



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 307 OF 2014

FIVE FRIENDS INVESTMENT COMPANY LIMITEDPETITIONER

VERSUS

DCIO PANGANI POLICE STATION1ST RESPONDENT

INSPECTOR GENERAL OF POLICE2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

HURUMA MINIBUS SACCO LIMITED5TH RESPONDENT

JUDGMENT

1. Five Friends Investment Company Limited, the petitioner, is a limited liability company incorporated under the **Companies Act** (Cap 486) Laws of Kenya. It filed a petition dated 3rd July 2014 and filed in court on 7th July 2014, against **Divisional Criminal Investigations Officer, Pangani Police Division, Inspector General of Police, Director of Public Prosecutions, Attorney General, and Huruma Minibus Sacco Limited**, 1st to 5th respondents respectively.

2. The petitioner stated that it is engaged in and is operating Public Service vehicles on the Huruma - Nairobi Central Business District, and that the 5th respondent operates the same business on the same route.

3. According to the petition, the petitioner broke away from the 5th respondent and has employed its own staff and stage managers to oversee its operations. It also stated that it has complied with the law as far as PSV operations are concerned, and has the license allowing it to operate along Huruma- Nairobi route and that both the petitioner and 5th respondent had agreed to harmoniously operate along the route without any friction and informed the OCS, DTO and OCPD of Pangani.

4. The petitioner states that officials of the 5th respondent later influenced the 1st respondent who misused and abused his powers by barring the petitioner from operating along the route and decreed that only the 5th respondent's vehicles would be allowed on that route.

5. The petitioner averred that the 1st respondent started harassing its staff (stage managers) and even arrested some of them and only released them on payment of cash bail, but never charged them in court with any offence and the cash bail has never been refunded.

6. The petitioner, therefore, felt aggrieved by the 1st respondent's actions and contends that the 1st respondent had no power to determine who should operate PSV business on the disputed route since that was the work of Transport Licensing Board, and that the 1st responded was being used to aid a competitor which amounted to abuse of office. The petitioner therefore sought the following reliefs-

i. A declaration that the petitioner's fundamental rights and freedoms have been violated.

ii. An order do issue to quash the decision of the 1st respondent barring the petitioner from operating on the city – Huruma Route.

iii. An order do issue compelling the 1st respondent to refund the cash bail paid by the petitioner's staff.

iv. An order permanently restraining the 1st, 2nd and 5th respondents or officers under them from preventing the petitioner from operating PSV on the City- Huruma Route or from picking passengers at the Huruma Bus stage.

v. Compensation to the petitioner for the violation of its fundamental rights and freedoms.

7. The petitioner also prayed for costs of the petition and any other relief the Court may deem just to grant.

8. The 2nd and 4th respondents filed grounds of opposition dated 31st July 2014 and filed on the same day. The two respondents objected to the petition stating that the petitioner should have utilized available mechanisms for lodging complaints through the **Independent Policing Oversight Authority (IPOA)** under Section 6 of the IPOA Act, and that the petition did not cite Constitutional provisions allegedly contravened and provide the particulars of complaints, manner of infringement and the jurisdictional basis for it, hence the petition is fatally defective.

9. The 3rd respondent also filed grounds of opposition stating that the petition and application lacked clarity and precision on the alleged decree as far as the 3rd respondent was concerned, that the petition did not disclose a cause of action against the 3rd respondent, and that the orders sought are not grantable against the 3rd respondent so far as its mandate under **Article 157** of the **Constitution** is concerned.

10. On its part, the 5th respondent filed a replying affidavit sworn on 15th August 2014 and filed in Court on the same day. **Stephen Wamui Thuku**, the chairman of the 5th respondent deposed that the 5th respondent was allocated a terminus for picking and dropping passengers within the City by the City County of Nairobi. He deposed that the petitioner who were its members have filed the petition with the sole purpose of harassing and destabilizing the 5th respondent's business. Mr Thuku singled out one **John Njoroje Irungu** accusing him of leaving the 5th respondent with TLB documents for the Motor vehicles he intended to use for PSV as a rival transport company.

11. Mr Thuku deposed in his replying affidavit, that the petitioner had not fulfilled the requirements for operating PSV vehicles, being a minimum of thirty (30) vehicles hence its vehicles are operating unlawfully. He further deposed that some of the owners of the motor vehicles supposedly operated by the petitioner are still active members of the 5th respondent.

