



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. 56 OF 2013

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

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA

AND

THE LAW REFORM ACT SECTIONS 8 & 9

REPUBLIC.....APPLICANT

EX PARTE ALICE WAMAITHA MWANGI

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

JUDGMENT

THE APPLICATION

1. By Notice of motion dated 10th February 2014, the Ex Parte applicant herein, ALICE WAMAITHA MWANGI sought the following orders;
 - a. ***THAT this Honourable court grant an order of Mandamus compelling the respondent's head of security to release for further processing and the Respondent upon such release to process the applicant's application for an operations licence at the Port of Mombasa.***
 - b. ***That an order of prohibition do issue prohibiting the respondent and or its officers from acting unreasonably unfair and/or without regard to the rules of natural justice in relation to the applicant's application for an operator's licence and refrain from interfering with the applicants operations at the Port of Mombasa.***
 - c. ***THAT costs of this application be provided for.***
2. The grounds upon which the relief is sought as set out in the Statement dated 25th September 2013 are:
 - a. The respondent acted against the rules of natural justice in refusing to issue the applicant with an operator's licence and refusing to inform the applicant the reasons for such action.

- b. The respondent's head of security in his actions of recalling the application for the licence and barring the applicant's vehicles from accessing the Port of Mombasa were without due process.
 - c. The refusal by the respondent and or its offer to process the applicants application for an operator's licence after duly lodging all the documents required violate the legal principles of legitimate expectation.
 - d. The respondent's head of security actions were unreasonable and arbitrary.
 - e. The Respondent acted in bad faith in failing to discharge its duties.
3. The application is supported by an affidavit sworn by Alice Wamaitha Mwangi on 25th September 2013, where the applicant avers that she is the sole proprietor of the business firm known as Aliceshius Tours and Safaris which was registered on 10th February, 2005 and that for over ten (10) years she has been carrying out tour operator services from the Respondent's Kilindini Port.
 4. The applicant further deponed that she has dutifully applied for the renewal of the operator's licence by lodging with the application various documents which include a single business permit from the Municipal Council of Mombasa (now County Government of Mombasa) and copies of receipts from the year 2005 to 2011. In May 2013 when the Ex Parte applicant lodged her application for a tours operator's licence after fulfilling all the legal requirements, and on following up on the status of the licence from the commercial department, she was informed that her application had been recalled by the head of security, Major (Retired) Morowa.
 5. The Ex Parte applicant avers that on enquiring from the head of security as to the reasons for recalling her application, she was informed that as long as she refused to meet his so called terms, then she would never operate in the Port of Mombasa.

THE RESPONSE

6. In response to the application, the Respondent filed a replying affidavit sworn by **MOHAMED MOROWA** dated on the 11th November 2013 wherein he said that there had been several security related incidents involving clashes between tour and taxi operators, and amongst tour operators, and that on one such incidence, a ship crew was left stranded at the Port and had to return to their ship. This necessitated the suspension of tour operations until the operators would get their house in order. During the suspension he recalled the application for renewal of licences at the Port for the Ex Parte applicant and two other tour operators.
7. The deponent said he had called for a meeting on 4th June 2013, in which he cautioned them against such incidences. He stated that in this meeting the tour operators agreed on the way forward and under which rules they shall operate. This is supported by the affidavits sworn by **PURITY KALOO SAMBALO, WILMINA MPALALE, VIRGINIA WAMBOI, AMINA ABDALLA** and an annexed copy of the minutes of the meeting. The Ex Parte applicant did not attend this meeting.
8. Major (Rtd) Morowa averred that he handled all tour operators without favour and that all payments made to the Respondent had been receipted and properly documented, and he annexed copies of licence receipts and evidence of payment by a number of tour operators as evidence. He denied that only one company was allowed to operate a tour business at the Port.

SUBMISSIONS

9. The Ex Parte applicant filed written submissions dated on 6th May 2014, where it was submitted that;
 - a. Nowhere in the affidavits filed in Response to the application is it denied that and or stated categorically that the Ex Parte applicant had failed to meet any lawful requirements to warrant the denial of the licence.
 - b. In discharging his duty, the Respondent's security officer failed to uphold the principles of natural justice by not giving the Ex Parte applicant reasons for recalling the application and a fair hearing to be heard on any concerns they may have had.
 - c. The Respondent's actions are ultra vires the law. Article 47 of the Constitution requires that all the

officers of the Respondent as a statutory body, ensure that they adhere to the principle of fair administrative action whenever they discharge their functions. It was contended that the Respondent's security officer's actions were unconstitutional and ultra vires.

