IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL 185 OF 2001

MUNICIPAL COUNCIL OF MOMBASA ……....…… APPELLANT

AND

REPUBLIC …… RESPONDENT

AND

UMOJA CONSULTANTS LTD. ……....…… INTERESTED PARTY

(An appeal from the Ruling and Order of the High Court of Kenya at Mombasa (Waki, J) dated 15th day of January, 2001

in

H.C.MISC.APP. NO. 91 OF 2000)

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JUDGMENT OF THE COURT

This appeal arises from the ruling and the orders consequent thereon made by Mr. Justice Waki on the 15th January, 2001 at the High Court sitting in Mombasa. By that ruling the learned Judge, as is his wont, considered in great detail and partly allowed the respondent's application for judicial review in which the said respondents had asked the Judge for:

"an order of prohibition do issue directed to the respondent to prohibit the Respondent from any further actions and/or proceedings acting either by itself and/or through its agents and/or servants and/or employees and/or assignees under and pursuant to Gazette Notice No. 3613 dated 25/6/1999 in receiving, collecting or threatening to collect revised advertising fees and/or threatening to demolish, remove, deface, repaint advertising signboards and/or prosecute advertisers and to prohibit any further execution by the Respondent of the terms and conditions of the said Gazette Notice No. 3613".

Mombasa Municipal Council, the appellant herein, issues licences for various trades and businesses carried on within its area of jurisdiction. The Local Government Act, Cap. 265 of the Laws of Kenya, the Act, entitles the appellant, like all other local authorities in the Republic, to issue such licences and in doing so to levy various fees and charges in respect of the licences issued. On 5th June, 1999, the appellant caused to be published in the Kenya Gazette Notice No. 3613 and by that notice, the appellant

informed its numerous licensees that it had raised fees and charges for the various licences it [appellant] was entitled to issue under the Act. The respondents herein, namely Lightways Ltd, Lightex Ltd, Advertising Materials Ltd, Eye Catchers Ltd and Aruns Arcade were some of the appellant's licensees. Umoja Consultants Ltd which is named in the appeal as "Interested Party", was apparently an agent of the appellant for the purpose of collecting the fees and charges on behalf of the appellant. Pursuant to Gazette Notice No. 3613 of 25th July, 1999, the appellant, on 4th April, 2000, issued various notices to the respondents, amongst others, warning them to pay the new fees and charges or else certain consequences would follow. It was those notices which galvanized the respondents into action and on 10th or 11th April, 2000 they moved the High Court at Mombasa for the orders we have already set out herein.

The complaint of the respondent was that the whole process and procedure of raising the fees and charges were contrary to the provisions of the Act and the rules and regulations made thereunder and hence the prayer for an order of prohibition to stop the appellant from collecting the increased fees and charges. The appellant's answer to that complaint was in effect, that it had, in fact, whether lawfully or otherwise, made a decision raising the fees and Gazette Notice No. 3613 of 25th July, 2000 merely informed the public of the decision already made. Basing itself on the authority of this Court's decision in the case **KENYA NATIONAL EXAMINATIONS COUNCIL VS. REPUBLIC, EX PARTE: GEOFFREY GATHENJI NJOROGE & NINE OTHERS,** (Civil Appeal No. 266 of 1996) (unreported), the appellant had contended before Mr. Justice Waki, and Mr. Mburu for the appellant continued to contend before us, that as the appellant had already made a decision to raise its fees and charges, it could not be prohibited from effecting or carrying out that decision. Our understanding of the appellant's position is that the Gazette Notice was merely evidence of the decision it had made and that being so, the appellant could only be prevented from collecting the increased fees and charges if its decision to increase the fees and charges was first quashed. The decision to raise the fees and charges could only be quashed if the respondents had applied for an order of ***certiorari***. The respondents had not done so. Indeed they could not have done so at the time they came to court because the limitation period of six months within which to apply for an order of ***certiorari*** had long passed. According to Mr. Mburu, the appellant could not be prohibited from taking a decision which it had already taken. As we understand the matter, that was the basis on which the case of the **KENYA NATIONAL EXAMINATIONS COUNCIL**, ante, was heavily relied on. How did Mr. Justice Waki deal with these contentions? We quote him:

"The way I see it, the applicants seek the order of Prohibition for two reasons. Firstly because the decision to appoint the Interested Party was made contrary to the provisions of the Local Government Act, more specifically the sections referred to above, and it cannot therefore clothe the Interested Party with any legal authority to demand Advertising license fees from the Applicants or anyone else. The second reason is that the increased charges and fees were raised contrary to law more particularly the Building Code and Section 148 of the Local Government Act and therefore they are incapable of collection.

