REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. 447 OF 2014

IN THE MATTER OF AN APPLICATION

FOR JUDICIAL REVIEW ORDERS OF PROHIBITION & CERTIORARI

AND

IN THE MATTER OF LEGAL NOTICE NO. 75 OF 2014

(THE NATIONAL TRANSPORT AND SAFETY AUTHORITY

(OPERATION OF PUBLIC SERVICE VEHICLES) (AMENDMENT) REGULATIONS, 2014)

IN THE MATTER OF A JUDICIAL REVIEW APPLICATION BY:

REPUBLIC

VERSUS

THE NATIONAL TRANSPORT &

SAFETY AUTHORITY.....1ST RESPONDENT

CABINET SECRETARY FOR

TRANSPORT & INFRASTRUCTURE.....2ND RESPONDENT

PRINCIPAL SECRETARY -

STATE DEPARTMENT OF TRANSPORT.....3RD RESPONDENT

THE TRAFFIC COMMANDANT.....4TH RESPONDENT

THE HONORABLE ATTORNEY GENERAL……..5TH RESPONDENT

AND

EQUITY BANK LTD.....1ST INTERESTED PARTY

KENYA COMMERCIAL BANK LTD.....2ND INTERESTED PARTY

CO-OPERATIVE BANK LTD.....3RD INTERESTED PARTY

FAMILY BANK LTD.....4TH INTERESTED PARTY

FIBRE SPACE LTD (1963).....5TH INTERESTED PARTY

SAFARICOM LTD.....6TH INTERESTED PARTY

EX PARTEJAMES MAINA MUGO….....……EX PARTE APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 9thDecember, 2014, the applicant herein, **James Maina Mugo**, seeks the following orders:

> **1. THAT an order of prohibition do issue, prohibiting the Respondents from implementing, enforcing, or otherwise howsoever effecting the 2nd Respondent's Legal Notice No. 75 of 2014, (THE NATIONAL TRANSPORT AND SAFETY AUTHORITY (OPERATION OF PUBLIC SERVICE VEHICLES) (AMENDMENT) REGULATIONS, 2014 published in the Kenya Gazette on 11th June 2014.**
>
> **2. THAT an order of certiorari do issue, to remove to this Honourable Court, and be quashed, the 2nd Respondent's Legal Notice No. 75 of 2014, (THE NATIONAL TRANSPORT AND SAFETY AUTHORITY (OPERATION OF PUBLIC SERVICE VEHICLES) (AMENDMENT) REGULATIONS, 2014, published in the Kenya Gazette on 11th June 2014.**
>
> **3. THAT the costs of these proceedings herein be to the Ex Parte Applicant in any event.**

Applicant's Case

2. The application wassupported by a verifying affidavit and Supplementary Affidavitsworn by the Applicant on 25th November, 2015 and 2nd December, 2014, respectively.

3. According to the applicant, on November 20th 2014, he noticed a Public Notice carried by the 1st Respondent, NTSA in the ***Daily Nation*** and ***The Standard*** newspapers, touting the alleged "benefits" of the "cash light" payment system of PSV fares, payable by PSV service users yet in his view, Cash is a legitimate, lawfully sanctioned method of payment of any service including transport services. According to him, "cash light" PSV fare payment system is an unconstitutional and unlawful overthrow of the subsisting monetary policy of payment for goods and services in Kenya by means of Kenya's Constitutionally recognized legal tender – cash; Section 3 of the ***National Payment Systems Act***, Act 39 of 2011 Laws of Kenya designates the Central Bank of Kenya as the statutory and sole entity to designate a payment system, and not the 2nd Respondent hence the Legal Notice 75 of 2014 is *ultra vires* the ***National Payment Systems Act;*** whereas section 3(1) and 3(2) of the ***National Payment Systems Act***, Act 39 of 2011 confers exclusive power on the Central Bank of Kenya to publish in the Kenya Gazette the designated payment system, no such Gazette Notice was published by the Central Bank in furtherance of this statutory demand; It was incepted without any form of consultation with the end user – passengers, in violation of Article 10(2)(b) Principle of Consultation as opposed to an inconsequential section of PSV operators whose views do not represent passengers; The legislation on the "cash light" payment system was in excess of the powers of both the 1st and 2nd Respondent as the relevant statutory provisions do not empower them to prescribe how or in what manner payment of fare to any PSV operator should be made as long as the lawfully imposed fare is paid; The Interested Parties are operating an illegal payment system that is without regulation and the incidence of fraud and loss is extremely high, the process of receiving my cash on behalf of a PSV operator to convert the transaction into a "cashless" payment merely to satisfy the 1st and 2nd Respondents has no legal basis and privity of contract exists between the passenger and the PSV operators to render the commuting service, without involving the Interested Parties at all; Parliament has never approved the said "cash light" PSV fare payment scheme, as the 2nd Respondent Cabinet Secretary has never laid before the National Assembly Legal Notice 75 of 2014, in violation of Section 11 of the Statutory Instruments Act; Even assuming the said Legal Notice 75 of 2014 had the force of law, the Interested Parties have veered off to provide EMV Visa Cards and Near Field Communications (NFC) Cards that are outside the contents of the ISO-IEC 14443 Standards hence the purported "compliance" of the Interested Parties with Legal Notice 75 of 2014 is in any event void; the passengers' freedom of movement rights will have been pegged on possession of an EMV/NFC/Visa card operated by the Interested Parties so as to purchase PSV commuting services and will suffer the indignity of walking should they not acquire one of the said cards which is an unlawful truncating of their freedom of movement contrary to Article 24(2) of the Constitution; the 1st respondent through the use of these EMV/NFC cards operated by the Interested Parties has introduced an indirect tax unknown to law because for every access the passengers make into the Interested Parties' "operating system" in order to purchase the PSV fare service, they will be charged and this sum passed on to them by the PSV operators is an unlawful indirect tax not countenanced by Article 210(1) of the Constitution; As a commuter who uses PSV services to enjoy the right of freedom of movement, he will be compelled to join an online email service provider against his will, since none of the Interested Parties' NFC/EMV/Visa Cards operate off line which amounts to being compelled to join an association in contravention of Article 36(2) of the Constitution; The Respondents and Interested Parties have no power in a democratic nation such as Kenya to alter the monetary policy in PSV fare payment using an obscure delegated legislation instrument that was never laid before Parliament when the Constitution vests the power to formulate and enforce Kenya's monetary policy on the

