



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW CASE NO. 323 OF 2010**

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

**AND**

**IN THE MATTER OF THE TRAFFIC ACT, CAP 403 & THE LOCAL GOVERNMENT ACT,  
CAP 265**

**AND**

**IN THE MATTER OF PART VIA OF THE TRAFFIC ACT, CAP 403**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS**

**BETWEEN**

**REPUBLIC**

**VERSUS**

**CITY COUNCIL OF NAIROBI .....**

**1<sup>ST</sup> RESPONDENT**

**THE MINISTER FOR LOCAL GOVERNMENT .....**

**2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL .....**

**3<sup>RD</sup> RESPONDENT**

AND

MATATU WELFARE ASSOCIATION ..... 1<sup>ST</sup>  
INTERESTED PARTY  
THE KENYA LOCAL GOVERNMENT WORKERS UNION.....2<sup>ND</sup>  
INTERESTED PARTY

AND

KAKA TRAVELLERS CO OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED ..... EX  
PARTE APPLICANT

**RULING**

On 24<sup>th</sup> October, 2010 two applications were filed in different matters seeking more or less the same orders from different legal angles. In **MISC. APPLICATION NO. 319 OF 2010, HENRY MWINGIRWA NKURE**, the ex parte applicant, sought leave to apply for an order of certiorari to quash the 1<sup>st</sup> respondent's decision of 13<sup>th</sup> October, 2010 which was gazetted on 15<sup>th</sup> November, 2010 vide Gazette Notice Vol. CX11 – No. 102 to the extent that it purports to increase parking fees for private vehicles from Kshs.140/= to Kshs.300/= with effect from 1<sup>st</sup> November, 2010. He also sought leave to apply for an order of prohibition to prevent the 1<sup>st</sup> respondent, its servants, agents, employees or anybody else from implementing the aforesaid decision. He further urged that the leave granted do operate as stay of the respondent's decision to increase the aforesaid charges.

In this case, that is **JUDICIAL REVIEW CASE NO. 323 OF 2010, KAKA TRAVELLERS CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED**, is the ex parte applicant. The orders sought herein are as hereunder:

“1. ....

2. ....

3. **THAT leave be granted to the applicant to seek by way of Judicial Review for an order of certiorari to issue, to remove to this Honourable Court for purposes of being quashed, and to forthwith quash the 1<sup>st</sup> respondent's GAZETTE NOTICE NO. 12582 of 2010 published on 15<sup>th</sup> October, 2010.**

4. **THAT leave be granted to the applicant to seek by way of Judicial Review for an order or prohibition to issue, prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> respondents or any person acting under their behest, direction and authority, from demanding, directing, insisting upon, or ordering that the applicant, including any and all of its members, or any vehicle owned and lawfully operated by the applicant's specified members, (or such person or persons as directed by the court) to comply with the 1<sup>st</sup> respondent's GAZETTE NOTICE NO. 12582 of 2010 published on 15<sup>th</sup> October 2010.**

5. **THAT leave be granted to the applicant to seek by way of Judicial Review for an order of prohibition to issue, prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> respondents or any person acting under their behest, direction and authority, from demanding or imposing parking charges levied contrary to, and imposed contrary to the provisions of Part VIA of the Traffic Act, Chapter 403 of the Laws of Kenya, in respect of the Applicant's members' specified vehicles operated in and parked at any time within the City of Nairobi.**

6. **THAT leave be granted to the applicant to seek by way of Judicial Review for an order**

of mandamus do issue, compelling the 2<sup>nd</sup> respondent to produce and deliver to the applicant, a copy of his letter Ref. No. MLG 204 – 01/IV/61 of 12<sup>th</sup> October 2010, within such specified time as this court may order and direct.

7. THAT leave so granted do operate as a stay of the enforcement of the 1<sup>st</sup> respondent's GAZETTE NOTICE NO. 12582 of 2010 published on 15<sup>th</sup> October 2010, staying the 1<sup>st</sup> respondent or any person acting under their behest, direction and authority, from demanding, directing, insisting upon, or ordering that the Applicant, including any and all of its members, or any vehicle owned and lawfully operated by the applicant's specified members, (or such person or persons as directed by the court) to comply with the 1<sup>st</sup> respondent's GAZETTE NOTICE NO. 12582 of 2010 published on 15<sup>th</sup> October 2010 until the Notice of Motion in these proceedings filed is heard and determined.

8. THAT court be pleased to issue orders on the enjoinder of any party on account of the ancillary public interest raised by the proceedings.

9. THAT the costs of the application be to the applicant in any event."

The two applications were placed before Maraga J on the same day, that is, 29<sup>th</sup> October, 2010 and the court directed that:

**"As this application (319 of 2010) seeks more or less the same orders as HC. MISC. APPLICATION NO. 323 OF 2010 and as counsel in both matters have no objection, I direct that they be consolidated. The proceedings will be in this file." (310 of 2010).**

The court heard counsel for the ex parte applicants in the two cases as well as the respondents' counsel and proceeded to grant both applicants the leave sought. The leave was to apply as a stay of the orders sought for a period of 30 days.

On 15<sup>th</sup> November, 2010 the two matters were mentioned before me and it was by consent agreed that they be heard consecutively. The consolidation order earlier made was, to that extent, revised. Thereafter the two matters were mentioned on a number of times and the orders of stay were also extended from time to time.

On 17<sup>th</sup> January, 2011, counsel for the parties in MISC. APPLICATION NO. 319 OF 2010 filed a consent in the following terms:

**"1. That the parking fees for private cars at the Central Business District (CBD) be revised downwards from the gazetted Kshs.300.00 to Kshs.250.00.**

**2. That the respondent do pay the applicant costs to be agreed by the parties within seven (7) days from the date of filing this consent.**

**3. That this matter be marked as settled between the applicant and the respondent in J.R. 319 OF 2010.**

**4. That for the avoidance of doubt this consent does not affect J.R. No. 323 of 2010.**

(SIGNED)  
KURAUKA & CO.  
ADVOCATES FOR THE APPLICANT

**(SIGNED)**  
**OGETTO, OTACHI & CO**  
**ADVOCATES FOR THE RESPONDENT**

**(SIGNED)**  
**KIPKORIR, TITOO & KIARA**  
**ADVOCATES FOR THE LOCAL GOVERNMENT WORKERS UNION”**

The aforesaid consent was adopted by this court on 21<sup>st</sup> January, 2011.

That consent did not settle the dispute between the respondent and the two ex parte applicants. On 24<sup>th</sup> January, 2011 Kaka Travellers Co-operative Society Savings and Credit Society Ltd, filed an application seeking the following orders:

- “1. This motion be certified as urgent and heard ex parte in the first instance owing to its extreme and demonstrated urgency.**
- 2. Direction be issued on the hearing of this Motion in light of the Constitutional issues raised and arising within these pending Judicial Review Proceedings.**
- 3. An injunction do forthwith issue, restraining the 1<sup>st</sup> respondent (City Council of Nairobi), by itself, its Clerk, Deputy Clerk, its officials, Parking Attendants, contracted company or companies, or any person, servant, and/or agent howsoever of the 1<sup>st</sup> respondent, acting under or at its behest, from imposing, charging, levying or demanding from the applicant, the Applicant’s members, or member of the public the daily Parking fee of Ksh.250/= or any sum exceeding the sum of Ksh.140/= chargeable per motor vehicle per day within the City of Nairobi under the zonal jurisdiction of the City Council of Nairobi pending the hearing and determination of this Notice of Motion.**
- 4. An injunction do forthwith issue, restraining the 1<sup>st</sup> respondent (City Council of Nairobi), by itself, its Clerk, Deputy Clerk, its officials, Parking Attendants, contracted company or companies, or any person, servant, and/or agent howsoever of the 1<sup>st</sup> respondent, acting under or at its behest, from imposing, charging, levying or demanding from the applicant, the Applicant’s members, or member of the public the daily Parking fee of Ksh.250/= or any sum exceeding the sum of Ksh.140/= chargeable per motor vehicle per day within the City of Nairobi under the zonal jurisdiction of the City Council of Nairobi pending the hearing and determination of the Constitutional issues raised in this Notice of Motion or as the Honourable Court may direct.**
- 5. Leave be granted to the ex parte applicant to advertise in 2 local daily newspapers the pendency of these proceedings and such orders herein made and in the public interest, such members of the public as may elect to be enjoined herein as Interested parties do so within 14 days of the making of this order.**
- 6. Leave be granted to the ex parte applicant to forthwith advertise the issuance of the orders herein made in the Daily Nation newspaper and the Standard newspaper.**
- 7. Pending the hearing and determination of this notice of motion there be a stay of execution of paragraph 1 of the order issued on 21<sup>st</sup> January 2011 in Nairobi High Court Judicial Review Misc. Case No. 319 of 2010.**
- 8. The court issues such declarations as are necessary in respect of paragraph 1 of the order issued on 21<sup>st</sup> January 2011 in Nairobi High Court Judicial Review Misc. Case No. 319 of 2010.**
- 9. The costs of this motion be to the applicant in any event.”**

