



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS CIVIL CASE NO. 13 OF 2013**

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY OR AN**

**ORDER OF MANDAMUS & PROHIBITION**

**IN THE MATTER OF THE LOCAL GOVERNMENT ACT, CAP 265, LAWS OF KENYA**

**AND**

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

**IN THE MATTER OF THE TRANSPORT LICENSING ACT, CAP 404 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE TRANSPORT LICENSING ACT, CAP 404, LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE DIRECTIVE DATED 22<sup>ND</sup> NOVEMBER 2013 BY THE NAIROBI CITY CHIEF ENGINEER ON BEHALF OF THE NAIROBI CITY TOWN CLERK ALLOWING THE APPLICANT TO OPERATE WITHIN THE CENTRAL BUSINESS DISTRICT (C.B.D)**

**AND**

**IN THE MATTER OF ACTS OF FRUSTRATION BY THE DIRECTOR OF CITY INSPECTORATE PROHIBITING THE APPLICANT FROM OPERATING WITHIN THE CBD AS DIRECTED BY THE CITY ENGINEER FOR THE NAIROBI TOWN CLERK AND LICENSED BY THE TRANSPORT LICENSING BOARD**

**AND**

**IN THE MATTER OF**

**REPUBLIC**

**VERSUS**

**THE CITY COUNCIL OF NAIROBI TOWN CLERK.....1<sup>ST</sup> RESPONDENT**

THE DIRECTOR OF CITY INSPECTORATE (NAIROBI).....2<sup>ND</sup> RESPONDENT

THE NAIROBI AREA TRAFFIC COMMANDANT.....3<sup>RD</sup> RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

EX PARTE

METROTRANS LIMITED.....APPLICANT

### RULING

1. By a Chamber Summons dated 17<sup>th</sup> January 2013 filed in Court on 17<sup>th</sup> January 2013, the applicant herein, **Metrotrans Limited** seeks leave to apply for the following orders:

1. An order of Mandamus directed to the 1<sup>st</sup> Respondent, the City Council of Nairobi Town Clerk, 1<sup>st</sup> respondent herein, to ensure that its directive of 22<sup>nd</sup> November 2011 allowing the Applicant's duly licensed public service motor vehicles by the Transport Licensing Board (T.L.B.) free ingress and egress from the Central Business District (C.B.D.) along its designated routes and to be allowed to pick and drop commuters within the designated C.B.D. lay-bys without any interference or hindrance from the 2<sup>nd</sup> Respondent or its Askaris the Applicant's vehicles observing the laid down Traffic rules and regulations.

2. An order of Mandamus directed to the 2<sup>nd</sup> Respondent, the Director of City Inspectorate Nairobi to comply with the 1<sup>st</sup> Respondent's directive of 22<sup>nd</sup> November 2012 allowing or permitting the Applicants, Public Service Vehicles to pick and drop commuters within the Nairobi Central Business District along the designated lay-by the Applicant's PSVs having been issued with the requisite Transport Licensing board Certificates and the Road Service Identity Certificates to operate within the C.B.D and as specified in the Applicants respective vehicles' certificates the Vehicles' drivers observing and adhering the laid down Traffic rules and regulations.

3. An order of Mandamus directed to the 3<sup>rd</sup> Respondent, the Nairobi area Traffic Commandant and to ensure that there is compliance with the Directive emanating from the 1<sup>st</sup> Respondents' Town Clerk allowing or permitting the Applicants, Public Service Vehicles to pick and drop commuters within the Nairobi Central Business District along the designated lay-by the Applicant's PSVs having been issued with the requisite certificates being the Transport Licensing board Certificates and the Road Service Identity Certificates to operate within the C.B.D and as specified in the Applicants respective vehicles' certificates, the Applicants Vehicles' drivers the laid down traffic rules and regulations and in strict adherence to the 1<sup>st</sup> Respondent's directive of 22<sup>nd</sup> November 2012.

4. An order of Prohibition directed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents , to desist either by themselves, their City Council Askaris who act under the said Respondents' directive, or howsoever from frustrating , hindering or preventing in whatsoever manner the Applicants' Public Service Vehicles and their drivers, from picking or dropping commuters within the Central Business District as long as the Applicants PSVs do hold and have been issued with the necessary valid Transport Licensing board Certificates and the Road Service Identity Certificates in compliance with the directive emanating from the 1<sup>st</sup> Respondent's office allowing or permitting the Applicants, Public Service Vehicles to pick and drop commuters within the Nairobi Central Business District as designated in their licences and certificates.

