



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Miscellaneous Case 37 of 2010**

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 265 OF KENYA

AND

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

AND

**IN THE MATTER OF THE CITY COUNCIL OF NAIROBI (TAXI-CAB) BY-LAWS 2007 GAZETTED VIDE GAZETTE
NOTICE NO. 6297 PUBLISHED IN THE KENYA GAZETTE OF 6TH JULY, 2007**

BETWEEN

REPUBLIC APPLICANT

AND

THE CITY COUNCIL OF NAIROBI RESPONDENT

EXPARTE: KENYA TAXI CABS ASSOCIATION

JUDGMENT

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Kenya Taxi Cabs Association filed the notice of motion dated 17.02.2010 through its registered officers namely, Peter Waweru Mburu, Laban Maina, Peter Kuria Wanjama, Lawrence Maina Kimani and Job Nzioka, challenging the decision of the City Council of Nairobi on licensing of Taxi Cabs for the year 2010. The orders sought in the motion are as follows:

1. An order of certiorari be issued to remove into this court for the purpose of being quashed, the decision of the Respondent contained in the letter of the Town Clerk dated 05.01.2010 on licencing of Taxi Cabs for the year 2010.

2. The order of Certiorari so issue to remove to this court for the purpose of being quashed the Respondents requirement on inspection of Taxi contained in its internal memo dated 18.01.2010.

3. That an order of Certiorari be issued to remove into this Hon. Court for the purpose of being quashed the Respondent’s schedule dividing the Central Business District into four zones and limiting the number of taxis to qualify for licence to a grand total of 524 taxis.

4. That an order of mandamus be issued directed to the Respondent compelling it to issue permits to all eligible members of the Applicant pursuant to By-laws of the City Council of Nairobi (Taxi cab) By-laws 2007.
5. That an order of prohibition do issue to restrict the Respondent from reallocating the taxi cabs ranks allocated to the members of the Kenya Taxi Cab Association to other taxi operators.
6. Costs of the application be borne by the Respondent.

The Notice of Motion was supported by a statutory statement and verifying affidavit of Peter Waweru Mburu, both dated 09.02.2010, a further affidavit of Peter Waweru dated 19.05.2010 and a list of authorities dated 22.07.2010. The motion was vehemently opposed and a replying affidavit was sworn by Stephen Mburu, the City Engineer on 21.07.2010.

Briefly, the applicants' case is that the Association comprises about 2,500 members and its objects are inter alia, education of its members on customer care, maintaining of uniform charges in the industry and seeking protection from the Respondent, and against unfair competition from illegal taxi operators.

They exhibited the minutes in which the officials were elected (PWM 1), the Constitution of the Association (PWM 2) and list of members (PWM 3). That taxi operators are governed by the Traffic Act Cap 403 Laws of Kenya, the Local Government Act Cap 265 and by-laws and rules made thereunder. In respect to Nairobi, the by-laws are contained in City Council of Nairobi, By –laws (Taxi cabs), 2007 which were gazetted on 06.07.2007 under Gazette Notice No.6397 (PWM 5). That according to the By-Laws, regulating permits i.e, by-laws Nos.4 – 13, application for the 2010 permits were to be made in November 2009 to allow for one calendar month. Though applications were made in 2009, the 2010 permits were not issued and instead, on 05.01.2010, a letter was addressed to the Association and operators inviting stakeholders to a meeting scheduled for 13.01.2010 to inform them of the proposed changes pertaining to licensing of taxi cabs which the Respondent wanted to implement (PWM 7). The Association's representatives and other stakeholders attended the meeting in which the Respondent generally informed them of the changes irrespective of any objections or concerns by the stakeholders. Since they had not had an agenda for the meeting, they wrote a memoranda to the Town Clerk questioning the practicability of the changes, the financial implications and other concerns (PWM 8).

