



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 1 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN  
THE NATURE OF JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT SECTION 8 AND 9 CHAPTER 26, LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF SECTION 3,4,17 AND 34 OF THE NATIONAL TRANSPORT AND  
SAFETY AUTHORITY ACT, 2012**

**AND**

**IN THE MATTER OF DIRECTIVES ISSUED BY THE DIRECTOR GENERAL OF THE  
NATIONAL TRANSPORT AND SAFETY AUTHORITY VIDE A LETTER DATED 29TH  
DECEMBER, 2017**

**IN THE MATTER OF ARTICLES 10, 22,23,27,73, 74 AND 75 OF THE CONSTITUTION OF  
KENYA 2010.**

**BETWEEN**

**MARIMBA INVESTMENTS LIMITED.....APPLICANT**

**VERSUS**

**THE DIRECTOR GENERAL OF THE NATIONAL**

**TRANSPORT AND SAFETY AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL TRANSPORT AND SAFETY AUTHORITY...2<sup>ND</sup> RESPONDENT**

**THE TRAFFIC COMMANDANT.....3<sup>RD</sup> RESPONDENT**

**RULING ON LEAVE AND STAY.**

1. By a chamber summons dated 2<sup>nd</sup> January 2018 and filed on 3<sup>rd</sup> January 2018 the ex parte applicant **Marimba Investments Limited** seeks from this court (1) Leave to apply for the following Judicial Review orders:-

*a) Certiorari to bring into this court and quash the decision made by the 1<sup>st</sup> respondent Director General of the National Transport and Safety Authority (NTSA) to suspend all operations of all motor vehicles operating under the applicant Sacco, contained in the letter dated 29<sup>th</sup> December, 2017 and referred NTSA/R&L/Comp/010/080.*

*b) An order of prohibition be issued to prohibit interference and meddling in the applicant's operations and the making of decisions, directions and or orders regarding the motor vehicles operating under the applicant by the respondents herein.*

*c) Mandamus be issued by this court to compel the respondents to allow the applicant to operate without interference and carry on its activities in accordance with the law.*

*d) That grant of leave do operate as stay of implementation of the directive issued in the letter dated 29<sup>th</sup> December, 2017, and referenced NTSA/R&L/Comp/010/080.*

*e) Such further orders and directives be issued to the respondents jointly and severally to facilitate just, expeditious and fair administration.*

*f) Costs of the application be borne by the respondents its servants, employees and or agents.*

2. The chamber summons is predicted on the grounds set out in the statutory statement and verifying affidavit sworn by Stephen Kamau Ndungu and annexures/exhibits thereto.

3. According to the applicant, the 2<sup>nd</sup> respondent NTSA through the 1<sup>st</sup> respondent Director General, vide letter dated 29<sup>th</sup> December 2017 referenced NTSA/R&L/Comp/010/080, suspended with immediate effect the operations of the applicant and directed the 3<sup>rd</sup> respondent Traffic Commandant Nairobi County to impound any vehicle belonging to the applicant that is found operating on the roads.

4. It is claimed that the 2<sup>nd</sup> respondent is mandated under the Act to issue licences to drivers and conductors of public service vehicles.

5. It was averred that by suspending operations of all motor vehicles operating under the applicant Sacco, the 1<sup>st</sup> respondent acted illogically, irrationally and reached an unreasonable conclusion.

6. The applicant claims that the cause of suspension is the incident that occurred on 24<sup>th</sup> December 2017 involving motor vehicle registration No. KCF 793Z registered under the applicant Sacco wherein the driver and conductor of the aforesaid motor vehicle were involved in an altercation that led to the death of one Joseph Kiarie who was a fellow motorist.

7. That the incident was reported to Kasarani Police Station and booked under OB No. 99/24/12/2017 whereupon the police commenced investigations to unravel what really happened to the deceased.

8. That on 25<sup>th</sup> December 2017, the applicant supplied particulars of the offending/affected motor vehicle and deposited the said vehicle at Kasarani Police station and that the applicant has continued to co-operate fully with the investigators as they try to resolve the mystery that led to the death of the deceased Joseph Kiarie.

9. The applicant asserts that it is alleged that the deceased met his death when his friends who were occupants of his vehicle fought with the driver and conductor of the applicant's Sacco vehicle, which

fight was outside the vehicle hence the applicant's vehicles have no collective responsibility and that neither is the applicant under any investigations over the said incident and death.

