REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR. MISCELLANEOUS APPLICATION NO. 403 OF 2017

IN THE MATTER OF THE NATIONAL TRANSPORT AND SAFETY AUTHORITY ACT, NO. 33 OF 2012 LAWS OF KENYA

IN THE MATTER OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA

IN THE MATTER OF AN APPLICATION BY THE APPLICANT, KENYA DRIVING SCHOOLS ASSOCIATION THROUGH JOHN MWATHA, FOR ORDERS OF CERTIORARI AND PROHIBITION DIRECTED TO THE NATIONAL TRANSPORT & SAFETY AUTHORITY OF KENYA

BETWEEN

REPUBLIC……..……APPLICANT

VERSUS

DIRECTOR GENERAL, NATIONAL TRANSPORT &

SAFETY AUTHORITY ……..…….. 1ST RESPONDENT

CABINET SECRETARY,

MINISTRY OF TRANSPORT &

INFRASTRUCTURE…….....2ND RESPONDENT

AND

EX PARTE: KENYA DRIVING SCHOOL ASSOCIATION

JUDGEMENT

Introduction

1. The ex parte applicant herein, **Kenya Driving School Association**, filed an application dated 7th July, 2017 seeking the following orders:

1. That an order of certiorari to quash the letter dated 27th June, 2017 issued by the National Transport And Safety Authority seeking to delink or abolish the three driver test unit based in Nairobi and relocating the testing functions and services to Likoni Inspection Centre, commencing on 1st July, 2017 and all other subsequent orders.

2. That an order of Prohibition to prohibit the National Transport And Safety Authorityfrom proceeding further with the initiating or commencing partial changes to Curriculum For Drivers, Driving Instructors And Test Examiners and to the examination centres commencing on 1st July, 2017 pending the final determination of the Nakuru High Court Constitution Petition No. 9 of 2016 In the matter of contravention of Article 10 of the Constitution and in the matter of section 3 of the National Transport And Safety Authority and in the Matter of the New Curriculum For Drivers, Driving Instructors And Test Examiners.

Applicant's Case

2. According to the Applicant, it is registered under section 10 of the ***Societies Act*** and was registered on the 21st September, 1987 and was/is at all material times a representative of all driving schools in the country.

3. The applicant disclosed that there exist 3 drivers examination centres in Nairobi the same being Karen, Jogoo Road and Ruaraka established in accordance with the law and having examiners duly authorized and gazetted in various issues of Kenya Gazette. However by a letter the Respondent abolished the 3 drivers examinations and established one new driver examination centre to be based at Likoni Road, Industrial Area which was to commence on 1st July 2017. The Respondent in their letter further stated that the Driving Schools for Nairobi region would be providing the test vehicles and that they would release a schedule on how their directive would be applied.

4. In the applicant's view, the proposed new examinations centre along Likoni Road, Industrial Area is not an examination centre and does not have capacity or a driving site or facilities to undertake drivers testing since it is a motor vehicle inspection centre. In addition, there will be congestion due to the size and population of Nairobi. The applicant averred that it is unfair for the Respondent to have only one new examination centre in Nairobi and to abolish the three existing centres without a valid reason. It was further averred that the decision to abolish the 3 existing examination centres and establish one new examination centre was not authorized by the respective cabinet secretary in charge of transport and that the said decision had not been gazetted in Kenya Gazette.

5. The applicant contended that the 3 days notice was short and insufficient for the members of the applicant who are located in various parts of Nairobi to organize them themselves and comply with it.

6. The applicant disclosed that it has a case against the Respondent being Nakuru High Court Constitution Petition No. 9 of 2016 in which the Court issued orders on 28th November 2016 stopping the Respondent from interfering with driving schools ran by members of the applicant pending hearing and determination of the petition. It was averred that the said petition had been heard and was pending ruling.

7. It was however averred that in contempt of the said orders, the Respondent proceeded to act and issue the letter dated 27th June 2017 which in the applicant's view is arbitrary and an abuse use of power.

8. The applicant deposed that in response the applicant via their letter of 22nd June 2017 explained to the respondent that they would not act in contempt of court orders and reminded them that there was a need to obey the law and comply with court orders.

9. In the applicant's view, the Respondent's action is an attempt to go round court orders and couching them like a new item while it is the same end goal they want to achieve.

10. It was the applicant's case that there was no involvement of the public or the applicant which is registered and represents all driving schools in the country in the said decision. Further, the directive was not gazetted and there was no sufficient time before bringing it into operation. It was therefore contended that it does not meet the required thresholds of subsidiary legislations.

11. It was therefore the applicant's case that the Respondent acted unprocedurally in making such directive despite the fact that there were previous orders and various laws governing the examination centre which the Respondent intended to abolish through their letter of 27th June 2017.

12. The applicant in its further affidavit insisted that no meeting was ever called to discuss the delinking or closing the Nairobi testing units and that it is clear the agenda of the meeting the Respondents are relying on was not for a discussion to delink or close the Nairobi Test Units. From the agenda, it was averred that the meeting was as follows:

> **"The Authority wish to invite you for a consultative meeting to be held on 9th May, 2017 at our hill park offices, Nairobi, starting at 9:00 Am. The agenda of the meeting is to discuss the issues concerning operations of driving schools, implementation of new curriculum, training of instructors and roll out of the new driving licence. Please send two representatives to this meeting."**

13. The applicant insisted that he does not seek in any manner to curtail the 1st Respondent from exercising its powers but only seeks that it acts legally and within the law and in obedience to court orders.

1st Respondents' Case

14. In response to the application, the 1st Respondent herein, **National Transport & Safety Authority** (hereinafter referred to as "the Authority") averred that it is a public body established as a parastatal under section 3 of the ***National Transport and Safety Authority Act No. 33 of 2012*** with the statutory functions of *inter alia to:-* advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety, implement policies relating to road transport and safety. In addition, the Authority has the mandate to plan, manage and regulate the road transport system, ensure the provision of safe, reliable and efficient road transport services and to administer the ***Traffic Act*** Chapter 403 of the Laws of Kenya.

15. It was disclosed that the Authority also registers motor vehicles, conducts motor vehicle inspections and certifications, establishes systems and procedures for, and oversees the training, testing and licensing of drivers; formulation and review of the curriculum of driving schools; regulates public service vehicles, develops and implements road safety strategies, and conducts research and audits of road safety etc.

16. It was the Authority's position that the applicant herein, the Kenya Driving Schools Association is not recognized by or registered with the National Transport & Safety Authority (hereinafter NTSA); and that under the ***National Transport & Safety Authority Act***, No. 33 of 2012 (hereinafter "NTSA Act") only individual driving schools are registered/licensed by the NTSA.

17. The Authority averred that it was not in contempt of the Orders issued in Nakuru High Court Constitutional Petition No.9 of 2016 as the said petition concerned matters of ***The Traffic (Driving Schools and Driving Instructors) Rules*** which the petitioners are challenging its implementation due to lack of public participation while the subject matter of the directive in the letter of 27th June 2017 is the location of Driver Test Units. The Authority therefore contended that the Orders in the Nakuru Petition were specifically concerned about the issue of public participation which issue is not the subject of the 1st Respondent's letter of 27th June 2017; and that if indeed the Authority was in contempt of the said orders then the right application would have been contempt application filed in Nakuru in the same matter and not in Nairobi.

18. The Authority however contended that there was due consultation of driving schools that are major stakeholders at a meeting held on 9th May 2017. It was disclosed that from Annexture *"JQ-3"*, attendees Nos. 10 and 12 were actually officials of the Applicant.

19. The Authority averred that there is no requirement under the ***NTSA Act*** for gazettement of a directive concerning the location of Driver Testing Unit; and that the directive does not fall within the realm of subsidiary legislation.

20. According to the Authority, the pre-existing centres at Karen, Jogoo Road and Ruaraka were not established under any specific law but were merely located within Police Stations or Police installations since the driver testing mandate was then being discharged by the police prior to the enactment of the ***NTSA Act*** and that Driving Schools have always provided the vehicles used for testing of drivers.

21. It was the Authority's case that unlike the pre-existing centres, the new examination centre at Likoni Road has all necessary facilities for undertaking drivers testing and for the comfort of trainee drivers waiting to take driving tests hence there will be no congestion at the new centre as it is intended that a maximum of 250 drivers will be tested every day opposed to 600 being done per day whose ultimate goal is to be more efficient. The Authority disclosed that it has 12 examiners deployed at Likoni to undertake testing while in the 3 pre-existing centres equally had 12 examiners. Therefore the issue that the services will be affected is not true.

22. According to the Authority, the move to relocate the driver testing function is informed by the need for NTSA to delink this function from the police and to consolidate it in one convenient location.

23. The Authority however denied that there is a requirement under the ***NTSA Act*** for this decision of the Authority to require the authorization of the line Cabinet secretary and that there is equally no requirement under statute or subsidiary legislation for this decision to be gazette.

24. In the Authority's view, the majority of the driving schools licensed by the Authority have no problem with its directive being challenged herein based on the engagement at the meeting of 9th May 2017 hence there is no basis for grant of the discretionary prerogative orders sought in these proceedings. It was therefore its case that this application has no merit and the same should be dismissed to allow it discharge its statutory mandate of overseeing proper driver testing as part of the efforts to improve road safety.

2nd Respondent's Case

25. The application was similarly opposed by the 2nd Respondent herein, the **Ministry of Transport and Infrastructure** (hereinafter referred to as "the Ministry").

26. According to the Ministry, section 4(2)(i) of the ***National Transport and Safety Authority Act*** (herein referred to as "the Act) provides that the Authority as part of its statutory functions shall establish systems and procedures for, and oversee the training, testing and licensing of drivers. It was disclosed that prior to enactment of the Act, the National Police was carrying out the above stated function which the authority took over after the enactment of the Act and therefore employed its own driving test examiners trained under the new curriculum for Drivers, Driving instructors and Test Examiners.

27. According to the Ministry, the three driving test centres; Karen, Jogoo Road and Ruaraka, that were used to carry out the testing of drivers and examiners are police centres belonging to the National Police Service hence the Authority has no control, ownership and or jurisdiction over them necessitating the move by the Authority to delink from the previous centres and move to Likoni Road which premises belong to and are in the control of the Authority.

28. It was averred that prior to the directive by the authority to delink, all driving schools in Nairobi were invited to attend a consultative meeting held on 9th May 2017 between the Authority and the proprietors of the driving schools on operations of driving schools. It was therefore the Ministry's case that the

decision by the Authority to issue its letter dated 27th June 2017 to the applicant informing it of its decision to delink the testing centers was informed by its mandate as provided for under the law, public interest and not any other considerations.

29. The Ministry was therefore of the view that this application only seeks to curtail the powers of the Authority to make decisions in pursuance of implementing its function and delay progress in the road transport and safety sector. It was therefore its position that the application is misconceived, frivolous, vexations, as the applicant has not demonstrated how the 2nd respondent acted illegally, unreasonably, ultra vires and or contrary to natural justice.

30. The Ministry however supported the Authority's decision to relocate the centres and the appointing Likoni Road Cenre as the examination centre for drivers.

31. It was the Ministry's case that the application is deficient and discloses no justifiable cause to warrant intervention by this Court hence the same should be dismissed with costs to the 2nd respondent.

Determination

32. I have considered the issues raised in this application.

33. The first ground upon which the application is premised is that the Respondents' action is in contempt of Court. The applicant disclosed that it has a case against the Respondent being Nakuru High Court Constitution Petition No. 9 of 2016 in which the Court issued orders on 28th November 2016 stopping the Respondent from interfering with driving schools ran by members of the applicant pending hearing and determination of the petition. It was averred that the said petition had been heard and was pending ruling.

34. I agree with the Respondents that if that was the position the applicant ought to have commenced contempt of court proceedings in the proceedings in which the contempt is alleged to have been committed. To commence fresh legal proceedings in such circumstances, in my view amount to an abuse of the court process. As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**:

> **"No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice…"**

35. This was the position adopted by **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** when he expressed himself as follows:

> **"Judicial time is an expensive resource which must be apportioned fairly to the entire spectrum of the work in the Court. Every file is important. For Courts to continually inspire confidence of the Court users and litigants, they must have a very sharp sense of proportionality, fairness and equity in the allocation of judicial time."**

36. According that ground cannot be the basis for the issuance of the orders sought herein. My position is supported by the decision of **Onguto, J** in **Eliud Nyauma Omwoyo vs. Kenyatta University & Ors [2016] eKLR** where the Learned Judge at paragraphs 35 and 38 thereof held that:

> **"35. In furtherance thereto, I wish to add that, by the better reason, the essence of filing contempt of court proceedings where the judgment or order is made is to avert filing multiple suits and dissuading litigants from litigating afresh. While it may be true that disobedience of court orders may raise constitutional issues like fidelity to the rule of law, it is important to note that it would not result in a new cause of action. Contempt proceedings have to be**

commenced to enforce the court orders and it has to be before the right forum.

38. In my view, the Petitioner could not simply commence another suit. Substantially, the parties would have to go through a repeat of the same process and trial and if vindicated the Petitioner would end up with much the same orders, given that the Petitioner also lays a base on discrimination which had earlier been conclusively adjudicated.."

37. The next ground was that the decision to abolish the 3 existing examination centres and establish one new examination centre was not authorized by the respective Cabinet Secretary in charge of transport and that the said decision had not been gazetted in Kenya Gazette.

38. The applicant has however not cited to the Court the legal provision that requires that before such a decision is made the authorization of the Cabinet Secretary is necessary. Apart from that the applicant seems to be of the view that the said decision was a subsidiary legislation requiring gazettement. Section 2 of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya provides that:

"subsidiary legislation" means any legislative provision (including a transfer or delegation of powers or duties) made in exercise of a power in that behalf conferred by a written law, by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument;

39. Therefore for a decision to amount to a subsidiary legislation, it must first of all be a legislative provision in the sense that it must be a process by which a law is made. In this case, what is in contention is simply a decision to designate certain centres as centres for examination of drivers. That in my view cannot by any stretch of imagination be termed as a subsidiary legislation in order for the mandatory gazettement to be required.

40. In **Catholic Diocese of Moshi vs. Attorney General [2000] 1 EA 25 (CAT)**, it was held that the requirement that administration and remission orders made by the Minister under two statutory provisions (section 7(1) of the ***Customs Tariff Act*** of 1976 (Act 12 of 1976) and section 28(1) of the ***Sales Tax Act*** 1976 (Act 13 of 1976)), being administrative acts with no legislative effect whatever, be given publicity in the Gazette was no more than directory. The failure to comply with the directive, it was held, did not affect the validity of the orders since the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim "ignorance of the law does not excuse" more rational, in view of the growing stream of delegated legislation.

41. Therefore, it is my view and I so hold that unless there is an express requirement that a decision be by gazettement, the gazettement is merely directive and the failure to gazette the same does not necessarily nullify the decision.

42. With respect to public participation, the Respondents have averred that there was in fact such participation and that some of the people who attended the session were representatives of the applicants. It is however appreciated that the manner in which public participation is to be conducted must take into consideration the context in which the action is being undertaken. Dealing with this issue, it was held by the South African Constitutional Court in **Doctors for Life International vs. The Speaker of the National Assembly & Others(CCT 12/05) [2006] ZACC 11; 2006 (12) BCLR 1399(CC); 2006 (6) SA 416(CC)** that:-

"The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are "facilitate" and "involvement". To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "(a) taking part with others (in an action or matter);…the active involvement of members of a community or organization in decisions which affect them". According to their plain and

ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something…it is clear and I must state so, that it is impossible to define the forms of facilitating appropriate degree of public participation. To my mind, so long as members of the public are accorded a reasonable opportunity to know about the issues at hand and make known their contribution and say on such issues, then it is possible to say that there was public participation."

43. However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the regulation-making body that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the regulation-making and taken in formulating the final regulations. As was appreciated by **Sachs, J**. in the South African case of the **Minister of Health vs. New Clicks South Africa (Pty) Ltd [2005] ZACC:**

"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case." [Emphasis supplied]

44. Therefore the mere fact that particular views have not been incorporated in the making of regulations does not justify the court in invalidating the enactment in question. As was appreciated by **Lenaola, J** in **Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013**, public participation is not the same as saying that public views must prevail. The same Judge in **British American Tobacco Kenya Limited versus Cabinet Secretary, Ministry of Health & 4 Others [2016] eKLR** expressed himself at paragraph 90 as hereunder:

"As the cases cited above illustrate, the Regulations cannot properly be impugned on the basis that the petitioner's views were not taken into considerations: the position is that there is no requirement that the views held by any particular group or individual on a matter before the legislature or regulation – making body must prevail…While there is an obligation on Parliament under Article 118 cited elsewhere in this judgment to facilitate public participation, there is no requirement that legislation will be invalidated simply because there was a perception that a certain level of public participation was not achieved."

45. In light of conflicting factual averments made herein by both parties on this issue, to reconcile the same would amount to making a decision on merits which is not the purpose of judicial review proceedings. This was the position adopted by **Emukule, J** in **John Muraya Mwangi & 495 others & 6 Others vs. Minister for State for Provincial Administration & Internal Security & 4 Others Nakuru Petition No. 3 of 2011 [2014) eKLR**, where the learned Judge held that:

"Similarly the court cannot say with certainty that there was comprehensive consultation in the passage of the new Regulations. It cannot also say that there was no consultation. The benefit of doubt will therefore go to the purpose of the legislation to regulate the manufacture and sale of alcoholic drinks, and to protect consumers, and especially the children."

46. I agree that the benefit of doubt ought to go to the need to delineate the operations of the National Police Service from those of the National Transport and Safety Authority.

Determination

47. In the premises I find no merit in this application which I hereby dismiss with costs.

48. Orders accordingly.

Dated at Nairobi this 23rd day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ngila for the applicant

Miss Robi for Mr Thiga for the 1st Respondent and Miss Mutindi for the 2nd Respondent

CA Ooko