REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Civil Appeal 25 of 2000

NAROK COUNTY COUNCIL..... APPELLANT

AND

1. **TRANS MARA COUNTY COUNCIL**
2. **KENYA ASSOCIATION OF TOUR OPERATORS ..... RESPONDENTS**

(An appeal from the judgment of the High Court of Kenya at Kisii (Justice Tom Mbaluto)

dated 4th June 1998

in

H.C.C.C. No.17 of 1996

JUDGMENT OF AKIWUMI, J.A.

The fundamental issue in this appeal is whether the learned Judge had jurisdiction to hear the matter which is the subject of the appeal.

The Trans Mara County Council, the 1st Respondent in this appeal, sued by means of a plaint, the Narok County Council, the Appellant in this appeal, and the Kenya Association of Tour Operators (KATO), the 2nd Respondent in this appeal, for the following reliefs:

"1. The Plaintiff prays for a declaration that the Plaintiff is entitled to its rights in the agreement between the 1st and 2nd defendants.

b. That the Plaintiff is entitled to the entry fees collected by the 2nd defendant in the Plaintiff's area of jurisdiction vide:

i. Kichwa Tembo Camp

ii. Mpata Club

iii.Mara Serena Lodge

iv. Larrup Lodge

from 4th August, 1994 till payment in full.

2a. An injunction to restrain the 1st defendants, their servants and or agents or however (sic) from receiving for its own use revenue from areas in the Plaintiff's area of jurisdiction from the Masai Mara Reserve.

b. An injunction restraining the 2nd defendant or its agents from remitting collections from the Masai Mara to the 1st defendant and have the same deposited in an interest earning account for the Plaintiff.

3. The 2nd defendant do refund all monies collected from the Plaintiff's area of jurisdiction from 4th August, 1994 till the time it desists from such collection.

4. Damages and interest.

5. Costs of the suit.

6. Any other relief the Honourable Court may deem fit to grant.".

This was on the basis that, pursuant to the Trans Mara County Council having been carved out as a local council on its own, from the Narok County Council, it was entitled to an apportionment of the rights, liabilities, property and assets of the latter County Council on a fair and equitable basis. Among such assets, the newly created Trans Mara County Council had in its plaint, sought, not a fair and equitable apportionment of the collected entry fees to the Maasai Mara Game Reserve which is a common amenity to both County Councils, but, and worded confusingly, the refund of "all monies collected from the Plaintiff's area of jurisdiction ...". The 2nd Respondent, as agent of the Narok County Council, was the one that collected such entry fees.

In paragraph 9 of the 1st Respondent's plaint, it was stressed that:

"... despite repeated attempts to have the said revenue remitted to the Plaintiff either amicably or through the direction of the Minister of Local Government. The defendants have refused, ignored and or neglected to co-operate. ".

It is convenient now to consider the relevant provisions of the Local Government Act that applies to the issues raised in the plaint. Section 270(b) read together with Section 269 of the Act, provide that where a part of a local government area in this case, that of the Narok County Council, by virtue of Legal Notice No.285 of 1994, signed by the then Minister for Local Government, William Ole Ntimama, becomes a local government area under the jurisdiction of another local government authority, in this case, the Trans Mara County Council, the apportionment of the matters mentioned in section 269 of the Act such as "fees", shall, according to section

270(b) of the Act,:

"... be 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.".

In its statement of defence, the Narok County Council in paragraph 6 thereof, significantly pleaded that:

"Without prejudice to the foregoing the second defendant shall crave the indulgence of this court to raise a preliminary objection contending that this Honourable court has no jurisdiction whatsoever in the circumstances of this matter to hear the suit and/or grant the prayers sought since the dispute between the first and second defendants was not referred to the Minister for Local Government for his directions and/or resolution.".