On the first proposition I think with respect that the Applicants are misguided. They concede that they confused the facts and perhaps that may explain the obscurity of their claim. But clearly there was a decision made here by the Council, whether in October, 1998 or December, 1998 matters not, appointing the Interested Party as a Fees Collection Agent. The fact of that appointment was publicized, as conceded by the Applicants, on 7th January, 1999, a few months or weeks after the decision. If it was an objectionable decision then surely, the remedy of Certiorari was open to any aggrieved person as there was sufficient time to react before limitation period set in. Crying foul on that decision more than one year after publication of the decision would attact legal censure. …..

We shall never know what the result would have been if Certiorari was sought in the matter but it is not, and I am not at liberty to consider unpleaded issues".

Pausing there, what we understand the learned Judge to be saying is that part of the respondents' claim, though put obscurely, was that the respondents had also sought to prohibit the Interested Party from collecting the increased fees and charges. The learned Judge rejected that aspect of the respondents' claim and we think he was perfectly right in doing so. The appellant had appointed the Interested Party

its agent for the purpose of collecting the increased fees and charges. That appointment could have been lawful; it could have been equally unlawful. But the decision had been made and its making had been made known to the respondents. They did not challenge it, i.e. they did not, within six months of its being made go to the High Court for an order of ***certiorari*** to have it moved into the High Court and be quashed. Accordingly, it was not open to the respondents to seek to have the appellant prohibited from asking the Interested Party to collect the new fees and charges on its behalf. There was no appeal or cross-appeal by the respondents on this aspect of the learned Judge's ruling.

The learned Judge next dealt with what he called the second proposition contained in the respondents' notice of motion namely that the increased fees and charges were raised contrary to law, more particularly the Building Code and Section 148 of the Act, and that as the fees and charges had been increased contrary to law, the appellant could be prohibited from collecting them. On this aspect of the matter, the learned Judge had this to say, and once again we have no qualms in quoting him in extenso:

"As for the upward revision of the charges I think the Applicants are on firmer ground. There is no indication as to when the Council took the decision to increase the charges and the Council chooses in its reply and submissions to simply assert that the increments were made lawfully under Section 148 Cap 265. Unlike in the case of the appointment of the Fees Collection Agent where they displayed the minutes evidencing their decision, they say nothing about the latter decision and dismiss with contempt the relevance of the Building Code. The evasiveness is revealing. It is clear from the Gazette Notice published on the new charges that the Council purported to act under Section 148 of the Local Government Act. The section is reproduced above. It gives the power to the Council to impose fees and charges but goes ahead to regulate the manner of such imposition. Under section 148(2) it is either through by-laws or resolutions of the Council where no by-law exists.

But in this case there exists as correctly submitted by the applicants, a by-law imposing fees and charges on Advertisements. That is Part IV of the Schedules to the Building Code. The only valid manner in which the Council could interfere with the provisions of the by-law is to follow the amendment procedures prescribed. The provisions of By-Laws and their amendment are in part XIX of Cap 265. That they have not shown to have done and it is contended that they never did. All that is in existence is a Gazette Notice, the Notice complained about informing the public about the new charges.

The Gazette Notice was not a decision. It was conveying information to members of the public but it did not affect the Applicants until it was applied on them in April, 2000. They had hitherto complied with the Council's by-laws until a demand which had nothing to do with the By-Laws was made and they resisted it. They do not complain about the increases per se. But the manner of imposing them. I agree with them that the enforcement of a demand which has no basis in law is amenable to an order of Prohibition. The Council appears to have acted ultra vires the law as it has nothing to show, simple as it would have been, in compliance therewith. The Applicants came to court as soon as the ultra vires act threatened to affect them as they stood to have their sign boards demolished, removed defaced or repainted. That was contemplated action and an order of prohibition would be efficacious against it. Let the Council put its house in order before enforcing the charges stated in the Gazette Notice in issue.

