



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

PETITION NO 521 OF 2015

CITY RIDERS SACCO1ST PETITIONER
FLIGHT RIDERS SACCO.....2ND PETITIONER
TUMOTER SACCO.....3RD PETITIONER
TRANSCITY SACCO.....4TH PETITIONER
KIRINYAGA SACCO.....5TH PETITIONER
NYAKAMPALA SACCO.....6TH PETITIONER
SAFE RIDE SACCO.....7TH PETITIONER
LATEMA UNIQUE RIDERS SACCO.....8TH PETITIONER
UNIQUE BODA BODA SACCO.....9TH PETITIONER
NAIROBI RIDERS SACCO.....10TH PETITIONER
FOUR WAYS BODA BODA SACCO.....11TH PETITIONER
CBD BODA BODA SACCO.....12TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF NAIROBI1ST RESPONDENT
NATIONAL POLICE SERVICE COMMISSION.....2ND RESPONDENT
INSPECTOR GENERAL OF POLICE SERVICE.....3RD RESPONDENT
HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

Introduction

1. The petitioners lodged this matter to challenge a notice carried in the newspaper on 11th November 2015 seeking to stop the petitioners and others providing transport by motor cycles from entering the central business district of the City of Nairobi. They allege that they rely for their livelihood on the said motor cycles and their being prevented from entering the central business district will violate their right to.

2. The petitioners allege that they are duly registered under the provisions of the Co-operative Societies Act and are therefore entitled to operate within the central business district. In their application brought by way of Notice of Motion dated 20th November 2015, they seek the following orders:

1. That this application be certified urgent, service be dispensed with and the same be heard ex parte in the first instant.

2. That pending the hearing and determination of the petition, an order of injunction do issue against the 1st respondent, its agents and/ or servants from injecting the members of the petitioners from their lawful operating areas as contained in their certificates of registration.

3. That pending the hearing and determination of the petition, an order of injunction do issue against the 1st respondent and to stay and /or suspend the operation of the notice of the 1st respondent issued in the daily newspapers of 11th November 2015.

4. That pending the hearing and determination of the petition, an order of injunction do issue against the 1st, 2nd and 3rd respondents, their agents and /or servants from impounding the motor-cycles of the members of the petitioners.

5. That cost of the application be provided for.

3. The application is supported by the affidavit sworn on behalf of the petitioners by Mr. Kenneth Onyango and is based on the grounds set out in the face of the application. Principally, the grounds are that the 1st respondent had purported, by a notice dated 11th November 2015 appearing in national daily newspapers, to stop the operations of the members of the petitioners from the central business district of the City of Nairobi. The decision was made without prior notification to the members of the petitioners and contravened their right to conduct business anywhere within the Republic of Kenya in order to empower themselves socially and economically. The petitioners state that they have been registered by the Registrar of Cooperative Societies under the Co-operative Societies Act, Cap 490 Laws of Kenya) and have been designated areas of operation. The 1st respondent's notice has therefore affected those who have been duly registered to operate within the central business district. They further argue in the said grounds that under Article 191 of the Constitution with respect to conflict of laws, national legislations is superior to county government legislations and once the petitioners were registered under the Co-operative Societies Act and recognized as societies to operate at the designated areas, unless the 1st respondent has clearly demonstrated unlawfulness or any threat posed by the petitioners, its notices, such as the one issued on 11th November 2015 is null and void.

Submissions by the Petitioners

4. In presenting the petitioners application, Mr. Nyabena submitted that their application seeks orders against the notice issued by the 1st respondent 11th November 2015 banning all the members of the applicant from ferrying passengers to the central business district. He contended that while the notice alludes to the provisions of the Traffic Act, no specific provision has been cited in support. It was the petitioners' submission therefore that this failure to cite a specific provision of the Traffic Act was due to

the fact that the respondent has no power to issue such a notice, in which it also warns members of the petitioners that would in default be subject to fines and penalties.

5. The petitioners complain that a certain class of motor cycles has been exempted, and they submit that by banning the petitioners and allowing others, the respondent is discriminating against them.

6. Mr. Nyabena argued that the petitioners have been duly registered under the Co-operative Societies Act to carry out the business of ferrying passengers to and from the City of Nairobi. He contended that for the 1st respondent to ban the petitioners, it must demonstrate that it has the authority to do so, which it had not done. It was also his submission that the 1st respondent had not demonstrated that the petitioners' certificates of registration have been cancelled or suspended.

