



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW NO. 476 OF 2014**

**IN THE MATTER OF APPLICATION FOR REVIEW OF ORDERS OF MANDAMUS,  
CERTIORARI AND PROHIBITION AGAINST THE ATTORNEY GENERAL, NATIONAL  
TRANSPORT AND SAFETY AUTHORITY AND NAIROBI CITY COUNCIL**

**AND**

**IN THE MATTER OF TRAFFIC ACT CHAPTER 403 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE TRANSPORT LICENSING ACT**

**AND**

**IN THE MATTER OF THE NATIONAL TRANSPORT AND SAFETY ACT 2012**

**AND**

**THE CONSTITUTION OF KENYA**

**AND**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NATIONAL TRANSPORT AND SAFETY**

**AUTHORITY .....1<sup>ST</sup> RESPONDENT**

**AND**

**HON. ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**NAIROBI CITY COUNCIL .....3<sup>RD</sup> RESPONDENT**

**METROTRANS EAST AFRICA LTD.....EX-PARTE APPLICANT**

## JUDGEMENT

### Introduction

1. The ex parte applicant herein, **Metrotrans East Africa Ltd**, moved this Court by way of a Notice of Motion dated 15<sup>th</sup> February, 2015 seeking the following orders:
  1. **An order of certiorari do issue to remove to the high court for the purposes of quashing the 1<sup>st</sup> Respondent's decision prohibit and/or denying the ex-parte Applicant an opportunity of operating through KENCOM and GPO bus stops.**
  2. **An order of mandamus to direct the 1<sup>st</sup> Respondent to consider the application for a license by ex-parte Applicant to operate on the Kencom, Studio One and GPO bus stops and compensate the Applicant for the loss incurred as a result of its unilateral, irrational, illegal and irregular actions.**
  3. **An order in the nature of prohibition on the 1<sup>st</sup> Respondent to stop them from granting licenses to any other bus companies to use the Kencom, Studio One and GPO bus stops before the ex-pate Applicant's application for a similar license is dispensed with.**
  4. **Costs of the application be provided for.**

### Ex Parte Applicant's Case

3. According to the applicant, it has over 60 buses operating in various routes within Nairobi Council City and its environs and it has been paying all the licenses and complying with the **Transport Licensing Act** as well as paying all the taxes to the Kenya Revenue Authority since incorporation.
4. However, in September 2011 the ex-parte applicant applied to the Nairobi City Council requesting to be allowed to drop and pick commuters at Kenya Commercial Bank (Kencom), Studio One and General Post Office (GPO) bus stops. In October 2011 Nairobi City Council informed the ex-parte applicant that Kencom, Studio One and GPO bus stops are for those operators with a CBD license. Accordingly, in July 2012 the ex-parte Applicant applied to the Transport Licensing Board requesting for the CBD operating licence to be allowed to operate on Kencom, Studio One and GPO bus stops proceeding to Kenyatta National Hospital.
5. However, the Transport Licensing Board didn't give a satisfactory reason why it failed to consider the application for licenses to operate on GPO and Kencom bus stops and the applicant's further efforts and inquiries as to why its application was not being considered came to nought.
6. It was averred that in September 2013, when the ex-parte Applicant applied to Kenyatta National Hospital to be authorized to use KNH terminal and the same was allowed.
7. According to the ex parte applicant, the Transport Licensing Board and now the National Transport and Safety Authority (NTSA) was established to oversee and promote the public transport sector but their conduct of denying licence to a selected few companies to operate certain routes with no justifiable explanation defeats the very purpose which they intended to achieve. It further contended that from the Respondent's failure to consider the ex-parte applicant's application, it can only be concluded that the Respondent is acting at the behest of the Applicant's competitors. Further, by failing to grant the Applicant the license the Respondent has given undue advantage to the ex-parte applicant's competitors and is abuse of office by the Respondent offices.
8. The applicant disclosed that the ex-parte applicant's operators and services have been approved by Nairobi City Council, Kenyatta National Hospital and the Transport Licensing Board itself and that the ex-parte applicant has met all the requirements set by the Respondent and the Nairobi Central Business District (NCBD). The ex parte applicant could therefore not understand why its competitors continue increasing the number of business operating in the contended route yet the Respondent refused to grant the same license to it.
9. It was the ex parte applicant's case that the failure by the Respondent to grant license to the ex-parte applicants was exposing it to serious financial losses as it continued to pay its license to Kenyatta National Hospital yet its business cannot operate at Kencom and GPO bus stops where most of the passengers are destined to Kenyatta National Hospital. To it to grant it a dropping point at "KNH bus stop" while being denied picking points at Kencom, Studio one & GPO defeats

