



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO.464 OF 2013

BETWEEN

STERLINGRAD PRODUCTS LIMITED.....1ST APPLICANT
SABRIN BUS SERVICES LIMITED.....2ND APPLICANT
KUKENA SACCO SOCIETY LIMITED.....3RD APPLICANT
NAIROBI WESTERN SACCO CLASSIC LIMITED.....4TH APPLICANT

AND

CHAIRMAN, THE NATIONAL TRANSPORT
AND SAFETY AUTHORITY.....1ST RESPONDENT
CABINET SECRETARY FOR TRANSPORT
AND INFRASTRUCTURE.....2ND RESPONDENT
THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT
THE TRAFFIC COMMANDANT.....4TH RESPONDENT

RULING

1. On 30/12/2013, the Applicants appeared before Odunga, J. and were granted leave to institute judicial review proceedings against the Respondents. In doing so, the learned judge stated *inter-alia* that the issues raised in the Chamber Summons Application dated 30/12/2013 were of great public interest as they affect Kenyans of all walks of life. He however declined to grant prayer 5 thereof which is worded thus;

“That the grant of leave to apply for the Orders of Certiorari and prohibition do operate as a stay of the ban against the Applicants' lawful operation of public service vehicle business between 6.00 p.m. and 6.00 a.m.”

2. It is the above prayer that is the subject of this Ruling and in the Supporting Affidavit of Joseph Karanja Mbugua, (a Director of the 1st Applicant), the grounds on the face of the Application and Submissions by Mr. Kimathi on their behalf, the case for the Applicants can be summarised as follows;

3. That all the Applicants had prior to December 2013, applied for and were granted Transport Licensing Board Licenses after paying the requisite fees and were thereafter issued with licenses on certain conditions including travel time tables indicating estimated times of departure and arrival for their public service motor-vehicles. In their view, since the said licenses have neither been revoked nor suspended, they are still in operation. That the Respondents by a directive in “*The Star*” newspaper of 30/12/2013, purported to invoke **Legal Notice No.219 of 2013** and ban night travel for buses and matatus and although the same is “*well intentioned,*” it is “*draconian and was made without giving either notice or a hearing*” to enable the Applicants comply with the said Legal Notice.
4. Further, that the directive was given on the wrong assumption that road accidents are only caused at night by the negligence of passenger service vehicles while in fact trailers and trucks driven negligently have caused more accidents in the period November – December 2013 and at paragraph 11 of his Affidavit, Joseph Karanja Mbugua has given statistics of accidents that allegedly occurred on 16/12/2013, 14/12/2013 and 11/11/2013 including those involving trucks and trailers.
5. Lastly, that the night travel ban has caused inconveniences to the public and families have cancelled their holiday travel plans while the Applicants have been unduly harassed by police officers who have continuously arrested bus drivers at night including in unsafe and dangerous places for passengers.
6. That therefore a stay order as prayed would be in the best interests of all concerned parties including passengers and the public at large.
7. The response by the Respondents is contained in two Affidavits; one sworn on 2/1/2014 by Lee Kinyanjui, Chairman of the National Transport and Safety Authority and another sworn on the same day by Samuel Kimaru, the Traffic Commandant at the Kenya Police Service. Their joint position as expressed in those Affidavits is that;
 - i) Contrary to the Applicants' argument, there is actually no blanket ban on night travel by public service vehicles.
 - ii) The National Transport and Safety Authority Regulations (Operation of Public Service Vehicles) Regulations, 2013 define “*long distance night time passenger service*” as “*a transport service other than a commuter service offered by a public service vehicle registered to operate from or after the hours of 6.00 p.m. or whose scheduled time of arrival at its destination is after 9.00 p.m.*”

That therefore night travel is still allowed subject to the necessary conditions being met by travel operators.
 - iii) Public Motor Vehicle not registered as “*night time passenger services*” may be granted licences to leave their departure stations at any time after 6.00 a.m. but before 6.00 p.m. and must reach their destination before 9.00 p.m. and for practical reasons.
 - iv) The above conditions were put in place to curb the rising death toll from accidents involving public service vehicles at night.
 - v) The said accidents were caused *inter-alia* by poor vision and driver fatigue.
 - vi) The rate of accidents involving public service vehicles has reduced drastically since the implementation of **Legal Notice No.219 of 2013** and statistics have been attached to the two Affidavits in reply to the issue placed before me for determination.
 - vii) The licenses produced by the Applicants were issued under the **Transport Licensing Act** which

has been repealed and the timetable for travel must be brought in line with and be construed in light of **Legal Notice No.219 of 2013**.

viii) The process leading to the enactment of **Legal Notice No.219 of 2013** was participatory and all stakeholders in the public travel sector were adequately consulted. That therefore the prayer for stay is devoid of merit and should be dismissed.

In addition, Mr. Agwara and Mr. Njoroge, appearing for the Respondents, made two other important points, namely that;

ix) The Applicants have refused to comply with **Legal Notice No.219 of 2013** while all other operators had done so.

x) The cause of action, if at all, lies in private law and not public law and all the annexures to the Supporting Affidavit are indicative of that fact. That in the circumstances, judicial review orders cannot be a proper remedy to the Applicants' woes, if any.

8. I have considered the Application and taken into account the rival Submissions by Parties and I should begin by stating the law with regard to stay orders under **Order 53 Rule 1** of the **Civil Procedure Rules**. As I understand it, some of the considerations to be taken into account by the Court are that;

a) Since the arguments at the initial stage would not lead to a final determination of the judicial review proceedings, the Court should be careful not to prejudge the final outcome thereof.

b) The Judiciary review proceedings in the main should not be rendered nugatory by any action on the part of the Respondent during the pendency of those proceedings.

c) The objective of stay orders in judicial review proceedings is to stop the making of a decision which has not been made.

d) A stay order should not be framed in such a way as to reinstate a position or decision before the Respondent has been heard (**See James Mburu Gitau t/a Jambo Merchants vs Sub-County Public Health Officer Kiambu County [2013] eKLR, Taib A. Taib vs Minister of Local Government & Others, Msa H.C. Misc. Application No.158 of 2006 and Re: Meridian MedicalCentre H.C. Misc. Application No.363 of 2013**).

Applying the above principles to the present situation, I would opine as follows;

9. Firstly, the Applicants have stated in the prayer reproduced elsewhere above, that their main complaint is that there has been “*a ban against ... operation of public service vehicles between 6.00 p.m. and 6.00 a.m.*” As to the source of information in that regard, they referred me to “*The Star*” newspaper of 30/12/2013 under a headline titled, “*Night travel ban for buses and matatus causes chaos*”.

Aside from the fact that this Court has constantly stated that newspaper cuttings and reports are not authoritative sources of information in legal proceedings, in fact the story in “*The Star*” bears the Respondents out; that it is in fact the coming into operation of **Legal Notice No.219 of 2013** that may have caused the “*chaos*”, subject of the story.

If that be so, it means that in fact there is no “*directive*” specifically banning night travel by public service operators as contended by the Applicants and there lies their first hurdle.

I say so because if there is in fact no “*ban*” and there is no “*directive*”, on what basis am I to issue a stay order in the manner framed by the Applicants?

10. Secondly, **Legal Notice No.219** was published on 17/12/2013 and is titled, “**The National Transport and Safety Authority Act (Operation of Public Service Vehicles) Regulations, 2013**” and made pursuant to the **National Transport and Safety Authority Act (No.33 of 2013)**. **Regulations 3 and 4** thereof specifically provide that they “*shall apply to all Public Service Vehicles operating on a public road in Kenya*” and that no person “*shall operate a Public Service Vehicle in Kenya without a valid license issued by the Authority.*”

11. The Applicants in that regard have argued that they have licenses (*and some have been exhibited*) issued under the **Transport Licensing Act, Cap.404** to operate at night without any restrictions by the Respondents. Without saying more than I should at this stage of the proceedings, **Section 55 of The National Transport and Safety Authority Act** repealed the Transport Licensing Act and it is the latter **Act** and Regulations made under it, including **Legal Notice No.219** aforesaid, that constitute the law with regard to public transport and safety in Kenya.

12. Thirdly, **Regulations 11, 12 and 13 of Legal Notice No.219** provide as follows;

“11.(1) A person shall not operate a long distance night time passenger service vehicle without a valid license issued by the passengers PSVs Authority.

(2) A person applying for a long distance night passenger service license shall specify-

(a) whether the service is intended to be offered during the day only; or

(b) during both daytime and night time.

12. Every operator of a long distance passenger service vehicle shall;-

(a) have in place or outsource a fleet management system capable of recording speed and location of the vehicle at any one time;

(b) subscribe to a data storage system capable of storing data on vehicle speed, location and operation for a period of thirty days and when required by the Authority provide the data to the Authority before the expiry of the prescribed storage period;

(c) before the commencement of each journey arrange for the taking of a passenger manifest.

(d) operate or subscribe to an outsourced control centre;

(e) ensure that, except for small parcels and letters, the long distance passenger vehicle does not carry cargo other than luggage accompanying a passenger travelling on the bus and carried either as hand luggage to be placed in the overhead lockers on board the bus or in the hatch under the vehicle;

(f) ensures that, except for courier services, the long distance passenger vehicle does not operate as a commercial cargo carrier and does not have a cargo carrier mounted on the roof; and

(g) ensure or subscribe to an accident and emergency mutual aid system.

13. Every operator of an nighttime long distance passenger serve shall;-

(a) employ drivers certified by the Authority to drive on the particular route or routes at night time and meets conditions imposed by the Authority;

(b) ensure that no driver driving a long distance night time passenger public service vehicle

works for a period exceeding eight hours night in a shift;

(c) ensure that a person driving a long distance night time passenger service takes a break of a minimum of eight hours before the next night shift.

(d) plan the journey in a manner that allows for a thirty minute refreshment break for both the driver and passengers at an appropriate location of facility every three to four hours in the course of the journey; and

(e) employ two drivers for each vehicle.”

13. I have reproduced the above Regulations to make the point that in the entire Application before me, the Applicants have failed to show any compliance with the same. In submissions, Mr. Kimathi argued that the 1st Respondent in fact admitted that the Regulations were enacted and implemented in a rush and that the Applicants require time to implement them. That may well be true but where is the evidence that at the very least, the Applicants attempted to comply but were caught up with by exigencies of time and nature? It is almost one month since the Regulations were enacted and no such evidence has been tendered before this Court.

14. Fourthly, it is admitted by the Applicants that the Regulations are well intentioned and are meant to curb the increasing number of accidents involving public service vehicles at night. If that be so, it behoves upon them to embrace the Regulations, quickly comply with them and reclaim their position as obedient night time public service motor-vehicle operators

15. Fifthly, having considered all the facts placed before me, I understand the Applicants' plight; they intended to cash in on the holiday season, make money day and night to cater for their financial obligations including loans to buy their buses. The Regulations came in at the height of that season and obviously they have been terribly affected.

16. However, and with sympathy, they framed their Application badly, focused on a non-existent night ban and lost an opportunity to extend the time to implement the Regulations that would be agreeable to them and the Respondents. They have not denied that they were aware of the process of enactment of the Regulations and they should have taken the opportunity of the consultative process to create time for themselves. This Court cannot at this stage of the proceedings purport to rewrite the Regulations whose validity and lawfulness has not been challenged. The Applicants have not argued for example that the same are ultra vires the parent **Act** or the **Constitution** and in the end they failed to show at this stage why this Court should tamper with their implementation.

17. On the other hand, there is the wider public interest that road carnage should be curbed, discipline instilled in the transport service and that lives should be saved in doing so. I choose to invoke the public interest as opposed to the short-term private convenience of the Applicants.

18. Having applied the law to the facts before me, it is obvious that I see no merit in prayer 5 of the Application dated 30/12/2013 and the same is ordered to be dismissed.

19. Costs shall abide the outcome of the Notice of Motion seeking the Judicial Review Orders.

20. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 14TH DAY OF

JANUARY, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Agwara for 1st Respondent

Mr. Mwangi holding brief for Mr. Njoroge for 2nd & 3rd & 4th Respondents

No appearance for Petitioners

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

Further Order

Mention before the Judicial Review Division on 15/1/2014

Ruling to be supplied to Parties.

ISAAC LENAOLA

JUDGE

14/1/2014