

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO 12 OF 2015

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER CHAPTER 4 OF THE CONSTITUTION OF KENYA 2010**

Gladys Nyawira & Others T/A

Nyeruruma Self Help Group.....Petitioners

versus

County Government of Nyeri..... Respondent

JUDGEMENT

By a petition dated 28th July 2016, expressed under the provisions of Chapter 4 of the Constitution of Kenya 2010, (contravention of the fundamental rights and freedoms), the Petitioners herein sued the Respondent seeking the following orders/declarations:-

- i. A declaration that the unilateral decision by the Respondents officer, George Mwangi vide a letter dated 20/6/2016 is biased, capricious knee jack, oppressive against all the rules of natural justice and the right to a fair hearing and contrite unfair and disproportionate administrative actions within the meaning of the constitution and is therefore illegal and unconstitutional.*
- ii. That the Respondent be prohibited from unlawfully and illegally cancelling the petitioners' license to drop and pick passengers as per its licences dated 31/5/2016 without following due process.*
- iii. A declaration that decision of the Respondents constitutes entrenchment of unfair trade practice and is injurious to the economic rights of the petitioners and is against public policy where the citizens of Kenya should enjoy the lowest fees chargeable for any service rendered by all service providers, especially in the essential sector like transport.*
- iv. Costs of the petition plus interests.*

The petitioners case is that they are licensed members of various transport Saccos, that operate from Nyeri on various routes as licensed by the relevant bodies. Further with regard to the routes serving the suburbs in the various towns, the relevant departments in the county government does allocate on application a picking and dropping bay to extent service to the said areas. In conformity with the above, upon identifying such needy routes, the petitioners formed a group called Nyeruruma Self Help and submitted an application to the relevant department of the Respondent which was allowed and they were allocated a loading and dropping bay and upon being granted the said bay, they fully complied with all the conditions/requirements.

The petitioners aver that at the time their aforesaid application was considered and approved, a one George Mwangi in the employment of the Respondent herein was not in the office. The petitioners further aver that on 7th June 2016, the said George Mwangi called a meeting for 8th June 2016 and in the said meeting they learnt for the first time that there was a complaint relating to alleged business competition allegedly made by another Sacco, but the matter was referred to the secretariat for mediation. On 20th June 2016, the said George Mwangi purported to revoke their licence referred to above. The

petitioners allege that prior to revoking their license, the said George Mwangi had demanded a bribe of Ksh. 100,000/=.

The petition is opposed. In a Replying affidavit filed on 29th August 2016, the said George Mwangi, the Sub-County Administrator of Nyeri Town avers *inter alia* that the Respondent is legally mandated to regulate county transport which mandate includes regulating county roads and public transport in the county.

He stated that the petitioners made their application on 30th May 2016 and the same was approved on 31st May 2016 (casting doubts on its credibility because of the speedy manner in which it was processed. On my part I found it rather odd that he was critical of the speed with which the Respondent processed the said application, because to me, a reasonable observer ought to give credit to the said department for acting expeditiously, and I yearn for the day Kenyans will be accorded such speedy and real time service delivery as of right and without raising suspicions merely because we are accustomed and condone in efficient service delivery systems).The petitioners were allowed to pick and drop passengers at Kuku lane. He added that the petitioners were required to maintain order and ensure smooth operations among other conditions. He added that the petitioners were to use the space allocated to Chania bus ferrying passengers to the coast, hence they were required to operate as from 5pm.

He further alleged that other Saccos plying the Nyeri-Ruringu route complained of the operations of the petitioners and especially the fact they were not consulted on the issue. Their view was that there was no need for an extra bay. He claimed that unnecessary strife and tensions arose between the said other Sacco and the petitioners herein. He averred that the allocation of the said bay caused congestion in the already congested lane, and this prompted his office to convene a meeting of stakeholders to discuss the issue. He averred that the petitioners attended the said meeting and the issue was referred to the Nyeri Sacco Secretariat for amicable settlement., and following the recommendations of the said secretariat, his office revoked the said license. He also averred that existing regulations governing the transport sector only allows companies and co-operative societies to be licensed as public service vehicle operators. With regard to the allegations of bribery he stated that such allegations ought to be reported to the relevant authorities.