12. The deponent denied that the 5th respondent had conspired with the 1st respondent to harass the petitioner. Mr Thuku deposed that in a meeting held at the 1st respondent's office, the petitioner failed to

produce documents allowing them to operate on the disputed route. According to Mr Thuku, the 1st respondent directed that the 5th respondent will continue to operate on that route until the petitioner was properly registered. He denied preventing the petitioner's vehicles from picking passengers and contended that the petition was not presented with clean hands.

13. On 24th March 2015, the Court struck off the 3rd respondent from these proceedings leaving 4 respondents. The petitioner and the 5th respondent then filed written submissions which their respective counsel highlighted during the hearing of the petition.

Petitioner's submissions

14. Mr Thuku, learned counsel for the petitioner, submitted that the petitioner operates PSV Motor Vehicles on route No 46 Huruma- City Centre where the 5th respondent also operates the same business. Counsel submitted that the 5th respondent's officials started interfering with the petitioner's business with the assistance of the 1st respondent and obstructed its vehicles from picking or dropping passengers on the route, although the petitioner was allowed to operate its business on that route.

15. According to learned counsel, the 1st respondent was influenced by the 5th respondent to stop the petitioner from operating business on the disputed route, and caused the arrest and intimidation of the petitioner's clerks and route managers on unspecified charges. Mr Thuku submitted that Legal Notice No 23 of 2014 relied on by the 5th respondent on the management of PSV vehicles was quashed by the decision in *Republic v Cabinet Secretary for Transport and Infrastructure, Principal Secretary and 5 Others Ex parte Country Bus Owners Association & Others [2014] eKLR* and was therefore of no legal effect.

16. Counsel contended therefore that the 1st respondent had no power to determine who should operate on which route. Mr Thuku further contended that the 1st respondent acted without authority hence his actions were *ultra vires*, and he could not prevent the petitioner from operating on the disputed route at the expense of the 5th respondent. In counsel's view, the powers and duties of the 1st respondent are stipulated in the **Police Service Act, 2011**, and in purporting to issue a decree barring the petitioner from operating on the route, he was usurping the role of National Transport and Safety Authority (NISA) and Transport Licensing Board (TLB). The action, he argued, violated **Article 47** of the **Constitution**. It was further submitted that the action violated the petitioner's rights as it was discriminatory.

Respondent's submissions

17. Miss Wawira, counsel for the 2nd and 4th respondents relied on the grounds of opposition and replying affidavit sworn on 25th March 2015 asked that the petition be dismissed.

18. Mr Muriithi, learned Counsel for the 5th respondent, relied on his written submissions filed in court on 24th April 2017, and submitted that the 5th respondent did not violate the petitioner's rights. Counsel submitted that by virtue of the fact that **John Njoroge Irungu** had been a member of the 5th respondent, he was precluded by **By-Law 7** from forming the petitioner company.

19. Counsel maintained the position held by 5th respondent in its replying affidavit that **Mr Njoroge** went away with TLB documents for PSV vehicles under the 5th respondent's care and operation, and used them to operate business without meeting the TLB's threshold. Counsel further submitted that the petitioner was not properly registered and has not met the requirements for operating PSV. He therefore urged that the petition be dismissed since the petitioner did not come to court with clear hands.

Determination

20. I have considered the pleadings herein and submissions by counsel for the parties. What is before

court is a constitutional petition in which the petitioner contends that its fundamental right were violated.

21. The petitioner is corporate entity a **juristic** person and **Article 260** of the **Constitution** recognizes such a person and in that regard, it is a person for purposes of this petition, and as such its rights can be violated. This is because the Constitution defines a person to include a company, association or other body whether incorporated or unincorporated. Moreover, **Article 22(1)** of the **Constitution** provides that ***every person has the right 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.***

22. The petitioner has mainly complained against the 1st respondent a police officer and the 5th respondent, a co-operative society. What emerges from the pleadings and submissions is that the petitioner's members were at one time members of the 5th respondent. They disengaged themselves, from the 5th respondent and incorporated their own company and began carrying on the same business as that of the 5th respondent and on the same route. What is therefore clear from the record and evidence is that the dispute is about business rivalry.

