



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO.234 OF 2014

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI, MANDAMUS AND PROHIBITION**

AND

IN THE MATTER OF LEGAL NOTICE NO. 217 OF 2013

IN THE MATTER OF THE TRAFFIC ACT, CAP 403

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL, REVIEW ORDERS

BETWEEN

REPUBLIC

VERSUS

CABINET SECRETARY FOR TRANSPORT &

INFRASTRUCTURE..... 1ST RESPONDENT

PRINCIPAL 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

DIRECTOR OF MOTOR VEHICLE

JUDGEMENT**Introduction**

1. By a Notice of Motion dated 18th June, 2014, the applicants herein seek the following orders:
 1. **That by way of judicial review, an order of prohibition do issue, prohibiting the Respondents or any person acting under their behest, and in purported enforcement of Legal Notice 23 of 2014 from unlawfully, removing, detaining and confiscating the Ex parte Applicant's Public Service Vehicles and number plates thereof, which PSVs are duly licences to carry passengers.**
 2. **That by way of Judicial Review, an order of prohibition do issue, prohibiting the Respondents or any person acting under their behest from demanding, directing, insisting upon, or ordering that the Ex parte Applicants comply with any aspect of Legal Notice 217 of 2013 in regard to their public service vehicles.**
 3. **That by way of Judicial Review, an order of certiorari do issue, to remove to this honourable court for purposes of being quashed, and to forthwith quash Legal Notice 217 of 2013, published on 17th December 2013.**
 4. **That by way of Judicial Review, an order of mandamus do issue, compelling and directing the 3rd Respondent and 7th Respondents to forthwith release, to the Ex parte Applicants the number plates for the Ex parte Applicants' buses as specified in their respective verifying affidavits.**
 - 5 **The costs of this application be to the Ex parte Applicants in any event.**
2. The application was substantially supported by a verifying affidavit sworn by **Paul G. Gathumbi**, the Chairman of the 1st Applicant herein on 13th June, 2014.
3. According to the deponent, the 1st Applicant's claim against the Respondents is levied in this representative capacity and the benefit of its members, in defence of their (public service vehicle operators') legal and Constitutional rights to fair, just, and lawful administrative actions in respect to their stated business as averred in these proceedings in particular reference to the actions of the Respondents to maliciously, unlawfully and unjustifiable interfere with the running of the Ex Parte Applicants' businesses and the illegal plucking off the buses operated by the Ex Parte Applicants as well as the impugned Legal Notice 217 of 2013 affecting the Ex Parte Applicants' business.
4. It was deposed that the 1st Applicant's members possess public service vehicles (Buses) duly licensed as such to operate as passenger cargo/courier carriers within Kenya and in some instances (such as Kampala Coach and the 3rd Applicant, Panther Travels Ltd.) across Kenya-Uganda territory. The deponent however clarified that he was the chairman of Mbukinya Bus Service, the 2nd Applicant herein, and he had equally lodged his claim on behalf of the 2nd Applicant.
5. According to him, the 1st Applicant's members are aggrieved by:
 - a) The 1st Respondent's insistence that no PSV bus owned by the Ex Parte Applicants will operate at night between the hours of 9.00p.m. and 6.a.m. on any day without his personal sanction and authority, yet he has no such powers outside the prescription of the law, as the applicants possess valid TLB licences which on full hearing of the merits of the case, this Honourable Court in Judicial Review Case No.2 of 2014 has recognized.

