REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. 2 OF 2014

IN THE MATTER OF AN APPLICATION

FOR JUDICIAL REVIEW ORDERS OF PROHIBITION & CERTIORARI

AND

IN THE MATTER OF LEGAL NOTICE NO. 219 OF 2013

(THE NATIONAL TRANSPORT AND AUTHORITY (OPERATION OF PUBLIC SERVICE VEHICLES) REGULATIONS, 2013)

AND

IN THE MATTER OF THE NATIONAL TRANSPORT AND SAFETY AUTHORITY ACT, (ACT NO. 33 OF 2012)

AND

IN THE MATTER OF THE NOTICE OF DECEMBER 25TH, 2013 IN *THE DAILY NATION* NEWSPAPER OF DECEMBER 27TH, 2013

AND

IN THE MATTER OF THE TRAFFIC CAP 403, LAWS OF KENYA

AND

IN THE MATTER OF A JUDICIAL REVIEW APPLICATION BY:

KENYA COUNTRY BUS OWNERS' ASSOCIATION

(Through PAUL G. MUTHUMBI – CHAIRMAN,

SAMUEL NJUGUNA – SECRETARY,

JOSEPH KIMIRI – TREASURER)…........……...……..……1ST APPLICANT

MBUKINYA BUS SERVICE (KENYA) LTD………...……...2ND APPLICANT

CROWN BUS SERVICE LTD…....……………….……......3RD APPLICANT

KAMPALA COACHS LTD……….........………...…..…....4TH APPLICANT

TRATICOM ENTERPRISES LTD…......................….…….5TH APPLICANT

UGWE BUS SERVICES LTD…………………...…...…..6TH APPLICANT

TRISHA COLLECTIONS LTD…...............................……...TH APPLICANT

PANTHER TRAVELS LTD…...............................….…...8TH APPLICANT

NENO COURIER SERVICES LTD……....................….…..9TH APPLICANT

VERSUS

CABINET SECRETARY FOR

TRANSPORT & INFRASTRUCTURE………...………..1ST RESPONDENT

PRINCIPAL SECRETARY -

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

THE NATIONAL TRANSPORT

& SAFETY AUTHORITY…...3RD RESPONDENT

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

THE TRAFFIC COMMANDANT……………....……….5TH RESPONDENT

THE HONORABLE ATTORNEY GENERAL..…..…….6TH RESPONDENT

CONSOLIDATED WITH MISCELLANEOUS APPLICATION NO. 464 OF 2013

BETWEEN

REPUBLIC…………………………………………………….APPLICANT

VERSUS

THE CHAIRMAN, NATIONAL TRANSPORT

AND SAFETY AUTHORITY…………………...…...1ST RESPONDENT

CABINET SECRETARY FOR TRANSPORT…......…2ND RESPONDENT

INSPECTOR GENERAL OF POLICE………………..3RD RESPONDENT

TRAFFIC COMMANDANT……………….……..…....4TH RESPONDENT

RULING

1. On 14th April, 2014, I made a decision in this matter in which I expressed myself as follows:

   "I have considered the actions of the 1st respondent herein and I am of the view that this is a proper case in which the 1st Respondent ought to be called upon to show cause why the costs of this application ought not be placed squarely on his shoulders rather than the tax payers of this country who are already reeling under the weight of harsh economic times. The principle of accountability mandates that State and public officers be prepared to face the consequences of their actions when such actions are manifestly taken with impunity and *mala fides*. It is only when such officers are personally made to take the responsibility for their actions that the rule of law shall be upheld. The Courts in my view have a duty and a responsibility to ensure that the public does not suffer at the expense of actions or inactions of officers deliberately designed to bring judicial process into disrepute and turn Courts of law into circuses. To blatantly and brazenly disregard legal processes or to turn them into a mockery in the execution of executive authority is in my view an affront to the rule of law, an assault on the Constitution and constitutionalism and a recipe for chaos and anarchy. Courts of this country will not sit back and watch as the country slowly slides into lawlessness by way of scurrilous disparagement of its processes and decisions. Whereas public and State Officers have a duty to protect the public they have no right and authority to do so unlawfully. The protection of the public must be done in accordance with the law as laid down in the Constitution and the existing legislation….In exercising its judicial authority, this Court is enjoined by Article 159(2)(e) of the Constitution to be guided by *inter alia* the need to protect and promote the purpose and principles of the Constitution and one such principle is good governance. Good governance in my view dictates that the public ought not to unduly shoulder the burdens of persons whose actions are themselves contrary to their expectations….Therefore in order to maintain the dignity of this court as the temple of justice as well as in compliance with the rules of natural justice the order that commends itself to me is that the 1st Respondent be and is hereby called upon to show cause why the costs of this application cannot be borne by him personally. This action is not intended to send shivers down the spines of State and public officers but to ensure that the national values and principles of governance as engraved in the Constitution are upheld and adhered to at all times."

2. Accordingly, as is the practice where the Court directs that costs be paid by an officer or an advocate of a party to the proceedings personally, I directed the 1st Respondent to show cause why he ought not to be held personally responsible for the costs incurred in these proceedings.
3. On 13th May 2014, the 1st Respondent, **Eng. Michael S M Kamau** filed an affidavit sworn the same day in which he deposed that he revoked Legal Notice No. 219 of 2013 upon being informed by his Principal Secretary that the said Regulations may not have been submitted to Parliament within the time prescribed hence the same were null and void. He accordingly, in good faith, promulgated new Regulations in consultation with the Office of the Attorney General who approved the same with no reason to believe that the same were contrary to any law and while unaware that this Court had heard the case to conclusion and was in the process of writing its ruling. According to him the omission to disclose to the Court and counsel on record for the respondents the gazettement of Legal Notice No. 23 of 2014 was inadvertent as he had no reason to undermine the legal process.
4. It is trite that in order to safeguard and preserve the dignity and authority of the Court, the Court has powers to make any necessary orders which in my view include an order that a particular

public or state officer whose conduct the Court finds reprehensible pays the Costs of litigation. Such decision, however, is an exception to the general rule and the jurisdiction to do so is not to be invoked lightly. It is only to be made where the Court is convinced that the action taken by that officer was taken with impunity in disregard of the consequences. In **Truth, Justice and Reconciliation Commission vs. The Chief Justice of the Republic of Kenya & Bethwel Kiplagat Nairobi High Court Judicial Review Case No. 7 of 2012**, **Warsame, J** (as he then was) while dismissing the application opined that exemplary costs as a deterrent against frivolous and vexatious public interest litigation must be a mechanism which can be employed to ensure public resources are not wasted on frivolous and useless litigations. The learned Judge held that it is depressing to note that on account of such cases innumerable days and time are wasted which would otherwise have been spent on disposal of cases by genuine litigants with matters which are dear to them rather than for meddlesome interlopers having absolutely no grievances for personal gain or as a proxy of others or for extraneous motivation who break the queue by wearing a mask of public interest litigation. This according to the learned Judge wastes valuable time of the Court as a result of which genuine litigants standing outside the court in a queue that never moves thereby creating and fomenting public anger, resentment and frustration towards courts resulting in loss of faith in the administration of justice. The learned Judge in the circumstances of that case proceeded to dismiss the application with costs to be paid by the Commissioners of the applicant personally.

5. Where the action was taken as a result of a *bona fide* mistake or error of judgement on the part of the officer, it is my view that he ought not to be held personally liable. However where from the circumstances it is clear to the Court that the officer took the particular action not caring whether it was wrong or not or for malicious or other extraneous purposes or where the officer deliberately decides not to disclose to the Court facts material to the issue before the Court either with a view to discrediting the legal process or in a manner amounting to playing lottery with the judicial process, the public ought not to be burdened by the consequences of such misadventures. This is reflected in Article 201(d) of the Constitution which provides that one of the principles guiding all aspects of public finance in the Republic is that public money shall be used in a prudent and responsible way.
6. In this case it is my view that the action of the 1st Respondent in revoking the LN No. 219 of 2013 and publishing LN No. 23 of 2014 during the pendency of the judgement in this case, if he was aware of the stage of the proceedings in this case could be deemed to have been intended to render the said judgement inconsequential. The failure to disclose that LN no. 219 of 2013 was nolonger in existence even after the delivery of the judgement would clearly be contrary to Article 10 of the Constitution which stipulates accountability and transparency as some of the values and principles of governance which guide state officers in the conduct of their functions. In my view the people of the Republic of Kenya by adopting and enacting to themselves and their future generations the Constitution and in particular the values and principles of governance in Article 10 wanted to change the way in which all State organs, State officers, public officers and all persons are to conduct themselves while applying and interpreting the Constitution, enacting, applying and interpreting any law and making and implementing any public policy decisions. By specifically enacting that in doing so the principle of accountability must be taken into account, in my view the people of Kenya intended to do away with the culture of impunity. Accordingly with the Constitution came the advent of transparency and accountability so that persons entrusted with decision-making powers must be transparent in, accountable and answerable for their actions personally without subjecting the people to the vagaries of their irresponsible actions which cause loss to the people of Kenya. It is not for nothing that it is therefore provided in Article 73(2) of the Constitution that the guiding principles of leadership and integrity include selfless service based solely on the public interest, demonstrated by honesty in the execution of public duties and accountability to the public for decisions and actions. As was pronounced by the Supreme Court in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR:**

"No State agency, especially where it is represented by one person, should overlook the historical trajectory of the Constitution, which is clearly marked by transition from narrow platforms of ideosyncrasy or sheer might, to a scheme of progressive, accountable

institutional interplays…The Constitution of 2010 was a bold attempt to restructure the Kenyan State. It was a radical revision of the terms of a social contract whose vitality had long expired and which, for the most part, was dysfunctional, unresponsive, and unrepresentative of the peoples' future aspirations. The success of this initiative to fundamentally restructure and reorder the Kenyan State is not guaranteed. It must be nurtured, aided, assisted and supported by citizens and institutions. This is why the Supreme Court Act imposes a transitional burden and duty on the Supreme Court. Indeed, constitutional relapses occur in moments of social transition, when individual or institutional vigilance slackens. The Supreme Court has a restorative role, in this respect, assisting the transition process through interpretive vigilance. The Courts must patrol Kenya's constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order."

