



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.37 OF 2012

BETWEEN:

KENYA TAXI CABS ASSOCIATION (*suing through its registered officials*)

PETER WAWERU MBURU.....1ST PETITIONER
LABAN MAINA.....2ND PETITIONER
PETER KURIA WANJAMA.....3RD PETITIONER
LAWRENCE MAINA KIMANI.....4TH PETITIONER
JOB NZIOKA.....5TH PETITIONER

AND

THE CITY COUNCIL OF NAIROBI.....RESPONDENT

JUDGMENT

Introduction

[1] The Petition herein was filed on 7th February 2012 accompanied by the supporting affidavit of Mr. Peter Waweru Mburu. Subsequently, the Petitioners sought to amend it by filing an Amended Petition in this Court on 7th October 2015. The reliefs sought read as follows:

- “a) That a declaration be issued to declare that the Respondent has no power and authority to reduce and/or limit the taxi ranks within the City of Nairobi in accordance with the directive contained in its Town Clerk’s Memo dated 17th March, 2011.**
- b) That an order of certiorari be issued to quash the decision/directive of the City Engineer of the Respondent contained in a confidential Internal Memo dated 28th March, 2011 for being in violation of Article 10, 27, 47 and 50 of the Constitution.**
- c) That an order of certiorari be issued to quash the decision/directive of the City**

Engineer of the Respondent contained in the letter dated 31st October 2011 relocating the Taxi Rank in front of the Hilton Hotel to City Hall Way allegedly due to security concerns by the Hotel and/or relocation and/or removal of any other Taxi Rank in the Nairobi Central Business District for being in violation of Article 10, 27, 47, and 50 of the Constitution.

d) That an order of prohibition be issued to restrain the Respondent from removing the existing and/or approved Taxi Ranks pursuant to the directives/decision contained in its Town Clerks Memo dated 17th March 2011 and its City Engineers Memo dated 28th March, 2011 for being in violation of Articles 10, 27, 40, 47 and 50 of the Constitution.

e) That a declaration be issued to declare that the Respondent has no power to charge the taxi-cab members of the Petitioner's Association both Single Business Permit and the Daily parking fee by dint of their rights under Articles 10, 27, 40, 47 and 50 of the Constitution.

f) That a declaration be issued to declare that the Nairobi County Finance Bill, 2013 is illegal, null and void to the extent that it seeks to increase the parking fee as well as the business permits for practitioners.

g) That an order of prohibition be issued to restrain the Respondent from implementing the provisions in the Nairobi County Finance Bill, 2013 as against the Petitioners and the members of the Kenya Taxi Cabs Association.

h) That the costs of this Petition be borne by the Respondents.”

The parties

[2] The Petitioners describe themselves as registered officials of the Kenya Taxi Cabs Association, an association registered in terms of the **Society's Act Cap 108 of Laws of Kenya**. This Association has more than 2300 members and provides taxi-cab services within Nairobi and surrounding areas.

[3] The Respondent is a body corporate within the scope of **Section 2** of the **County Government Act** and is established by **Article 176** of the **Constitution**. It is the successor of the now defunct City Council of Nairobi, and by operation of law inherited both the assets and liabilities of the City Council of Nairobi. It also regulates *inter alia* issues relating to the taxi-cab business in the Nairobi Central Business District.

Factual background

[4] This Petition was a reaction to a number of decisions/directives made by the Respondent during the course of 2011 pertaining to the regulation of taxi operations in the Nairobi Central Business District (CBD).

[5]The first was contained in a memo dated 17th March 2011, from the Town City Clerk to the City Engineer. The former expressed concerns about the large number of taxi ranks in the CBD, and directed that the latter devise a proposal on how to “reduce/minimize the number of taxi ranks in the CBD”. The City Engineer was expected to come up with such a proposal by 31st March 2011. He was also directed, in the interim, to ensure that all illegal taxi ranks in the CBD were removed by 15th April 2011.

[6]In compliance with this directive, the City Engineer circulated an internal memo dated 28th March 2011 to, among others, the Chief Assistant Engineer noting—

“that there were many taxi rank signs on our roads and streets within the Central Business District. This has reduced the available parking spaces and caused a lot of congestion in the

affected areas.”