The grounds upon which the application was made may be summarized as hereunder:

- **The wording of paragraph 1 of the consent order is illegal since the ex parte applicant in JR 319 of 2010 had not filed a representative suit. That being the case, in respect of JR 323 of 2010 the ex parte applicant's vehicles and its members' vehicles that will opt not to be public service vehicles, although hitherto licensed as such, will be compelled to pay an illegal parking fees of Kshs.250/= which has not been subjected to the legal process envisaged under the Local Government Act and the Traffic Act.**
- **The ex parte applicant in JR 319 of 2010 had no power to consent to have the daily parking fees increased.**
- **There is no definition in law of "Private Car" under the Traffic Act and as such paragraph 1 of the said consent order is an illegality *ab initio*.**
- **Paragraph 1 of the consent order is a direct violation of Section 72 J of the Traffic Act which stipulates – the making of by-laws that are subjected to the legal process of scrutiny under the procedures laid down in the Local Government Act, which entitles the court to intervene.**
- **The said consent violates and is in breach of Article 10(2) (c) of the Constitution of Kenya as there was no transparency, accountability, integrity or good governance in the said settlement as the increase of the parking fees to Kshs.250/= was not brought into the public domain.**
- **Paragraph 1 of the said consent order offends and infringes upon the ex parte applicant's right under Article 47(1) of the Constitution which requires administrative action that is "lawful, reasonable and procedurally fair".**
- **Paragraph 1 of the said consent order is a breach of the ex parte applicant's constitutional right to a fair trial under Article 25(c) of the Constitution since a stay order had been issued on 29<sup>th</sup> October, 2010 and reiterated on 17<sup>th</sup> January, 2011 wherein the operation of the 1<sup>st</sup> respondent's Gazette Notice No. 12582 of 2010 was stayed.**
- **The ex parte applicant herein is entitled to a fair and just trial as enshrined in Article 50(1) of the Constitution but the said consent order had the effect of negating such a trial.**
- **The ex parte applicants and its members stand to suffer breach of Article 48 of the Constitution which guarantees them right to access justice unhindered.**
- **The increment of the daily parking fees as stated in the said consent is a matter of grave public interest thus necessitating publicity before implementation.**

Mr. Kinyanjui for the ex parte applicant made brief submissions in amplification of the aforesaid issues.

Mr. Kipkorir is on record for Kenya Local Government Workers Union, the second interested party. His submissions in opposition to the ex parte applicant's application may be summarized as hereunder:

**1. That this is not a representative suit. It is a judicial review matter brought under the provisions of Order 53 by Kaka Travellers Co-operative Savings and Credit Society Ltd, which has a membership of 114 members who are registered proprietors of 14 seater public service vehicles (matatus). No orders can therefore be sought on behalf of other persons except the ex parte applicant.**

**2. A Constitutional reference cannot be filed in pending judicial review proceedings and consequently the application is fatally defective.**

**3. The application is an attempt to impugn the consent order that was recorded in JR 319 of 2010. The consent order cannot be challenged in different proceedings other than those in which the order was recorded.**

Mr. Ogetto for the 1<sup>st</sup> respondent associated himself with the submissions of Mr. Kipkorir and in addition stated that:

**(a) The conservatory orders sought are not available. What is sought to be enjoined has already been implemented because the new parking rates were effected since 24<sup>th</sup> January, 2011.**

**(b) This court's jurisdiction had not been properly invoked. A judicial review court cannot transform itself into a Constitutional Court and deal with the Constitutional issues raised by the ex parte applicant.**

**(c) The ex parte applicant has no *locus standi* to challenge the consent order because the consent does not affect the motor vehicles of the ex parte applicant's members. It refers to private motor vehicles only.**

**(d) This court has no jurisdiction to grant the orders sought.**

Mr. Njuguna for the second respondent supported the submissions by both Mr. Kipkorir and Mr. Ogetto.

Mr. Kurauka for the ex parte applicant in JR 319 of 2010 stated that his client agreed to an out of court settlement, having been given sufficient reasons that necessitated an increase in the parking charges. He was also assured that the parking regulations would be streamlined. He added that although the consent order was duly executed, its effective date had not been agreed upon. That created room for the first respondent to choose the effective date, he added. He conceded that the implementation of the consent order came too soon.

That notwithstanding, he was of the view that the manner in which the consent order was being challenged is improper.

I have given due consideration to all the issues raised by all the parties in this application. The first issue that I must consider is whether this court has jurisdiction to grant the orders sought. Jurisdiction is the bedrock of every judicial decision by a court or tribunal and without it no valid order can issue. This matter came to court as a judicial review application and in the course of proceedings a consent order was recorded in another similar application which gave rise to Constitutional issues. As a result, the ex parte applicant filed the application dated 24<sup>th</sup> January, 2011. The application was brought pursuant to various Articles of the Constitution including **Articles 22 and 23. Article 23(1)** states as follows:

**“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”**

Then **Clause (3)** thereof expressly states that in any proceedings brought under **Article 22** a court may grant appropriate relief, including an injunction. **Article 22** regards enforcement of the Bill of Rights and under **Clause (3)** thereof the Chief Justice is required to make rules providing for the court proceedings referred to in the Article. But until the Chief Justice makes those rules, the Rules for the enforcement of

the fundamental right and freedoms under **Section 84(6)** of the **former Constitution** (commonly referred to as “**the Gicheru Rules**”) continue to apply but with the alterations, adaptations, qualifications and exceptions as may be necessary to conform with **Article 22**. Under “**the Gicheru Rules**”, where a Constitutional issue arises in a matter before the High Court, the court may treat such an issue as a preliminary point and proceed to hear and determine the same. That does not, however, bar a party from filing an application in the pending matter. But whether the procedure in which the application was brought is right or not, **Article 159(d)** of the **Constitution** requires the court to administer justice without undue regard to procedural technicalities. In all respects, this court has jurisdiction to deal with the application in question. The application is not an abuse of the court process as alleged by the respondents and the interested parties.

Does the ex parte applicant have *locus standi* to bring the application? The ex parte applicant is alleging that the consent in JR 319 of 2010 violates its Constitutional right in several respects, as earlier stated, including the right to a lawful, reasonable and procedurally fair administrative action and trial. **Article 22(1)** of the **Constitution** states that:

**“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”**

The scope of the people who may file such proceedings is widened by **Clause (2)** thereof which provides that in addition to a person acting in their own interest, court proceedings under **Clause (1)** may be instituted by:

**“(a) a person acting on behalf of another person who cannot act in her own name;**

**(a) a person acting as a member of, or in the interest of, a group or class of persons;**

**(b) a person acting in the public interest; or**

**(c) an association acting in the interest of one or more of its members.”**

The provisions of **Article 22(1)** and **(2)** clearly grant the ex parte applicant *locus standi* to file the application under consideration.

Further more, the impugned consent expressly refers to the ex parte applicant’s matter, that is, JR 323 of 2010. The parties in JR 319 of 2010 cannot make reference to JR 323 of 2010 and having done so now turn around and say that the ex parte applicant therein has no legal capacity to question the consent. I am satisfied that the ex parte applicant has *locus standi* to file its application dated 24<sup>th</sup> January, 2011.

Does the impugned consent order violate the ex parte applicant’s right to a fair administrative action that is lawful, reasonable and procedurally sound? As earlier pointed out, there are striking similarities between the final orders sought in these two judicial review matters. That was well known to all the advocates and the parties in both matters. The orders that were by consent agreed upon on 17<sup>th</sup> January, 2011 stated that in view of the compromise in JR 319 of 2010, the order of 24<sup>th</sup> October, 2010 in JR 319 of 2010 for leave and stay be replicated in this application. The interim orders of stay issued on 29<sup>th</sup> October, 2010 were to remain in force until 21<sup>st</sup> February, 2011 when the matter was scheduled to be mentioned. That is why the consent issued on 21<sup>st</sup> January, 2011 in JR 319 of 2010 stated that it will not affect JR No. 323 of 2010. In the judicial review application, the ex parte applicant seeks, *inter alia*, an order of certiorari to remove into this court for purpose of quashing Gazette Notice No. 12582 of 2010 which purported to increase the daily parking charges for saloon cars from Kshs.140/= to Kshs.300/=. The ex parte applicant contended that the Gazette Notice was published inappropriately and without regard to the relevant law and procedure. The court will have to determine these issues. However, the wording of paragraph 1 of the consent order purported to legitimize the proposed figure of Kshs.300/=. That in itself tends to compromise the ex parte applicant’s challenge of the validity of the said Gazette Notice.

It is instructive to note that the consent order of 21<sup>st</sup> January, 2011 did not state the commencement date of the new charges. One would have thought that since the parties to the said consent were well aware that the substantive application in this matter (JR 323 of 2010) was yet to be heard, the effective date of the consent orders would await the final determination thereof. I would agree that the immediate commencement of the new daily parking rates was calculated to deny the ex parte applicant the right to administrative action that is lawful and procedurally fair. It was also calculated to negate a fair trial.

The respondents and the interested parties cannot fault the ex parte applicant's action of challenging the said consent in this application. By stating that the consent would not affect JR No. 323 of 2010 when the parties knew or ought to have known that immediate implementation thereof would definitely affect the said case, the signatories to the said consent were attempting to drag the ex parte applicant into their house, close the doors and hope that ex parte applicant will not make any attempt to get out.

There are several other issues that were raised by the ex parte applicant regarding the propriety of the said Gazette Notice which I do not wish to scrutinize for now since this is an interlocutory application and the main matter is yet to be heard and determined.

I do not agree with the 1<sup>st</sup> respondent that since the new parking rates have already been implemented there is nothing that can be stopped and that the application for injunction does not lie. As long as the new parking rates were improperly introduced, and that has been demonstrated, continued breach of the ex parte applicant's Constitutional rights cannot be tolerated and has to be stopped.

Consequently, I grant the orders as sought in prayers 3 and 4 of the ex parte applicant's application dated 24<sup>th</sup> January, 2011. Given the nature of this matter, prayers 5, 6 and 7 are also granted.

The 1<sup>st</sup> respondent shall bear the costs of this application.

**DATED, SIGNED and DELIVERED at NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY, 2011.**

**D. MUSINGA**  
**JUDGE**

**In the presence of**

**Nazi – court clerk**

**Mr. Kinyanjui for the ex parte applicant**

**Mr. Monari for the 1<sup>st</sup> respondent**

**Mr. Ondieki for the 1<sup>st</sup> interested party**

**Mr. Makori for Nairobi Central Business District Association**

**Mr. Monari holding brief for Mr. Kipkorir for the 2<sup>nd</sup> interested party**

**Mr. Njuguna for the 2<sup>nd</sup> and 3<sup>rd</sup> respondent**