- b) Absent compliance with the provisions of the National Transport and Safety Authority Act, the 1st and 3rd Respondents have no right in law to discriminate against the applicants duly licensed PSV operators and proceed to grant “exclusive licenses” to 7 bus companies for “night travel” between 9.00p.m. and 6.00a.m.
- c) Legal Notice No. 217 of 2013, which was published on 17th December 2013 by the 1st Respondent has specifications of 2 speed governor brands that this court has outlawed by its judgement in Judicial Case No. 2 of 2014.
- d) The Respondents continue to demand and enforce the said Legal Notice 217 of 2013 claiming no specific order of quashing the said Legal Notice has ever issued and that hence we must comply with its demands. The Court’s Orders must not be seen to be in vain, hence the plea sought herein in regard to the said Legal Notice 217 of 2013.
- e) The unilateral, illegal and unconstitutional ban of night travel by the applicants’ buses (long distance PSV buses) via an oral “roadside” directive that was made on December 25th 2013 by the 1st Respondent, announced by the 2nd Respondent, and executed by the 5th Respondents and to date upheld the officers of the 5th Respondent was based on Legal Notice 219 of 2013 which was quashed by this court on 14th April 2014 in JR 2/2014.
- f) The 3rd Respondent’s Transport License Application form which all PSV operators including the Applicants must fill, titled “OPERATION OF PUBLIC SERVICE VEHICLES REGULATIONS, 2013 APPLICATION FOR LICNCE” be quashed for being *ultra vires* and unconstitutional, as it contains unconstitutional and illegal demands.
- g) The stoppage of the Ex Parte Applicants buses for “inspection” by the 3rd Respondent while they are on the road ferrying passengers who are exercising their right to freedom of movement cannot be done by the 3rd Respondent’s personnel alone but must be by law done by a police officer in uniform.
- h) The Ex Parte Applicants buses have been unceremoniously and illegally stopped, without as much as stating the reason for their actions, the officers of the 3rd Respondent driving their “NTSA” branded vehicles have been stooping these buses and illegally plucking off number plates.

6. The deponent deposed that he was shocked and dismayed when he was informed by his drivers that while his duly licensed buses KBR 166B, KBT 207U, KBJ 659R, KBH 240V, and KBX 217K, were operating on their designated routes persons who were from a 3rd Respondent’s branded vehicle stopped them and unceremoniously proceeded to remove the number plates thereto without being given any notice in writing or reason in writing for the said action. Further, no opportunity was accorded to his company the 2nd Applicant or indeed the other Applicants to demonstrate to the Respondents that indeed the 2nd Applicant is to date validly licensed to conduct and execute lawful night travel as such PSV operators as envisaged under section 61(1) of the *National Transport and Authority Act*, (Act No. 33 of 2012). In his view, since their TLB licenses subsist and are still operative to date, the removal of their bus number plates merely because they are operating as expected is capricious. To him, the 1st, 2nd and 3rd Respondents sought to uphold and abide by Article 47(1) of the constitution in regard to effecting of the impugned PSV night travel ban through the said act of removing their bus number plates, the 1st and 2nd Applicant for their part could have amply demonstrated that there is no lawful reason for the said arbitrary act since they possess (to date) valid TLB licences duly recognized as valid and lawfully issued by a competent authority, by operation of the applicable law.

7. The deponent further averred that to date none of the Applicants’ PSV licenses hitherto issued to his company by the 3rd Respondent’s predecessor, (TLB, Transport Licensing Board) have been

suspended, revoked, or otherwise nullified hence the act of arbitrarily removing off and detaining their bus number plates is therefore illegal and totally unjustifiable. To him whereas the law directs the 3rd Respondent in mandatory terms to give the specific members of the 1st Applicant affected and the 2nd Applicant reasons in writing on the revocation or suspension of their PSV licences, and for the issuance of a prohibition order under section 106(6) of the *Traffic Act*, to date no such compliance or attempted compliance has been effected by the 3rd Respondent, in spite of the applicants' requests for compliance.

8. It was contended that notwithstanding the fact that no such formal revocation or suspension of the applicants' subsisting PSV licenses or prohibition orders in respect of the specified buses had been made by the 3rd Respondent, the officers of the 4th Respondent under the behest of the 5th Respondent concerned with public transport and traffic matters have adamantly refused the applicants the right to the enjoyment and benefit of the proprietary interest they have over and in the already paid and issued TLB licences. In his view, absent any specific action or express communication from the 1st, 2nd and 3rd Respondents that these subsisting and valid TLB licenses which they we held had been suspended or revoked, they had no basis to invoke the other law except to move to court for redress.

9. The deponent asserted that Section 106(4) of the *Traffic Act* must be read with Section 58 of the *Traffic Act*, Cap 403, and in the result no detention of number plates of the Applicants' vehicles can validly or lawfully subsist as long as a certificate of compliance has been issued subsequent to an allegation of breach of Section 55 or 56 of the *Traffic Act*.

