



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW CASE NO. 124 OF 2014

REPUBLIC..... APPLICANT

VERSUS

**CABINET SECRETARY FOR TRANSPORT & INFRASTRUCTURE1ST
RESPONDENT**

PRINCIPLE SECRETARY

STATE DEPARTMENT OF TRANSPORT.....2ND RESPONDENT

THE NATIONAL TRANSPORT & AUTHORITY.....3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE..... 4TH RESPONDENT

THE TRAFFIC COMMANDANT.....5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

EXPARTE

KENYA COUNTRY BUS OWNERS ASSOCIATION(Thro’ PAUL G. MUTHUMBI – Chairman)

SAMUEL NJUGUNA – SECRETARY JOSEPH KIMIRI – TRASURER 1ST APPLICANT

MBUKINYA BUS SERVICE(KENYA) LTD 2ND APPLICANT

CROWN BUS SERVICES LTD.3RD APPLICANT

KAMPALA COACHES LTD 4TH APPLICANT

TRATICOM ENTERPRISES LTD.5TH APPLICANT

UGWE BUS SERVICES 6TH APPLICANT

TRISHA COLLECTIONS LTD..... 7TH APPLICANT

RULING

Introduction

1. By a Chamber Summons dated 28th March, 2014, the applicants herein sought the following orders:
 1. **THAT this Motion be certified urgent and heard ex-part as by law envisaged, and as expeditiously as possible, owing to its demonstrated urgency.**
 2. **THAT this Court do forthwith vary and vacate the last part of its Order No.2 made on March, 14th 2014 in these proceedings suspending the invalidity of Legal Notice 219 of 2013 for 60 days, as Legal Notice 219 of 2013 is no longer in existence. The remaining part of the Order No.2 of this Court made on March 14th 2014 be upheld.**
 3. **THAT this Court do vary and vacate the lat part of its Order No.6 to truncate the period of 60 days to table the stated evidence of Legal Notice 219 of 2013 compliance with Section 11 of the Statutory Instrument Act, Act No.33 of 2012.**
 4. **THAT in exercise of the Court's inherent power and in protecting the proper administration of Justice this Court do stay any implantation of Legal Notice No.24 of 2014 titled " THE NATIONAL TRANSPORT AND SAFETY AUTHORITY(OPERATIONS OF PUBLIC SERVICE VEHICLES)REGULATIONS, LEGAL NOTICE 23 OF 2014 published on 11th March, 2014 in the Kenya Gazette Supplement No. 11 of 11th March, 2014 until further orders of the Court or as the Court may direct.**
 5. **THAT the cost of this application and the Judicial Review proceeding herein be to the Ex Parte Applicant in any event.**
2. When the application came before me on 31st March, 2014, **Mr Kinyanjui** appeared for the applicant while **Mr Agwara** was surprisingly present for the 3rd Respondent in an application which is usually heard ex parte unless the Court directs otherwise. Nevertheless considering the importance of the matter the Court listened to both counsel.
3. After hearing the counsel the Court granted the leave sought and stayed part of the impugned Legal Notice No. 23 of 2014 and as the 1st and 2nd Respondents were not represented the Court pursuant to the proviso to provisions of Order 53 rule 1(4) of the **Civil Procedure Rules**, directed that the limb dealing with the stay be heard inter partes.
4. It is that limb of the application which is the subject of the present ruling.
5. The application is supported by a verifying affidavit sworn by **Paul G. Muthumbi**, the 1st Applicant's Chairman on 28th March, 2014, a supplementary affidavit sworn on 31st March, 2014 and a further supplementary affidavit sworn on 7th April, 2014 by the same deponent.
6. According to the said affidavits, this Court in Judicial Review Case No. 2 of 2014 pronounced itself in regard to Legal Notice No. 219 of 2013 (hereinafter referred to as the earlier Legal Notice) published by the 1st Respondent in the same manner as he has purported to do in Legal Notice No. 23 of 2014 (hereinafter referred to as the impugned Legal Notice). However the 1st Respondent remained adamant that the applicants comply with the earlier Legal Notice. In his

