



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW NO. E001 OF 2020**

**IN THE MATTER OF: ORDER 53 RULE 3, ORDER 50 RULE 5 OF THE CIVIL PROCEDURE RULES 2020**

**AND**

**IN THE MATTER OF: THE URBAN AREAS AND CITIES ACT NO 13 OF 2011**

**AND**

**IN THE MATTER OF: THE DECISION/ORDER/DIRECTIVE BY CHIEF OFFICER ROADS, TRANSPORT AND PUBLIC WORKS, COUNTY GOVERNMENT OF KILIFI**

**AND**

**IN THE MATTER OF: APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CHIEF OFFICER, ROADS, TRANSPORT**

**AND PUBLIC WORKS, COUNTY**

**GOVERNMENT OF KILIFI.....1<sup>st</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KILIFI.....2<sup>nd</sup> RESPONDENT**

**AND**

**MOHAMUD GULLEID t/a PREMIER SHUTTLE...EX-PARTE APPLICANT**

**RULING**

**Background**

The applicant respectively seeks writ of certiorari to review the decision by the respondents of giving notice and directing the ex-parte applicant to stop operating and/or carrying on business and/or issuing the public transport services at Epic Petrol Station with immediate effect and operate at the Main Bus Park issued on the 25<sup>th</sup> of August 2020 offends the provisions of the Urban Areas and Cities Act, No. 13 of 2011, in particular Sections 12, 14, 20 (1), 31, and 31 (A), in that the 1<sup>st</sup> respondent has usurped the powers of the Board of Municipalities and/or Town Committee.

Pursuant to leave granted to the applicant by this court on 11.9.2020, the ex-parte applicant moved this honourable court seeking two substantive reliefs:

- 1. a declaration that the decision and/or order and/or directive by the Chief Officer, Roads, Transport and Public Works, County Government of Kilifi giving notice and directing the ex-parte applicant to stop operating and/ or carrying on business and/ or**

*issuing the public transport services at Epic Petrol Station with immediate effect and operate at the Main bus park is ultravires and is invalid and void and of no effect for the reasons that the same offends the rules of natural justice and the 1<sup>st</sup> respondent dealt with the matter over which it has no jurisdiction;*

**2. an order of certiorari quashing the decision and/or order and/or directive by the Chief Officer, Roads, Transport and Public Works, County Government of Kilifi giving notice and directing the ex-parte applicant to stop operating and/ or carrying on business and/ or issuing the public transport services at Epic Petrol Station with immediate effect and operate at the Main bus park.**

The grounds relied upon by the ex-parte applicant are inter alia that the impugned decision was issued without hearing the ex-parte applicant and therefore in breach of the *audi alteram partem* rule. The ex-parte applicant stated that the 1<sup>st</sup> respondent had no jurisdiction to issue the impugned orders and that the said orders contravened Sections 12, 14, 20(1), 31 and 31A of the Urban Areas and Cities Act No. 13 of 2011.

The ex-parte applicant avers in his supporting affidavit that he operates a public service vehicle business and has a license to do so (PS1) however a decision to stop him from operating at Epic Petrol station and directing him to operate at the main bus part was issued to him and he was not afforded an opportunity to be heard. He averred that he had been operating the business since August 2020 to date as evidenced by the lease agreement (PS3) where he rented for 5 years and even paid rent and therefore he had a constitutional right to operate on the property that is private property.

The application is opposed vide replying affidavit deponed on 9.2.2021 by **Kenneth Kazungu**, the 1<sup>st</sup> respondent and on behalf of the 2<sup>nd</sup> respondent. It was pointed out that a decision and or directive was issued by the 2<sup>nd</sup> respondent for purposes of orderliness. The deponent averred that the 2<sup>nd</sup> respondent had jurisdiction to make policy decisions on matters relating to the facilitation and regulation of public transport by dint of Section 20d and r of the Urban Areas and Cities Act No 13 of 2011. It was revealed that the functions were delegated to the 2<sup>nd</sup> respondent as evidenced by annexure **CGK1**. It was revealed that he ex-parte applicant is not licensed to operate public service vehicles by the NTSA and operated his services at Epic Petrol Station to evade the authorities, *a priori*, that the ex-parte applicant was illegally operating his services and seeks the court to advance an illegality. It was averred that other operators have complied with the directive and the ex-parte applicant could not seek refuge in lack of public participation for issuance of the directive. The deponent averred that the 2<sup>nd</sup> respondents was operating within its mandate and grant of the orders sought would cripple the ability of the 2<sup>nd</sup> respondent to carry out its functions. It was deponed that the interest of the public supersedes private interests. The court was urged to dismiss the application.