10. It was claimed that the letter of 29th December 2017 violates the Constitution, The National Transport and Safety Authority Act, 2012 and disregards the rule of law and rules of natural justice.

11. Further, that the 1<sup>st</sup> respondent exceeded his jurisdiction hence his directives are null and void and amounts to abuse of office and that the respondents' actions are not immune to judicial scrutiny as they demonstrate impunity and disrespect for the legitimate governance of our road networks systems.

12. In the verifying affidavit sworn by the ex parte applicant's official, it is deposed that majority of the vehicles operating under the applicant Sacco are on loan hence their suspension from operating is injurious to them and that they stand to suffer financial loss unless stay of implementation of the directive is issued.

13. The ex parte chamber summons which this court directed that it be served upon the respondents for inter partes hearing was vehemently opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents who filed grounds of opposition dated 8<sup>th</sup> January 2018 on the same day contending that: the applicant had not exhausted the internal appeal mechanisms to the Transport Licencing Appeal Board established under Section 39 of the National Transport and Safety Authority Act; that the applicant has not made any application to be exempted from such exhaustion of internal appeal mechanisms; that the applicant in all Judicial Review applications is the Republic and that the application is an abuse of the court process.

14. The 1st and 2nd respondents urged the court to dismiss the applicant's application with costs.

### **SUBMISSIONS.**

15. The parties' advocates canvassed the chamber summons orally on 5<sup>th</sup> January 2018 with Mr Wachira advocate representing the applicant whereas the 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by Mrs Sirai advocate.

16. Mr Wachira reiterated what is contained in the statutory statement and the verifying affidavit of his client and maintained that the 1<sup>st</sup> and 2<sup>nd</sup> respondent's decision as contained in the impugned letter dated 24th December 2017 is unreasonable and unlawful. It was submitted that the Director General of NTSA acted on a matter which was within the realm of criminal law on individual criminal responsibility.

17. Further, that the decision made by the two respondents to be implemented by the 3<sup>rd</sup> respondent Traffic Commandant of the Nairobi Region falls within Wednesbury's unreasonableness, is illogical and outrageous because the police were already investigating the incident and that the applicant is not one of those being investigated. It was therefore submitted that the decision by the 1st and 2nd respondents lacked legal basis.

18. Further, that the applicant has over 40 vehicles plying Nairobi and its environs and are owned by different people who should not be collectively punished. It was submitted that the applicant has employees and hence the suspension by the 1<sup>st</sup> respondent affects innocent employees under the applicant Sacco.

19. On the 1<sup>st</sup> and 2<sup>nd</sup> respondent's grounds of opposition, it was submitted that the decision in JR 10/2017 relied on by the respondents refers to the application to grant or vary a licence and not a decision to suspend a licence hence the case is inapplicable to this case. It was further submitted that appeal to the Appeals Board is not mandatory but discretionary and that unlike in JR 10/2017 where the applicant sought for mandamus, the applicant herein has not sought for mandamus.

20. A further submission was made that in any case, under Section 9(2) of the Fair Administrative Action

Act, a party may be exempted from appealing to the internal appeal or review mechanisms.

21. Further, that in any case the Appeal Board belongs to the National Transport and Safety Authority hence the Appeals Board would not be fair. Counsel urged the court to allow the application because the applicant's vehicles are on loan and that it had lost business on a daily basis.

22. In a terse opposition to the chamber summons for leave to apply and stay of the impugned decision, Mrs Sirai counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents relied on the grounds of opposition filed on 5th January 2018.

23. According to Mrs Sirai, the applicant does not deserve the exercise of this court's discretion because it had not exhausted the internal appeals mechanisms as stipulated in Section 39 of the National Transport and Safety Authority Act and that whatever orders that are being sought from this court, can be granted by the Appeals Board established under the Act.

24. In addition, it was submitted that there was no application for exemption from resorting to the internal appeals mechanisms. It was further submitted that the National Transport and Safety Authority Act establishes the Authority and the Appeals Board which are distinct bodies with different mandates.

25. Further, that Section 34 of the NTSA Act gives the Authority power to revoke the licence of a licensee if the terms of the licence are breached and that the licensee must have a Code of Conduct to be adhered to by its operators. In this case, it was submitted that the driver and conductor of the Applicant Sacco Vehicle assaulted a motorist and killed him which was in breach of the Code of Conduct.

