



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 37 OF 2017**

IN THE MATTER OF AN APPLICATION BY MNGN SACCO FOR ORDERS OF MANDAMUS  
AND CERTIORARI

AND

IN THE MATTER OF THE NATIONAL TRANSPORT SAFETY AUTHORITY ACT

AND

IN THE MATTER OF THE TRANSPORT LICENSING APPEALS BOARD

AND

REPUBLIC .....APPLICANT

VERSUS

TRANSPORT LICENSING APPEAL BOARD .....1<sup>ST</sup> RESPONDENT

THE NATIONAL TRANSPORT SAFETY

AUTHORITY.....2<sup>ND</sup> RESPONDENT

FIGKOMBA SACCO LTD .....INTERESTED PARTY

MNGN SACCO LTD.....EX-PARTE

**JUDGMENT**

1. On 9<sup>th</sup> February 2017 the exparte applicant MNGN Sacco Ltd was granted leave of court to institute Judicial Review proceedings within 14 days. The notice of motion was filed on 20<sup>th</sup> February 2017 seeking the following Judicial Review orders:

**a Certiorari** to quash the decision of the Transport Licensing Appeals Board at Nairobi in Case No. 20 of 2016 between FIGKOMBA Sacco Ltd and National Transport and Safety Authority dated 7<sup>th</sup> December, 2016;

**b. Mandamus** compelling the National Transport and Safety Authority to revoke the road

service license and or any decision made in favour of FIGKOMBA Sacco Ltd pursuant to the decision of the Transport Licensing Appeals Board in case No. 20 of 2016 between FIGKOMBA Sacco Ltd and National Transport and Safety Authority dated 7<sup>th</sup> December, 2016.

c. Costs.

2. The application is predicated on the grounds contained in the statutory statement dated 17<sup>th</sup> February 2017 and verifying affidavit sworn by Daniel Macharia on 17<sup>th</sup> February 2017.
3. The application is predicated on the grounds contained in the statutory statement dated 17<sup>th</sup> February 2017 and verifying affidavit sworn by Daniel Macharia on 17<sup>th</sup> February 2017.
4. According to the ex parte applicant, on 7<sup>th</sup> December 2016 the National Transport and Safety Authority rendered a decision which was in total non-compliance with the law and without justification.
5. That the impugned decision materially and adversely affected the ex parte applicant who was not afforded a chance to be heard in spite of the judgment expressly recognizing that MNGN Sacco Ltd had an interest in the matter; That the decision rendered by the Transport Licensing Appeals Board was unreasonable, unjustified, unlawful and oppressive to the ex parte applicant; That the decision by the Transport Licensing Appeals Board was made in excess of jurisdiction and is consequently illegal and null and void for all intents and purposes; That it is fair, just and in the interest of justice that orders sought be granted.
6. The ex parte applicant's case as set out in the verifying affidavit of Daniel Macharia, its Chairman MNGN Sacco Ltd is that its public service motor vehicles are licensed by the National Transport and Safety Authority to operate within the **Mathare North- Gikomba – Ngara – Fig Tree** route with the current fleet of motor vehicles plying the subject route standing at 61.
7. On the other hand, it is alleged that the interested party FIGKOMBA Sacco Ltd motor vehicles are licensed to operate within **Ngara- Gikomba- Kiambu** route with a fleet of 38 vehicles.
8. That over the years, there has been the intrusion of FIGKOMBA Sacco Ltd vehicles on the ex parte applicant's route which has led to disputes and complaints lodged with the National Transport and Safety Authority by the ex parte applicant.
9. In 2016, the interested party lodged a complaint with the Transport Licensing Appeals Board against the National Transport and Safety Authority touching on the Mathare North route operated by the ex parte applicant's vehicles culminating in the judgment of the Transport Licensing Appeals Board delivered on 7<sup>th</sup> December 2016.
10. It is alleged that the said judgment materially and adversely affected the ex parte applicant yet the latter was not made a party to the dispute and neither was it called upon to be heard before an adverse decision was made against it. It is therefore claimed that the decision of the Transport Licensing Appeals Board offended the rules of natural justice as it affected the ex parte applicant's business directly and adversely yet they were not afforded a chance to be heard; that the decision did not comply with the law and was without justification; was made in excess of jurisdiction, was illegal, null and void ab initio and that it is fair, just and in the interest of justice that the orders sought be granted.
11. The impugned judgment among other documents were annexed to the verifying affidavit.
12. Despite service of the notice of motion upon the respondents and the interested party, only the 2<sup>nd</sup> respondent the National Transport and Safety Authority entered an appearance and filed a replying affidavit sworn by Cosmas Ngeso its Deputy Director, Registration on 24<sup>th</sup> February, 2017.

