notice”), that was published on 27<sup>th</sup> February, 2009. According to the Gazette notice Lamu County Council (hereinafter referred to as the 2<sup>nd</sup> Respondent), imposed a 2% accommodation levy on Hotels and or Guest houses operating in Lamu with effect from 1<sup>st</sup> January, 2009. **CELIA KECK** and **JOHNNY BRINKMAN** (hereinafter referred to as the appellants) who are Hotel operators, failed to comply with the Gazette notice. As a result the 2<sup>nd</sup> respondent initiated criminal proceedings against them before the Resident Magistrate (Lamu Court) (1<sup>st</sup> respondent).

[2] The appellants and 4 others moved to the High Court as *ex parte* applicants under **Order 53** of the Civil Procedure Rules, pursuant to leave granted on 3<sup>rd</sup> May, 2010. They filed a notice of motion seeking judicial review orders against the respondents as follows:

*1. That this Honourable Court do grant an order of certiorari to remove the proceedings in Senior Resident Magistrate’s Court at Lamu in criminal cases number 159 and 166 of 2010 to this court to be quashed.*

*2. That this Honourable Court do grant an order of prohibition to prohibit the 2<sup>nd</sup> Respondent from collecting 2% levy on accommodation from the Applicants.*

*3. That costs of this suit be borne by the Respondents*

[3] The application was premised on the ground that the 2<sup>nd</sup> respondent’s decision to impose a 2% accommodation levy was made in contravention of **Section 148** of the Local Government Act Cap 265 (the Act) of the Laws of Kenya,(now repealed), as the approval of the minister for local government was never obtained, and consequently, the arrest and arraignment of the 5<sup>th</sup> and 6<sup>th</sup> *ex parte* appellants before the 1<sup>st</sup> respondent was unlawful and the proceedings a nullity as no offence had been committed, since the alleged levy does not legally exist.

[4] From the record of appeal, it is evident that though served none of the respondents filed any response to the *ex parte* appellants’ motion. Consequently when the matter came up for hearing before the learned Judge on 19<sup>th</sup> July, 2010, **Mr. Hamza** learned Counsel for the *ex parte* applicants simply asked the court to allow the motion as unopposed. However, in her ruling delivered on 10<sup>th</sup> November 2010, the learned Judge (**Omondi J.**) found the motion to be without merit and proceeded to dismiss it with costs to the Respondents.

[5] Being aggrieved the appellants lodged this appeal faulting the learned Judge for failing to consider the overwhelming and uncontroverted facts placed before her, which showed that the 2% accommodation levy imposed by the 2<sup>nd</sup> respondent was never approved by the minister. Before the appeal was heard, **Celia Keck** withdrew her appeal.

[6] On 15<sup>th</sup> July, 2014, when the appeal came up for hearing there was no representation for the 2<sup>nd</sup> respondent despite service having been effected on its Counsel on record, **M/s Abuodha & Omino**. In arguing the appeal, **Mr. Odongo** for **Johnny Brinkman**, the remaining appellant, submitted that though the learned Judge acknowledged that **Section 148** of the Act makes it mandatory for any rules made by a local authority to be approved by the minister for local government, the Judge overlooked the fact that no such approval is apparent from the legal notice that was produced before her, and that in the absence of this approval, the Respondents’ purported enforcement of this Gazette Notice was illegal. He thus urged that this appeal be allowed. On his part, **Mr Eredi** counsel for the 1<sup>st</sup> Respondent, conceded the appeal concurring that on the face of it, the Gazette Notice did not appear to have been approved by the minister.

[7] **Section 148 of the Local Government Act** (now repealed) provided 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.***

***(3) Save where the contrary is expressly or by necessary implication in any written law provided, a local authority may authorize the remission in whole or in part of any fees due to it or charges imposed by it under this Act or any other written law.***

[8] It is evident from the above quoted provision that where a local authority imposes fees and charges, the same must be backed either by the authority's by-laws, or by a resolution of the authority that is supported by an approval by the Minister of the proposed levies. In this case, the ex parte applicants established that the 2<sup>nd</sup> respondent imposed a 2% accommodation levy pursuant to a resolution it had passed, and that the appellants were arraigned in court for failure to pay the imposed levy. The sole issue for determination before the learned Judge was whether the levy imposed by the 2<sup>nd</sup> respondent was ultra vires for want of ministerial approval.

[9] The Gazette Notice issued by the 2<sup>nd</sup> respondent reads in part as follows:

***'...In exercise of the powers conferred by section 148 of the Local Government Act, the Municipal Council of Lamu has with the approval of the Deputy Prime Minister and Minister for Local Government imposed the following revised fees and charges with effect from 1<sup>st</sup> January, 2009....'***

[10] From the wording of the Gazette notice, the 2<sup>nd</sup> respondent clearly stated that the increase of the levy had been undertaken in accordance with the approval of the minister. In light of **section 48** of the Act and the Gazette Notice that was established to have been issued by the 2<sup>nd</sup> respondent, the ex parte applicants discharged the burden of proof of admissibility under **section 110** of the Evidence Act that provides as follows:

***"110 Proof of admissibility***

***The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence"***

[11] The obtaining of the ministerial consent had to be done by the 2<sup>nd</sup> respondent, and therefore it was a matter that was within the peculiar knowledge of the 2<sup>nd</sup> respondent. In accordance with **section 112** of the Evidence Act the burden of proof was upon the 2<sup>nd</sup> respondent to establish that there was ministerial consent for the levies. **Section 112** of the Evidence Act provides as follows:

***"112 Proof of special knowledge in civil proceedings***

***In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him"***

[12] The learned Judge erred in failing to address **section 148** of the Act and the relevant provisions of the

Evidence Act regarding proof of a fact that was especially within the knowledge of a party. The 2<sup>nd</sup> respondent having relied on the ministerial consent for the imposition of the levies, and having failed to prove that there was such ministerial consent, there was sufficient proof before the learned judge that the 2<sup>nd</sup> respondent acted ultra vires in imposing the levy, and that the criminal proceedings against the appellants were anchored on an illegality and were therefore null and void. In the circumstance the ruling of the learned judge dismissing the appellants motion cannot be supported.

[13] Accordingly we allow the appeal, set aside the ruling and orders of the High Court dismissing the motion of the ex parte applicants, and substitute thereof an order giving judgment in favour of the ex parte applicants and issuing orders of certiorari and prohibition as sought in prayers (1) and (2) of the Notice of Motion dated 14<sup>th</sup> May 2010 filed in the High Court. We further award costs of the suit and costs of the appeal to the remaining appellant who had pursued this matter to its logical conclusion.

Those shall be the orders of the Court.

**Dated and delivered at Malindi this 2<sup>nd</sup> day of October, 2014**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**