It was therefore not surprising that the Narok County Council in a notice of preliminary objection filed on 2nd February, 1996, sought, inter alia, the dismissal of the plaint. The 2nd Respondent also by notice of preliminary objection filed on 6th March, 1996, sought the dismissal of the plaint in this way:

"... that this suit is incompetent, misconceived and bad in law in that it does not comply with the provisions of section 270 of the Local Government Act and as such should be dismissed with costs.".

In his ruling of 15th March, 1996, on the preliminary objection, Mbaluto J. made short work of this objection by stating in reference to Section 270 of the Act, that:

"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.".

He went on further to state that, since in conformity with section 60(1) of the Constitution which confers upon the High Court unlimited original jurisdiction in civil and criminal matters, this Court had held in the case of Miller v Miller, without giving its full reference, that:

"The unlimited and original jurisdiction of the High Court can be ousted only by an express provision of the Constitution.", he was of the view that section 270 of the Act, had not dispossessed him of jurisdiction to hear the suit. First of all, no such dictum as quoted by the learned Judge, exists in this Court's judgment in the only appeal entitled Miller v Miller ever heard by it and which is Civil Appeal No. 83 of 1988 (unreported).

Apart from this, the learned Judge did not make any reference to, or indeed, consider, the following additional, important and concluding words of Section 60(1) of the Constitution which defines the jurisdiction including its limitation, of the High court:

"... and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law", and which in turn, means that the extent of the jurisdiction of the

High Court may not only, be that which is conferred or limited by the Constitution but also, that which the Constitution or any other law, may by express provisions or by necessary implication, so confer or limit.

In the Rent Restriction Act, for instance, the Rent Tribunal established under section 4A of the Rent Restriction Act, is empowered by section 5 of the same Act, inter alia, to assess standard rents and the date from which they may be payable; fix service charges; make orders for the recovery of possession of premises, arrears of rent and mesne profits; permit the levy of distress; and to order the carrying out of repairs to dwelling houses. As regards the role of the High Court, section 4A(9) significantly provides that:

"Where the chairman of a tribunal is of opinion that a question arising in any proceedings before the tribunal involves a substantial question of law, he may, and shall if any party to the proceedings so requests, adjourn the proceedings and refer that question of law to the High Court for a decision thereon, and, upon such decision being given, the tribunal shall dispose of the proceeding in accordance therewith.".

Then in section 8(2) of that Act, it is provided that an appeal from a decision of a tribunal shall only lie to the High Court in certain specified cases. And finally, it is provided in section 37(2) of the Act that:

"Where jurisdiction or power to deal with any matter is conferred by this Act on a tribunal, no proceedings with respect to that matter shall be taken in any court except by way of an appeal under section 8(2).".

And so, though the Rent Restriction Act does not expressly provide that the so called unlimited original jurisdiction in civil matters conferred on the High Court by section 60 (1) of the Constitution, have been

ousted in the particular cases covered by the Act, the necessary implication or inference is quite clear, that the unlimited original jurisdiction of the High Court in civil matters can be, and has been, limited by the Act. Similarly, where the Local Government Act restricts the apportionment of assets to the local authorities concerned and failing which, to the Minister for Local Government , the jurisdiction of the High Court itself, to undertake such action is ousted.

Although, having regard to the reliefs sought in the plaint, I am unable to say with certainty that the learned Judge erred in dismissing the notice of preliminary objection filed by the Narok County Council and KATO, he espoused doubtful legal principles which were to form the basis of his judgment in the suit. Firstly, he relied on a non existing dictum of this Court in Miller, (supra) which he obviously and happily felt bound by; and on only that part of section 60 (1) of the Constitution which appeared to support his assertion of the complete unlimited original jurisdiction of the High Court in civil matters. Secondly, even though section 270 of the Local Government Act did not empower the local authorities concerned and the Minister for Local Government to hear any judicial proceedings, they were the ones and not the High Court, who were mandatorily required to take certain actions

:in the case of the local authorities:

"any apportionment of rights ... shall be made between the ... local authorities concerned on a fair and equitable basis ... as agreed between them ...",

and in the case of the Minister for Local Government:

"any apportionment of rights ... shall be made ... in default of agreement (by the local authorities concerned) as directed by the

Minister." .