13. According to the 2<sup>nd</sup> respondent, it draws its mandate from the National Transport and Safety Authority Act No. 33 of 2012 and that both the ex parte applicant and interested party are currently registered and licensed transport operations which are recognized by the Authority.

14. That the interested party filed an appeal to the Transport Licensing Appeals Board claiming that the Authority had failed to amend its Road Service Licence (RSL) to include the name “Mathare North” and to rectify the representation of “Ngara” and “Fig Tree” as the different destinations, as they denote one destination.

15. Further, that the interested party also alleged that the name “Mathare North” was omitted from their Road Service Licence during the transition from the Transport Licensing Board to National Transport and Safety Authority.

16. That when the interested party wrote a letter dated 1<sup>st</sup> August 2016 to the National Transport and Safety Authority, the Authority advised the interested party to apply for a route extension requesting “Mathare North” to be included in their Road Service Licence.

17. That the interested lodged an application for inclusion of “Mathare North” in its Road Service Licence but after consideration, the Authority refused the application due to several considerations including current operators on the same route and the need to avoid uneconomical competition.

18. That being aggrieved by the decision of the Authority, the interested party lodged an appeal to the Transport Licensing Appeals Board claiming that National Transport and Safety Authority had refused to amend its Road Service Licence to include “Mathare North” and to rectify the representation of “Ngara” and “Fig Tree” as two different destinations as they denote one destination.

19. That after the Transport Licensing Appeals Board heard the interested party, it delivered its judgment on 7th December 2016 making the following substantive orders:

***“a. A declaration that the Appellant’s constitutional right to a fair administrative action was violated.***

***b. An order of certiorari quashing the respondent (NTSA’s) decision to refuse the Appellant’s (interested party’s) application to have the word “Mathare North” inserted into their Road Service Licence;***

***c. An order of mandamus compelling the respondent to reconsider the applicant’s application and made a lawful decision.***

***d. That the order be served upon National Transport and Safety Authority and Traffic Commandant with a view to ensuring that FIGKOMBA vehicles are allowed to operate along the Mathare route until the respondent makes a lawful decision as per order No. three(3) above(mandamus).”***

20. The applicant and the 2<sup>nd</sup> respondent’s counsels filed written submissions to explain away their respective positions as supported by authorities annexed thereto, which they adopted as canvassing their respective client’s positions.

21. The ex parte applicant’s submissions were filed on 25<sup>th</sup> April 2017 whereas the 2<sup>nd</sup> respondent’s submissions were filed on 12<sup>th</sup> May 2017 and as the court was proceeding on leave, judgment date had to be fixed falling on a suitable date after resumption from my leave.

22. The parties’ submissions basically reiterate their respective positions as per the grounds and or depositions in their respective affidavits reproduced in this judgment.

23. The exparte applicant maintained that the 1<sup>st</sup> respondent Transport Licensing Appeals Board was all along aware that its decision would materially and adversely affect the exparte applicant since the latter's vehicles are licenced to ply Mathare North route yet it went ahead to hear the interested party and make a determination without ensuring that the appeal giving rise to the decision of 7<sup>th</sup> December 2016.

24. Reliance was placed on Article 47 of the Constitution on the right to a fair administrative action and Section 4(3) of the Fair Administrative Action Act, 2015 which stipulates that where an administrative action is likely to adversely affect the rights and fundamental freedoms of any person, the administrator shall give the person affected by the decision prior notice; an opportunity to be heard and to make representation; notice of a right to a review or internal appeal against the administrative decision where applicable; statement of reasons, notice of the right to legal representation where applicable; notice of the right to cross examine or where applicable; information, materials and evidence to be relied upon in making the decision or taking the administrative decision.

25. Further reliance was placed on Section 5 of the Fair Administrative Action Act on the procedure to be adopted by an administrative body where the proposed action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public.

26. On the requirement that the administrative action must be fair, reliance was placed on **Republic vs National Transport and Safety Authority and 2 others Exparte Rengcom Communications Ltd [2017] e KLR.**

27. On the need to take into account the interests of third parties who are likely to be affected by the decision, reliance was placed on **Council of Legal Education & Another Exparte Mount Kenya University [2016] e KLR** citing with approval **Judicial Service Commission vs Mbalu Mutava & Another [2015] e KLR.**

28. According to the exparte applicant, the decision made by the Transport Licencing Appeals Board was made without jurisdiction as the powers of the Appeals Board are stipulated in Section 39(5) of the National Transport and Safety Authority Act, 2012 which powers do not include the power to make the orders made on 7<sup>th</sup> December 2016.

29. It was submitted that the Judicial Review orders made by the Transport Licencing Appeals Board are only in the preserve of the High Court hence the orders were made without jurisdiction. The exparte applicant prayed that the application be allowed with costs.

30. The 2<sup>nd</sup> respondent's submissions in all material particulars mirror the depositions by its Deputy Director and concludes by stating that it welcomes any decision of this court since it is the decision of the 1<sup>st</sup> respondent that is sought to be impugned and quashed.

31. The 2<sup>nd</sup> respondent further prays that there should be no order of costs against it given it is the decision of the 1<sup>st</sup> respondent Transport Licencing Appeals Board which is challenged .

### **DETERMINATION.**

32. I have carefully considered the exparte applicant's motion, grounds, statutory statement; verifying affidavit and annexures. I have given equal consideration to the 2<sup>nd</sup> respondent's replying affidavit and both parties advocates' submissions and the case law as well as constitutional and statutory provisions relied on by the exparte applicant's counsel. In my view, the following issues flow for determination in this application which are:

1. Whether the 1<sup>st</sup> respondent had jurisdiction to make the orders that it made vide its decision of 7<sup>th</sup> December 2016.

2. Whether the exparte applicant was entitled to be heard before the 1<sup>st</sup> respondent made the orders of 7<sup>th</sup> December 2016.

3. What orders should this court make.

4. Who should bear costs of these Judicial Review proceedings.

33. On the first issue of whether the 1<sup>st</sup> respondent had jurisdiction to make the orders which it made vide its decision of 7<sup>th</sup> December 2016, the Transport Licensing Appeals Board is a creature of the statute namely, the National Transport and Safety Authority Act, 2012. Under Section 39(5) of the Act, the Board is vested with the jurisdiction to, on appeal, to affirm or reverse the decision of the Authority, or make such other order as the Board considers necessary and fit.

34. The Board is an Appeals Board which exercises powers as a tribunal or subordinate court. It is subject to the Constitution, the laws of the land and the High Court which exercises supervisory powers over it, like it does to all other tribunals, bodies, persons or subordinate courts( see Article 165 (6) and (7) of the Constitution.

