



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL CASE NO. 13 OF 2013**

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY**

**OR AN ORDER OF MANDAMUS & PROHIBITION**

**IN THE MATTER OF THE LOCAL GOVERNMENT ACT, CAP 265, LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE TRAFFIC ACT, CAP 403, LAWS OF KENYA**

**IN THE MATTER OF THE TRANSPORT LICENSING ACT, CAP 404 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE DIRECTIVE DATED 22<sup>ND</sup> NOVEMBER 2013 BY THE NAIROBI CITY**

**CHIEF ENGINEER ON BEHALF OF THE NAIROBI CITY TOWN CLERK ALLOWING THE**

**APPLICANT TO OPERATE WITHIN THE CENTRAL BUSINESS DISTRICT (C.B.D)**

**AND**

**IN THE MATTER OF ACTS OF FRUSTRATION BY THE DIRECTOR OF CITY**

**INSPECTORATE PROHIBITING THE APPLICANT FROM OPERATING WITHIN**

**THE CBD AS DIRECTED BY THE CITY ENGINEER FOR THE NAIROBI TOWN**

**CLERK AND LICENSED BY THE TRANSPORT LICENSING BOARD**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CITY COUNCIL OF NAIROBI TOWN CLERK.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF CITY INSPECTORATE (NAIROBI)....2<sup>ND</sup> RESPONDENT**

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

EX PARTE: METRO TRANS LIMITED

JUDGEMENT

Introduction

1. The ex parte applicant herein, **Metro Trans Limited**, moved this Court by way of a Notice of Motion dated 7<sup>th</sup> February, 2013 seeking the following orders:

1. An order of Mandamus directed to the 1<sup>st</sup> Respondent, the City Council of Nairobi Town Clerk, 1<sup>st</sup> respondent herein, to ensure that its directive of 22<sup>nd</sup> November 2011 allowing the Applicant's duly licensed public service motor vehicles by the Transport Licensing Board (T.L.B.) free ingress and egress from the Central Business District (C.B.D.) along its designated routes and to be allowed to pick and drop commuters within the designated C.B.D. lay-bys without any interference or hindrance from the 2<sup>nd</sup> Respondent or its Askaris the Applicant's vehicles observing the laid down Traffic rules and regulations.

2. An order of Mandamus directed to the 2<sup>nd</sup> Respondent, the Director of City Inspectorate Nairobi to comply with the 1<sup>st</sup> Respondent's directive of 22<sup>nd</sup> November 2012 allowing or permitting the Applicants, Public Service Vehicles to pick and drop commuters within the Nairobi Central Business District along the designated lay-by the Applicant's PSVs having been issued with the requisite Transport Licensing board Certificates and the Road Service Identity Certificates to operate within the C.B.D and as specified in the Applicants respective vehicles' certificates the Vehicles' drivers observing and adhering the laid down Traffic rules and regulations.

3. An order of Mandamus directed to the 3<sup>rd</sup> Respondent, the Nairobi area Traffic Commandant and to ensure that there is compliance with the Directive emanating from the 1<sup>st</sup> Respondents' Town Clerk allowing or permitting the Applicants, Public Service Vehicles to pick and drop commuters within the Nairobi Central Business District along the designated lay-by the Applicant's PSVs having been issued with the requisite certificates being the Transport Licensing board Certificates and the Road Service Identity Certificates to operate within the C.B.D and as specified in the Applicants respective vehicles' certificates, the Applicants Vehicles' drivers the laid down traffic rules and regulations and in strict adherence to the 1<sup>st</sup> Respondent's directive of 22<sup>nd</sup> November 2012.

4. An order of Prohibition directed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents , to desist either by themselves, their City Council Askaris who act under the said Respondents' directive, or howsoever from frustrating , hindering or preventing in whatsoever manner the Applicants' Public Service Vehicles and their drivers, from picking or dropping commuters within the Central Business District as long as the Applicants PSVs do hold and have been issued with the necessary valid Transport Licensing board Certificates and the Road Service Identity Certificates in compliance with the directive emanating from the 1<sup>st</sup> Respondent's office allowing or permitting the Applicants, Public Service Vehicles to pick and drop commuters within the Nairobi Central Business District as designated in their licences and certificates.

5. That the costs of this application be provided for.

Ex Parte Applicant's Case

2. The application is supported by a statement of facts and a verifying affidavit filed on 17<sup>th</sup> January 2013. According to the applicant by a letter dated 26<sup>th</sup> September 2011 it applied to the City Council of

Nairobi through the office of the Chief City Engineer for permission to pick and drop commuters at the Ambassador Lay-By. Prior to making the said application, the Applicant company had entered into an understanding with the **Mama Lucy Kibaki Hospital** situate in Komarock estate in Nairobi to use the latter's parking yard to pick and drop commuters and patients to the said hospital and the company was the only public transport company allowed to pick and drop commuters at the hospitals' parking yard. Following the letter stated in paragraph 5 above the City Council of Nairobi whose operations are run amongst others and of relevance by the 1<sup>st</sup> and 2<sup>nd</sup> respondents' offices did respond to the Applicant's letter declining to grant the company stating that it does not allocate picking and dropping points.