2. The ex parte applicant however, was also seeking an order that the grant of stay by way of judicial review for an order of prohibition aforesaid do operate as a stay of such action pending the hearing and

determination of the substantive Notice of Motion application or as this Honourable Court may direct.

3) After the grant of the said leave I directed that the application be served for the hearing and determination of the prayer for stay aforesaid.

4) In support of its application the applicant filed an affidavit sworn by Oscar **Omurwa Rossana**, a Director of the ex parte applicant on 17<sup>th</sup> January 2013. According to the applicant his company by a letter dated 26<sup>th</sup> September 2011 did apply to the City Council of Nairobi through the office of the Chief City Engineer for permission to pick and drop commuters at the Ambassador Lay-By. Prior to making the said application, the Applicant company had entered into an understanding with the **Mama Lucy Kibaki Hospital** situate in Komarock estate in Nairobi to use the latter's parking yard to pick and drop commuters and patients to the said hospital and the company was the only public transport company allowed to pick and drop commuters at the hospitals' parking yard. Following the letter stated in paragraph 5 above the City council of Nairobi whose operations are run amongst others and of relevance by the 1<sup>st</sup> and 2<sup>nd</sup> respondents' offices did respond to the Applicant's letter declining to grant the company stating that it does not allocate picking and dropping points. By a letter dated 26<sup>th</sup> October 2011, the Applicant who had a prior arrangement with the **Mama Lucy Kibaki Hospital** wrote to the hospital requesting for an alternative pick up and dropping point for passengers going to the hospital since it was terminating the trips to its parking yard. The hospital responded that the Applicant's buses should pick up its clients from the Ambassador Hotel stage which is within the C.B.D. However, for the Applicant to pick up and drop commuters at the Ambassador stage/lay-by, it had to obtain a T.L.B license and the applicant company did apply for the same to the chairman of the Transport Licensing board which is the issuing authority vide a letter dated 11<sup>th</sup> June 2012 for the said license which is always accompanied by the Road Identity Certificate (R.S.I) The Transport Licensing Board did issue to the Applicant the requisite certificates to eight(8) of the Applicant's public service vehicles to operate within the C.B.D Nairobi and more particularly to pick up and drop passengers at the Ambassador hotel lay-by. On obtaining the certificates, the Applicant by its' letter dated 19<sup>th</sup> November 2012 wrote to the City Council of Nairobi's Chief City Engineer who is in charge of allocating stages for public commuter vehicles informing him that the applicant had now obtained the relevant permission to operate within the C.B.D and more especially to pick and drop commuters at the Ambassador lay-by. By a letter dated 22<sup>nd</sup> November 2012, the 1<sup>st</sup> Respondent through the Chief City Engineer responded confirming that the Applicant's uses could use the designated lay-by to pick and drop its clients which designated areas include the Ambassador Hotel lay-by within the C.B.D. Despite the issuance of the certificates to the Applicants' vehicles to operate within the C.B.D, attempts to pick and drop passengers at the Ambassador hotel stage have been frustrated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' City Council Askaris who have prevented or hindered the operations of the Applicant's vehicles at the said lay-by, by arresting their drivers and detaining the vehicles any time they would drive along the Ambassador hotel route to pick or drop commuters subjecting them to payment of un warranted fines yet they have been licensed to operate on the said route. According to the deponent the Askaris are directly under the command of the 2<sup>nd</sup> Respondent's office whose docket is to enforce T.L.B regulations within the City, as it is the law enforcing department of the Council. The Applicant has raised their frustrations to the 2<sup>nd</sup> Respondent but to no avail and have in fact gone further to lodge a formal complaint to the 1<sup>st</sup> Respondent seeking the good offices' intervention in the matter to see to it that its directive is implemented and enjoyed through their letter dated 18<sup>th</sup> December 2012 which has elicited no response.

