



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 128 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

BETWEEN

ASSOCIATION OF BUS OPERATORS KENYA.....APPLICANT

VERSUS

NAIROBI METROPOLITAN SERVICES.....1ST RESPONDENT

NAIROBI COUNTY GOVERNMENT.....2ND RESPONDENT

NATIONAL TRANSPORT & SAFETY AUTHORITY.....3RD RESPONDENT

INSPECTOR GENERAL OF POLICE KENYA.....4TH RESPONDENT

METRO TRANS EAST AFRICA LIMITED.....5TH RESPONDENT

RULING

The Application

1. The Association of Bus Operators Kenya, (hereinafter “the Applicant”) is a registered association of bus operators that operate in the Nairobi Central Business District. The Applicant states that its members are the bona fide public service vehicle operators licensed to pick and drop passengers at General Post Office (GPO), ICEA and Ambassador Hotel (eastbound) and Kencom bus and GPO termini (westbound) and are also licensed to operate within the Nairobi Central Business District, that is, through Kenyatta Avenue, Moi Avenue, Nkrumah Avenue, City Hall Way and Mama Ngina Street with a bus holding ground at Central Bus Station.

2. The Applicant alleges that the Metro Trans East Africa Limited, the 5th Respondent herein, has been piling pressure on the Nairobi Metropolitan Services and Nairobi City County (the 1st and 2nd Respondents herein) to allot to it picking and dropping slots at the General Post Office (GPO), Ambassador and Kencom bus termini (westbound) and GPO and ICEA termini (eastbound), when they do not have the valid Road Service Licenses to operate from the said termini or the associated routes.

3. In this respect, that the 5th Respondent, through its Advocates, wrote to the Nairobi City County, the 2nd Respondent herein on 23rd April, 2020 seeking purported enforcement of a Decree dated 11th October, 2017 from **Milimani Misc. (JR) Application No. 13 of 2013-Republic v City Council of Nairobi Town Clerk & 3 Others Ex Parte Metro Trans Limited**, in a bid to coerce the 2nd Respondent into allocating them slots at the Ambassador Hotel, Kencom and General Post Office (GPO) termini.

4. The Applicant has consequently moved this Court by way of an application by way of Chamber Summons dated 16th June 2020, seeking the following orders:

1. THAT this Application be certified urgent and heard ex parte in the first instance;

2. THAT the Association Of Bus Operators Kenya (ABOK), the Applicant herein be granted leave to apply for an order of

prohibition prohibiting the 1st and 2nd Respondents from allotting to the 5th Respondent pick-up and dropping slots at the Ambassador Hotel, General Post Office (GPO) and Kencom bus termini (westbound), GPO and ICEA stages (eastbound) or allowing the 5th Respondent to operate within the Nairobi Central Business District via City Hall Way, Mama Ngina Street and Kenyatta Avenue without obtaining the necessary Road Service Licenses;

3. THAT the Association Of Bus Operators Kenya (ABOK), the Applicant herein be granted leave to apply for an order of prohibition prohibiting the 1st, 2nd, 3rd and 4th Respondents from allowing the 5th Respondent to operate within the Nairobi Central Business District or to pick and drop passengers at the General Post Office (GPO) and Kencom bus termini based on the Decree dated 11th October, 2017 in Milimani Misc. (JR) Application No. 13 of 2013; Republic v City Council of Nairobi Town Clerk & 3 Others Ex Parte Metro Trans Limited;

4. THAT the Association Of Bus Operators Kenya (ABOK), the Applicant herein be granted leave to apply for an order of mandamus compelling the 1st, 2nd and 3rd Respondents to involve the Applicant herein as a bona fide stakeholder, in any decision making process pertaining to allocation of slots to any public transport operator at the General Post Office (GPO), Ambassador Hotel and Kencom bus termini.

5. THAT the grant of such leave do operate as a stay of any decision by the 1st, 2nd and 3rd Respondents purporting to allot any slots to the 5th Respondent based on the Decree dated 11th October, 2017 in Milimani Misc. (JR) Application No. 13 of 2013; Republic v City Council of Nairobi Town Clerk & 3 Others Ex Parte Metro Trans Limited; and

6. THAT costs of this Application be provided for.

5. The 1st and 2nd Respondents are sued for the reasons that the Nairobi City By-laws provide that public service vehicles must operate on the routes and termini designated to them on their Road Service Licenses, while the issuance of the said Road Service Licenses is the preserve of the National Transport and Safety Authority, which is sued as the 3rd Respondent. The Application is supported by a statutory statement dated 16th June 2020, and a verifying affidavit sworn on 15th June 2020 by Edwins Massimba Mukabanah, the Applicant's chairman.

6. The Applicant annexed copies of the Applicant's and 5th Respondents List of road service licenses as published on the 3rd Respondent's website; the 5th Respondent's Advocates' letter dated 23rd April, 2020, and of the decree dated 11th October 2017 and judgment dated 28th September 2017 issued in **Milimani Misc. (JR) Application No. 13 of 2013- Republic v City Council of Nairobi Town Clerk & 3 Others Ex Parte Metro Trans Limited.**

The Determination

7. I am satisfied that the Applicant has demonstrated that this matter is urgent, and that the same ought to be heard on a priority basis since an application for the allotment of the disputed slots by the 5th Respondent.

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

9. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success. In the present application, the Applicant has provided evidence of the application made by 5th Respondent to be allotted pick-up and dropping slots, and of their road licences, to illustrate the irregularity of the application

10. To this extent I find that the Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

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

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

12. It has in this regard been held that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation. See in this regard the decisions in **Taib A. Taib vs. The Minister for Local Government & Others, Mombasa HCMISCA. No. 158 of 2006; Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995; Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others, (2014) e KLR; and James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR.**

13. In the present application, while the Applicant has provided evidence of an application made by the 5th Respondent to be allotted pick up and dropping slots, it has not provided evidence of any decision made by the 1st, 2nd and 3rd Respondents on the said application. To this extent, the prayer for stay of any such decision is speculative and is not merited.

The Orders

14. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 16th June 2020 is merited to the extent of the following orders:

I. The Applicants' Chamber Summons application dated 16th June 2020 be and is hereby certified as urgent, and that the same is hereby admitted for hearing *ex parte* at the first instance.

II. The Applicant is granted leave to apply for an order of Prohibition prohibiting the 1st and 2nd Respondents from allotting to the 5th Respondent pick-up and dropping slots at the Ambassador Hotel, General Post Office (GPO) and Kencom bus termini (westbound), GPO and ICEA stages (eastbound) or allowing the 5th Respondent to operate within the Nairobi Central Business District via City Hall Way, Mama Ngina Street and Kenyatta Avenue without obtaining the necessary Road Service Licenses;

III. The Applicant is granted leave to apply for an order of prohibition prohibiting the 1st, 2nd, 3rd and 4th Respondents from allowing the 5th Respondent to operate within the Nairobi Central Business District or to pick and drop passengers at the General Post Office (GPO) and Kencom bus termini based on the Decree dated 11th October, 2017 in Milimani Misc. (JR) Application No. 13 of 2013- Republic v City Council of Nairobi Town Clerk & 3 Others Ex Parte Metro Trans Limited.

IV. The Applicant is granted leave to apply for an order of mandamus compelling the 1st, 2nd and 3rd Respondents to involve the Applicant as a bona fide stakeholder, in any decision making process pertaining to allocation of slots to any public transport operator at the General Post Office (GPO), Ambassador Hotel and Kencom bus termini.

VI. The prayer that the grant of leave do operate as a stay of any decision by the 1st, 2nd and 3rd Respondents purporting to allot any slots to the 5th Respondent based on the Decree dated 11th October, 2017 in Milimani Misc. (JR) Application No. 13 of 2013- Republic v City Council of Nairobi Town Clerk & 3 Others Ex Parte Metro Trans Limited is denied.

VI. The costs of the Chamber Summons dated 16th June 2020 shall be in the cause.

VII. The Applicant shall file and serve the Respondents with the substantive Notice of Motion, and shall also serve the Respondents with the Chamber Summons dated 16th June 2020 and its supporting documents, a copy of this ruling, and a mention notice, within fourteen (14) days from today's date.

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

IX. This matter shall be mentioned on 27th July 2020 for further directions.

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

XI. All the parties shall file their pleadings, applications and written submissions electronically, by sending them to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com, and shall also avail the electronic copies in word format.

XII. The electronic copies of pleadings and documents sent by the parties shall be clearly and correctly titled to indicate the J.R Case Number, the description of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

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

XIV. The parties shall also be required to send the respective affidavits of service by way of electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Friday, 19th June 2020.

XVI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on

27th July 2020, and bring it to the attention of a Judge in the Division on that date for directions.

XVII. Parties shall be at liberty to apply.

15. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF JUNE 2020

P. NYAMWEYA

JUDGE