I grant the application as prayed with costs to the Applicants".

The appellant was aggrieved by this order and hence this appeal. The appellant complains in grounds 3 and 4 of its memorandum of appeal that:

"3 The learned Honourable Judge erred in failing to appreciate that the remedy of prohibition lies to prohibit or pre-empt decisions intended to be made and not to prohibit or pre-empt a contemplated action.

4. The learned Judge erred in failing to appreciate that the publication of Gazette Notice No. 3613 by the appellant meant that the appellant had already made its decision and the remedy of prohibition did,

therefore (sic) not lie".

These are the grounds which Mr. Mburu argued before us; he abandoned grounds one and two in the appellant's memorandum of appeal.

We agree with Mr. Mburu that by and large an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision- maker, or where the decision maker has evinced an intention to act contrary to law. That is the effect of this Court's decision in the **KENYA NATIONAL EXAMINATION COUNCIL** case and as the Court has repeatedly said, judicial review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.

We have already referred to Mr. Mburu's contention that Gazette Notice No. 3613 announcing the increased charges and fees was not the decision itself but was merely evidence of a decision already made by the appellant. Yet the strange aspect of this case is that even before Waki J. none of the parties brought the decision itself to the attention of the court. The respondents contended that they were not aware that a decision had been made and if it had been made, when it was made. The only thing they knew was the Gazette Notice and they moved to court as soon as the appellant purported to enforce the new fees and charges in the Gazette Notice. For our part, we asked Mr. Mburu where and when the decision was made. His short answer to us was that it was no part of the appellant's duty to help the respondents prove their case. That may be so, but it was clearly the duty of the appellant to comply with the law in coming to its decision, and common sense and fairness would demand that once the appellant made the decision, it was its duty to bring it to the attention of those affected by it. The appellant is not a limited liability company created for commercial purposes. It is a statutory body and can only do that which is authorized by the statute creating it and do it in the manner authorized by the statute. The appellant purported to collect money from the respondents on the foot of a purported decision which no one was aware of its making or when it was made. In those circumstances, the respondents were perfectly entitled to seek an order of prohibition to stop the appellant from demanding money from them on the basis of some unknown decision. The position in this case is different from what prevailed in the case of **KENYA NATIONAL EXAMINATIONS COUNCIL**. In the latter case, the Council had cancelled the examination results of certain students, and having done so, the Council wrote a letter to the head of the institution where the students were learning and had taken their examinations, telling them that the results had been cancelled and the reason for the cancellation. Instead of going to court and asking for certiorari to quash the cancellation, the applicants in that case went to court and asked the court for an order THAT:

"An order of prohibition do issue to the Kenya National Examinations Council prohibiting it its officers agents and/or employees or otherwise howsoever, from further withholding the Kenya Certificate of Primary Education 1994 results of the following candidates ……".

In this case the students, despite their knowledge that their examination results had been cancelled, were still persisting that the Examinations Council be prohibited from withholding those cancelled results, i.e. to release the results to them without first asking that the cancellation be quashed. It is not surprising that the court refused to issue the order sought.

Again in that case, the Examinations Council was not demanding anything further from the students

whose results it had cancelled. It merely informed them that their results had been cancelled and as far as the Examinations Council was concerned, that was the end of the matter. But in the case we are considering, having made the decision, assuming it was made and having published the increases arising from its decision, the appellant proceeded to demand from the respondents money by way of fees and charges and as Waki, J. correctly held, if the decision was contrary to law, the respondents were not bound to pay and were, therefore, entitled to seek an order prohibiting the appellant from demanding payment and taking the other actions it threatened the respondents with. That is exactly what Waki, J. did.

We have said enough, we think, to show that we are satisfied the learned trial Judge came to the correct decision on the matter before him and we must uphold his judgment. That being our view of the matter, we order that this appeal be and is hereby dismissed with the costs thereof to the respondents. The Third Party is not entitled to any costs.

Dated and delivered at Mombasa this 1 day of November, 2002.

R. O. KWACH

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JUDGE OF APPEAL

R. S. C. OMOLO

……..

JUDGE OF APPEAL

E. O. O'KUBASU

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR