



**Republic v Kenya Maritime Authority & another; Zam Zam Shipping Limited (Interested Party) (Judicial Review 10 of 2020) [2021] KEHC 309 (KLR) (23 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 309 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
JUDICIAL REVIEW 10 OF 2020  
JM MATIVO, J  
NOVEMBER 23, 2021**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**KENYA MARITIME AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**BOARD OF DIRECTORS OF THE KENYA MARITIME  
AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ZAM ZAM SHIPPING LIMITED ..... INTERESTED PARTY**

**Factors that led a dispute before court to become moot.**

Reported by Ribia John

*Civil Practice and Procedure – filing of a suit – locus standi - claims that a matter was moot - what factors made a dispute before a court of law moot - whether claims for damages for past harm could become moot.*

*Judicial Review – grounds for judicial review – legality – judicial review remedies - what factors did a judicial review court take into consideration in reviewing the legality of an administrative action; and in awarding judicial review remedies - whether a judicial review court could direct statutory bodies to grant licenses if the pre-requisites had not been met.*

**Brief facts**

The applicant's general shipping agency business within the Indian Ocean Coast, was a business regulated by the Kenya Maritime Authority (the respondent) who was mandated to issue licenses for the business. The applicant's bone of contention was that it applied for a license for 2019 and 2020 and it complied with the requisite requirements under the License of Shipping Agents/ Cargo Consolidators under the Merchant Shipping Act. Its grievance was that despite satisfying all the requirements and proving the requisite documents, the applicant had failed to issue the license without providing reasons. The applicant challenged the impugned decision as being contrary to public policy, arbitrary, unilateral, capricious and unreasonable



within the Wednesbury principles and that it offended the applicant's right to legitimate expectation. The applicant prayed for orders of *mandamus* to compel the respondent to grant the applicant the requisite licence. The respondent opposed the application on the grounds that the applicant's ship Captain was the subject of a drug traffic charge in the Mombasa Law Courts and that the orders sought were not deserving because the applicants had appealed against the judgment *vide* Nairobi Civil Appeal Number 553 of 2019; that the orders if granted would prejudice the appeal; that the application was incompetent, frivolous and an abuse of court process.

### Issues

- i. What factors led a dispute before court to become moot?
- ii. Whether claims for damages for past harm could become moot.
- iii. What was the purpose of judicial review remedies?
- iv. What factors did a judicial review court take into consideration in:
  1. reviewing the legality of an administrative action; and
  2. in awarding judicial review remedies?
- v. Whether a judicial review court could direct statutory bodies to grant licenses if the pre-requisites had not been met.

### Held

1. The law of mootness inquired whether events subsequent to the filing of a suit would have eliminated the controversy between the parties. There was no attempt to demonstrate that the 2019/2020 license if granted would serve any utilitarian purpose.
2. Mootness issues could arise in cases in which the plaintiff challenged actions or policies which were temporary in nature, in which factual developments after the suit was filed to resolve the harm alleged or in which claims had been settled. A case was not moot so long as the plaintiff continued to have an injury for which the court could award relief, even if entitlement to the primary relief had been mooted and what remains was small. The presence of a collateral injury was an exception to mootness. Distinguishing claims for injunctive relief from claims for damages was important. Because damage claims sought compensation for past harm, they could not become moot.
3. Short of paying the plaintiff the damages sought, a defendant could do little to moot a damage claim. A license was an authorization valid for the period specified. It could not and did not operate retrospectively. So, once the period covered lapsed, even if it was granted, it was not possible to breathe life into the license. A license automatically expired after its validity period ended.
4. A matter was moot if further legal proceedings with regard to it could have no effect, or events had placed it beyond the reach of the law. Thereby, the matter had been deprived of practical significance or rendered purely academic. Mootness arose when there was no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact. Thus, a court order compelling a public body to issue a license for a past period, would lead to an absurdity. The rights and liabilities of parties to any judicial proceedings pending before court were determined in accordance with the law and facts as it was at the time when the suit was instituted and by applying the facts to the law and circumstances. A court should not act in vain.
5. No court of law would knowingly act in vain. The general attitude of courts of law was that they were loathe in making pronouncements on academic or hypothetical issues as it did not have any useful purpose. A suit was academic where it was merely theoretical, made an empty sound and of no practical utilitarian value to the Plaintiff even if judgment was given in his favour. A suit was academic if it was not related to practical situations of human nature and humanity.
6. A case or issue was considered moot and academic when it ceased to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there was no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case.



- Courts generally declined jurisdiction over such cases or dismissed them on grounds of mootness, save when, among others, a compelling constitutional issue raised required the formulation of controlling principles to guide the bench, the bar and the public; or when the case was capable of repetition.
7. Judicial Review remedies were meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of Law. The task for the courts in evaluating whether a decision was illegal was essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument would normally be a statute or regulations. The courts when exercising the power of construction were enforcing the rule of Law, by requiring administrative bodies to act within the four corners of their powers or duties. They were also acting as guardians of Parliament's will, seeking to ensure that the exercise of power was in accordance with the scope and purpose of Parliament's enactments.
  8. Safeguarding legality was the most important purpose for the judicial review of administrative actions. A person that sought judicial review of an administrative decision had to be able to persuade the court that there were grounds for review in order for the decision to be invalidated. There ought always be the premise of want of legality. An administrative decision was flawed if it was illegal. A decision was illegal if it: -
    1. contravened or exceeded the terms of the power which authorizes the making of the decision;
    2. pursued an objective other than that for which the power to make the decision was conferred;
    3. was not authorized by any power;
    4. contravened or failed to implement a public duty.
  9. While determining the legality of administrative actions, courts generally considered compliance with both substantive law and procedural rules because any administrative decision-making process involved the exercise of legally conferred powers and the observation of legally prescribed procedures. Three rules were beyond question:
    1. decision makers could exercise only those powers conferred on them by the law.
    2. Decision makers could exercise those powers only after compliance with such procedural prerequisites as exist.
    3. So long as administrators/public bodies complied with the above two rules, their decisions were safe. The exercise of powers of had to strictly comply with the law both substantively and procedurally. The legality of an administrative decisions could be judicially challenged on grounds that the administrative decision did not comply with the basic requirements of legality.
  10. The most obvious example of illegality was where a body acted beyond the powers prescribed for it, *ultra vires*. The decision maker had to understand correctly the law that regulated his decision making power and had to give effect to it.
  11. Fettering discretion entailed considering whether an administrative body actually exercised the power it had, or whether because of some policy it had adopted, it had in effect failed to exercise its powers as required. In general, terms the courts accepted that it was legitimate for public authorities to formulate policies that were legally relevant to their powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust. An illegality could also occur where a body exercised a power, which was within its functions but exceeded the scope of power that was legally conferred to it.
  12. When a decision or an act or omission of a government official was challenged, the court's duty was first to determine whether, through the application of all legitimate interpretive aids, the impugned decision, act or omission was capable of being read in a manner that complied with the Constitution or the enabling statute and the applicable regulations. Whether a law, act, omission, decision or conduct was invalid was determined by an objective enquiry into its conformity with the Constitution or the relevant statutory provisions.



13. Courts generally assumed that the words of a statute meant what an ordinary or reasonable person would understand them to mean. If the words of a statute were clear and unambiguous, the court needed not to inquire any further into the meaning of the statute. One could confidently assume that Parliament intended its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.
14. Where discretion was conferred on the decision maker the courts also had to determine the scope of that discretion and therefore need to construe the statute purposefully. One could confidently assume that Parliament intended its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. The Constitution required a purposive approach to statutory interpretation. The purpose of a statute played an important role in establishing a context that clarified the scope and intended effect of a law.
15. The proper approach for the instant court in reviewing the impugned decision was to establish, factually, whether an irregularity occurred. Then the irregularity had to be legally evaluated to determine whether it amounted to a ground for the court to intervene. The legal evaluation had to, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a ground for the court to intervene had been established.
16. So long as a statutory body remained within the powers conferred upon it by the law, a judicial review court would not intervene. The respondents' statutory mandate had not been challenged. There was no argument that they exercised powers they did not have, that they had refused to issue a license and that no reasons had been offered. Regulatory bodies tasked with enforcement of the law were required to interpret and apply the law in a manner that gave effect to the objects of the legislation. The issues raised by the respondents were relevant to enable them arrive at a just decision. The questions raised were consistent with their statutory mandate. The respondents had not ousted/exceeded their statutory mandate. The applicant had not demonstrated illegality, ultra vires, irrationality, or procedural impropriety.
17. The grant of the orders of *certiorari*, *mandamus* and prohibition was discretionary. The court was entitled to take into account the nature of the process against which judicial review was sought and satisfy itself that there was reasonable basis to justify the orders sought. The argument that there were security concerns, a pending criminal trial and failure to disclose information on the part of the applicant were sufficient to compel the court not to exercise its discretion in favour of the applicant even if the grounds in support of the application had been established.
18. Equally important was the fact that there was a pending appeal involving a previous similar decision. The court had to weigh one thing against another to see whether or not the remedy was the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one had to be exercised on the basis of evidence and sound legal principles.
19. Even if a court found a public body had acted wrongly, it did not have to grant any remedy. Examples where discretion would be exercised against an applicant included where the applicant's own conduct had been unmeritorious or unreasonable, or, where the decision was taken in public interest. Also, the court could not direct the respondent to grant licenses if the pre-requisites had not been met.
20. The applicant claimed that no reasons were offered. From the replying affidavit, the reasons had been offered. Strictly speaking, reasons could be declined if they fell under the exceptions listed in section 6 of the Access to Information act. The *ex parte* applicant made no attempts at all to apply to be provided with reasons (if at all they were declined). That would have assisted the court to weigh the refusal (if any) or appreciate that the request was made and declined. Court's discretion would not be exercised to impede an authority's ability to perform its functions or where the court considered that an alternative remedy could have been pursued.

*Application dismissed.*



## Orders

Costs to the respondents.

## Citations

### Cases

#### **East Africa;**

1. *Amin, Abdi Gediv Kenya Revenue Authority & 3 others* Judicial Review 60 of 2019; [2020] eKLR — (Explained)
2. *Kaminja, Daniel & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* Judicial Review 441 of 2018; [2019] eKLR - (Explained)
3. *Koech, John Kipngeno & 2 others v Nakuru County Assembly & 5 others* Petition 23 & 25 of 2013; [2013] eKLR — (Explained)
4. *Njenga, Mwangi Wachira & Partners v The County Secretary, City County of Nairobi* Judicial Review Case 176 of 2016; [2017] eKLR — (Explained)
5. *Onyango, Malombo Robinson t/a O.M. Robinson & Company Advocates v County Executive Committee Member Finance & Economic Planning (County Government of Mombasa) & 2 others* Judicial Review 63 of 2019; [2019] eKLR) — (Explained)
6. *Petro Oil Kenya Limited v Public Procurement Administrative Review Board; Accounting Officer, Kenya Ferry Services Limited & 2 others (Interested Parties)* Judicial Review 16 of 2020; [2020] eKLR — (Explained)
7. *Political Parties Forum Coalition & 3 others v Registrar of Political Parties & 8 others* Civil Appeal 80 of 2014; [2016] eKLR — (Explained)
8. *Republic v Attorney General & another* Judicial Review Miscellaneous Application No 193 of 2015; [2016] eKLR — (Explained)
9. *Republic v Kenya Broadcasting Corporation & another* Judicial Review Miscellaneous Application No 667 of 2017; [2018] eKLR — (Explained)
10. *Republic v Kenya National Examinations Council ex parte Gathengi & 8 others* Civil Appeal No 234 of 1996; [1997] eKLR — (Explained)
11. *Wayua, Susan v Attorney General* Judicial Review No 689 of 2017; [2018] eKLR — (Explained)

#### **Nigeria;**

*Plateau State v AGF* ([2006] 3 NWLR) — (Explained)

#### **South Africa;**

1. *Ferreira vs Levin No and others; Vryenhoek and others vs Powell No and others* ([1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC)) — (Explained)
2. *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (2012(4) SA 618 (CC)) — (Explained)
3. *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* ([1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC)) — (Explained)

#### **Canada;**

*O Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] SCR 140 - (Explained)

#### **Phillippines;**

*Osmeña III v Social Security System of the Philippines* (GR No 165272, 13 September 2007, 533 SCRA 313) — (Explained)

## Statutes

#### **East Africa;**

1. Access to Information Act, 2016 (No 31 of 2016) section 6 — (Interpreted)
2. Companies Act (cap 486) (Repealed) — (Cited)



3. Constitution of Kenya, 2010 articles 10, 23, 27, 41, 47(1)(2); 159(2)(a)(b) — (Interpreted)
4. Law Reform Act (cap 26) section 8 — (Interpreted)
5. Merchant Shipping Act, 2009 (No 4 of 2009) sections 5(1), 8(2)(h) — (Interpreted)
6. Narcotic Drugs And Psychotropic Substances (Control) Act, 1994 (Act No 4 of 1994) section 4 (a) — (Interpreted)

#### **Texts & Journals**

1. Barron, A., & Dienes, C., (Eds) (2020) *Constitutional Law in A Nutshell* West Academic Publishing 10th Edn
2. Burrows, J. 2003, *Statutes and the Ordinary Person* Waikato Law Review 3rd edn pp177–99
3. Rupert, C., (Ed) (1995) *Statutory Interpretation* Lexus Law Publishers 13th Edn pp172–75
4. Lord Mackay of Clashfern (Ed) (2003) *Halsbury’s Law of England* Butterworth’s Laws of England 4th Edn Vol 1 p 111

#### **Advocates**

None mentioned

## **JUDGMENT**

1. Pursuant to the leave of this court granted on February 26, 2020, the applicant moved this court by way of Notice of Motion dated March 2, 2020 expressed under the provisions of section 8 of the [Law Reform Act](#)<sup>1</sup> seeking an order of *mandamus* to compel the respondents to issue Shipping Licenses to the applicant for the years 2019 and 2020 (now past). The applicant also prays for costs of these proceedings to be provided.

#### **Grounds Relied Upon**

2. The factual chronology of the events which triggered these proceedings is essentially uncontroverted or common ground. It is common ground that the applicant general shipping agency business within the Indian Ocean Coast, a business regulated by the respondent who is mandated to issue licenses for the said business. There is no contest that the applicant was previously licensed by respondent states but in 2016 it sued the respondent in JR No 49 of 2016, Mombasa before the license could be issued on 4<sup>th</sup> November 2016. Further in 2017, it again sued the respondent and a consent was recorded pursuant to which the license was issued.
3. The point of departure is that the applicant states that it applied for license for the years 2019 and 2020 and it complied with the requisite requirements under the License of Shipping Agents/ Cargo Consolidators under the [Merchant Shipping Act](#).<sup>2</sup> Its grievance is that despite satisfying all the requirements and proving the requisite documents, the applicant has failed to issue the license without providing reasons.

#### **Legal Foundation of the Application**

4. The applicant states that the respondent is bound by the article 10 of the [Constitution](#) and that the impugned decision is contrary to public policy, arbitrary, unilateral, capricious and unreasonable within the Wednesbury Principles and that it offends the applicant’s right to legitimate expectation.

#### **Respondent’s Grounds of Opposition**

<sup>1</sup> Cap 26, Laws of Kenya.

<sup>2</sup> Act No. 4 of 2009.



5. In their grounds of opposition filed on November 25, 2019, the respondent's states that:- the orders sought are not deserving because the applicants have appealed against the judgment vide Nairobi Civil Appeal Number 553 of 2019; that the orders if granted will prejudice the appeal; that the application is incompetent, frivolous and an abuse of court process.

### **Respondent's Replying Affidavit**

6. Jane Florence Otieno, the 1<sup>st</sup> respondent's Corporation Secretary and Head of legal Services swore the replying affidavit dated June 4, 2020 in opposition to the application. The nub of the affidavit is that the applicant submitted its application for renewal of its Shipping Agent's Licence for the year 2019 and 2020; that the application is to be accompanied with Certified Copies of Certificate of Incorporation, Company PIN Certificate, Memorandum and Articles of Association, Company Annual Returns or Company Search (CR 12) showing current directors, Directors National Identification cards, Directors' PIN Certificate, Tenancy agreement/ lease agreement/land title document, Tariff structure, Professional Profile of key persons in charge of the company, Directors Certificate of Good Conduct and security clearance.
7. Further, that the licenses are issued subject to an applicant adhering to all the requirements including security clearance; and upon conforming a license is issued without delay and the applicant is constantly updated on the status of its application. The respondents also states that the 2019 license was not issued to the applicant because the respondent received a confidential brief from the National Intelligence Service, classified "secret," indicating that there was an adverse reporting against the applicant. Also, that the respondent was still in the process of vetting the applicant for the 2020 license when it was served with the instant application on March 4, 2020.
8. The respondents also states that prior to the receipt of the application for renewal of license for the year 2020, the respondent received a confidential brief from the National Intelligence Service, classified "secret," indicating that there was an adverse reporting against the *ex-parte* applicant. Further, she averred that the applicant is yet to avail a certificate of good conduct for Director Mariam Mohamed Osman, one of the company Directors as part of the 2020 license application documents.
9. Also, that in the Company Profile attached to the application the *ex-parte* applicant listed Captain Ahmed Mohamed Osman as its Operations Manager and that the role of the operations manager is to control and manage the affairs of the Company. It is the respondents' case that a background check on Captain Ahmed Mohamed Osman revealed that he has been charged with the offence of trafficking in narcotic drugs contrary to sec 4(a) of the [Narcotic Drugs and Psychotropic substances Control Act](#)<sup>3</sup> in Mombasa Chief Magistrates Court Criminal Case No 1255 of 2014 which case was still ongoing.
10. Further, the applicant states that in view of the foregoing revelations there arose a need to carry out a more detailed review of the applicant's application and a decision has not been made since the vetting process is still on going and its only upon completion of the process that the decision will be made. Also, the delay in concluding the process has been attributed partly to the applicant's failure to disclose material information, that is Captain Ahmed Mohamed Osman has been charged with the aforesaid offence, hence the applicant does not deserve the orders sought. Lastly, that, no decision has been made on the applicant's application, so the application is premature and ought to be dismissed.

### **Applicants' Further Affidavit**

11. Mr Ali Abdulkadir Mohamed, a director of the applicant swore the further affidavit dated July 6, 2020 in response to the respondent's replying affidavit. The salient points are that the applicant supplied

<sup>3</sup> No. 4 of 1994.



all the required documents including the certificate of good conduct; that Fatma and Mariam are the only shareholders and directors of the company and they are the ones who manage the company and Mr Ahmed Mohamed Osman is an employee of the company; that the respondents have been aware of the criminal case since 2014 and the accused is yet to be convicted; Lastly, the delay to render the decision is unfair and a breach of article 47 of the Constitution.

### **The Applicant's Advocates Submissions**

12. The applicant's counsel submitted that the respondent is obligated to adhere to article 47(1) & (2) of the Constitution which guarantees every person a fair administrative action which is expeditious, efficient, lawful and reasonable. Also, he submitted that the respondent is bound by the principles stipulate in article 10 of the Constitution. He submitted that under article 23, this court is obligated to uphold and enforce the Bill of Rights and under article 27, the applicant has a right of equality and freedom from discrimination. Further, he argued that article 35 guarantees the applicant the right to access information from the respondents which has never been availed.
13. Additionally, counsel cited article 41 and submitted that the applicant's employees have a right to fair labour practices including reasonable working conditions, working in a licensed organization. Further, that the respondents are unreasonably delaying issuance of Licence for 2019 and 2020. Counsel cited Abdi Gedi Amin alias Abdi Ibrahim Ahmed v The Kenya Revenue Authority & 3 others<sup>4</sup> which accentuated the grounds for judicial review which are illegality, irrationality and procedural impropriety and the need for a fair administrative action.
14. Also, counsel cited Susan Wayua v Attorney General<sup>5</sup> in which the court cited previous decision in support of the proposition that mandamus will be granted if the duty is in the nature of a public duty, affects individual rights if there is no other appropriate remedy. He also cited Onyango Malombo Robinson T/a OM Robinson & Company Advocates v County Executive Committee Member Finance & Economic Planning [County Government of Mombasa] & 3 others<sup>6</sup> which underscored the values in article 10 of the Constitution and the court's obligation to do administer justice without delay as engrained in article 159(2)(a)(b) of the Constitution.
15. To further buttress his argument, counsel cited Petro Oil Kenya Limited v Public Procurement Administrative Review Board & others<sup>7</sup> in support of the proposition that the order of *mandamus* is a remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. ( Also cited Republic v Kenya Broadcasting Corporation & another,<sup>8</sup> Republic v Attorney General & another,<sup>9</sup> Republic v Kenya National Examinations Council ex parte Gathengi & 8 others<sup>10</sup> Njenga Mwangi

<sup>4</sup> Mombasa - Constitution & Judicial Review Division - Judicial Review No 60 of 2019

<sup>5</sup> Nairobi JR No 689 of 2017.

<sup>6</sup> Mombasa - Constitution & Judicial Review Division - Judicial Review No 09 of 2019

<sup>7</sup> Mombasa - HCCC Judicial Review No 16 of 2020.

<sup>8</sup> Nairobi - Judicial Review Division - Misc Application No 667 of 2017

<sup>9</sup> Nairobi - HCCC Judicial Review Misc Application No 193 of 2015.

<sup>10</sup> Civil Appeal No 234 of 1996.



Wachira & Partners v The County Secretary City County of Nairobi<sup>11</sup> all of which explicated the purpose of *mandamus* and urged the court to grant the orders sought.

### **The Respondent's Advocates Submissions**

16. The respondent's counsel cited *Halsbury's Law of England*<sup>12</sup> which reads: -

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

Paragraph 90: -

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.”

17. Additionally, counsel cited *John Kipngeno Koeh & 2 others v Nakuru County Assembly & 5 others*<sup>13</sup> which observed that the court will direct a licensing body to meet and consider a license application but it will not direct a licensing body to grant licenses or make decisions in any one way. He submitted that where a statute imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, *mandamus* cannot command the duty in question to be carried out in a specific way. He cited section 5(1) of the *Kenya Maritime Authority Act (sic)* which provides: -

5 (1) The functions of the Authority are to carry out such functions as may be necessary to give effect to the objects of this Act and without prejudice to the generality of the foregoing, the Authority shall have the duty to—

(a) administer and enforce the provisions of the *Merchant Shipping Act, 2009* (No 4 of 2009) and any other legislation relating to the maritime sector for the time being in force;

18. He submitted that the grant of licenses is a statutory function under the act and argued that the respondents has discretion whether or not to issue a licence. He argued that the *mandamus* sought is not efficacious in the circumstance and should be refused.

### **Determination**

19. First, I will address a germane issue I glean from the facts of this case. So glaring is the issue that it is inconceivable how it escaped the attention of both counsels, despite the much-accepted norm

<sup>11</sup> Nairobi - HCCC Judicial Review No 176 of 2015 .

<sup>12</sup> 4<sup>th</sup> Edition Volume 1 at page 111 89.

<sup>13</sup> {2013} e KLR.



that advocates are meticulously hawkeyed. The applicant seeks an order of *mandamus* to compel the respondent to issue it with Shipping Licenses for years 2019 and 2020. We are now nearing the end of 2021. The question is, even if this court were to be persuaded to grant the *mandamus* sought, will the said order serve any utilitarian value. Its elementary knowledge that such licenses are annual in nature so the efficacy of the order sought (if granted) is highly in doubt. The applicant did not bother to amend its application to pray for a current licence.

20. The above scenario brings into sharp focus the law of mootness which inquires whether events subsequent to the filing of a suit have eliminated the controversy between the parties. There was no attempt to demonstrate that the 2019/2020 license if granted will serve any utilitarian purpose. I have in several previous decisions addressed this doctrine in detail. (See [\*Daniel Kaminja & 3 Others \(Suing as Westland Environmental Caretaker Group\) v The County Government of Nairobi\*](#)<sup>14</sup>).
21. In the above case, I observed that mootness issues can arise in cases in which the plaintiff challenges actions or policies which are temporary in nature, in which factual developments after the suit is filed resolve the harm alleged or in which claims have been settled. A case is not moot so long as the plaintiff continues to have an injury for which the court can award relief, even if entitlement to the primary relief has been mooted and what remains is small.<sup>15</sup> Put differently, the presence of a “collateral” injury is an exception to mootness.<sup>16</sup> As a result, distinguishing claims for injunctive relief from claims for damages is important. Because damage claims seek compensation for past harm, they cannot become moot.<sup>17</sup> Short of paying plaintiff the damages sought, a defendant can do little to moot a damage claim. In the same parity of reasoning, a license is an authorization valid for the period specified. It cannot and does not operate retrospectively. So, once the period covered lapses, even if it is granted, it is not possible to breathe life into the license. A license automatically expires after its validity period ends.
22. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby, the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact. Thus, a court order compelling a public body to issue a license for a past period, will lead to an absurdity. It is trite that as

<sup>14</sup> Judicial Review No 441 of 2018.

<sup>15</sup> In [\*Chafin vs. Chafin\*](#), 133 S Ct 1017 (2013), the Supreme Court discussed mootness at length in a complex child abduction case and held that the dispute between the parents was not moot because issues regarding the custody of the child remained unresolved. The court noted that the prospects of success of the suit were irrelevant to the mootness question, and uncertainty about the effectiveness and enforceability of any future order did not moot the case. *Chafin*, 133 S Ct at 1024-26. A case is moot, however, when the court cannot give any “effectual” relief to the party seeking it. See *Knox v Service Employees International Union, Local 1000*, 132 S Ct 2277, 2287 (2012); *Church of Scientology of California v United States*, 506 US 9, 12 (1992); *Firefighter’s Local 1784 v Stotts*, 467 US 561, 571 (1984); see also *Tory v Cochran*, 544 US 734, 736-37 (2005) (death of attorney Johnnie Cochran did not moot injunction enjoining plaintiff from defaming Cochran). A case can, of course, become moot when the plaintiff has abandoned their claims, but such abandonment must be unequivocal. *Pacific Bell Telephone Company vs. Linkline Communications*, 555 US 438, 446 (2009).

<sup>16</sup> [\*In re Burrell\*](#), 415 F3d 994, 998 (9th Cir 2005).

<sup>17</sup> [\*Board of Pardons vs. Allen\*](#), 482 US 369, 370 n1 (1987), illustrates the use of a damage claim to avoid mootness. Prisoners who were denied parole without a statement of reasons challenged the denial. They claimed that the state statute mandating release under certain circumstances created a liberty interest in eligibility for parole protected by the Fourteenth Amendment. Plaintiffs sought damages as well as declaratory and injunctive relief. Although plaintiffs were later released, mootness of their individual claims for injunctive relief, their damage claims remained alive. Because the immunity of defendants was not settled, the Supreme Court reached the merits, holding that plaintiffs had a cognizable liberty interest in the processing of their parole applications. The court remanded the case for further proceedings. See also *City of Richmond v JA Croson Company*, 488 US 469, 478 n1 (1989). An inability to pay a damages judgment at present does not moot a claim. See *United States vs. Bebrman*, 235 F3d 1049, 1053 (7th Cir 2000). However, if the judgment seemingly could never be paid, a claim might be dismissed on prudential grounds. See, eg, *Federal Deposit Insurance Corporation vs. Kooyomjian*, 220 F3d 10, 14-15 (1st Cir 2000).



a general principle, the rights and liabilities of parties to any judicial proceedings pending before court are determined in accordance with the law and facts as it was at the time when the suit was instituted and by applying the facts to the law and circumstances. Time and again, it has been expressed that a court should not act in vain.<sup>18</sup>

23. No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.<sup>19</sup>
24. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition.<sup>20</sup>
25. Barron and Dienes put it pithily when they observed that "a case or controversy requires present flesh and blood dispute that the courts can resolve."<sup>21</sup>Loots, a South African constitutional commentator, endorses these sentiments and points out that a case- "...is moot and therefore not justiciable if it no longer presents an existing or live controversy or the prejudice, or threat of prejudice, to the plaintiff no longer exists."<sup>22</sup>However, a court will decide a case despite the argument of mootness if to do so would be in the public interest.<sup>23</sup> As stated above, the applicant never deemed it fit to amend its pleadings. Courts generally only have subject-matter jurisdiction over live controversies. When a case becomes moot during its pendency, the appropriate step is a dismissal of the case.<sup>24</sup> On this ground alone, this case falls for dismissal.
26. Notwithstanding my above finding, I will address the application on merits. I have in many of my decisions stated that Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the Rule of Law. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or regulations. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring

<sup>18</sup> [Political Parties Forum Coalition & 3 others v s Registrar of Political Parties & 8 others](#) [2016] eKLR

<sup>19</sup> See [Plateau State v AGF](#). {2006} 3 NWLR (Pt 967) 346 at 419 paras. F-G wherein the Nigerian Supreme court defined an academic suit or petition the above terms

<sup>20</sup> [Osmeña III v Social Security System of the Philippines](#) GR No. 165272, 13 September 2007, 533 SCRA 313, citing [Province of Batangas v Romulo](#), GR No 152774, 27 May 2004, 429 SCRA 736, 754; [Olanolan v Comelec](#), 494 Phil 749,759 (2005); [Paloma v CA](#), 461 Phil 269, 276-277 (2003).

<sup>21</sup> Barron and Dienes (eds) *Constitutional Law* 44.

<sup>22</sup> Loots "Standing, Ripeness and Mootness" 18.

<sup>23</sup> See [S v Manamela](#) 2000 5 BCLR 491 (CC) para 12. See also [Independent Electoral Commission v Langeberg Municipality](#) 2001 9 BCLR 883 (CC) para 11; [AAA Investments Pty \(Ltd\) v Micro Finance Regulatory Council](#) 2006 11 BCLR 1255 (CC) para 27.

<sup>24</sup> [Mills v Green](#), 159 US 651, 653 (1895)



administrative bodies to act within the “four corners” of their powers or duties. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments.

27. Safeguarding legality is the most important purpose for the judicial review of administrative actions. A person seeking judicial review of an administrative decision must be able to persuade the court that there are grounds for review in order for the decision to be invalidated. There must always be the premise of “want of legality.” Simply put, 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.
28. While determining the legality of administrative actions, courts generally consider compliance with both substantive law and procedural rules because any administrative decision-making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures. Three rules are beyond question. One, decision makers may exercise only those powers conferred on them by the law. Two, they may exercise those powers only after compliance with such procedural prerequisites as exist. Three, so long as administrators/public bodies comply with the above two rules, their decisions are safe. This fundamental principle generally requires that the exercise of powers of must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decisions can be judicially challenged on grounds that the administrative decision does not comply with the basic requirements of legality.
29. The most obvious example of illegality is where a body acts beyond the powers prescribed for it. In other words, it acts ultra vires. The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second issue that can be argued under illegality is fettering discretion. This entails considering whether an administrative body actually exercised the power it has, or whether because of some policy it has adopted, it has in effect failed to exercise its powers as required. In general, terms the courts accept that it is legitimate for public authorities to formulate policies that are ‘legally relevant to their powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust. An illegality can also occur where a body exercised a power, which was within its functions but exceeded the scope of power that is legally conferred to it.
30. When a decision or an act or omission of a government official is challenged, the court’s duty is first to determine whether, through “the application of all legitimate interpretive aids,”<sup>25</sup> the impugned decision, act or omission is capable of being read in a manner that complies with the constitution or the enabling statute and the applicable regulations. Differently put, whether a law, act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution<sup>26</sup> or the relevant statutory provisions. Courts generally assume that the words of a statute mean what an “ordinary” or “reasonable” person would understand them to mean.<sup>27</sup> If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

<sup>25</sup> *National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24.

<sup>26</sup> *Ferreira vs Levin No and others; Vryenhoek and others v Powell No and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26.

<sup>27</sup> Plain meaning should not be confused with the “literal meaning” of a statute or the “strict construction” of a statute both of which imply a “narrow” understanding of the words used as opposed to their common, everyday meaning. Supra note 1.



31. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.<sup>28</sup> One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. The Constitution requires a purposive approach to statutory interpretation.<sup>29</sup> The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.<sup>30</sup>

32. The preamble to the [Merchant Shipping Act](#)<sup>31</sup> in so far as it is relevant to this case reads: - “... to make provision for the control, regulation and orderly development of merchant shipping and related services; generally to consolidate the law relating to shipping and for connected purposes.” Part 11 of the [Merchant Shipping \(Maritime Service Providers\) Regulations, 2011](#) deals with licensing. Regulation 4 enumerates the Role of the Kenya Maritime Authority. It provides:

#### Role of the Authority

The functions of the Authority shall be to—

- a. license maritime service providers;
- b. promote fair competition among maritime service providers;
- c. promote and enforce high standards of professional and ethical conduct;
- d. formulate and promote the attainment of the highest standards of competence, and qualifications among respective maritime service providers;
- e. maintain a register for persons licensed to practice as maritime service providers, the various categories of maritime service providers and to publish from time to time information relating to such register;
- f. provide for a framework for consultations on the cost and quality of maritime transport services;
- g. monitor the standards of infrastructure, equipment, facilities and services as the Authority may specify by notice in the Gazette, and perform such other functions as specified under section 8(2)(h) of the Act.

33. Regulation 5 provides for qualifications for licensing as follows: -

#### 5. Qualifications for licensing

<sup>28</sup> Sir Rupert Cross, [Statutory Interpretation](#), 13th edn. (1995), pp.172–75; J. Burrows, [Statute Law in New Zealand](#), 3rd ednl. (2003), pp.177–99. For a recent example in Canada see [ATCO Gas and Pipelines Ltd v Alberta \(Energy and Utilities Board\)](#) [2006] SCR 140.

<sup>29</sup> For examples of a purposive approach to statutory interpretation, see [African Christian Democratic Party v Electoral Commission and others](#) {2006} ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC); at paras 21, 25, 28 and 31; [Daniels v Campbell No and others](#) {2004} ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 22-3; [Stopforth v Minister of Justice and others](#); [Veenendaal v Minister of Justice and Others](#) {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

<sup>30</sup> [Thornton Legislative Drafting](#) 4ed (1996) at 155 cited in JR de Ville [Constitutional and Statutory Interpretation](#) (Interdoc Consultants, Cape Town 2000) at 244-50.

<sup>31</sup> (No. 4 of 2009).



1. A person shall be eligible to be licensed as a maritime service provider if such person is a citizen of Kenya, or is a company incorporated under the *Companies Act* cap 486) in which not less than fifty-one per cent of the share capital is held directly by a citizen of Kenya;
2. Notwithstanding paragraph (1) any company which holds a licence to operate as a maritime service provider shall within eighteen months from the date of commencement of these regulations, comply with the provisions of that paragraph.
3. The maritime service provider referred to in paragraph (2) may, at any time within eighteen months from the date of commencement of these regulations, apply for, and upon satisfying the requirements of regulation 11, be entitled to the grant of a licence under these regulations.
4. A ship's agent or cargo consolidator shall be eligible to be licensed under these regulations if such agent or consolidator, is of good standing and its reputation as evidenced by a letter of recommendation from the principal.
5. A container handling facility shall be eligible for licensing if it is located in an area where it does not inhibit accessibility to other users.
6. A person shall in addition to the foregoing paragraphs, be eligible for licensing if the person—
  - a. has complied with the requirements of regulations 7 and 11; and
  - b. is financially sound evidenced by—
    - i. financial resources adequate to its business evidenced by references from banks, financial institutes, auditors and reputable credit reference companies, to the satisfaction of the Authority; and
    - ii. a minimum paid-up share capital as may be specified under paragraph (7).
7. The Authority shall specify by notice in the Gazette, the minimum paid-up share capital to be maintained by a maritime service provider that is a body corporate.