23. In that regard, I do not find any violation of the petitioner's fundamental rights by the 5th respondent. There was no evidence of the violations alleged against the 5th respondent either. The disagreement as to whether the petitioner was or was not properly registered, whether or not the vehicles the petitioner uses to operate belong to members of the 5th respondent, and whether or not the petitioner has enough vehicles to justify its operating PSV services, is not a matter for this Court, and cannot therefore, form the basis of a Constitutional petition against the 5th respondent.

24. In this regard, the case of ***Anarita Karimi Njeru v Attorney General*** (NO 2) [1979] KLR 154 is clear that a Constitutional petition should plead with precision the Constitutional provisions alleged to have been breached, the manner of the alleged breach and the jurisdictional basis for it. The Court stated;

“if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (See ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others*** 2013 eKLR)

25. I do not therefore find any basis why this petition was filed against the 5th respondent.

26. As stated earlier in this judgment, the 3rd respondent, the Director of Public Prosecutions was struck off these proceedings which left the 1st, 2nd and 4th respondents. The 1st respondent is the person who is accused of having been used by the 5th respondent to harass the petitioner and its employees- clerks and route managers. He is an employee of the 2nd respondent which would make the 4th respondent liable for actions of the 1st respondent as its employee.

27. The 2nd respondent is a Public Institution and, therefore, the 4th respondent is sued in his capacity as the principal legal adviser to the government and government institutions. Pursuant to Article 156 of the Constitution, the 4th respondent is responsible for representing the national government in court and other legal proceedings. It is in that capacity that the 4th respondent is sued in these proceedings.

28. The 1st respondent was in charge of Criminal Investigations in Pangani Police Division under whose jurisdiction the petitioner and 5th respondent operated. His mandate was to investigate criminal activities and take action against suspects.

29. The issue, as can be seen from the pleadings is; who between the petitioner and the 5th respondent was entitled to operate business on the Huruma-City Centre Route No 46. This was a matter falling outside the mandate of the 1st respondent. Licensing of PSV operator and routes, is that of the Transport

Licensing Board (TLB) under National transport and Safety Authority (NTSA). According to **Section 4** of the **National Transport and Safety Authority Act**, No. 33 of 2012, one of the functions of the NTSA is **to plan, manage, and regulate the road transport system in the country in accordance with the Act.**

30. Under Section 26(1) of the Act, a person is not authorized to operate Public Service vehicle unless the vehicle is licensed by the authority. On the other hand, the 1st respondent as a Police Officer operates under the **National Police Service Act**, (No 11 A of 2011). Section 49 of the Act is material to this case, and provides as follows:-

1) Subject to Article 244 of the Constitution and the Bill of Rights, a police officer may exercise such powers and shall perform such duties and functions as are by law imposed or conferred on or assigned to a police officer.

2) Where any duty, power or discretion is imposed or conferred by this Act or any other law on a police officer of any specified rank or holding any specified office, the police officer, shall, in the performance of such duty or the exercise of such power or discretion, and subject to the lawful orders and directions of any police officer to whom the police officer is directly subordinate, and any senior police officer, if the occasion arises where it is expedient to do so, perform any such duty or exercise any such power or discretion.

3) Police officers shall make a report of all daily occurrences and incidents encountered and make it available to their superior.

4) A police officer who performs an official duty or exercises police powers shall perform such duty or exercise such power in a manner that is lawful.

5) Where a police officer is authorized by law to use force, the officer shall do so in compliance with the guidelines set out in the Sixth Schedule.

6) Every police officer shall be competent to serve or execute any summons, warrant or other process whether directed to him or to any other officer.

7) The storage and use of information by any member of the Service shall be done in compliance with Article 31 of the Constitution, and all other relevant laws and regulations.

8) The Inspector-General may make regulations on handling of information by the Service.

9) Matters of a personal nature and operational information in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise.

10) A police officer shall respect the law, regulations and the Service Standing Orders, and to the best of their capability, prevent and oppose any violations of them.

11) A police officer who has reason to believe that a violation of the law has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

12) No member of the Service shall be subjected to disciplinary hearings or other disadvantage based solely on the fact that he or she has lodged a complaint with or given evidence before or information to the Independent Police Oversight Authority or other authorities or organs vested with reviewing or remedial power.