3. It was averred that by a letter dated 26<sup>th</sup> October 2011, the Applicant who had a prior arrangement with the **Mama Lucy Kibaki Hospital** wrote to the hospital requesting for an alternative pick up and dropping point for passengers going to the hospital since it was terminating the trips to its parking yard. The hospital responded that the Applicant's buses should pick up its clients from the Ambassador Hotel stage which is within the C.B.D. However, for the Applicant to pick up and drop commuters at the Ambassador stage/lay-by, it had to obtain a T.L.B license and the applicant company did apply for the same to the chairman of the Transport Licensing board which is the issuing authority vide a letter dated 11<sup>th</sup> June 2012. The said application, it was deposed is always accompanied by the Road Identity Certificate (R.S.I) The Transport Licensing Board did issue to the Applicant the requisite certificates to eight(8) of the Applicant's public service vehicles to operate within the C.B.D Nairobi and more particularly to pick up and drop passengers at the Ambassador hotel lay-by.

4. According to the applicant, on obtaining the certificates, it by its' letter dated 19<sup>th</sup> November 2012 wrote to the City Council of Nairobi's Chief City Engineer who is in charge of allocating stages for public commuter vehicles informing him that the applicant had now obtained the relevant permission to operate within the C.B.D and more especially to pick and drop commuters at the Ambassador lay-by. By a letter dated 22<sup>nd</sup> November 2012, the 1<sup>st</sup> Respondent through the Chief City Engineer responded confirming that the Applicant's buses could use the designated lay-by to pick and drop its clients which designated areas include the Ambassador Hotel lay-by within the C.B.D.

5. It was however averred that despite the issuance of the certificates to the Applicants' vehicles to operate within the C.B.D, attempts to pick and drop passengers at the Ambassador hotel stage have been frustrated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' City Council *Askaris* who have prevented or hindered the operations of the Applicant's vehicles at the said lay-by, by arresting their drivers and detaining the vehicles any time they would drive along the Ambassador Hotel route to pick or drop commuters subjecting them to payment of un-warranted fines yet they have been licensed to operate on the said route.

6. According to the applicant the said *Askaris* are directly under the command of the 2<sup>nd</sup> Respondent's office whose docket is to enforce T.L.B regulations within the City, as it is the law enforcing department of the Council. Despite the applicant complaining about the said frustrations to the 2<sup>nd</sup> Respondent and lodging a formal complaint with the 1<sup>st</sup> Respondent seeking their intervention in implementing the above directives, no response was elicited.

7. According to the deponent, as other commuters picking and dropping passengers at the Ambassador Hotel lay-by do hold similar certificates to what was issued to the Applicant's vehicles, it beats logic why the Applicant's vehicles are prohibited. It is contended that the acts complained of adversely affect the Applicants' business as they continue to suffer losses and further jeopardizes its arrangement with the **Mama Lucy Kibaki Hospital** where the Applicant was supposed to be picking and dropping the hospitals' clients at the Ambassador Hotel lay-by. To the applicant failure to ensure that it's vehicles do operate along the designated routes on its R.S.I certificates jeopardizes the Applicants' chances of renewing the T.L.B. license as the same is renewable annually and renewal is pegged on having utilized the earlier issued license by plying the permitted routes. In the applicant's view if the orders craved are not granted, the licenses issued to the Applicant's vehicles will expire without having been used and thereby the amounts paid for their issuance will have gone to waste.

## **1<sup>st</sup> and 2<sup>nd</sup> Respondents' Case**

8. In opposition to the application, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that the dispute herein in respect of the same matter had been determined by this Court in Misc. Case No. 368 of 2013 – **Ex Parte Metro Trans (EA) Ltd vs. Nairobi City Council and Others**. It was the said Respondents' case that in that case the Court dealt with all the issues regarding the issues raised herein. It was therefore contended that this application is an abuse of the Court process.

9. According to the said Respondents, the applicant has no locus standi to institute these proceedings against them as they are not mandated to allocate picking and dropping points of passengers to any public Service Vehicle operators. It was contended that it would be contrary to public policy to allocate a single operator a terminus.

10. According to the said respondents, the letter relied upon by the applicant was not in any way an authorisation to the applicant to operate within the CBD since in the said letter the applicant was requested to comply with and adhere to the law governing PSV operators. Since in the said letter it was indicated that the relevant bylaws prohibited *matatus* from parking at a designated bus stop for more than five minutes or 30 minutes at a terminus, it would be contradictory if the Council went ahead and authorised the same thing that its bylaws prohibits.

