



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC E054 OF 2020

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

BETWEEN

SNOWBALL SACCO LIMITED.....1ST APPLICANT

ASTRABELL LIMITED.....2ND APPLICANT

AVERTECH LIMITED.....3RD APPLICANT

VERSUS

NAIROBI METROPOLITAN SERVICES.....RESPONDENT

AND

KENYA RAILWAYS STAFF RETIREMENT

BENEFITS SCHEME.....INTERESTED PARTY

RULING

The Application

1. The 1st and 2nd Applicant companies herein own and operate public service vehicles (PSVs), and state that they are licensed to operate the Nairobi- Kiserian-Ngong route, while the 3rd Applicant company is their strategic investment vehicle. The Applicants are aggrieved by the decision by the Nairobi Metropolitan Services, which it has sued as the Respondent herein, to effect a blanket ban on all PSVs from the Nairobi Central Business District (CBD) from 1.11.2020.

2. The Applicants have therefore brought an application by way of a Chamber Summons dated 27th October 2020, seeking the following orders:

1. The application be certified as urgent and heard ex-parte in the first instance.

2. Leave be granted for the Applicants to apply for:

i. An order of certiorari to issue to bring into this Court for quashing the decision made by the Director General of Nairobi Metropolitan Services (NMS) Major Mohamed Badi announced on 8.9.2020 during the Parliamentary Transport Select Committee Session intending to effect a blanket ban on all Public Service Vehicles (PSV) popularly known as Matatus from accessing the Nairobi Central Business District (CBD) from 1.11.2020.

ii. An order of prohibition to issue against the Respondent prohibiting it from implementing or enforcing the blanket ban of Public Service Vehicles (PSV) from Nairobi Central Business District (CBD) as announced by its Director General on 8.9. 2020 during Parliamentary Transport Select Committee Session without addressing the concerns raised by the Applicants who have leased and operate a private bus termini and parking area for its vehicles on L.R. No. 209 / 12401, Goodshed Area, Opposite Haile Selassie Avenue.

3. That such leave granted herein do act as stay of implementation of the decision by the Respondent intending to ban Public Service Vehicles (PSV) from the Central Business District (CBD) in respect of the clearly marked and identifiable vehicles owned and operated by the Applicants namely Snowball Sacco and Astrabell buses and mini-buses plying the Ngong Road and Lang'ata Road routes.

4 . Costs be provided for.

3. The Application is supported by a statutory statement dated 27th October 2020, and a verifying affidavit sworn on the same date by Kelvin Mogaka, the 1st Applicant's chairman. The main ground for the application is that unlike most of the PSV operators in Nairobi who rely on public bus termini or parking space in the Nairobi CBD for their operations, the Applicants have through their Investment vehicle, the 3rd Applicant herein, leased private space on L.R. No. 209/12401 that is situated at Goodshed Area, Opposite Haile Selassie Avenue that serves as a private bus termini, parking and holding area for their buses and a dropping and pick-up stage for the passengers travelling on their vehicles.

4. Further, that the aforesaid parking space on L.R. No. 209/12401 is owned by the Kenya Railways Staff Retirement Benefits Scheme, which is joined as the Interested Party herein, and the Applicants have been operating from the said space since 2019 and have lease obligations running up to December. 2021. The Applicants annexed a YouTube video recording of part of the proceedings by the Parliament Select Committee on Transport wherein the Respondent's Director General confirmed the decision to ban all PSVs from the CBD with effect from November 2020, and copies of the contracts signed with the Interested Party.

The Determination

5. I am satisfied that the Applicants have demonstrated that this matter is urgent, and that the same ought to be heard on a priority basis in light of the looming ban of PSVs from the Nairobi CBD.

6. On the orders sought by the Applicants 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.

7. 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 Applicants have provided evidence of the decision made by the Respondent on the intended ban on their PSVs and of their arrangements as to parking of the said PSVs

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

9. 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.”

10. 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.**

11. In the present application, while the Applicant has provided evidence of the decision made by the Respondent, it is my view that the Respondent and Interested Party need to be given an opportunity to address the allegations made by the Applicants before any orders of stay, if any, are granted in this matter.

The Orders

12. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 27th October 2020 is merited to the extent of the following orders:

I. The Applicants' Chamber Summons application dated 27th October 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 Applicants are granted leave to apply for an order of certiorari to issue to bring into this Court for quashing the decision made by the Director General of Nairobi Metropolitan Services (NMS) Major Mohamed Badi announced on 8.9.2020 during the Parliamentary Transport Select Committee Session intending to effect a blanket ban on all Public Service Vehicles (PSV) popularly known as Matatus from accessing the Nairobi Central Business District (CBD) from 1.11.2020.

III. The Applicants are granted leave to apply for an order of certiorari to issue to bring into this Court for quashing the prohibition to issue against the Respondent prohibiting it from implementing or enforcing the blanket ban of Public Service Vehicles (PSV) from Nairobi Central Business District (CBD) as announced by its Director General on 8.9. 2020 during Parliamentary Transport Select Committee Session without addressing the concerns raised by the Applicants who have leased and operate a private bus termini and parking area for its vehicles on L.R. No. 209 / 12401, Goodshed Area, Opposite Haile Selassie Avenue.

IV. The prayer that the leave granted herein operates as a stay of implementation of the decision by the Respondent intending to ban Public Service Vehicles (PSV) from the Central Business District (CBD) in respect of the clearly marked and identifiable vehicles owned and operated by the Applicants namely Snowball Sacco and Astrabell buses and mini-buses plying the Ngong Road and Lang'ata Road routes shall be canvassed inter partes at a hearing to be held on 15th December 2020.

V. The Applicants shall file and serve the Respondent and Interested Party with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated 27th October 2020 and skeletal submissions on the prayer for stay therein, (iii) a copy of this ruling, and (iv) a hearing notice, within twenty-one (21) days from today's date.

VI. Upon being served with the said pleadings and documents, the Respondent and Interested Party shall be required to file their responses to the substantive Notice of Motion and skeletal submissions on the prayer for stay within twenty-one (21) days from the date of service.

VII. 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' prayer for stay and substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

VIII. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

IX. 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.

X. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 15th December 2020.

XII. 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, 30th October 2020.

XIII. Parties shall be at liberty to apply.

13. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF OCTOBER 2020

P. NYAMWEYA

JUDGE