



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 6 OF 2017

IN THE MATTER OF ARTICLE 19, 20, 21, 22, 23, 43, 46 AND 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 43, 46 AND 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED BREACH OF ARTICLE 10, 108 AND 85 OF THE CONSTITUTION OF KENYA

AND

IN THE ALLEGED BREACH OF SECTION 58(1)(b) AND (f) 34(a)(g) AND (h) OF THE COUNTY GOVERNMENT ACT 2012 AND SECTION OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

BETWEEN

MUNAWAR SHUTTLE.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF KILIFI.....1ST RESPONDENT

AL WAHIM EXPRESS SHUTTLE COMPANY LTD....2ND RESPONDENT

001 INVESTMENT.....3RD RESPONDENT

JUDGEMENT

1. The Petitioner, Munawar Shuttle Limited, is a limited liability company carrying on public transport services business within Kilifi County. The 1st Respondent, the County Government of Kilifi is a creature of Article 176 of the Constitution with the mandate to carry out the roles assigned to county governments by the Constitution and the laws made thereunder. Al Wahim Express Shuttle Company Limited is a limited liability company also providing public transport services within Kilifi County. The 3rd Respondent, 001 Investment, a cooperative society, is likewise engaged in provision of public transport services within Kilifi County.

2. Through the Petition dated 22nd March, 2017, the Petitioner seeks orders as follows:

“1. A declaration that the 1st Respondent’s directive dated 9th March, 2017 is unconstitutional and or legally and therefore null and void.

2. A declaration that the 1st Respondent Directive dated 9th March, 2017 infringes and or violates the Petitioner’s fundamental rights and freedoms particularly the right to Economic and Social Rights, Consumers Rights and the right to a fair administrative action under articles 43, 46 and 47 of the Constitution of Kenya,2010.

3. A prohibitory order prohibiting the 1st, 2nd and or 3rd Respondents from restricting the operations of the Petitioner at the Malindi Public Bus Park by implementing and or carrying out the 1st Respondent's directive dated 9th March, 2017.

4. A Conservatory Order restricting the 1st, 2nd and 3rd Respondents, their employees, agents, servants and or any person authorized by them from implementing the respondent's directive dated 9th March, 2010.

5. An Interim Conservatory Order in terms of prayer 4 hereinabove pending the hearing and determination of the Petition herein.

6. Damages.

7. Any other relief that the Honourable Court may deem fair and just to grant."

3. This Petition revolves around a notice issued on 9th March, 2017 by the 1st Respondent's Department of Roads, Transport and Public Works directed to all public service operators at Malindi New Bus Park titled: **"Operations for Malindi-Mombasa Matatu Route"**, which stated *inter alia*:

"Following failure to come up with workable solutions on the boarding challenges, the department of Roads, Transport and Public Works in its endeavor to ensure a peaceful boarding and healthy working environment at the bus park, hereby give the following directions.

1. The Malindi bus park shall be managed by newly formed Malindi bus park management committee whose membership has been drawn from all saccos operating in the park, The Kenya Police Service, Sub-County Administration and the Department of Road Transport and Public Works.

2. The Malindi-Mombasa shuttles (11 seater) shall operate under one podium on a 1:1:1 ratio basis.

3. The Malindi-Mombasa Express matatus (14 seaters) shall continue to operate from one podium as before.

4. That peaceful environment shall be maintained in the bus park and respect for passengers and their property shall be upheld.

The changes will take effect from the date of this letter. Kindly be informed."

4. The Petitioner's case is that in order for the economic and social rights guaranteed under Article 43 of the Constitution to be enjoyed, the state has a duty to provide a conducive environment in which the Petitioner can conduct its business freely, safely and effectively without interference or hinderance from any person including the respondents.

5. According to the Petitioner, being duly registered to conduct public transport business and having leased a stall at Malindi bus park and paying the daily required fees, it is entitled to a conducive environment for the smooth conduct of its economic operations which includes: competing with the 2nd and 3rd respondents without being placed under unfair trade practices; advertising and marketing its business without interference or undermining of its products; and safe environment to conduct its business without harassment or intimidation.