Despite the said letter, the Respondent has gone ahead and announced implementation of the By-laws and specifically one banning taxi cabs which are more than 10 years old from being licenced and the requirement for inspection of taxis, which issues did not feature at the meeting of 13.01.2010. The applicants are challenging the memo of 18.01.2010 which sought to introduce changes to the law and that the Respondent is denying taxi cabs owners inspection certificates yet the vehicles have already been inspected by the Government's Vehicle Inspector. Another new requirement is that the taxi cabs be painted yellow and temporary permits be issued pending compliance with the other requirements. (PWM 11) and it is urged that the law does not provide for issuance of temporary permits.

The applicants therefore contend that the decision of the Town Clerk contained in the letter of 05.01.2010 is null ab initio, that the memo of 18.01.2010 contravenes the taxi Cab By-laws 2007; that the decisions were actuated by malice, ulterior motives, are unfair and insensitive to the Association members and that the decisions breached the Applicant's legitimate expectation that the procedure for changing laws would be followed, that the stakeholders would be consulted before the changes were made and that the decision was disproportionate as against the Applicants with negative adverse consequences.

In opposing the motion, Stephen Mburu, the City Engineer, deponed that the Respondent is vested with powers to regulate, control taxi business and has also discretionary powers to grant or refuse licences subject to fulfillment of specified conditions as may be reasonably prescribed. That the respondent informed all taxi operators of the changes under the letter of 05.01.2010 and they were also invited to a meeting of 13.01.010 where the changes were discussed as per the minutes (SKM 2).

That the taxi operators wrote to the Respondent appreciating the changes vide their letter of 14.01.2010 (SKM3). The Respondents contend that whatever changes were made were within the Respondent's power and discretion. That the changes in the age of the vehicles (not more than 10 years) painting of the vehicles to yellow and issuance of temporary permits is designed to regulate the business for all taxi operators and that the decisions taken were reasonable in the circumstances. That the decision is also meant to decongest the Nairobi Central Business District (NCBD) and that the application is brought in bad faith as the applicants do not want to share in the taxi ranks within the NCBD.

The issues that seem to lend themselves for determination are contained in the grounds and they are as follows:

1. Whether the Respondent has power to make changes to the (laws) rules pertaining to licensing of taxi cabs;
2. Whether the changes to the rules violate the Traffic Act;
3. Whether the changes contravene the Taxi cab By-laws 2007;
4. Whether the Respondent can unilaterally change the By-laws made pursuant to Section 201 of the Local Government Act.
5. Whether the impugned letters of 05.01.2010 and 18.01.2010 are an abuse of power and unreasonable.
6. Whether the applicants' legitimate expectation was breached.
7. Whether the Respondent's actions were biased, unfair, discriminatory.

1) The Respondent's mandate under Section 201 of the Local Government Act.

Section 201 of the Local Government Act Cap 265 Laws of Kenya mandates the Respondent to make, from time to time, by-laws in respect of all matters that are necessary or desirable for the maintenance of health, safety and the well being of the inhabitants within its area. It may also prescribe penalties for breach of any by-laws. Under Section 204, the by-laws must be submitted to the Minister for Approval.

Further to the above, Section 118 A of the Traffic Act Cap 403 Laws of Kenya, mandates the Respondent to make by-laws that regulate, control, taxi cabs within its areas of jurisdiction and the procedure for making such by-laws is in accordance with the procedure set out in the Local Government Act. Section 118A (1) of the Traffic Act provides as follows:

"A Municipal Council and a City Council may make By-laws:

- a) For controlling taxi cabs within its area;***
- b) For fixing the number of taxi cabs permitted in its area;***
- c) For requiring the installation and providing for installation of meters on such taxi cabs;***
- d) For licensing the drivers of such taxi cabs;***
- e) For fixing the fees for any such licences and;***
- f) For prohibiting the licencing of taxi cabs, except for the picking up or depositing passengers or loads elsewhere than on stands provided for taxi cabs.***

2. -----

3. -----

(4) In this section, controlling includes regulating, inspecting, supervising and licensing."

Section 119 of the Act goes on to empower the Minister to make rules prescribing inter alia;

“(a) anything required by the Act to be prescribed;

(d) the standards for or inspection approval, calibration or testing of devices, tachographis or other instruments prescribed under paragraphs (da) or (db)

(g) all matters relating to the inspection, registration, licensing, regulation and control of vehicles and to the conditions which may be imposed in regard to :

(ga) (o).....

(p) Measures for generally restricting and regulating the use of vehicles in any such manner as the circumstances and safety on the roads may appear to him to require, and for the further better or more convenient carrying out of any provisions of the Act;

(q) (1)

(2)”

According to the Respondent, the above provisions are not couched in mandatory terms and they avail the Respondent discretion in controlling or regulating taxi business. I totally agree with the Respondent’s Counsel on that submission but the discretion availed to the Respondent must be exercised judiciously within the confines of the Act taking into account the intention of the Act. Having established that the Respondent has the mandate to make by-laws relating to taxi cab business, the next question for consideration is whether in making the by-laws the Respondent acted within its jurisdiction.

2. Ultra Vires

The applicant’s contention is that the 2007 By-laws having been approved by the Minister, the Town Clerk could only implement them but that he had no power to change the requirements.

The impugned letter and memo are dated 05.01.2010 and 18.01.2010 respectively. The letter of 5/1/2010 reads in part;

“Kenya Taxi Cabs Operators”

“RE: LICENCING OF TAXI CABS FOR THE YEAR 2010

The above refers.

The City council of Nairobi has introduced several changes as pertains to the licensing of taxi cabs from the way it used to be done before.

The Council needs to understand and implement these changes as part of requirements for this year. The purpose of this letter is to invite you for a meeting on 13.01.2010 at the city Engineer’s Boardroom to deliberate on the same at 10.00 a.m.

Signed

Engineer S. K. Mburu

For Town Clerk”

The internal memo of 18.01.2010 reads in part,

“RE: INSPECTION OF TAXIS”

The following are the requirements for taxi inspection:

1. *Licence for year 2009;*
2. *Taxis not more than 10 years old from the year of manufacture;*
3. *Payment of inspection fees;*
4. *The number of taxis to qualify for licence in each zone shall be as per the attached schedules;*
5. *Once a taxi has been found to be mechanically suitable, a temporary permit shall be issued for three months subject to the owner complying with the following conditions;*
 - a. *Obtaining of certificate of good conduct for the taxi driver;*
 - b. *Uniform for the taxi driver*
 - c. *Painting of yellow colour to the taxi*
 - d. *Number placement on side door and bonnet for the taxi.*

.....

Signed

Eng. S. K. Mburu

CITY ENGINEER”

According to the Respondent, in the meeting called for 13.11.2010, the applicants were accorded a hearing and that they addressed a letter to the Respondent on 14.01.2010 approving the changes. A reading of the letter dated 05.01.2010 clearly indicates that the changes to the requirements had already been made by the Respondent and the meeting called for 13.11.01.2010 was merely to inform the stakeholders about the changes and how the changes would be effected.

The minutes of the meeting of 13/1/2010 (SKM 2) clearly demonstrates that it was not a meeting to discuss and consider the views of all stakeholders in the changes to the requirements of licensing of taxi cabs. It was a forum meant to inform and advice the stakeholders of the changes and their enforcement. The changes had already been made.

One of the proposed changes to the taxi cabs was the painting of the whole taxi yellow. In their memorandum of 14/1/2010, the applicants indicated that there was already provision under By-law 18 that all taxi cabs be painted with a yellow line on the side of each taxi and that the proposed change would mean they would need to apply to Kenya Revenue Authority requesting change of colour, change of log book and there was a cost implication for changing colour and consequently there would be loss of resale value if an operator wished to dispose of the vehicle. The identification of the vehicle to be used as a taxi cab is specifically provided for under By Law 18. It reads as follows;

“18 (1) Every taxi cab shall have painted on the outside of both front doors of the vehicle and affixed inside in a position plainly visible to a passenger, in legible letters and figures-

(a) the name of the owner, and

(b) *the business address of the owner;*

and

(c) *the number of the permit issued in respect of the vehicle pursuant to the provisions of by-law 6 of these By-Laws; and”*