26. Further, that the impugned letter issued by the NTSA has conditions to be satisfied before the licence is reinstated including, production of the offending driver and conductor. It was also submitted that the applicant has refused to obtain the good conduct certificates for their employees who have refused to go to the National Transport and Safety Authority.

27. Referring to JR 10/2017 a decision of this court, it was submitted that where there is an alternative remedy, it must be exhausted before coming to court. In this case, it was submitted that no special circumstances have been shown to exist hence the application for leave and stay should be declined.

28. In a brief rejoinder, Mr Wachira counsel for the applicant reiterated that Section 38 of National Transport and Safety Authority Act is clear and that the facts of JR 10/2017 are different from this case and maintained that this court has jurisdiction to hear and determine this matter. It was further submitted that it is the respondents who issue certificates of good conduct to the conductors and drivers and that the conditions imposed on the applicant are so outrageous and one-sided.

29. Further, that it is not the responsibility of the applicant to produce drivers and conductors who have committed criminal offences. It was submitted that in this case the applicant had written statements with the police on what it knew concerning the incident that led to the killing of Mr Joseph Kiarie in the hands of the Sacco Vehicle hence the orders sought should be granted.

### **DETERMINATION.**

30. I have carefully considered the applicant's application as supported by the statutory statement, verifying affidavit and annexures thereto.

31. I have given equal consideration to the 1<sup>st</sup> and 2<sup>nd</sup> respondent's grounds of opposition, and both parties' advocates oral submissions.

32. The main issue for determination is whether the prayers sought by the applicant are available.

33. The respondents have also raised an issue of preliminary nature to the effect that the applicant is improperly before this court because there are internal appeal mechanisms which the applicant has not

exhausted before resorting to court for Judicial Review remedies hence the court has no jurisdiction to hear and determine these proceedings.

34. It is trite law that where a preliminary point of law is raised touching on jurisdiction of the court to hear and determine a matter, the court must first investigate that issue of jurisdiction before proceeding to delve into the merits of the case.

35. This is because jurisdiction is everything without which a court of law acts in vain. See **Motor Vessel “Lilian S” vs Caltex Oil(K) Ltd [1989] KLR 1** where it was held that jurisdiction is everything without which the court has no power to make one more step and that the court must down its tools once it establishes that it has no jurisdiction to hear and determine a matter, because lack of jurisdiction renders the proceedings a nullity.

36. The respondents contended that the applicant has an alternative remedy under Section 39 of the National Transport and Safety Authority Act to Appeal to the Transport Licencing Appeals Board challenging the decision of the Director General of the 2<sup>nd</sup> respondent National Transport and Safety Authority and that where there are special circumstances then the applicant could apply to be exempted from resorting to internal appeal mechanisms, but that in this case the applicant has not complied with the above provision under the Act.

37. On the part of the applicant, its counsel Mr Wachira submitted that in any case, the Appeals Board will not act fairly because the Board belongs to the Authority and that the court can exempt the applicant from resorting to the appeals mechanisms under the Act since the section does not mandate the filing of the appeal but that it is couched in discretionary terms “*may appeal.*”

38. Further, that JR 10/2017 is different from this case as it does not concern mandamus.

39. First and foremost is that leave to institute Judicial Review proceedings is necessary to weed out frivolous, vexatious applications or applications which are time barred or statute barred, or wherein the court would have no jurisdiction to entertain the application.

40. At leave stage, the applicant is only expected to demonstrate that it has a prima facie arguable case for further investigation at the substantive stage. But an arguable case is not necessarily one that must succeed. In the spirit of access to justice, courts are not expected to lock out litigants who wish to ventilate their grievances before a court of law.

41. However, where it is clear that the court’s jurisdiction is divested by either the Constitution or an Act of Parliament, then the court would not wade into the merits of the dispute but it would be expected to make a finding on its jurisdiction and where it finds that its jurisdiction is divested, it must down its tools and say no more.

42. Section 39 of the National Transport and Safety Authority Act establishes the Transport Licencing Appeals Board and under Section 38 of the Act;

*(1) A person who-*

*a) Being an applicant for the grant or variation of a licence, is aggrieved by the decision of the Authority on the application;*

*b) Having made an objection to any such application as aforesaid, being an objection which the Authority is bound to take into consideration, is aggrieved by the decision of the Authority thereon; or*

*c) **Being the licensee is aggrieved by the revocation or suspension thereof;***

*May, within the time and in the manner prescribed, appeal to the Appeals Board Established under*

*Section 39.*[emphasis added].

