



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CIVIL APPEAL 25 OF 2000

NAROK COUNTY COUNCILAPPELLANT

AND

TRANS MARA COUNTY COUNCIL

KENYA ASSOCIATION OF TOUR OPERATORS.....RESPONDENTS

(Appeal from a judgment of the High Court of Kenya at Kisii (Mbaluto J) dated 4th June, 1998

in

H..C.C.C. NO. 17 OF 1996)

JUDGMENT OF KWACH, J.A.

By the Local Government (County Council of Trans Mara) Order 1994 (LN No. 285 of 1994) made on 11.8.1994, Hon William Ole Ntimama, the Minister for Local Government (hereinafter called "the Minister") created out of Narok County Council a new county council called the County Council of Trans Mara (Trans Mara). This order was made by the Minister pursuant to the powers conferred upon him by *Sections 5, 28 and 399 of the Local Government Act (Cap 265)* (hereinafter called "the Act").

The apportionment of rights, liabilities, properties, etc., between Narok County Council (Narok) and Trans Mara had to be undertaken in accordance with the provisions of *Section 270 (b) of the Act* the relevant portion of which states:

"(b) and any apportionment of rights, liabilities, property, assets or any other of the matters or things mentioned in those paragraphs shall be made between the several local authorities concerned on a fair and equitable basis. either as agreed between them or. in default of agreement as directed by the Minister,"

One of the things Narok and Trans Mara were unable to agree upon was the division of the entry fees collected from the following game reserves:

- (1) Kichwa Tembo Camp
- (2) Mpata Club
- (3) Mara Serena Lodge

(4) Olkarruk Lodge

(5) Little Governors Camp from the 11.8.94 although it is erroneously stated in the plaint as 4.8.94. The fees were collected by the Kenya Association of Tour Operators, the second respondent, on behalf of Narok. Following this disagreement, Trans Mara filed a suit in the superior court against Narok and the Association seeking the following among other reliefs:

- (1) a declaration that it was entitled to its rights under the agreement between Narok and the Association;
- (2) that the plaintiff was entitled to the entry fees collected by the second defendant from the 5 lodges;
- (3) an injunction to restrain Narok, their servants and agents from receiving for its own use revenue from the areas of jurisdiction from the Masai Mara Reserve;
- (4) an injunction restraining the Association from remitting collections from Masai Mara to the first defendant and have the same deposited in an interest earning account for the plaintiff;
- (5) the second defendant to refund all monies collected from the plaintiff's area of jurisdiction from 4.8.94 (sic);
- (6) damages and interest.

Narok filed a defence in which it denied owing Trans Mara any money and admitted having refused to remit the sum of Shs.69,362,400/=to Trans Mara. In paragraph 6 of the defence of Narok, it was pleaded that the court had no jurisdiction to entertain the claim by Trans Mara. In its defence, the Association admitted that it had collected the fees in dispute and had paid it over to Narok in accordance with the agreement between it and Narok.

When the case came up for hearing before Mbaluto J, counsel for Narok raised a preliminary objection that the suit was incompetent, misconceived and bad in law in that the provisions of *Section 270 of the Act* had not been complied with. The learned Judge dismissed the preliminary objection and said, inter alia:

"Nowhere in that section or indeed in the entire Act is it stated that the jurisdiction of the High Court to hear disputes involving local authorities or between them is ousted. Section 60 of the Constitution of Kenya confers upon this court unlimited jurisdiction in civil and criminal matters. In the case of Miller V Miller the Court of Appeal had this to say about the interpretation of section 60 (1) of the Constitution:

"The unlimited and original jurisdiction of the High Court can be ousted only by an express provision in the Constitution."

Regarding the matter before me nothing has been said by counsel fro the defendants which remotely shows that the unlimited civil jurisdiction of this court granted by the constitution has been taken away by the provisions of section 270 of the Local Government Act."

Section 60 of the Constitution does give the High Court unlimited jurisdiction but I do not understand it to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a minister as part of his statutory duty. Clearly if *Section 270 (b) of the Act* had simply provided that the two local authorities should agree on the apportionment without indicating what is supposed to be done in the event of a disagreement, then in that case I would agree with the learned Judge that even without an express provision that in that event the dispute should be taken to court, the High Court would have jurisdiction under *Section 60 of the Constitution of Kenya* to deal with the matter and make a determination. But in the present case, the law expressly states that in default of agreement between the two councils, the apportionment of assets and liabilities would be undertaken as directed by the Minister.

It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister (as in the present case) refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter case, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the division is to be made on a fair and equitable basis. But if, as in this case, the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court. The learned Judge says in his judgment that by the time the suit was filed on 11.1.96, the Minister had not deemed it fit to invoke the wide powers he had under *Section 270 (b)* of the Act to direct how the assets and liabilities were to be apportioned between the two local authorities. And he says the reason for this was animosity between the parties and the fact that the Minister was an interested party being a native of Narok.

With respect, I cannot accept that the reasons given by the learned Judge could justify the Minister's failure to perform his statutory duty. When the Minister took the decision to split Narok and create Trans Mara, he must have known that the decision would be greeted with resentment in some quarters. As a native of Narok the decision to split Narok must have caused him great anxiety than the consequential step of directing how the assets and liabilities were to be apportioned. In any case, as a Minister of the Government with statutory duties such mundane considerations should not weigh in his mind when he is called upon to make important decisions.

The Minister was required by law to direct the apportionment of assets and liabilities if this could not be agreed between Narok and Trans Mara. Having refused or neglected to act, an application should have been made to the High Court by either party for an order of mandamus to compel the Minister to perform his statutory duty. The High Court does this in exercise of its special jurisdiction of judicial review of administrative action. The Minister's refusal to act did not and could not confer any right on Trans mara to institute proceedings against Narok over the issue of division of assets. The refusal by Narok to agree the apportionment could only give rise to a ministerial directive but could not render it liable to a suit at the instance of Trans Mara.

The plaint in this case was filed on 11.1.96. The hearing started before Mbaluto J on 28.10.97 and was concluded on 30.3.98. On 2.5.97, after the suit had been filed but before it was heard a new Minister for Local Government, Hon Francis Lotodo, who had replaced the Hon William Ole Ntimama, set up a commission by Gazette Notice No 2183 to deal with the distribution of assets and liabilities of 18 local authorities, including County Council of Narok and County Council of Trans Mara. There is no reference to this appointment in the judgment and one cannot tell whether the Judge's attention had been drawn to this important development.

As Trans Mara was clearly aggrieved by the refusal of the Minister to direct the apportionment of the assets, the only remedy available to it in the circumstances was to apply to the High Court for an order of mandamus against the Minister to compel him to act. I am accordingly satisfied that the learned Judge wrongly rejected the preliminary objection raised by counsel for Narok. The court had no jurisdiction to deal with the matter at that stage and the preliminary objection should have been upheld and the suit struck out as it was clearly incompetent. The proceedings were a nullity as the court acted without jurisdiction.

I would allow this appeal, set aside the judgment and decree of Mbaluto J and substitute therefor an order striking out the suit filed by Trans Mara with costs to Narok and the Association. I would also give Narok the costs of this appeal. As the Association did not appear it is not entitled to an order for costs.

As Akiwumi and O'Kubasu, JJ.A. also agree, the appeal is allowed in terms of the orders I have proposed.

Dated and delivered at Nairobi this 7th day of April, 2000.

R. O. KWACH

JUDGE OF APPEAL