He thus directed the Chief Assistance Engineer to replace these signs with a manageable number to create extra parking spaces for the general public and ease the traffic congestion in the City.

[7]In a memo dated 31st March 2011, the City Engineer further duly reported to the Town Clerk with the suggested proposals to deal with the issue of reducing the number of taxi ranks in the CBD. In this memo he enumerated the measures that had already been taken and stated thus:

“(1) We have already embarked on an exercise to remove all illegal taxi ranks.

(2) The proposal in the revised by-law ensures that:-

(i) No taxi cab shall park on the rank and should be exclusively used for picking/dropping passengers.

(ii) Taxi cab operators should make arrangements on where to park their vehicles.

(3) We are reviewing the number of existing taxi ranks with a view of reducing them to two bays per taxi rank at a distance of not less than 200m from each other.

(4) We shall also hold a stakeholders meeting and sensitise the users on the new by-laws.

Once these measures are put in place the number of taxi ranks should drop considerably to manageable proportions.”

[8]Disgruntled by this direction to relocate its operations, the Petitioners penned a letter dated 26th April 2011 to the City Engineer expressing its disapproval of the relocation despite having been lawfully allocated the taxi rank by the Respondent. They requested an alternative parking area in the CBD close to the original rank so that they would not lose their customers.

[9]According to the Petitioners, this letter did not elicit any response or any action to stop the relocation but on 31st October 2011, the Town Clerk addressed a letter to the Chairman of the Kenya Taxi Cab Association informing him of its decision to relocate the taxi rank in front of the Hilton Hotel to City Hall Way and further requested that it relocate its operations accordingly. The reason cited for this decision was that the Hilton Hotel had raised security concerns on the operation of taxi cabs outside the Hotel and hence the relocation was necessary to “enhance security and ensure a conducive atmosphere for all the concerned operators”.

[10]On 7th February 2012, the Petitioners filed their Petition in this Court seeking the abovementioned reliefs.

Litigation History

[11]Before I set out the parties’ submissions, it is fitting to discuss three important decisions of this Court and one of the Court of Appeal relating to this matter, because they are central to both parties’ cases.

Judgment of 20th September 2010: Republic v City Council of Nairobi: Ex parte Kenya Taxi Cabs Association 2010 eKLR

[12]The first is the judgment of this Court in *Republic v City Council of Nairobi: Ex parte Kenya Taxi Cabs Association 2010 eKLR* dated and delivered on 20th September 2010 by Wendoh J.

[13]In that case the Petitioners had sought to review and set aside certain decisions made by the Respondent on licensing of taxi cabs for the year 2010. The reliefs they sought included *inter alia*:

- a) The review and setting aside of the Respondent's decision, contained in a letter dated 5th January 2010 on licensing of taxi cabs for the year 2010.
- b) The requirement on inspection of taxis contained in the Respondent's internal memo dated 18th January 2010.
- c) To review and set aside the decision to divide the CBD into four zones and limiting the number of taxis to qualify for licenses to 524 taxis only.
- d) It also sought a mandamus compelling the Respondent to issue permits to eligible members of the Petitioner in terms of the **2007 By-Laws**. In addition, an order of prohibition restricting the Respondent from re-allocating taxi cab ranks allocated to members of the Association to other taxi operators.

[14]What was at issue in that case was *inter alia*:

- a) whether the Respondent had power to make changes to laws pertaining to the licensing of taxi cabs;
- b) whether the changes to the rules violated the **Traffic Act Cap 403 Laws of Kenya**;
- c) whether the changes contravened the **Taxi Cab By-Laws 2007**;
- d) whether the Respondent could unilaterally change the By-Laws made pursuant to **Section 201 of the Local Government Act**;
- e) whether the impugned letters of 5th January 2010 and 18th January 2010 were an abuse of power and unreasonable;
- f) whether the Respondent's actions were biased, unfair and discriminatory.