6. The Petitioner's case is that the 1st Respondent failed or neglected its mandate to provide a conducive trading environment thereby violating its rights under Article 43 of the Constitution by:

(a) failing to take up its function under the Fourth Schedule, Part 2, Clause 5(c) and 7(b) and (c) of the Constitution;

(b) failing to make laws as mandated under Articles 185(1) and 186 of the Constitution to regulate the use of public parking areas in line with its function under the Fourth Schedule; and

(c) failing to make policies, that ensures enjoyment of rights under Article 43 of the Constitution.

7. The Petitioner avers that the alleged failures on the part of the 1st Respondent has resulted in chaos, uncertainty and unfair trade practices in the use of Malindi public bus park and violation of the Petitioner's rights provided by Article 43 of the Constitution.

8. It is the Petitioner's position that the 1st Respondent has allowed its Executive Committee to illegally and wrongly issue directives that are unfair and oppressive to the Petitioner. Further, that the said directives are not backed by law, policy and regulations thereby leading to abuse of office or *ultra vires* acts.

9. The Petitioner asserts that the directive issued on 9th March, 2017 was unconstitutional and violated the Petitioner's right in that it was issued without a legislative or policy framework envisaged under Article 185(1) and the Fourth Schedule of the Constitution. Further, that the said directive restricts passengers from boarding its vehicles until those of the 2nd and 3rd respondents have been boarded and left the park yet the Petitioner has more vehicles and has invested in advertising and marketing, thereby contravening fair trade practices and the principles of equity. According to the Petitioner, the directive also restricts the passengers' choice on the vehicles to board thus infringing their consumer rights under Article 46 of the Constitution.