(d)

(2)

Rules 70 to 72 of the Traffic Rules made under the Traffic Act Cap 403 Laws of Kenya, have special provisions relating to taxi cabs and Rule 70 to 72 specifically deal with identification of the taxi cabs. Section 70 reads as follows:

“70 (1) Every taxi cab shall have painted on both sides and on the rear a continuous horizontal yellow band having a width of 150 millimeters and a consistency sufficient to enable such band to be clearly visible by day at a distance of not less than 275 metres;

(2) If the main body work of a taxi cab is so coloured that the yellow band required under this rule does not contrast permanently therewith, so as to be clearly visible at a distance of at least 275 metres, then the main body work, or so much of it as runs parallel to and at a distance of not less than 75 millimeters on either side of and contiguous to the aforesaid yellow band, shall be painted a dark colour of sufficient consistency to enable the yellow band to be clearly visible at the distance aforesaid.”

By-law 18 of the City Council of Nairobi (taxi cab) By –laws has to be read with Rules 70 to 72 of the Traffic Act. The law already provides for identification of taxi cabs in the country and Nairobi. If the Respondent wants further changes, there would be need to amend the City Council of Nairobi (By-laws) on Taxi Cabs and the Traffic Act and the Rules made thereunder.

Both the Respondent and Applicant admit that there already exists a requirement that the owners paint a six inch yellow line on the side of each taxi. Change of colour for the whole vehicle would have cost implications that have been pointed out by the Applicants and it is also likely to cause a lot of inconvenience to the operators. The requirement of painting the whole taxi is a major change in the By-laws and the subsidiary legislation made under the Traffic Act and I find and hold that the By-laws relating to identification should have been substantively amended to reflect that changes. The manner in which a By-law should be made is provided for under Ss.203 and 204 of the Local Government Act Cap 265 Laws of Kenya. Before approval of the By-laws by the Minister, the By-laws have to be made available to the public to enable the public raise objections, if any. I find that such a change to the requirements of taxi cabs licencing should have been made through amendment of the By-laws but not through a memo or a mere rule made by the Town Clerk or Town Engineer. I find that this would also apply to the requirement that for a vehicle to be licenced, it had to be less than 10 years old. That is a substantive change to the requirement that should have been included in the By-laws where the stakeholders would have a say before its promulgation. I do agree with the Applicant’s contention that the By-laws or the Traffic Act did not provide for the painting of the taxi cabs yellow nor did they require the taxi cabs to be less than 10 years before licencing and such changes should have been made through the amendment of By laws or the Traffic Rules but not through a memo. The Town Clerk’s mandate is to implement the law on behalf of the City Council of Nairobi not to make the law. In this case, the Town Clerk has arrogated himself the powers to make laws/By laws and I find the impugned decision to have been made without jurisdiction and ultra vires S. 201 of Cap 265, Rules made under the Traffic Act and the Traffic Act as a whole and must be quashed.

The other complaint raised by the Applicants is that the new rules require that even after a vehicle has been inspected by the Motor Vehicle Inspector in the Ministry of Transport, the Council has to carry out another inspection. The operators objected to the vehicles being subjected to another inspection by the Respondent as that would mean double inspection and multiplication of the costs. Again this double inspection was not provided for by the By-laws. The said rule was made outside the mandate of the Town Clerk or Engineer and in contravention of the Taxi Cab By laws 2007.