11. According to the said Respondents, apart from the fact that the said letter dated 22<sup>nd</sup> November, 2012, did not allow or authorise the applicant to turn the Ambassador Hotel, as a terminus, there was no decision made by the said Respondents capable of being quashed as the said letter was a mere restatement of law.

## **Interested Party's Case**

12. It was the interested party's case that the applicant omitted to state which routes its vehicles operated which was material to allow the Court grant an order of mandamus as sought. It was therefore contended that the Court cannot give blanket orders that will allow the applicants operate as they please within the CBD without regard to the bylaws. In this respect the interested party relied on **Forward Travellers Sacco vs. Nairobi City County & Another [2014] eKLR**.

13. It was the 1<sup>st</sup> interested party's case that pursuant to section 28(1) of the ***National Transport & Safety Authority Act***, it has the right by law to grant exclusive licences to any person subject to such a person making a request for an exclusive licence authorising such person to operate a motor vehicle as the case may be, for the carriage of passengers or goods in such areas, over such routes or between such places and for such period as the Authority may determine. It was the interested party's case that it had not received any request from the ex parte applicant in respect of the lay-by in dispute. In this respect the interested party relied on **Republic vs. Officer Commanding Traffic Nairobi Area & 2 Others [2014] eKLR**.

14. According to the interested party, the Respondents in discharging their mandate only arrest and charge the traffic offenders who violate traffic rules as laid down by law. It was its case that it was unaware of any instance where the Respondent's officers have harassed or frustrated through arrest or detention any of the applicant's operations, its drivers as well as their vehicles.

15. It was the interested party's case the orders of mandamus sought against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents cannot be issued as the same will amount to barring the said Respondents from exercising their mandate.

16. The interested party therefore argued that the application ought to be dismissed with costs.

## **Determinations**

17. Having considered the foregoing, this is the view I form of the matter.

18. In this case, the ex parte applicant's contention is that it has complied with the regulations which permit it to operate within the CBD and that other vehicles with similar licenses do operate within the said CBD.

19. In the letter dated 22<sup>nd</sup> November, 2012, the City Council of Nairobi clearly informed the applicant that the applicant was supposed to use the designated terminus and designated bus lay bys along the permitted route as per the TLB which lay bys the applicant was to share with other operators who were also licenced by the TLB to operate on the same route.

20. The applicant has however exhibited documents from the interested party clearly indicating the routes which the applicant's vehicles were to ply. Among those routes was Ambassador. It is clear from the correspondences exhibited that the dispute whose stay is sought is specifically with respect to picking and dropping of passengers at Ambassador Hotel rather than the operation of the applicant in the whole of the CBD. Clearly even the Road Service Identity Certificate exhibited specify permitted routes and does not mention the whole of the CBD and Ambassador (abbreviated Amb) seems to be one of them.

21. In my view to deprive the applicant access to that lay by was clearly unjustified and if the applicant's position is true it would amount to discrimination and the burden would then shift to the Respondents to show that the limitation imposed by the said discrimination is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In **Republic vs. Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another Ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400**, it was held that in considering the merits of the test to be applied in a case where there is allegation of bias, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation of bias the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality. Similarly, in **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280**, the Court held that bias and unreasonableness have been recognised as grounds which stand alone in assisting the Courts to deal with the challenged decisions. The de-registration of the applicants in that case and the registration of main rivals within two days was held to be indicative of both bias and unreasonableness on the part of the decision maker and that the failure to give reasons for what was patently lack of even-handedness on the part of the decision maker did constitute procedural impropriety. In addition where there is certainly evidence of bad faith on the part of the decision maker the Court would not in cases where bad faith is proven to exist in influencing a decision, hesitate to take up this as a valid ground of argument.

22. In **Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 (HCK) [2008] KLR 688**, although Nyamu, J (as he then was) found that there was no discrimination, he was of the opinion that:

**“Laws including by-laws must as much as is practically possible, deal in the same way with their targets who have the same traits, class or qualities or needs. If not, they cannot withstand the challenge of discrimination.”**

23. In my view, where the decision is targeted at a particular person rather than to a class and no legally acceptable justification is forthcoming such decision cannot withstand the challenge of discrimination.

24. It is therefore my view that the grievances raised by the applicants are not without merits.

### **Order**

25. In the premises I issue an order of Prohibition directed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, either by themselves, their City Council *Askaris* acting under their directive, or howsoever to desist from frustrating, hindering or preventing in whatsoever manner the Applicants' Public Service Vehicles and their drivers, from picking or dropping commuters within the routes designated to them by the interested party as long as the Applicants hold the necessary valid Transport Licensing board

Certificates and the Road Service Identity Certificates.

26. The costs of this application are awarded to the applicant to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

27. Orders accordingly.

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

**G V ODUNGA**

**JUDGE**

**Delivered in the presence**

***Mr Ochieng for Mr Agwara for the interested party***

**CA Ooko**