Central Bank of Kenya; and The 1st and 2nd Respondents have grossly abused their power, overstepped their statutory mandate conferred by the ***Traffic Act*** and the ***National Transport and Safety Authority Act*** and hence their action is unlawful.

4. While expounding on these issues it was contended that Regulation 28(2) ***National Payment Systems Regulations2014*** forbids the charging of fees by the "service provider" upon such a party as a PSV passenger only if such a charge has been agreed upon with him and he maintained that he had not been consulted and no passenger was aware of what cost the Interested Parties will charge. In his view, the purported "consultations" that the 1st and 2nd Respondents reportedly had with Matatu Owners Association do not constitute public participation of all stakeholders in the PSV industry and there appeared to be an apparent collusion between the said Matatu Owners Association and the said Respondents to force the uptake of the so called cash light system of PSV fare payment by passengers without involving passengers as end users at all.

5. In was the applicant's case that the use of PSV means is tied up with so many ancillary rights and hence the need to have had consultation with passengers in regard to this scheme of fare payment under challenge.

6. According to the applicant, this Honourable Court outlawed both of the 2nd Respondent's Legal Notice 219 of 2013 (which contained the 2nd Respondent's attempt at imposing his draconian "cashless system" on PSV users), and also Legal Notice 23 of 2014, which Legal Notice 75 of 2014 sought to amend. Further Legal Notice 75 of 2014 has never been laid before the National Assembly in conformity with the mandatory requirement of Section 11 of the ***Statutory Instruments Act*** hence is null and void.

7. He disclosed that the National Assembly's Delegated Legislation Committee having expressly outlawed the primary purported Regulations contained in Legal Notice No. 23 of 2014 informing the "cash light" scheme by the 2nd Respondent, which were adopted by the House, there can be no lawful "amendment" of that which has been outlawed.

8. It was the applicant's opinion that it is imperative for the Kenya Government to develop optional national e-payment systems first, so that Kenyan citizenry will be familiar with its usage and means of transactions before such purported forcible enforcement of cashless fare payments such as now threatened by the 1st and 2nd Respondents, effective December 1st 2014. To him, the entire "cashless" or "cash light" PSV fare payment system propounded by the 1st and 2nd Respondents is rooted on illegality, unconstitutionality, and outright unilateral, dictatorial acts of the said Respondents. It is impossible to effect Legal Notice No. 75 of 2014 without reference to either Legal Notice No. 219 of 2013 or Legal Notice 23 of 2014, which are null and void.

9. Referring to ***The National Payment Systems Act*** and its Regulations the applicant asserted that nowhere therein has Parliament authorized the ouster of cash payments for the purchase of goods and services and that there is no convenience at all for, to wait in a queue while the "swiping" is being done by an employee of either the PSV owner or the Interested Parties while they take the cash. The only difference in this arrangement is that the cash is now given to a third party stranger in the transport service contract (who in this case is the Interested Party), and then it is branded "cash light". This third party is an encumbering burden whose "services" every other Kenyan PSV user would be burdened to shoulder. In addition, it is time-consuming to go to the bank or to the Interested Parties' "points of sales" to make a purchase of the swipe card, yet cash payment is direct with no need for a 3rd party who charges a fee that is passed on to the PSV user.

10. According to the applicant, other than licensing PSVs, whenever a passenger seeks to travel and has the ready cash to pay for the service, the 1st Respondent Cabinet Secretary and the National Transport and Safety Authority have no further interest in the mode used in making the payment for the service rendered. To him, neither the ***National Payment Systems Regulations 2014***, nor the ***National Payment Systems Act*** oust use of cash and neither the 2nd Respondent Cabinet Secretary nor the 1st Respondent National Transport and Safety Authority should be engaged in the financial aspects of the transport services rendered by the PSV owners. The said Respondents' scope of involvement in the business of the PSV operators is limited to the licensing and regulation of the conduct of the transport services rendered but not the form adopted or elected by such PSV owners and consumers to make and receive the payments for the services so rendered as now purported.

