



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JR MISC CIVIL APPLICATION NO. 17 OF 2017**

**IN THE MATTER OF NATIONAL TRANSPORT AND SAFETY AUTHORITY ACT, 2012  
LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE JUDGEMENT OF THE TRANSPORT LICENSING APPEALS  
BOARD AT NAIROBI CASE NO. 22 OF 2016 DELIVERED ON 19<sup>TH</sup> DECEMBER 2016**

**JASET ENTERPRISE LIMITED.....APPLICANT**

**VERSUS**

**THE DIRECTOR GENERAL NATIONAL TRANSPORT AND**

**SAFETY AUTHORITY.....RESPONDENT**

**JUDGEMENT**

**Introduction**

1. The ex parte applicant herein, **Jaset Enterprise Limited**, wrongly described in these proceedings as the substantive applicant, vide its Motion on Notice dated 25<sup>th</sup> January, 2017 seeks the following orders:

**a. That an order of Mandamus be issued against the Respondent compelling it to issue a Road Service Licence to Jaset Enterprises Ltd forthwith or within Fourteen (14) days of the Judgement herein.**

**b. That in default of prayer (a) above, the Respondent be personally summoned to Court and be personally committed to civil jail for contempt of Court Order.**

**c. That the Respondents be condemned to bear the Cost of this Application.**

**Ex Parte Applicant's Case**

2. The application was supported by a three paragraph affidavit which was limited to verifying the contents of the Statement of Facts. This Court and the Court of Appeal has stated time without a number that such an affidavit is not the one contemplated under Order 53 of the **Civil Procedure Rules**.

3. According to the grounds of the application as contained in the said Statement, the Applicant filed an Appeal against an adverse verbal decision by the Respondent against the application to Transport

Licensing Appeals Board (hereinafter referred to as “the Board”) on 5<sup>th</sup> December 2016 and it was heard inter partes on 7<sup>th</sup> December 2016.

4. By its decision, it was averred that the Board issued Orders of Certiorari quashing the Respondent’s verbal decision and *mandamus* compelling the Respondent to make a decision and give written reasons to the Appellant within 14 days in the Board Judgement delivered on 19<sup>th</sup> December 2016 which Judgement was duly served on the Respondent by the Applicant’s Advocates vide a Letter dated 20<sup>th</sup> December 2016.

5. According to the applicant, on 9<sup>th</sup> January 2017, its Advocates wrote a reminder to the Respondent requesting that the Applicant be issued with Road Service Licence in compliance with the Board’s said judgement but the Respondent has disobeyed, defied, disregarded and refused to issue the Applicant with the said licence even after the lapse of the 14 days given by the Board pursuant to the provisions of the ***National Transport and Safety Authority Act, 2012*** and ***Fair Administrative Action Act, 2015***.

6. According to the applicant, its overall 30 Motor Vehicles belonging to its Members have continued to suffer immense losses as they cannot carry on business without the prerequisite Road Service Licence as a result of which 3 Motor Vehicles have been locked at Rongai Police Station for lack of the Road Service Licence and its 14 *Matatus* have continued to suffer irreparable loss of Kshs 10,000 per Motor Vehicle daily.

7. The applicant therefore prayed for the orders sought herein.

### **Respondent’s Case**

8. In response to the application, the respondent averred that the applicant submitted an application to the Authority to be registered as a PSV operator vide a letter dated 14<sup>th</sup> November 2016 and was informed verbally that the Company needs to comply with certain licensing requirements for the applicant to resubmit his application for reconsideration.

9. Aggrieved by the said decision, the applicant moved to the Board on the grounds that the Authority had delayed unreasonably to act on the Appellants application for Registration which appeal was heard by the Tribunal and judgment delivered on 19<sup>th</sup> December 2016 by which orders were issued quashing the Authority’s verbal decisions and an order of *mandamus* issued compelling the Authority to make a decision and give written reasons to the Appellant within 14 days on the status of the Application of registration.

10. According to the Respondent, it indeed complied with the decision of the Board and gave written reasons to the Appellant on the status of their application for Registration vide a letter dated 26<sup>th</sup> January 2017. To the Respondent, the applicant as at 23<sup>rd</sup> February 2017 did not have a minimum of 30 vehicles since 10 vehicles only belong to the company while 20 vehicles belong to other Saccos.

11. According to the Respondent, despite the applicant being furnished with written reasons as to why they cannot be granted registration the applicant continued to operate illegally without being registered which led to the impounding of the Applicants 3 motor vehicles on 21<sup>st</sup> January 2017 and the holding thereof at Rongai Police Station an action which was clearly anchored in law since the Appellant is not a registered and licensed transport operator.