35. In considering whether or not the 1<sup>st</sup> respondent had jurisdiction to make orders that it did make on 7<sup>th</sup> December 2016, it is important to note that jurisdiction is everything without which a court of law or tribunal acts in vain. (see **Owners of the Motor Vessel “Lilian S” –vs- Caltex Oil(Kenya) Ltd (1989) KLR 1** where Justice Nyarangi of the Court of Appeal states that:-

***“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

36. It has been said that the authority for this holding by the then Learned Judge of Appeal is to be found in the writings of **John Beecroft Saunders in a Treatise** headed **Words and Phrase Legally defined- Volume 3:I-N** where the Learned Author states at Page 113 the following about jurisdiction:-

***“By jurisdiction is meant the authority which the court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restrictions or limits is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exists. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgment is given.”***

37. It is jurisdiction granted by statute or the Constitution that courts, tribunals or persons exercising judicial or quasi-judicial authority exercise. Jurisdiction cannot be granted by craft or by consent of the parties. It is a creature of legal or constitutional instruments and therefore where a tribunal or quasi or judicial body or person exercises jurisdiction which it does not possess, it is said to have acted in excess of its jurisdiction or ultra vires.

38. The High Court has power to intervene and interfere in cases where the it is called upon to do so,

and where it is satisfied that on the material before it, the tribunal is proven to have acted either illegally or without jurisdiction in rendering its decisions.

39. Thus, Judicial Review is a constitutional supervision of public authorities or bodies involving a challenge to the legal and procedural validity of the decision. Judicial Review is not an appeal. It does not allow the court to examine the evidence with a view to forming its own independent opinion about the substantial merits of the case. If a tribunal or public body does something or makes a decision which it had no lawful authority to do, or if it abuses or misuses that authority or departs from procedures which either the statute or at common law, as a matter of fairness, ought to have been observed and followed to the letter, the court will intervene.

40. Equally, where the decision of a public authority, or where a public authority, or administrative or judicial body had the jurisdiction to make decisions but the decision itself is perverse, or irrational, or grossly disproportionate to what was required or where the decision is found to be erroneous in respect of a legal deficiency such as through absence of evidence or through the taking into account of an irrelevant matter, the High Court may intervene without forming its own preferred view of the evidence.

41. In this case, the question is whether the Appeals Board had jurisdiction to issue Declarations to the effect that the Appellant's Interested party Constitutional Rights to Fair Administrative Action was violated; or to issue certiorari quashing the 2<sup>nd</sup> respondent's decision or mandamus compelling reconsideration of the interested party/appellant's application to make a lawful decision.

42. On the first order which is a declaration that the appellant's/interested party's Constitutional Right to a Fair Administrative Action was violated, Article 22 of the Constitution confers on every person 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 it threatened.

43. In addition, Article 23 which deals with authority of courts to uphold and enforce the Bill of Rights confers on the High Court jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

44. Sub Article 2 thereof empowers Parliament to enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights.

45. The orders/appropriate relief that a court may issue under Article 22 of the Constitution, are, among others- a declaration of rights; an injunction, a conservatory order, a declaration of invalidity of any law that denied, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order of Judicial Review.

46. Under Article 165(3) of the Constitution, the High Court is vested with unlimited original and appellate jurisdiction in criminal and civil matters; jurisdiction to determine the question whether a right or fundamental freedom in the Bill or Rights has been denied, violated, infringed or threatened; jurisdiction to hear an appeal from a decision of a tribunal appointed under the Constitution to consider the removal of a person from office other than a tribunal appointed under Article 144( on removal of President on grounds of incapacity).

47. From the above constitutional provisions, it is clear that only the High Court is vested with unlimited original and appellate jurisdiction in matters of declaration of rights and fundamental freedoms in the Bill of Rights. Subordinate courts are, under Article 23(2) of the Constitution, subject to legislation being enacted by Parliament, only vested with original jurisdiction and only in appropriate cases, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom on the Bill of Rights and in doing so, the courts( whether subordinate or High Court) may grant the appropriate relief as stipulated in Article 23(3) of the

Constitution.

48. Subordinate courts are defined under Article 169(1) of the Constitution as:-

- a) The Magistrate's courts.
- b) The Kadhi's Courts.
- c) The Court's Martial; and
- d) Any other court or local tribunal as may be established by an Act of Parliament, other than the courts established under Article 162(2).