- view though the 1st Respondent is empowered to make Regulations under the **National Transport and Safety Authority Act** (hereinafter referred to as the Act), being aware of the pendency of the proceedings in Judicial Review Application No. 2 of 2014 and having unreservedly subjected himself thereto whose judgement was due for delivery on 14th March 2014 unlawfully purported to revoke the earlier Legal Notice days before the delivery of the said judgement.
7. In the deponent's view, Article 132(1)(a) of the Constitution demands that the 1st Respondent acts with utmost professionalism and ethics and that his conduct herein does not meet that threshold. To him the 1st Respondent has engaged in oppressive, arbitrary and unconstitutional action against their lawfully engaged business as public service vehicle transporters, not countenanced of a public official the aggregate of which poses real prejudice to administration of justice. According to him Article 153(4)(a) of the Constitution demands of the 1st Respondent that he acts in accordance with the Constitution and when he violated the Court's authority vested by Article 159(1) of the Constitution in publishing the impugned Legal Notice as he did he acted without regard or respect to this Court's authority hence the impugned Legal Notice being an outflow of an unconstitutional decision is utterly void and cannot be enforced.
 8. It was deposed that the sudden, draconian and arbitrary enforcement of the Legal Notice No. 23 of 2014 without Parliamentary scrutiny as envisaged under section 11 of the **Statutory Instruments Act** denies and deprives the applicants of the opportunity of the protection of the law through Parliamentary scrutiny of the impugned Legal Notice and an avenue for the applicants to express their sentiments on the legality of the impugned Legal Notice. In the deponent's view, no regulation or Rule can have a retroactive effect.
 9. According to the deponent the failure by the 1st Respondent to inform the Court that the earlier Legal Notice was no more as a result of the publication of the impugned Legal Notice was unethical and a demonstration of mala fides and the publication of a similar Legal Notice creates a bad and violent governance a practice that amounts to a violation of Article 10(2)(b) on good governance.
 10. It was contended that though the applicants' licences allow them to operate at night which licences are valid till December, 2014, the 1st and 3rd Respondents intend to act arbitrarily in violation of the ex parte applicant's statutory rights to enforce Legal Notice No. 23 of 2014 without any force of law. Without repealing Rule 61(1)(a) of the Traffic Rules which permit the applicants to carry luggage on the roof where guard rails have been fitted, it is a breach and violation of the Rule of law enshrined in the Constitution for the 1st respondent to purport to enact Regulation 11(f) in the impugned Legal Notice. The removal of the roof carriers, it was deposed would increase the public cost of travel since the said carriers enable the ex parte applicants to ferry cargo not otherwise readily ferried by other means.
 11. On the same point it was deposed that Articles 28 and 54 of the Constitution enjoins the applicants to treat persons with physical disabilities with dignity and in particular Article 54(1)(a) enjoins the applicants to ensure that persons with disabilities are treated with dignity and respect. The removal of the carriers, it was deposed would leave the applicants without the means of carrying wheelchairs of the physically disabled hence the implementation of the said Regulation would lead to turning away the people with disabilities which would be unconstitutional.
 12. According to the deponent the said Regulation contravene the rights to individually own and operate public service motor vehicles without belonging to an association as well as contractual rights.
 13. In the applicants' view the **National Transport and Safety Authority (operations of public service vehicles) Regulations, 2014**, (hereinafter referred to as the Regulations) ought to be scrutinised not just by the National Assembly and also by the Senate.
 14. Unless this Court intervenes the Respondents will ground the applicants' vehicles for failure to comply with the said illegal Regulations. In their view the cause of high fatality on the roads is partly the glaring omission by the responsible National and County Government authorities in not providing safe passage on roads and road users hence the denial of members of the public the right to travel by banning night travel is a gross violation of Kenyans' right to freedom of movement guaranteed by the Constitution.
 15. It was further deposed on March 31st 2014 the deponent went to the office of the 3rd Respondent's Director General, **Mr. Meja**, after the 1st Applicants' members requested for reasons from the 3rd