- d. It was further contended that the actions of the Respondent's security officer of recalling the tour licence application and not giving reasons for the same are contrary to the Ex Parte applicant's legitimate expectation of fair administrative action that is expeditious, lawful, reasonable and procedurally fair.

10. The Respondent filed written submissions dated 18th July 2014 in which it was submitted that:

- a. The Respondent did not breach the rules of natural justice as the Ex Parte applicant was accorded an opportunity to be heard through a security meeting on 4th June 2013 which she did not attend while other tour and taxi operators did.
- b. Under Section 12 (2) (j) (ii) of the Kenya Ports Authority Act, Cap. 391, the Respondent has been granted the power to control and regulate the presence of persons within the Port. The Respondent acted within its jurisdiction in regulating the persons entering the Port. The decision was not irrational as other tour operators agreed to comply with the security requirements.
- c. There was no procedural impropriety as the tour operators were called for a meeting on 4th June 2013 and a solution was agreed upon. It was their submission that the Respondent did not act in bad faith as this was a routine security process of vetting and licencing tour operators.

11. In its submissions the Respondent urged the court to find that there was a conflict between the private interest of the Ex Parte applicant to have her licence renewed and the interest of the public to have a safe and secure apparatus at the Port of Mombasa, and to uphold the latter.

ISSUE FOR DETERMINATION

12. The issue for determination is whether there was breach of the ex parte applicant's natural justice right to fair hearing, fair administrative action under the Constitution and legitimate expectation in common law to justify grant of the reliefs sought.

DETERMINATION

13. In paragraphs 7-22 of his replying Affidavit the Head of Security Services of the Respondent defends the action complained against by the ex parte applicant as follows:

*“7. **THAT**, both taxi and tour operators are expected to adhere to security and safety regulations while operating within the Port. This is due to the fact that the Port is a vital Government installation and an international sea Port serving Kenya and countries in the East Africa and the Great Lakes Region. Security of and within the Port is therefore paramount.*

*8. **THAT**, there have been several security related incidences involving clash between tour and taxi operators and between tour operators amongst themselves. Some of these have been rePorted while others have not been rePorted.*

*9. **THAT**, in one such incident, tour operators clashed, forcing a ship crew who was to be taken to town to cancel his trip and return to the ship for the rest of the day.*

*10. **THAT**, this caused me to suspend the operations of the tour and taxi operators from the Port until such a time when they would **put their house in order**.*

*11. **THAT**, this decision to suspend their operations was taken by some of them as an illegal eviction. There were several complaints by the tour and taxi operators which*

prompted me to call the taxi operators and thereafter the tour operators for a meeting.

12. **THAT**, in the meeting, I cautioned them against incidences of breach of security and harassment of passengers, especially when ships dock. We had a discussion where the tour operators themselves came with good and workable proposals on the way forward. The meeting took place in my office on 4.6.2013.

13. **THAT**, taxi operators had filed a case way back in 2009, and which remains unheard to date, restraining the respondent from stopping their operations within the Port. When I suspended their operation following the numerous incidences of insecurity and lawlessness and bad behaviour on their part, they went back to court for yet another order.

14. **THAT**, on their part, the tour operators engaged the respondent in numerous correspondences accusing me of all manner of wrongdoing. I annex copies of some of those letters as “MM 1”.

15. **THAT**, the applicant is one of the tours operator who wrote several letters of complaint, both in person and through lawyers, addressed to several people.. I annex copies of her letters as “MM 2”.

16. **THAT**, in the meantime, the tour operators would engage and request me to lift the suspension to allow them to operate at the Port.

17. **THAT**, during the suspension of their operations, one Amina Abdalla, the proprietor of Swams tours and Safaris presented her application for a license to operate her tour business within the Port, and agreed to abide by any and all conditions as and when that may have been put in place by Kenya Ports authority.

18. **THAT**, I told Amina Abdalla that provided her tour company agrees to obey all the rules, her application would be considered alongside that of other tour operators who had also applied for their licenses.

19. **THAT**, in the meantime, as regards the other tour operators who had submitted applications for licenses, and which were being processed, including undergoing vetting by various departments or KPA, I recalled the application by the applicant and two other tour operators, namely, Lizmarine Tour and Safaris and Wilmina Tour and Safaris from Commercial Department of KPA the respondent.

