



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO E009 OF 2021

SONSAM (KENYA) LIMITED.....PETITIONER

VERSUS

NATIONAL TRANSPORT

AND SAFETY AUTHORITY.....1ST RESPONDENT

INSPECTOR GENERAL

OF THE NATIONAL POLICE.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

RULING

1. The petitioner herein, is a limited liability company with a business in the transport industry. The nature of the petitioner's business is that individuals lease to it their vehicles and in return the petitioner uses the said vehicles in its transport business. The petitioner alleges that it has 61 motor vehicles registered in its name for purpose of carrying out the transport business.
2. The 1st respondent, the National Transport Authority ('Authority') is a statutory body corporate established under **section 3 of the National Transport and Safety Authority Act No 3 of 2012 ('the Act')**.
3. The second respondent is the Inspector General of the National Police Service whose office is established under **Article 245 of the Constitution of Kenya**.
4. The 3rd Respondent is the Director of Public Prosecution whose office is established under **Article 157 of the Constitution**.
5. On or about November 2020 the petitioner acting under the directive of the Authority took all of its vehicles for inspection and the Authority found that the petitioner was compliant as per the provisions of the Traffic Act. The petitioner then proceeded to apply for a road service license through the Authority's online platform but unfortunately its application was rejected without any lawful and justifiable reasons.
6. The petitioner also contends that its drivers/agents have also been arrested because they were driving the said vehicles on a public road without a yellow band. According to the petitioner the requirement for a yellow band only applies to taxicabs are provided by **Rule 70 (i) of the Traffic Rules**. Although the petitioner recognizes that its vehicles are classified as public service vehicles, it contends that its vehicles are not taxi cabs and therefore the arrest of its agents on that account is a violation of the rule of law.
7. It is the petitioner's case that as a result of the respondents' actions, its business has suffered leaving the petitioner with no option but to scale down its operations.
8. Dissatisfied with the foregoing turn of events, the Petitioner lodged the instant Petition and a Notice of Motion application. Both are dated 26th May, 2021.
9. The petitioner in his petition thus prays for the following:

a) A declaration that the decision by the 1st respondent rejecting the application for a road Service Licence by the Petitioner without any justifiable reasons was unconstitutional.

b) A declaration that the 1st respondent's decision to reject an application made formally to its office by the Petitioner for a Road Service Licence is a violation of Article 10 and 73 of the Constitution and Section 26 and 27 of the National Transport and Safety Authority Act therefore null and void.

c) A declaration that the decision by the 1st Respondent's decision to reject an application made formally to its office by the Petitioner for a Road Service Licence without any reason violates the rights of the members of the Petitioner to a fair administrative Action guaranteed under Article 47 of the Constitution.

d) A declaration that the decision by the Respondents action to arrest and charging the Petitioner's drivers and/agent for failing to have a yellow band by the Respondents us a violation of the Rule 70 (i) of the Traffic Rules.

e) An order of certiorari to remove to the High Court and quash the decision of the 1st Respondent rejecting applications made by the petitioner for purposes of securing a Road Service Licence.

f) An order of Mandamus directing the 1st respondent to issue Road Service Licence to the Petitioner's Motor Vehicle as applied for.

g) An Order of prohibition do issue prohibiting the 2nd Respondent and his officers from impounding the Petitioner's motor vehicles and harassing, intimidating and arresting the Petitioner's drivers/agent and or/servant for failure to display a Road Service Licence and Having a Yellow Band on the Petitioner's motor vehicles.

h) An order of prohibition do issue prohibiting the 3rd respondent from instituting and commencing any legal proceedings against the petitioner or the petitioner's drivers/agents and/ or servants for failure to display a road service licence and having a Yellow band on the Petitioner's motor vehicles.

10. The application filed alongside the Petition prays for some conservatory orders and an order compelling the 1st respondent to issue the petitioner with a short term licence pending hearing and determination of the petition.

11. In response to the Petition and the application the Authority filed a Preliminary Objection dated 8th June, 2021. There were no responses from the 2nd and 3rd respondents despite being served. The 1st respondent opposed the Petitioner's case on the following grounds:

1. THAT the Petitioner has not exhausted the internal appeal mechanism to the Transport Licencing Appeal Board established under section 38 and 39 of the National Transport and Safety Authority Act.

2. THAT the Applicant has not made any application to be exempted from the exhaustion of internal appeal mechanism.

SUBMISSIONS

12. The petitioner submits that the Transport Licensing Appeals Board ('the Board') established under **section 39 of the National Transport and Safety Authority Act** does not have original jurisdiction. It also has only limited jurisdiction according to **section 38 and 39 (5) of the Act**. It cited the case of **Republic v Transport Licensing Appeal Board & 2 others Ex-Parte MNGN Sacco Ltd [2017] eKLR** where the court observed that;

"51. The statute creating the Appeals Board is clear that the Board only has appellate jurisdiction and not original jurisdiction.

52. A declaration of rights or grant of rights or grant of any of the reliefs under Article 23(1) of the Constitution cannot be made by a subordinate court exercising appellate jurisdiction. It follows, therefore, without much ado, that the 1st respondent Appeals Board, in declaring that the interested party's rights guaranteed under the Constitution were violated, the Appeals Board was usurping powers of the High Court."

13. The Petitioner contends that the Board cannot grant orders on declaration of the petitioner's rights.

14. The petitioner further submitted that the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat of, or threat to a right or fundamental freedom in the Bill of rights falls within the High Court's jurisdiction.

15. The petitioner further cited the case of **Samper Tours and Travel Ltd & 2 Others v National Transport and Safety Authority & 2 Others [2017]** where the court held that:

"...charges the 2nd petitioner with driving a Motor Vehicle on a Public Road without a Yellow Band contrary to Rule 70(i) as read with Rule 72(b) of the Traffic Rules is patently oppressive and arbitrary since the requirement that a Motor Vehicle be painted with a yellow band applies only to taxicabs and the Subject Motor Vehicles are not taxi cabs."

16. The Authority submitted that this court has no jurisdiction to handle the instant matter. It relied on **section 38 (1) (a) of the Act** and advanced that the petitioner ought to have appealed the decision of the Authority before the Board.

17. The 1st respondent further cited the case of **Nairobi High Court Judicial Review No 10 of 2017 Safe Rider Vehicle Technologies & 2 others v National Transport & Safety Authority** where the court stated that there was an alternative remedy of exhaustion of internal

appeal mechanism to the Transport Licensing Appeals Board established under **section 39 of the Act**. The court stated that in the absence of any special circumstances and on an application by the applicants for exemptions from exhaustion of internal appeal mechanisms, the applicant was not entitled to judicial review mechanisms.

18. The 1st respondent submitted that the petitioner’s application in its entirety is an abuse of court process as this court is not clothed with the requisite jurisdiction to handle the matter.

ANALYSIS AND DETERMINATION

19. The preliminary objection by the 1st respondent challenges the jurisdiction of this court to hear the petition and application filed before this court both dated 26th May, 2021.

20. In the case of Owners of **Motor Vessel “Lillian S” v Caltex Oil Kenya Limited (1989) KLR 1** Nyarangi JA stated:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

21. In this case the Act creates the Board under section 39 that is empowered to hear any appeals from the Authority. Section 38 and 39 of the Act provides as follows:

“38. Appeals against decision of Authority

(1) 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.

39. Transport Licensing Appeal Board

(1) There is established the Transport Licensing Appeals Board.

(2) The Appeals Board shall consist of a chairperson and four other members appointed by the Cabinet Secretary.

(3)

(4)

(5) The Appeals Board may, on any appeal, affirm or reverse the decision of the Authority, or make such other order as the Board considers necessary and fit.

(6) Where the Appeals Board has received an appeal under this section, it shall consider that appeal and, if it determines that the grounds of appeal are frivolous or vexatious or do not disclose sufficient reason for interfering with the decision of the Authority, may summarily reject the appeal.”

22. The issue surrounding the grant of license is a matter that falls within the Jurisdiction of the Board. The Court of Appeal in **Anthony Kariuki Mwai v National Transport & Safety Authority & 2 others [2020] eKLR** cited with authority the finding in **Speaker of National Assembly Vs. Karume 1992 eKLR** where the court stated;

“where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures”.

23. The doctrine of exhaustion was elaborately discussed by the court of Appeal in the case of **Geoffrey Muthinja Kabiru & Another; 2 Others [2015] eKLR**, where the court stated;

“It is imperative that where a dispute resolution mechanism exists outside courts, the same must be exhausted before the jurisdiction of the court is invoked. Court ought to be a for a 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 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....”

24. In the case of **Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others (2019) eKLR** the Court was emphatic that:

“In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute”.

25. Although the petitioner heavily relied on the case of **Republic v Transport Licensing Appeal Board & 2 others Ex-Parte MNGN Sacco Ltd (supra)** the facts in that case are distinguishable from those in this instant case. The main issue for consideration before the court in **Republic v Transport Licensing Appeal Board & 2 others Ex-Parte MNGN Sacco Ltd (supra)** was whether the Board had jurisdiction to issue Declarations to the effect that the Appellant’s interested party Constitutional Rights to Fair Administrative Action was violated. It on this issue that the court held that the Board is considered a subordinate court and a declaration of rights under **Article 23 (1) of the Constitution of Kenya** cannot be made by it while exercising appellate jurisdiction. The court further held that the court could not make judicial review orders.

26. In this case however, the main issue revolves around the grant of license. In my view, the issue is perfectly within the jurisdiction of the Board and the petitioner ought to have lodged an application before the board challenging the decision of the Authority before seeking redress before this court.

27. In **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs. Habil Olaka - Executive Director (Secretary) of the Kenya bankers Association being sued on behalf of Kenya Bankers Association) & Another Petition 457 of 2015 [2018] eKLR** where Mwita J held thus:

“A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure.”

28. In conclusion, this court will not proceed to determine the application and Petition for want of jurisdiction in light of my findings on the key issue of jurisdiction as the Petitioner has failed to comply with the Exhaustion Doctrine. The preliminary objection is upheld. The petition and application are dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF SEPTEMBER, 2021.

R. E. OUGO

JUDGE

In presence of;

Mr. Bonuke For the Petitioner/Applicant

Miss Opili For the 1st Respondent

Limo/Rael Court Assistants