11. The applicant averred that what the 1st and the 2nd Respondents in permitting these illegalities to proceed to this stage have done is to not merely affect Kenya's monetary policy but also incept their own monetary policy of a payment system in regard to the payment of Kenya's PSV fares in transport system without Parliamentary approval or sanction. However, only the Central Bank of Kenya has the Constitutional mandate to effect Kenya's monetary policy. He was however unaware of any changes in Kenya's monetary policy where the use of cash as legal tender has been outlawed and NFC or "cash light" or "cashless" payments become the only legal means of paying for goods and services and therefore believed in the circumstances that the 1st, 2nd and 3rd Respondents' intended payment scheme is illegal.

12. To the applicant, the acts of both the 5th and the 6th Respondents are unlawful and in breach of Regulation 24(d) of the ***National Payment Systems Regulations 2014*** which requires a mandatory separation of payment services by the service provider's separate business units.

13. The applicant asserted that none of the Interested Parties had established a Trust into which the funds collected as fares across Kenya would be deposited as mandated by Regulation 25(3)(a) of the ***National Payment Systems Regulations 2014,***hence such a scheme was therefore illegal. He further contended that both the 5th and the 6th Respondents acts were unlawful and in breach of Regulation 24(d) of the ***National Payment Systems Regulations*** 2014 which requires a mandatory separation of payment services by the service provider's separate business units.

14. In the applicant's view, the entire scheme is therefore illegal and is fertile ground to promote and shroud fraudulent financial activities by the Interested Parties on unsuspecting commuters.Furthermore, there are existing legislations that are in place as enacted by Parliament to deal with money laundering, tax evasion, anti terrorism, and such related laws that are designed to curb misuse of cash. Not a single case of money laundering was reported by the NTSA and the police arising from PSV passengers paying for their fare in cash.

15. The applicant affirmed that he was a commuter, of passenger services offered by PSV vehicles and not an operator though in his view, public interest was involved in this cause of action.

16. The applicant clarified that Judicial Review Case No. 2 of 2014 which dealt with Legal Notice 219 of 2014 was declared null and void. At any rate, the Cabinet Secretary in charge of Transport published Legal notice 23 of 2014 withdrawing Legal Notice No. 219 of 2013. Since Legal Notice 75 of 2014 was not published at that time, there was no basis to allege that these proceedings are *res judicata* based on the proceedings and Judgement in High Court Judicial Review Case No. 2 of 2014 – **Kenya County Bus Owners' Association & Others vs. Cabinet Secretary for Transport & Infrastructure & Others** (hereinafter referred to as Judicial Review No. 2 of 2014). In any case, High Court Judicial Review Miscellaneous Application No. 124 of 2014 - **Republic vs. Cabinet Secretary for Transport & Infrastructure & 5 Others ex parte Kenya Country Bus Owners Association & 8 Others** (hereinafter referred to as Judicial Review No. 124 of 2014) -did not address at all Legal Notice 75 of 2014 as the court held that the said Legal Notice was not the subject of the proceedings.

17. In his view, the decision in Constitutional Petition No. 172 of 2014 was not decided as alleged on Legal Notice 75 of 2014, but concerned Legal Notice 23 of 2014 and not Legal Notice 75 of 2014. As Constitutional Petition No. 172 of 2014 was consolidated with Judicial Review Case No. 124 of 2014, it also dealt with Legal Notice 23 of 2014.

18. It was the applicant's contention that Legal Notice 75 of 2014 was purportedly incepted to amend Rule 7(f) in Legal Notice 23 of 2014 yet Legal Notice 75 of 2014 was published on 9th June 2014. Judicial Review Case No. 2 of 2014 on the other hand was filed on 7th January 2014 hence it was impossible to have made the said Judicial Review a subject of the said case. He added that the Cabinet Secretary in charge of Transport had made a decision that what was to be implemented was the "cashless" payment and not "cash light" as was clear from Legal Notice 75 of 2014.

19. The applicant reiterated that the process of making the entire Legal Notice 23 of 2014 was not the subject of the proceedings cited by the 1st Respondent. It was a Legal Notice all the same, affected and circumscribed by the operations and provisions of the ***Statutory Instruments Act***. The matters now raised relate to Legal Notice 75 of 2014 as a stand alone legal instrument. To him, such a Legal instrument must also be presented in the manner prescribed by Section 11 of the ***Statutory Instruments Act*** and this issue has not been addressed at all by the 2nd Respondent. He contended that the timelines stated in Legal Notice 23 of 2014 could not apply to the implementation of Legal Notice 75 of 2014 at all as the National Payments Systems Regulations which were enacted on 1st August 2014 and there was no way the Legal Notice 75 of 2014 could then have become a subject of Judicial Review proceedings before 1st August 2014.

20. As the 1st Respondent produced several exhibits in the replying affidavit of the Director General, one of which is exhibit ***"FK-3"*** and it was clear, in the applicant's view that the 2nd Respondent's Principal Secretary was making meeting arrangements as at November 24th 2014, an indication that there was a rushed "implementation" as the "Stakeholders" mentioned are only those operate from Kencom, GPO, and Ambassaduer bus stages.

1st Respondent's Case

21. The 1st Respondent, in opposing the application relied on the affidavit sworn by **Francis Meja**, its Director General on 1st December, 2014.

22. According to the deponent, the amendments to Legal Notice No. 23 of 2014 contained in Legal Notice No. 75 of 2014 published on 11th June, 2014 were effected with full approval, authority and consent of the Central Bank of Kenya in full recognition of its oversight and regulatory role in ensuring integrity of payment systems as well as ensuring the sanctity of financial transactions within the country.

23. It was deposed that Legal Notice No. 75 of 2014 merely provides for operative amendments to Legal Notice No. 23 of 11th Match, 2014 of the ***National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014***.

24. To the deponent, the sole intention of implementation of a cash light fare collection system is to the greatest extent possible reduce the use of cash in matatu paying PSV's which has been identified as a leading source of corruption, disorder and lawlessness in the public transport which situation currently visits great losses to PSV owners and as such discouraging investors and offering the public convenient, secure and reliable services.

25. Though initially intended to take effect from 1st July, 2014, following deliberations between the authority and the industry stakeholders the deadline was extended to 1st December, 2014 to allow all PSV operators adequate time to comply. As a result, numerous stakeholders have invested substantial amounts of money to allow for the rolling out of the system hence it would be unfair if the orders sought were granted. It was contended that the legality of the system was challenged in Judicial Review No. 124 of 2014, hence the issue is *res judicata*.

26. In the deponent's view the decision sought to be quashed having been implemented, the same cannot be the subject of an

order of prohibition. To him the grant of the orders sought will be prejudicial and unfair to Kenyans particularly the users of public service vehicles who rely on the government and the Authority to ensure provision of safe, reliable and efficient road transport services hence the Court ought, in the exercise of its discretionary powers, to consider the efficacy of the said order as well as the principle of proportionality in order to see wheel the scales of justice lie.

2nd Interested Party's Case

27. The 2nd Interested party, Kenya Commercial Bank (hereinafter referred to as "KCB") opposed the application vide a replying affidavit sworn by **Bonnie Okumu**, its Head of Legal Services on 12th February, 2015.

28. According to the deponent, the *ex parte* applicant has alleged that he is a consumer of transportation services who will be affected by L.N. Number 75 of 2014. However in so far as the intended regulations relate to regulating the operation of PSV's the *ex parte* applicant had no *locus standi* to commence these proceedings. Even if the *ex parte* applicant has the *locus standi* to commence these proceedings, it was evident that the entire proceedings were based on the *ex parte* applicant's apprehension that the implementation of the L.N. Number 75 of 2014 would bring great inconvenience to him in so far as his travels by use of PSV's is concerned.

29. He however deposed that this honourable court in exercising its judicial review powers is concerned not with the merits or otherwise of the implementation of L.N. Number 75 of 2014 but with the process leading to the enactment of the said legal notice. In his view, paragraphs 41 to 110 of the Verifying Affidavit delved into the merits and demerits of the implementation of Legal Notice No. 75 of 2014.

30. The deponent deposed that section 119 (1)(a) and (p) of the ***Traffic Act*** grant various powers to the 2nd Respondent hence in enacting Legal Notice No. 75 of 2014 the 2nd Respondent did not act *ultra vires* as alleged by the *ex parte* applicant since providing for the manner of payment of fares to PSV operators by passengers falls within the ambit of regulating the use of public service motor vehicles and further the convenient carrying out of the provisions of the ***Traffic Act*** as envisaged under section 119(1)(p) thereof. Further, the act by the 1st Respondent in providing for the manner of payment of fares to PSV operators by passengers falls within the ambit of its duties of planning, managing and regulating the road transport system as envisaged under section 4(1)(c) of the ***National Transport & Safety Authority Act***.

31. In the deponent's view, a reading of Section 3 of the ***National Payment Systems Act***, confirms that the decision on whether to publish in the Kenya Gazette a payment system is a discretionary power vested on the Central Bank of Kenya.Vide letters dated 27th June 2014 and 4th July 2014, KCB duly sought for permission from the Central Bank of Kenya to be a payment service provider as mandatorily provided for under section 13 of the ***National Payment Systems Act***and vide a response dated 17th July 2014 the Central Bank of Kenya duly granted the foregoing approval as sought by KCB which approval was also confirmed by the 1st Respondents by a letter dated 21st July 2014.

32. With respect to Regulation 28(2) of ***The National Payment Systems Act,*** the deponent averred that it refers to electronic retail transfer hence is inapplicable to KCB and any other service provider for that matter in so far as the implementation of the L.N. Number 75 of 2014 through the introduction of the use of the cash light system is concerned. To him, Regulation 25(3)(a) of the ***National Payment Systems Regulations 2014*** requires the establishment of a Trust. However Regulation 56 thereof requires the Central Bank of Kenya to remedy any violation of the said Regulations. As such therefore it is only the Central Bank of Kenya that can confirm to this honourable court whether the service providers have violated any provisions of the ***National Payment Systems Regulations, 2014***. It was his view that the *ex parte* applicant had not demonstrated the nexus between the alleged failure by the Interested Parties to comply with Regulation 25(3)(a) of the ***National Payments Systems Regulations 2014*** and the legality of the implementation of the L.N. Number 75 of 2014 through the introduction of the use of the cash light system.