20. **THAT**, I later called for a meeting of all the tour operators on 4.6.2013 for a discussion on the way forward, on how to resolve the issue. We were to discuss issues on how the operators would operate safely and as per the rules. All the tour operators attended except the applicant.

21. **THAT**, the meeting was fruitful. Rules were discussed and agreed upon; the operators wrote and signed their own minutes of the meeting. I annex copy as “MM 3”. I released the applications for license for Lizmarine tours and Safaris and Wilmina Tour and Safaris for the licenses to be processed, but retained that of the applicant until she agreed and signed a commitment to follow the same rules the others had agreed to and signed in the meeting on 4.6.2013.

22. **THAT**, the applicant bragged to me that she would operate at the Port with or without a license and that she would not stoop low like the other tour operators to comply with the Port security requirements.”

[emphasis added]

Right to be heard

14. At the outset, the court must observe that in taking action pursuant to its power to control and regulate the presence of persons within the Port under section 12 (2) (j) (ii) of the Kenya Ports Authority Act, cap. 391, the respondent is obliged to comply with the rules of natural justice, fair administrative action under Article 47 of the Constitution and in accordance with any legitimate expectation created in the circumstances of the particular case. Article 47 provides as follows:

“47. (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.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

15. All the deponents of 6 replying affidavits deponed to a meeting of 4th June 2013 called to address issues arising in the tour and taxi operators at the Port and ***‘put their house in order’*** as stated by the Head of Security at the Port. However, no formal invitation to the meeting, no formal agenda, and no formal record of proceedings by way of formal minutes on the resolutions of the meeting were disclosed by the respondent. The deponent of the 6th Replying Affidavit, Amina Abdalla, states that:

“2. That I applied to operate at the Port but was turned away because at the time, the operation of all tour operators had been stopped. This was mid to late May, 2013.

3. That after a week, I was invited to the Port by the Head of Security Services to attend a meeting of tour operators who were desirous of operating within the Port. This was on 4th June 2013. I attended and got to meet other tour operators. I was new in my operation at the Port. ”

16. The matter ought, consistently with the requirements of fair administration action, to have been dealt with through a written notification of the stoppage of operations, with reasons given in writing as required under Article 47 (2) and a written notice or invitation to the meeting to resolve any problems identified issued giving the tour operators ample notice of the agenda and time to prepare for the deliberations. In this case, the informal minutes of the alleged other tour operators attached to the Replying Affidavit of the respondent’s Head of Security indicate that the invitation to the meeting of 4/6/2013 was by Short Message Service (SMS) text for which there can be no certainty that it was received by the ex parte applicant. Indeed, the respondent did not show that it had invited the ex parte applicant to the meeting even by SMS!

17. It is inconceivable that such a serious matter as stoppage and suspension of tour operations at the Port, concerning the business and livelihoods of the tour operators and their employees could be met with casual dealing, which is proffered by the respondent as being compliant with the requirements of the natural justice right to fair hearing and the fair administration action principle of Article 47 of the Constitution.

18. Moreover, the informal minutes of the tour operators appear to have been drawn in anticipation of this suit; why else would the minutes record lack of communication by the applicant’s company as to ex parte applicant’s failure to attend. The minutes in material part read:

“4th June 2013

MEETING ATTENDANCE

1. Major Morowa HSS/PFSO KPA – Chairman
2. Elizabeth Wanjiru
3. Purity Kaloo Sambalo
4. Amina Abdalla
5. Grace Nderitu
6. Willimina Mpapale

ABSENT WITHOUT APOLOGY

1. Aliciouse tours and safaris Meeting was started 11.00am in the Office of the HSS/PFSO

The HSS informed members that the aim of the meeting was to come up with a workable solution on how operations of tour operators do not interfere with Port operations. He also stated that he sent SMS to the following tour operators to attend the meeting:

1. Aliciouse tour and Safaris
2. Liz marine tour and safaris
3. Wilmarine tour and safaris
4. Pamdev marine tour and safaris
5. True safaris
6. Swamps tours and safaris

However, there was no communication from Aliciouse tours as to why she did not attend the meeting.”

19. In accordance with Article 47 (2) of the Constitution, a right to reasons for an administrative action attaches to every action which affects or is likely affect a right or fundamental freedom. The ex parte applicant’s Article 40 rights to property in the business and proceeds from the business of tour operations at the Port would naturally be affected by the stoppage or suspension of the Port activity by the tour operators. An SMS invitation was wholly inadequate!

