



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW CASE NO. 130 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF  
MANDAMUS & PROHIBITION**

**AND**

**IN THE MATTER OF THE NATIONAL TRANSPORT AND SAFETY AUTHORITY ACT, (ACT  
NO. 33, 47 & 48 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF A JUDICIAL REVIEW APPLICATION BY:**

**DIGITAL LUXURY TRAVELLERS LTD .....APPLICANT**

**VERSUS**

**NATIONAL TRANSPORT & SAFETY AUTHORITY.....RESPONDENT**

**JUDGEMENT**

1. By a Notice of Motion dated 20<sup>th</sup> day of March, 2017, the *ex parte* applicant herein, **Digital Luxury Travelers Ltd**, seeks the following orders:

1. That by way of judicial review, an order of prohibition do issue, prohibiting the respondent from further delaying from acting upon the *Ex parte* Applicant's application for registration as a duly licensed public transport business operator.
2. That by way of judicial review, an order of mandamus do issue, compelling the respondent to register the *Ex parte* Applicant as a duly licensed transport business operator for the Kangemi-Nairobi CBD route as prayed in their application in October 2016 and subsequently updated thereafter.
3. That the costs be to the applicant in any event.

**Ex Parte Applicant's Case**

2. According to the applicant, it is duly registered under the Company's Act. Cap 486 and its members have formed the said company with a view to operate public transport within Kenya. The said members,

it was averred have sought registration under the said company in order to obtain valid PSV transport licenses which by dint of section 61(1) of *The National Transport and Authority Act*, (Act No. 33 of 2012) operate as valid under the Ex-parte Applicant.

3. According to the applicant, it is aggrieved by the oppressive, arbitrary, illegal and utterly unconstitutional decision of the Respondent herein to decline to register the Ex-parte Applicant as such PSV operator and having failed to promptly and timeously state the reasons for the refusal in registration as envisaged under Article 47 of the Constitution. The said actions of the Respondent, it was contended have deprived the members of the Ex-parte Applicant their right to associate, earn a living and provide for themselves and in exercise of their Constitutionally held Freedom of Association.

4. According to the applicant the refusal/delay in registration is not an appealable as no decision has been made.

5. The applicant contended that there is an implicit legitimate expectation created under Article 47 of the Constitution that such administrative Act will be done expeditiously. It was therefore its case that the actions of the Respondent to implicitly and obliquely deny it registration as a PSV operator of fleet of PSV vehicles are irrational, unfair, oppressive and without any reasonable justification or bases as it has constantly shifted the “goalposts” since October, 2016 at the behest of external forces yet the applicable considerations were met *ab initio* for the registration of the Ex-parte Applicant. As a result, it was averred that the Ex-parte applicant’s members have suffered financial losses (nearing penury and utter financial ruin) on account of the Respondent’s delay in registering the Ex-parte Applicant as a PSV operator on the CBD-Kangemi route since October 2016, thereby depriving them of the enjoyment of their freedom and right of association, constituting a violation of Article 20(2) of the Constitution.

6. It was disclosed that the Respondent laid down a raft of requirements to be met by the Ex-parte Applicant at the first point of application of such registration, which were ALL met. Thereafter, the former SACCO where the Applicant’s members were having their vehicles alleged that some contributions were owing as hindrance to registration (which the Respondent established was not true) and still it (the Respondent) arbitrarily and unreasonably held the application for registration as pending. It was the applicant’s case that its members have formed the Applicant company and taken their 31 PSV buses there only because the Respondent has regulations demanding they associate together as such. Yet even after complying with these regulations, the Ex parte Applicant’s members have been deprived and denied their constitutionally guaranteed right to associate, by being denied such registration. In the applicant’s view, regulations cannot override Constitutional rights within the bounds of practical application and the Applicant having met all the set requirements by the Respondent for such registration.

7. It was averred that other parties have applied for such registration and within a space of not more than a fortnight, are registered promptly as such PSV operators by the Respondent. This constitutes a clear violation of Article 27(1) of the Constitution, entitling this Court to intervene. The applicant asserted that as a public body, the Respondent is bound by the Principles of Articles 10(2) of the constitution which in this case it has totally impugned. Therefore the delay in registering the Applicant as a PSV operator has been unfair, unreasonable, overly delayed without justification, shifting of demands placed on the Applicant constituting bad faith and gross neglect of communicating to the Applicant the reasons for such delay.

8. It was the applicant’s case that it has no other resource than to this Court as all correspondence, visits to the Respondent’s offices and calls to the licensing officers have all met a brick wall.