These provisions seem to me to oust the jurisdiction of the High Court to apportion rights, property, assets etc between the local authorities namely, the Trans Mara County Council and the Narok County Council. All that the High Court could do in this respect, is to enforce by way of judicial review proceedings, the implementation of the provisions of the section 270 of the Local Government Act; certainly not, in this case, to usurp the powers of the Minister for Local Government. Even though the learned Judge did not do so in his ruling dismissing the notice of preliminary objection, he did so in the proceedings that followed and at the end of which, he on 4th June, 1998, gave the judgment which is the subject of the appeal before this Court.

During these proceedings, the Trans Mara County Council sought, inter alia, by another Chamber Summons dated 15th December, 1996, orders to restrain KATO from remitting entry fees collected from those visiting the Maasai Mara Game Reserve to the Narok County Council. In his ruling of 15th July, 1997, dismissing this

application, the learned Judge made the following important and correct remark but which he unfortunately, completely ignored in his judgment of 4th June, 1998, when he, wrongly, took upon himself, the task of apportioning assets between the County Councils:

"Clearly the root problem between the parties herein is that of apportionment of the assets of the former Narok County Council but that task is outside the scope of this suit.".

Having said this, the learned Judge then went on and I an not sure whether he was right, to order that:

"... the best solution to the immediate problem is to direct the 2nd respondent or any other person who collects entry fees and/or royalties to and/or in connection with the Masai (sic) Mara Game Reserve to pay one half of the royalties he/it collects from the Game Reserve to each of the two local authorities i.e. the applicant and the 1st respondent pending the apportionment of the assets and liabilities of the former Narok County Council.".

Another matter which is worth adverting to, is in respect of another interlocutory Chamber Summons of 15th July, 1997, by the Trans Mara County Council seeking, inter alia, to restrain the Narok County Council from dispensing with the services of KATO.

Annexed to the affidavit of the Clerk of the Narok County Council in opposition to the Chamber Summons, and marked "NL - 10" is Gazette Notice No.2183 published in the Kenya Gazette of 2nd May, 1997, wherein, the then Minister for Local Government, Francis Lotodo, in exercise of his powers under section 270 of the Local Government Act, to give directions, appointed a Commission of Distribution of Assets and Liabilities to apportion assets and liabilities between the Narok County Council and the Trans Mara County Council. This Gazette Notice was drawn to the attention of the learned Judge on 4th June, 1997, when the Chamber Summons of 15th December, 1996, was being argued before him and also subsequently, during the hearing of the suit, to show, among other things, that he lacked jurisdiction to hear the suit and in any case, that the suit itself, had been overtaken by events because the Minister for Local Government had given directions as required under section 270 of the Local Government Act. This did not seem to have made any impression on the learned Judge in his ruling of 15th July, 1997, already referred to, and where he had emphatically observed that the apportionment of assets was outside the scope of the suit.

Another significant document which was produced during the hearing of the suit and contained in the record of proceedings, is the letter Ref. No.134974/56 of 11th March, 1996, some three months after the Trans Mara County Council had filed its plaint, from the then Minister for Local Government, William Ole Ntimama, to the Clerks of the Trans Mara and the Narok County Councils. This letter which relates to the validity of the suit filed by the Trans Mara County Council, and which deserves to be fully set out, is as follows:

"COUNTY COUNCIL OF TRANSMARA ..... PLAINTIFF

VERSUS

NAROK COUNTY COUNCIL ..... 1ST DEFENDANT

KENYA ASSOCIATION OF TOUR OPERATORS..2ND DEFENDANT

It has come to my notice that there is a dispute between the two councils which is as a result of the ongoing division of assets and liabilities occasioned by the creation of the County Council of Transmara out of the Narok County Council.