- Respondent as to why their buses' roof carriers were removed and why Legal Notice 23 of 2014 was being implemented yet there was pending before this Court Judicial Review Case No.2 of 2014, pointed at the impugned Legal Notice but on further prodding he expressed shock and dismay at what was happening and promised to immediately call the 5th Respondent on his cell phone to state that the removal of roof top carriers was not supposed to be happening. In his view, there will be no crisis at all as purported by 3rd Respondent should Legal Notice 23 of 2014 be suspended for this Court to lawfully determine the basis of the said Legal Notice since all PSV buses and vehicles are already fitted with speed Governors and the imposition of the demands in Legal Notice of 23 of 2014 is onerous.
16. To the deponent, the Respondents having failed to comply with the time lines accorded to them by the Court on March 14th 2014 in regard to Legal Notice 219 of 2013 ought not be benefit from their default in compliance and there is no proof that the safety of the public is to be promoted by Legal Notice 23 of 2014.
 17. The deponent deposed that the 2nd Respondent's position that there "has been a steady increase in number of road accidents" is not justified or backed at all by any statistical data. To the contrary, the road users are myriad: pedestrians, *matatus*, omnibuses, long distance buses such as their, small cars, SUVs, lorries of 7 tonne capacity, lorries of larger tonnage, trailers, motorcycles and cyclists yet the statistical spread of these classes of road users has not been supplied hence the allegation is anecdotal and cannot be the basis of denying them their legal protection against illegalities.
 18. It was his case that each and every PSV vehicle on the road as of March, 31st 2014 had a duly authorized speed governor, and as such no safety hazard was posed or is posed by such vehicles and further the 2 brands of speed governors specified by the 1st Respondent in Legal Notice No. 219 of 2013 was outlawed and declared illegal on March, 2014 by this Court's decision in Judicial Review Case No.2 of 2014. As such there are no speed governors to be fitted any different from what they already have in their vehicles.
 19. To him there were absolutely no consultations at all in respect of the contents of Legal Notice No.23 of 2014 and contrary to the allegations by the Respondents, there will be no exposure to Kenyans to unsafe and "unregulated" mode of public transport as alleged or at all since there is a very comprehensive legal framework of the **Traffic Act**, Cap 403 in regulating public transport and hence there will be no vacuum in legal enforcement as alleged or at all. He deposed that as a result of the impugned Regulations the Respondents have been imposing the same contrary to the Traffic Rules which do not prohibit the actions by the applicants.
 20. In his submissions, **Mr Kinyanjui** learned counsel for the applicants argued that the prayer for stay herein cannot be viewed in isolation but ought to be considered in the context of the Court's finding in JR No. 2 of 2014 in respect of the earlier Legal Notice. Therefore it would be fallacious for the 1st and 2nd Respondents to suggest that the stay will lead to road carnage on astronomical scale without taking into account the context of the current Legal Notice.
 21. According to him two results are inherent in the refusal to grant the stay sought. First, is the perpetration of maladministration and misapplication of the Respondent's powers of regulation making pursuant to sections 54 of the Act and section 191 of the **Traffic Act** and moreso since the Court in Judicial Review No. 2 of 2014 directed the Respondents to initiate the process of meaningful engagement with the applicants and the public within 60 days. Instead of informing the Court of the steps which were being undertaken to comply with the said direction the Respondents instead incepted the earlier Legal Notice on 11th March, 2014 thus defeating the ends of justice and that is a basis for the grant of the orders sought herein.
 22. Secondly, it was submitted that Article 2 of the Constitution forbids any act being done outside the scope of the Constitution such act being null and void. According to the deposition by **Mr Meja**, Legal Notice No. 23 of 2014 reproduced Legal Notice No. 219 of 2013 both in substance and in form which is an affirmation for the Court to appreciate, find and hold that the present Legal Notice must be viewed in the context of Legal Notice No. 219 of 2013. Under Article 47 of the Constitution it is a requirement that administrative powers be exercised in context of fairness and legality.
 23. In light of the admission that Legal Notice No. 219 lapsed before transmission to Parliament hence became void by operation of the law, the same scenario applies to Legal Notice No. 23 of

2014. The Court was therefore urged to uphold the rule of law and dignity since there is no evidence that the impugned Legal Notice was tabled before parliament which is constituted by both the National Assembly and the Senate. Without evidence that the road accidents are caused by the PSVs it was submitted that the Respondents actions are anecdotal and expects the Court to make determination based on emotions.
24. Citing the provisions of the **Traffic Act**, **Mr. Kinyanjui** submitted that it is not correct that if the stay is granted the PSVs will operate in an unregulated environment or that there is bound to be complete anarchy and vacuum since the provisions of the Traffic Act adequately caters for the safety of the road transport.
25. It was therefore submitted that the Court ought not to validate the illegality of the 1st respondent's actions and therefore the Court ought to grant the stay sought since the 1st respondent's action does not espouse good governance under Article 10 of the Constitution. In **Mr. Kinyanjui's** view, had the applicants' been afforded an opportunity to show that the impugned Legal Notice is adequately covered by the **Traffic Act** and that the same is illegal, this application would have been rendered unnecessary.

Respondents' Case

26. In opposition to the application the 2nd Respondent filed a replying affidavit sworn by **Nduva Muli**, the Principal Secretary of Infrastructure on 4th April, 2014.
27. According to him, there has been a steady increase in the number of road accidents in the country and it is a major concern to the government and all the major stakeholders in the transport industry and as such the government has taken necessary measures to ensure the reduction of the road accidents which continue to claim the lives of many Kenyans. In view of the foregoing the 1st Respondent in collaboration with the 3rd Respondent came up with the Regulations, which are now the subject of challenge before this Honourable Court aimed at reducing road carnage and thus reduce the number of lives lost on the roads. In his view, a reading of the **National Transport and Safety Authority Act** at Section 54, empowers the Cabinet Secretary in consultation with the board, to make regulations for the better carrying into effect of the provisions of the Act and in pursuance to the Act, the regulations under contention were formulated and gazetted.
28. According to the deponent, the aforementioned regulations are in all material respects the same as the once gazetted by the Cabinet Secretary for Transport and Infrastructure in December 2013 which were prepared and gazetted after consultations with relevant stakeholders and are clearly meant to enhance road safety and thus reduce the number of lives lost on the roads.
29. To him, if this Honourable Court were to stay the implementation of Legal Notice 23 of 2014 pending the hearing and determination of the present case the consequence would be the exposure of Kenyans to unsafe and unregulated mode of public transport which would be contrary to the Honourable Court's mandate of upholding the dignity of very same people the Court is meant to protect as rightly observed by this Court in Nairobi HCC Misc. Application No.2 of 2013 by the same Applicants in which the Court found that not the entire corpus of the regulations in issue were impeachable and proposed a scheme for remedial action by the Respondents which due to the filing of the present application the Respondent have been denied the opportunity to redress.
30. To him, as has been judicially noticed by our courts in various cases including Nairobi HCC Misc. Application No.2 of 2013 by the same Applicants, have acknowledged the need for regulation of the public road transport sector which for years had been marked by anarchy, mayhem and severe compromises to normal expectations of civilized services it would be against public interest to stay the implementation of the challenged regulations leaving the said sector unregulated.
31. On behalf of the 3rd Respondent the following grounds of opposition were filed:
- 1. The application for stay contravenes the legal principal of sub-judice which ousts the Courts jurisdiction to hear and determine an issue pending determination before the same court in another suit.**

