



No. 26

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 15 OF 2014**

**IN THE MATTER OF: AN APPLICATION BY LUCY NYOKABI NYAMBURA AND 12  
OTHERS UNDER ARTICLE 22 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLE 22, 23, 27, 36, 40 AND 165 OF THE  
CONSTITUTION OF KENYA**

**LUCY NYOKABI NYAMBURA AND 12 OTHERS VERSUS HON. ATTORNEY GENERAL  
AND 2 OTHERS**

**AND**

**PETITION NO. 16 OF 2014**

**IN THE MATTER OF: CONTRAVENTION OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED BREACH/INFRINGEMENT OF RIGHTS AND  
FUNDAMENTAL FREEDOMS**

**AND**

**IN THE MATTER OF: ARTICLE 3, 10, 19, 20, 21, 22, 23, 27, 40, 46, 47, 165, 258 AND 259 OF  
THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE TRAFFIC ACT CHAPTER 403 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSALS ACT NO. 3 OF  
2005**

**KENYA TRANSPORT ASSOCIATION LIMITED VERSUS CABINET SECRETARY  
TRANSPORT AND INFRASTRUCTURE AND OTHERS.**

**RULING**

1. This is a consolidated ruling in the two applications made in Petitions nos. 15 and 16 of 2014, respectively by Chamber Summons dated 27<sup>th</sup> March 2014 and Notice of Motion dated 31<sup>st</sup> March 2014, for purposes only of the applications for adjournment made on the 1<sup>st</sup> April 2014 in the two matters. The applications for adjournment raised the same questions of law and fact and were argued consecutively in the same order as listed above.
2. The principal order sought by the two applications is a conservatory Order staying, suspending and postponing implementation by the Respondent's Legal Notice No. 217 of 16th December, 2013 the *National Transport and safety Authority (Operation of Public Service Vehicles) Regulations 2013*. In addition, on account of the number of interested parties, the petitioner in Petition No. 16 of 2014 sought an order that 'Service of the Application, Petition, Affidavit in support and Order herein be by Notice to be advertised once in the Standard Newspaper.'
3. The respondents sought adjournment to enable them to prepare to respond to the applications in accordance with their right to fair hearing. The petitioner did not object to the adjournment but sought the grant of the conservatory order in the meantime. The respondents protested that the conservatory order may not be given without their being given an opportunity to be heard and indicated that should their application for adjournment be refused they would be ready to urge their opposition to the grant of the order. They cited the petitioners' delay in coming to court since the regulations were gazetted in December 2013 and emphasized the public interest in the enforcement of the rules which they said were calculated to enhance road safety.
4. The objection as to delay is not well founded because on the doctrine of ripeness, the petitioners may not have come to court earlier as the regulations, although published in December 2013, could only come into effect upon their tabling in the National Assembly which occurred in the past fortnight.
5. It is true that the court has jurisdiction to grant conservatory orders even at ex parte stage if cause is shown of immediate and grave danger or injury or threatened injury of applicants' rights or interests. The jurisdiction is recognized in the scope of remedies under Article 23(3) of the Constitution and rule 23 of the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013***, [Mutunga Rules].
6. However, the practice of hearing the respondent even on applications that may be heard ex parte, as they are sometimes called - opposed ex parte applications - is salutary and must be encouraged. It gives opportunity even if not ample, for the respondent to contest the application through grounds of objection on fact and or law, or, as may be possible within the short notice, by affidavit in reply. It also gives a forum for possible settlement between the parties or for negotiated terms of order. Parties upon whom such urgent applications are served on the orders of the court must understand the circumstances of matter and the extra dispatch that it calls for in the preparation of an answer to the applicants claim to facilitate the *inter partes* hearing on the basis of the urgency shown.
7. In an application for conservatory order, the applicant must demonstrate an urgent and compelling need or interest to be protected by the conservatory order as against the interest of the respondent in the subject matter of the proceedings. In balancing of rights and interests of the applicants and the respondent, if the applicants' interest outweighs that of the respondent the conservatory orders may be granted. If the respondent's interest outweighs the applicant's interest which is sought to be protected, the conservatory orders shall not be granted. In the matters before the court there is on the one side of the scales the acknowledged public interest in road safety with numerous deaths and injuries being reported on our roads every so often. On the other side of the scales, it is sought to be counterbalanced by the applicants' interest in maintaining their commercial operations.

8. Weighed against the road safety goal, the profiteering concerns must yield, at least in the period before the matter is fully canvassed *inter partes*. Counsel for the applicants sought draw a nexus between dangers to road safety and the improper fitting of the speed gadgets by unqualified personnel of which the petition complains. That is an indirect interest; the true motivation of the petition is the probable loss of manufacturer's warranty in the event of tampering with the motor vehicles during installation of the speed gadgets.

9. The applicants' interests being monetary in nature are outweighed by the respondents' interest in the need to preserve lives through improved safety on the roads. Accordingly, the applications will be scheduled for hearing on the basis of urgency already shown by the coming into effect of the regulations sought to be suspended. The conservatory orders are declined, in the public interest concern for road safety sought to be enhanced by the regulations.

10. Accordingly. I grant the adjournment sought by the respondents and, on the basis of urgency shown, the applications in the two petitions will be heard on a date to be fixed in consultation with the parties within seven days.

11. The court process in Petition No. 16 of 2014 may, in view of its numerous interested parties, be served through advertisement in two daily newspapers on a working day of the week at least three days before the hearing date.

**Dated and delivered this 2<sup>nd</sup> day of April, 2014.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Omwenga for Mr. Mogaka for Petitioners in Pet. No. 16/2014

Mr. Ratemo for Petitioner in Pet. No. 15 /2014 for the

Mr. Eredi for the 1<sup>st</sup> Respondent

Mr. Ndegwa for the 2<sup>nd</sup> Respondent

No appearance for the Interested Parties

Miss Linda - Court Assistant