Several attempts have been made by my PLGO at Nakuru to get a fair and equittable (sic) distribution of the assets and liabilities between your two councils. Indefault of an amicable agreement by your councils, I have now taken over the dispute under powers conferred to me by virtue of Section 270 (b) of the Local Government Act. The Ministry will be issuing directions in the matter in due course.".

This important letter which shows that the Minister for Local Government was taking action under section 270 (b) of the Local Government Act, was also ignored by the learned Judge. The Chamber Summons of 15th July, 1997, was subsequently, on 28th October, 1997, withdrawn with costs to the Narok County Council. The proceedings before the learned Judge during which evidence was adduced as to the fair and equitable apportionment of the assets of the Narok County Councel between it and the Trans Mara County Council, then continued unabated. The Gazette Notice and the letter from the Minister for Local Government might, however, not have affected the jurisdiction of the superior court, if, contrary to what was sought in the plaint, the learned Judge had not in his judgment, done what he was not entitled to do, namely, the apportionment of assets between the Narok County Council and the Trans Mara County Council. The following excerpts from the judgment of the learned judge illustrate his conception of the suit before him:

"Ordinarily disputes between local authorities regarding the distribution of their assets and liabilities are low key affairs which normally do not end up to Courts. In fact this case is the first one of its type that I

have come across. Nonetheless there are serious issues to be determined, not the least of which is the way revenue from the Maasai Mara Natural Reserve, one of the most famous tourist destination in the world, is to be shared out ... So in reality this suit is about the distribution of revenue accruing from Maasai Mara Natural Reserve between the plaintiff and the 1st defendant . . . Looking at all those figures, the 2nd defendant considered that a fair and reasonable basis for sharing the revenue of the two country councils would be in the ratio 32% in favour of Narok.

Given the various factors that influenced the 2nd determination of the ratio it arrived at, one of which I must observe was its experience in these matters and doing the best I can in the circumstances I find the ratio of 32% to 68% suggested by DW6 to be the fairest and most equitable method of distributing the assets and liabilities, including revenue from Masai Mara Natural Reserve, between the two local authorities. ... From the above gross revenue the commission payable to the 2nd defendant (4%), royalties to group ranchers (19%) and contributions to Maa Development Association (1/2%) amounting to shs.171,717.30 according to my calculations must be deducted leaving a balance of shs.529,171,109.70 which on the basis of two ratio aforesaid must be apportioned between the two authorities as follows:

Narok (68%) Shs.359,836,354.60

Trans Mara (32%) Shs.169,334,755.10

Total Shs.529,171,109.70

The evidence available shows that apart from the sum of shs.60,565,178/- which the 1st defendant paid directly to the plaintiff, it retained all the above collections. Consequently it is bound to pay to the plaintiff the sum of shs.169,334, 775/10 less shs.60,565,178/- = shs.108,769,577/10. For the above reasons there will be judgment for the plaintiff against the defendant for shs.108,769,557/10 together with costs and interest.".

These excerpts also fortify the view that the learned Judge must have intended to apportion the assets of the former Narok County Council, in this case, the Maasai Mara Game Reserve entry fees, between it and the Trans Mara County Council all along, though he had no jurisdiction to do so, and in fact, did do so.

Even though it is conceded that the resort to the judicial review process,"in this case, an application for mandamus to make the Minister for Local Government to take action under sections 269 and 270 of the Local Government Act, may in appropriate cases not be a bar to other proceedings such as the plaint of the Trans Mara County Council, this would not apply in the peculiar circumstances of the present case, so as to entitle the learned Judge by way of the plaint brought by the Trans Mara County Council, to do not only, what he had not been requested in the plaint to do, but also, to do what he had no jurisdiction to embark upon, namely, the apportionment of revenue accruing from the fees charged for entry into the Maasai Mara Game Reserve, between the two County Councils.

I would, for the reasons set out herein above, allow the appeal, declare the judgment of the learned Judge to be a nullity, and set it aside. "Phere will be costs for the Narok County Council in this Court and in the High Court.

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

A.M. AKIWUMI

JUDGE OF APPEAL