3. Rules of natural justice;

Section 203 and 204 of Cap 265 have entrenched to them rules of natural justice so that before any by-laws or subsidiary legislation is made into law, the stakeholders and the public have an opportunity to read and consider the said By laws and may raise their objections at an early stage before approval by the Minister. In the instant case, the Town Clerk and City Engineer have exceeded their mandate by actually making new Rules without following due process or allowing the Applicants a chance to give an input or raise objections to rules that adversely affect them. As earlier pointed out, the meeting of 13/1/2010 can not be said to amount to consultation as envisaged under S203 and 204 of Cap 265. At that meeting, the Applicants were merely being informed what had already been done. No wonder, on the next day, they wrote to the Town clerk appreciating the changes but pointing out the shortcomings of the requirements and how they were aggrieved by the said changes. The Applicants even gave suggestions on how the changes could be effected. In my view, the Applicants were denied a chance to be heard when the Town Clerk and Engineer went ahead to make rules that directly affected the rights of the Applicants without following due process. I adopt the decision in **R V LIVERPOOL CORPORATION ex p. TAXI FLEET (1972) AC 299** where the Court held that once vested interests of a party were confirmed, they could not be taken away without giving the affected party a hearing. In this case, By Laws were being changed unilaterally without hearing or consulting the stakeholders, the taxi operators. Those changes may totally affect their rights to livelihood and the Respondent should have complied with the law. Having failed to do so, the Respondent's decision does attract an order of Certiorari to quash it.

4. Legitimate Expectation

The Applicants also contend that their legitimate expectation that the Respondent would abide by the law in making the changes to the By-Laws regarding taxi cabs was breached. What is legitimate expectation? The doctrine is all about the administrative body charged with making decisions affecting rights of others acting fairly. Lord Diplock at page 406-409 of the **CCSU V THE MINISTER FOR CIVIL SERVICE (HL 1984) (1985) 1 AC 375**, had this to say of legitimate expectation

“—for a legitimate expectation to arise, the decision must affect (the) other person by depriving him of some benefits or advantage which either,

(i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which has been given an opportunity to comment; or

(ii) he has received assurance from the decision maker will, not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”

The Respondents are expected to abide by the statutory provisions that govern their functions and they are expected to act fairly. In the instant case, the Respondent failed to carry out amendments in accordance with the law and hence breached the applicant's expectation. In **CCSU V THE MINISTER FOR CIVIL SERVICE (HL 1984) (1985) 1 AC 375**, it was observed that there was an implied duty of fairness attached to all administrative acts such as what the Respondent's officers purported to do. The only fair action that could be taken in the instant case was follow due process and involve the stakeholders in the promulgation of new By laws by consulting or giving them a hearing as required under the law.

5. Unreasonableness, Bias and Bad Faith

It was the Applicants contention that the decision contained in the letter and memo of 15/1/2010 and 18/1/2010, respectively, were an abuse of power. The failure by the Town Clerk to comply with the law and in trying to get a short cut to amend the law is an abuse of power. It is also contended that the decisions were unreasonable. In the **CCSU** case, (Supra) unreasonableness as a ground in Judicial Review is described by Lord Diplock – it is also referred to as irrationality. He said at page 410

“By irrationality’ I mean what can by now be succinctly referred to as “wednesbury unreasonableness” ---. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

The manner in which the new licencing rules came up and are being effected is unfair to the Applicants. They had applied for licences in 2009 and the licences were supposed to be issued in January 2010. Instead, new rules were imposed on the Applicants without prior warning or consultation. Yet the implementation of the said rules which concerns change of colour of taxi cabs, the obtaining of new log book etc, needed time and money. In my view the decision was unfair, unreasonable and punitive of the Applicants. The Respondents contend that the Rules have partially been implemented and were meant to enhance the taxi business. In my view, even if they are partially implemented, they lack the necessary foundation and are a nullity ab initio and can not therefore be sustained. The Respondent having allowed such acts to be perpetrated has to bear the consequences of its actions and abide by the law. I do not think I need to go into every complaint raised by the Applicants.

Consequently, I hereby grant prayers 1, 2, 3, quashing the decision contained in the letter of 5/1/2010 and the memo of 18/1/2010 and having done that, I do not find it necessary to grant an order of Mandamus and Prohibition but expect that the Respondent will comply with the statutory provisions and By laws relating to Licensing of Taxi Cabs. I order that the Respondent bears the costs of this application.

DATED AND DELIVERED THIS 20TH DAY OF SEPTEMBER 2010

R.P.V. WENDOH

JUDGE

PRESENT

Mr. Kibe Mungai for the Applicant

Mr. Omotti for the Respondent

Muturi, Court Clerk