7. To penalise the public for such action would be to cultivate and abet the culture of impunity on the part of the public officers. Similarly where a public officer takes an action which is clearly meant to demean or bring judicial process into disrepute he ought to personally shoulder the consequences since such action cannot be said to have been taken on behalf of the public from whom the judiciary derives its mandate.
8. It was argued on behalf of the 1st Respondent that the 1st Respondent is a layman in matters of the law. That may be so. However, the 1st Respondent was represented in these proceedings by very competent lawyers. It was the duty of his legal advisers, taking into account the seriousness of these proceedings, to appraise him of the stage at which the proceedings were. The 1st Respondent was represented in these proceedings by a State Counsel from the Attorney General's office. It is the same office which he avers approved his new Regulations. Whereas the Court appreciates that the departments may have been different, one would have expected that in approving the new Regulations the said office would have exercised due care and diligence to inquire as to the status of the pending proceedings so as to give a holistic opinion.
9. If, however, the 1st Respondent did not disclose the existence of legal proceedings to that department then he took a calculated risk and if it boomeranged on him, he would have himself to blame since that would either be very casual in the manner in dealing courts proceedings or evidence of dishonourable motive to frustrate the judicial process. To act in such a manner would inevitably demean and embarrass the administration of justice. It is not a reputable thing at all; it brings disrepute to the administration of justice. It confers neither honour nor solace. It is an affront to the rule of law. To do so is to violate the values and principles of governance which bind state officers. In such event the Court would not only be entitled to but would be obliged, in order to uphold its dignity and protect the Constitutional provisions, to take such steps as would ensure that Constitutional provisions are adhered to. It has been said time and again that the Constitution is neither a toothless bulldog nor a collection of pious platitudes. See **Marete vs.Attorney General [1987] KLR 690**.
10. This principle is well depicted in the words of **Mahomed, AJ** in the Namibian case, **S vs. Acheson, 1991 (2) SA 805 (NM)** as follows:

"The law requires me to exercise a proper discretion having regard, not only to all the circumstances of the case and the relevant statutory provisions, but against the backdrop of the constitutional values now articulated and enshrined by the Namibian Constitution of 1990. The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation…"

11. The need for adherence to the rule of law was made succinctly put by **Emukule, J** in **Republic vs. Kombo & 3 Others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 [2008] 3 KLR (EP)**

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"The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong...or which infringes a man's liberty...must be able to justify its action as authorised by law – and nearly in every case this will mean authorised directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard."

12. As was held by **Musinga, J** (as he then was) in **Robert Kisiara Dikir & 3 Others vs. The Officer Commanding Keiyan General Service Unit (GSU) Post & 3 Others Kisii HCCP No. 119 of 2009**, if we show disrespect to the supreme law of the land, casual observance or breach with impunity by the Government or its servants and fail to punish or penalise those who violate important provisions we, as the temple of justice, will be encouraging such violation.
13. I wish to associate myself with the position taken by **Hewett, J** in **Samuel Karuga Koinange vs. Bullion Bank Ltd. Nairobi (Milimani) HCCC No. 951 of 2000** that misleading the Court is an abuse of the process of the Court and something that the Court will to not tolerate with impunity. Where such dishonourable conduct is traced to a State Officer, the consequences are even greater. The Court would particularly be less sympathetic to persons who swear to protect and defend the Constitution and thereafter violate the same with impunity. Our Constitution is still in its infancy. To violate it at this stage in my view amounts to defiling the supreme law of the land and that cannot be countenanced by any Court of law.
14. I have considered the contents of the affidavit sworn by the 1st Respondent and in particular the fact that he has feigned ignorance of the stage at which the proceedings had reached and further his averment that his action was not meant to undermine the legal process. Whereas he cannot be totally exonerated from blame, taking into account the drastic nature of the orders herein I am prepared, reluctantly though, to accept that his actions were as a result of either misinformation or failure to bring himself up todate on the progress of the court proceedings. Therefore his conduct, though deplorable, disgraceful and distasteful ought not, in the circumstances of this case to invite such drastic orders. This ruling however ought to act as a notice to public officers that Court proceedings and orders ought to be taken seriously and that it is their constitutional obligation to ensure that they are regularly appraised of the state of such proceedings undertaken by or against them or on their behalf and orders given by the Court and the Court will not readily accept as excusable the fact that they have delegated those duties to their assistants. Where there are pending legal proceedings they ought to secure proper legal advice from the Government's Chief legal advisers before taking any steps which may be construed as an affront to the Court process or which is calculated to demean the judicial process and bring it into disrepute.
15. In the unique circumstances of this case the costs of the Respondents in both matters shall be borne by the 1st, 2nd and 3rd Respondents in their official capacities.

Dated at Nairobi this 27th day of May 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kinyanjui for the Applicants

Prof. Muma for Mr Agwara for the 3rd Respondent

Mr Bitta for the 1st, 2nd, 4th, 5th and 6th Respondents

Cc Kevin