[15]The Court looked at the Respondent's mandate under **Section 201 of the Local Government Act Cap 265 Laws of Kenya** together with **Section 118A of the Traffic Act Cap 403 Laws of Kenya** and reasoned that those provisions gave the Respondent a discretion in controlling or regulating the taxi business but that such discretion must be exercised judiciously within the parameters of the Act taking into account the Act's intention. It was thus clear that the Respondent had the mandate/power to make by-laws relating to the taxi cab business and in addressing the issue, the Court stated thus:

“The manner in which a By-law should be made is provided for under Ss.203 and 204 of the Local Government Act Cap 265 Laws of Kenya. Before approval of the By-laws by the Minister, the By-laws have to be made available to the public to enable the public to raise objections, if any. I find that such a change to the requirements of taxi cabs licensing should have been made through amendment of the By-laws but not through a memo or a mere rule made by the Town Clerk or Town Engineer. I find that this should also apply to the requirement that for a vehicle to be licensed, it had to be less than 10 years old. That is a substantive change to the requirement that should have been included in the By-laws where the stakeholders would have a say before its promulgation. . . The Town Clerk's mandate is to implement the law on behalf of the City Council of Nairobi not to make the law. In this case the Town Clerk has arrogated himself the powers to make laws/by-laws and I find the impugned decision to have been made without jurisdiction and ultra vires S. 204 of Cap 265, Rules made under the Traffic Act and the Traffic Act as a whole and must be quashed.”

[16]The Court further found that, on the facts, there was no public participation, and that the stakeholders meeting that was called was to merely inform the Applicants of what had already been done and they

were thus denied a chance to be heard when the Town Clerk and Engineer went ahead to make rules that directly affected the rights of the Applicants without following due process. The Court therefore went further to state:

“In this case, By-Laws were being changed unilaterally without hearing or consulting the stakeholders, the taxi operators. Those changes may totally affect their rights to livelihood and the respondent should have complied with the law. Having failed to do so, the Respondent’s decision does attract an order of Certiorari to quash it.”

[17] On the issue of whether the Respondent’s actions were biased, unfair and discriminatory, the Court found that both impugned decisions amounted to an abuse of power because the Respondent had failed to comply with and in fact tried to get a short cut to amend the law.

[18]The Court ultimately granted Prayers 1, 2 and 3 of the Applicant’s application quashing the decisions contained in the letter of 5th January 2010 and the memo dated 18th January 2010. It however declined to grant the mandamus and the prohibition order the Applicants had sought.

Judgment of 18th December 2013: Nairobi Metropolitan Psv v Saccos Union Limited & 25 Others v County of Nairobi Government & 3 Others [2013] eKLR

[19]The second judgment is that of this Court in *Nairobi Metropolitan Psv v Saccos Union Limited & 25 Others v County of Nairobi Government & 3 Others [2013] eKLR* dated 18th December 2013. The central issue in that matter was the constitutionality or otherwise of the enactment of the **Nairobi City County Finance Act, 2013**. The Petitioner had averred that there was inadequate and inappropriate public participation prior to the enactment of **paragraph 6.1** in the **Schedule to that Act**. This provision had authorized the Respondent to increase motor vehicle parking levies.

[20] In response to that issue this Court reasoned at paragraph 37 thus:

“The Constitution contemplates a participatory democracy that is accountable and transparent and makes provision for public involvement. Consistent with this, Article 174(c) of the Constitution provides for the principle of devolved government and has given powers to the people to enhance self governance and enhance their participation in decisions that affect them. Clearly, the making of county laws by members of County Assembly is, in my view an essential part of public participation.”

Having so reasoned, it however held that on the facts of that case, there was no evidence that the Respondents had failed to enhance public participation in the making of the **Nairobi City County Finance Act, 2013**. It also found that the public was involved in the process leading up to the enactment of the Act and those who would be affected by their decisions were engaged and given details of the proposals and an opportunity of raising any objections. Indeed the Court found at paragraph 46 that—

“To my mind the process was highly public as there were public forums, meeting with stakeholders, media reports and even lobbying and an opportunity to make written representations through written memoranda.”

The Court thus dismissed this contention that there was no public participation in the enactment of the Act.

Judgment of 3rd October 2014: Nairobi Mertropolitan Psv v Saccos Union Limited & 25 Others v County of Nairobi Government & 3 Others [2014] eKLR

[21]This was an appeal against the abovementioned judgment in the Court of Appeal where the Petitioners challenged the High Court’s dismissal of their Petition. It is reported as *Nairobi Mertropolitan Psv v Saccos Union Limited & 25 Others v County of Nairobi Government & 3 Others*

[2014] eKLR. This appeal was visited by the same fate as in the High Court. The Court of Appeal found no fault in the reasoning and outcome of the High Court and accordingly dismissed the appeal.