10. The Petitioner further avers that the directive being an administrative decision was made in violation of Article 47 of the Constitution and the Fair Administrative Action Act, 2015 in that there was no prior and adequate notice of the nature and reasons for the administrative action; there was no opportunity to be heard and make representation; there was no notice of the right of review or the internal appeal mechanism available; that there was no notice of the right to legal representation; that there was no opportunity to attend the proceedings in person or in the company of an expert of its own choice; and that there was no opportunity to be heard.
11. In conclusion, the Petitioner disclosed that it had filed Malindi CMCC No. 42 of 2017. The Petitioner therefore sought the stay of the case pending the hearing and determination of this Petition.
12. The affidavit sworn in support of the Petition by Mohamed Aboud Said, one of the directors of the Petitioner, reiterates the contents of the Petition. Annexed to it are the Petitioner's certificate of incorporation, the disputed directive, the business permit and receipts issued to it by the 1st Respondent.
13. In opposition to the Petition, the 1st Respondent filed an affidavit sworn on 4th October, 2017 by Keneth Kazungu, the Chief Officer in charge of the 1st Respondent's Department of Road Transport and Public Works. According to the 1st Respondent, the said directive was issued within its legislative and policy framework. The 1st Respondent's position was that the directive was issued after numerous consultations with the aim of restoring order at the bus park.
14. It was further averred on behalf of the 1st Respondent that the directive did not interfere with the passengers' choice of the motor vehicle to board and that the administrative action was done in accordance with Article 47 of the Constitution.
15. As for the Petitioner's claim that it had leased and paid for a stall within the bus park, the 1st Respondent asserted that the said stall had actually been leased to Al Wahid Express Shuttle which had sublet the premises to the Petitioner contrary to the rules of the 1st Respondent.
16. The 1st Respondent's position is that the directive was issued in order to safeguard the interests of the passengers after the Petitioner and the 2nd and 3rd respondents who are members of the Malindi Bus Park Management Committee failed to agree on the formula for operating the 11 seater matatus. Further, that the said formula had worked well for 14 seater matatus and the Petitioner and the 2nd and 3rd respondents operate that type of public service vehicles.
17. Since the Petitioner had at the time of filing the Petition also filed an application seeking interlocutory orders, the 2nd Respondent filed grounds of opposition to the application asserting that the matter herein was *sub judice* for reasons that Malindi CMCC No. 42 of 2017 concerned the same issues and parties save for the addition of the 1st Respondent. Further, that injunctive orders had been granted in favour of the Petitioner against the 2nd and 3rd respondents who had since appealed against the orders through Malindi High Court Civil Appeal No. 21 of 2017.
18. The 2nd Respondent also filed a replying affidavit dated 21st April, 2017 sworn by one of its directors, Mohamed Aziz Ahmed. The 2nd Respondent's reply is that the Petitioner is a member of the Sacco Committee that was formed and mandated to find solutions to problems hindering the work of matatu operators. According to the 2nd Respondent, the Petitioner was a party to the meetings that gave rise to the directive it is now contesting. It was the 2nd Respondent's case that the Petitioner was forum shopping even though it already had orders issued in its favour in Malindi CMCC No. 42 of 2017. The 2nd Respondent concluded that in the circumstances of this case this court has no jurisdiction to handle the matter.
19. On 29th June, 2017, Mr. Mouko who was appearing for the 2nd Respondent intimated to the court that he had been instructed to appear for the 3rd Respondent. There being no response filed by the 3rd Respondent, it follows that the 3rd Respondent adopted the response filed by the 2nd Respondent.
20. The parties filed and exchanged submissions on the interlocutory application filed with the Petition. The said submissions were by consent adopted as submissions in respect of the Petition. I will thus refer to the submissions only in so far as they are relevant to the Petition.
21. On behalf of the Petitioner, it was submitted that Article 185 of the Constitution confers upon a county assembly of a county government legislative authority to make laws that are **"necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule."** It is the Petitioner's case that the implementation and execution of the powers spelled out in the Fourth Schedule is subject to the enactment of county legislation.
22. According to the Petitioner, the 1st Respondent had complied with Article 185 by enacting the Kilifi County Transport (Regulations and Control) Act, 2015 and through Part IV Regulation 32 prohibited any parking on private property without permission or authorisation of the owner of the private property or a person having lawful permission or control of the private property. It is submitted that the Petitioner is a licensee, leasee and or tenant of the 1st Respondent hence the area it leases is private property as protected by Regulation 32. During highlighting of the submissions, counsel for the Petitioner clarified that they were referring to Section 32 of the Act and not Regulation 32. It is argued that the podium the three operators were directed to use belongs to the Petitioner.
23. In addition, the Petitioner submitted that Clause 7 of the Fourth Schedule on Trade Development and Regulation includes trade licensing and fair trading. It is the Petitioner's case that the 1st Respondent has not enacted any law on the same and the impugned directive leads to unfair trade practice as it restricts the boarding of the Petitioner's motor vehicles and interferes with the passengers' choice of the vehicles to board.

24. According to the Petitioner, the impugned directive is not based on any legislative authority as required by Article 186 of the Constitution and sections 5, 8(1)(b) and (f) and 34(a), (g) and (h) of the County Governments Act, 2012. Further, that the said directive was contrary to Clause 7, Part 2, Fourth Schedule and in particular consumer rights under Article 46 which protects the economic interests of the Petitioner.

25. It is the Petitioner's assertion that the issuance of the directive being administrative in nature fell under Article 47 of the Constitution and the Fair Administrative Action Act, 2015 and by virtue of Section 4 of the Act the Petitioner was entitled to:

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations;
- (c) notice of right of review or any internal appeal mechanism against the directive;
- (d) notice of the right to legal representation;
- (e) an opportunity to attend proceedings in person and or in the company of an expert of their choice; and
- (f) an opportunity to be heard.