5. It is deposed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents the latter as represented in the proceedings by the 4<sup>th</sup> Respondent could ensure that the applicant's vehicles do operate on the designated routes unhindered hence the orders sought herein. According to the deponent, other commuters picking and dropping passengers at the Ambassador hotel lay-by do hold similar certificates to what has been issued to the Applicant's vehicles and it beats logic why other public transporters holding similar certificates licenses would be allowed by the respondents to pick and drop passengers there while the Applicant's vehicles are prohibited. It is contended that the acts complained of adversely affect the Applicants' business as they continue to suffer losses and further jeopardizes its arrangement with the **Mama Lucy Kibaki Hospital** where the Applicant it had been agreed was supposed to be picking and dropping the hospitals' clients at

the Ambassador Hotel lay-by. The failure to ensure that the Applicant's vehicles do operate along the designated routes on its R.S.I certificates jeopardizes the Applicants' chances of renewing the T.L.B. license as the same is renewable annually and renewal is pegged on having utilized the earlier issued license by plying the permitted routes. In the applicant's view if the orders craved are not granted, the licenses issued to the Applicant's vehicles will expire without having been used and thereby the amounts paid for their issuance will have gone to waste. It is further deposed that the selective protection of other commuters on the permitted routes by the 1<sup>st</sup> Respondent is tantamount to subjecting the Applicant to unfair business competition which has no place in such a democracy.

### **RESPONDENTS' CASE**

6. In opposition to the application, the 3<sup>rd</sup> respondent on 7<sup>th</sup> February 2013 filed the following grounds of opposition:

- 1. That the Application lacks clarity and precision in setting out the alleged directives in relation to the 3<sup>rd</sup> Respondent.**
- 2. That the Application discloses no cause of action against the 3<sup>rd</sup> Respondent.**
- 3. That the orders sought by the Applicant discloses no cause of action against the 3<sup>rd</sup> Respondent.**
- 4. That the orders sought against the 3<sup>rd</sup> Respondent are not tenable against the 3<sup>rd</sup> Respondent.**
- 5. That the 3<sup>rd</sup> Respondent is wrongly enjoined as a party as the Applicant does not show how the 3<sup>rd</sup> Respondent has a duty in the matters raised.**

7. On behalf of the 4<sup>th</sup> Respondent, the following grounds were on 1<sup>st</sup> February, 2013, filed:

- 1. That the application is misconceived, bad in law and an abuse of the court process.**
- 2. That the orders prayed for are not available to the applicant.**
- 3. That the fourth respondent is not party to this suit.**

8) On behalf of the ex parte applicant, it is submitted that the submissions filed by the Respondents miss the point in this matter since they tend to address the substantive motion rather than the prayer for stay. It is submitted that the ex parte applicant having been issued with valid Transport Licensing Board Certificates (TLB) and Road Service Identity Certificates (RSI) permitting them to operate within the Nairobi Central Business District, an order that leave to apply for an order of prohibition ought to operate as a stay due to the fact that the said certificates permitting the use of the designated routes ought to operate as a stay since they are only valid for one (1) year and the renewal is premised on the operation of the vehicles along the said routes. The ex parte applicant having handsomely paid for the said certificates, it is submitted that its vehicles ought to be permitted to operate along the said routes unhindered and unblocked by the 1<sup>st</sup> and 2<sup>nd</sup> respondents' askaris. The failure to issue stay orders, it is submitted will put the ex parte applicants' certificates at the risk of expiring without being utilized, thereby occasioning the applicant substantial loss of revenue paid out for the certificates and also what they would have gained from commuting on the said routes. According to the ex parte applicant, no justification or explanation has been advanced why the applicants' commuter vehicles are being locked from ferrying passengers within the CBD without which the said action amounts to impunity and breaches of law. In the ex parte applicant's view the respondent stand to suffer no prejudice if the stay sought is granted.

9) On behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents it was submitted that they are not mandated to allocate picking

and dropping points of passengers to any Public Service Vehicle operators and it would be against public policy to allocate a single operator a terminus as it will amount to discriminating against the others. The letter relied upon by the applicant, it was submitted was not an authority to the applicant to operate within Ambassador Hotel Terminus since to do so would be contrary to the council's by-laws. In any case, it is submitted that the said letter is not a decision and hence not capable of being quashed. To grant the application, it is submitted, would be to compel the respondents to breach its by-laws under which it is statutorily mandated to regulate and control the business within its jurisdiction.