Ruling of 11th September 2015: Kenya Taxi Cabs Association (Suing Through Its Registered Officials) Peter Waweru Mburu & 4 Others v City Council of Nairobi [2015] eKLR

[22]An Application was brought by the present Petitioners prior to the hearing of the present Petition alleging that the Respondent, through its agents or employees, had clamped some of their taxi motor vehicles because the owners had not obtained Single Business Permits for 2014. This was notwithstanding the fact that these vehicles were under the protection of a consent order dated 18th March 2015 that was entered into between both parties. This consent order provided, in the relevant part:

“(3) That in the interim an order do issue pending hearing inter parties, in the following terms:

(i) That the Respondents be restrained from charging or levying the daily car park fees/seasonal car park fee from the members of the Petitioner Society who have paid and produce evidence of payment of the 2014 Single Business Permit for Taxi Operations with effect from 11th March 2014.

(ii) The Petitioner’s advocate shall furnish the Respondent’s advocate with a list of the members by Monday 10th March 2014 at 12 noon.”

[23]The Petitioners in that Application dated 18th March 2015 had sought the following specific reliefs:

“(1) ...

(2) That the Respondent be restrained from charging daily parking fees to the members of the Petitioner pending the hearing of the Application.

(3) That the Respondent be compelled to issue Single Business Permits to the members of the Petitioners who are willing and ready to pay the fees chargeable for the same, and to renew the said on an annual basis as required by its by-laws.

(4) That any money that has already been paid to the Respondent for the removal of the clamps of the Petitioner’s member’s vehicles be utilized as part of the Single Business Permit or in the alternative, the money be refunded to the persons who paid the same.”

[24]The Respondent in response averred that the consent order aforesaid applied to only 8 of the 734 members of the Petitioner who had paid for the 2014 Single Business Permit. Further that it would be **“unconscionable, unfair and unacceptable for the Petitioners to expect that the Respondent allow them to conduct business without a permit and also not pay parking fees”**.

[25] In dismissing the said Application, this Court reasoned that the consent order unequivocally made it clear that it only covered members who had paid for the 2014 Single Business Permit and only 8 had paid – thus those were the only members entitled to the consent order’s protection. That further, the Application was an attempt to amend the consent order without adhering to the principle that a consent order is akin to a contract and can only be vitiated by either party to it in the same way that a normal contract would be vitiated.

[26]It accordingly struck off the Application and ordered strict compliance with the consent order and further ordered Parties to expeditiously finalise the hearing of the Petition.

[27]I now turn to the parties' arguments in this case.

Petitioner's case

[28]The thrust of the Petitioner's case can be summarized into four points.

[29]Firstly, that the Respondent's decision/directives are in contradiction of this Court's judgment in ***Republic v City Council of Nairobi: Ex parte Kenya Taxi Cabs Association (supra)*** and are in fact a strategy to undermine that judgment and that further, they are thus in violation of **Article 10** of the **Constitution** and contrary to the principle of the rule of law.

[30]In further advancing the **Article 10** argument, they aver that the decision to remove taxi ranks and restructure taxi operations without consultation with them as is required by **2007 By-Laws** is a breach of the constitutionally entrenched principle of public participation in public decision making.

[31]Second, they claim that the Respondent's decisions/directives have resulted in a violation of a whole host of their constitutional rights which include *inter alia*, their rights to equality under the law as protected by **Article 27**, their property rights under **Article 40**, their rights to fair administrative action under **Article 47**, and their economic and social rights under **Article 43**.

a) On the right to equality under the law as protected by **Article 27**, they assert that they are being discriminated against on the basis of their social origin/standing in the membership of their Association. That the aforesaid decision is an effort to create more parking space for private cars which means that according to the Respondent's view, private vehicle owners' right to park in Nairobi outweigh theirs. Further, that other taxi operators, like KENATCO taxi cabs were not requested to relocate.

b) On their right to property under **Articles 40** and socio-economic rights under **Article 43**, they posit that the Respondent, through its decisions/directives and contrary to the decision in ***Republic v City Council of Nairobi: Ex parte Kenya Taxi Cabs Association (supra)*** violated their right to earning income from the taxi business. That this right is part and parcel of their right to property under **Article 40** and that the said unlawful restrictions on and disruption of their taxi operations through the Respondent's decisions/directives have affected their income and subjected them to unnecessary losses which fact implicates on their right to economic and social rights under **Article 43**.

c)On their rights under **Article 47**, they aver that the Respondent is in violation of same in the following ways:

(i) The decision/directive to reduce the number of taxi ranks in the CBD contained in the memo dated 17th March 2011, was contrary to **Article 47** because the power to make that decision, in terms of the **2007 By-Law** vested in the Council after consulting relevant stakeholders.

