



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 128 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NAIROBI METROPOLITAN SERVICES.....1<sup>ST</sup> RESPONDENT**

**NAIROBI COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**NATIONAL TRANSPORT & SAFETY**

**AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE KENYA.....4<sup>TH</sup> RESPONDENT**

**METRO TRANS EAST AFRICA LIMITED.....5<sup>TH</sup> RESPONDENT**

**EX PARTE APPLICANT:**

**ASSOCIATION OF BUS OPERATORS KENYA**

**JUDGMENT**

**The Application**

1. The Association of Bus Operators Kenya, (hereinafter “the *ex parte* Applicant”) is a registered association of bus operators that operate in the Nairobi Central Business District. The *ex parte* Applicant has brought a Notice of Motion application dated 16<sup>th</sup> June 2020, in which it is seeking the following orders:

a) THAT this Court be and is hereby pleased to grant an order of Prohibition prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from allotting to the 5<sup>th</sup> Respondent pick-up and dropping slots at the Ambassador Hotel, General Post Office (GPO) and Kencom bus termini (westbound), GPO and ICEA stages (eastbound) or allowing the 5<sup>th</sup> Respondent to operate within the Nairobi Central Business District via City Hall Way, Mama Ngina Street and Kenyatta Avenue without obtaining the necessary Road Service Licenses;

b) THAT this Court be and is hereby pleased to grant an order of Prohibition prohibiting the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents from allowing the 5<sup>th</sup> Respondent to operate within the Nairobi Central Business District or to pick and drop passengers at the General Post Office (GPO) and Kencom bus termini based on the Decree dated 11<sup>th</sup> October, 2017 in Milimani Misc. (JR) Application No. 13 of 2013; Republic v City Council of Nairobi Town Clerk & 3 Others Ex Parte Metro Trans Limited;

c) THAT this Court be and is hereby pleased to grant an order of Mandamus compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to involve the *ex parte* Applicant herein as a bona fide stakeholder, in any decision making process pertaining to allocation of slots to any public transport operator at the General Post Office (GPO), Ambassador Hotel and Kencom bus termini; and

**d) THAT costs of this application be provided for.**

2. The Nairobi Metropolitan Services and Nairobi City County (the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein), are sued for the reasons that the Nairobi City By-laws provide that public service vehicles must operate on the routes and termini designated to them on their Road Service Licenses, while the issuance of the said Road Service Licenses is the preserve of the National Transport and Safety Authority, which is sued as the 3<sup>rd</sup> Respondent. The *ex parte* Applicant is in this regard aggrieved by the allotment of passenger picking up and dropping of slots to Metro Trans East Africa Limited, the 5<sup>th</sup> Respondent herein. The Inspector General of Police, who is sued as the 4<sup>th</sup> Respondent, is a Constitutional office in command of the National Police Service, and responsible for *inter alia*, enforcement of the law.

**The ex parte Applicant's Case**

3. The instant application is supported by a statutory statement dated 16<sup>th</sup> June 2020, and a verifying affidavit and supporting affidavit sworn on 15<sup>th</sup> June 2020 and 29<sup>th</sup> June 2020 respectively by Edwins Massimba Mukabanah, the *ex parte* Applicant's chairman. The *ex parte* Applicant states that its members are bona fide public service vehicle operators licensed to pick and drop passengers at General Post Office (GPO), ICEA and Ambassador Hotel (eastbound) and Kencom bus and GPO termini (westbound) and are also licensed to operate within the Nairobi Central Business District, that is, through Kenyatta Avenue, Moi Avenue, Nkrumah Avenue, City Hall Way and Mama Ngina Street with a bus holding ground at Central Bus Station.

4. The *ex parte* Applicant alleges that the 5<sup>th</sup> Respondent has been putting pressure on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein to allot to it picking and dropping slots at the General Post Office (GPO), Ambassador and Kencom bus termini (westbound), and GPO and ICEA termini (eastbound), when they do not have the valid Road Service Licenses to operate from the said termini or the associated routes. That in this respect, the 5<sup>th</sup> Respondent, through its Advocates, wrote to the 2<sup>nd</sup> Respondent on 23<sup>rd</sup> April, 2020 seeking purported enforcement of a decree dated 11<sup>th</sup> October, 2017 given in **HC Misc. (JR) Application No. 13 of 2013- Republic v City Council of Nairobi Town Clerk & 3 Others Ex Parte Metro Trans Limited**, in a bid to coerce the 2<sup>nd</sup> Respondent into allocating them slots at the Ambassador Hotel, Kencom and General Post Office (GPO) termini.

5. It was further contended that as it is, the 5<sup>th</sup> Respondent's operators do not hold the valid road service licenses to operate on the aforementioned routes within the Nairobi Central Business District, or to pick and drop passengers at the Ambassador, GPO and Kencom termini (westbound) or the GPO and ICEA termini (eastbound), and that the decree dated 11<sup>th</sup> October, 2017 could not be used as a substitute for a road service license and was spent as it was enforced in 2017. Furthermore, that the decree dated 11<sup>th</sup> October, 2017 did not authorize the 5<sup>th</sup> Respondent to operate within the whole of the Nairobi Central Business District or to pick and drop passengers at the Ambassador, Kencom and GPO bus termini (westbound) or GPO and ICEA (eastbound), neither did it license them to ply through Kenyatta Avenue, Moi Avenue, Nkrumah Avenue, City Hall Way and Mama Ngina Street as the case is now.

6. The *ex parte* Applicant therefore averred that the 5<sup>th</sup> Respondent has to follow due process and obtain the necessary valid road service licenses before they could seek to be allocated any slots at the Ambassador Hotel, GPO and Kencom termini, as it has no colour of right to use the said decree to try to obtain or get allotted any slots at the said termini. Further, that the 1<sup>st</sup> Respondent had confirmed in its letter dated 19<sup>th</sup> June, 2020 that the 5<sup>th</sup> Respondent indeed did not have a valid Road Service License and had not been authorized to operate at the General Post Office (GPO) and Kencom termini.

7. According to the *ex parte* Applicant, the 5<sup>th</sup> Respondent's actions were highly prejudicial to the Applicant herein as the GPO and Kencom termini were already congested and could not accommodate additional public service vehicles. In addition, that currently, the GPO and Kencom bus termini each have a capacity to accommodate only 11 buses at any given time with members of the *ex parte* Applicant sharing the space as follows; Kenya Bus Service Management-3 slots, City Hopper-3 slots, Double M-3 slots and City Star Shuttle-2 slots. The *ex parte* Applicant asserted that any additional public service vehicles would result in obstruction due to the congestion of vehicles and interference of the zebra crossings at the said termini which would flout the city traffic rules.

8. Furthermore, that the 5<sup>th</sup> Respondent operates 14-seater mini-buses which are prohibited from operating within the Nairobi Central Business District, and may thereby increase the congestion of public service vehicles and disrupt the normal flow of business and management of traffic therein. The *ex parte* Applicant contended that as a bona fide stakeholder at the said termini, it is imperative it is involved or consulted in the decision-making process regarding the allotment of slots to any other public transport operator at the GPO, Ambassador Hotel and Kencom termini, as they stand to be adversely affected by any such decision made in their absence, since its members would be unfairly forced to cede their slots to accommodate the 5<sup>th</sup> Respondent's vehicles without any participation on their part.

9. It was also averred that the 5<sup>th</sup> Respondent's operators hold both the Inter-city and Commuter Road Service Licenses, which means they are authorized to ferry passengers as far as 50km outside the Nairobi Central Business District to Thika and Kikuyu towns and also along Tom Mboya Street within the Nairobi Central Business District. However, that the *ex parte* Applicant was denied Inter-City Road Service Licenses and only operate Commuter Road Service Licenses, which only authorizes them to ferry passengers within the NCBD through Kenyatta Avenue, Moi Avenue, Nkrumah Avenue, City Hall Way and Mama Ngina Street with a bus holding ground at Central Bus Station. It was contended that not only would it be manifestly unfair to the *ex parte* Applicants for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to bow to the 5<sup>th</sup> Respondent's pressure and allocate them additional picking and dropping slots at the Ambassador Hotel, GPO and Kencom bus termini but would also contravene the competition laws in Kenya. According to the *ex parte* Applicant, fair business practice for public transport operators requires that they to be issued with either the Inter-city road service license or the Commuter road service license, and that an operator should not be issued with both.

10. The *ex parte* Applicant annexed copies of its demand letter dated 2<sup>nd</sup> June 2020 and the 1<sup>st</sup> Respondent's letter in response thereto dated 19<sup>th</sup> June 2020, the 5<sup>th</sup> Respondents list of road service licenses as published on the 3<sup>rd</sup> Respondent's website, the 5<sup>th</sup> Respondent's Advocates' letter dated 23<sup>rd</sup> April, 2020, and of the decree dated 11<sup>th</sup> October 2017 and judgment dated 28<sup>th</sup> September 2017 issued in

**Milimani Misc. (JR) Application No. 13 of 2013- Republic v City Council of Nairobi Town Clerk & 3 Others Ex Parte Metro Trans Limited.**

**The Respondents' Cases**

11. The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents filed responses to the instant application. No responses were filed by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. The Responses filed are set out hereinbelow.

***The 1<sup>st</sup> Respondent's Case***

12. The 1<sup>st</sup> Respondent filed a Replying Affidavit dated 21<sup>st</sup> July, 2020 sworn by Enosh Momanyi Onyango, the Deputy Director General and Accounting Officer of the Nairobi Metropolitan Services. He averred that on 25<sup>th</sup> February, 2020, the National Government and the Nairobi City County Government signed a Deed of Transfer of Functions pursuant to provisions of Article 187 of the Constitution of Kenya, 2010 as read together with Section 26 of the Intergovernmental Relations Act, (No. 2 of 2012). Which was published in Gazette Notice 1609 of 25<sup>th</sup> February 2020. Further, that pursuant to the signing of the said Deed of Transfer of Functions, four (4) functions namely, County Health Services, County Transport Services, County Planning and Development Services and County Public Works, Utilities and Ancillary Services were transferred to the National Government by the County Government of Nairobi.

13. In addition, that pursuant to Article 132 (4) (a) of the Constitution and Article 7.1 of the said Deed of Transfer of Functions, the Nairobi Metropolitan Services, the 1<sup>st</sup> Respondent herein, was duly established on 18<sup>th</sup> March 2020 under the Executive Office of the President as the Institutional Framework mandated to perform the transferred functions on behalf of the National Government, upon recommendation by the Public Service Commission. The 1<sup>st</sup> Respondent contended that the subject matter of this case relates to the management of transport services on public roads within the Central Business District of Nairobi, and operation of Public Service Vehicles (PSVs) within the Nairobi Central Business District, and that following the transfer of functions, the mandate to perform the traffic management function in Nairobi City County is bestowed upon the 1<sup>st</sup> Respondent.

14. It was also averred that pursuant to section 72A of the Traffic Act, the City of Nairobi (Omnibus Station) By-Laws 2008 were duly promulgated, which regulate management of traffic services within Nairobi County, empower the local authority to establish routes to be used by PSVs and provide for licensing of PSVs, . Further, that the routes to be followed by PSVs in Nairobi County are set out under Regulation 23 of the By-Laws, have designated pick-up and drop-off parking areas. And are allocated and managed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the basis of Road Service Licences which are allocated to PSVs upon application. Therefore, that all PSVs are required to operate in accordance with and within the routes allocated as per the Road Service Licences.

15. The 1<sup>st</sup> Respondent asserted that it has not permitted or allowed the 5<sup>th</sup> Respondent or any other Party to operate outside the routes allocated as per the Road Service Licences, and that to the contrary, it has ensured that all PSVs operate within the established routes and adhere to the conditions set out in the Road Service Licence. The 1<sup>st</sup> Respondent also denied that the 5<sup>th</sup> Respondent or any other person has put pressure on it to allocate any pick up and/or dropping slots at the General Post Office, Ambassador and Kencom bus termini (westbound) and GPO and ICEA termini (eastbound) or at all. The 1<sup>st</sup> Respondent averred that it has continued to ensure that all licenced vehicles observe the relevant By-laws on management of traffic in Nairobi, as evidenced in its letter 19<sup>th</sup> June, 2020, which was annexed by the *ex parte* Applicant.

16. According to the 1<sup>st</sup> Respondent, it is always guided by the existing laws and regulations in the management of traffic matters and involves all stakeholders in decision-making, including the *ex parte* Applicant. In addition, that there is no evidence that the *ex parte* Applicant has ever been discriminated or overlooked and hence the order of mandamus is unnecessary. The 1<sup>st</sup> Respondent contended that the Road Service Licence only permits the *ex parte* Applicant to operate within the Central Business District as per the established routes and pick-up or drop-off points, and that the *ex parte* Applicant had instead illegally and unlawfully shared the spaces to their members without any authority or approval by the 1<sup>st</sup> Respondent, and were now attempting to use the court process to legalize their unlawful action. In addition, that the *ex parte* Applicants do not have an exclusive right or licence to use the subject termini within the Central Business District, and its right of use and to operate within the stated places is not automatic but subject to meeting the legal and regulatory requirements such as holding a valid Road Service Licence.