On 29th August 2016, the parties agreed that the court hears the main petition instead of the application for injunction/conservatory orders filed together with the petition. The court endorsed the said proposal and gave directions that the petition herein be heard by way of oral evidence, that the Respondents Replying affidavit referred to above be treated as the opposition to the petition. It was further ordered by consent that all the documents annexed to the affidavits filed by both parties be admitted in evidence.

The first petitioner testified on her own behalf and on behalf of her co-petitioners. Her evidence was that they formed a self-help group and sought permission from the Respondent to be provided with a place to operate from so as to meet their customers' needs to cover some routes which were not covered by the NTSC. She insisted that their vehicles complied with TLB requirements to cover day time routes and in the evening there are other destinations which take customers nearer to their homes otherwise referred to as the local routes. Such distances are covered after 5 pm. To serve those routes they presented the issue to the Respondent. The Respondent approved their request and gave conditions as per the letter dated 31.5.2016. Among the conditions was a requirement that they would use the space allocated to Chania Bus after the bus has left for the day, that is after 5pm. They complied with the said conditions and they never had any problem with the said bus and to the best of her knowledge there were no other complaints from other persons/operators.

However, currently they are no longer operating because as they were working, one person approached them demanding to know who granted them permission to operate from the said bay, they gave him the licence but on 6.6.2016 she received a letter inviting them to attend a meeting which was also attended by county officers and a one George Mwangi who was chairing the meeting. He claimed that the bay in question was given without the knowledge of others, but those present refused to have the issue discussed at the meeting because it was not the right forum, but instead the issue was referred to the secretariat referred to earlier. There after the secretariat called them and asked why the issue was raised in the above

meeting yet they were not aware about it. The secretariat asked if they had a problem, but they said they had none. No conclusion was arrived at by the secretariat regarding the said issue because there was no problem in the first place.

After the said meeting George Mwangi told them to "see him" if they needed help hence on 9.6.2016 they went to his office. He "asked for Ksh. 100,000/= failure of which they would not win the battle." Later they were served with a letter revoking the permission granted to them. No reasons were offered for the drastic action of revoking the authority. She insisted that no one ever complained against their operations and it is not true that Nyesuma Sacco (who operate outside the stage as one exits) ever complained nor did they ever have disagreements with them. They never got to know the alleged complaints nor were they given details of the complaints.

She reiterated that the routes they were covering were not covered by the existing Saccos, and that no Sacco had a license to cover such routes, hence NTSC could not intervene because such routes are allocated by the County Government. She reiterated that while during day time they travel to Nairobi, at night they cover the outskirts of Nyeri Town, which are the routes in question in these proceedings and in respect of which they were allocated the bay in question and which route did not required TLB licence. She denied the Respondents allegations that they were a security threat and insisted that they operated peacefully and in an orderly manner. She also denied that they were congesting an already congested route.

The same bay is still being used by Chania Bus and to the best of her knowledge its licence has not been revoked. She stated that they were not given the opportunity to be heard and asked the court to quash the decision.

George Mwangi Muriithi (whose name featured prominently in the petitioners evidence) testified on behalf of the Respondent. He adopted his affidavit filed in court and confirmed the petitioners operate from the bay in question after 5 pm. He stated that there were problems in the transport sector and at the time he joined the Respondent, he found a tough war between two Saccos, that is Nyesuma Sacco and a S.H.G, that is the petitioners in this case. He decided to hear both sides, hence Nyesuma came to his office and he heard them. The first petitioners also came to his office. He discussed with the OCPD and the Regional Base Commander and they agreed to call a stakeholders meeting. Consequently he wrote to the first petitioner, the meeting was held and congestion at the lane in question was discussed and it was agreed that the stakeholders be given seven days to resolve the issue. He claimed that the issue was discussed and the secretariat gave a report dated 15.6.16 that they had resolved the matter amicably, hence they had to revoke the licence. He also denied asking for a bribe as alleged.

In his submissions, the Petitioners counsel submitted that the Respondent could not revoke the licence without offering sufficient reasons and that there was a breach of the Rules of natural justice.

Counsel for the Respondent submitted that the petitioners have not stated their allegations with sufficient clarity, hence have not met the threshold for proving breach of fundamental rights, that the actions complained of were executed legally, that the decision was arrived at after holding two consultative meetings in which the petitioners were present and urged the court to dismiss the petition.

I have carefully analysed, evaluated and considered the affidavits and annexure(s) filed by both parties in this case and the documents filed by both parties. I have also considered the rival submissions by both parties, the authorities and generally the law applicable in cases of this nature.

It is my considered opinion that the Petition raises the following fundamental issue namely, whether the Respondents decision of revoking the petitioners licence was arrived at in a fair procedure and in conformity with the rules of natural justice.

Natural justice is a common law doctrine that provides important procedural rights in administrative decision-making. The doctrine now has a wide application and is presumed by the courts to apply to the exercise of virtually all statutory powers.

The doctrine of natural justice has two components — the hearing rule and the bias rule. Both originated in the common law but their operation in any particular case can only be fully understood by careful reference to the statutory context in which they arise. The requirements of the hearing and bias rules depend heavily on common law interpretive principles which are applied to the statute under which questions of fairness arise. The common law recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. [1]

It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it. [2]

Issues of procedural fairness generally arise in the context of decisions made by government departments and officials as well as quasi-judicial bodies such as tribunals. [3] Such decisions may affect people in a range of contexts; such as:-

- i. decisions may curtail a person's liberty, or
- ii. affect their freedom of movement, or
- iii. have a significant effect on their economic well-being.

Principles of procedural fairness recognize the power imbalance which may exist between an administrative decision-maker, such as an officer representing a government agency, and an individual citizen. Procedural fairness is protected at common law and by statute. For instance, a breach of the rules of natural justice is a ground for judicial review.

Chief Justice Robert French authoritatively stated that procedural fairness is 'indispensable to justice'.

Procedural fairness usually involves two requirements: the fair hearing rule and the rule against bias. The hearing rule requires a decision-maker to inform a person of the case against them and provide them with an opportunity to be heard. It is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by a judicial or quasi-judicial proceeding he must be afforded an adequate opportunity to be heard. The bias rule of procedural fairness requires that a decision-maker must not be biased (actual bias) or be seen by an informed observer to be biased in any way (apprehended or ostensible bias).

The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "an essential inbuilt component" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

'Natural Justice' is an expression of English common law. In one of the English decisions, reported in *Local Government Board v. Arlidge*, [4] Viscount Haldane observed:-

"...those whose duty it is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice."

In *Lapointe v. L'Association*, [5] the Judicial Committee observed that the principle should apply to every tribunal having authority to adjudicate upon matters involving civil consequences.

In *Snyder v. Massachussets*,^[6] the Supreme Court of the United states observed that there was a violation of due process whenever there was a breach of a "*principle of Justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.*"

In India the principle is prevalent from the ancient times. In this context, para 43 of the judgment of the Hon'ble Supreme Court in the case of *Mohinder Singh Gill v. Chief Election Commissioner*,^[7] , may be usefully quoted:

“Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognized from earliest times and not a mystic testament of judge-made law. Indeed from the legendary days of Adam..... the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.”

Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In *Onyango v. Attorney General*,^[8] **Nyarangi, JA** asserted at page 459 that:-

“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.”

At page 460 the learned judge added:

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

And in *Mbaki & others v. Macharia & Another*,^[9] at page 210, the Court stated as follows:-

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

Section 4 of the Fair Administrative Act^[10] re-echoes Article 47 of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. At the same time, every person has to be given written reasons for any administrative action taken against him. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision: prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

Subsection 4^[11] further obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing. The right to appear with an expert is said not to limit the right to appear or be represented by a legal representative. The courts may soon be called upon to interpret the meaning of “legal representative”. Does the phrase mean “advocate” or was Parliament deliberate in allowing, for instance, paralegals, union officials, floor representatives or work colleagues to

appear for or to represent parties in administrative action. The latter interpretation seems most accurate, administrative action may at times arise in situations where representation by an advocate is expensive or unnecessary. This however, must not be seen as an invitation for unqualified persons to perform the work of advocates for gain.

I have carefully evaluated the facts, circumstances and accusations and counter accusations tendered by both parties and I am clear in my mind **that focus lies on the conduct and manner in which George Mwangi** revoked the licence granted by Respondent to the petitioners. There is nothing to show that he observed the rules of natural justice. First, the persons alleged to have complained against the petitioners were not disclosed nor did the Respondent furnish details of the alleged complaints to the petitioners to enable them to respond to the complaints. The Respondent talked of Nyesuma Sacco as having complained. The report dated 16.6.2016 dwelt on persons who had been expelled from the Sacco and mentioned alleged loan default and discussed nothing about the contested bay or the alleged "reasons" that prompted the Respondent to cancel the license.

Even if the alleged complainants existed, (which has not been proved) the petitioners were never supplied with details of the complaint or afforded an opportunity to face the complainants and cross-examine them on the complaints and adduce evidence to rebut the allegations. George Mwangi cannot allege to have received complaints (if at all he did) and proceed to act as the prosecutor, judge and executor. His actions are a clear breach of the well established rules of natural justice, totally unfair, illegal, oppressive and an infringement on the rights of the petitioners who are constitutionally entitled to a decision that is procedurally fair and just. The decision affects them adversely and as such they are entitled to a fair process.

To a reasonable observer, George Mwangi acted in a manner that demonstrated biasness and gross unreasonableness on his part. As **Sedley J** put it in *R vs Somerset CC Ex parte Dixon(COD)*[12]:-

"Public law is not about rights, even though abuse of power may and often do invade private rights; it is about wrongs-that is to say misuse of public power."

Broadly, in order to succeed in a case of this nature, the petitioners are required to demonstrate either:-

a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or

b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

It is also important to note that the license granted to the petitioners is subject to conditions stated therein. No evidence was tendered to prove that the Respondents breached any of the conditions stated therein. In fact after carefully evaluating the evidence and having observed the parties give evidence in court, I am persuaded beyond doubt that the author of the letter dated 20th June 2016 containing the decision complained of sat in his office, authored and or generated the said letter.

The benchmark decision on this principle was made as long ago as 1948 in the celebrated decision of **Lord Green** in *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation*[13]:-

"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."

In my view, the petitioners case demonstrates irrationality and perversity in the manner the decision was arrived. I find that the decision complained of was made in a totally arbitrary manner without due regard to the law and procedure. A decision arrived at in total breach of the rules of natural justice is *ultra vires* null and void and cannot be allowed to stand.

Accordingly the Respondents' decision contained in the letter dated 20th June 2016 purporting to revoke the petitioners license/permission for a picking/dropping bay along Kuku Lane, Nyeri Town is illegal, null and void and cannot be allowed to stand.

I find that the petitioners petition has merits. Accordingly, I allow the petitioners petition dated 28th July 2016 and make the following orders/declarations:-

i. **That** the Respondents decision contained in the Respondents letter dated 20th June 2016 addressed to the petitioners and signed by a one George Mwangi, Sub-County Administrator, Nyeri Town be and is hereby declared illegal, null and void for all purposes and the same is hereby revoked.

ii. **That** the Respondent and /or its servants and /or agents or persons acting or purporting to act for and on behalf of the Respondent be and are hereby restrained from unlawfully and illegally cancelling/revoking the petitioners license to pick and drop passengers as per their license dated 31st May 2016.

iii. **That** the petitioners licence/authority dated 31st May 2016 shall remain in force for all practical purposes unless and or until the same is legally revoked.

iv **The** Petitioners shall bear the costs of this Petition.

Orders accordingly

Dated at Nyeri this 24th day of **November**, 2016

John M. Mativo

Judge

Delivered at Nyeri this 24th day of **November** 2016

Hon. Justice Jairus Ngaah

Judge

[1] *Kioa v West* (1985) 159 CLR 550. See also David Clark, *Introduction to Australian Public Law* (Lexis Nexis Butterworths, 4th ed, 2013) [12.34]. The common law doctrine has a 'wide application and is presumed by the courts to apply to the exercise of virtually all statutory powers': Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39 *Monash University Law Review* 285, 285. The 'particular requirements of compliance with the rules of natural justice will depend on the circumstances': *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1, 16–17 [48].

[2] *Kioa v West* {1985}, Mason J

[3] Principles of procedural fairness overlap with the principles of a fair trial and principles of judicial review, <https://www.alrc.gov.au/publications/common-law-duty>

[4] {1915} AC 120 (138), HL

[5] {1906} AC 535 (539),

[6]{1934} 291 US 97(105)

[7] AIR 1978 SC 851

[8] {1986-1989} EA 456

[9]{2005} 2 EA 206

[10] Act No. 4 of 2015

[11] Ibid

[12]{1997} Q.B.D. 323

[13] {1948} 1 K. B. 223, H.L.