43. Although the applicant's counsel attempted to say that the provision of section 39 of the Act only talks of variation of a licence, it is not true as the Section is clear at paragraph (c) that an appeal also lies to the appeals Board where a licensee is aggrieved by revocation or suspension of the license.

44. In addition, the usage of the word "**May**" is a discretion given to an aggrieved party to choose whether to appeal to the Appeals Board or not to appeal. The Act does not provide for another alternative way of challenging the decision of the Authority to revoke or suspend a license.

45. In this case, the 1<sup>st</sup> and 2<sup>nd</sup> respondents did make an administrative decision on 29<sup>th</sup> December 2017 to suspend the operations of the applicant Sacco vehicles following an alleged murder incident arising from a dispute between a driver and a conductor of one of its fleet vehicles killing another motorist, following an accident.

46. The letter dated 29<sup>th</sup> December 2017 is signed by the 1<sup>st</sup> respondent as the Director General of the 2<sup>nd</sup> respondent Authority, NTSA.

47. The applicant's vehicles operate on the basis of and in accordance with a licence terms issued to them by the 2<sup>nd</sup> respondent as per the Regulations made under the Act and therefore observance of the said Public Service Vehicle Regulations is a condition of the licence. The conditions include observance of a Code of conduct governing the conduct of employees, agents and subcontractors (see Regulations 5(1) (c) and 10(c) Regulations 2014.

48. It follows that where the National Transport and Safety Authority is persuaded that there has been no observance of the Regulations or Code of Conduct stipulated in the Regulations by the motor vehicle operators, it may, for good cause, suspend or revoke the licence of the operator. Where the National Transport and Safety Authority so revokes or suspends the operator's licence, it must however do so within the confines of the law.

49. And the person aggrieved by the decision to suspend the licence is guaranteed a right of appeal to the Transport Licencing Appeals Board. The Board as established under Section 39 of the Act is a tribunal established to hear and determine disputes between licensees and the National Transport and Safety Authority( Authority). It is therefore not true that the Appeals Board belongs to the Authority and that therefore the applicant who is aggrieved by the decision of the Authority cannot get a fair hearing before the Appeals Board since the two bodies are distinct and have distinct mandates, as correctly submitted by Mrs Sirai. Furthermore, the Appeals Board is a Tribunal falling under the Judiciary as stipulated in Article 169(1) (d) of the Constitution.

50. The National Transport and Safety Authority Act was enacted to be effective in the management of the National Transport and road Safety matters and therefore where there is an established mechanism for resolving disputes under the Act, failure to resort to those internal mechanisms would frustrate the implementation of the Act and render the institutions established under the Act Otiose or useless or redundant.

51. The Appeals Board established under the Act is a specialized body comprising of experts in the transport sector with the mandate of resolving disputes arising between and among players in the sector.

52. Article 159 of the Constitution of Kenya is clear that in the exercise of Judicial power by courts and tribunals established under the Constitution, they must promote and embrace alternative resolution mechanisms.

53. In addition, Article 50(1) of the Constitution recognizes that every person has the right to have any dispute that has to be resolved by application of the law to be decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

54. It therefore follows that where a party fails to utilize the available internal dispute resolution mechanisms set out in the parent Act, to rush to court by by-passing those internal appeals mechanisms is to urge the courts to oust the jurisdiction of competent statutory bodies or authorities in the exercise of their functions and powers conferred by law.

55. This court must, whenever it is faced with a situation where though it may have jurisdiction to entertain a matter, but where similar jurisdiction is conferred on another body or competent authority by statute, adopt an interpretation that most favours the spirit and letter of the parent Act so that the implementation of the Act is not rendered useless.

56. In **Constitution Petition No. 359 of 2013 Diana Kethi Kilonzo vs IE BC & 2 Others**, it was held, inter alia

*“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision making be shared by different bodies. The decision of Kenyans must be respected, guarded, and enforced. The courts should not cross over to areas which Kenyans respectively reserve for other authorities.”*

57. The Court of Appeal in Trinidad Tobago case of **Damian Belfonte vs The Attorney General of Trinidad and Tobago CA 84/2004** added its voice to this debate of resort to internal review or appeal mechanisms before approaching the court and held that where there is a means of redress that is adequate, the court should exercise restraint. The court held:

*“The opinion in Jaroo has recently been considered and clarified by the Board in Attorney General vs Ramanoop. Their Lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their Lordships words:*

*“Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate.*

*To seek constitutional relief in the absence of such a feature would be a misuse of abuse, of the court’s process. A typical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power. Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the Constitution. It would not be fair, convenient, or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights.”*

58. In **Petition No. 203/2012 Kapa Oil Refineries Ltd vs Kenya Revenue Authority, & 2 Others**, Lenaola J ( as he then was ) stated and I concur that:

*“ I am also aware that even if this court has jurisdiction to determine a violation of fundamental rights and freedoms, it must also first give an opportunity to other relevant bodies established by law to deal with the dispute as provided in the relevant statute. This rule was well articulated by the Court of Appeal in Narok County Council vs Transmara County Council [2000] 1 EA 164 where it stated that:*

*“ It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister refuses to give direction or in purporting to do so, arrives at a decision*

*which is grossly unfair or perverse. In the latter case his decision at page 15 of 24 can be challenged by an application to the High Court for writ of certiorari because under the relevant section, the decision is to be made on a fair and equitable basis.”*

59. This court in **JR 10/2017 Saferider Vehicle Technologies (PTY) & 2 Others vs The National Transport and Safety Authority (NTSA)**, and while adopting many other decisions of the Court of Appeal including **Republic vs National Environmental Management of the National Assembly Nairobi CA 92/1992; Republic vs Ministry of Interior and Coordination of National Government and Another ZTE JR 442/2013; Francis Gitau Parsirmei vs The National Alliance Party of Kenya & 4 Others Petition 352/2012; Kipkalya Kones vs Republic and Another Exparte Kimani Wanyoike & 4 Others [2008] EA 291** did not shy away from asserting itself in line with the holdings in the above cases and held, inter alia:

*“65. Judicial Review, though now elevated to the Constitutional threshold, is a remedy of last resort since it does not substantially look into the merits of the decision but the legality, rationality and or procedural impropriety of the decision and decision making process. It therefore ought not to be resorted to where there exist appropriate efficacious remedies to redress the grievances complained of.*

*The exparte applicants in this case had the remedy of lodging the appeal to the Transport Licencing Appeals Board established under Section 39 of the National Transport Safety Authority Act. The Board would then have examined the grounds of appeal and determined the merits of the respondent’s refusal to grant to the 1<sup>st</sup> applicants agent the licence to distribute the “ Saferider © devices (Speed governors and or to accept the vehicle speed governors certificate issued by the 3<sup>rd</sup> applicant).”*

*This is because, as earlier stated, there is no specific statutory duty placed on the respondent to do any of the things that the applicants wish this court to compel the respondent to do.*

*An Act of Parliament such as the National Transport and Safety Authority Act and others with inbuilt dispute resolution mechanisms are self embodiments and cannot be wished away at the altar of Judicial Review which is a remedy of last resort. The mechanisms provided for under these enactments for dispute resolution which is espoused in Article 159(2) (c ) of the Constitution must be respected.”*

*In the end, I find that not only have the applicants failed to demonstrate that they are entitled to the orders of mandamus sought as the decision of refusal to grant the licence or to accept the certificates issued by the 3<sup>rd</sup> applicant has not been sought to be quashed by this court and secondly, there was and still is an alternative remedy of exhaustion of internal appeals mechanism to the Transport Licencing Appeals Board established under Section 39 of the National Transport and Safety Authority Act. In the absence of special circumstances and Or application by the applicants for exemption from mechanisms, this court finds and holds that the exparte applicant is not entitled to the Judicial Review remedies s of mandamus sought.”*

60. The above cited holding is in line with the Court of Appeal decisions in **Speaker of the National Assembly vs Njenga Karume Nairobi CA No. 92 of 1992** where the court stated:

*“ There is considerable merit in the submission that where there is a clear procedure for redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.*

*Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure.”*

61. And in **Republic vs Ministry of Interior and Coordination of National Government & Another Exparte ZTE JR 442/2013** the court stated, inter alia:

*“.....for the court to require the alternative procedure to be exhausted prior to resorting to Judicial Review is in accord with Judicial Review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute.”*

62. The Court of Appeal further in **Republic v NEMA CA 84/2010** stated:

*“.....where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in context of the real issue is to be determined and whether the statutory appeal procedure was suitable to determine it. The learned judge, in our respectful view, considered these strictures and came to the conclusion that the appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the judge.”*

63. As I have held before and severally, albeit the above decisions were made prior to the enactment of the Fair Administrative Action Act, 2015, which Act implements Article 47 of the Constitution on the right to a fair administrative action, and albeit in this case the applicant carefully avoided reliance on the provisions of Article 47 of the Constitution and the provisions of the Fair Administrative Action Act, 2015, I have no doubt in my mind that those provisions are applicable to this case and in all cases where an administrative action, failure to act or omission is being challenged. The decision to suspend operations of the applicant's fleet of Public Service Vehicles is no doubt an administrative action made by the 1<sup>st</sup> respondent public officer on behalf of the 2<sup>nd</sup> respondent authority.

64. Section 4(2) of the National Transport and Safety Authority Act provides that in the performance of its functions under Sub Section 4(1), the Authority shall, among others;

- a) Register and licence motor vehicles;*
- b) Conduct motor vehicle inspections and certifications;*
- c) Regulate public service vehicles;*
- d) Develop and implement road safety strategies.*

65. The above provision as read with Section 38(1) of the Act on the power of the Authority to revoke or suspend a licences clearly contemplate exercise of administrative authority or power by the Authority, through the Director General. Accordingly, that exercise of administrative power is governed by Article 47 of the Constitution and the Fair Administrative Action Act, 2015, which latter implements Article 47 of the Constitution.

66. As such, albeit the applicants in the JR 10/2017 only sought for mandamus which this court found was not available to them, as there was no statutory duty placed on the National Transport and Safety Authority to grant a licence to the agent of the 3<sup>rd</sup> applicant, the principles for resort to alternative remedies are the same irrespective of whether the prayer sought are for mandamus, certiorari, prohibition, injunction, declaration, direction among other Judicial Review or constitutional remedies.

67. It is also worth noting that Judicial Review has since the promulgation of the 2010 Constitution been elevated from the ordinary common law remedy to a constitutional remedy and therefore when the Fair Administrative Action Act, 2015 was enacted, it took into account that fact and the fact that Article 23 of the Constitution recognizes Judicial Review as one of the remedies for enforcement of human rights enshrined and guaranteed in the expansive Bill of Rights. It therefore follows that since the Bill of Rights binds all persons, any implementing legislation must be implemented to the letter as long as it is not inconsistent with the Constitution which is the supreme law of the land.

68. In this regard, Section 9 of the Fair Administrative Action Act, 2015 stipulates:

***“(2) the High Court or a subordinate court under Subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”***

69. The above provision **prohibits** this court from entertaining Judicial Review proceedings where there are alternative internal mechanisms for appeal or review which have not been exhausted in the first instance.

70. In this case, the Transport Licencing Appeals Board had the power to hear appeals from decisions made by the National Transport and Safety Authority on among others: revocation and suspension of licences of the Public Service Vehicles. It follows that the applicants are expected to have first approached the Transport Licencing Appeals Board with an appeal challenging the decision of the Director General of the National Transport and Safety Authority to suspend operations of their fleet Public Service Vehicles as contained in the impugned letter dated 29<sup>th</sup> December 2017 and only after exhausting that mechanism of appeal could the applicants, if dissatisfied with the decision of the Appeals Board, approach the High Court either by way of an Appeal or Judicial Review.

71. It is therefore not sufficient for the applicants to allege that the National Transport Authority's letter and conditions thereto are outrageous and Wednesbury unreasonable. The suspension letter or notice was issued within the parameters of the Act, whether the process of issuing it was right or wrong but the intention was to regulate public service vehicles and since Section 38 of the Act contemplates that the Authority may revoke and or suspend the licence and therefore the operations of public service vehicles on the roads in its implementation of road safety strategies, the appropriate statutory body that is mandated to hear and determine the grievances regarding decisions made by the Authority is the Transport Licencing Appeals Board, and not the High Court by way of Judicial Review.

72. Furthermore, Section 9(3) of the Fair Administrative Action Act, 2015 stipulates that ***the High Court, or a subordinate court shall, if it is not satisfied that the remedies referred to in Subsection (2) have been exhausted, direct that the applicant shall first exhaust. Such remedy before instituting proceeding under Sub Section (1).***

73. In the same vein, Sub Section (4) of Section 9 of the Fair Administrative Action Act, 2015 provides that the High Court or subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

74. It follows that whereas there is a window of opportunity for an applicant to be exempted from resorting to the internal appeal mechanisms, the onus is on the applicant to prove to the satisfaction of the court that there are special circumstances to warrant such exemption and, on an application before the court for consideration on its merits.

75. Having found that the applicant has and still has the available alternative statutory internal appeals mechanism to appeal to the Transport Licencing Appeals Board to challenge the decision of the National Transport and Safety Authority and its Director General suspending the applicant's licence to operate the fleet of vehicles registered under the applicant Sacco, what remains is the question of

whether there is an exceptional circumstances for exemption from resorting to the alternative forum.

76. As earlier stated, Section 9(4) of the Act contemplates that even if there are exceptional circumstances, exemption would only be considered by the court on application by the applicant. The court is not given any latitude to exercise its discretion to decide on its own motion that there are exceptional circumstances to warrant an exemption from resorting to the alternative remedy stipulated under the Act and in this case, under Section 38 of the National Transport and Safety Authority Act.

77. Accordingly, albeit the applicant's counsel submitted too much into the merits and demerits of the application and the arguableness of the intended substantive notice of motion, this court finds that each right has a corresponding obligation to follow the law and where the statute clearly stipulates modalities for dispute resolution, this court will be acting contrary to the spirit and letter of Article 159(2) (c) of the Constitution of Kenya if it usurped powers of the Transport Licencing Appeals Board as it would be encouraging parties to take wrong cuts by taking umbrage in courts instead of approaching the rightful specialized bodies that are better equipped with experts to resolve disputes arising from the implementation of the relevant Acts of Parliament and in this case, the National Transport and Safety Act.

78. I am in agreement with the 1<sup>st</sup> and 2<sup>nd</sup> respondent's contention that the Transport Licencing Appeals Board has the mandate to deal with issues relating to the conditions stipulated in the letter of suspension of operations issued to the exparte applicant, which suspension is temporary and the conditions thereto call for dialogue on how to resolve the issues amicably including a commitment by the 2<sup>nd</sup> respondent's Director General to facilitate the applicant to meet the conditions set out in the letter of suspension.

79. On the 1<sup>st</sup> and 2<sup>nd</sup> respondent's assertion that the Judicial Review application ought to have been brought in the name of the Republic, I find and hold that no pleading or proceeding can be defeated for want of form.

80. I must add that our public transport sector in this country requires dialogue among stakeholders to resolve the ever increasing problems that bedevil the sector including alleged indiscipline and road carnage that has taken a toll on the lives of the people on our roads.

81. It is not the courts that will offer a lasting solution to the phenomena. It is dialogue and more so, alternative dispute resolution mechanisms that bring about all stakeholders to discuss and develop policies and strategies for discipline and road safety. This is so especially bearing in mind the fact that even if this court were to quash the decision of the administrative bodies, regarding revocation or suspension of licences of operators, parties would still be taken back to the drawing board which is the original position. It is a cycle of sorts that offers no solution in hand.

82. Courts of law are established to assist parties conclusively resolve their disputes and not to escalate disputes and in a way, sometimes perceived to merely perform rituals of cleansing the wrongdoers, at the expense of the right to life and to the protection of life and limb and human dignity. Any party who resists the established mechanisms for resolving disputes shows impunity which this court is not prepared to sanitize at the expense of life and extremity.

83. Accordingly, I find and hold that the exparte applicant has failed to demonstrate that this court has jurisdiction to hear and determine the dispute relating to the impugned administrative decision of 29<sup>th</sup> December 2017 before exhaustion of available efficacious appeal mechanisms established under the National Transport and Safety Authority Act hence the notice of motion dated 2<sup>nd</sup> January 2018 must fail and the same is hereby declined and dismissed with an order that each party shall bear their own costs of the application.

**Dated, signed and delivered in open court at Nairobi this 15th day of January 2018**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr Wachira for the exparte applicant

Mrs Sirai for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

N/A for the 3<sup>rd</sup> Respondent

Court Assistant: Kombo