



Road Hauliers Association of Kenya (Local Transporters) v County Government of Mombasa & 2 others (Judicial Review Application E010 of 2024) [2024] KEHC 6257 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E010 OF 2024**

OA SEWE, J

MAY 30, 2024

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS AND IN THE MATTER OF ARTICLES 23, 47, 50, 118, 201 AND 209 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2014

BETWEEN

ROAD HAULIERS ASSOCIATION OF KENYA (LOCAL TRANSPORTERS) APPLICANT

AND

THE COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

KENYA PORTS AUTHORITY 2ND RESPONDENT

THE OFFICE OF THE ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The Chamber Summons dated 16th May 2024 was filed by the applicant, Road Hauliers Association of Kenya, under various provisions of the law, notably Article 23(3)(f) of the [Constitution of Kenya, 2010](#) and Order 53 Rules 1(1), (2) and (4) of the Civil Procedure Rules. It seeks orders that:
 - (a) Spent
 - (b) Leave be granted for the applicant to apply for the following Judicial Review Orders:
 - (i) An Order of Certiorari to set aside the decision of the 1st respondent and the implementation by the 2nd respondent contained in the Customer Notice on Parking Fee Collection for Heavy and Commercial Vehicles in Mombasa commencing on



May 15th 2024 vide a communication through the Managing Director of the 2nd respondent which violates Articles 47, 50 and 118 of *the Constitution* of Kenya.

- (ii) An Order of Certiorari to quash the decision of the 1st respondent and the implementation by the 2nd respondent contained in the Customer Notice on Parking Fee Collection for Heavy and Commercial Vehicles in Mombasa commencing on May 15th 2024, which designates the 2nd respondent as a levy collecting agent on behalf of the 1st respondent.
 - (iii) An order of Mandamus to compel the respondents to rescind its decision contained in the said Customer Notice on Parking Fee Collection for Heavy and Commercial Vehicles in Mombasa commencing on May 15th 2024 in the way that the parking fees and fines have been previously collected in line with the Mombasa County Finance Act 2023 and provide books of accounts for the irregular collections of parking taxes and subsequent refund.
 - (c) An order of Prohibition to forbid the respondents from increasing the parking fees payable and changing the mode of collection of parking fees as threatened in the said Customer Notice on Parking Fee Collection for Heavy and Commercial Vehicles in Mombasa commencing on May 15, 2024.
 - (d) That the leave so granted does operate as a stay of the decision of the respondent contained in the Customer Notice on Parking Fee Collection for Heavy and Commercial Vehicles in Mombasa commencing on May 15, 2024.
 - (e) The Court do give further directions.
 - (f) The Costs of the application be borne by the respondents.
2. The application was premised on the grounds that the applicant is an association of drivers and owners of trucks whose capacity exceeds 10 tonnes and who deal in transportation of various goods and containers to and from the Port of Mombasa. They further averred that they have been paying levies and penalties in line with Schedule D of the Mombasa County Finance Act, which they paid at the commencement of the year 2024. The applicant further averred that they are also required to pay Port access and other statutory charges prior to accessing the 2nd respondent's facilities.
 3. Their cause for complaint was that the respondents chose to arbitrarily and in a flawed procedural manner change the rule through an undated Customer Notice on Parking Fee Collection for Heavy and Commercial Vehicles in Mombasa by commencing collection of the parking levies and imposing hefty and unconscionable penalties on May 15, 2024. They further averred that the impugned notice was made without the input or participation of the applicant and by extension the members of the public, stakeholders, National Government and Port users. Thus, the applicant contended that the implementation of the impugned notice is oppressive and amounts to a contravention of their legitimate expectations.
 4. The application was supported by a Statutory Statement as well as the affidavit of a truck driver, Dennis Okumu Ombok, sworn on 16th May 2024, in which the aforementioned grounds were explicated. In support of the applicant's assertions several documents, including the impugned notice, were annexed to the Supporting Affidavit.
 5. The 1st respondent opposed the application vide the Replying Affidavit of its County Attorney, Mr. Jimmy Waliula. He deposed that the charge of Kshs. 700/= for parking charges is founded in law and forms part of the charges set out in the Mombasa County Finance Act 2024. The 1st respondent



opposed any stay deposing that such an order would gravely prejudice its operations. Annexed to the Replying Affidavit is a copy of the Mombasa County Finance Act, 2024.

6. The application was also opposed by the 3rd respondent by way of the Grounds of Opposition dated 22nd May 2024. It thereby contended that:
 - (a) That the ex parte applicant has no locus standi to appear before the Court;
 - (b) That the orders sought will greatly interfere with the legal mandate of the 1st respondent to raise revenue for its own operations as provided for in Article 185 and the Fourth Schedule of *the Constitution*.
7. Needless to say that judicial review proceedings now have a constitutional underpinning such that it is optional for a party to seek leave or not before approaching the Court with a substantive application. Hence, in Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR by a 5-judge bench of the Court of Appeal held:

In our considered view presently, judicial review in Kenya has Constitutional underpinning in articles 22 and 23 as read with article 47 of the Constitution and as operationalized through the provisions of the *Fair Administrative Action Act*. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the *Civil Procedure Act* and rules is a procedure for applying for remedies under the common law and the *Law Reform Act*. These common law remedies are now part of the constitutional remedies that the High Court can grant under article 23(3)(c) and (f) of the Constitution. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both...We hold that Kenya has one and not two mutually exclusive systems for judicial review. The common law and statutory judicial review are complementary and mutually non-exclusive judicial review approaches."

8. In the premises, it is only where a party approaches the Court under the [/akn/ke/act/1956/48](#) Law Reform Act that the Court is obliged, in appropriate instances, to ascertain whether the requisite threshold provided for in Order 53 of the Civil Procedure Rules has been met before granting leave. Hence, in Mombasa HCMCA No. 384 of 1996: Republic v County Council of Kwale & Another, Ex Parte Kondo and 57 others it was held that:

The purpose of application for leave to apply for Judicial

Review is firstly to eliminate at an early stage any applications for Judicial Review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial Review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with the administrative action while proceedings for Judicial Review of it were actually pending even though misconceived...Leave may only be granted therefore if on the material available before the court the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing



of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised Judicially".

9. I have consequently looked at the application for leave, the accompanying Statutory Statement and Verifying Affidavit sworn by the applicant from the prism of Order 53 of the Civil Procedure Rules with a view of ascertaining that the applicant has complied with the strictures of Order 53 Rules 1 and 2 of the Civil Procedure Rules. I am accordingly satisfied that the application is compliant; and that it has been brought within the 6 months' period stipulated in Rule 2. I am further satisfied that the applicant has an arguable case that is fit for further investigations and therefore is entitled to leave as prayed.
10. As to whether leave should operate as stay I have taken into account the position taken by the applicant and the response made thereto by the respondents. In particular, it is plain from the 1st respondent's Replying Affidavit that the levy is not premised on the impugned notice issued by the 2nd respondent but on the Mombasa County Finance Act, 2024. Since statutes enjoy the presumption of constitutionality, it has to be a very strong case in which the Court would intervene by way of stay; and I am far from convinced that this is such a case. Hence, I subscribe to the view expressed in Mombasa High Court Petition No. 669 of 2009 Bishop Joseph Kimani & others v Attorney General & others that:

It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stage actually show that the operation of the legislative provision are a danger to life and limb at that very moment...It is my view the principle of presumption of Constitutionality of Legislation in (sic) imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its Constitutional duty of legislating law. I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation of statutes, statutory provisions or even Regulations should be wholly avoided except where the national interest demand and the situation is certain...I am still of the view that "there is no place for conservatory or interim order in petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void." It is even more premature at this stage where the application has not been heard or is not being heard to seek such conservatory orders. The applications must be heard first."

11. Similarly, in *Susan Wambui Kaguru & 4 others v Attorney General & another* [2012] eKLR the view taken was as hereunder:

7. The question for the court is to consider whether these laws are within the four corners of *the Constitution*. No doubt serious and weighty arguments have been advanced and I think any answer to them must await full argument and consideration by the court. I cannot at this stage make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so."

12. In the result, the application for stay is hereby declined; such that the application dated 16th May 2024 is hereby allowed only partially and orders granted as hereunder:

(a) Leave be granted for the applicant to apply for the following Judicial Review Orders:



- (i) An Order of Certiorari to set aside the decision of the 1st respondent and the implementation by the 2nd respondent contained in the Customer Notice on Parking Fee Collection for Heavy and Commercial Vehicles in Mombasa commencing on May 15th 2024 vide a communication through the Managing Director of the 2nd respondent
 - (ii) An Order of Certiorari to quash the decision of the 1st respondent and the implementation by the 2nd respondent contained in the Customer Notice on Parking Fee Collection for Heavy and Commercial Vehicles in Mombasa commencing on May 15th 2024, which designates the 2nd respondent as a levy collecting agent on behalf of the 1st respondent.
 - (iii) An order of Mandamus to compel the respondents to rescind its decision contained in the said Customer Notice on Parking Fee Collection for Heavy and Commercial Vehicles in Mombasa commencing on May 15th 2024 in the way that the parking fees and fines have been previously collected in line with the Mombasa County Finance Act 2023 and provide books of accounts for the irregular collections of parking taxes and subsequent refund.
 - (iv) An order of Prohibition to forbid the respondents from increasing the parking fees payable and changing the mode of collection of parking fees as threatened in the said Customer Notice on Parking Fee Collection for Heavy and Commercial Vehicles in Mombasa commencing on May 15, 2024.
- (b) The substantive application to be filed within 14 days from the date hereof.
 - (c) The Costs of the application to be costs in the substantive application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF MAY 2024

OLGA SEWE

JUDGE