(ii) This decision is unlawful because it circumvents and flouts the decision aforesaid by Wendoh J.

(iii) It is also procedurally unfair to the Petitioners and contrary to its rights to property and to earn a living as contained under **Article 40** and **43** of the **Constitution**.

(iv) The Respondent's failure to refer to Court the apparent dispute between it and the Petitioners relating to the number of taxi ranks and its corresponding resort to "harassment" of the Petitioners' members violate their rights under **Articles 27, 28, 40** and **50** of the **Constitution**.

[32] Third, they argue that the **Nairobi County Finance Bill 2013 ("The Finance Bill")** did not adhere to the requirements of citizen participation as enshrined in **Section 87** of the **County Government Act, 2012 (County Government Act)** and that the passing of the **Finance Bill** was shrouded in secrecy and the principle of access to information under **Article 35** of the **Constitution** and **Part IX** of the **County**

Government Act.

[33] Fourth, they have disputed the factual reasons cited by the Respondent for taking these decisions/directives; by arguing that:

- a) their removal from the taxi rank in front of the Hilton Hotel due to security reasons was an unjustified harassment because there are other taxi operators in that taxi rank which have not been asked to relocate like the Petitioners and members of the Association they lead.
- b) The Respondent's actions are discriminatory and unreasonable in that they illustrate a concerted effort on its part to remove taxi ranks originally allocated to the Petitioner's members under the guise of security concerns meanwhile other operators have been allowed to use those very same taxi ranks.
- c) Moreover, the decongestion of the CBD, as the Respondent has argued, is not at issue and is both false and misleading because their taxi ranks have now been occupied by buses.

[34] In closing, they argue that this Court is enjoined, in terms of **Articles 20, 23 and 165** of the **Constitution** to give them the reliefs they seek.

Respondent's case

[35] The Respondent filed written submissions dated 12th November 2012 in response to the Petition dated 7th February 2012. It further filed a replying affidavit dated 24th November 2015 in response to the Petitioner's amended Petition dated 29th September 2015.

[36] Firstly, it asserts that it does not recognize the existence of the Association's members listed in annexure **PWM2** of the Petition because a number of them are not licensed taxi operators. It also avers that the Petitioners are not officials of the Association and as such they do not have *locus standi* to prosecute this Petition. Furthermore, that they have not produced any evidence to rebut this contention.

[37] The Respondent further argues that the relocation of the taxi rank in front of the Hilton Hotel was not done out of malice but rather as a genuine security enhancement measure prompted by terrorist threats – bearing in mind that the Hotel is frequented by tourists who are commonly targeted by terrorists. Further, that the Petitioners were not the only taxi operators who were asked to relocate; the order to relocate taxi operators to the City Hall Way rank was addressed to all taxi operators and not just to those belonging to the Association. That the Petitioners have also failed to produce any evidence as to which taxi operators have been excluded from the request to relocate.

[38] The Respondent also aver that the annual operating license and the daily parking ticket fee are to ensure that there are no illegal taxi operators in the CBD and also functions as a regulatory measure because they limit the number of taxi cabs which may operate in the CBD without having complied with these requirements.

[39] also submit that parking fees are a statutory requirement which must be paid by any motorist (including taxi operators) who park their vehicle within the City and no one is exempt therefrom. Moreover, that a taxi operating license does not exempt taxi operators from paying parking fees and that the purpose of taxi ranks is to create a venue to drop and pick up passengers and not for parking purposes.

[40] In response to the amended Petition, it argues that the Petitioners, through the amended Petition, are trying to add a new cause of action based on the **Nairobi City County Finance Act, 2013** which is wholly unrelated to their case in the main Petition.