9. It was disclosed that the Applicant’s members have hitherto been members of KMO SACCO until 7<sup>th</sup> October, 2016 when they notified KMO SACCO and copied the Respondent of the cessation of their membership and withdrew their PSV business from the said KMO SACCO. By a letter of even date (7<sup>th</sup> October, 2016) KMO did NOT object to the cessation of such membership by the members of the Ex parte Applicant and instead demanded that such members do surrender their Road Service Licenses issued by the Respondent NTSA in respect of their said PSV vehicles as part of the PSV vehicles under the KMO SACCO fleet of PSV vehicles. Without waiting for any response from the Ex parte Applicant’s

members, KMO SACCO proceeded on 8<sup>th</sup> October, 2016 to unceremoniously, unlawfully and using hooligans and goons pluck off the respective RSL licenses from the said Ex parte Applicant's members' vehicles. Despite the applicant's lamentations, no response was received from the Respondent by way of admonishing KMO SACCO.

10. As a result thereof, it was averred that the Ex parte Applicant's members then proceeded to form and join themselves as Digital Luxury Travellers Ltd and applied for such registration as a PSV operator (as a limited liability company) with the Respondent and it accepted their application.

11. The Ex parte Applicant averred that and its members are left without recourse to the protection of the law should this Court not intervene as herein sought, as the officers of the Respondent are now misusing and exploit the police powers to harass, clamp down, intimidate and altogether cause the grounding unlawfully the Applicant's members' vehicles not complying with the unknown and un-communicated.

### **Respondent's Case**

12. The application was opposed by the Respondent.

13. According to the Respondent, the application and the orders sought herein are premature. It was its case that it advised the applicant on what the applicant needed to submit in order for the applicant's application to be considered. To the Respondent, there has been no ill motive, malice and/or unreasonable refusal to license the applicant as alleged or at all as the Respondent has provided the applicant with technical assistance on licensing procedures to the extent of allowing the applicant to submit a minimum of fifteen vehicles owned by it as opposed to the required thirty vehicles

14. The applicant further averred that it had facilitated the applicant to transfer 15 logbooks in the names of the directors to the applicant within one day in order to enable the applicant submit the documents as evidence of ownership of the vehicles by the applicant.

15. It was the Respondent's case that the applicant did not meet all the conditions for licensing despite receiving the said technical advice from the Respondent. It was averred that the applicant was required to avail all its vehicles for inspection as a pre-condition for licensing to be completed. In addition the applicant was requested to propose other routes for consideration other than the one it submitted as the same had security concerns which is one of the paramount factors.

16. It was the Respondent's case that allowing the applicant the orders sought would violate the licensing procedures and the law. The Respondent affirmed that once the vehicles are inspected and the routes approved, they would be duly licensed.

17. It was therefore the Respondent's case that the applicant should be directed to comply with the legal and procedural requirements so as to be licensed.

### **Determinations**

18. I have considered the material on record and this is the view I form of the matter. ,

19. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** in which the said Court held *inter alia* 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* compel 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”.

20. Article 47 of the Constitution which provides:

***(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.***

21.The applicant’s application is that its application for registration as a duly licensed public transport business operator was not considered as the Respondent did not furnish it with its decision thereon. The Respondent has however in these proceedings averred that it did furnish the applicant with the reasons why the applicant’s application was not allowed and that the delay in effecting the registration resulted from the failure by the applicant to comply with the pre-conditions necessary for registration to be effected.

22.The applicant has however contended that it never received the communication. This Court cannot determine which of the versions with respect to receipt of the Respondent’s communication is correct in the proceedings of this nature.

23.Section 4(2) of the *National Transport and Safety Authority Act* empowers the Respondent to *inter alia* regulate public service vehicles. As to whether its decision made pursuant to the said power is merited or not is not for this Court to determine. Such decision can only be determined by an appellate tribunal.

24.Whereas it may well be (and I am unable to make a definite finding on this) that as at the time of the commencement of these proceedings, the Respondent had not communicated its decision on the applicant’s application, it is now clear that the Respondent had reasons for not effecting the said registration. In these kinds of proceedings, the Court cannot compel the Respondent to exercise its discretion in a particular manner. The Court can only direct the Respondent to exercise its powers as by the law required. It is not contended that the conditions the Respondent imposed for registration of the applicant to be effected were unreasonable.

25.However as the Respondent has satisfactorily explained its reasons for not registering the applicant in the manner sought by the applicant, judicial review being a discretionary relief, this Court cannot in the circumstances of this case issue the orders sought herein. 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.’”

26. 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 on which conditions have been imposed for the better carrying out of the provisions of the said Act. 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 (as he then was) in Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688, 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.”**

27. 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.

28. Considering the totality of my findings hereinabove, I find no merit in the Notice of Motion dated 20<sup>th</sup> day of March, 2017.

### **Order**

29. In the result the said Motion fails and is dismissed with no order as to costs.

**Dated at Nairobi this 19<sup>th</sup> day of September, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Makori for Mr Kinyanjui for the applicant**

**Mr Orengo for the Respondent**

**CA Ooko**