49. Under Article 169(2) of the Constitution, Parliament is empowered to enact legislation conferring jurisdiction, functions and powers on the courts established under Clause(1).

50. No doubt, the Transport Licensing Appeals Board is a local tribunal established under the National Transport and Safety Authority Act, 2012 with jurisdiction to hear appeals from the decisions of the National Transport and Safety Authority. The Appeals Board can therefore safely be considered to be a subordinate court as stipulated in Article 169(1) (d) of the Constitution and its jurisdiction clearly spelt out in Section 39(5) of the National Transport and Safety Authority Act.

51. The statute creating the Appeals Board is clear that the Board only has appellate jurisdiction and not original jurisdiction.

52. A declaration of rights or grant of rights or grant of any of the reliefs under Article 23(1) of the Constitution cannot be made by a subordinate court exercising appellate jurisdiction. It follows, therefore, without much ado, that the 1<sup>st</sup> respondent Appeals Board, in declaring that the interested party's rights guaranteed under the Constitution were violated, the Appeals Board was usurping powers of the High Court.

53. In the same vein, the 1<sup>st</sup> respondent Appeals Board was acting beyond and outside its jurisdiction and without jurisdiction when it made Judicial Review orders of certiorari and mandamus against the decision of the National Transport and Safety Authority as it had no such jurisdiction as an Appeals Board to grant such orders in exercise of its appellate jurisdiction.

54. It therefore follows that even without deciding whether or not the exparte applicant herein was heard or entitled to be heard or not, the 1<sup>st</sup> respondent acted ultra vires not only the statutory provisions of the Section 39 of National Transport and Safety Authority Act, 2012 but made a decision which outrightly contravened Articles 23,165 of the Constitution by usurping jurisdiction which is exclusive to the High Court by granting orders of Judicial Review and Declaration of Rights guaranteed under the Constitution without first stopping to examine whether it had such jurisdiction to do so.

55. A tribunal has no inherent jurisdiction ( See **Republic vs Cabinet Secretary Ministry of Education exparte John Njomo[2017] e KLR**. It only acts in accordance with the vested jurisdiction/power. It would be guilty of abuse of power of it granted orders that are expressly excluded by the Constitution and that is exactly what the 1<sup>st</sup> respondent herein, the Appeals Board did, by acting without jurisdiction and outside its jurisdiction.

56. For those reasons, I have no hesitation in finding and holding that the decision of the 1<sup>st</sup> respondent was and is illegal, ultra vires and unconstitutional.

57. Accordingly, the Order No. 4 of the decision of 7<sup>th</sup> December 2016 which flows from orders Nos. 1,2 and 3 cannot lie for want of jurisdiction.

58. For the foregoing reasons, I find and hold that the ex parte applicant's notice of motion dated 17<sup>th</sup> February 2017 is merited in its entirety. I grant prayers Nos. 1 and 2 of the notice of motion as sought.

59. Costs are in the discretion of the court. However, in this case, the court finds that the impugned decision was made by the 1<sup>st</sup> respondent which is a public body under the judiciary, out of utter ignorance. The 2<sup>nd</sup> respondent was enjoined to the proceedings because the 1<sup>st</sup> respondent had considered the latter's decision not to allow the interested party to include a route "Mathare North" in its Road Service Licence. It is also a public body.

60. The interested party is the ex parte applicant's competitor in the matatu Public Service Vehicle business. In order to promote harmonious co-existence between the ex parte applicant's and the interested party's members of the Public Service Vehicle operators in the matatu sector which has been difficult to manage over the years, and to save tax payers of the burden of paying costs in these hard economic times, I order that each party shall bear their own costs of these Judicial Review proceedings.

Dated, signed and delivered in open court at Nairobi this 17<sup>th</sup> day of October, 2017

**R.E. ABURILI**

**JUDGE**