[41] That the Petitioners clandestinely want to have a redetermination of the constitutionality of the **Nairobi City County Finance Act, 2013** by this Court when that matter has already been settled by the judgment in **Nairobi Metropolitan Psv Sacco Union Limited and 25 Others v County of Nairobi Government & 3 Others (supra)**. Further, that in the said case the Court dismissed the argument that the

Act had been promulgated in contravention of the provisions of the **Constitution** that provide for public participation and that the Act further contravened **Articles 37, 46(c), 174(c) and 184(1)(c)** of the **Constitution**. The Petitioners' appeal to the Court of Appeal also met the same fate.

[42] The Respondent further argues that the Court of Appeal decision is binding and thus the proposed amendment must not be allowed.

[43] In addition, that the issues raised herein have already been determined by both the High Court and Court of Appeal and the amendment of the Petition would amount to duplication of issues.

[44] Lastly, that this Petition, as amended, is frivolous and vexatious and is a total abuse of court process. Therefore, it should be struck out with costs.

Issues and Determination

[45] Having carefully considered the Petition and both parties' arguments, these are the issues falling for determination:

- a) Whether the Respondent has the powers and authority to reduce and/or limit the taxi ranks within the City of Nairobi in accordance with the directive contained in its Town Clerk's Memo dated 17th March, 2011;
- b) Whether the decision/directive of the City Engineer of the Respondent contained in a confidential Internal Memo dated 28th March, 2011 should be quashed for being in violation of **Articles 10, 27, 47 and 50** of the **Constitution**.
- c) Whether the decision contained in the letter dated 31st October 2011 relocating the Taxi Rank in front of the Hilton Hotel to City Hall Way, allegedly due to security concerns by the Hotel, and/or relocation and/or removal of any other Taxi Rank in the Nairobi Central Business District is in violation of **Article 10, 27, 47, and 50** of the **Constitution**?
- d) Whether the **Nairobi County Finance Bill, 2013** is illegal, null and void to the extent that it seeks to increase the parking fee as well as the business permits for taxi operators.

(i) Powers and authority to reduce and/or limit the taxi ranks within the City of Nairobi

[46] In essence the Petitioners are challenging the power of the Respondent to reduce the number of and also relocate taxi ranks in the CBD through its decision/directives contained in the memorandum and letter in question. That fact inevitably leads to the question: where is the power to reduce and relocate taxi ranks sourced from?

Legislative framework

[47] The regulation of taxi cabs by local authorities is primarily governed by the **Traffic Act. Section 118A** of the **Traffic Act** gives a local authority very wide powers to make by-laws regulating taxi cabs and provides thus:

“118A. Local authority may make by-laws regulating taxicabs, etc.

(1) A municipal council, and a county council, may make by-laws—

(a) for controlling taxicabs within its area;

(b) for fixing the number of taxicabs permitted in its area;

- (c) for requiring the installation and providing for the inspection of meters on such taxicabs;
- (d) for licensing the drivers of such taxicabs;
- (e) for fixing the fees for any such licences; and
- (f) or prohibiting the parking of taxicabs, except for the picking up or depositing passengers or loads, elsewhere than on stands provided for taxicabs.

...

(3) The procedure for the making, approval and publication of by-laws made under subsection (1) and subsection (2) shall be that prescribed in the Local Government Act (Cap. 265), and, for the purposes of their enforcement and the disposal of fines imposed for their contravention, such by-laws shall be deemed to be by-laws made by the same local authority under that Act.

(4) In this section, “controlling” includes regulating, inspecting, supervising and licensing.” (Emphasis added.)

The text of the above provision makes it clear that these powers under (a) to (f) are to be exercised through by-laws. Thus by-laws must be the enabling legislation and the Act referred to in subsection (3) above is the Local Government Act CAP 265 while the relevant sections are Sections 203 and 204 thereof which set out the manner in which a by-law should be made. The relevant by-laws in this regard are the City Council of Nairobi (Taxi-Cab) By-Laws, 2007 (the “By-Laws”).

These By-Laws define “taxi rank” to mean “any one of the places prescribed by the Council under the provisions of by-law 28 of these By-laws.”

By-law 27 of these By-Laws provides that:

“(1) The Council may from time to time by resolution prescribe an area to be a taxi rank.

(2) The position of each taxi rank prescribed in accordance with paragraph (1) of this by-law shall be indicated by a sign erected by the Council adjacent thereto and shall state the maximum number of vehicles authorized to occupy the rank.

(3) Any person who parks a vehicle other than a taxi-cab in an area prescribed under paragraph (1) of this by-law as a taxi rank shall be guilty of an offence under these By-laws.”

In that context, these By-Laws do not explicitly stipulate that the Council has the power to relocate a taxi rank or reduce the number of taxi ranks within the City. All that by-law 27(1) does is to give the Council the power to demarcate an area to be a taxi rank by resolution and once it has prescribed a certain area to be a taxi rank, it will put up a sign indicating how many taxis are authorized to occupy that taxi rank. Does this broad power to prescribe an area to be a taxi rank encompass a variation of an existing taxi rank i.e. relocate or reduce the number of vehicles authorized to park there? By implication, common sense and sheer interpretative reasoning, the answer must be in the affirmative.

[48] I say so because the purpose of the by-laws is to allow the City Council of Nairobi to regulate the taxi cab business operating within its jurisdiction. Although this legislation was enacted prior the coming into effect of the 2010 Constitution, this purpose is still relevant because the Constitution gives local/county government the exclusive competence to regulate county transport. The relevant provision

in this regard is **Article 185(1) and (2) of the Constitution** read together with the **Fourth Schedule** to the **Constitution** which provides:

- (1) The legislative authority of a county is vested in and exercised by, its county assembly.**
- (2) A county assembly may make any laws that are necessary for or incidental to, the effective performance of the functions and exercise of the powers of the County government under the Fourth Schedule.**

Item 5 of the Fourth Schedule lists functions of a county relating to county transport to include:

- (a) County roads;
- (b) Street lighting;
- (c) Traffic and parking; and
- (d) Public road transport; and
- (e) and harbours, excluding the regulation of international and national shipping and matters related thereto. (Emphasis added.)

[49] Traffic and parking, read with the by **By-Laws** above, would mean that the power to designate an area to be a taxi rank should invariably include any variations to an existing taxi rank i.e. that is the reduction or relocation thereof.

[50] Further, the Council and now the County Government has the powers to ensure that all illegal conduct that is in breach of the relevant by-law is dealt with accordingly.

[51] Thus it is no doubt that read with **Section 7 of the Sixth Schedule** to the **Constitution**, all the above findings would lead to the inevitable conclusion that the Respondent has the powers/authority to relocate and reduce the number of taxi ranks imposed through by-laws. However, this power is not unbridled. It must be in accordance with the **Constitution**.

(ii) Are the decisions of 28th March 2011 and 31st October 2011 in violation of Articles 10, 27, 47 and 50 of the Constitution?

[52] **Article 10(1) of the Constitution** provides that:

“The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) Applies or interprets this Constitution;**
- (b) Enacts, applies or interprets any law;**
- (c) Makes or implements public policy decisions.”**

[53] **Sub-Article (2) of Article 10** further provides:

“The national values and principles of governance include—

- (a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**
- (b) Human dignity, equality, social justice, inclusiveness, equality, human rights, non-**

discrimination and protection of the marginalized;

(c) Good governance, integrity, transparency and accountability; and

(d) Sustainable development.”

In effect therefore, when enacting or applying or interpreting any law (including the **By-Laws**), the Respondent must be guided by the rule of law, democracy and participation of the people. As was held by this Court in *Nairobi Metropolitan Psv v Saccos Union Limited & 25 Others v County of Nairobi Government & 3 Others (supra)*, our **Constitution** contemplates a participatory democracy that is accountable and transparent and makes provision for public involvement.

[54] Closely related to this is the right to fair administrative action entrenched in **Article 47** of the **Constitution**. **Article 47(1)** guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The impugned decisions are clearly administrative actions pegged on the authority granted by law and the Respondent as shown elsewhere above. However, whether **Article 47** was violated or not is a matter I shall shortly address.

[55] Further, in terms of **Article 47(2)**, where a person’s right or fundamental freedom has been or is likely to be adversely affected by administrative action, that person has the right to be given written reasons for the action.

[56] I also note that the Petitioners argued that the impugned decisions/directives were unlawful in that they circumvented and were contrary to the decision of Wendoh J cited elsewhere above.