Legitimate expectation

20. A tour operator such as the ex parte applicant who has been licenced over time to operate at the Port and who has faithfully met all the conditions for the carrying on tour business at the Port including paying the necessary licence fee has an expectation created by the long period of prior licensing and payment of applicable licence fee and meeting all conditions set by the respondent that her licence would not be stopped, canceled or suspended and or his application for renewal refused or recalled without reasons given to her for the stoppage, cancellation or suspension and without giving her an opportunity to be heard on the matter. There is also legitimate expectation that meeting all the licensing requirements, an applicant will have her application for licence successfully processed.

Private dispute

21. It was clear that the dispute giving rise to the intervention by the Head of Security is a private dispute between the tour operators and not one of Port security as contended by the respondent. It would appear that the head of security at the Port used public administrative action to resolve a private dispute between the operators and to, in his own words ***‘put their house in order’***. The informal minutes of the said tour operators’ meeting with the head of security indicates agreement after lengthy deliberations as follows:

1. ***That we are tour operators.***

2. *We have our tour operators working under our umbrellas*
 3. *All tour operators should have Reg. NOs. and Yellow Line.*
 4. *We agree that every two [berths] should have followed numbers.*
 5. *If any members of tours have any problem should first discuss with Director of company.*
 6. *Every driver under tour company must wear a uniform under his or her name of company.*
 7. *Every tour operator must put the logo of the company on the car door and Reg. NO. on the back of the car.*
 8. *Every tour company vehicle will not comply full yellow on their vehicle but must have yellow lines on all corners of the car.” (sic)*
22. It was not shown that any clash between the tour operators, as alleged had resulted in breach of security at the Port necessitating the drastic action of stoppage or suspension of licences and refusal to renew applications for licence taken by the respondent. The cited incident where **“one such incident, tour operators clashed, forcing a ship crew who was to be taken to town to cancel his trip and return to the ship for the rest of the day”** is hardly such as to call for a public administration intervention; it may have called for private law remedies under the law of contract, and no more. In using its administrative action to resolve private disputes between the tour operators, the respondent through its head of security is in abuse of process.
23. Furthermore, there was a disturbing aura around this matter which gave the court a feeling that the action the subject of this judicial review proceedings had a personalized character where the actors appeared to act based on their personal relations than out of any public concerns. Right from the 1st paragraph of his replying affidavit, it is clear that there is personal issues between the ex parte applicant and the respondent, as he describes himself thus **“I am the Head of Security Services of Kenya Ports Authority, the respondent herein, and the one against whom the applicant has made several serious adverse complaints.”**

CONCLUSION

24. On a balance of probabilities, the court finds as proved the fact that the ex parte applicant was not afforded a fair opportunity to be heard before the stoppage or suspension of licence and subsequent recall of the ex parte applicant’s application for a new licence. The Court also finds that as a licenced tour operator for ten years previously who had paid the necessary fees and complied with other administrative requirement, the ex parte applicant was entitled to legitimate expectation that complying with the said requirement and paying necessary fees her application would be successfully processed and could only be stopped, suspended or canceled in accordance with the law, in particular Article 47 of the Constitution.
25. The action of the Respondent in stopping or suspending the tour operations in the Port and, subsequently, recalling the ex parte applicant’s application for a licence despite meeting all administrative requirements under the pretext of addressing a problem of clash between tour operators and taxi operators and among the tour operators, at a meeting for which no notice or adequate notice is shown to have been given to the ex parte Applicant is a clear breach of the rules of the rules of natural justice as to fair hearing and the fair administrative action principle of Article 47 of the Constitution and the common law principle of legitimate expectation. This breach invites the judicial review remedies to correct the situation by an order of Mandamus compelling the respondent to take steps for the processing of the application for licence and for Prohibition to prevent any dealing by the respondent in respect to the ex parte applicant, in accordance with principles of fair administration action, fair hearing and legitimate expectation.

ORDERS

26. Accordingly, for the reasons set out above, the Notice of Motion dated 10th February 2014 is granted as prayed, with costs to the Ex Parte Applicant.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 24th DAY OF JUNE, 2016.

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JUDGE

In the presence of: -

No Appearance for the Ex Parte applicant

Mrs. Kariuki holding brief for Sangoro for the Respondent

Mr. Silas Kaunda - Court Assistant.