7. According to the petitioners, they have been carrying out business over the years in the city of Nairobi, and if they had committed any offences, they should be charged, but their motor cycles should not be impounded.

8. The petitioners further argue that the notice by the 1st respondent was in breach of Article 47. It was their contention that by issuing the notice without giving the petitioners a hearing, the respondent had breached the said Article 47. They urged the Court to intervene and issue the orders sought to allow them to continue with their business pending the determination of the petition. Mr. Nyabena contended that the petitioners had made out a prima facie case with a probability of success by showing that the notice is illegal. It was his argument, further, that the balance of convenience is in favour of the petitioners as the 1st respondent will not suffer any prejudice if the petitioners continue to carry out business in the central business district.

Submissions in Reply

9. In response to the application, Mr. Makokha for the 1st respondent noted that the petitioners had faulted the 1st respondent's notice on the basis that it does not refer to any provision in the Traffic Act. Counsel referred to section 118A of the said Act which he submitted confers power on local governments to make laws to regulate taxicabs and, by extension, motor cycle taxis. His submission was that the county government of Nairobi is the successor of the local government by virtue of section 43 of the 6th schedule to the Constitution, and the powers vested in local governments by section 118 of the Traffic Act vest in the county governments.

10. Counsel submitted further that the Constitution has, under section 5(d) of Part 2 of the Fourth Schedule to the Constitution vested the public road transport function exclusively within the mandate of county governments. With respect to the contention that there were no by-laws cited to support the issuance of the notice, Counsel relied on the decision in **Nairobi Metropolitan PSV Sacco Ltd and 25 Others vs the Nairobi County Government and 3 Others Petition No. 486 of 2013** in which the court observed that where a function is conferred to a particular level of government such level of government does not need by laws to perform its functions.

11. With respect to the petitioners' reliance on the Cooperative Societies Act, the 1st respondent submitted that the Act does not regulate road transport. Further, that the certificates issued under the Act do not indicate where members of co-operatives should operate from. Mr. Makokha submitted that the certificates only relate to registration and have nothing to do with road transport. In any event, according to the 1st respondent, if the Co-operative Act had any application to the road transport functions, which, in his view, it does not have, it would have to be read in conformity with the Constitution in accordance with section 7 of the Sixth Schedule to the Constitution.

12. The 1st respondent also objected to the application by the petitioners on various technical grounds. Mr. Makokha submitted that the orders sought by the petitioners and the application itself are fundamentally defective; that the petitioner was seeking at prayer 3 to stay a gazette notice, which cannot be done; that they were essentially arguing that they should never be regulated, which would not be in the

public interest, and it was his submission that the public interest favours the respondent. Counsel relied on the decision in **Nicholas Mwiti and Others vs Pharmacy and Poisonous Board Petition No. 140 of 2015** with regard to the caution to be exercised before issuing injunctive orders against a public body performing its functions. The 1st respondent concluded that it had considered the presence of motor cycles in the city centre and had found that they do more harm than good. It prayed that the application be dismissed with costs.

13. Mr. Makokha, who was also holding brief for Mr. Sekwe for the 2nd, 3rd and 4th respondents, indicated that Mr. Sekwe supported the submissions of the 1st respondent and its prayer that the application be dismissed with costs.

14. In his submissions in reply, Mr. Nyabena argued that section 118 of the Traffic Act gives the 1st respondent authority to issue by laws and since the notice by the respondent is not a by-law, reliance on it could not stand. To the contention that the petitioners were a threat to security, his response was that if they break any law, there is a clear procedure for enforcement, which does not include impounding their motor cycles.

15. Counsel further argued that the authorities relied on by the 1st respondent were not relevant to the issue before the Court, noting that the decision in **Metropolitan PSV Sacco vs County Government of Nairobi (supra)** related to increase of parking charges while this case is about an illegal notice barring the petitioners from accessing the central business district. He urged the Court to grant the interim orders sought in the petitioners' application.

Determination

16. In determining the application before me, I bear in mind the principles to be taken into account when a Court is dealing with an application for conservatory orders under Article 23 of the Constitution. These principles have been enunciated by our Courts in various decisions.

