

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTION AND JUDICIAL REVIEW DIVISION
PETITION NO.103 OF 2010

IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: AN APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS ARISING FROM AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 27, 36, 40 AND 47 OF THE CONSTITUTION OF KENYA

BETWEEN

**DIRECTLINE ASSURANCE COMPANY
LIMITED.....PETITIONER**

VERSUS

THE HON. THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA, (Being sued for and on behalf of the Minister for Transport and being sued for and on behalf of the Transport Licensing Board).....RESPONDENT

AND

**OROKISE SACCO LIMITED
EMBASAVA SACCO LIMITED
INDIMANJE SACCO LIMITED
MENYA SACCO LIMITED
NAEKANE SACCO LIMITED**

.....
INTERESTED PARTIES

RULING

The Ministry of Transport of the Government of the Republic of Kenya through the Transport Licensing Board, a Licensing authority established under section 31 of Cap 404 Laws of Kenya published an advertisement in the local press and in particular on the Daily Nation of 1st November 2010 in which it seeks to compel all public transport operators and individual owners of public transport vehicles to come together and form either Limited Liability companies or join Savings & Credit Cooperative Societies before the 31st day of December 2010. It is the case of applicant that the purported advertisement and public notice issued by the Transport Licensing Board is invalid and incapable of due compliance because it denies, violates, infringes and threatens rights and fundamental freedoms of individuals guaranteed under the Constitution of Kenya. It is alleged that Article 36(2) of the Constitution of Kenya forbids the respondent or any other person or authority from compelling any person or class of persons to join an association of any kind hence the purported advertisement clearly offends the said Constitutional provision as it seeks to compel individuals to join an association contrary to their will.

It is the position of the applicant that the notice is discriminatory against public transport operators and

denies them the equal protection and benefit of the law accorded to limited liabilities companies and SACCOs carrying out business as public transport operators. It is contended that the notice is a limitation of the freedom of association and said limitation is not reasonable and justifiable in an open and democratic society. It is further contended that the consequences of non-compliance are grave and punitive in that any individual owner of matatu who will not have complied by 31st December 2010 will not be issued with the necessary license hence the need and necessity for a conservatory order of stay to be granted. The basis of the application for my determination is to grant following orders;

1. That pending the hearing and final determination of the annexed Petition, this Honourable Court be pleased to grant the Petitioner conservatory and/or interim orders of stay barring the Minister for Transport of the Government of the Republic of Kenya and the Transport Licensing Board, or any other Licensing Authority established under the Transport Licensing Act, Cap 404 Laws of Kenya, either by themselves or officers acting under their direct supervision and control and whether acting jointly or singularly, from compelling the Petitioner or any other individual Public Transport Operator and/or any individual owner of Public Service Vehicles (PSV) to form a Limited Liability company or join a Savings and Credit Co-operative Society (Saccos) as a pre-condition for issuance of any licence or class of licenses issues by the Transport Licensing Board or any other Transport Licensing Authority to Public Transport Operators for the carrying on of public transport business or ownership of public service vehicles.

2. THAT pending the hearing and final determination of the Petition filed herein, this Honourable Court be pleased to grant the Petitioner conservatory and/or interim orders of stay barring the Minister for Transport in the Government of the Republic of Kenya and the Transport Licensing Board, or any other Licensing Authority established under the Transport Licensing Act, Cap 404 Laws of Kenya, from either jointly or singularly, effecting, implementing or demanding the due compliance of the Public Notice published by the Transport Licensing Board on page 37 of the Daily Nation Newspaper issue number 16664 of 1st November, 2010 or any other public notice published in any other local newspaper or publication in Kenya, similar or akin to that published on page 37 of the Daily Nation Newspaper issue number 16664 of 1st November, 2010.

3. THAT pending the hearing and final determination of the Petition filed herein, this Honourable Court be pleased to grant the Petitioner conservatory and/or interim orders of stay barring the Minister for Transport in the Government of the Republic of Kenya or any other Officer in the said Ministry and the Chairman of the Transport Licensing Board or any other Officer of the said Board from publishing in the Kenya Gazette any public or legal notice, rules or regulations purporting to compel individual Public Transport Operators who currently operate as Individual owners of Matatus or Public Service Vehicles to come together to form either Public or Private Limited Liability Companies or to join Savings and Credit Co-operative Societies (Saccos) as a pre-condition to being issued with all or any class of licences issued by the Transport Licensing Board to Public Transport Operators who own and/or operate public service vehicles.

Whilst recognizing that even the most progressive of Constitutions cannot alone resolve all of the ills of the society, a Constitution that aspires to be legitimate, progressive, authoritative and to be accepted as a fundamental law must address issues like regulating and limiting the powers of the Government or Governmental organs. Such powers must be exercised on the basis of openness, probity, honesty and to the best interest of the wider public by ensuring that the fundamental rights of the people are fully protected. Fundamental rights are not absolute. There ought to be some limitations which are necessary for orderly administration of the transport industry. A constitution has to provide for the elimination of all forms of discrimination by ensuring that the ordinary laws, rules, procedures and directives applied in execution of governance are in conformity with the provisions of the Constitution. I understand and appreciate that ordinary men and women need support in their fight to claim and protect their rights and liberties. I also understand that most Government organs or institutions or persons exercising executive powers, think they know best what the public interest requires and are inclined to play down, if not ignore the rights and interests of those opposed to their policies. It is for that reason that courts need the power as well as the will to help such organs or persons exercising executive powers resist the temptations to abuse or overreach their powers. I must therefore determine the issues in the light of the facts disclosed by the

applicant.