In rejoinder, the ex-parte applicant via his affidavit deponed on 11.5.2021 challenged the letter marked CGK1 for being untruthful and reiterated that the Municipality of Malindi was the proper authority to exercise the functions that were effected by the respondents. The deponent took issue with the averment that he was operating illegally for want of evidence and urged the court to grant the orders sought. The applicant's counsel has not filed submissions in support of the application.

Learned counsel for the respondents filed submissions on 13.7.2021. In the said submissions, there were 2 issues framed; *to wit*, whether the impugned decision is null and void and whether the ex-parte applicant has met the threshold for grant of the order sought. In respect of the 1<sup>st</sup> issue, learned counsel reminded the court that the functions and roles of the municipalities under the Urban Areas and Cities Act was delegated to the County Government therefore the functions under Section 20d of the said Act fall within the jurisdiction of the 2<sup>nd</sup> respondent. On the element of public participation, it was submitted that there was no such obligation when ensuring compliance with an enforcement notice. In respect of the 2<sup>nd</sup> issue, while appreciating the case of **R v Public Procurement Administrative Review Board & Another ex parte Express DBB Kenya Limited (2018) eKLR** it was submitted that judicial review orders are discretionary and that the court could not disturb orders that were made according to statute. It was pointed out that the ex-parte applicant was guilty of non-disclosure as they were operating illegally without a license from the NTSA. Cited was the case of **Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 Others (1998) eKLR**. The court was urged to withhold discretion in favour of the ex-parte applicant and refuse to grant the orders sought in the application.

## **Determination**

Having considered the application, and the singular issue for determination is whether the court may grant the orders sought.

The writ of certiorari allows a Court to review the record of an administrative body to determine whether the administrative body is acting lawfully, reasonably and fairly. The Court may grant an order "quashing" or setting aside the decision and remitting back to the administrative body for reconsideration. In some cases, a Court will simply set the decision aside and not remit it to the administrative body for reconsideration. In the case of **Council of Civil Service Unions v Minister for the Civil Service [1985] A. C. 374 at 410 – 411 Lord Diplock** conveniently classifies under three heads the grounds upon which administrative action is subject to control by judicial review as illegality, irrationality or "Wednesbury unreasonableness" and procedural impropriety. He explained them in this way:

*"By "illegality, as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided. In the event of dispute, by those persons, the Judges, by whom the judicial power of the state is exercisable. By irrationality, I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture House Ltd v Wednesbury Corporation [1948] 1 K. B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. Whether the decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong without judicial system... I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by*

*which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”*

In judicial review proceedings the Court is called to examine the circumstances under which the impugned act is done to determine whether it was fair, rational and arrived at in accordance with rules of natural justice. The purpose of Judicial Review is concerned not with the decision but with the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made it is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. In the case of **R vs Secretary of State for Education and Science exparte Avon County Council (1991)** which was referred to in the case of the **Commissioner of Lands v Kunste Hotel Limited CA No 234/95**, the Court held that,

*“... judicial review is not concerned with private rights or the merits of the decision being challenged, but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.”*

The ex-parte applicant has sought orders of declaration and certiorari.

The circumstances to be established by the Applicant to obtain the declaration sought are that the decision is illegal. In the case of **Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR**, the court stated that;

*“An administrative decision is flawed if it is illegal. A decision is illegal if it: - (a) contravenes or exceeds the terms of the power which authorizes the making of the decision; (b) pursues an objective other than that for which the power to make the decision was conferred; (c) is not authorized by any power; (d) contravenes or fails to implement a public duty.*

*12. Statutes do not exist in a vacuum.[7] They are located in the context of our contemporary democracy. The Rule of Law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the Rule of Law and other democratic fundamentals which Parliament has no power to exclude.[8] The courts should therefore strive to interpret powers in accordance with these principles.*

Was the decision to relocate the ex-parte applicant illegal? I am unable to find so because on a balance of probabilities, I am satisfied with the evidence that other public service operators have complied with the directive and I find difficulty in understanding why the ex-parte applicant wants to be exempted. I am convinced that the directive was intended to maintain order and prevent rules of the jungle from taking force because if this court proceeds to allow the application then it will open the floodgate for every operator to select where to operate and then file an application before this court to seek to sanitize their area of operation.

Certiorari is designed to make the machinery of government operate according to law and public interest. Certiorari issues to quash decisions, which are ultra vires, arbitrary or oppressive. Certiorari thus is a remedy for something done in the past. **(See Administrative Law, 5<sup>th</sup> Edition, HWR Wade)**

The ex-parte applicant bears the burden of proof on a balance of probability. For certiorari to issue, the decision must be of a public interest as opposed to a private character. According to **Law v National Greyhound Racing Club Ltd (1983) 3 ALL ER 300**, Certiorari does not lie in respect of contractual powers nor powers derived from property rights, these being regarded as private law matters. In the above case, the Court of Appeal refused to strike out originating summons issued in the Chancery Division to restore greyhound trans licences which were needed by the applicants for their livelihood, on the ground that the basis of the licenses and such rights to them as the applicants may have had was contractual and therefore enforceable as a matter of “private” rather than “public” law. In these circumstances no prerogative order would lie.

Similarly, in **R. v East Berkshire Health Authority exparte Walsh (1985) QB 554** the Court of Appeal reasoned that where private rights have been breached under a private arrangement like a contract, judicial review can't apply, rather a party should proceed by ordinary action.

The general rule inherent in the nature of this prerogative writ is not for the protection of private legal rights. An applicant who seeks to restrain implementation of a public plan to reorganize public transport operations on a compressive basis has to demonstrate *locus standi* and relator to the cause of action. Thus, it seems to me that the applicant ought to show special damage arising from the interference with his private rights. It is possible to criticize with some justification the change of public transport stages but the determining factors are whether the decision to do so is tainted with illegality, irrationality or unreasonableness. The circumstances here are far different that the respondents undertook a public participation on the question of relocating and implementing a new plan on public transport management. Although, the applicant happens to be one of the investors he will no doubt be inconvenienced by having his fleet of public services vehicles relocated to the new public transport ‘stage’ not in proximity with Epic Petrol Station. Here the Court is concerned with the aspect of remedies in administrative law in particular to whom is available and its procedure.

The truth is a question I have found particularly difficult in this petition is whether each investor within Kilifi County can be accorded an exclusive stage for his or her vehicles to assert an economic right. If this alternative procedure is followed it will not be possible to legally meet the expectations of each individual needs. In this context, it is interesting to note the distinction being drawn by the applicant as to who among the respondents and the Board of Municipalities and town committees has the statutory power to implement the strategy on public transport transformation by itself does not bring the dispute within the scope of the principles in **Council of Civil Service Unions (supra)**.

The appropriate test is whether the respondents created an opportunity for the applicant to be heard before the decision in this matter was taken and implemented. First, through the eyes of the application there is no evidence that the public authority breached the principles of natural justice. This was not a predetermined decision. I adopt the principles in **Steeple v Derbyshire County Council [1985] 1 WLR 256, pg 258, paragraph 3, letter C:**

*“That, although the decision of the planning committee had been fairly and properly made, natural justice required that the decision to grant planning permission should be seen to have been fairly made; that in deciding whether the decision was seen to have been fairly made the court had to ask whether a reasonable man, who was not present when the decision was made and was unaware that it had in fact been fairly made, but who was aware of all the terms of the council’s agreement with the company, would think that there was a real likelihood that the agreement had had a material and significant effect on the planning committee’s decision to grant permission; and that applying that test, the decision was not seen to have been fairly made and was either void or voidable as being in breach of natural justice.”*

In absence of supporting evidence, it might not be possible for this court to grant the writ of certiorari to the applicant. Despite the suggestion by the applicant that the respondents were wrong in ordering him to relocate to the new public service vehicles stage, none of those grievances fit the criteria in **Steeple (supra)**.

In applying a correctness standard of review, the remedy being sought as described above for a declaration to quash the decision and order or directive by the respondents giving notice to the ex-parte applicant to stop operating or carrying on business or issuing the public transport services at Epic Petrol Station is hereby denied with no orders to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED via email AT MALINDI THIS 2<sup>ND</sup> DAY OF AUGUST 2021**

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**R. NYAKUNDI**

**JUDGE**