13) A police officer who abuses any powers conferred by this Act commits an offence and is liable to disciplinary or criminal action and a person whose rights are violated by a police officer shall be entitled to redress and compensation upon the decision of a court, tribunal or other

authority.” (Emphasis)

31. Any Police Officer while in the performance of his duties must operate in accordance with the law. Although it appears that the 1st respondent may have filed a replying affidavit, the same is not on the record and the Court is unable to tell the contents thereof. However, from the grounds of opposition and submissions made on behalf of the respondents, there was no suggest or submission that the 1st respondent acting as an agent of the 2nd respondent acted with a view to preventing criminal activities which would fall within his mandate and jurisdiction as the criminal investigation officer in charge of the area where the petitioner and 5th respondent operated.

32. The issue in this petition related to public service vehicle operations and to a large extent traffic duties which would place the issue in the domain of the Traffic Commandant of the Area (DTO). In that regard, therefore, a public officer and police officer in particular, must perform duties conferred on him by law or regulations. Where one performs duties other than those conferred on him by law, he acts **ultra vires** his duties

33. In the instant case, it has not been shown that the 1st respondent was performing his duties as the Divisional criminal investigations officer. I agree with that petitioner’s counsel, that the 1st respondent took it upon himself to order or “**decree**” that only the 5th respondent would operate PSVs on the route, thus discriminated against the petitioner contrary to the dictates of the Constitution. If there was a dispute on who was lawfully authorized to operate PSV business on the disputed route, the authority to resolve the issue was not the 1st respondent, and he could not discriminate against the petitioner contrary to **Article 27(1) of the Constitution**.

34. To that extent, I am persuaded that the 1st respondent as an agent of the 2nd respondent violated the petitioner’s rights to operate PSV business on the disputed route as he had no mandate to determine who between the petitioner and the 5th respondent was allowed to operate business on that route.

35. The petitioners also sought an order for refund of cash bail paid by its staff upon their being arrested on the orders of the 1st respondent. During the hearing of this petition, counsel for the petitioner submitted that the petitioner’s staff were randomly arrested and forced to pay cash bail which he estimated to be over one hundred thousand shillings yet these people were never charged in court.

36. I have perused the record and in particular the affidavit of **John Njoroge Irungu** sworn 3rd July 2014 in support of the petition. The affidavit is silent on the names of the persons arrested and forced to pay cash bail to secure their release. The affidavit especially paragraphs 17, 18 and 19 are rather in general terms and contain no specifics with regard to the people affected and the amount.

37. The annexures referred to in paragraph 18 as “**JN1 8**” shows cash bail receipt for Ksh10,000/ paid by John Macharia who was to appear in Court on 27th February 2014, there is no evidence that John Macharia did or did not appear in Court and that the cash bail was never refunded to him. John Macharia has not sworn an affidavit to that effect and has not produced the original receipt for that money. None of the petitioner’s members of staff has sworn an affidavit either that he paid cash bail to the 1st respondent which has not been refunded to show that the order sought for refund is merited.

38. If the persons have never been arraigned in Court since 2014, the person(s) who deposited the money should seek to have it released. There is no evidence before Court, either that the person named in the cash bail receipt is a member of the petitioner and that the petitioner has authority to seek refund of that money on his behalf.

39. As regards the claim for compensation, the petitioner did not adduce evidence that it suffered loss and to what extent, to enable the Court determine whether damages are payable. The petitioner attached an agreement to show that the petitioner and 5th respondent had agreed to operate on the route, and both counsel for the petitioner and the 5th respondent admitted during the hearing that the two parties are

conducting their businesses unhindered.

40. Damages are meant to restore a party to his or its initial position prior to any alleged suffering caused by an unlawful act of the respondent. There must be evidence of suffering, possible loss or inconvenience that need to be compensated. However, in this case, there was no such evidence hence the claim for damages is not based on any tangible evidence and therefore no justification for its grant has been made.

41. From what I have stated above the petitioners was only able to prove that the 1st respondent acted beyond his powers and his actions were ***ultra vires***. Consequently, the petition succeeds partly and I make the following orders;

1. A declaration is hereby issued declaring the 1st respondent's decision barring the petitioner from operating PSV business along Huruma -City Centre Route ultra vires and therefore null and void.

2. An order is hereby issue quashing the decision of the 1st respondent barring the petitioner from operating on the city – Huruma Route.

3. An order is hereby issued restraining the 1st, 2nd and 5th respondents or officers under them from preventing the petitioner from operating PSV on the City- Huruma Route or from picking passengers at the Huruma Bus stage.

4. Each party do bear their own costs.

Dated, Signed and Delivered at Nairobi this 26th Day of September 2017

E C MWITA

JUDGE