17. Lastly, the 1<sup>st</sup> Respondent averred that the orders sought by the *ex parte* Applicant have the effect of granting them exclusive rights of use without following the laid down procedures. Further, that there is no evidence that the 1<sup>st</sup> Respondent had violated or acted a manner that is contrary to the court order and decree dated 11<sup>th</sup> October, 2017 in **Milimani HC Misc. (JR) Application No. 13 of 2013 - Republic vs City County of Nairobi Town Clerk and 3 others ex parte Metro Trans Limited.** nor has the *ex parte* Applicant demonstrated any wrong doing on the its part to warrant issuance of the orders of prohibition or mandamus, and its claim is speculative.

18. The 1<sup>st</sup> Respondent annexed a copy of Gazette Notice 1609 of 25th February, 2020.

***The 2<sup>nd</sup> Respondent's case***

19. The 2<sup>nd</sup> Respondent filed a Replying Affidavit dated 23<sup>rd</sup> November, 2020 sworn by Eng. F.N. Karanja, the Deputy Director and Head of Section Roads and Public Works with the 1<sup>st</sup> Respondent, and previously the Chief Officer Road, Public Works and Transport of the 2<sup>nd</sup> Respondent. The deponent averred that he was duly authorized by the 2<sup>nd</sup> Respondent to swear the said affidavit on its behalf.

20. He contended that the law on grounds for granting Judicial Review Orders is now fairly settled and that Judicial Review is concerned with the legality of the decision-making process, and averred as to the said grounds and remedies, as well as on the elements of procedural

fairness in the administrative law. He cited the decisions in **Republic vs Public Procurement Administrative Review Board & 2 others Ex Parte- Sanitam Services (E. A) Limited (2013) eKLR**, **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 30**, **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996**, **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817**, and **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009** in this respect.

21. The deponent averred that he was aware that the 5<sup>th</sup> Respondent had irregularly allocated themselves pick-up and drop-off slots similar to that of the *ex-parte* Applicant herein, and that these actions were irrational thus making it appropriate for the *ex-parte* Applicant to question the manner in which the slots were allocated. Further, that the process required for the Public Service Vehicles operators to make an application for picking and dropping slots is via an online platform created by the 2<sup>nd</sup> Respondent. He added that once their application is successful, it is upon the Road Engineer to proceed and assess the said slots applied for and determine how many public service vehicles may operate under the same slots. It Eng. F.N. Karanja's averment that the order sought of Prohibition be issued on the terms prayed by the *ex parte* Applicants, as the 5<sup>th</sup> Respondent should be prohibited from unprocedurally allocating themselves pick-up and drop-off slots similar to those of the *ex parte* Applicants with an approval from the Road Engineer.

22. According to Eng. F.N. Karanja that the 2<sup>nd</sup> Respondent have not yet created a taskforce or committee on road transport whereby the operators take part in the decision-making of what routes they should ply or not. Further, that the *ex parte* Applicants are concerned by how the road transport system works, and are thus demanding to be part of the committee or taskforce on public transport operations in Nairobi which will bring certainty in the public transport industry and avoid further conflict of interests. He further averred that maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process, and that since the *ex parte* Applicants have raised problems as to the irregular allocation of pick-up and drop-off slots to the 5<sup>th</sup> Respondent, the best solution was to involve public transport operators into the decision-making of allocating pick-up and drop-off slots within Nairobi. In conclusion, the deponent stated that it is in the interest of fairness and justice that the *ex-parte* Applicant's Application be allowed.