10. The deponent believed that by reason of this non-compliance, the number plates of the Applicants' vehicles (for the 1st Applicant's number Crown Bus Ltd, KBE, 390V (40 seater plying the Mombasa-Mumias Route), and for the 2nd Applicant Mbukinya Bus Service Ltd, registration nos. KBR 166B, KBT 207U KBJ 659R, KBH 240V, and KBX 217K, and 3rd Applicant's buses registration KBX 930R, KBX 931R and KBX 307D) were being unlawfully detained by the 3rd Respondent or indeed the 7th Respondent at the behest of the 1st Respondent. He was therefore dismayed that no Order had issued from any competent court pursuant to Section 58(3)(a) of the *Traffic Act*, directing the 3rd Respondent herein or its Director General to detain the said Ex parte Applicants' vehicle's number plates hence the purported detention of these plates was manifestly illegal and without justification in law, calling for this court's intervention.

11. It was the deponent's case that these were pilling on them on account of the illegality perpetrated and the inability to do business without harassment and that it was not the first time that the 1st, 2nd and 3rd Respondents were acting with such crass impunity, causing them a lot of financial losses that cannot be fully computed. He expounded that on 24th March 2014 the officers of the 3rd Respondent caused the forcible unlawful removal of the roof top carriers of the 2nd Applicant at Kenya Railways and took them to Nairobi Area Traffic yet Rule 61(1) (a) of the *Traffic Rules* exist to permit the said roof top carriers. Even, if the roof top carriers were being removed pursuant to Legal Notice 23 of 2014 (whose validity and legality is questioned in a different proceeding, and which is denied in any event), the manner of removal of number plates is prescribed in very elaborate terms by the law and the 3rd Respondent cannot act outside thereof to justify its illegality. He therefore believed that this was an act amounting to abuse of power and a violation of Article 232(1)(a) of constitution and in spite of the court having clearly expressed itself in this matter of the applicants' TLB licenses in Judicial Review Case No. 2 of 2014, still the Respondents acted unlawfully to remove the applicants' buses' number plates without due process.

12. According to the deponent, he believed that the said action was motivated by an intent to obstruct justice, and the timing was clearly intended to frustrate this court's findings on the illegality of Legal Notice 219 of 2013 they complained of in Judicial Review Case No. 2 of 2014 and the order on the resumption of the validity of their TLB licenses. Since then, the 1st Respondent has turned to allege that he never has such "night ban" directive, and that he has licensed, in conjunction with the

3rd Respondent, 7 buses exclusively to operate at night, but which list excludes the applicants. In the deponent's view, the 1st Respondent's conduct whichever he elects to interpret the effect of his impugned Regulations in Legal Notice 23 Of 2014 the effect is that the applicants' buses cannot travel at night which is an illegal and draconian decision not backed by law since there was not a single regulation or rule subsisting to block them from enjoying the full and effectual application of the applicants' TLB licenses lawfully issued to them and urged this court to grant their motion dated March 20th 2014 and the Judicial Review Notice of Motion orders they sought in these proceedings.

13. In the deponent's view, without issuing any written reason, believe that the 3rd Respondent's act by its officers and the behest of the Director General to pluck off and unlawfully detain the Ex Parte Applicants' duly licensed PSV buses' number plates, under the guise that their buses are in breach of a non-existent and already declared void Legal Notice 219 of 2013, and other unspecified demands was unlawful and the provisions of Article 47(1) of the constitution of Kenya, were thereby violated. As there were no reasons in writing given for the arbitrary actions complained of, in spite of the Ex Parte Applicants specifically requesting for the reasons in writing, the Respondents cannot benefit from their unlawful acts in the name of "enforcing the law".

14. He further noted that the 3rd Respondent's employees were using branded "NTSA" vehicle and without the company of police officers who were on a daily basis menacingly threatening the Ex Parte Applicant' members bus drivers who operate between 9.00p.m and 6.00a.m and resorted to stopping and plucking off the Ex Parte Applicants' specified buses number plates subject of these proceedings in violation Section 42(1) of the *National Transport & Safety Authority Act* yet this court stated by its order of April 14th 2014 in Judicial Review Case No. 2 of 2014 that the Respondents cannot violate the law in the name of enforcing "sanity" and law in their work.

15. To the deponent, these violations of the law are impermissible, and the message the 1st, 2nd and 3rd Respondents are sending by means of sanctioning and approving such actions is that there is no respect for the rule of law in Kenya and they are a law unto themselves hence resort to this Court under Article 27(1) of the Constitution to have this honourable court issue orders to stop the said illegal acts. To him, only police officers in uniform were authorized by the law to conduct such inspections as are purported to be executed by the 3rd Respondent.

