



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**PETITION NO4 OF 2012**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
OF THE INDIVIDUAL UNDER CHAPTER 4 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION  
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)  
HIGH COURT PRACTICE AND PROCEDURE RULES 2006**

**IN THE MATTER OF THE RELOCATION OF PUBLIC SERVICE VEHICLES OPERATED BY  
MEMBERS OF THE PETITIONER FROM KISMAYU ROAD NEAR OASIS HOTEL TO  
SOUTH C NEXT TO THE TOWN HALL WITHIN GARISSA MUNICIPALITY**

**BETWEEN**

**GARISSA MADOGO MATATU SAVINGS AND**

**CREDITCOOPERATIVESOCIETYLIMITED.....PETITIONER**

**AND**

**MUNICIPAL COUNCIL OF GARISSA.....RESPONDENT**

**JUDGEMENT**

The Petitioner is a cooperative society operating public service vehicles between Garissa Municipality and Madogo in Tana River County situated a few kilometres from Garissa Municipality. The Respondent is the Municipal Council of Garissa. The Petitioner's case is that its members have been picking and dropping passengers along Kismayu Road next to Oasis Hotel within Garissa Municipality but the Respondent has unilaterally and arbitrarily decided to move the location to South C area next to the Respondent's Offices; that this decision is unreasonable, unfair, unprocedural and unlawful; that the Petitioners were neither given written explanation nor consulted before that decision was made; that that decision to relocate was made without proper planning for the new site; that there are no amenities such as lights, public toilets and shades and it is a security risk to both members of the Petitioner and the general public;

The Petitioner also states that its members have been paying to the Respondent parking fees of Kshs 70 each per day but despite this the Respondent has failed, refused and/or neglected to provide for amenities including road maintenance within the new site at South C or the old one along Kismayu road; that the Respondent has continued to harass members of the Petitioner including arbitrarily removing number plates of public service vehicles belonging to the members of the Petitioner without justifiable reason; this action has denied the members of the Petitioner their right to property as provided for under Article 40 of the Constitution. It is also stated that the Respondent has been unjustly demanding Kshs 56,000 as Trade

Licence from the Petitioners.

The Petitioner prays that this Court:

- i. Declares that the rights of the members of the Petitioner as guaranteed under Article 40 of the Constitution of Kenya 2010 have been, are being and/or are likely to be violated
- ii. Declares that the rights of the members of the Petitioners as guaranteed under Article 47 of the Constitution of Kenya 2010 have been, are being and/or are likely to be violated
- iii. Permanent orders be issued against the Respondent restraining the Respondent from harassing and relocating public service vehicles belonging to the members of the Petitioner from Kismayu Road near Oasis Hotel to South C next to Town Hall within Garissa Municipality pending the hearing and determination of this Petition
- iv. Such other order or orders as this Honourable Court shall deem just and fair to grant
- v. Costs of the Petition

The Petition was filed on 21<sup>st</sup> September 2013 contemporaneously with a Notice of Motion brought under a certificate of urgency seeking interim conservatory orders, which were granted, restraining the Respondents from harassing and relocating the public service vehicles belonging to the members of the Petitioner from Kismayu Road to South C within Garissa Municipality pending the hearing and determination of the application and Petition.

In his supporting affidavit, Mohamed Abdi Digale avers that he is the chairman of the Petitioner and that the Petitioner was registered on 30<sup>th</sup> March 2011. He has repeated the contents of the Petition in respect to the relocation and harassment and denial of their rights under the constitution. He avers that he believes the decision to relocate members of the Petitioner was unreasonable, unprocedural and unlawful because they were not consulted to give their views; that there are amenities at the new site, is a security risk and it is not planned and that the members of the Petitioner were not given reasons for the relocation in writing.

The Petition is opposed by the Respondent. In the affidavit sworn by Mr. Mahamud Abdirashid Santur, the Respondent's Town Clerk, it is averred that the Respondent is mandated under the law to regulate, streamline and enforce public transport operators to ensure public transport is carried out in an organized manner and in a place that ensures safety of commuters, operators and other persons affected by the operations of public transport; that pursuant to this mandate, the Respondent has passed the following by laws:

- i. The Local Government (Municipal Council of Garissa) Commercial and Passenger Transport User Permit By Laws, 2008 which requires any person engaging in commercial passenger transport business to acquire a permit for the business
- ii. The Municipal Council of Garissa (General Nuisance) By-Laws, 2008 which prohibits any person from obstructing free passage from, into or along any street
- iii. The Municipal Council of Garissa (Country Omnibus Stations) By- Laws, 2008 which prohibits any Omnibus (Taxicab, Matatu and PSV Vehicles) from commencing or terminating a journey in any place except the designated Omnibus station

It is further averred that the public service vehicles have been carrying out operations in a disorganized manner and at non-designated areas such as streets, verandas and roads which has led to congestion of the town, nuisance by hawkers, miraa traders, food vendors, touts, insecurity and mushrooming of illegal structures.