### **The 5<sup>th</sup> Respondent's Case**

23. The 5<sup>th</sup> Respondent filed grounds of opposition dated 23<sup>rd</sup> July, 2020 and a Replying Affidavit dated 18<sup>th</sup> August, 2020 sworn by Oscar Omurwa Rosana, one of its Directors, in response to the instant application. The 5<sup>th</sup> Respondent opposed the application as being an abuse of the court process at it is tantamount to challenging and seeking to set aside a subsisting order and decree of a court of concurrent jurisdiction issued in **Republic vs City Council of Nairobi Town Clerk & 3 others ex-parte Metro Trans Limited (2017) e KLR in Milimani HC Misc (JR) Application No. 13 of 2013**. Further, that the application is made *mala fide* for to incite of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents against the 5<sup>th</sup> Respondent, and that the orders sought therein are against the purpose of the Competition Act No. 12 of 2010 to inter alia promote and safeguard competition in the National economy, and are tantamount to predatory practice prohibited under the said Act. Lastly, that the substantial orders the *ex-parte* Applicant seeks are *res judicata*, and that the *ex-parte* Applicant has no *locus standi* to challenge the orders in **Republic vs City Council of Nairobi Town Clerk & 3 others ex-parte Metro Trans Limited (2017) e KLR** being **Milimani HIC Misc (JR) Application No. 13 of 2013** as it was not privy to the proceedings in suit.

24. The grounds of opposition were supplemented by averments made by the 5<sup>th</sup> Respondent in its affidavit. The 5<sup>th</sup> Respondent contended therein that its company did apply to the 1<sup>st</sup> Respondent to be allowed to operate their public transport vehicles to and from Kenyatta Hospital to Kencom Bus station, and by a letter dated 24<sup>th</sup> July, 2020, the 1<sup>st</sup> Respondent allowed the 5<sup>th</sup> Respondent to operate the said route as they indicated they have no objection thereto. It was also averred that the 1<sup>st</sup> Respondent took over from the 2<sup>nd</sup> Respondent on matters to do with allocation of routes, laybys and termini to be played by public service vehicle within Nairobi. Therefore, that the *ex parte* Applicant by making the instant application is to trying to push the 1<sup>st</sup> Respondent for no justifiable reason at all, to deny the 5<sup>th</sup> Respondent an opportunity to compete with other public transport operators fairly.

25. It was further contended that it is clear in the judgment and decree of the Odunga . in **Republic vs City Council of Nairobi Town Clerk & 3 others Ex-parte Metro Trans Limited (2017) eKLR** being **Milimani HC Misc (JR) Application No. 13 of 2013**, the predecessor to the 1<sup>st</sup> Respondent whose functions they took over as far as managing Public Service Vehicles in Nairobi was concerned, were ordered not to interfere with the operations of the 5<sup>th</sup> Respondent's vehicles so long as they have valid operating licences. Therefore, that so long as the 5<sup>th</sup> Respondent's public service vehicles have valid Road licenses for particular routes, they would freely and in a law-abiding manner ply the routes and use the stages and terminus. In addition, that this fact was made clear by the 1<sup>st</sup> Respondent letter dated 19<sup>th</sup> June 2020 when it wrote to the *ex parte* Applicant's advocates on record after they lodged a complaint, namely that allocation of slots to the 5<sup>th</sup> Respondent's buses was vide this courts orders and as such they could not interfere with the said orders. Attached and marked "OS2" was a copy of the letter.

26. According to the 5<sup>th</sup> Respondent, it is equally a bona fide public service vehicle licensed operator, that is dully allowed by this court to ply routes and have the benefit to share with other-like licensed operators, all routes, termini and laybys that they have been licensed to operate. Further, that the *ex parte* Applicant has no mandate whatsoever to impugn the 5<sup>th</sup> Respondents' licenses as that is the job of the 3<sup>rd</sup> Respondent, and their operations are checked by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents. As such, that the *ex parte* Applicant should aim at fairly competing in the public transport industry. It was also averred that the allocation and refusal to allocate slots to be used by the public service vehicle is purely within the mandate and discretion of the 1<sup>st</sup> Respondent and not the *ex parte* Applicant who are themselves beneficiaries of the said discretion, having been allotted the slots its members operate by the 1<sup>st</sup> Respondent. The 5<sup>th</sup> Respondent contended that the routes and laybys the *ex parte* Applicant wants their vehicles locked out of are not terminuses, and as such any operator is allowed to operate along the said routes as fair competitors.