17. The first principle is that a party seeking conservatory orders must show a prima facie case with a likelihood of success, and that if the conservatory orders are not granted, he is likely to suffer prejudice. In **Centre for Rights Education and Awareness (CREAW) and 7 Others vs Attorney General Petition No. 16 of 2011**, the Court (Musinga, J (as he then was) stated as follows:

“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.” (Emphasis added)

18. The second principle was enunciated by Ibrahim J in the case of **Muslims for Human Rights (MUHURI) and 2 Others vs Attorney General and 2 Others, Petition No 7 of 2011**. While agreeing with the view expressed by Musinga, J in the **CREAW** case cited above, the Learned Judge observed as follows:

“I would agree with my Brother, that an applicant seeking Conservatory Orders in a constitutional case must demonstrate that he has a “prima facie case with a likelihood of success.”

19. In its decision in the case of **Martin Nyaga Wambora vs Speaker of The County Assembly of Embu and 3 Others Petition No. 7 of 2014**, the three-judge bench seized of the matter cited with approval the principles set out above and summarized the law in the following terms:

[59]”In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: “... [an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”

[60] To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention”.

[61] The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory”.

20. Finally, in the case of **Gatirau Peter Munya vs Dickson Mwenda Githinji and 2 Others, SCK Petition No 2 of 2013**, the Supreme Court enunciated a third, critical principle to be taken into consideration when a seeks to determine whether or not to grant conservatory orders in a constitutional petition before it. This principle is to the effect that the Court must consider the public interest in determining whether or not to grant conservatory orders, particularly in cases where orders are sought to stop a public agency from carrying out its mandate. In that case, the Supreme Court (Ojwang and Wanjala, JJSC) stated as follows:

[86]”...Conservancy Orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes”

[63] Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest.”

21. In applying these principles to the case before me, I ask, first: have the petitioners made out a prima facie case with a probability of success? The petitioners’ case is premised on their registration under the provisions of the Co-operative Societies Act. They allege that this entitles them to operate as motorcycle taxis within the central business district of the city of Nairobi. Consequently, the respondents’ notice banning them from entering the city centre is a violation of their rights, though they are not explicit about exactly which right has been violated or is under threat of violation.

22. I have considered their averments and documents in support. I note that they are indeed registered, on various dates, as savings and credit societies. However, a reading of the Co-operative Societies Act does not indicate any powers vested in the Commissioner of Co-operatives to licence members of savings and credit societies to operate as public transport operators in any part of the country. The petitioners did not also, in their petition, application or submissions, point out to the Court the provisions of the Co-operative Societies Act that entitles them to operate within the central business district, or that give the Commissioner of Co-operatives the mandate to licence their operations within the city of Nairobi or elsewhere in the country.

23. That mandate, from the material before me, lies with the 1st respondent with respect to the County of Nairobi. This is in view of the provisions of section 118 of the Traffic Act and Part 2 of the Fourth Schedule to the Constitution which vests matters of road transport in county governments. Thus, on a

limited consideration of the material before me, and bearing in mind that I am not at this stage required to delve into an analysis of the respective cases of the parties, I am not satisfied that the petitioners have made out a prima facie case with a probability of success.

24. Would the petition be rendered a nullity should I not grant the orders sought? It was submitted on behalf of the petitioners that this petition raises issues of conflict of laws, and that it seeks declarations with respect to the relationship between national and county laws regulating transport.

25. I note also that the petitioners' grievance is not that they have been prohibited from carrying out business as transporters within the city of Nairobi. Rather, the respondents seek to stop them from entering the central business district, for various reasons. In my view, these are matters that will remain live and worthy of determination even without restraining the respondent from carrying out what appears to be, on the material before me, its constitutional and statutory mandate.

26. Lastly, even though the consideration of the first two principles militates against the grant of the conservatory orders in this matter, let me make a few observations with respect to the public interest principle. As I have noted above, the material presented before me suggests that the 1st respondent is carrying out its constitutional and statutory mandate with regard to regulation of road transport within the city of Nairobi. That being the case, the public interest consideration is in favour of allowing it to do what the law, on the face of it, allows it to do.

27. In the circumstances, I am not satisfied that the petitioners have made out a case for grant of conservatory orders, and I therefore decline to grant the conservatory orders that they seek.

28. Their application dated 20th November 2015 is therefore hereby dismissed. Costs shall await the outcome of the petition.

Dated, Delivered and Signed at Nairobi this 19th day of February 2016

MUMBI NGUGI

JUDGE

Mr. Nyabena instructed by the firm of Nyabena Nyakundi & Co. Advocates for the petitioners.

Prof. Ojienda & Mr. Makokha instructed by the firm of Prof. Tom Ojienda & Associates for the 1st respondent.

Mr. Sekwe instructed by the State Law Office for the 2nd – 4th respondents.