



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 123 OF 2020

REPUBLIC.....APPLICANT

VERSUS

CABINET SECRETARY TRANSPORT

AND INFRASTRUCTURE.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

EX PARTE APPLICANT: OKIYA OMTATAH OKOITI

JUDGMENT

The Application

1. Okiya Omtatah Okoiti, the *ex parte* Applicant herein is aggrieved by a **Notice on Transport of Cargo**, which he alleges that the Cabinet Secretary for Transport and Infrastructure, who is sued as the 1st Respondent herein, issued *ultra vires* on 22nd May 2020. According to the *ex parte* Applicant, the said notice which came into effect on 1st June 2020 was published at 14:00 hours on 22nd May 2020 on the official Facebook Page of the Ministry of Transport and Infrastructure at <https://www.facebook.com/Ministry-of-Transport-and-Infrastructure-GoK493194307419924/>.

2. Upon being granted leave, the *ex parte* Applicant consequently filed an application by way of a Notice of Motion dated 24th June 2020, seeking the following orders:

1. THAT an order of certiorari do issue, to bring to this Court for purposes of being quashed, and to be quashed, the Notice on Transport of Cargo.

2. THAT an order of prohibition do issue, prohibiting the respondents herein, and any other person howsoever acting, from implementing, giving effect to, or enforcing the Notice on Transport of Cargo.

3. THAT an order of mandamus do issue, to compel the 1st Respondent to adhere strictly to the Constitution, national legislation and best international practice in managing the movement of all transit cargo/containers imported through the Port of Mombasa and destined for Uganda, Rwanda and South Sudan.

4. THAT consequent to the grant of the prayers above the Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

5. THAT costs be in the cause.

3. The grounds for the application are stated in the *ex parte* Applicant's Statutory Statement dated 2nd June 2020, and a verifying affidavit he swore on 5th June 2020. In summary, the *ex parte* Applicant contends that the impugned notice has no basis in law, and breaches express provisions of the Constitution and of national legislation. In particular, that the impugned notice has not been gazetted contrary to section 22 of the Statutory Instruments Act, No. 23 of 2013. In addition, that the Cabinet Secretary issued the impugned notice in the manner he purports to do contrary to Articles 1(1), 2(1-4), 3(1), 4(2), 10, 47(1), 73, 129, and 153(4)(a) of the Constitution.

4. The *ex parte* Applicant in this regard averred that there was no public participation leading to the publication of impugned notice, and that under the law, industry players, stakeholders, and the general public in Kenya ought to have been consulted on the impugned policy but were

not. Further, that the claim that all transporting on the Standard Gauge Railway (SGR) for clearance at the Naivasha Inland Container Depot (ICD) all transit cargo/containers imported through the Port of Mombasa and destined for Uganda, Rwanda and South Sudan will help contain the Coronavirus (COVID-19) pandemic is not backed by any scientific study. But that even then, a declaration of a State of Emergency was necessary and a condition precedent to the enactment and enforcement of such emergency policies and legislation, which limit rights and fundamental freedoms under Article 58 of the Constitution.

5. Hence, that whatever justifications there are for giving the SGR preferential treatment, it cannot be done outside the law and in violation of the rights of the owners of the goods in issue and private transporters. The *ex-parte* applicant posited that the impugned actions of the 1st Respondent are contrary to the national values and principles of governance in Article 10 of the Constitution including the rule of law, equity, social justice, inclusiveness, equality, human rights, non-discrimination, protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development. Further, that they violate various Articles of the Constitution, which were cited.

6. The *ex parte* Applicants annexed copies of the said *Notice on Transit Cargo* issued by the 1st Respondent, and various newspaper reports on the same in support of his case. The said Notice reads as follows:

“NOTICE ON TRANSIT CARGO

The Heads of State, Their Excellencies President Paul Kagame of the Republic of Rwanda; President Uhuru Kenyatta of the Republic of Kenya; President Yoweri Kaguta Museveni of the Republic of Uganda and President Salvar Maryardit Kiir of the Republic of South Sudan during their Consultative Meeting of the East African Community held by Video Conference on 12th May 2020 considered the current Status of the outbreak of the Covid-19 Pandemic in the region and directed the Ministers responsible for Health, Transport, and EAC Affairs to adopt a Digital Surveillance and Tracking System for drivers and also as the Focal Persons to immediately work on a Regional mechanism for monitoring of truck drivers to reduce the impact of the Pandemic.

Following the directive by the Heads of State, the Partner States Ministers in charge of Transport, in recognition of the need to contain the spread of the Covid-19 pandemic within the Region, have considered appropriate cross border transportation modalities to reduce human traffic movement without impacting negatively on transportation of cargo across the borders and consequently direct as follows:

- 1. The Nairobi- Naivasha SGR Project is pan of the proposed Mombasa - Nairobi - Malaba /Kampala Standard Gauge Railway Project and therefore, the Mombasa - Naivasha SGR, which has overall length of 600 kilometre up to the Inland Container Depot at Naivasha will reduce the road distance to three Partner States of Uganda, Rwanda and South Sudan by 600 kilometres, and will subsequently reduce interactions along the corridor and thus facilitate the containment of the Covid-19;**
- 2. Since Kenya Ports Authority (KPA) as the lead agency on port matters has provided requisite office accommodation to the Kenya Revenue Authority, Uganda Revenue Authority, Rwanda Revenue Authority and the South Sudan Revenue Authority, deployment of the staff to the Inland Container Depot (ICD) at Naivasha is expected to be finalised to ensure smooth clearance of the cargo;**
- 3. All transit cargo destined for Uganda, Rwanda and South Sudan will be transported either on standard gauge railway (SGR) for clearance at the Inland Container Depot (ICD) at Naivasha or Metre Gauge Railway to Tororo/Kampala. All transit cargo railed to the Inland Container Depot (ICD) at Naivasha will be collected by trucks to the Partner States via Busia or Malaba. Further, fuel products will be transported by pipeline to Kisumu and thereafter by lake Victoria to Port Bell or Jinja;**
- 4. All the transit cargo/containers transported on SGR will be armed only at the Inland Container Depot (ICD) at Naivasha to be tracked through the Regional Electronic Cargo Tacking System; and**
- 5. All exports (both full and empty exports) not railed on metre gauge railway will be delivered to the Inland Container Depot (ICD) at Naivasha for railage to the Port of Mombasa.**

The directives will become effective after ten (10) days from the date of this notice and, for the avoidance of doubt, from 1st June 2020.”

7. The Respondent thereupon filed a replying affidavit sworn on 23rd September 2020 by Solomon Kitungu, the Principal Secretary, State Department of Transport at the Ministry of Transport, infrastructure, Housing, Urban Development and Public Works in opposition to the application. The Respondents confirmed that a Notice on Transit Cargo was issued in May 2020 that mandated the use of the Standard Gauge Railway to transport cargo from Mombasa to Naivasha ICD, and covered transit cargo destined to Kenya's hinterland . The Respondents provided a background to the said Notice, and stated that it arose from consultations held by the East African Heads of State, and subsequent consultations among Partner State Ministers in charge of Transport to formulate strategies of stemming the spread of Covid-19 pandemic in the East African Community region, whilst at the same time facilitating the smooth flow of people and commerce.

8. According to the Respondents, there was no need for declaration of a State of Emergency as the country was not at war, and the *ex parte* Applicant has not demonstrated how human rights were abused as well as the fundamental rights and freedoms were violated. Furthermore, that there is no proof of such violation as alleged. The Respondents averred that it was not possible to carry out public participation due to the Covid- 19 pandemic and the guidelines set out by Government to combat the virus, which included banning public gatherings of more

than 15 people. Further, that the Government acted unilaterally based on public health information and the best interests of the people of Kenya.

9. The Respondents in conclusion contended that the instant application has been compromised by the virtue of the fact that the Notice on Transportation of Cargo was suspended and transportation of cargo via the SGR is no longer mandatory but optional. Therefore, there is no further action contemplated on the part of the Respondents herein that may merit issuance of an order of prohibition as sought. The Respondents attached a copy of a statement dated 2nd July 2020 by the Cabinet Secretary for Transport to the effect that the use of the SGR was optional.

The Determination

10. This Court directed the parties to urge the application by way of written submissions. The *ex parte* Applicant filed submissions dated 9th September 2020, while Annette Nyakora, a Senior State Counsel in the office of the Attorney General filed submissions dated 22nd September 2020 on behalf of the Respondents, wherein the averments made in their replying affidavit were reiterated. Ms. Nyakora submitted that the *ex parte* Applicant is merely carrying out an academic exercise as the impugned Notice which formed the basis of the judicial review application has since been revoked and/or suspended.

11. The *ex parte* Applicant on the other hand made lengthy submissions on this Court's jurisdiction in constitutional petitions and in public interest litigation, which is not in issue in this application. The *ex parte* Applicant further submitted that the functions of the 1st Respondent to issue public notices is an administrative function, and to that extent must not be exercised *ultra vires*. Therefore, that the decisions of the 1st Respondent when performing administrative duties must be legal, reasonable, rational and procedurally fair. Reliance was placed on the decision in the case of **AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and Another (2006) ZACC 9; 2007 (1) SA 343 (CC)** on the doctrine of legality.

12. The *ex parte* Applicant reiterated that the procedure for issuing the public notice is subject to values and principles enshrined in Articles 10 of the Constitution, and that the impugned actions of the 1st Respondent also violated the Articles 1, Article 2, 46, 47, 48, 73, 129, 153 and 259 of the Constitution and Statutory Instruments Act for reasons that that the process of issuing the Notice was not open and transparent.

13. Further, that the impugned decisions of the 1st Respondent violated Article 47 of the Constitution of Kenya 2010 to the extent that the 1st Respondent disregarded the constitutional rights of the users of the corridor to the Great Lakes region, specifically the importers, transporters, and investors in various businesses along the corridor who service the transporters, and proceeded to issue the Notice which adversely affects them, without giving him any notice or consulting them. The *ex parte* Applicant relied on the case of **Republic vs Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO (2019) eKLR**, to submit that the public and the stakeholders of the corridor had a legitimate expectation that the 1st Respondent would adhere strictly to the law.

14. The *ex parte* Applicant reiterated that the Respondents have not demonstrated that the impugned notice was subjected to both public participation and to parliamentary scrutiny and approval. In other words, that the impugned Notice was not enacted in compliance with provisions of Articles 10(2), 94(5) and 118 of the Constitution as read with the Statutory Instruments Act. Reliance was placed on the case of **Republic vs. Cabinet Secretary For Transport & Infrastructure & 5 Others Ex-Parte Kenya Country Bus Owners Association (Through Paul G. Muthumbi Chairman) Samuel Njuguna Secretary Joseph Kimiri Treasurer & 8 Others [2014] eKLR** in this regard.

15. The *ex parte* applicant further urged that the impugned notice was not gazetted contrary to section 22 of the Statutory Instruments Act, No. 23 of 2013, and the decision of the Court of Appeal in **Hassan Joho & Another vs Suleiman Said Shahbal & 2 Others, Malindi Civil Appeal No. 12 of 2013** was cited for the proposition that the notice was not laid before Parliament in compliance with the provisions of Section 11 of the Statutory Instruments Act. Also cited in this respect was the decision in **Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 others vs Cabinet Secretary For Transport & Infrastructure & 5 others [2014] eKLR**. Therefore, that the failure by the Respondents to comply with the provisions of the Statutory Instruments Act had the effect of rendering the instrument in question illegal, unconstitutional, null and void.

16. Lastly, the *ex parte* Applicant detailed the provisions on emergency situations under Article 58 of the Constitution, and reiterated that the impugned notice purportedly made to contain the COVID-19 pandemic is without the force of law, and cannot bring about restrictions on rights and fundamental freedoms. Further, that in the absence of a declaration of a state of emergency, any legislation purporting to limit rights must conform to the standard for doing so which is set in Article 24 the Constitution.

17. I have considered the arguments made by the parties, and it is not disputed that the operation of the impugned Notice on Transit Cargo was suspended, as averred and submitted by the Respondents. The only live issue in this application therefore is the legality of the impugned Notice on Transit Cargo, which issue still requires to be considered, since there still exists the possibility of its revival of the impugned Notice. On this aspect of legality of the impugned Notice, the Respondents have further conceded that they did not undertake any public participation on the said impugned Notice.

18. The Respondents' concession that no public participation was conducted on the impugned Notice is in my view, sufficient to dispose of the issue of the legality of the impugned Notice, even though the *ex parte* Applicant has faulted the said Notice on other grounds in terms of the procedure employed in it to operation. As the Notice is no longer operational, it would be superfluous in the circumstances to interrogate whether the emergency laws or the Statutory Instruments Act applied, and if so, whether they were complied with.

19. In this regard, public participation and stakeholder engagement in the application, interpretation and implementation of laws and policies, is now specifically required of all state organs, state officers and public officers under Article 10 of the Constitution. A 5-Judge Bench of this Court in **William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others**

(Interested Parties) [2020] eKLR, considered the question whether a public authority undertaking statutory functions authorized by its parent statute is obligated to engage in public participation and/or stakeholders' engagement while carrying out those functions, and if so, to what extent.

20. The Court pointed out two scenarios in this respect as follows:

“ 133.The manner in which a public body exercises its statutory powers is largely dependent on the resultant effect. This yields two scenarios. The first scenario is when the exercise of the statutory authority only impacts on the normal and ordinary day-to-day operations of the entity. We shall refer to such as the ‘internal operational decisions concept’. The second scenario is when the effect of the exercise of the statutory power transcends the borders of the entity into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public.”

21. The Court held that subjecting the first scenario to public participation is undesirable and that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions, and that as long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.

22. As regards the second scenario, it was held as follows:

“137. While, as aforesaid, it is imprudent to subject internal operational decisions of a public body to the public policy requirement of Article 10 of the Constitution, the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders.”

23. The impugned Notice on Cargo clearly fell within the second scenario, in light of the extent of its operations, and failing to subject it to public participation renders it illegal. In this respect, the mode and modalities of public participation also needs to evolve with the current circumstances of Covid-19 pandemic, and the Respondent did not demonstrate in what manner the pandemic nor the guidelines in place for its containment prevented it from undertaking public participation on the impugned notice.

The Disposition.

24. The *ex parte* Applicant has sought the remedies of certiorari, mandamus and prohibition. An order of certiorari nullifies an unlawful decision or enactment, while an order of prohibition restrains a public body from acting in the manner specified in the order to restrain a threatened or impending unlawful conduct. An order of mandamus on the other hand requires a public body to do some particular act as specified in the order, to enforce public law duties. The Court of Appeal in the case of **Republic v Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances under which the said orders can issue.

25. Given that the irregularity in the making of the impugned Notice of Cargo has been admitted by the Respondent, to this extent the order of certiorari is merited. It is my view that an order of certiorari will be an adequate remedy in the circumstances of this appeal, and that the orders sought of prohibition and mandamus will be superfluous and speculative. This is for the reasons that the impugned notice is not operational, and is in any event now subject to nullification, and no other duty has also been demonstrated in the instant application that exists on the part of the Respondent in relation to any actions relating to the movement of transit cargo/containers.

26. The *ex parte* Applicants' Notice of Motion application dated 24th June 2020 is accordingly found to be merited only to the extent of the following orders:

I. An order of Certiorari be and is hereby issued to remove into this Court for purposes of quashing, the Notice on Transport of Cargo, issued by the Cabinet Secretary for Transport and Infrastructure, which Notice was published at 14:00 hours on 22nd May 2020 on the official Facebook Page of the Ministry of Transport and Infrastructure at <https://www.facebook.com/Ministry-of-Transport-and-Infrastructure-GoK 493194307419924/>.

II. The Respondent shall bear the *ex parte* Applicant's costs of the Notice of Motion dated 24th June 2020.

27. Orders accordingly.

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

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2021

A. NDUNG'U

JUDGE