12. It was disclosed that the Applicant being dissatisfied again by the conditions given to him that are mandatory to resubmit his application for consideration for registration and the fact that applicants motor vehicle which were operating illegally had been impounded lodged another appeal before the Board seeking orders that the said motor vehicles be released to the applicant and an order seeking to compel the Authority to register and issue Road Service Licenses to the applicant. The said appeal was duly heard by the Board on 1<sup>st</sup> February 2017 and by its judgment of 13<sup>th</sup> February 2017 and made the following

orders:

a) That the Judgment delivered by TLAB on the 19<sup>th</sup> of December 2016 neither granted a license to the Appellant nor gave an injunction to the Respondent but compelled the Respondent to make a decision and give written reasons to the Appellant within 14 days. The Respondent complied with this order albeit late.

b) the Respondent was not malicious for failing to respond to the Appellant within 14 days given by TLAB. The Respondent adduced compelling evidence indication why it was impossible to act within the 14 days.

c) That the grant of the orders sought by the Appellant on the basis that the Respondent did not respond in time would amount to granting them with a License without meeting the conditions that other public service operators are required to comply with.

d) That the Appellants needs to comply with the licensing conditions set out in the Respondents letter dated the 20<sup>th</sup> January 2017

13. It was the Respondent's case that pursuant to this Judgment the applicant's case was clearly dispensed at the TLAB as the applicant was required to comply with the Licensing conditions set out in the Authority letter dated 20<sup>th</sup> January 2017 which has not been complied with to date.

14. In the Respondents view, to grant the orders sought herein would be tantamount to granting the applicant a License without meeting the conditions that other public service operators are required to comply with. In the circumstances, the Court was urged to dismiss the application with costs.

### **Determinations**

15. I have considered the Notice of Motion filed herein and the affidavits in support thereof as well as the affidavits filed in opposition thereto together with the submissions on record.

16. The scope of and the grounds for the grant of judicial review orders of *mandamus* were discussed in depth by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

**“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an**

**order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

17. Similarly in in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** held, *inter alia*, as follows:

**“*Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty...Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done...In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it.”**

18. Section 4(2) of the ***National Transport and Safety Authority Act*** (hereinafter referred to as “the Act”) empowers the National Transport and Safety Authority (hereinafter referred to as “the Authority”) to *inter alia* regulate public service vehicles. In this case, it is clear that the applicant, as it was entitled to, exercised its appellate option by lodging an appeal against the decision of the Respondent to the Board. By its decision dated 19<sup>th</sup> December, 2016, the said Board purported to issue *inter alia* an order of *certiorari* quashing the respondent’s said verbal decision and an order of *mandamus* compelling the Respondent to make a decision and give written reasons to the applicant herein within 14 days.

19. The reliefs which the Board may issue are expressly provided for under section 39(5) of the Act which provides as follows:

***The Appeals Board may, on any appeal, affirm or reverse the decision of the Authority, or make such other order as the Board considers necessary and fit.***

20. The phrase ***such other order as the Board considers necessary and fit*** coming after affirmation or reversal of the decision of the Authority in my view ought to be read *ejusdem generis* to the two expressly specified reliefs. Further, such other reliefs can only be issued pursuant to section 11 of the ***Fair Administrative Action Act*** which provides for remedies which the High Court or a subordinate Court may grant. The orders of *certiorari*, *mandamus* and prohibition are **NOT** some of the orders which the subordinate court is expressly empowered to issue under the said provision. It ought to be noted that such orders have a long history and whereas the effect of grant of the orders under section 11 aforesaid may well be the same as the grant of the said orders, I am not prepared to hold that subordinate courts have the powers to issue orders of *mandamus*, prohibition and *certiorari*. This must necessarily be so since under section 8(2) of the ***Law Reform Act***, it is only the High Court that is expressly empowered to issue orders in the nature of prerogative writs. It ought to be appreciated that such orders are usually in the nature of supervisory reliefs issuable pursuant to Article 165(6) of the Constitution which only confers jurisdiction for their issuance on the High Court and Courts of equal status subject to the conferment of such jurisdiction by Parliament.

21. It is trite that an executive body or authority has no inherent powers. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525**, **Madan, J** (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them. It was in appreciation of the foregoing position that the Court in **Ex Parte**

**Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon (supra); Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 at 461.**

22. It is therefore clear that the powers of an executive authority must be conferred by the Statute under which the said authority exercises its powers which instrument must necessarily set out its powers expressly. Unless such powers are expressly donated by the parent instrument, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

23. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies or executive authorities. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

24. I therefore have no hesitation in holding that the Board has no powers to issue orders in the nature of *certiorari*, *mandamus* and prohibition.

25. I have however looked at the substance of the orders which were issued herein and to my mind, the same fall squarely within section 11(1) relating to orders declaring the rights of the parties in respect of any matter to which the administrative action relates; directing the administrator to give reasons for the administrative action or decision taken by the administrator; setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions; and compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right.

26. In this case, the Respondents were not directed to issue the applicant with the licence. Rather, the Respondent was directed to consider the applicant's application and render its decision within 14 days.

27. It is contended that the Respondent did not comply within the prescribed period though the Respondent did in fact so comply. Whereas it may well be true that the compliance by the Respondent outside the period directed by the Board without seeking extension of time may well be inconsequential, the Board did not state that in default of compliance with its directive the licence be issued to the

applicant. The applicant was therefore at liberty to come to this Court for an order of *mandamus* compelling the Respondent to comply with the order of the Board which was to the effect that the Respondent considers the application and furnishes the applicant with the reasons therefor. That was the duty that the Board placed upon the Respondent. Accordingly, by seeking that this Court compels the Respondent to issue the applicant with the licence, the applicant is in effect seeking that this Court compels the Respondent to take an action which it was not bound to take pursuant to the decision of the Board which is what has provoked these proceedings. In other words the Respondent is not under a duty to issue the licence in purported compliance with the order of the Board but simply to consider the applicant's application and furnish the applicant with reasons for the said decision. The Respondent may allow the application, reject the same with or without conditions but it must give reasons for whatever decision it arrives at.

28. To that extent the orders sought herein cannot be issued in the manner sought.

29. Apart from that it is clear that following the decision made by the Respondent albeit belatedly, the Respondent invoked the jurisdiction of the Board which found that the reasons advanced by the Respondent were reasonable and declined to set aside the Respondent's decision. Having invoked that alternative remedy, the applicant cannot go back and challenge the decision of the Respondent as to do so amounts to abuse of the legal process. What the applicant can now challenge is the decision of the Board.

30. Apart from the foregoing, judicial review remedies being discretionary, the Court would not grant them in certain circumstances even if the same are merited. As is appreciated, in *Halsbury's Laws of England* 4<sup>th</sup>Edn. Vol. 1(1) para 12 page 270:

**“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’”**

31. In this case, public interests and good public administration dictates that the applicant just like other public transport operators must comply with the safety regulations that guide operation of public transport in this country. To grant the orders sought herein would amount to extending preferential treatment to the applicant to the detriment of other public service vehicle operators. It would also amount to compelling the Respondent to act in disregard of the law. It is the duty of the Respondent to take actions geared towards the proper regulation of public service transport in the country. It therefore behoves the Respondent to take proper legal measures to ensure that the said mode of transport is conducted in an orderly and safe manner. To do so cannot be termed as unlawful or inherently unreasonable. This position was appreciated by Nyamu, J in Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688, Nyamu, J when he pronounced himself as follows:

**“The Town Clerk must of course be aware that the implementation of the by-laws must be**

**anchored in reasonableness and fairness and they must be aimed at achieving the legitimate purpose namely decongestion of the CBD and to a achieve a reasonable traffic flow and a semblance of order in the CBD. He would obviously defeat the legitimate objectives by giving consent to an unreasonable number of operators who would in turn flood the CBD... He cannot allow the players to be judges in their own cause.”**

32. Therefore even if the Applicant’s application was merited, if to grant the orders sought would lead to compelling the Respondent to act unlawfully, by failing to carry out its statutory mandate, this Court would still have not acceded to the same as that would clearly cause administrative chaos and public inconvenience.

33. Before I pen off, I noted at the beginning that the application is expressed to be brought in the name of the applicant. In judicial review applications, it must be remembered that the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. The rationale for this was given in Mohamed Ahmed vs. R [1957] EA 523 where it was held that:

**“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellant’s advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.**

34. In Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J (as he then was) expressed himself as follows:

**“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -**

**“REPUBLIC.....APPLICANT**

**V**

**THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT.**

**EX PARTE**

**JOTHAM MULATI WELAMONDI”**

35. Apart from that I also noted that application was supported by a very scanty three paragraph verifying affidavit in which apart from confirming the averments in the Statement of Facts, nothing of substance was deposed therein. The said verifying affidavit was clearly very economical in terms of the factual averments. It is now trite that it is the verifying affidavit which contains the facts rather than the statement. This was held by the Court of Appeal in Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000 where the Court restated the law that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. Accordingly, the ex parte applicant ought to ensure that the verifying affidavit contains all the factual information that he intends to rely upon. In that case it was held that:

**“The application for leave was grounded on the matters set out in the statement accompanying the application and in the verifying affidavit. The statement is required by**

rule 1(2) of Order LIII of the Civil Procedure Rules to set out the name and description of the applicant, the relief sought, and the ground on which it is sought. The facts relied on are required by the rule to be in the verifying affidavit not in the statement as largely happened in this case.”

36. This was the position adopted in Bespoke Insurance Brokers vs. Philip Kisia, the Town Clerk City Council of Nairobi & Another [2013] eKLR where it was held that:

“Thirdly, the respondents argued that the statutory statement does not adhere to the provisions of Rule 1(2) of Order 53 Civil Procedure Rules. According to the said rule a statutory statement should contain the name and description of the applicant, the relief sought and the grounds upon which the relief is sought. It is the respondents’ argument that the statutory statement does not contain the grounds upon which the reliefs are sought but facts relied upon. The respondents argue that the facts are supposed to be found in the verifying affidavit(s). The respondents are correct in their submissions. The contents of a statutory statement are as they have stated. The facts to be relied upon are supposed to be found in the verifying affidavit(s).”

37. It follows that the verifying affidavit filed herein was worthless in terms of evidential weight.

38. Considering the totality of my findings hereinabove, I find no merit in the Notice of Motion dated 25<sup>th</sup> January, 2017.

**Order**

39. In the result the said Motion fails and is dismissed with costs.

**Dated at Nairobi this 28<sup>th</sup> day of March, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Gitau for the applicant***

***CA Mwangi***