33. It was therefore averred that the allegations that the Legal Notice Number 75 of 2014 is *ultra vires* the ***Traffic Act***, ***The National Transport and Safety Authority Act*** and the ***National Payment Systems Act*** lack merit and are baseless and that the *ex parte* applicant had not demonstrated how the implementation of L.N. Number 75 of 2014 through the introduction of the use of the cash light system violates Article 231 (2) of the Constitution of Kenya. To him, the freedom of movement that the ex parte applicant alludes to is limited to the extent that it is pegged on the ability or otherwise of a commuter to have access to fare and the bottom line in the implementation of L.N. Number 75 of 2014 through the use of the cash light system is that to access Public Transport Services all commuters, the *ex parte* applicant included, must first possess the legal tender in the form of either coins or notes. Secondly the commuters thereafter are expected to change the legally accepted legal tender in the form of coins and notes from a tangible form to an intangible form. He contended that the conversion of the legally accepted legal tender in the form of coins and notes from a tangible form to an intangible form is widespread in the country such as in the mobile telecommunication sector where a consumer seeking a service in the form of a phone call is required to first convert the legally accepted tender to an intangible form of 'airtime'. It was therefore his view that there is nothing irrational or oppressive in the implementation of the L.N. Number 75 of 2014 through the introduction of the use of the cash light system

34. To the deponent, the freedom of choice alluded to by the *ex parte* applicant is equally available to the PSV operators. In so far as the PSV operators have not challenged but have instead welcomed the implementation of L.N. Number 75 of 2014 through the use of the cash light system, the ex parte applicant's freedom of choice cannot override that of the PSV operators since it is not within the purview of the ex parte Applicant to dictate to either the PSV operators and/or the 2nd Interested Party on who and how to sign contracts. In any event the ex parte Applicant has not placed before this honourable court any material to demonstrate that it is the commuters who will be forced to fork out 3% of the collections made by KCB on behalf of PSV operators.

35. While admitting that Article 46 of the Constitution enjoins this Honourable Court to protect the *ex parte* applicant's consumer rights, he averred that he was equally aware that Article 24 of the Constitution also allows for the limitation of this consumer right. In any event the said Article 46 of the Constitution is not a fundamental right that cannot be limited as provided for under Article 25 of the Constitution and that exhibit marked '**AJE 2'** in the verifying affidavit of the *ex parte* applicant sworn on 25th November 2014 clearly shows the extent of reasonability of the limitation of the consumer rights if any, by the implementation of L.N. Number 75 of 2014 through the introduction of the use of the cash light system. Similarly while admitting that Article 36(2) of the Constitution of Kenya forbids the compelling of any person to join an Association of whatever kind, the deponent however averred that he was equally aware that Article 24 of the Constitution also allows for the limitation of this freedom of association. Further to the above 6th Interested Party, Safaricom, acting out of its free will decided to associate with PSV operators in so far as the implementation of L.N. Number 75 of 2014 through the introduction of the use of the cash light system is concerned. This Honourable Court thus is under obligation to ensure that KCB's freedom of association as provided for under Article 36(1) of the Constitution of Kenya is protected.

36. The deponent's position was that the implementation of L.N. Number 75 of 2014 through the introduction of the use of the cash light system does not introduce unlicensed tax. On the contrary KCB and any other service provider have the freedom to contract with any PSV operator in so far as the implementation of L.N. Number 75 of 2014 through the introduction of the use of the cash light system is concerned.

37. The deponent averred that the ex parte applicant had not placed before the Honourable Court any material to prove his assertion that the National Assembly adopted the findings of the Select Committee on Delegation Report on the ***National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014***.

38. It was therefore his view that there is absolutely nothing unconstitutional in the implementation of L.N. Number 75 of 2014 through the introduction of the use of the cash light system and that the *ex parte* applicant had not placed before this honourable court material that would warrant the court to grant the orders sought in the substantive application dated 9th December 2014 and urged the court to dismiss the said application with costs forthwith.

3rd Interested Party's Case

39. The third interested party, Co-operative Bank Ltd (hereinafter referred to as "Co-operative Bank") in opposition to the application filed a replying affidavit sworn by **Cyrus Kariamwere**, its Head of Transport, Housing and Investment Co-operatives on 20th March, 2015.

40. According to the deponent, Legal Notice No. 75 of 2014 in effect formulates the cashless fare payment system for public service vehicles, the formulation of which is a responsibility, duty and mandate that rests upon the Respondents jointly and severally. Therefore the decision by the Respondents to propose, formulate and implement the amendments introduced by Legal Notice No. 75 and 2014, according to him was exercised in full approval, endorsement, authority and consent of the Central Bank of Kenya which is mandated with ensuring integrity of payment systems as well as the sanctity if financial transactions in the Count.

41. It was his view that the Applicant in essence was challenging the merits of the implementation of the decision made on the 11th day of June 2014 and not the administrative process preceding and surrounding the making of the decision. He disclosed that Co-operative Bank, after the enactment of the Legal Notice No. 75 of 2014 and further consultations with the Respondents herein, invested substantial amounts of money and incurred considerable costs and expenses in setting up the relevant software, resources and equipment to implement the cashless fare payment system and further, in order to allow the Interested parties interoperate their systems to provide the Cashlite System, Co-operative Bank heavily invested in a switch known as the E-Transit Switch which allows the various Cashlite systems in the market to interoperate irrespective of the technology used.

42. The deponent denied the allegation that passengers will be required to open email accounts and bank accounts in order to utilize the Cashlite systems and clarified that passengers are only required to obtain a card that allows them to pay fare to the operators of the public service vehicles and hence the Applicant's claim that his freedom of association will be curtailed is without basis.

43. The deponent asserted that as Co-operative Bank complied with the requirements to provide cards operating on an ISO-IEC 1443 Standard, granting the prayers as sought by the Applicant would threaten the operations of Co-operative Bank and expose it to substantial financial risk and irreparable injury that cannot be addressed or compensated by an award of damages. It would further amount to undermining the Respondent's mandate to severally and jointly regulate and improve systems in public transport to ensure a safe and secured transport system to both the stakeholders and the investors such as the 3rd Interested Party.

44. It was his view that the cashless payment system was introduced by the Respondents to cure the lawlessness, extortion, money laundering and corruption that have persisted within the public transport industry and to ensure that money reaches the investors and Public Service Vehicle owners in real time while at the same time tracking the amount in fare collected every day from their vehicles, system that will help reduce bribery, fraud and corruption in the industry where majority of the revenue is often lost to cartels.

45. It was the deponent's view that the Applicant was guilty of laches, the decision sought to be quashed having been made more than six months ago and as such the court cannot prohibit or quash that which has already been implemented through a lawful administrative process that preceded and surrounded the making of the decision to legislate the regulations. He contended that there was no court finding that the subject regulations were unlawful or unconstitutional neither have the claim of

fraud attributed to the Interested Parties been shown to constitute a scheme in relation to implementation of the regulations legislated and hence the judicial review orders of prohibition and certiorari are neither appropriate nor available to the Applicant.

5th Interested Party's Case.

46. On the part of the 5th interested party, Fibre Space Ltd (hereinafter referred to as "Fibre Space") the following grounds of opposition were filed:

> **1. The *Ex parte* Applicant has clearly demonstrated that there was compliance with Sections 11 to 19 of the Statutory Instruments Act 2013 with regard to Legal Notice No. 75 of 2014 sought in the Judicial Review Notice of Motion dated 9th December, 2014.**
>
> **2. The *Ex- parte* Applicant has not demonstrated that the Legal Notice No. 75 of 2014 was revoked by the National Assembly.**
>
> **3. The 5th Interested Party is in the business of providing e-money services to the public and not an implementer of the Legal Notice No. 75 of 2014 contrary to assertions by the *Ex parte* Applicant in paragraph 10 and page 7 of his submissions.**
>
> **4. The application is misconceived and bad in law, and should be dismissed with costs to the 5th Interested Party has been unfairly and unnecessarily dragged into this matter.**

6th Interested Party's Case

47. On behalf of the 6th interested party, Safaricom, the following grounds of opposition were filed:

> 1. **The Ex-parte Applicant has not demonstrated any breach of rules of natural justice by the Respondents and the Interested Parties in the process leading to the making of the decision of 11th June, 2014 to warrant the orders sought.**
>
> 2. **The remedies of Judicial Review are not available to the Ex-parte Applicant as the Ex-parte Applicant is challenging the merits of the implementation of the decision made on the 11th day of June, 2014.**
>
> 3. **The Order of prohibition cannot be granted as the decision sought to be prohibited has since came into effect from 1st December, 2014.**
>
> 4. **A grant of the orders sought by the Ex-parte applicant will affect the wider public interest.**

Determinations

48. I have considered the issues raised, the affidavits both in support of and in opposition to the application, the submissions and authorities relied upon.

49. The first issue for determination is whether the documents allegedly secured by the applicant without the authority of the Respondents ought to be expunged. Article 35(1) of the Constitution provides that every citizen has a right to access information held by the State. It is not contended that the applicant is not a citizen. That the Respondents are organs of the State is not in dispute. It has not been contended that the information relied upon by the applicant is the kind of information that the State is not obliged to furnish to citizens. The Respondents' only issue is that they did not furnish the applicant with the same. Since Article 35(1) obliges the Respondents to avail the same and the applicant is entitled to access the same, I do not see why this Court should expunge the said information. After all under Article 159(2)(d) and (e) of the Constitution, this Court is required to be guided with *inter alia* the principles that justice shall be administered without undue regard to procedural technicalities and the purpose and principles of the Constitution shall be protected and promoted. Some of the said principles under Article 10 thereof are transparency and accountability.

50. The purview of judicial review was clearly set by **Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** when he stated that:-

> **"Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."**

51. I am cognisant of the fact that judicial review remedies being discretionary, the Court would not grant them in certain circumstances even if the same are merited. As is appreciated, in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."**

See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

52. As was stated by **Ojwang, AJ** (as he then was) in **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice.

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

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."**

54. Therefore judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. *See* R vs. Secretary of State for Education and Science *ex parte* Avon County Council (1991) 1 All ER 282, at P. 285.

55. It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.

56. Those are the general principles guiding the grant of judicial review.

57. In the instant matter it was contended that the present application is *res judicata* since the issues raised herein were the subject of judicial review applications nos. 2 and 124 of 2014. *Res Judicata*, strictly speaking is provided under section 7 of the ***Civil Procedure Act*** which in the preamble to the Act is "*An Act of Parliament to make provision for procedure in civil courts*". However, in **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995** it was held that Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply since it is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the ***Civil Procedure Rules*** being the procedural law. Therefore strictly speaking section 7 of the ***Civil Procedure Act*** does not apply to judicial review proceedings. In fact in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47** it was held that *res judicata* does not apply to judicial review.

58. This, however, does not mean that the Court is powerless where it is clear that by bringing proceedings a party is clearly abusing the court process. Whereas *res judicata* may not be invoked in judicial review the Court retains an inherent jurisdiction to terminate proceedings where the same amount to an abuse of its process. One of cardinal principles of law is that litigation must come to an end and where a court of competent jurisdiction has pronounced a final decision on a matter to bring fresh proceedings whether as judicial review proceedings or otherwise would amount to an abuse of the process of the court and would therefore not be entertained. The Court in terminating the same would be invoking its inherent jurisdiction which is not a jurisdiction conferred by section 3A of the ***Civil Procedure Act*** as such but merely reserved thereunder. In **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743** it was held:

> **"It is trite law that an *ex parte* order can be set aside by the judge who gave it or by any other judge. The Civil Procedure Rules provide for this. Our Constitution does assume the existence of supportive Civil Procedure regime in so far as the same is not inconsistent with the Constitution. There is nothing inconsistent with the Constitution in the act or principle of setting aside of *ex parte* orders for good reasons. If an order obtained in a Constitutional application is incompetent or improperly obtained there cannot be any valid reason why the court would not have the jurisdiction to set it aside. Setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy...Where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore the Court does have the inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside *ex parte* orders, which by their very nature are provisional."**

59. As was stated by **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009**:

> **"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".**

60. Accordingly the Court may in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process and this may be done where the principles of *res judicata* would be applicable.

61. This then leads me to the issue whether the said principles apply to this case. Judicial review No. 2 of 2014 was challenging Legal Notice No. 219 of 2013 published on 17th December 2013. Judicial review no. 124 of 2014 on the other hand challenged Legal Notice No. No. 23 dated 11th March, 2014. In the latter proceedings, this Court on 6th October, 2014 expressed itself *inter alia* as follows:

> **"It was further contended in the submissions that since the body authorised under section 31(2) of the *National Payment Systems Act* to make regulations in the nature of Regulation 7(f) of the said Regulations being the Central Bank of Kenya and not the 1st Respondent, the 1st Respondent had no powers to make the said Regulation. Suffice to say that this issue was not raised in any of the grounds in the Notice of Motion in JR No. 124 of 2014 or in the Petition. By virtue of Order 53 rule 4(1) the same cannot be a basis upon which this matter can be determined."**

62. The instant application, however seeks to impugn Legal Notice No. 75 of 2014. This instrument is however dated 11th June, 2014, Obviously there is no way the said Legal Notice could have been competently challenged in either of the past two applications as the instant Legal Notice came into existence long after the said two applications had been filed. In any case in Judicial Review No. 124 of 2014, this Court declined to deal with the issues dealing with ***National Payment Systems Act.*** It is therefore my view and I so find that *res judicata* is, in the circumstances, inapplicable.

63. It was further contended that the Respondent's action flies in the face of section 3 of the ***National Payment Systems Act***. The said section provides as follows:

> ***(1) The Central Bank may, by notice in the Gazette, designate a payment system for the purposes of this Act, if it is of the opinion that?***

(a) the payment system poses systemic risk;

(b) the designation is necessary to protect the interest of the public; or

(c) such designation is in the interest of the integrity of the payment system.

64. The interested parties however contend that as the Central Bank permitted the introduction of the cashlite system this requirement was complied with. However as this Court held in **The Republic vs. The President & Others ex parte Dr. Wilfrida Itondolo & Others [2014] eKLR:**

> **"The issue of gazettement of the 1st interested party was also raised. In *Catholic Diocese of Moshi vs. Attorney General [2000] 1 EA 25 (CAT)*, it was held that the requirement that administration and remission orders made by the Minister under two statutory provisions (section 7(1) of the Customs Tariff Act of 1976 (Act 12 of 1976) and section 28(1) of the Sales Tax Act 1976 (Act 13 of 1976)), being administrative acts with no legislative effect whatever, be given publicity in the Gazette was no more than directory. The failure to comply with the directive, it was held, did not affect the validity of the orders since the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim "ignorance of the law does not excuse" more rational, in view of the growing stream of delegated legislation. Therefore, it is my view and I so hold that unless the instrument in question expressly provides that an appointment thereunder is effective on gazettement, the gazettement is merely directive and the failure to gazette the appointment does not necessarily nullify the appointment."**

65. In this case however, the phrase used is: "***The Central Bank may, by notice in the Gazette"***. In my view the insertion of the comma after "may" is an indication that the discretion is only referable to the action of the Central Bank. However, the manner of doing it is expressly by Gazette Notice. Accordingly the word "may" does not apply to the Gazette Notice which is mandatory. The argument by the interested parties that Central Bank consented to the said payment system, in my view cannot be taken to be a substitute for Gazette Notice.

66. It was further contended that Legal Notice No. 75 did not comply with section 11 of the ***Statutory Instruments Act,*** Act No. 23 of 2013. That section provides as follows:

> **(1) Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament.**
>
> **(2) An explanatory memorandum in the manner prescribed in the Schedule shall be attached to any statutory instrument laid or tabled under subsection (1).**
>
> **(3) The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.**
>
> **(4) If a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void."**

67. In support of his position that section 11 of the ***Statutory Instruments Act*** was not complied with, the applicant has exhibited a copy of the ***Report of the Select Committee on Delegated Legislation on National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014*** dated 23rd July, 2014 in which the Committee recommended that the said Regulations be annulled. However, there is no evidence as to what transpired on 6th August, 2014 or thereafter. As there is evidence of compliance with section 11 of the ***Statutory Instruments Act***, I agree that it was incumbent upon the applicant to prove that the said report of the Select Committee was adopted by the House. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that:

> **"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."**

68. It ought to be appreciated that under Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya, "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." I am also cognisant of the legal maxim that *omnia praesumuntur legitime facta donec probetur in contrarium* (all things are presumed to have been legitimately done, until the contrary is proved). Therefore unless the doctrine of judicial notice applies or where what is sought is simply a negative and the information to the contrary ordinarily ought to be in the position of the adverse party, it is upon the person who alleges a fact to prove it. In this case it was the applicant who was alleging that Legal Notice No. 75 of 2014 had been rescinded or annulled by the National Assembly to prove the same. As was held by **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001**:

> **"a fact is not proved if it is neither proved nor disproved. It is therefore not proved".**

69. Therefore the factual averment that Legal Notice No. 75 of 2014 did not comply with section 11 of the ***Statutory Instruments Act*** on the ground that the same was not approved by Parliament is merely speculative and cannot be the basis for quashing the same.

70. I must however point out that since the introduction of the system affects the public, it is not enough to simply consult Public Motor Vehicle Owners on the same while leaving the consumers of the service. The Constitution in Article 10(2)(a) talks of "participation of the people" as opposed to "stakeholder consultation". Here I must say that public participation ought not to be equated with mere consultation. Whereas "consultation" is defined by ***Black's Law Dictionary*** 9th Edn. at page 358 as "*the act of asking the advice or opinion of someone*", "participation" on the other hand is defined at page 1229 thereof as "*the act of taking part in something, such as partnership*…" Therefore public participation is not a mere cosmetic venture or a public relations exercise. In my view, whereas it is not to be expected that the legislature would be beholden to the public in a manner which enslaves it to the public, to contend that public views ought not to count at all in making a decision whether or not a draft bill ought to be enacted would be to negate the spirit of public participation as enshrined in the Constitution. In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public. In other words the end product ought to be owned by the public.

71. In the instant case, from the respondent's own pleadings the deadline for the implementation of the cash light system was extended to 1st December, 2014. These proceedings were instituted on 2nd December, 2014. Though the applicant could have commenced these proceedings earlier on, the fact that there was no immediate threat till 1st December, 2014 renders the delay which is not beyond the statutory period excusable.

72. I have considered the other issues raised in the application and I agree with the respondents and interested parties that the same touch on the merit of the impugned system and are better of being dealt with in either a Constitutional petition or in the normal civil proceedings which are better placed to interrogate the merits of the system.

73. However as the decision whether or not to grant judicial review remedies is discretionary, the Court will no doubt look at the efficacy of the remedy sought. The applicant seeks to impugn Legal Notice No. 75 of 2014. The cash light system was however introduced by regulation 7 of Legal Notice No 23 of 2014. Legal Notice No. 75 of 2014 only sought to implement Regulation 7 of Legal Notice No. 23 of 2014. To quash Legal Notice No. 75 of 2014 would leave Legal Notice No. 23 of 2014 intact. As has been held time and again, where what is ought to be quashed is simply the implementation of a decision, which decision itself is not sought to be quashed judicial review order of certiorari ought not to be granted. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

> **"Where a decision is made and its making has been made known to the Respondents who did not challenge the same within 6 months of its being made by way of *certiorari* to have it moved into the High Court and be quashed, it is not open for them to seek to have the Appellant prohibited from implementing the decision as an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law."**

74. Without quashing Legal Notice in issue there would be no basis or granting the order of prohibition sought. See **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR**.

Order

75. It follows that the Notice of Motion dated 9thDecember, 2014 fails and the same is hereby dismissed but pursuant to what I have stated above, there will be no order as to costs.

Dated at Nairobi this 30th day of April, 2015.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Harrison Kinyanjui for the Applicant

Mr Odhiambo for Mr Bitta for the 2nd, to 5th Respondents

Mr Mayende for the 3rd Interested Party

Cc Patricia