It is averred that the Respondent purchased property to construct a modern bus park and contrary to allegations, the park is paved, secure and equipped with modern facilities like lavatories, restrooms, benches and shopping outlets; that the bus park is barely 100 metres from the area the Petitioner's members operate; that the area from where the members of the Petitioner operate from has no facilities; that stakeholders were involved in the decision making process and this was advertised through the media.

Parties filed written submissions and attended the court on 22<sup>nd</sup> July 2013 to highlight the same.

### **Petitioner's Submissions**

The Petitioner has drawn the following issues for determination:

- i. Whether the Petitioner's members are entitled to be consulted and heard on the Respondent's decision to relocate them from their present location of operation on Kismayu Road next to Oasis Hotel to South C area
- ii. If the answer to (i) is in the affirmative, whether the Respondent's arbitrary decision to relocate the Petitioner's members violates the Petitioner's fundamental rights as secured under Article 40 and Article 47 (1) and (2) of the Constitution of Kenya 2010
- iii. If the answer to (ii) is in the affirmative, whether Orders declaring the Petitioner's rights secured under Articles 40 and 47 of the Constitution of Kenya 2010 issue
- iv. What is the order as to costs

It is submitted on behalf of the Petitioner that the Petitioner is entitled to administrative action that is reasonable and procedurally fair; that it was important that the Petitioner was given reasonable opportunity to be heard on the decision to relocate its members; that had the Petitioner been given such an opportunity, its it would have raised legitimate concerns over the new site that the new site has no amenities; that it is important that a party be given reasonable opportunity to be informed and participate in the processes leading up to an administrative decision.

Counsel for the Petitioner cited the case of **Kenya Anti Corruption Commissioner v. Lands limited & Others, Nairobi Misc. Application 583 of 2006** which was cited with approval **in Geothermal Development Company Limited v. Attorney General & 3 others (2013) eKLR** where the court noted that Constitutional provisions are procedural safeguards aimed at ensuring due process before any right to property can be taken away.

Counsel also cited the case of **Republic v. Kenya Revenue Authority ex parte Lab International Kenya Limited, Mombasa High Court Misc. Application No. 82 of 2010 [2011] eKLR** where the court observed as follows:

*“The Common law in its evolution has defined the rules of conduct for a public authority taking a public decision, entrusting the overall control – jurisdiction in the hands of courts of law; but for Kenya a general competence of the Courts is now no longer confined to the terms of Statute law and subsidiary legislation, but has a fresh underwriting in the Constitution of Kenya 2010, Article 47 which imposed a duty of fair administrative action and Article 10 (2) (c) demands, “good governance, integrity, transparency and accountability.”*

Counsel submitted that the Respondent has not tendered evidence to demonstrate prior to making the decision to relocate the members of the Petitioner they consulted them to allow them give their views and that there is no evidence to show that notices were served.

### **Respondents Submissions**

On its part, the Respondent through its counsel has drawn the following issues for determination:

- i. Have the Petitioner's member's rights under Article 40 of the Constitution violated?
- ii. Have the Petitioner's member's rights under Article 47 of the Constitution violated?
- iii. Do the Petitioner's members deserve the remedies sought in light of their conduct?
- iv. Is it in the public interest to grant the orders sought?

In respect to issue 1 it has been submitted that there is nothing in the Petition to show that the Respondent has taken away any of the Petitioners' members' property; that they still retain their vehicles which they use to ply their trade and therefore their citing of Article 40 in unwarranted and unnecessary; that the

Kenya Police removed the number plates in pursuit of its mandate under the Traffic Act.