10) The first issue for consideration by the Court is the circumstances under which the Court may grant an order 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.***

11) It is therefore clear that an order that the leave granted do operate as a stay may only be granted in cases where leave granted is with respect to application for prohibition and certiorari. There is, therefore, no discretion to grant stay under Order 53 where what is sought and granted is only leave to apply for *mandamus*. Accordingly, in **Re: Justus Nyangaya and Social Democratic Party Nairobi HCMA 1132 of 2002 Nyamu, J** (as he then was) held that at leave stage it cannot be ordered that leave to apply for a *mandamus* order do operate as stay because logically there can be nothing to stay in respect of the leave for *mandamus* unlike orders of certiorari and prohibition where such leave can if ordered by a Judge operate as stay. In this case, the stay sought is pursuant to the application for leave to apply for an order of prohibition hence it follows that the prayer for stay is competently before the Court. Where the decision sought to be quashed has been 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.**

12) 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. Where, therefore the stay is in respect of the grant of leave to apply for prohibition, it must be emphasized that prohibition by its very nature looks to the future hence where the impugned decision has already been implemented prohibition is not the best remedy to seek. See **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR.**

13) However even where the leave is granted to apply for certiorari and prohibition 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 and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous. Therefore where the outcome of the judicial review might be in a manner contrary to the conclusion reached by the inferior tribunal, stay of proceedings should be granted as it might lead to an awkward situation.

14) **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.”**

15) In this case, the ex parte applicant’s contention is that it has complied with the regulations which permit it to operate within the CBD and that other vehicles with similar licenses do operate within the said CBD. The respondents have not controverted these allegations by way of an affidavit. If the applicant’s position is true it would amount to discrimination and the burden would then shift to the Respondents to show that the limitation imposed by the said discrimination is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In **Republic vs. Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another Ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400**, it was held that in considering the merits of the test to be applied in a case where there is allegation of bias, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation of bias the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality. Similarly, in **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280**, the Court held that bias and unreasonableness have been recognised as grounds which stand alone in assisting the Courts to deal with the challenged decisions. The de-registration of the applicants in that case and the registration of main rivals within two days was held to be indicative of both bias and unreasonableness on the part of the decision maker and that the failure to give reasons for what was patently lack of even-handedness on the part of the decision maker did constitute procedural impropriety. In addition where there is certainly evidence of bad faith on the part of the decision maker the Court would not in cases where bad faith is proven to exist in influencing a decision, hesitate to take up this as a valid ground of argument.

16) Apart from the foregoing, the ex parte applicant’s contention is that the license granted to them is for only one year and its renewal depends on the operations. Accordingly, to deny the ex parte applicant the stay is likely to render the outcome of this application purely academic. In **Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 (HCK) [2008] KLR 688**, although Nyamu, J (as he then was) found that there was no discrimination, he was of the opinion that:

**“Laws including by-laws must as much as is practically possible, deal in the same way with their targets who have the same traits, class or qualities or needs. If not, they cannot withstand the challenge of discrimination.”**

17) Where the decision is targeted at a particular person rather than to a class and no legally acceptable justification is forthcoming such decision cannot withstand the challenge of discrimination. Accordingly, I am satisfied that the ex parte applicant has satisfied the Court that a stay ought to be granted. However, it is clear from the correspondences exhibited that the dispute whose stay is sought is specifically with respect to picking and dropping of passengers at Ambassador Hotel rather than the operation of the applicant in the whole of the CBD. Clearly even the Road Service Identity Certificate exhibited specify permitted routes and does not mention the whole of the CBD and Ambassador (abbreviated Amb) seems to be one of them. In order that the stay not be misused I hereby grant a stay of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ actions as sought in prayer 6 of the Chamber Summons dated 17<sup>th</sup> January 2013 but specifically directed to the Ambassador lay-by. The ex parte applicant must however comply with the by-laws more particularly prohibiting it from parking at a designated bus stop for more than five minutes and forty minutes at a terminus.

18) The costs of this application will be in the cause.

**Dated at Nairobi this day 28<sup>th</sup> of March 2013**

**G V ODUNGA**

**JUDGE**

*Delivered in the presence of Miss Mutai for Mr. Kuloba for the Applicant.*