2. The Applicant has already filed similar Application in Nairobi High Court Judicial Review Application No.2 of 2014, which Application is between the same parties herein

and is pending hearing and determination before the Learned Honourable Justice G. V. Odunga. A copy of the said Application is attached hereto.

3. The 1st Respondent has powers under both the Traffic Act and Section 54 of the National Transport Safety Authority Act to make Regulations for public good and require anything to be done within the law in order to enhance road safety and reduce road carnage. The Applicants have not challenged the said power to formulate the Regulations neither has they proved with cogent plausible evidence that the said Regulations were formulated and gazette in contravention of any law.

4. The enforcement of the Regulations is an important aspect of public road transport and the Applicants are merely required to comply with the same as a means of enhancing road safety and reducing road carnage.

5. The judicial review orders sought herein are against the public interest and the same should not issue for being grossly prejudicial and unfair to the Kenyan citizenry particularly the users of public service vehicles who rely on the government and the Authority herein ensure the provision of safe, reliable and efficient road transport services.

6. The import of the judicial review orders applied for herein if the same were to issue is that the Applicant will through the Court process control the operations of road transport and curtail the Authority's efforts at regulating the same with a view of enhancing road safety and reducing road carnage.

7. The Regulations have already been gazetted and taken effect and all the industry players are already complying with the same without any complaint since it is in the public interest.

8. An order of stay is not efficacious in the circumstance of this matter.

9. The Honourable Court has already considered the contents tenor and merits of the Regulations herein and it would be just and expedient to allow the Respondents effect the Judgment of the Court in Nairobi High Court Judicial Review Application No.2 of 2014.

32. Apart from the said ground the said Respondent filed a replying affidavit sworn by **Francis Meja**, the Director General of the 3rd Respondent on 4th April, 2014.

33. According to him, increasing number of road accidents in the country is a major concern to the government and all the stakeholders and that the Government of Kenya has been keen to carry out necessary measures to ensure the reduction of the road carnage which has so far claimed a large number of Kenya lives. In effecting the said measures the Government established the 1st Respondent Authority herein to be in charge of transport and road safety. Therefore the 1ST Respondent Authority is as such a public body established as a parastatal under Section 3 of the **National Transport and Safety Authority Act** No.33 of 2012 with the statutory functions of *inter alia* to;- advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety, implement policies relating to road transport and safety; plan, manage and regulate the road transport system, ensure the provision of safe, reliable and efficient road transport services and to administer the **Traffic Act** Chapter 403 of the Laws of Kenya.

34. In the performance of its above functions, the Authority is mandated to *inter alia* register motor vehicles, conduct motor vehicle inspections and certification, regulate public service vehicle, develop and implement road safety strategies, conduct research and audits of road safety etc. In carrying out its mandate, the Authority established that 85% of the road accidents within the Kenyan roads occur at night and the same involve public vehicles mainly as a result of the hazards of night driving by public service vehicles. The Authority further established that in order to reduce road carnage, it was necessary to come up with regulations that would require the drivers,

