



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CASE NO. 368 OF 2013

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY OR AN ORDER OF
MANDAMUS, PROHIBITION & CERTIORARI**

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

**IN THE MATTER OF THE NATIONAL TRANSPORT AND SAFETY AUTHORITY ACT NO.
33 OF 2012**

AND

IN THE MATTER OF COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

**IN THE MATTER OF ACTS BY THE OFFICER COMMANDING TRAFFIC NAIROBI AREA,
THE CHIEF ENGINEER OF THENAIROBI CITY COUNTY AND THE DIRECTOR GENERAL
OF THE NATIONAL TRANSPORT & SAFETY AUTHORITY TO FRUSTRATE THE
OPERATIONS OF THE EX PARTE APPLICANT (METROTRANS (EA) LTD] ALONG THE
RACECOURSE ROAD (ST. PETERS CLAVERS) AND MWIKI ROAD**

AND

**IN THE MATTER OF PURPORTED CONTAVENTION OF TRAFFIC REGULATIONS AND
TERMINI BY LAWS**

AND

IN THE MATTER OF

REPUBLIC

VERSUS

THE OFFICER COMMANDING TRAFFIC

**NAIROBI AREA.....1ST
RESPONDENT**

**THE NAIROBI CITY COUNTY.....2ND
RESPONDENT**

EX PARTE

METROTRANS [EA] LIMITED.....APPLICANT

RULING

1. By a Chamber Summons dated 18th October 2013, the applicant herein, **Metrotrans Limited** seeks leave to apply for judicial review orders of mandamus, prohibition and certiorari as more particularly enumerated in the said Chamber Summons.
2. As is the usual practice in such matters the applicant also sought an order:

“THAT leave to apply for orders (sic) prohibition and certiorari as prayed to operate as a Stay of the 1st and 2nd Respondent’s actions of frustrating the ex parte applicant’s public service vehicles from operating along the bus Stops, bus lay-bys and termini on the Race Course (St. Peters Clavers) and Mwiki routes subject to the ex parte applicant’s public service vehicles adhere to the Traffic Regulations.”

3. There was also a prayer for costs to be in the cause.
4. When the application came before me on 22nd October 2013, I granted the leave sought in the said chamber summons and pursuant to the proviso to provisions of Order 53 rule 1(4) of the Civil Procedure Rules, I directed that the limb dealing with the stay be heard *inter partes*.
5. It is contended by **Mr. Kuloba** learned counsel for the applicant that the applicant is in the business of offering public transport to commuters yet the Respondents have continued to frustrate the applicant’s operations along the routes cited and the bus stops, bus lay byes and termini. It was contended that the applicant has valid licenses to operate on the said routes which assertion has not been negated which licences are renewable annually at a fee and if stay is not granted the applicant’s vehicles will have incurred a loss on money expended to obtain the said licences and business earning from ferrying commuters. According to the applicant they intends to observe law and operate in accordance with Traffic Regulations and it has not been shown that any offences have been committed. It was further submitted that the City Engineer has allowed the applicant to use the lay bye for picking and dropping passengers and not as termini which directive the applicant has complied with. It is contended that most of the applicant’s vehicles are being detained by the 1st respondent with the 3rd respondent’s authority and this needs to be stopped by the grant of the orders sought otherwise the Court may end up engaging in an academic exercise as the matter shall have been overtaken by events.
6. In opposing the application **Mr. Koceyo** learned counsel for the 2nd respondent submitted that there is nothing to be stayed since the Court cannot grant orders staying what is not defined such as frustration. According to him there is no proof of the licences by the Transport Licencing Board issued in respect of the routes in question as no such documents have been exhibited. It is submitted that whereas the letter from the 1st respondent only concerned two transporters the 2nd respondent did not act on that letter but notified all the transporters to use only designated routes which directive has been complied with. Therefore to grant the order of stay sought by the applicant would be to allow the applicant benefit from what other transporters have been denied which will be against public policy. Further if the stay is granted it would negate the Gazette Notice and will allow breach of the bylaws by one transporter.
7. In his response **Mr. Kuloba** submitted that the application ought to be read as a whole and if so read it would reveal the acts complained of. With respect to proof of licences it was submitted that it is the 3rd respondent’s mandate to state whether or not the applicant has licences or not. According to learned counsel the applicant is simply asking to be allowed to share the facilities which the revocation does not affect. To him there is no evidence that the directive has been complied with hence the Court ought to do justice by granting the stay sought.
8. I have considered the application, the affidavits on record as well as the submissions of counsel.

9. The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judicially. What then are the circumstances under which the grant of leave in a judicial review application may be directed to operate as a stay?
10. 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.**
11. 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.
12. However even where the leave is granted, it was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** that in considering whether the said leave ought to operate as a 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. I however agree that the strength or weakness of the applicant's case is a factor to be taken into consideration since it would not be right to stay proceedings where the Court is clear in its mind that the chances of the judicial review proceeding being successful are slim. However, in granting leave the Court usually takes into account whether a prima facie case has been made out.
13. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.
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. Therefore it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings. It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.
16. In this case the applicant bases its decision for seeking stay on the ground that it has incurred expenditure in securing the relevant licences which expenditure is bound to go to waste. Further the applicant stands to lose income from the commuters whom it transports. It is therefore clear that the applicant's loss is mainly financial in nature. This is a loss which in my view is quantifiable. Apart from that it is clear that the applicant has not annexed any document showing that it was licensed to operate along the routes cited. It has however contented itself with stating that whether or not they have licences is upon the 3rd respondent to reveal. It must however be

remembered that the orders being sought herein are being sought by the applicant and not the 2nd respondent. The orders being discretionary in nature it behoves the applicant to place all relevant material before the Court to enable the Court exercise its discretion in favour of the applicant. As was held in **Bagajo vs. Christian's Children Fund Inc Civil Application No. Nai. 298 of 2003 [2004] 2 KLR 73:**

“...it is for the person seeking the favourable exercise of the Court’s discretion to place such materials as will adequately inform the Court in the exercise of such discretion....If that is not done, the applicant stands a risk that his application will fail for it would otherwise be impossible for the Court to be certain that it was not being requested to act in vain.”

17. Under section 109 of the *Evidence Act*, Cap 80 Laws of Kenya, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
18. Based on the material on record the applicant’s contention that it was licenced to operate along the cited routes cannot be established with certainty. To grant the applicant the stay orders whose effect would be to allow them to operate along the said routes without evidence that they are licenced to do so would amount to granting orders when no basis has been laid for doing so. According to the memo exhibited by the applicant the revocation of authorisation letters for pick and drop off points did not affect those operating from shared facilities such as bus stops, bus lay-bys and termini along ***licenced routes***. [Emphasis mine]. Without evidence that the stay is sought in respect of routes on which the applicant is licenced to operate, this Court cannot grant the order of stay sought.
19. Accordingly I decline to grant the order of stay sought and direct the parties to expedite the hearing and determination of the substantive Motion which has already been filed.
20. The costs of this application will be in the cause.

Dated at Nairobi this day 3rd of December 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kuloba for the applicant

Mr Amadi for Mr Koceyo for the 2nd Respondent