[57] In my view, that judgment can be distinguished from this case in the following ways: The impugned decisions there related to the requirements of licensing of taxi cabs which was an action regulated by legislation whether in the form of by-laws or the **Traffic Act**. The impugned decisions therein had sought to vary those licensing requirements – in essence they purported to amend the existing by-laws and relevant provisions under the **Traffic Act** through a memo or letter, and without following the procedures under **Sections 203 and 204** of the **Local Government Act**. In contrast, the impugned decisions at issue in this Petition were administrative decisions and not any attempt at circumventing any statute or by-law. That is all I should say regarding that issue.

[58] Regarding **Article 50**, the same entrenches the right to a fair hearing by providing that—

“every person has the right to have any dispute that can be resolved by application of laws decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

[59] Important as the right may be the Petitioners have merely averred that the impugned decisions/directives were in violation of their rights under **Article 50**. However they have not explained to this Court how those rights have been infringed. I cannot, therefore proceed and determine that issue in an evidential vacuum.

[60] They have also alleged that the impugned decisions/directives have violated their rights under **Article 27(1) of the Constitution**. This Article enshrines the right to equality and freedom from discrimination for everyone and states:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.”

[61] On this score they posit that the Respondent is discriminating against them on the basis of their social origin or membership to the Petitioner organization and that these decisions are an effort to create more parking space for private cars to their detriment. The Respondents have rebutted these allegations by emphasizing that the relocation of the taxi ranks was prompted by bona fide security reasons and that the Petitioners were not the only taxi operators who were requested to relocate as the order to relocate

was addressed to all taxi operators. True to the Respondent's assertions, the Petitioners have not provided any evidence to show that these changes were directed only to them and that other taxi operators were excluded. Moreover, they have not supported, with evidence, their averment that the impugned decision was an effort to create more parking space for private cars.

[62] I further note that **Article 27(4)** prohibits the State from discriminating, whether directly or indirectly, against any person on the listed grounds thereunder which include ethnic or social origin.

[63] It is apposite at this stage and before I proceed any further to pause and point out that the Petitioners have not provided any evidence to support their allegations on being discriminated against on the basis of their economic status and social origin. The old age maxim "**He who alleges must prove**" is applicable in that regard and mere allegations are insufficient. It is expected that they must also demonstrate, with particularity, how their rights have been infringed and the violation or threat they face and the damages suffered by this alleged infringement - See *Paul Ng'ang'a Nyaga & 2 Others v Attorney General & 3 Others [2013] eKLR* at paragraph 37.

[64] The same can be said on the Petitioners' argument relating to **Article 28 (right to human dignity), Article 40 (right to property) and Article 43 (economic and social rights)**. With due respect to the Petitioners, all complaints raised with regard to these provisions were speculative and based on no more than bare statements. Their chief complaint was that of the relocation of the taxi ranks in the CBD including the one outside the Hilton Hotel and once I have said that the Respondent's actions in that regard were lawful, then the substratum of their case collapsed and nothing else could salvage it.

(iii) The Nairobi County Finance Bill, 2013 is illegal, null and void to the extent that it seeks to increase the parking fee as well as the business permits for practitioners.

[65] As discussed above, the constitutionality of this piece of legislation has already been pronounced upon by this Court and its decision was later confirmed by the Court of Appeal in *Nairobi Metropolitan Psv Saccos Union Limited & 25 Others v County of Nairobi Government & 3 Others [2014] eKLR*. That issue therefore has no merit and is thus put to bed. I say so with respective reference to the alleged lack of public participation prior to the impugned decisions/directives. In any event, having found, as I have, that the Respondents acted within the law and the **Constitution** in issuing the impugned directives/decisions, I see nothing unlawful about any of the provisions of the **Finance Act, 2013**, in as far as they affect the Petitioners and I have shown why.

Conclusion

[66] Turning back to the prayers in the Petition, it is clear that the grounds relied upon do not support any of the reliefs sought and it is obvious that the Petition is one for dismissal.

Disposition

[67] From my findings above, the Petition dated 7th February 2012 as amended is hereby dismissed.

[68] Let each Party bear its own costs.

[69] Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Mungai for Petitioners

No appearance for Respondents

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE