



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**JUDICIAL REVIEW NO. 111 OF 2016**

**IN THE MATTER OF APPLICATION BY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF SECTION 48 (1) (a) OF THE COUNTY**

**GOVERNMENT ACT (ACT NO. 29 OF 2012 LAWS OF KENYA), FAIR ADMINISTRATIVE  
ACT, 2015, SECTION 12, 13 AND 15 OF THE CONSUMER PROTECTION ACT, AND THE  
CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF TRAFFIC ACT, CAP 403 AND LEGAL NOTICE NO. 37 OF 2008**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**NAIROBI CITY COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**KENYA POLICE SERVICE TRAFFIC DEPARTMENT.....2<sup>ND</sup> RESPONDENT**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY...3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**AND**

**SOUTH B MATATU OWNERS SACCO.....EX PARTE APPLICANT**

TEL AVIV TRAVELLERS LIMITED.....1<sup>ST</sup> INTERESTED PARTY

AKILLA TRANSPORTERS LIMITED.....2<sup>ND</sup> INTERESTED PARTY

COUNTY LINK SACCO LIMITED.....3<sup>RD</sup> INTERESTED PARTY

## JUDGEMENT

### Introduction

1. By a Motion on Notice dated 10<sup>th</sup> March, 2016, the ex parte applicant herein, **South B Matatu Owners Sacco**, moved this Court seeking the following orders:

a. **AN ORDER OF MANDAMUS** directed at the County Government of Nairobi and the National Transport and Safety Authority to compel them to direct the 1<sup>st</sup> Interested Party and other operator plying South B route to carry out operations in the Hakati Road Terminus Near Country Bus Station and not from the stage alongside Gedi Street located between Gill House and Agro House and Afya Centre.

b. **AN ORDER OF PROHIBITION** directed at the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to deter the 1<sup>st</sup> Interested Party and other operators plying route 11, South B route from operating from the stages alongside Gedi street between Gill House and Agro House and Afya Centre along Mfangano Lane and to carry out its operations from designated Terminus at Hakati Road .

c. **AN ORDER OF CERTORARI** to revoke road service licences (RSL), letter, authority or consent in favour of the 1<sup>st</sup> Interested Party directed at the Respondents from operating from the stages alongside Gedi Street between Gill House and Agro House and Afya Centre and to carry out its operations from designated Terminus at Hakati Road .

d. **AN ORDER OF MANDAMUS** directed at the 2<sup>nd</sup> Respondent to compel the 1<sup>st</sup> Interested Party stop operating from non-designated stage alongside Gedi street between Gill House and Agro House and Afya Centre and begin operations in the Hakati Bus Station terminal.

e. **AN ORDER TO RESTRAIN** the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from acting or continuing to act in breach of duty imposed upon them by law and specifically Legal Notice No. 37 of 2008 or from acting or continuing to act in any manner that is prejudicial to the legal rights of the Ex-Parte Applicant.

f. **AN ORDER** directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to give reasons for the administrative action or decision taken by allowing the 1<sup>st</sup> Interested Party to operate from non-designated terminus alongside Gedi street between Gill House and Agro House and Afya Centre in violation of Legal Notice 37 of 2008.

g. **AN ORDER** directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents compelling them to undertake public duty owed in law and in respect of which the Ex-Parte applicant has a legally enforceable right and legitimate expectation.

h. **The costs of this application be provided for.**

### Ex Parte Applicant's Case

2. According to the applicants, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have allowed the 1<sup>st</sup> Respondent (sic) to park their buses and pick, drop passengers alongside Gedi Street between Gill House and Agro House, Afya Centre stages and head to South B & C. This act, it was contended is in violation of the law

established under **Traffic Act** and Legal Notice No. 37 of 2008, **The City of Nairobi (Omni Bus Stations) Amendment By-Laws, 2008**, and has adversely affected the operations of the applicants' business given that the stages allocated to the 1<sup>st</sup> Interested Party are catchment areas for all passengers getting to the Ex parte - applicant's buses heading to South B and C.

3. It was averred that by reason of the foregoing, the applicants the ex-parte Applicants are disadvantaged by operating in Hakati Road terminus while the 1<sup>st</sup> interested Party operates in the upper town (CBD) on your way to bus station. To them, the irregularity of allocation of stages alongside Gedi Street between Gill House and Agro House and Afya Centre stages were barred by the law established under Legal Notice No. 37 of 2008 under the guise of de-congesting the (CBD) Central Business District of Nairobi, is a leading to unfair business competition. It was averred that the decision to allow the 1<sup>st</sup> Interested Party, who are the applicants' rivals and competitors, back to the stage the applicants were directed to vacate in the year 2008 and without explaining the same and/or giving the applicants reasons why they should not operate in their former stages alongside Gedi Street between Gill House and Agro House and Afya Centre stages is in bad faith, suspect and violates the applicants' legitimate expectation to be treated equally and fairly. Further, by allocating the former stage to their competitor (1<sup>st</sup> Interested Party) operating the same route amounts to unfair competition.

4. It was the applicants' case that a section of its members have started joining the 1<sup>st</sup> Interested Party Company since it is easily obtaining passengers and charging the passengers highly because their buses are operating in an upper part of town (CBD) hence achieving great profits than the applicants. It was therefore contended that the actions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is tantamount to abuse of power and by letting the applicants operate from Hakati Road Terminus near Country Bus station and to disenfranchise its members expectations yet the applicants' members have always complied with all the necessary legal provisions necessitated for their operations and it was their legitimate expectation that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents would not allow any unfair competition between them and the 1<sup>st</sup> Interested Party allowing them to operate in a non-designated area.

5. The applicants disclosed that their efforts to get a logical, rational and/or reasonable explanation from the 1<sup>st</sup> Respondent have not elicited any plausible reasons and have been left to speculate and seek for answers on behalf of their members who are traumatized and unfairly discriminated. However despite visiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents several times in their offices, no assistance has been forthcoming. To the applicants, the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to allow the 1<sup>st</sup> Interested Party to operate from the said stages was arrived at without any justifiable or legal basis but based on corruption cartels and/or wrong parameters (if any). They explained that their concern was with respect to the absence of any enforcement of the law as envisaged in the 2<sup>nd</sup> Respondents to allow the 1<sup>st</sup> Interested Party to operate his business in non-designated and de-gazetted areas by picking and dropping contrary to Legal Notice No. 37 of 2008.

6. To the applicants, the said decision, omission or dereliction of delegated powers is irrational, unfounded, misplaced and based on corrupt dealings, biased, discriminatory, *ultra vires*, illegal and unlawful and in contravention of the Constitution, the Act, Circulars and Regulations governing the Respondents hence their grievance with the said decision promoting unfair business, discriminatory and in violation of the individual rights and legitimate expectation of the public whose consumer rights are being infringed upon the 1<sup>st</sup> Respondent.

7. The applicants contended that they were not given prior notice or an opportunity to present their case or any intention by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to grant a license to their competitors to operate in premises they previously operated hence the decision by the 1<sup>st</sup> and 2<sup>nd</sup> respondents is an error of law and is unfair.

8. The applicants based their case on section 4(1) of the **Fair Administrative Action Act 2015** that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair and contended that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have to date failed, ignored and/or refused to respond to their issues/concerns however much acknowledging receipt of letters addressed to

them having their grievances as to the manner in which the offence was carried out and the main actors behind the alleged irregularity.

9. According to the applicants, unless this Humble Court intervenes, their Sacco members stand to lose opportunities to compete equally with other Sacco's who will in the event of delay to act by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to prohibit the 1<sup>st</sup> Interested Party or allow the applicants to operate from the same stages lead to the collapse of their Sacco since members are moving out every day due to loss of business.

### **3<sup>rd</sup> Interested Party's Case**

10. The 3<sup>rd</sup> interested party herein, **County Link Sacco Limited**, supported the Motion.

11. According to them, they operate *matatus*/buses plying south B route and they used to pick and drop passengers along Gedi Street between Gill House and Agro House, Afya Centre stages and then head to South B. However, under the guise of de-congesting the Central Business District (CBD) the 3<sup>rd</sup> interested party was barred from operating within the aforesaid area and they were re-located to Hakati Road Terminus pursuant to the provisions of the Legal Notice Number 37 of 2008 and since then they have been operating along Hakati Road Terminus.

12. The 3<sup>rd</sup> interested party averred that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents recently allowed the 1<sup>st</sup> interested party to operate within Gedi Street between Gill House and Agro House and this has affected the 3<sup>rd</sup> interested party's business in that the said area is located in an area for many passengers heading to South B. Since the 1<sup>st</sup> interested party's road service licence indicates that they are to pick and drop off passengers at bus station then head to Mombasa road it was averred that it is clear that this regulation or the law is not being followed by the 1<sup>st</sup> interested party and it is also not being enforced by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. By allowing the 1<sup>st</sup> interested party to operate within Gedi Street between Gill House and Agro House, it was contended that the 1<sup>st</sup> interested party was being given advantage over the others and this amount to discrimination and also unfair trade practice.

13. The 3<sup>rd</sup> interested party asserted that they have been paying without fail or delay parking fees to the 1<sup>st</sup> respondent on time and have never defaulted in doing so hence there should be a level playing ground for all the operators plying within the aforesaid route. However the 1<sup>st</sup> Respondent was accused of showing open favouritism for the 1<sup>st</sup> interested party to the detriment of the other operators among them the 3<sup>rd</sup> interested party.

14. The 3<sup>rd</sup> interested party averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have refused and or ignored to enforce the law which has given a great advantage to the 1<sup>st</sup> interested party to gain unfairly to the detriment of the others and despite the 3<sup>rd</sup> Respondent having written several letters to the 1<sup>st</sup> respondent advising it to enforce the law equally, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have ignored and or refused to act on the advice and the 3<sup>rd</sup> respondent.

15. The 3<sup>rd</sup> interested party lamented that currently the 1<sup>st</sup> interested party is taking advantage of the 3<sup>rd</sup> interested party's members and is now requesting them to join their Company since it is easy to get passengers and since most of the members' vehicles are on loan from banks the members have no option but to pay heavy fees to join the 1<sup>st</sup> Interested party's Company. To the 3<sup>rd</sup> interested party, the actions by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents of failing to enforce the law equally has violated the 3<sup>rd</sup> interested party's constitutional right of not to be discriminated while performing its business and as a stakeholder, has been disadvantaged and as such it associated itself with the pleadings filed herein by applicant herein and prayed that the Applicant's application be allowed as prayed.

### **Respondent's Case**

16. The application was however opposed by the 1<sup>st</sup> Respondent.

17. The 1<sup>st</sup> Respondent conceded that the designated picking and dropping point for all public service vehicles plying Nairobi – South B Route is at Hakati Road Terminus and this was made clear in Legal Notice Number 37 of 20<sup>th</sup> March 2008 - City Council of Nairobi (Omnibus Stations) Amendment by-laws 2008. The 1<sup>st</sup> Respondent however averred that the 1<sup>st</sup> Interested Party made an Application by way of a letter dated 15<sup>th</sup> December 2015 to be allowed to operate from Gedi Street- Gill House and that **Engineer C.A. Ogut**, Chief Officer Roads, Public works & Transport replied to the letter and informed the 1<sup>st</sup> Interested Party that the designated picking and dropping areas for South B public service vehicles is a shared facility for use by all operators and that they were supposed to use the designated area for picking and dropping. Accordingly, by the said letter the 1<sup>st</sup> Interested Party was directed to pick and drop passengers from Hakati Terminus and to share the terminus with other operators. The 1<sup>st</sup> interested party was consequently directed to cease operating from Gill House and operate from Hakati Road Terminus.

18. The 1<sup>st</sup> Respondent therefore denied that it had allowed the 1<sup>st</sup> Interested Party to operate from Gedi Street- Gill House and asserted that it cannot go against its own by laws which it made to regulate the *Matatu* Sector. According to the 1<sup>st</sup> Respondent, there is no such a discussion that has been made to allow the 1<sup>st</sup> Interested Party to operate from Gedi –Street and none has been annexed to the Applicant's pleadings. To it, the letters annexed to the application cannot make a decision as a decision has to be made in a meeting of stake holders wherein minutes are taken hence the letters under challenge are not a decision as per Order 53. To the 1<sup>st</sup> Respondent, the Application is brought under the wrong provisions of the law and is bad in law and should be struck out.

19. It was contended that the Application and the entire Judicial Review proceedings are premature and a waste of the Court's time as the Ex parte Applicant has never been denied the right to be heard or any audience by the 1<sup>st</sup> Respondent hence it cannot be said that the 1<sup>st</sup> Respondent has refused and/or neglected to direct the 1<sup>st</sup> Interested Party to operate from Hakati Road Terminus.

20. To the 1<sup>st</sup> Respondent, judicial review proceedings are meant to challenge and eventually quash a decision made in bad faith and against the rules of natural justice but here the Ex-parte Applicant has not enumerated and/or demonstrated how the 1<sup>st</sup> Interested Party has not given any hearing before making any decision sought to be challenged.

### **1<sup>st</sup> Interested Party's Case**

21. In opposition to the application, the 1<sup>st</sup> Interested Party herein, **Tel Aviv Travellers Limited**, averred that the claim pending before the Hon Court, as presented by the ex parte applicant is ill-conceived, ill-advised bad in law and should be dismissed with costs, as *inter-alia* it is seeking orders which are unavailable in law, it is an uncanny attempt between business rivals to abuse judicial process against perceived success of its competitors. To the 1<sup>st</sup> interested party, the substance of the complaint by the ex parte applicant is the authority to designate and allocate parking places. It was the 1<sup>st</sup> interested party's case that the Legal Notice No. 37 f 2008 [The city of Nairobi Omnibus Stations] Amendment By-Laws, 2008] exhibited by the applicants omitted substantive portions thereof including Reg 2 and 3(1) thereof; both of which recognize the discretionary authority of the government to [from time to time] establish omnibus stations or otherwise allow for operation at places other than designated omnibus stations.

22. According to the 1<sup>st</sup> interested party, LN No. 37 of 2008 was enacted under the authority of Section 72A, **Traffic Act**, Cap 403 and that with the growth in population, the need for transport system also goes up daily. To the 1<sup>st</sup> interested party, the subsidiary legislation cannot lawfully vitiate and/or otherwise revoke an authority and/or power conferred upon the Nairobi City County Government [the City Council of Nairobi] and that LN 37 of 2008 has not in any way purported to so do, and if at all any such inference has been created; such inference is void *ab initio* in law, under the authority of Article 2 of the

Constitution of Kenya. The 1<sup>st</sup> interested party was of the view that LN 37 of 2008 in setting out various terminal/areas as designated parking areas; does not in any way oust the authority's discretion to act and from time to time, "provide parking places on roads or on other places under its control, within its area of jurisdiction for vehicles or vehicles of any particular class or description (including the provision of omnibus stations)".

23. It was contended by the 1<sup>st</sup> interested party that there was no violation of the law by the Respondents. The 1<sup>st</sup> interested party averred that a different *Matatu* Sacco had already been allocated in the space that its fleet used to occupy at Afya Centre. The Court was therefore urged to look into public interests and in line with the current transport problems in Nairobi it must be appreciated City Council has to act in the best interest of the public hence the Court should never be used to settle personal scores.

### **Determination**

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

25. The scope of and the grounds for the grant of judicial review orders were 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.”.**

26. Before embarking on the issues raised in this application it is important in my view to revisit the place of judicial review in our current constitutional dispensation. In **O’Reilly vs. Mackman [1982] 3 WLR 604, 623**, Lord Denning expressed himself as follows:

**“Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new up-to-date machinery, by declarations, injunctions, and actions for negligence...We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove ourselves equal to the challenge. Now, over 30 years after, we do have the new and up-to-date machinery...To revert to the technical restrictions...that were current 30 years or more ago would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime. So we have proved ourselves equal to the challenge. Let us buttress our achievement by interpreting section 31 in a wide and liberal spirit. By so doing we shall have done much to prevent the abuse or misuse of power by any public authority or public officer or other person acting in the exercise of a public duty.”**

27. In our case, it is my considered view that this Machinery was achieved by the promulgation of the current Constitution under which Article 23(3) of the provides:

**a. In any proceedings brought under Article 22, a court may grant appropriate relief, including—**

**i. a declaration of rights;**

**ii. an injunction;**

**iii. a conservatory order;**

**iv. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**

**v. an order for compensation; and**

**vi. an order of judicial review.**

28. The current Constitution provides in Article 47 as follows:

**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.**

29. It is therefore clear that the right to fair administrative action is no longer just a judicial review issue but a Constitutional issue as well. As was appreciated in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)** judicial review has been said to stem from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. In my view it is no longer possible to create clear distinction between the grounds upon which judicial review remedies can be granted from those on which remedies in respect of violation of the and Constitution can be granted. Whereas the remedies in judicial

review are limited and restricted, the grounds cut across both. It is therefore my view that violation of the provisions of the Constitution may well be a ground for granting judicial review relief.

30. This position was adopted in **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443**, where **Nyamu, J** (as he then was) noted that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism.

31. In this case, it is contended that the actions or inactions of the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents are geared towards the promotion of discriminatory tendencies in that the 1<sup>st</sup> interested party is thereby afforded a treatment different from the one its competitors are being accorded. The ***Black's Law Dictionary*** defines discrimination as follows: “*The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.*” ***Wikipedia, the Free Encyclopedia*** defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. ***The Bill of Rights Handbook, Fourth Edition 2001***, defines discrimination as follows:- “A particular form of differentiation on illegitimate ground.”

32. In his decision in **Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688**, **Nyamu, J** (as he then was) held:

**“The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification... The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the Constitution may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including (a) the nature and importance of the limitation (b) the relation between the limitation and its purpose (c) less restrictive means to achieve the purpose. The principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:- (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim.”**

33. In the above case, **Nyamu, J** was dealing with a matter with striking similarities to the present one where the petitioners alleged that by being denied access to the Central Business District, the Respondents had discriminated against them. The learned Judge expressed himself on that issue as follows:

**“Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word “discriminatory” in section 82 of the Constitution. Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions**

**namely:- (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question; (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification...** [Emphasis added]

34. In this case, it is contended that by virtue of Legal Notice No. 37 of 2008 all the operators including the 1<sup>st</sup> interested party were relocated from the upper town (CBD) stages along Gedi Street between Gill House and Agro House and Afya Centre to Hakati Road and that this relocation was meant to decongest the CBD. However without the applicants and the 4<sup>th</sup> interested parties being given a hearing, the 1<sup>st</sup> interested party has with the authority of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents sneaked back to the said upper CBD as a result of which an unfair advantage has been conferred upon it in terms of favourable business conditions to the detriment of other operators.

35. The 1<sup>st</sup> interested party has not denied that it operates from the said upper CBD. Its contention is that it has been authorised to do so by the 1<sup>st</sup> Respondent, an assertion which the 1<sup>st</sup> Respondent has denied. To the applicants this action is in bad faith, suspect and violates its legitimate expectation to be treated equally and fairly and amounts to unfair competition.

36. In this case, there is no clear evidence that the 1<sup>st</sup> interested party was in fact authorised by the 1<sup>st</sup> Respondent to operate from Gill House. In fact in the letter dated 10<sup>th</sup> February, 2016, the 1<sup>st</sup> Respondent categorically directed the 1<sup>st</sup> interested party to operate from Hakati Road Terminus just as the other operators. Accordingly there is no tangible evidence on the basis of which I can find that there is a decision to the contrary which can justify the grant of an order of certiorari.

37. However as was held in **Nyarangi & 3 Others vs. Attorney General** (supra), it is the duty of the 1<sup>st</sup> respondent to regulate the flow of traffic into the CBD and in so doing it can enlist the services of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. In fact under the ***National Safety & Transport Authority Act***, section 4(1)(c), one of the functions of the 3<sup>rd</sup> Respondent is to plan, manage and regulate the road transport system in accordance with the provisions of the Act. In performance of its functions the 3<sup>rd</sup> Respondent rightly questioned the permission of the 1<sup>st</sup> interested party to operate from the said undesignated stage but it seems this concern fell on deaf ears.

38. While the 1<sup>st</sup> Respondent contends that it has not authorised the 1<sup>st</sup> interested party to operate from the said stage, it has not shown any steps it has taken to stem that action. The 1<sup>st</sup> Respondent has not contended that it is powerless when it comes to enforcement of Legal Notice No.37 of 2008. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya [2002] 1 KLR 486; [2008] 2 KLR (EP) 393**, it was held that:

***“Mandamus is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant. Fortiori it should be an appropriate remedy to compel the performance of a constitutional duty.”***

39. As was held in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) 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 applicants and the 4<sup>th</sup> interested parties have the right to operate their business in a fair atmosphere with their competitors without either of them being afforded unfair advantage over the other unless such differentiation is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and further it must have a rational relation to the object sought to be achieved by the law in

question. As this Court held in **Republic vs. Nairobi City County Government & 2 Others Ex-Parte Nucleur Investments Ltd & Another [2015] eKLR.**

**“In my view, whereas the ex parte applicants are entitled to be protected in carrying out their businesses, this protection ought not to be interpreted to mean that the *ex parte* applicants have exclusive right to use the areas allocated to them by the Respondent. To do so would result to the stifling of competition in the business world, a situation which would be conducive to promotion of monopolistic policies rather than free market economy to the detriment of the consumers of transport services. Article 46(1)(c) of the Constitution protects the rights of the interests of the consumers.”**

40. If the object was to decongest the CBD, then there ought to have been an explanation as to why only the 1<sup>st</sup> interested party was permitted to operate from the upper CBD. That the 1<sup>st</sup> Respondent itself is unable to justify the 1<sup>st</sup> interested party’s action and has in fact disowned the 1<sup>st</sup> interested party’s action, the 1<sup>st</sup> interested party’s case must fall by the wayside.

41. It is however clear that the 1<sup>st</sup> Respondent abdicated its role of ensuring that there is order in the operation of traffic within the CBD by closing its eyes to what even it admits to be a transgression of the law.

42. In the premises whereas the prayer for certiorari cannot be granted, I find merit in the prayer for *mandamus*.

### **Order**

43. In the premises an order of *mandamus* is hereby issued directed to the 1<sup>st</sup> Respondent compelling it either by itself or in conjunction with the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents to take the necessary legal steps geared towards directing the 1<sup>st</sup> Interested Party and other operators plying South B route to carry out operations in the Hakati Road Terminus Near Country Bus Station and not from the stage alongside Gedi Street located between Gill House and Agro House and Afya Centre.

44. Since the applicants have only succeeded partly, they shall have half the costs of these proceedings to be borne by the 1<sup>st</sup> Respondent.

45. Orders accordingly.

**Dated at Nairobi this day 29<sup>th</sup> day of September, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Jobika for the applicants***

***Mr Odhiambo for Mr Munene for the 2<sup>nd</sup> and 4<sup>th</sup> Respondents***

***Mrs Munaro for the 1<sup>st</sup> interested party***

*Miss Butoyi for the 3<sup>rd</sup> interested party*

*Mr Mbugua the 4<sup>th</sup> interested party in person*

*CA Mwangi/Gitonga*