26. It is the Petitioner's case that having failed to comply with the Act, the 1st Respondent breached Article 47 of the Constitution and the Petitioner's rights under Article 43 to ensure that its members **"work hard in order to be free from hunger, and to have adequate food of acceptable quality."**

27. On the respondents' claim that the matter was *res judicata* and *res sub judice*, counsel for the Petitioner submitted that the matter was neither barred by the doctrine of *res judicata* or *res sub judice* as the matter raised constitutional issues. According to the Petitioner, conservatory orders differ from injunctive orders hence the orders sought in this Petition are different from those sought in Malindi CMCC No. 42 of 2017. The Petitioner submitted that the parameters for granting conservatory orders were laid out in the case of **Michael Osundwa Sakwa v Chief Justice and the President of the Supreme Court of Kenya & another [2016] eKLR** guided by the Supreme Court case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, S.C. Application No. 5 of 2014**. It is the Petitioner's case that the parameters are that a petitioner has to establish a prima facie case, satisfy the provisions of Article 23(3)(c) of the Constitution and the court must consider **"whether or not it is in the public interest that the order of stay be granted and that this condition is dictated by the expanded scope of the Bill of Rights and the public spiritedness that run through the Constitution."** The Petitioner asserts that it has fulfilled all the requirements for grant of conservatory orders.

28. Another point taken up by the Petitioner is that the implementation of the 1st Respondent's directive is subject to approval by the County Assembly which has legislative authority under Article 185(1) and (2) of the Constitution. Further, that the directive contravenes the right of the Petitioner as a tenant of the 1st Respondent in respect of the parking area at the bus park. It is the Petitioner's view that the designated space is private as it has been paid for but the directive requires that all the three operators pick passengers from the same space at a ratio basis of 1:1:1. It was further submitted that the directive was not adequate and was insufficient. The Petitioner emphasized that the directive was unconstitutional and illegal as it interfered with consumer rights.

29. The Petitioner asserted that fair hearing is express and not implied and that the 1st Respondent was biased as it issued the directive despite admitting that there was business rivalry. On the 1st Respondent's claim that the Petitioner had submitted itself to similar directives issued by Mombasa County, the Petitioner averred that the operations of Mombasa County cannot be replicated by Kilifi County and that the Petitioner's rights to fair competition had been violated.

30. In response to the Petitioner's submissions, the 1st Respondent stated that the directive was within its mandate under Schedule 4, Part 2, Clause 5 of the Constitution and that of Kilifi County Transport Act and gives effect to Legal Notice No. 149 of 2013. According to the 1st Respondent, the directive was issued due to lack of consensus amongst the three operators and it stemmed from various stakeholder meetings in which the Petitioner also participated. Further, that the Petitioner is represented in the committee set up to manage the bus park.

31. The 1st Respondent submitted on unpleaded issues such as alleged existence of a turbulent relationship amongst the operators before the bus park was established; that there were previous business partners who fell out; that the Petitioner complied with similar directives issued by Mombasa County; and further that the Petitioner also operated 14-seater public service vehicles and they had complied with a similar ratio basis.

32. The 1st Respondent asserted that the Petitioner seeks exclusive right to use the podium at the expense of other operators whose fleets are smaller and was using the courts to intimidate its business rivals.

33. Counsel submitted that the bus park was a public utility and that the 1st Respondent was mandated under the Fourth Schedule, Part 2, Clause 5 of the Constitution to legislate on traffic matters hence the enactment of the Kilifi Transport Act to regulate boarding of vehicles and designation of parking and loading zones. It was submitted that the podium was sub-let to the Petitioner contrary to the lease agreement. Further, that as part of Malindi Bus Park Management Committee, the Petitioner could not say that it was not notified of the making of the directives.

34. It was also submitted on behalf of the 1st Respondent that the directives do not restrict the Petitioner's operations and were similar to those issued by Mombasa County which the Petitioner complied with. Further, that the 1st Respondent was intent on ensuring that uniform rules applied and that the basis of the Petitioner's complaint was business rivalry.

