



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E051 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW

PROCEEDINGS FOR ORDERS OF CERTIORARI AND MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

TRANSPORT LICENSING APPEALS BOARD.....1ST RESPONDENT

THE NATIONAL TRANSPORT & SAFETY AUTHORITY (NTSA).....2ND RESPONDENT

EX PARTE: TRANSLINE GALAXY SAVINGS AND

CREDIT CO-OPERATIVE SOCIETY LIMITED

RULING

The Application

1. Transline Galaxy Savings and Credit Co-operative, the *ex parte* Applicant herein, is aggrieved by the decision made on 22nd March 2021 by the Transport Licensing Board, (the 1st Respondent herein) in Rongo Appeal No. 05 of 2021.

2. The *ex parte* Applicant has consequently filed an application by way of a Chamber Summons dated 19th April 2021, seeking the following orders:

- 1. This application be certified as urgent and service thereof be dispensed with in the first instance.**
- 2. Leave be granted to the Applicant to apply for an order of Certiorari to remove into this Court and quash the judgment of the 1st Respondent delivered on 22nd March 2021.**
- 3. Leave be granted to the Applicant to apply for an order of Mandamus to compel the 2nd Respondent to issue a license to the applicant to operate as an independent Sacco in offering transport services and register the Applicant as a PSV Operator.**
- 4. The leave so granted do operate as a stay of the decisions of Respondents with regard to the applicant's operations.**
- 5. The Costs of this application be provided for**

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 19th April 2021, and a verifying affidavit sworn on the same date by Fred Nyachae Meshack, the *ex parte* Applicant's Director. In summary, the *ex parte* Applicant averred that it has fulfilled all the licensing requirements in the checklist provided by 2nd Respondent which did not include the issue of trade names, and that in any event, there was no conflict on the issue of trade mark as the relevant authority had authorized the *ex parte* Applicant's trade mark.

4. Further, that the 1st Respondent misdirected itself in fact and in law in directing the applicant to seek a declaratory order at the Co-operative tribunal to compel the 2nd Respondent to register it as a Sacco. The *ex parte* Applicant therefore contends that the 1st and 2nd Respondents acted maliciously by failing to register it as a Sacco and license its operations.

5. The *ex parte* Applicant annexed a copy of its registration certificate and tax documents, the impugned judgment made by the 1st Respondent on 22nd March 2021, its applications for a trademark and the response thereto by the Kenya Industrial Property Institute dated 12th April 2021, and a request it made to the 2nd Respondent of the same dated to review its decision.

The Determination

6. I have considered the application dated 19th April 2021 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent. This for reasons that the *ex parte* Applicant's operations have been affected by the impugned decisions.

7. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

8. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in this respect in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

9. In the present application, the *ex parte* Applicant has provided evidence of the judgment by the 2nd Respondent on in Rongo Appeal No. 05 of 2021, and has averred as to the grounds and reasons why it considers the Respondent's decision to be illegal. To this extent I find that the *ex parte* Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

10. On the question of whether the said leave can operate as a stay of the impugned report, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

11. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

12. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. A similar decision was made by Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** .

13. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)** where Dyson L.J. held that the effect of a stay is to prevent the taking of the steps that are required for the decision to be made, and that if a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. It therefore follows that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

14. In this regard, the orders given by the 1st Respondent in the impugned judgment upheld the legality of 2nd Respondent's decision not to licence the *ex parte* Applicant as a new PSV operator, and advised the *ex parte* Applicant to resolve its registration dispute at the Cooperative's Tribunal before licencing. The said orders therefore do not require any positive action or implementation on the part of the *ex parte* Applicant or any other person, and are therefore not amenable to stay. In addition, the said orders specifically state that the *ex parte* Applicant cannot commence operations, which is therefore the current *status quo* that obtains. In the premises the stay orders are not merited.

15. Lastly, it is evident from the impugned judgment that there is a third party, namely Transline Sacco, which had objected to the licensing of the *ex parte* Applicant that is likely to be directly affected by the instant proceedings, but has not been joined herein as a party.

The Disposition

16. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 19th April 2021 is found to be

merited only to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 19th April 2021 is hereby certified as urgent, and is hereby admitted for hearing *ex parte* in the first instance.

II. Transline Sacco is hereby joined to this suit as an Interested Party.

III. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to remove into this Court and quash the judgment of the 1st Respondent delivered on 22nd March 2021.

IV. The *ex parte* Applicant is granted leave to apply for an order Mandamus to compel the 2nd Respondent to issue a license to the applicant to operate as an independent Sacco in offering transport services and register the *ex parte* Applicant as a PSV Operator.

V. The prayer that the grant of leave herein operates as a stay of the decisions of Respondents with regard to the applicant's operations is declined.

VI. The costs of the *ex parte* Applicants' Chamber Summons application dated 19th April 2021 shall be in the cause.

VII. The *ex parte* Applicant shall file and serve the Respondents and Interested Party with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated 19th April 2021 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.

VIII. Upon being served with the said pleadings and documents, the Respondents and Interested Party shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.

IX. The hearing of the substantive Notice of Motion shall be held on 24th May 2021.

X. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

XI. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

XII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XIII. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.

XIV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing by email on 24th May 2021.

XV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Thursday, 22nd April 2021.

XVI. Parties shall be at liberty to apply.

17. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF APRIL 2021

P. NYAMWEYA

JUDGE