- the operators and the owners of public vehicles to meet specific requirements for night time operation so as to enhance safety and reduce the number of fatalities arising from accidents occurring at night.
35. Therefore in pursuit of the above and with the primary objective of reducing road carnage, the Authority together with the 2nd Respondent herein, developed the Regulations which were first gazetted on 17th December, 2013 vide Kenya Gazette Supplement No.173 of 17th December, 2013 being Legislative Supplement No.73 as contained in the Legal Notice No.219 and took effect on the said 17th day of December, 2013. In formulating the above Regulations, the Respondents incorporated all the stakeholders in the public vehicle industry who were all invited to participate in the formulation of the Regulations and discussions of the draft regulations. Further to the public consultation meetings and discussions on the draft Regulations held in various dates in September, 2013, a further public advertisement was carried out in the local dailies of 4th October, 2013 for further consultative meeting which was attended by the Applicants through their representatives and held at the KICC on 8th October, 2013 there was substantial and reasonable consultation between all the industry players and stakeholders and the 3rd Respondent ensured that the Draft Regulations was amended to incorporate all comments that serve the interest of the government, the regulator and the general public. The consultations were aimed at striking a balance within all the stakeholders. It is therefore misleading for the Applicants to allege that the final regulations departed from the Draft Regulations which was the subject of discussions in the stakeholders meeting of September 2013 yet the Applicants together with other industry player are the ones who proposed the changes to the draft regulations. To the deponent, the said Regulations were prepared and gazetted in good faith with full participation of all the stakeholders and/or unnecessary requirements on the operators of public service vehicle are the same is merely designed to enhance road safety and reduce road carnage and they largely formalize practices already adopted and implemented by the public transport sector to enhance safety.
36. However, upon the publication of the said Regulations vide Legal Notice No. 219 of 2013, the Applicants herein challenged the same vide Judicial Review No.2 of 2014 on the basis that they were not laid before Parliament as required under Section 11 of **Statutory Instruments Act** No.23 of 2013 among other grounds and urged Court to quash the whole of the said Regulations which are designed to benefit the members of the public and reduce road carnage and the Respondents have no personal interest on the same other than to safe guard the safety of the members of the public using the Applicants motor vehicles.
37. According to the deponent, the regulations were gazetted at a time when Parliament was on recess and through oversight when Parliament resumed the 7 days period for transmission lapsed before the transmission to Parliament could be effected and pursuant to the aforesaid section 11 of hence the same became void by operation of law. In light of the lapse of the period and the in the belief that pursuant to the said section 11 a legal vacuum had arisen, in order to avoid the legal vacuum as this would have far reaching consequences for public safety, the Respondents were forced to re-gazetted the Regulations afresh on 11th March, 2014 vide Kenya Gazette Supplement No.24 of 11th March, 2014 as contained in the Legal Notice No.23 of 2014 and took effect on the said 11th day of March, and the same were then submitted to Parliament as required by law and consequently approved by Parliament. To him, Legal Notice No.23 of 2014 reproduces Legal Notice No. 219 of 2013 both in substance and in form hence the Court should consider the two sets of Legal Notices and confirm the foregoing.
38. To the deponent, the said Regulations were prepared in strict compliance with Section 54 of the Act and the requirements of the Constitution and the related statutes. Further this Honourable Court has considered the substance content and purport of Legal Notice No.23 of 2014 in the elaborate hearing of Judicial Review No.2 of 2014 and gave a very well considered judgment which is designed to assist the Industry players which judgment the Respondent are in the process of implementing. This Honourable Court having determined the subject matter herein it would be prudent to apply the same judgment to the current matter before court with a view of upholding the integrity of the Court and ensuring fair administration of justice as guaranteed by Article 47 of the Constitution. Since the subject Regulation No.23 of 2014 is intended to save public lives and substantial reduce road carnage, the Honourable Court ought to allow the same to operate to allow the Respondents protect human lives which are guaranteed by Article 26 of the constitution since

- as recognised by the Court to declare the Regulations invalid would have the effect of exposing Kenyans to unsafe and unregulated mode of public transport and that would be contrary to the Court's mandate of upholding the dignity of the same people the Court is meant to protect. In his belief it would be in the circumstances premature to stay the operation of the regulations herein which play a very important role in regulating public transport.
39. It was the deponent's view that contrary to the fresh allegations made by the Applicants herein, it is clear from the foregoing that Legal Notice No.23 of 2014 does not exhibit abuse of power or contravene any of the Articles of the Constitution as alleged by the Applicants and that the Regulations do not negate and/or contravene any provision of the constitution, the **Traffic Act** and/or the **National Transport Safety Authority Act**. To the contrary every human life is worth protecting through ensuring safety in the roads and the Respondents being the custodian of that duty must not watch as road accidents increase and more lives are lost merely because the Applicants have a business interest and are keen to make profits. Enhanced safety requirements for public travel, it was averred is important for the members of the public and the same overrides individual convenience since it is better to save lives than to loss the same at the alter of convenience and/or profits.
40. Although the requirements of Regulations 12 of Legal Notice No.219 of 2013 which the Court determined to be regular and within the law was to come to effect on the 1st of February 2014, the Applicants did not challenge the same but some industry player sought extension and the same was granted by the Authority up to 31st March, 2014. However, following the revocation of Legal Notice No.219 of 2013 in compliance with Section 11 of the **Statutory Instruments Act**, the said Regulation 12 was reprinted word for word as Regulation 11 in Legal Notice No.23 of 2014 and the same is scheduled to come to effect on 15th April, 2014 which Regulation has not changed and the Applicants must not be allowed to suspend its operations as the Applicants have had sufficient time to comply with the same and as such they must be stopped from applying court process for personal gain and with the sole intention of frustrating the implementation of safety measures as proposed herein.
41. With respect to the carriers, it was deposed that it is common knowledge that all the buses and mini buses are manufactured and purchased without roof carriers in order to enhance stability and as such it is unfair, irregular and wrong for the Applicant to decline the removal of the illegal carriers which only operate to increase road accidents due to the reduced motor vehicle stability on the road. Despite being fully aware of the Regulations herein and participating in their formulation, the Applicants have declined to comply with the requirements for night travel and now wants this Honourable Court to allow them operate at night without considering the road safety concerns and the interest of the members of the public who fully rely on the Respondents to guarantee their safety when they travel at night.
42. To the 3rd Respondent, the Application as filed herein by the Applicant is wholly misconceived and lacks in merit since the same is substantially premised on none existent facts and utter misrepresentation designed by the Applicants to mislead this Honourable Court into granting unmerited stay orders hence it is proper and necessary that the Authority is allowed to continue with its implementation of the Regulations herein and the Applicants must not be allowed to only consider their perceived financial gains and profit at the expense of road safety and the important need to reduce road accidents involving public service vehicles. The Court was therefore urged to consider the fact that the stay sought herein if granted will automatically lead to continued loss of life through road accidents and as such it would be prudent and in the general public interest that the applicants be allowed to comply with the requirements of the Regulations herein and in effect save innocent human lives pending the hearing and determination of this matter.
43. It was reiterated that the 1st Respondent have powers under both the **Traffic Act** and Section 54 of the **National transport Safety Authority Act** to make Regulations for public good and require anything to be done within the law in order to enhance road safety and reduce road carnage. The applicants have not challenged the said power to formulate the Regulations neither has they proved with cogent power to formulate the Regulations neither has they proved with cogent plausible evidence that the said Regulations were formulated and gazette in contravention of any law. In his view, the purport and intent of the Application for judicial review herein and the order of certiorari sought herein are clearly designed to harass the Authority and the Government of Kenya with an intention of stopping them from carrying out their lawful duties as expressed in the

- Act herein and other relevant legislations yet all the industry players in the public transport industry including the Matatu Owners Association and other related unions support the implementation of the Regulations herein and trust that the same will reduce road carnage.
44. Based on his advocate's advice he deposed that judicial review order of prohibition is not available to the Applicants since the regulations have since been gazette and the same took effect on 11th March 2014 the Court cannot prohibit what has already been implemented. Further an order of certiorari as sought herein is not available to the Applicants since the Regulations have not contravened any law and their formulation was regularly carried out in full compliance of all the legal requirements and procedures and the applicants have not demonstrated any rights and/or legitimate expectation and/or any breach of the rules of natural justice to avail them to the orders sought herein and /or to warrant the issuance of an order of certiorari. To him, the judicial review orders sought herein are against the public interest and the same should not issue for being grossly prejudicial and unfair to the Kenyan citizenry particularly the users of public service vehicles who rely on the government and the authority herein ensure the provision of safe, reliable and efficient road transport services. To the contrary, the import of the judicial review orders applied for herein if the same were to issue is that the Applicant will through the Court process control the operations of road transport and curtail the Authority's efforts at regulating the same with a view of enhancing road safety and reducing road carnage.
45. In deciding to grant the application the Court was urged to consider the efficacy of the said order and take into account the principle of proportionality in order to see where the scales of justice lie and hence the Court ought to safeguard its integrity and the due process by dismissing the application herein with costs to the Respondent.
46. In his submissions **Mr Bitta**, learned counsel for the 1st and 2nd Respondents, the impugned Legal Notice was tabled before the National Assembly. According to him the substance of the present application was the substance of Judicial Review No. 2 of 2014 in which the Respondents were given 60 days to rectify the anomalies therein. However not even 30 days have lapsed hence the Respondents have not been given adequate time within which to address the problems in the manner directed.
47. According to learned counsel it is not true that if the impugned Legal Notice is stayed there would be other Regulations dealing with the public road transport regulating the sector hence if stay is granted the Kenyan public are bound to suffer.
48. On his part **Mr Agwara**, learned counsel for the 3rd Respondent submitted that in JR No. 2 of 2014 the Court found that the laying of the Regulations was mandatory and that was by operation of the law and in order to avoid a situation where there would be no regulations, there was a need for new Regulations hence the reason why Legal Notice No. 219 of 2013 does not depart from Regulations in Legal Notice No. 23 of 2014.
49. It was submitted that the applicants were initially oppose to the regulations enhancing safety during the night travel. It was submitted that apart from the Court finding that Regulation 5(f) of the earlier Regulations ought to be amended, there was no problem with the Regulations and the facts are still the same. With respect to the carriers, it was submitted that there was a meeting in which an extension was sought and as the earlier had been rendered in-operational the same was replaced with a regulation requiring compliance by 15th April, 2014. In his view the applicants are not being forthright as the issue of the carriers was not raised hence the Regulations ought to be allowed to operate.
50. Learned counsel contended that it is not true that these Regulations are provided for in the **Traffic Act** since the provisions of the **National Transport and Safety Act** specifically apply to road safety. It was submitted that the Regulations have substantially reduced accidents. Since the Court considered the Regulations and gave directions with respect to amendments, the errors will be corrected. In his view there is good faith on the part of the Respondents as the Regulations have been laid in Parliament. In his view the Court cannot stay what has been implemented hence the Court ought not to stay the said Regulations at this stage.

Determinations

51. Having considered the application herein the affidavits both in support of and in opposition thereto as well as the submissions, it is important to keep in mind that at this stage of the

proceedings the Court is only concerned with a determination whether or not the leave granted herein ought to operate as a stay of the decision in question.

52. The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously. What then are the circumstances under which the Court may grant a direction that the grant of leave do operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise? Order 53 Rule 1(4) of the *Civil Procedure Rules* provides:

The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.

53. Where, however, the decision sought to be quashed has been fully implemented leave ought not to operate as a stay. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**
54. This position arises from the fact that once a decision has been implemented stay is no longer efficacious as there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted.
55. However it was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** that in an application for leave to apply for judicial review and stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review. Therefore where the outcome of the judicial review might be contrary to the conclusion reached by the body or person whose decision is challenged, stay of proceedings should be granted as it might lead to an awkward situation where a decision which ought not to have been made has been concluded.
56. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the *ex parte* applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

57. In this case, it is contended that the impugned Legal Notice has been implemented hence there is nothing capable of being stayed. In my view, it is only where the decision in question is complete that the Court cannot stay the same. However where what is sought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings. In criminal proceedings for example the mere fact that the proceedings are ongoing does not bar the Court from staying the same at any stage of the proceedings before they come to an end. Accordingly since what is sought to be stayed is the implementation of Regulations which are being implemented daily this Court still has the jurisdiction to suspend the further operation thereof.
58. It was further contended that since the applicants are seeking similar orders in Judicial Review Application No. 2 of 2014 this matter is *sub judice* and ought not to be granted. It is correct that there was an application pending in Judicial Review Application No. 2 of 2014 seeking the stay of

Legal Notice No. 23 of 2014. However for the doctrine of *sub judice* to apply one of the conditions is that the Court seised of the earlier matter ought to be competently seised of the same matter. That judicial review application No. 2 of 2014 was substantially determined is not in question. Under Order 53 rule 1(4) of the **Civil Procedure Rules** the Court is only empowered to stay proceedings in question. In my view there are no pending proceedings in Judicial Review No. 2 of 2014 which are being questioned since Legal Notice No. 219 of 2013 which was being questioned was revoked by Legal Notice No. 23 of 2014 hence the Court is no longer competent to grant the stay therein. In any case **Mr Kinyanjui** intimated to the Court that he was no longer keen in pursuing the said order. Accordingly, I find that the doctrine of *sub judice* does not apply to these proceedings.

59. It is clear that in Judicial Review Application No. 2 of 2014, this Court expressly found that certain provisions of the earlier Legal Notice were ultra vires Acts of Parliament. In my view once the Court finds that a particular subsidiary legislation is ultra vires, it does not become intra vires simply because it is reintroduced by another or subsequent subsidiary legislation. It would still be ultra vires.

60. In the said decision this Court *inter alia* held as follows:

“Regulation 16 on the other hand prescribes a fine of not exceeding Kshs 50,000.00 or a term of imprisonment of not more than one year or both. Clearly Regulation 16 is *ultra vires* the provisions of section 24(5) aforesaid and to that extent the said Regulation is null and void.....With respect to the validity of the applicants’ licences, section 61 of the Act provides as follows:

All directions, orders and authorizations given, or licenses or approvals issued, or registrations made by the Transport Licensing Board and subsisting or valid immediately before the appointed day, shall be deemed to have been given, issued or made by the Authority as the case may be, under this Act.

In my view, the effect of this provision was to preserve the existing directions, orders and authorisations given, or licences or approvals issued, or registrations made by the Transport Licensing Board subsisting or valid before the appointed day. This provision in my view was meant to ensure smooth transition between the old order and the new order with minimum disruption of the transport services in the country. Any Regulation which is inconsistent with the said section or whose effect is to vary the same would not only be unreasonable but also *ultra vires*. It would be unreasonable because its effect would be to bring the transport services in the country to a standstill by abruptly cancelling all subsisting licences. I do not agree with the position advanced by the Respondents that since the said section appears in the transition part of the Act, it would only subsist pending the promulgation or enactment of the Regulations. If that was the intention the section ought to have expressly provided so. To construe the said section in the manner suggested would amount to subjecting the provisions of the Act to the Regulations and that would be contrary to section 24(2) and 31(b) of the *Statutory Instruments Act* and the *Interpretations and General Provisions Act* respectively.....Therefore if it was intended that the Regulations were to vary or cancel the conditions attached to the subsisting road service licences the Respondents were obliged to do so fairly in compliance with the provisions of Article 47 of the Constitution. Therefore if the effect of the Regulations is the cancelling the applicants’ valid and subsisting licences without the same being validly and legally cancelled the Regulations would, to that extent be invalid. I..... have no hesitation in finding that the Cabinet Secretary acted *ultra vires* his powers in prescribing the brands of speed governors. In my view the requirement for certification from the specified agencies provided sufficient safeguards for ensuring that the speed governors in use met the requisite standards..... Regulation 5(1)(f) is hereby struck down as being retroactive, unreasonable and *ultra vires* the said Act.”

61. As I have held hereinabove once a Court holds that a particular provision is null and void the same remains so and it does not matter whether the same is introduced in another piece of legislation.

62. In this case Regulation 16 in the earlier Legal Notice was introduced in the impugned Legal

- Notice as Regulation 15(1). Regulation 5(f) on the other hand remained unchanged. As the two Regulations were expressly declared null and void, that remains the position. Accordingly, the said Regulations are stayed. It follows that similarly any provision or form which purports to prescribe brands of speed governors as opposed requisite standards is similarly unlawful.
63. In the said Judgement I also held that if the effect of the Regulations is the cancelling the applicants' valid and subsisting licences without the same being validly and legally cancelled the Regulations would, to that extent be invalid. The Court, however in determining the nature of the orders to grant must take into account the principle of proportionality. It was due to that consideration that I expressed the view that to declare the Regulations invalid would have the effect of exposing Kenyans to unsafe and unregulated mode of public transport and that would be contrary to the Court's mandate of upholding the dignity of the same people the Court is meant to protect. The Applicants have however contended that there is no such possibility since the provisions of the **Traffic Act** adequately cater for what is provided for in the impugned Regulations. That however is a matter which will have to await the hearing of the substantive motion. If the Regulations are replicated in the Act, no advantage will be gained by staying the Regulations wholly.
64. On that basis I suspended this declaration for 60 days. Though the said Regulations have now been quashed the said 60 days are yet to run out and the need to safeguard the public still exists. The applicants have however, contended that the Respondents have not commenced the process of engagement of the stakeholders and the public with a view to bringing the Regulations in line with the spirit of the Constitution. I am prepared to give the Respondents the benefit of doubt. This is however not to be taken as a sign of complacency on the part of the Court. The Respondents ought to take the sentiments of this Court in Miscellaneous Application No. 2 of 2014 seriously otherwise they will have themselves to blame for the failure to heed this Court's pronouncements. Therefore at the expiry of what remains of the said 60 days the declaration with respect to the validity of the applicants' licenses will immediately take effect unless otherwise ordered.
65. It is however contended that the effect of Regulation 11 is to infringe upon the freedom of those with disability to move with their gears such as wheelchairs since the same can only be carried on the carriers. That such wheelchairs in effect constitute their mode of mobility is not in doubt. To compel them at this stage to secure two separate modes of transport may well be discriminatory. This position was not seriously contested. In my view by providing in Regulation 16 that Regulation 11 of the impugned Regulations would come into operation on 15th April, 2014, the Respondents must have been cognisant of the fact that the said Regulation 11 due to its inherent difficulties could not be effected immediately. That the Respondents recognised that some of the provisions in the Regulations may not be capable of immediate realisation is further confirmed by Regulation 5(2)(b) which gives the 3rd Respondent discretion to "*issue a licence conditional on the requirement that the applicant demonstrates compliance within a stipulated period failing which the licence shall be withdrawn upon the expiry of the stipulated period.*" Accordingly Regulation 11 of the impugned Legal Notice No. 23 of 2014 is hereby stayed pending the hearing and determination of the substantive Notice of Motion or until further orders of the Court.
66. In this determination I have deliberately refrained from dealing with the issue whether or not the requirement for tabling of the Regulations in Parliament necessitated that the same be tabled before both Houses and whether that requirement was complied with as to determine the same would have the effect of determining the issues in the Motion at this stage. Accordingly the determination of that issue will have to await the hearing of the Motion.
67. The costs of this application shall be borne by the Respondents in any event.

Dated at Nairobi this 14th day of April 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kinyanjui for the applicants

Mr Agwara for the 3rd Respondent