35. On their part, the 2nd and 3rd respondents submitted that the injunctive orders in Malindi CMCC No. 42 of 2017 were similar to the conservatory orders sought in this Petition and were meant to achieve the same results hence making this matter *sub judice* for contravening Section 6 of the Civil Procedure Act. Further, that since the application for injunction had been dismissed by the Chief Magistrate's Court, the only recourse available to the Petitioner was to file an appeal. It was also submitted that since the issuance of the directive was an administrative act, the Petitioner ought to have sought judicial review remedies.

36. On the Petitioner's prayer for conservatory orders, the 2nd and 3rd respondents submitted that the application lacks merit as the facts relied upon do not disclose grounds upon which conservatory orders can be granted and the conservatory orders sought are prejudicial to the respondents.

37. Turning to Malindi CMCC No. 42 of 2017, counsel for the 2nd and 3rd respondents pointed out that the said case which was filed by the Petitioner was still pending and raised similar facts and issues. Further, that although the Petitioner's application in that case was dismissed, this was done after the instant Petition had been filed. They stressed that the suit in the lower Court was pending when this Petition was filed hence this court lacks jurisdiction to determine the matter at hand. According to the 2nd and 3rd respondents, the 1st Respondent acted within its mandate and the Petitioner participated in the decision-making. They assert that the Petitioner cannot claim that the availability of an appellate mechanism was not pointed out to it as it is deemed that every person knows the law. Further, that the Regulation 32 cited by the Petitioner is not applicable in this case.

38. In my view, the issues in this Petition are whether this court has jurisdiction to handle this matter and if so, whether the orders sought by the Petitioner should be granted.

39. The 2nd and 3rd respondents have taken issue with the competence of this court to hear and determine the matter at hand. According to them, this court lacks jurisdiction for the reason of the application of the doctrines of *res sub judice* and *res judicata*. They point out that at the time this Petition was filed the issues raised herein had been raised in Malindi CMCC No. 42 of 2017 and were pending determination in that matter. Further, that the said issues had subsequently been determined by a competent court. The 2nd and 3rd respondents submitted that the Petitioner was the plaintiff in the lower court case having sued them in that matter and the only avenue open to the Petitioner was to appeal the decision of the lower court or seek judicial review.

40. Once an issue of jurisdiction is raised, the court or tribunal has to determine the same before taken any further step. Jurisdiction is everything and the court cannot take any further step before determining whether it has the authority to proceed to determine the matter before it.

41. The doctrine of *res judicata* bars subsequent proceedings between the same parties or their representatives over the same issues where those issues have been heard and determined by a competent court in a prior suit.

42. It is not disputed that Malindi CMCC No. 42 of 2017 involved the Petitioner as the plaintiff and the 2nd and 3rd respondents as the defendants and the subject of that litigation was the impugned directive issued by the 1st Respondent herein and which is the subject of this litigation.

43. The Petitioner's response was that the doctrine of *res judicata* is not applicable in constitutional petitions and the 2nd and 3rd respondents' claim that the issues raised herein are *res judicata* is neither viable or valid.

44. In **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**, the Court of Appeal held that though the doctrine of *res judicata* can be invoked in Constitution based litigation, **"[i]t must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions."** The Petitioner's assertion that the principle of *res judicata* cannot be invoked in constitutional petitions is thus not correct.

45. In **John Florence Maritime Services Limited & another** (supra), the Court of Appeal identified the ingredients of *res judicata* as **"firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be [between] the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally...."** I will depart from this issue at this stage and revisit it later. I proceed to consider the other ground which the 2nd and 3rd respondents claim to bar this court from determining this matter.

46. Section 6 of the Civil Procedure Act, Cap. 21 (CPA) provides that:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

47. The purpose of Section 6 is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter. It is meant to avoid abuse of the court process and diminish the chances of courts with competent jurisdiction issuing conflicting decisions over the same dispute. When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed. The conditions to be met by a party who seeks to stay suit (*res sub judice*) under Section 6 of the CPA is that there must be two suits or more. One suit should have been instituted previously and the other instituted subsequently. Both suits should be pending before courts of competent jurisdiction and must be between the same parties or their representatives. The subject matter of the suits should be same.

48. The question is whether the 2nd and 3rd respondents have established that the doctrine of *res judicata* should be invoked and also that this suit should be stayed for breaching of Section 6 of the CPA.

49. In a ruling delivered on 21st June, 2017 in Malindi CMCC No. 42 of 2017 Khatambi, SRM held that:

“In the current application it is evident that the plaintiff is alleging an illegality, procedural impropriety, failure to observe basic rules of natural justice and procedural fairness by the County department of roads, transport and public works. Being a public body it follows that the appropriate remedy would have been to pursue the claim by way of judicial review. It is my considered view that for as long as the directive issued on 9th March, 2017 is in force all parties are bound by it and until the same is declared null and void, which prayer has not been sought in the current application or until the alleged illegal/unlawful directive is quashed by a competent court....

The said decision is alleged to have been issued illegally and was actuated by malice. Notwithstanding the body issuing the said directive has not been enjoined as a party and neither has the plaintiff sought to impugn the alleged illegal directive.”

50. The impression one gets from the said decision is that the trial magistrate concluded that she was not competent to handle the matter and the unconstitutionality of the 1st Respondent’s directive was not an issue before her. That being the case, it cannot be said that this Petition is *res judicata* and neither have the 2nd and 3rd respondents established grounds for staying the suit under Section 6 of the CPA. Their claim that this court has no jurisdiction to handle this Petition therefore fails.

51. There is only one disturbing issue about this case. The Petitioner asked this court to stay the proceedings in Malindi CMCC No. 42 of 2017 pending the hearing and determination of this Petition. Why would a party who has filed a case seek a stay order instead of withdrawing such a case? Were it not for the fact that the constitutionality of the impugned directive is an important issue for the determination of this court, I would have easily declared this Petition an abuse of the court process. It does not make sense for a party to file a suit before a lower court and then move to a higher court seeking a stay of such a suit. The impression created is that such a party is playing lottery with the courts and such acts should not be allowed.

52. Are the orders sought by the Petitioner deserved? The Petitioner’s claim is that its rights under Articles 43, 46 and 47 of the Constitution were breached by the 1st Respondent when it issued the impugned directive. It is important to reproduce the cited provisions of the Constitution.

53. Article 43 provides for economic and social rights thus:

“43. (1) Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food of acceptable quality;

(d) to clean and safe water in adequate quantities;

(e) to social security; and

(f) to education.

(2) A person shall not be denied emergency medical treatment.

(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.”

54. Article 46 provides for consumer rights by stating that:

“46. (1) Consumers have the right—

(a) to goods and services of reasonable quality;

(b) to the information necessary for them to gain full benefit from goods and services;

(c) to the protection of their health, safety, and economic interests; and

(d) to compensation for loss or injury arising from defects in goods or services.

(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.

(3) This Article applies to goods and services offered by public entities or private persons.”

55. Article 47 of the Constitution is about fair administrative action and it states that:

“47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

56. In accordance with the requirements of Article 47(3) Parliament enacted the Fair Administrative Action Act, 2015 which at Section 4 sets down the parameters of fair administrative action as follows:

“4. (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 41 of the Constitution, the administrator may act in accordance with that different procedure.”

57. I have struggled to follow the Petitioner’s arguments on alleged breach of its economic and social rights moreso the right **“to be free from hunger, and to have adequate food of acceptable quality”** as protected by Article 43(1)(c) and I am at a loss as to how the issuance of the directive has affected the Petitioner’s rights. The said directive did not in any manner direct the Petitioner to cease its economic activities. There is therefore no reason to conclude that the rights protected by Article 43 were breached by the 1st Respondent.

58. Through this Petition, the Petitioner has turned a crusader for the rights of passengers to board matatus of their own choice. Although

Article 22(2) does indeed allow a person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of, a group or class of persons; a person acting in the public interest or an association acting in the interest of one or more of its members, to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, the person instituting the claim must clearly indicate on whose interest the suit is being brought. In the case at hand the Petitioner is clear that this suit is brought on its own behalf. It cannot turn around and claim that the suit is being brought on behalf of unnamed and unidentified consumers of public transport services. No consumer has complained against the impugned directive and it is thus not proved by the Petitioner that the rights protected by Article 46 of the Constitution were breached by the 1st Respondent. The Petitioner's claim that the 1st Respondent breached Article 46 of the Constitution finds no merit and the same fails.

59. There was the claim by the Petitioner that the decision of the 1st Respondent breached Section 32 of the Kilifi County Transport (Regulation and Control) Act, 2016 which provides that **“[n]o person shall park a vehicle or permit a vehicle to be parked on private property without the permission or authorization of the owner of the private property or a person having lawful possession or control of the private property.”**

60. According to the Petitioner, it has leased from the 1st Respondent the space from which the eleven-seater matatus are to be launched and that space is therefore private property which cannot be converted to public use without its consent. The response by the 1st Respondent is that the said space was leased to a third party and the space sub-let to the Petitioner contrary to the lease agreement.

61. In my view, the question as to whether the space from which the eleven-seater matatus are to be launched is leased by the Petitioner or not is not something that can make this court declare the impugned directive illegal. If the directive is found to have been regularly issued, the question of the space from which to launch the eleven-seater matatus is one that can be addressed mutually by the parties. Any fees already paid by the Petitioner can be refunded or used to take care of any fees that the Petitioner is expected to pay in future. That will of course depend on whether or not the Petitioner actually leased the said space.

62. What remains to be determined is whether the right to fair administrative action was complied with prior to the issuance of the impugned directive.

63. Looking at the minutes attached to the 1st Respondent's replying affidavit, it is apparent that the problem that the directive sought to solve was a protracted one. Passengers had complained about the way they were treated whenever they wanted to board the eleven-seater matatus. Several meetings were held in which the Petitioner and the 2nd and 3rd respondents were engaged in an attempt to find a lasting solution for the problem. Several systems were tried prior to the issuance of the impugned directive. There was no satisfactory solution to that problem.

64. A perusal of the minutes of the meeting held on 15th February, 2017 shows the constitution of a committee of the members of the bus park. Included in the committee is Mr. Mohamed A. Said representing Munawar Shuttle, the Petitioner herein.

65. In a meeting held on 8th March, 2017 the following statement is recorded:

“From the suggestions by the Committee Members that the Committee would not come up with a permanent solution on the operation of the Saccos at the stage and hence the Sub County Administration was given the solution to solve the problem. Mr. Moki read the final verdict that ALL OF THE THREE SACCOS: MUNAWAR, ALWAHIM and the 001 INVESTMENT, pick the passengers from one podium in the ratios of 1:1:1 respectively notwithstanding how many matatus a Sacco Company had which were to operate from the stage. The solution therefore should stand binding to each of the three Saccos without further delay or without violation whatsoever by either of the operators.

Mr. Kerongo supported the resolution and further said that one podium to be used by all the three Sacco's companies in those ratios was the MUNAWAR podium which should centre all the other two SACCO within the stage....

The implementation of that order as given to the Committee leaders was to be supported by a letter signed by the Chief Officer County Department of Roads, Transport and Public Works which would also be copied to other relevant bodies within the Sub County of Malindi.”

66. The minutes therefore indicate that the Petitioner was represented in the process that led to the making of the decision. The Petitioner cannot thus be heard to complain of breach of Article 47 of the Constitution and the provisions of the Fair Administrative Action Act, 2015.

67. The end result is that the Petitioner has failed to establish breach of any of its constitutional rights. As such the Petition is dismissed. This being a matter revolving around constitutional rights, I direct each party to meet own costs of the proceedings.

Dated, signed and delivered at Malindi this 19th day of April, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT