



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: O’KUBASU, GITHINJI & NYAMU, J.J.A.)

CIVIL APPLICATION NO. NAI. 276 OF 2010 (UR. 194/2010)

BETWEEN

REPUBLIC APPELLANT

AND

HON. KITUKU - RESIDENT MAGISTRATE

LAMU

LAMU COUNTY COUNCIL RESPONDENTS

(Application for stay of proceedings in Lamu Criminal Case Numbers 159 and 166 of 2010 and for restraining Lamu County Council the 2nd Respondent herein from collecting 2% levy on accommodation from the applicants of the intended appeal against the Ruling of the High Court of Kenya at Malindi (Omondi, J.) given on 10th November, 2010

in

H.C.JUDICIAL REVIEW CASE NO. 15 OF 2010

RULING OF THE COURT

By a notice of motion dated 14th May, 2010, the applicants, **Shela House Management Limited and Lamu Adventures Limited and 4 Others** sought Judicial Review Orders of Certiorari to quash the decision of the County Council of Lamu to raise a 2% levy on accommodation and to prohibit its imposition on the ground that it had been imposed illegally. An order of certiorari was also sought to remove the proceedings in the Senior Resident Magistrate’s Court at Lamu in **Criminal Case 159 and 166 of 2010** to the court and to quash the proceedings. The proceedings against the directors of the applicants related to the refusal to pay the levy. On 10th November, 2010, the application for Judicial Review was dismissed by Lady Justice Omondi.

The applicants have since filed an appeal namely **Civil Appeal No. 23 of 2011** in which they have challenged the dismissal of the application. However, what is now before us is an application for stay of the High Court ruling in so far as it relates to the crucial process because the same are likely to be finalised before the appeal against the order is heard on merit. The applicants have also sought restraining orders against the Council from collecting the levy until the appeal is heard and determined. We shall however not deal with any restraining orders since as at the time the Judicial Review proceedings were instituted, no injunctive orders could lie in Judicial Review proceedings.

The grounds relied on are set out in the body of the application but the principal ground is that the gazette notice purporting to constitute Ministerial approval under **section 148** of the *Local Government Act Cap 265* of the Laws of Kenya did not constitute the approval contemplated by **section 148** of the Act. During the hearing, the appellants were represented by Hamza Omar, advocate, while the 1st respondent was represented by Mr. Kamau, learned State Counsel. The second respondent was not represented although it had been duly served with a hearing notice. All the respondents did not oppose the application either by way of affidavits in reply or by way of submissions by counsel. Mr. Hamza's arguments are that although Gazette Notice of 27th February, 2009 does purport to constitute Ministerial approval pursuant to **section 148** of the Local Government Act the gazette notice does not make any reference to a resolution of the Council nor does it indicate that the nature of the accommodation as it only makes reference to accommodate hearing per total value 2% and does not make reference to any regulating by-law which is a statutory requirement where the levy is imposed without a resolution of the Council. The respondent's counsel have not on a prima facie basis demonstrated that there was full compliance with the requirement of any of the two options open to the Council under the section.

Without going into the merit we consider it important to set out the relevant section of the Act.

Section 148(2) reads:-

“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 an unspecified power or a particular matter”.

The applicant's counsel's submissions on the two legal requirements before the imposition of a levy or any charges by a local authority are not frivolous in our view.

In the unique circumstances of this matter, we grant an order of stay of execution of the decision to levy the 2% accommodation levy and further grant a stay prohibiting the continuance of the criminal proceedings in Lamu Senior Resident Magistrate's Court at Lamu in **CR.C. NO. 159 and 166 of 2010** respectively until the determination of the intended appeal.

Costs of the application to be in the appeal.

It is so ordered.

Dated and delivered at Mombasa this 7th day of October, 2011.

E.O. O'KUBASU

.....
JUDGE OF APPEAL

E.M. GITHINJI

.....
JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR