



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Appli 133 of 2008**

**REPUBLIC.....APPLICANT**

**VERSU**

**PERMANENT SECRETARY MINISTRY OF LOCAL  
GOVERNMENT.....1ST RESPONDENT**

**TRANSPORT LICENCING BOARD.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI.....4<sup>TH</sup> RESPONDENT**

**THE COMMISSIONER OF POLICE.....5<sup>TH</sup> RESPONDENT**

**EXPARTE**

- 1. IMMACULATE TRANSPORTERS LTD**
- 2. ELIZAPHAN WAHOME**
- 3. DUNCAN NGUGI**
- 4. DANIEL KIMANI**
- 5. JOHN K. MACHARIA**
- 6. PETER G. MITI**
- 7. MICHAEL KINYUA**
- 8. BENJAMIN WAMUGI**
- 9. JACKSON NGURE**
- 10. JOE MACHARIA**
- 11. DAVID MWANGI**

**12. PAUL NJOROGI**

**13. PETER MAINA**

**14. PETERSON MURIITHI**

**15. HARUN MWANGI WACHIRA**

**16. BERNARD GOKO**

**17. SHADRACK KIRUI**

**18. ROSE NJOKI**

### **RULING**

By an application date 27.3.08 the Applicants/Respondent applied for the following orders:-

1. THAT this application be certified urgent and be heard and determined instantly: -
2. THAT the applicants herein that is to say Bernard Goko, Elizaphan Wahome, Duncan Ngugi, Daniel Kimani, John K. Macharia, Peter G Miti, Michael Kinyua, Benjamin Wamugi, Jackson Ngure, Joe Macharia, David Mwangi, Paul Njoroge, Peter Maina, Peterson Muriithi, Harun Mwangi Wachira and Immaculate Transport Company Limited be granted leave to apply for a judicial view order by way of certiorari to bring before this court and quash the decision of the respondents jointly and severally to bar the motor vehicles registration numbers KAL 560 C, KAM 801 C, KBA 009 C, KAQ 910 U, KAS 102 V, KAK 877 S, KAK 261D, KAJ 342W, KAK 021F, KAJ 921F, KAT 860U, KAS 725G, KAH 852 H, KAH 671 M, KAW 663V, KAW 083V, KAS 353Q, KAS 380 B, KAT 268C, KBA 934G, KAH 227W, KAL 992 M, KAT 208C, KAS 022 K, KAT 217F, KAK 950 U, KAS 206 K, KAM 225Y, KAJ 853 Z, KAS 808 Y, KAS 990 B, KAQ 228 E, KAK 089 D, KAH 229 D, KAN 514H, KAJ 945 Y, KAS 135 V, KAK 020 P and KAP 892 R belonging to the applicants from entering into the Central Business District, Nairobi and or using the Landies Road.
3. THAT the applicants be granted leave to apply for a judicial review order by way of Prohibition restraining and or prohibiting the respondents jointly and or severally from continuing to block the applicants' motor vehicles registration KAL 560 C, KAM 801 C, KBA 009 C, KAQ 910 U, KAS 102 V, KAK 877 S, KAK 261D, KAJ 342W, KAK 021F, KAJ 921F, KAT 860U, KAS 725G, KAH 852 H, KAH 671 M, KAW 663V, KAW 083V, KAS 353Q, KAS 380 B, KAT 268C, KBA 934G, KAH 227W, KAL 992 M, KAT 208C, KAS 022 K, KAT 217F, KAK 950 U, KAS 206 K, KAM 225Y, KAJ 853 Z, KAS 808 Y, KAS 990 B, KAQ 228 E, KAK 089 D, KAH 229 D, KAN 514H, KAJ 945 Y, KAS 135 V, KAK 020p and KAP 829R from entering into the central business district, Nairobi and or using the Landies Road;
4. THAT the grant of the said leave to operate as a stay of actions of the Respondents.

The Court on the 31st March 2008 granted leave to the Applicant to file a substantive application for the above mentioned reliefs and the leave so granted was to operate as a stay of the 4th interested

Respondent's decision. The 4th Respondent by way of a Notice of Motion Application dated 3<sup>rd</sup> April 2008 sought to set aside or vacate the order issued on 31st March 2008 grounds.

1. 4<sup>th</sup> Respondent Party/applicant's decision to order that vehicles plying the Applicant/Respondents' route should terminate their journey at the Muthurwa bus station was lawful as when the said decision was made all the statutory procedures were followed before the said decision was brought into effect i.e. there was a council resolution which was followed by the ministerial approval and the said decision was duly gazetted.

By Kenya Gazette Notice Supplement Number 21 vide legal Notice No. 37 the Applicant herein made the City of Nairobi (Omnibus Stations) Amendment By-Laws 2008 which clearly designate special parking for all vehicles plying route Number 58, that is to say from Outering Road. Buru Buru Estate Jogoo Road and into the Central Business District. The Section 23 of the said by-laws state as follows:

The following are the authorized or routes and designated parking areas for omnibuses.

| Terminus | Route       | Destination         | Route Description   |
|----------|-------------|---------------------|---|
| circular | CBD Shuttle | Circular within CBD | Muthurwa Community (via Haile Selassie Avenue and Ngong Road) Globe Cinema Roundabout (via Ngong Road - Kenyatta Avenue-Moi Avenue (Muranga Road) and back to Muthurwa (via Tom Mboya Street-Moi Avenue-Haile Selassie Avenue |
| Circular | CBD Shuttle | Circular within CBD | MUTHURWA -Globe Cinema roundabout (via Haile Selassie Avenue  |

|                         |                           |                                      |   |
|-------------------------|---------------------------|--------------------------------------|---|
|                         |                           |                                      | Muranga<br>Road) and back to<br>Muthurwa (via Ngong<br>Road-Haile Selassie<br>Avenue)   |
| Hakati Road<br>Terminas | 33B (via<br>Mombasa Road) | Embakasi                             | Embakasi-North Airport<br>Road Mombasa Road -<br>Uhuru High Way-Haile<br>Selassie Avenue-Race<br>Course Road-Uyoma<br>Road-Hakati |
| Muthurwa                | 69/72                     | Enterprise Road<br>(Industrial Area) | Enterprise Road-Lusaka<br>road-Muthurwa   |

The above amendment was operationalising an earlier by-law, City Council of Nairobi (Matatu Termini) by-laws 2007 which provides as follows under Section 9.

1. The Council may from time to time declare any area within the City to be a matatus to use that terminus.
2. The position of such terminus declared in accordance with these by-laws shall indicate the route number of the matatus to use that terminus.
3. Any person who parks any vehicle other than a matatu permitted under these By-laws at a matatu terminus commits an offence.
4. The owner, driver or conductor of a matatu who uses any matatu terminus established under these by-laws shall be subject to all the provisions prescribed there under.

The Respondents have through their Counsel responded to the application, by submitting that Section 72A (j) deals with parking, whereas the issue before the court is where matatus from Jogoo road should terminate or end their service. And that under Nairobi Matatu Termini, By laws 2007 no party is allowed and vehicles are on the move all the time. They contend that The Traffic Act regulates parking.

The Respondents also contend that the greater public interest is to have the stay orders continue because the traffic situation will be chaotic if matatus were not allowed into the CBD.

Moreover the orders are in the interest of the majority of the vehicle owners instead of favoring a few by setting them apart from the others.

Finally they claim that the three operators who ply the CBD have been favoured and this constitutes discrimination of the other operators including the applicants. Related to this is the issue of licenses which had been issued to the applicants for a period of one year by the TLB on the basis of known routes and as a result the applicant's legitimate expectations to so operate throughout the year have been thwarted.

It is not disputed that the order for leave and that such leave operates as stay had been given by the then Vacation judge. It is also not in contest, that the by laws published on 20/3/2008 and exhibited by the applicants were in existence before the applicants commenced judicial review proceedings on 27/3/2008 without exhibiting the by laws or making reference to them. It is also common ground that the impugned decision is the subject matter of the by law. Section 69 of the Interpretation and General Provisions Act Cap. 2 provides that the production of a Gazette Notice containing a written law, is prima facie evidence in all courts and for all purposes.

The applicants have also contended that sufficient notice had not been given contrary to the rules of natural justice. Obviously this ground of intervention should, in retrospect, be seen from the standpoint of the due process provisions relating to the passing and the making of by laws as set out under section 201 of the Local Government Act Cap 265. As at the time the Vacation Judge gave the order for leave and stay his, attention was not drawn to be provisions of Section 201 of the Local Government Act. Instead, he was informed that the applicant/Respondents had made an oral is decision on 12/3/2008.

I therefore find that failure to disclose the existence of the By laws as the real subject matter constituted a serious non disclosure of a material fact which could have affected the grant of the orders as sought. I find that on the point of the claim based on the legitimate expectation the court has not been adequately briefed on how this has been resolved up to now.

I find that there was no decision which was under attack by the Respondents as at the time of the grant of the order for leave stay. Instead what LN37/08, which were in turn not brought to the attention of the Court or challenged.

Moreover due to the very nature of the orders sought namely the orders of Certiorari and Prohibition, without the correct impugned decision being brought before the court i.e. the by laws LN37/08, certiorari, cannot possibly lie even at the next stage. Similarly, the order of Prohibition deals with the future and does not apply to decisions already made. On this see the Court of Appeal decision in the case of KENYA NATIONAL EXAMINATION COUNCIL -vs- R. Exparte GEOFFREY GATHENJI NJOROGE & OTHERS CA 266 of 1996, the court held.

"The point we are making is that an order of prohibition is particular against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That in our understanding is the efficacy and scope of an order of prohibition"

Had the attention of the Vacation Judge been drawn to the By laws the chances of the applicants succeeding in obtaining the substantive orders of certiorari and prohibition would have been apparent to him - namely that the chances were almost non existent.

At the leave stage the Court grants or refuse leave by answering the question whether or not an applicant is likely to succeed at the second stage. If not, leave is declined and if yes, leave is granted –

See WANJUGUNA VERSUS MINISTRY OF AGRICULTURE (a decision of the Court of Appeal). This is the test I have applied.

Finally on the issue of non disclosure, this court reiterates its two rulings in the KENYA BUS SERVICE -vs- R. HCC MISC NO. 413 of 2005 (now reported) and JUSTUS NYANGAYA -vs- REPUBLIC HCC MISC. 1133 of 2007 (also reported) where it was reiterated that an order for leave is only provisional and

it can be set aside or vacated for material non disclosure or if wrongly entered see the case of WEA RECORDS. I therefore hold that the order for leave and stay could not have been granted on the same terms, if the By laws had been exhibited. Moreover the courts discretion could have been affected substantially by the existence of the By Laws and more so, as regards that part of for order of leave operating as a stay.

On the issue concerning the public interest, I rule that on a tentative basis, there cannot be a greater public interest concerning traffic matters than achieving the smooth flow of traffic, order and discipline on our roads.

For the above reason, I hereby set aside or/and vacate that part of the Order given on 31/3/2008 by the Vacation Judge directing that leave operates as stay. However I do leave intact the grant of leave in view of the possible contest on licenses and the arguments they attract touching on the legitimate expectation of the applicants.

I order that costs be in the cause.

Dated at Nairobi the 5th day of May 2008.

**J. G. NYAMU**

**JUDGE**