the whole purpose and is calculated to sideline and frustrate the Applicants and favour its competitors.

10. It was the applicant's case that the said decision is a blatant abuse of the powers conferred upon the Respondent under the *National Transport and Safety Authority Act*, 2012.

### **1<sup>st</sup> Respondent's Case**

11. In response to the application, the 1<sup>st</sup> Respondent (hereinafter referred to as "the Authority") contended that it is a public body established as a parastatal under section 3 of the *National Transport and Safety Authority Act* No. 33 of 2012 with the statutory functions of to inter-alia, advice and make recommendations to the Cabinet Secretary on matters relating to road transport and safety, implement policies relating to transport and safety, plan, manage and regulate the road transport system, ensure the provisions of safe reliable and efficient road transport services and to administer the *Traffic Act* Chapter 403 Laws of Kenya.

12. It contended that in performance of its functions, the Authority is mandated to inter-alia register motor vehicles, conduct motor vehicle inspections and certification, regulate public service vehicles, develop and implement road safety strategies, conduct research and audits of road safety.

13. According to the Authority, the Transport Licensing Board, which the applicant purported to have made application to does not exist as all applications are made to the Authority which issues Applicants with relevant licenses, whose issuance depends on many factors. For one to be issued with a licence to drop at CBD, it is required to make that application and in consultation with the Nairobi City Council which is in charge of Central Business District (herein referred to as CBD) determines how many vehicles would be allowed to the CBD hence guides the issuance of licenses.

14. According to the Authority, at the moment, the CBD is congested with the Saccos and companies that had made prior applications and had been given licences hence the only reason why another Sacco cannot probably be allowed to drop and pick passengers at CBD.

15. The Authority further disclosed that apart from that the Cabinet Secretary Ministry of Transport and Infrastructure and the County Government of Nairobi appointed a task force on the decongestion of the City of Nairobi which task force is to look at reorganization of routes so as to reduce congestion in the CBD which confirms that indeed the CBD is congested.

16. In the Authority's view, the order of prohibition sought against it cannot be issued as the same will amount to barring it or any of its offices from exercising its mandate over the Applicant in the course of discharging their public duties where the Applicant herein is involved.

17. It asserted that this court has no jurisdiction to issued orders of compensation as prayed by the Applicant herein.

### **3<sup>rd</sup> Respondent's Case**

18. On behalf of the 3<sup>rd</sup> Respondent, the following grounds of objection were filed:

- 1. That the 3<sup>rd</sup> respondent is a defunct entity which does not exist in law and no cause of action can lie as against a non-existence entity. It is not a legal entity capable of being sued on the date this application was filed by virtue of the repealed Local Government Act Cap 265 Law of Kenya as read o together with provisions of the Constitution, Country Government Act and Transition Authority Act.**
- 2. That the application dated 3<sup>rd</sup> February 2015, and 15<sup>th</sup> February 2015 respectively constitute an abuse of the honourable court's process warranting their immediate dismissal with costs to the 3<sup>rd</sup> Respondent.**

### **Determinations**

19. I have considered the Notice of Motion filed herein and the affidavits in support thereof as well as the affidavits and grounds filed in opposition thereto together with the submissions on record.

20. It is important to reiterate the scope of and the grounds for the grant of judicial review orders and this was discussed in depth by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...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* compels 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...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

21. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

22. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is

important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60*.