In respect to the second issue it is submitted that the Respondent acted in accordance with Section 72A and made by-laws which became effective on 30<sup>th</sup> January 2009; that it is in execution of these by-laws that the Respondent requires the Petitioner to operation within the Bus Park and these by-laws were effective by the time the Petitioner was registered on 30<sup>th</sup> March 2011; that the by-laws are not being challenged for being illegal or unconstitutional and consequently the Petitioner cannot challenge their execution; that the Petition is void of merit; that stakeholders including Public Service Vehicles representatives were consulted prior to the decision to relocate them to the Bus Park was made; that the Respondent acted fairly, justly and lawfully.

In respect to third issue, it was submitted that the Petitioner's members have been flouting Section 72G (1) (c) of the Traffic Act in operating along public roads and asking this court to grant restraining orders is tantamount to asking the court to enforce an illegality; that the Petition is actuated by ulterior motives in resisting to move being that they are trying to avoid paying the daily parking fees of Kshs 70 which can only be collected within the Bus Park; that the Bus Park has amenities . Counsel cited **Petition 103 of 2010 Directline Assurance Company Ltd v. A.G (2011) eKLR** where the judge in reference to Public Service Industry stated that “.....**The industry resists or frowns at any change, rules, regulations and application of the law when it serves an interest contrary to that of cartels and the goons who mainly control or have assumed the control of the industry.....**”. I believe these were the judge's personal views but having lived in this country, I take judicial notice that this is often the case and the judge was justified in making such strong remarks.

On issue four, it is submitted that it is in the public interest to move all Public Service Vehicles including the members of the Petitioner to the new Bus Park and the public interest in such a move overrides the Petitioners narrow interest. The Respondent cited security, proper planning, sanitation, public comfort as some of the examples of public interest.

Counsel highlighted the submissions by stating that the case cited by the Petitioner, the Geothermal case above, is not relevant to this case because the facts are different, that the cited case was in respect of a taxation notice which the court held did not comply with statutory requirements; that the by-laws were gazetted way before the registration of the Petitioner and by seeking the orders of this court, the Petitioner is seeking to have the by-laws stopped from operating; that the bad elements have taken advantage of the chaos on Kismayu Road while on the other hand the Bus Park is fenced and movements reduced.

With regard to notice to the Petitioner's members, it was submitted that the by-lays were in place before the Petitioner came into existence and they cannot challenge the by-laws; that out of courtesy, the Petitioner's members were notified through the media and their representatives were involved; that fundamental rights are not absolute and there are limitations.

### **Determination of the issues**

The Petitioner bears the burden of proof that it possesses rights under Articles 40 and 47 of the Constitution and that those rights have been violated by the Respondent.

Article 40 (1) provides that subject to Article 65, every person has the right to either individually or in association with others, to acquire and own property (a) of any description, and (b) in any part of Kenya. Article 260 defines “property” to include money. The Petitioner did not come out clearly whether by property it means the vehicles of its member, number plates of those vehicles or the money its members collect as fare from passengers. If it is the vehicles belonging to its members, there is no evidence that these have been taken away by the Respondent; if it is number plates of those vehicles I find no evidence in proof that the Respondent or its agents took those plates. The Respondent has stated that it did not take the plates and that the Kenya Police took them in exercise of its duty under the Traffic Act. There is no evidence in rebuttal. If it is the money they collect, my view is that they have not been denied collection of fare from passengers. What is proposed to be done is to relocate them to the new place. Does this move, when actualized, bar them from collection fare from passengers? It is strange that this is not

pleaded. What is stated is that the new location has no amenities not that they will not get passengers.

Article 47 states that every person has a right to a fair administrative action. To my understanding the Petitioner seems to be saying that the fair administrative action denied to its members is consultation to air their views before the decision to relocate them was made. It is instructive that the Petitioner did not mention the existing by-laws. Among the annexures to the Respondents documents are the Municipal Council of Garissa (Commercial and Passenger Transport Use Permit) By-Laws 2008; the Municipal Council of Garissa (General Nuisance) By-Laws 2008 and Municipal Council of Garissa (Country Omnibus Stations) By-Laws 2008. These were gazetted vide Kenya Gazette Notice Vol. CXI-No.10 dated 30<sup>th</sup> January 2009.

I have considered all pleadings, submissions and the law. As a resident of Garissa town I have also taken judicial notice that Kismayu road is a nightmare for road users. It can be said to be the nerve centre of the town. It is congested with public service vehicles including public service vehicles commonly known as 'matatus', buses, lorries, trucks, taxis, motor cycles commonly known as 'border borders' and human traffic. The latter understandably is drawn by the transport service. There are also shanties, hawkers peddling their wares, traders of every nature, motor vehicle repair businesses referred to as garages, dumpsites and donkey carts. It is an eye sore. Planning is good but this must be done in accordance with the law. There should be no discrimination against any person, group or operators of any industry. This court further takes judicial notice of the mayhem that can ensue if public service operators (matatus, buses, border borders and taxis) are not regulated. Like any change, attempts to make this change will always be fought and resisted.

By-law 3 of the Local Government Municipal Council of Garissa (Commercial and Passenger Transport User Permit) By-Laws 2008 states that **"Any person wishing to engage in any commercial, passenger transport business within the jurisdiction of the Council shall apply to the Town Clerk for a permit to do so."** In my view therefore asking members of the Petitioner to pay Trade Licence is not unlawful as claimed by the Petitioner. By-law 14 of the Municipal Council of Garissa (General Nuisance) By-Laws 2008 makes it an offence to wilfully obstruct the free passage from, into or along any street. The Respondent alleges that this is what the members of the Petitioner are doing by operating from undesignated area. In addition to the two sets of By-Laws, the Respondent has in place the Municipal Council of Garissa (Country Omnibus Stations) By-Laws 2008 which require all Public Service Vehicles to start and terminate their journey in the designated Omnibus Station.

On 15<sup>th</sup> August 2012, the Respondent sent what it called Reminder Notice to all Matatu Operators with the following content:

***"Following numerous notices served by the council you are hereby reminded that all Matatus (PSV) operating within the Municipality to strictly transact their businesses from the Municipal Bus Park with effect from 22<sup>nd</sup> August 2012 without fail. Take note, this shall serve as the last notice and reminder that any operator who fails to comply will be liable for prosecution bordering on security/traffic charges. Please comply for better transport management."***

This to me means one thing that other notices had been sent to the PSV operators. This Petition was filed on 21<sup>st</sup> September 2012 a month after the above notice was written.

My careful consideration of this case, rival submissions and the authorities cited leads me to the conclusion that the Petitioner has failed to establish that it has a constitutional right capable of being protected by this court. The Respondent was acting within the law as shown in the attached By-Laws, whose legality has not been challenged. These By-Laws came into effect upon gazettelement on 30<sup>th</sup> January 2009 and any PSV operator like the members of the Petitioner operating within Garissa Municipality cannot claim that the Respondent is acting outside the law to implement the By-Laws.

To my mind, the administrative action is not the decision to relocate members of the Petitioner. That action of relocating was lawful under the By-Laws and it was undertaken in execution of the By-Laws.

The administrative action the Petitioner should be complaining about ought to be the enacting of the By-Laws which is the mandate of the Respondent. As long as the legality of these By-Laws has not been challenged the Petitioner cannot, in my view, come to court claiming unfair administrative action. The Notices served on them including the Reminder dated 15<sup>th</sup> August 2012 was enough in my view to alert them that the Respondent requires all the PSV operators to commence operations from the Bus Park. That action by the Respondent is not unreasonable, unprocedural, unfair or unlawful. It is also adequate written explanation.

I am saying that the Petitioner has failed to establish before this court that their rights under Articles 40 and 47 of the Constitution have been violated. The Respondent did not take away any of the Petitioner's member's property, or at least there is no proof of such action. In respect to issue one by the Petitioner, the By-Laws and the Notices issued to its members is adequate and no other consultation was required. In respect to issue number two that action by Respondent to relocate the members of the Petitioner is not arbitrary, but an action allowed under the By-Laws.

It is the finding of this court, and I so hold, that the Petitioner is not entitled to the remedies it is seeking and this Petition must fail. The Respondent shall continue in execution of the By-Laws. However, this should be done in a manner that does not amount to harassment or destruction of property. Although other PSV operators in Garissa Municipality as well as all those who park their lorries, tracks, taxis, matatus or operate other business on Kismayu Road are not part of this case, it is the view of this court that the Respondent shall act in a manner that does not discriminate against the members of the Petitioner by moving them and leaving other operators on Kismayu Road. Let this action target everyone who is acting contrary to the By-Laws. Nothing short of this will be taken well given that all are equal before the law.

This court has considered the public interest in the operations of the Respondent and would hesitate to order costs to be paid to the Respondent. Each party shall therefore bear its own costs in respect of this case. These are the orders of this court.

**S.N MUTUKU**

**JUDGE**

**Dated,            signed            and            delivered            this            6<sup>th</sup>            day            of            August  
2013**