8. A maritime service provider shall, whenever requested to do so by the Authority, demonstrate that it has complied with paragraph (1).
9. A person shall be not eligible for a licence or any renewal thereof if such person—
  - a. has been convicted of corruption, an economic crime or other criminal offence that amounts to a felony under the law of Kenya; or
  - b. has not complied with any of the provisions of this Act or any other law.
10. Paragraphs (1), (5), (6), (7) and (8) shall not apply to shipping lines.

34. Regulation 6 which provides: -

6. Application for licence

1. An application for a licence as a maritime service provider shall be made to the Authority in the form set out in the Second Schedule.
2. The Authority may approve or reject an application and shall notify the applicant of its decision together with reasons within sixty days from the date of receipt of the application.
3. Where the Authority approves an application for a licence or the renewal of a licence, the Authority shall, upon payment of such standard fee as it may determine, issue to the applicant the appropriate licence or renewal of the licence.
4. A licence issued under these regulations shall—
  - a. be limited exclusively to use by the named licensee and shall not be transferred to any other person without prior approval of the Authority; and
  - b. be valid for one year and shall, in any case, expire on the 31st of December, of each year;
  - c. be issued upon such other conditions as may be specified by the Authority in the license.
  - d. be issued upon such other conditions as may be specified by the Authority in the license.
5. Any person who carries on the business of a maritime service provider without a valid licence commits an offence and shall be liable on conviction to a fine not exceeding ten million shillings or imprisonment for a term not exceeding three years, or both such fine and imprisonment.



35. The proper approach for this court in reviewing the impugned decision is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground for the court to intervene. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a ground for the court to intervene has been established. The role of the court in cases of this nature was well in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*<sup>32</sup> as follows: -

“ [95] Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.”

36. In other word, so long as statutory body remained within the powers conferred upon it by the law, a Judicial Review court will not intervene. The respondents’ statutory mandate has not been challenged. There is no argument that they exercised powers they do not have. Have refused to issue a license and no reasons have been offered. The counter argument is that the respondent received a confidential brief from the National Intelligence Service, classified “secret,” indicating that there was an adverse reporting against the applicant. Further, it is the respondent’s case that the applicant is yet to avail a certificate of good conduct for Director Mariam Mohamed Osman, one of the company Directors as part of the 2020 license application documents. Also, the applicant states that in the Company Profile attached to the application the applicant listed Captain Ahmed Mohamed Osman as its Operations Manager and that the role of the operations manager is to control and manage the affairs of the Company, but a background check on the said person revealed that he has been charged with the offence of trafficking in narcotic drugs contrary to sec 4 (a) of the *Narcotic Drugs and Psychotropic substances Control Act*<sup>33</sup> in Mombasa Chief Magistrates Court Criminal Case No. 1255 of 2014 which case was still ongoing.

37. The respondent maintains that above revelations necessitated a need to carry out a more detailed review of the applicant’s application and a decision has not been made because the vetting process is still on going and its only upon completion of the process that the decision will be made. It was also contended that the delay in concluding the process has been attributed partly to the applicant’s failure to disclose material information, that is Captain Ahmed Mohamed Osman has been charged with the aforesaid offence. Lastly, the respondents state that they were still in the process of vetting the applicant for the license when they were served with the instant application on March 4, 2020. To them, this case is premature since no decision has been made.

38. Regulatory bodies tasked with enforcement of the law are required to interpret and apply the law in a manner that gives effect to the objects of the legislation. It’s my view that the issues raised by the respondents are relevant to enable them arrive at a just decision. The questions raised in my view are consistent with their statutory mandate. In fact, there is no argument before me to suggest that the

<sup>32</sup> 2012(4) SA 618 (CC).

<sup>33</sup> No. 4 of 1994.



respondents acted outside their mandate or exceeded their statutory mandate. The applicant has no demonstrated illegality, *ultra vires*, irrationality, or procedural impropriety.

39. The grant of the orders of *certiorari*, *mandamus* and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought. The argument that there are security concerns, a pending criminal trial and failure to disclose information on the part of the applicant are sufficient to compel the court not to exercise its discretion in favour of the applicant even if the grounds in support of the application had been established. Equally important is the fact that it was disclosed that there is a pending appeal involving a previous similar decision. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.
40. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, or, where the decision is taken in public interest. Also, the court cannot direct the respondent to grant licenses if the pre-requisites have not been met.
41. The applicant claims that no reasons were offered. From the replying affidavit, the reasons have been offered. Strictly speaking, reasons can be declined if they fall under the exceptions listed in section 6 of the *Access to Information act*.<sup>34</sup> The ex parte applicant made no attempts at all to apply to be provided with reasons (if at all they were declined). This would have assisted the court to weigh the refusal (if any) or appreciate that the request was made and declined. Court's discretion will not be exercised to impede an authority's ability to perform its functions or where the judge considers that an alternative remedy could have been pursued. Flowing from my discussion herein above, it is my finding that the applicant's application dated March 2, 2020 is unmerited. I dismiss the said application with costs to the respondents.

Orders accordingly

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23<sup>TH</sup> DAY OF NOVEMBER 2021.**

**JOHN M. MATIVO**

**JUDGE**

<sup>34</sup> Ibid.