23. Broadly, the grounds upon which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** and held:

**“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”**

24. A clear reading of the prayers sought as well as the grounds for seeking them as propounded in the supporting affidavits, one cannot understand the reason why the 3<sup>rd</sup> Respondent was sued in these proceedings. None of the orders sought is directed at the 3<sup>rd</sup> Respondent. Further the affidavits do not disclose any wrongdoing on the part of the 3<sup>rd</sup> Respondent.
25. Apart from that as clearly shown by the 3<sup>rd</sup> Respondent, in the submissions, by the time these proceedings were instituted, the 3<sup>rd</sup> Respondent had ceased to exist. This is clearly not a situation covered by section 59 of the ***Urban Areas and Cities Act*** No. 13 of 2011 which former provides:

***Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force or any defence appeal or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.***

26. I agree with the 3<sup>rd</sup> Respondent that the foregoing provision covers situations where the legal right accrued or cause of action commenced against the defunct local authorities, which cause of action is sustainable against the present County Governments. However, where the County Governments had already come into being at the time the cause of action accrued, to institute proceedings against the defunct local authorities cannot be warranted and such suits cannot be sustained. I therefore associate myself with the decision of **Munyao, J** in **John Michael Wanjau vs. Municipal Council of Eldoret [2013] eKLR** that such suits cannot be saved under section 59 aforesaid.

27. In the premises the suit against the 3<sup>rd</sup> Respondent is incompetent.

28. With respect to the suit against the 1<sup>st</sup> Respondent, on 12<sup>th</sup> June, 2014, this Court in **Republic vs. Officer Commanding Traffic Nairobi Area & 2 Others [2014] eKLR**, a matter filed by the

same *ex parte* applicant expressed itself *inter alia* as hereunder:

**“Even if the Applicant’s application was merited, if to grant the orders sought would lead to congestion of the CBD of Nairobi, this Court would still have not acceded to the same as that would clearly cause administrative chaos and public inconvenience.”**

29. These proceedings were commenced on 24<sup>th</sup> December, 2014, after the said decision was delivered. The actions complained of purportedly took place by latest the year 2013. One cannot understand why the applicant did not incorporate the issues being raised herein in the said proceedings. Instead the *ex parte* applicant chose to raise issue with respect to St. Peters Clavers lay by while leaving out Kencom. It would seem that the applicant herein is litigating in instalments. To do so may well violate the doctrine of *res judicata*. That was the position contemplated in **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958 [1958] EA 450** in which the former East African Court of Appeal stated as follows:

**“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...”**

30. Similarly in **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhajjee (1932) 14 KLR 28** it was held that:

**“** However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of **SIRI RAM KAURA VS. M J E MORGAN CIVIL APPLICATION NO. 71 OF 1960 [1961] EA 462** the then East African Court of Appeal stated as follows:

**“...The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res judicata*...The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but**

whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.”.

31. There is no reason why the issues raised in the present application could not have been raised in the earlier proceedings. To institute legal vexatious proceedings with a view to harass a person also amounts to abuse of the process of the Court. As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229:**

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in *bona fides* and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

- i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
- ii. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.
- iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.

76. Where the Court is of the view that its process is being abused, it would be entitled to invoke its inherent jurisdiction in order to bring such proceedings to an end. This was the position taken in **Mitchell and Others vs. Director of Public Prosecutions and Another (1987) LRC (Const) 128** where it was held that:

“ ...in civilized society legal process is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties .It can be used properly ,it can be used improperly, and so abused. An instance of this is where it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral one or to gain some collateral advantage, which the law does not recognize as legitimate use of that process. But the circumstance in which abuse of process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes extrinsic evidence only. But if and when it is shown it happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instance. Others attract the *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop proceedings, or put an end to it. This inherent power has been used time and again to put a summary end to a process which seeks to raise and have determined an issue which has been decided against the party issuing it in earlier proceedings between the parties”

32. In the premises this application is misconceived and the same is struck out with costs to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

Dated at Nairobi this day 16<sup>th</sup> of February, 2016

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Odhiambo for 3<sup>rd</sup> Respondent**

**Cc Patricia**