27. Lastly, the 5<sup>th</sup> Respondent stated that it is equally a member of a licensed public service vehicles association being the Association of Matatu Operators (NCBD), and the *ex parte* Applicant cannot use the said association to seek orders against the Respondents. Therefore, that the instant application is not made in good faith, and is also an attempt to drive a competitor out of business, which action under the

Competition Act is prohibited as being “Predatory Practice”. In conclusion, the 5<sup>th</sup> Respondent deponed that the application is also an abuse of this Court’s process and an affront to justice as it is a disguised attempt by the Applicant to set aside or vary orders of a prior suit or appeal against them by a party that was not prejudgement to a party to the said suit.

28. The 5<sup>th</sup> Respondent attached copies of the 1<sup>st</sup> Respondent letters dated 19<sup>th</sup> June 2020 and 24<sup>th</sup> July 2020, and of its membership and registration certificates with the Association of Matatu Operators.

### **The Determination**

29. The instant application was canvassed by way of written submissions. Oundo Muriuki & Company advocates filed two sets of submissions dated 20<sup>th</sup> August 2020 and 6<sup>th</sup> November 2020. The 1<sup>st</sup> and 4<sup>th</sup> Respondents submissions dated 5<sup>th</sup> October 2020 were filed by Munene E. Wanjohi, Senior State Counsel in the Attorney General’s Chambers. A.S. Kuloba & Wangila Advocates filed submissions dated 26<sup>th</sup> October 2020 for the 5<sup>th</sup> Respondent.

30. It is necessary at the outset and before the identification of the issues raised by the instant application and determination thereof, to restate the parameters of judicial review jurisdiction. It was held in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** in this regard as follows:

**“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala*, miscellaneous application number 643 of 2005 (UR).**

**Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....**

**Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.**

**Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”**

31. Judicial review is also now entrenched as a constitutional principle pursuant to the provisions of Article 47 of the Constitution, which provides for the right to fair administrative action, and section 7 of the Fair Administrative Action Act in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the said action or decision. In addition, it was noted by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) eKLR that Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.**

32. **Lastly**, Article 165(6) of the Constitution also provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person’s rights.

33. **Coming** to the present application, it is evident that the *ex parte* Applicant is aggrieved by the decision of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to allot the 5<sup>th</sup> Respondent pick-up and dropping slots in various bus termini in, and to allow the 5<sup>th</sup> Respondent to operate within the Nairobi Central Business District. This raises a preliminary issue as to whether the instant application is amenable to judicial review, and if found to be competently filed, this Court will proceed to examine the two substantive issues arising, which are whether the Respondents have acted illegally, and whether the *ex parte* Applicant merits the relief sought.

### ***On the competence of the application***

34. The *ex parte* Applicant in its submission dated 20<sup>th</sup> August, 2020 framed the issues for determination as follows:

**(a) Whether the 5th Respondent is properly licensed to operate within the NCBD and/or to pick and drop passengers at the General Post Office (GPO), ICEA and Kencom bus termini;**

**(b) Whether the Court Order and Decree issued in Milimani Misc. (JR) Application No. 13 of 2013; Republic v City Council of Nairobi Town Clerk & 3 Others Ex Parte Metro Trans Limited gave the 5th Respondent authority to operate within the NCBD and/or to pick and drop passengers at the General Post Office (GPO), ICEA and Kencom bus termini; and**

**(c) Whether the 1st, 2nd and 3rd Respondents should involve the *ex parte* Applicant herein as a bona fide stakeholder, in any decision-making process pertaining to allocation of slots to any public transport operator at the General Post Office (GPO),**

**ICEA, Ambassador Hotel and Kencom bus termini.**

35. I have reproduced the said issues to illustrate that the *ex parte* Applicant's grievance is on the merit and legality of the 5<sup>th</sup> Respondent operations within the Nairobi Central Business District, either arising from lack of a licence to do so, or the inapplicability decision in **Milimani Misc. (JR) Application No. 13 of 2013 - Republic vs City Council of Nairobi Town Clerk & 3 Others Ex Parte Metro Trans Limited**. In its submissions on the said issues, the *ex parte* Applicant urges that that the 5<sup>th</sup> Respondent has not filed any evidence in court to controvert the evidence produced by the *ex parte* Applicant or to show that they are properly licensed and authorized to operate within the Nairobi Central Business District and/or to pick and drop passengers at the GPO and Kencom bus termini.

36. Further, that the 5<sup>th</sup> Respondent needs to follow due process and apply for the requisite licenses from the 3<sup>rd</sup> Respondent, which is the licensing authority as mandated by Section 28(1) of the National Transport and Safety Authority Act, authorizing them to ply the said routes before they can request the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for allotment of slots. Lastly, the *ex parte* Applicant submits that the decree issued in **Milimani Misc. JR Application No. 13 of 2013** is not a license in itself or a substitute for road service licenses, and that contrary to the 5<sup>th</sup> Respondent's allegations, the application herein is not challenging the Court Order and Decree issued in **Milimani Misc. (JR) Application No. 13 of 2013** but seeking to have the 5<sup>th</sup> Respondent comply with the directions therein and the Nairobi City Omnibus termini By-laws by obtaining the necessary licenses first before they can request for allotment of slots.

37. The 1<sup>st</sup> and 4<sup>th</sup> Respondents on their part submitted on the competence of the instant application, and urged the High Court's jurisdiction in judicial review is circumscribed by the provisions of the Law Reform Act which confers to the court the jurisdiction to issue any of the three judicial review orders of Mandamus, Prohibition or Certiorari, and that section 8 of the Act provides that the High court shall not issue any of the orders in the exercise of its civil or criminal jurisdiction. Further, that a fairly well-settled criteria for issuance of the orders has been developed which include illegality, impropriety of procedure and irrationality, and is incumbent upon a party in a judicial review application who seeks the issuance of any of the orders to prove breach of any of the above criteria. Reliance was in this regard placed on the decisions in **Re Bivac International SA (Bureau Veritas), (2005) 2 EA 43** and **Pastoli vs. Kabale District Local Government Council and Others, [2008] 2 EA 300** and **Republic vs Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR**.

38. According to the 1<sup>st</sup> and 4<sup>th</sup> Respondents, the issue as to whether the 5<sup>th</sup> Respondent is properly licensed to operate within the NCBD is not an issue for determination within the realms of judicial review. Counsel averred that it is trite law that judicial review deals with the decision-making process. He contended that the issue of the 5<sup>th</sup> Respondent being licensed or not is matter that requires calling of evidence. More so, that if the *ex parte* Applicant is aggrieved, it should file a complaint in the Transport Licensing Appeals Board. The 1<sup>st</sup> and 4<sup>th</sup> Respondents submissions on **Milimani Misc (JR) Application No. 13 of 2013 - Republic vs City Council of Nairobi Town Clerk & 3 Others Ex parte Metro Trans Limited** were that they were not a party in the matter, and that the order was granted by a court of equal and concurrent jurisdiction, and thus they ought to move the court that issued the order for its enforcement.

39. The 5<sup>th</sup> Respondent on its part submitted that the *ex parte* Applicant has no *locus standi* to challenge the ruling and orders of this Court in **Republic vs City Council of Nairobi Town Clerk & 3 others, ex parte Metro Trans Limited (2017) e KLR** as it was not a party to the said suit and should have first sought to be enjoined in the said suit and then challenge the said orders that they seek quashed. That in any case, the challenge is being brought late in the day, and the application seeks frustrate the 5<sup>th</sup> Respondent who has been lawfully allowed to operate so long as they adhere to the laid down rules, instead of competing fairly. Lastly, that the application is an appeal or review of an already determined matter.

40. I have considered the arguments made by the parties and it is evident that the gist of the *ex parte* Applicant's grievance is the legality or otherwise of the 5<sup>th</sup> Respondent's operations and actions as opposed to any illegality on the part of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. This is not a grievance that is amenable to judicial review, as it is basically a dispute between two private entities, and the public element therein is hard to fathom. This is especially so because the *ex parte* Applicant did not bring evidence of any decision made by the Respondents allotting the disputed picking and dropping slots in the stated bus termini and routes to the 5<sup>th</sup> Respondent. On the contrary, the only decision annexed by the *ex parte* Applicant is the 1<sup>st</sup> Respondent's response to their complaint in the letter dated 19<sup>th</sup> June 2020 which stated as follows

**"The allocation of slots to Metro Trans Ltd at the General Post Office (GPO) and Kencom bus terminus was made by the Nairobi City County Government (NCCG) pursuant to an application by the said Company on 23 April 2020 vide their Advocates, S. Kuloba & Wangila Advocates.**

**Following the transfer of functions, the mandate to perform County Transport Services vested in the Nairobi Metropolitan Services (NMS) with effect from 18 March 2020. Consequently, it was irregular for NCCG to purport to perform a function that was already transferred.**

**NMS reviewed the matter and observed that the order in question prohibited the NCCG from interfering with operations of Metro Trans Limited on the routes and picking/dropping points as per the Road Service License issued by the National Transport and Safety Authority (NTSA). The company did not have a Road Service Licence that permits it to operate in GPO and Kencom bus terminus and hence, it was immediately stopped from operating in the said points without a valid licence. In view of the above, NMS considers the complaint settled."**

41. The 1<sup>st</sup> Respondent in the said letter is categorical that the 5<sup>th</sup> Respondent was stopped from operating on the contested bus termini, and is therefore not evidence of a decision on the part of the Respondents to allot the slots to the 5<sup>th</sup> Respondents as alleged. Therefore, if the 5<sup>th</sup> Respondent was acting contrary to the said decision, the *ex parte* Applicant needed to pursue the appropriate criminal and civil remedies which are not within the purview of this Court's jurisdiction.

42. In addition, the jurisdiction to hear a grievance of this nature against the Respondents in the first instance is granted to another entity under section 38 of the National Transport and Safety Act as follows:

**A person who—**

- (a) being an applicant for the grant or variation of a licence, is aggrieved by the decision of the Authority on the application;**
- (b) having made an objection to any such application as aforesaid, being an objection which the Authority is bound to take into consideration, is aggrieved by the decision of the Authority thereon; or**
- (c) being the licensee, is aggrieved by the revocation or suspension thereof, may within the time and in the manner prescribed appeal to the Appeals Board established under section 39.**

43. The said Appeals Board established under section 39 is the Transport Licensing Appeals Board. An available adequate alternative remedy is a material consideration in the competence of an application for judicial review, for the reasons that judicial review is a remedy of last resort, and Courts require other avenues of redress to be first utilised in relation to the actions or decisions of a public body. In addition, the exhaustion of alternative remedies is now both a constitutional and legal imperative under Article 159 (2)(c) of the Constitution and section 9(2) and (3) of the Fair Administrative Action Act, and as exemplified by emerging jurisprudence on the subject. Article 159(2)(c) of the Constitution in this regard obliges this Court to observe the principle of alternative dispute resolution.

44. Specifically, with respect to the exercise of the judicial review jurisdiction of this Court, sections 9(2) (3) and (4) of the Fair Administrative Action Act state as follows:

**“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**

**(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).**

**(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”**

45. The Court of Appeal first embodied the doctrine of exhaustion in Speaker of National Assembly vs Karume (1992) KLR 21, and further clarified the doctrine under the current constitutional dispensation in Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR as follows:

**“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”**

46. In the present case, it is also notable that the *ex parte* Applicant relies on the road service licenses issued by the 3<sup>rd</sup> Respondent to illustrate its case against the 5<sup>th</sup> Respondent, and its demand letter dated 2<sup>nd</sup> June 2020 was also addressed to the 3<sup>rd</sup> Respondent, which is the Authority that is given powers under section 4 of the National Transport and Safety Act to regulate public service vehicles. Likewise, the question of whether the 5<sup>th</sup> Respondent is licenced to operate at the disputed bus termini and routes as required by the decision in Milimani Misc (JR) Application No. 13 of 2013 - Republic vs City Council of Nairobi Town Clerk & 3 Others Ex parte Metro Trans Limited is one that can only be answered by the 3<sup>rd</sup> Respondent.

47. If for any reason the *ex parte* Applicant was dissatisfied with any action or inaction on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as regards regulation and operations of the 5<sup>th</sup> Respondent, which is a public service transport provider, its first port of call should have been the Transport Licensing Appeals Board before approaching this Court. The *ex parte* Applicant’s application is accordingly incompetently filed for the foregoing reasons, and the outstanding issues are accordingly moot.

### **The Orders**

48. Arising from the foregoing findings, this Court orders as follows:

- i. The *ex parte* Applicant’s Notice of Motion application dated 16<sup>th</sup> June 2020 is incompetently filed before this Court and is hereby struck out.**
- ii. There shall be no order as to the costs of the Notice of Motion application dated 16<sup>th</sup> June 2020.**

49. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH 2021**

**P. NYAMWEYA**

**JUDGE**

**FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT**

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this judgment was delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondents' Advocates on record.

**P. NYAMWEYA**

**JUDGE**