16. It was averred that the provisions of Section 28 of the *National Transport and Safety Authority Act* which only permits the issuance of such exclusive licenses after the publication of the notice in a national newspaper of daily circulation and in the Kenya Gazette yet this was never done in respect of the so-called "7" companies that 1st and 3rd Respondents 'licensed' to conduct night travel for passengers.

17. According to the deponent, the imposition and demand of specific brands of speed governors specified in Legal Notice 217 of 2013 was quashed and declared illegal on March 14th 2014 by this court in Judicial Review Case No. 2 of 2014. Despite that, the said Respondent still insisted and demanded that they fit those same speed governors in their vehicles. However when the deponent followed up the issue with the officers of the 3rd Respondent at Times Towers, and specifically their **Mr. Muya**, the said Respondents' flimsy excuse was that the order in Judicial Review Case No 20 of 3014 did not address itself directly to Legal Notice 217 of 2013 in spite of the fact that the 3rd Respondent's application form stipulates these 2 brands of speed governors as a precondition to licensing and that the 7th Respondent was demanding compliance too with the said Legal Notice 217 of 2013.

18. To him, the Ex parte Applicants are as of right entitled to the benefit of the law, being the precept of rule of law under Article 10(2)b of the Constitution. As explained to us by our advocates on record, Legal Notice 23 of 2014 which the 1st, 2nd 3rd and 7th Respondent are demanding compliance with is unconstitutional and a violation of the principle of rule of law as the 1st Respondent had never obtained the approval of the Senate and the National Assembly in writing that

upon laying Legal Notice 23 of 2014 before both houses of Parliament as envisaged under Article 93(1) of the Constitution, so as to render the said regulations available for enforcement. To him they were orally being directed to “comply” with the said Legal Notice 23 of 2014 yet in light of it having been void and illegal, it could thus be enforced at all, and it could be available for enforcement as it sprung from an act of illegality.

19. In the deponent’s opinion, it was imperative that the orders sought in exercise of the court’s Inherent Power and to the end that justice will be met as sought are granted, otherwise the applicants stood to suffer grave prejudice and loss hence the matter was of great urgency, and of great public interest

3rd Respondent’s Case

20. In response to the application, the 3rd Respondent filed a replying affidavit sworn by **Francis Meja**, the 3rd Respondent’s Director General on 30th July, 2014.

21. 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 National Transport and Safety Authority, the 1st Respondent Authority herein to be in charge of transport and road safety and that 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. 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.

22. It was contended in carrying out its mandate, the Authority established that most of the road accidents in within the Kenyan roads, 85%, occur at night mainly at due to over speeding and the same largely involve public service vehicles and trailers/trucks and 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 service vehicles and trucks to meet specific requirements with respect to speed control with a view to enhance safety on the road and reduce fatalities thereto.

23. According to the deponent, majority of the road accidents are caused by over speeding public service vehicles and commercial vehicles i.e. buses, trailer/trucks etc. which ram onto on coming and/or stationery public service vehicles and private vehicles such causing many deaths. This is a matter of public notoriety and we invite this honourable court to take judicial notice of the same. He further deposed that issues relating to Legal Notice No. 23 of 2014 and its enforcement are actively before this court through Judicial Review Application No 124 of 2014 which was filed by the same Applicants herein and is between the same parties hence it is therefore against public policy and proper administration of justice and the rule of law that the Applicants should be allowed to canvass the same issues herein when they have already addressed them in the above mentioned matter. While relying on the replying affidavit in opposition to the issues raised against Legal Notice No. 23 the deponent stated the 3rd Respondent has not detained any motor vehicle Number plate belonging to the Applicants as alleged and/or at all. In his view other than inflated statements made by the Applicants in their affidavits, there is no evidence whatsoever to demonstrate and/or confirm that any of the 3rd Respondent and/or any of the Respondents has irregularly confiscated any of the Applicants’ number plates as alleged and/or at all.

24. It was averred that under Section 41A of the *Traffic Act* Chapter 403 of the Laws of

Kenya, every public service vehicle and commercial vehicle whose tare weight exceeds 2048 Kg must be fitted with a speed governor which conforms to such specifications which the minister may by gazette notice prescribe which provision of law has been in force for over 12 years now and the same have never been challenged by the Petitioners herein and/or amended by the parliament. The same to him is therefore operational and the honourable court cannot give orders which are designed to frustrate the operation of the said law in these proceedings since to him, in formulating the above legislation, parliament's main intention was to curb over speeding which causes lots of accidents and deaths on our roads and was designed with the state of our roads in mind and after elaborate consultation with the industry players and all stakeholders. It was further deposed that as expressly provided for by the above Section 41A(1)(b) of the **Traffic Act**, the speed governors are required to be in conformity with the specifications as the minister may by notice in the Gazette prescribe.

25. The deponent stated that in compliance with the foregoing, the 1st Respondent on 16th December 2013 prescribed the specifications for the speed governors vide Legal Notice No. 217 as contained in Kenya Gazette Supplement No. 172 of 16th December 2013 which Legal Notice No. 217 of 2013 only sets the standards and does not prescribe any particular speed governor to be used as erroneously and deliberately alleged by the Applicants herein. In his view, the said gazette notice is made pursuant to Section 41(a) of the **Traffic Act** and does not constitute any fresh legislation and the same does not constitute any threat and/or breach to the Applicants' rights. To him, the common practice among the Applicants drivers is that there drivers have continuously tampered with the Speed Governors and rendered the same useless which has been a major cause of the increased road accidents and that statistics held by the 2nd Respondent shows that from 19th February 2014 to 29th June 2014 commercial trucks (in particular) have been involved in 298 road accidents which led to the death of 354 innocent Kenyans which accidents are mainly as a result of over speeding by truck drivers and that is the reason why there exists great need to ensure compliance with the Legal Notice No. 217 of 2013 since the said accidents can be avoided if the drivers are made to stop over speeding by complying with Legal Notice No. 217 of 2013.

26. According to him, though the introduction of speed governors for PSV, Commercial Vehicles and other vehicles on our roads was a well thought out idea, mechanisms to make it sustainable were not put in place hence the circumventing of the speed governors being carried out by various scrupulous industry players who would tamper with the speed governors and disable them. The Government of Kenya therefore decided to put measures in place to curb the criminal activity of tampering with the speed governors and to reduce the number of deaths and serious injuries caused by speeding in our roads and to this end, the Government of Kenya through KEBS therefore develop the standards for speed governors which are tamper proof and can record and store speed data. The standard of the speed governors as set out in Legal Notice No. 217 of 2013 being KS 2295-1: 2011 and KS 2295-2: 2011 were therefore formulated and developed by the experts in the field working under the umbrella of Kenya Bureau of Standard, which process began in the year 2009 and was concluded in the year 2011 and that the formulation process of the said standards incorporated all the industry stakeholders and involved participation of the members of the public. The experts who were involved in the formulation of these standards comprised of a Technical Committee put in place by Kenya Bureau of Standard (KEBS) which Technical Committee was composed of stakeholders for Kenya Police, Motor Vehicles Inspection Unit, Ministry of Roads, Matatu Owners Association, Speed Governors and Road Safety Association, Saferider Management Systems Limited, Markmann's Company Ltd, Pinnacle Systems, Associated Battery Manufacturers East Africa Ltd, Chloride Exide among Others. Upon completion of the formulation of the said standards and going through all the legal requirements, the above speed governor standards being KS 2295-1: 2011 and KS 2295-2: 2011 were gazetted on 9th December 2011 Pursuant to Section 9(1) of the **Standards Act** vide the Kenya Gazette Notice No. 15751 of 9th December 2011 and the same tool effect on the same date of publication of the Gazette Notice.

27. The deponent's position was therefore that the said standards were formulated within an exhaustive record period of 3 years between the year 2009 and 2011 and the same have been operational for the past 3 years yet the Applicants have never challenged these standards and as such

the application as filed herein is an afterthought and an abuse of the court process. Further majority of the Applicants members have complied with Legal Notice No. 217 of 2013. He deposed that requiring the Applicants' and their members to comply with the Standard as set out in Legal Notice No. 217 as read together with Section 41A of the **Traffic Act** does not contravene any of their rights as alleged herein and as such the petition as filed lacks in merit and ought to be dismissed in public interest.

28. It was reiterated that the purport and intent of Legal Notice No. 217 of 2013 is singularly to save public life as guaranteed by Article 26 of the Constitution and the formulation of the standards complied with all the laws including Articles 46 and 47 of the Constitution. To the deponent, the sanctity of human life is the paramount concern of the Constitution and any measure taken within the law to protect loss of life as is the case herein should not be undermined at the alter of selfish private commercial interest as is the case herein. In his view, the Applicants had failed to demonstrate how the standards of the speed governors herein as developed by KEBS has contravened their fundamental rights *vis a vis* the Constitutional duty of the Respondents to protect life and ensure road safety as set out in Article 26 of the Constitution and the **National Transport and safety Authority Act**. To the contrary, the subject standard which is the only body authorized to determine standards of items used in the Country and they have the competent personnel and the knowledge/capability to determine the suitable standard applicable in the Country.

29. It was contended that contrary to the assertions by the Applicants, this Honourable Court has never outlawed the setting of the standards of speed governors to be used in the Country by the KEBS and that the subject standards as developed and set by KEBS are operational and have not been set aside by this Honourable Court. To him, the Applicants have failed to demonstrate how the application of those speed governors standards affect their individual rights or impede their operations yet the Applicants are fully aware that over speeding by their drivers is a major cause of road accidents in the Country. It was stated that the said Legal Notice was prepared and gazetted in good faith with full participation of all the stakeholders and the same does not introduce any new and/or unreasonable requirements and/or unnecessary requirements on the operators of public service vehicles as the same is merely designed to enhance road safety and reduce road carnage. Further, it is designed to benefit the members of the pubic 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 and/or exposed to the Petitioner's motor vehicles. The Court was therefore urged to allow the same to operate to allow the Respondents protect human lives which are guaranteed by Article 26 of the Constitution. In his view, Legal Notice No. 217 of 2013 does not negate and/or contravene any provision of the Constitution, the **Traffic Act** and/or the National Transport Safety Authority Act and that it similarly does not limit any of the Applicants rights as alleged and/or at all it only sets the standards for applicable speed governors. To the contrary, the enhanced safety requirements for public travel 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 altar of convenience and/or profits.

30. The deponent asserted that despite being fully aware of the Legal Notice No. 217 of 2013, the Applicants have declined to comply with the requirements for the speed limiters and now wants this honourable court to allow them operate without competent speed limiter 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.

31. It was contended that 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 orders hence it is proper and necessary that the authority is allowed to continue with its implementation of the Legal Notice No. 217 of 2013 herein as the purport and intent of the Application herein and orders sought 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 Constitution, the Act herein and other relevant legislations. In his view, the import of the application if the same were to be allowed is that the Applicant will through the court process control the operations of road transport and curtail the government and the Authority's efforts at

regulating the same with a view of enhancing road safety and reducing road carnage. To him, requiring the Applicants to comply with Section 41A of the **Traffic Act** does not contravene any of their rights as alleged herein and as such the application as filed lacks merit and ought to be dismissed in public interest.

32. He disclosed that all the industry players in the public transport industry including the Matatu Owners Association and other related unions have complied with Legal Notice No. 217 of 2014 and installed speed governors which are compliant with the standards as set out by KEBs.

33. To him, the judicial review order of prohibition is not available to the Applicants since the subjected standards for speed governors were formatted in 20-11 and have been in place since then. Further an order of certiorari as sought herein is not available to the Applicants since Legal Notice No. 217 of 2014 have not contravened any law and their formulation was regularly carried out in full compliance of all the legal requirements and procedures. 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. In addition, 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. According to him, 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.

34. The deponent contended that the subject speed governor standards as set out in Legal Notice No. 217 of 2014 are merely a reproduction of the speed governor standards being Ks 2295-1:2011 and KS 2295-2:2011 as developed by KEBS and gazetted on 9th December 2011 pursuant to Section 9(1) of the standards Act vide the Kenya ~Gazette Notice No. 15751 of 9th December 2011 and the same took effect on the same date of publication of the Gazette Notice. These standards remain operational and have not been challenged by any one in any court of law throughout the Country. In granting an order sought herein, he deposed, the Honourable Court will necessary 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.

35. He therefore argued that the application ought to be dismissed with costs to the Respondents.

Determinations

36. I have considered the issues raised herein.

37. In my view the following are the issues which fall for determination in this judgement:

1. **Whether the 3rd Respondent removed the applicants' number plates from the applicants' vehicles and whether that action was justified.**
2. **Whether the applicants were required to be issued with new licences notwithstanding the validity of the existing TLB Licences.**
3. **Whether the legal instrument in question was validated before Parliament as provided by the law.**
4. **Whether Legal Notice No. 217 sets out standards or requires particular speed governors and the effect thereof.**
5. **Who should bear the costs of the application?**

38. In my view most of these issues have been determined by this Court. In **Republic vs. Cabinet Secretary for Transport & Infrastructure Principal Secretary & 5 others exparte Kenya Country Bus Owners Association & 8 others [2014] eKLR**, this Court on 6th October, 2014 pronounced itself with respect to the issue of removal of number plates as follows:

“...for a licensing officer, a police officer or inspector to remove the vehicle identification plates and the vehicle licence he must form an opinion that the vehicle is being used in contravention of section 55 or section 56 of the Traffic Act which deal with conditions of vehicles and limitation of loads or in contravention of any rules relating to the construction, use and equipment of vehicles. After forming such an opinion, the officer concerned is required to make an order prohibiting the use of the said vehicle. The said identification plates and licences when removed are required to be delivered to the Registrar for keeping while the order is in force. It is therefore clear that to remove the said plates or licences in circumstances other than those contemplated under Section 106(4) as read with sections 55 and 56 of Act and without an order of prohibition is illegal. If therefore the Respondents removed the same and are keeping them without surrendering the same to the Registrar, such action is unlawful and they ought to restore the same.”

39. This Court then proceeded to order that the removal of the identification or number plates or licences from the petitioners'/applicants' motor vehicles in circumstances other than those contemplated under Section 106(4) as read with sections 55 and 56 of Act and without an order of prohibition was illegal and directed the Respondents to restore the same. That order having been made in the said matter, there is no need to make the same order again in these proceedings.

40. With respect to the existing TLB licences, similarly this Court in the said case held that:

“...it is hereby reiterated that all the applicants'/petitioners' unexpired TLB licences are valid and any attempt to bar them on the basis of the invalidity thereof is illegal, unlawful and devoid of any legal basis. The Respondents have however urged the Court to invoke its powers and suspend the invalidity of the decision. The Court in Judicial Review No. 2 of 2014 gave the Respondent ample time to regularise their action but the Respondent seems to have taken no action. Accordingly I do not

see the reason for extending any further indulgence to the Respondents.”

41. On this point the Court ordered that all the applicants'/petitioners' unexpired TLB licences are valid and any attempt to bar them on the basis of the invalidity thereof is illegal, unlawful and devoid of any legal

basis.

42. On the allegation of invalidity of the Legal Notice in questions based on the failure to lay the same before Parliament, the Court held that it was not necessary that the Regulations be laid before the Senate and that there was no basis upon which the Court could find that the Instrument in question was not transmitted to the National Assembly which was the concerned House.

43. It is therefore clear that the first three issues hereinabove were the subject of the previous proceedings and the Court dealt with the same. It was therefore unnecessary to raise the same issues in the present application.

44. With respect to the issue whether the Legal Notice No. 217 sets out standards or requires particular speed governors and the effect thereof, this Court in Judicial Review No. 2 of 2014 held that prescription of the brands of speed governors rather than the standards was a departure from what was expected of the Cabinet Secretary and hence unlawful. In that case what had been prescribed were two types of speed governors being KS-2295-1-2011 and KS-2295-2-2011. In Legal Notice No. 217 of 2nd December, 2013, the schedule similarly provided for the speed limiters as KS 2295-1-2011

and KS 2295-2-2011. One does not need to be a rocket scientist to realise that the brands are exactly the same. It follows that Legal Notice No. 217 in so far as it prescribed brands of speed governors or limiters, is unlawful and is accordingly quashed.

45. However the subject of Judicial Review No. 2 of 2014 was Legal Notice No.219 which took effect on the said 17th day of December 2013. It was definitely later in time to the instant Legal Notice. This Court has not been addressed on the reason why the said earlier proceedings did not challenge both Legal Notices instead of the challenge being brought piece meal and in instalments.

46. It follows that the Legal Notice No. 217 dated 2nd December, 2013 is hereby quashed. However each party will bear own costs.

Dated at Nairobi this 19th day of November, 2014.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kinyanjui for the Applicant

Cc Patricia