It is recognized that the petitioner is not a public transport operator. It is also not an individual owner of public vehicle. It has not demonstrated that it is acting in its own interest but in the interest of others who have not been disclosed. It is also clear that the petitioner has not demonstrated that those on whose behalf it is acting for cannot act in their own individual capacities. It is also alleged the petitioner has not demonstrated that it is acting on behalf of a group or class of persons as the group or class of persons has not been disclosed. It is alleged the applicant is acting on behalf of the public so as to protect a right which is about to be infringed by the respondents.

It is also contended that the notice dated 1st November 2010 addressed to the general public has been a culmination of various meetings between all the stake holders in the transport industry and the Government of Kenya wherein a resolution was made on 19th October 2010 by all stake holders in the industry to try and streamline the operations of the industry for the benefit of the public. The resolution was aimed at dismantling illegal cartels in the industry and also to cushion individual PSV owners from a few within their ranks who are bent on ensuring that there was no order in the industry and to protect the members from Government excesses always targeted at the industry. There is no indication that the petitioner attended the stake holders meeting as a PSV owner or that it represented its interests as an insurance service provider to the industry. In seeking to stop the Board from implementing the resolution of the stake holders in the transport industry, the petitioner is clearly supporting the existence of cartels in the industry, an issue of grave concern to the industry, the Government and the general public. It is alleged that it is of great importance that the Transport Licensing Board should not deal with cartels but with genuine PSV owners. In essence it is the contention of the respondent that the petitioner cannot prevent the Government from formulating policies and making policies into law. And in any case the transport Licensing Board has not compelled any person or group of persons to join any SACCO but an individual would voluntarily decline or join or form a company or a SACCO of his choice.

The question for my determination is whether in view of the conflicting facts, this court should grant conservatory orders in order to paralyze or restrict the implementation or operation of the notice dated 1st November 2010. A person seeking a right must demonstrate the existence of a right which requires or which entitles him to intervention or protection from court. It is incumbent upon applicant to show that it is entitled to the remedy it seeks. The issue of public interest is one of the main issues in this petition. Public interest means, the interests and convenience of the members of the public as a whole. This court has to ensure no person or party whatever his position or his status endangers public interest, public safety and public security. The paramount consideration in giving an adequate protection is an existence of a right which has been infringed or is about to be infringed. In assessing whether a right has been infringed or is about to be infringed, the applicant has to demonstrate that he would suffer or he has suffered some prejudice or damages which is foreseeable and which is directly resulting from the action or the inaction complained from.

The law is that only those who are entitled to a claim or be affected by the outcome can legitimately seek protection from the court. The applicant has not demonstrated how the legal notice would affect its interests and that of the public it purports to represent. It is not every person who can approach the court for redress of his grievances but persons with legitimate interests and stake in the outcome and the effects of the decision complained against.

In my understanding the nuts and bolts of the PSV industry is one of the confusion and one with no regard for rules and regulations. Owners of PSV motor vehicles have become the alpha and omega of the management of the industry. Except in very few instances e.g. (the Michuki Rules) there has never been an attempt to have an orderly and regulated industry. The cultural life of the transport industry is one that disregards law and order and one that completely refuses checks and balances.

It is impossible for any undertaking to take root in the Kenyan transport industry without the cartels or goons who have assumed the role of the Government because of the vacuum created by the central players. Wicked things have been done and continue to be done. The Notice dated 1st November 2010 allegedly purports to stop or regulate the mayhem in the PSV industry. It is common that traffic offences

are being committed with gross impunity. The industry resists effective scrutiny unless the cartels and the goons are consulted. In my assessment police are complicity or are unable to control the industry mainly on the basis of lack of resources and unwillingness from the central players. The industry resists or frowns at any change, rules, regulations and application of the law when it serves an interest contrary to that of the cartels and the goons who mainly control or have assumed the control of the industry. In my view the PSV industry is a rogue State within a State and the persons who are the unlawful occupiers of the prime positions within the industry would resist any kind of rules and regulations. That is why the notice dated 1st November 2010 has ignited what I may call a ferocious attack on the Ministry of Transport. The industry thrives on catastrophe, mayhem and lack of rules or collapse of rules. In my understanding the very reason for establishing the new legal notice is intended to regulate, control and manage the transport industry in an orderly and peaceful manner and to guard against detrimental ethics of the confusion related situations that prevails within the industry. The striking feature of our PSV industry, is one that has a penchant for chaos and lack of regulations. It is haphazard and lacks coordinated design and structure in the way the service is provided to the general public. It has the semblance of a decaying system that is craving for reform and restructuring. Kenyans need an efficient and cheap transport that would have regard for the public interest at any given time notwithstanding the prevailing circumstances. That has been the missing link which the notice intends to correct.

Having taken into consideration the facts and circumstances in this case, I am satisfied that the applicant is not entitled to the orders sought. The applicant's business does not require a licence from the Transport Licensing Board in order to operate or run its business. The notice by the licensing board does not target the business and the interests of the applicants. It is a mere notice to individual PSV owners encouraging them to come together so as to have an orderly service industry. The interests the applicant are purporting to champion in this case are unknown in law, hence, no prima facie case with high chances of success has been established. In the premises I decline to grant the orders sought by the applicant. The application is dismissed with costs to the respondent and the interested parties.

Dated, signed and delivered t Nairobi this 4th day of January 2011.

M. WARSAME
JUDGE