



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

PETITION 298 OF 2008

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER SECTIONS 3, 82 AND 84 OF THE CONSTITUTION OF KENYA**

BETWEEN

JAMES NYASORA NYARANGI 1ST PETITIONER

MIKE MUNGA MUSA 2ND PETITIONER

NAMAN OGWENO 3RD PETITIONER

REVEREND JOHN MBUGWA 4TH PETITIONER

VERSUS

THE ATTORNEY GENERAL RESPONDENT

JUDGMENT

The petition before Court is dated 22nd May, 2008. The Petitioners are seeking the following orders:

(a) It be declared that the purported amendment and gazette of ***THE CITY OF NAIROBI (OMNIBUS STATIONS) AMENDMENT BY-LAWS 2008*** has contravened sections 3 and 82 of the Constitution and therefore illegal, null and void.

(b) It be declared that the purported implementation of ***THE CITY OF NAIROBI (OMNIBUS STATIONS) AMENDMENT BY-LAWS 2008*** is arbitrary, capricious and a contravention of the petitioners fundamental right under section 82 of the Constitution.

(c) It be declared that the purported order to the omnibus to use Muthurwa terminus is null and void.

(d) That it be ordered that the Respondent does pay the Petitioners costs of this suit.

(e) This Honourable Court be pleased to make any other or further effective remedy as it shall deem fit and just in the circumstances of this case.

The petition is supported by the affidavits of ***JAMES NYASERA NYARANGI***, the 1st Petitioner and

REVEREND JOHN MBUGUA the 4th Petitioner. The Petitioners have also filed skeleton arguments cum summary of submissions on 23rd June, 2008. The petitioners were represented by Mr Abong B.O. Advocate. The petition was opposed by the Respondent vide the grounds of objection dated 16th June, 2008 filed in court on the 18th day of June 2008 skeleton submissions dated 26th June 2008 filed on the same date. The Respondent was represented by M Stephen N Gikera a litigation Counsel. The grounds upon which the Petition is founded are contained in the body of the petition and are as follows:-

1. The said By-Laws have provided that several omnibus (including those of the 1st and 2nd Applicant in route 58) plying between various parts of the country to the City Centre of Nairobi through Jogoo Road are now discriminately barred from accessing the City Centre of Nairobi and have instead been directed to terminate their journey at Muthurwa Market which is 2 kilometres from the previous terminus ie the CBD.
2. The Government has the obligation to ensure that the implementation of the said By-Laws does not contravene section 82 of the Constitution by ensuring that the implementation does not offend the Petitioners' rights under section 82 of the Constitution not to be subjected to a capricious discrimination, in the implementation of the said By-Laws.
3. The implementation of the said By-Laws has contravened section 82 of the Constitution because, whereas it has barred most of the omnibuses from accessing the City Centre of Nairobi, some omnibuses for the business rivals of the 1st and 2nd Petitioners namely, Citi Hoppa Ltd, Double M Ltd and the Kenya Bus Service Management Ltd, have been allowed to access the City Centre of Nairobi.
4. The 2nd Petitioner's rights have been violated in that being a user of Jogoo Road, in addition to commuting in the usual buses to reach the new terminus, he is now required to use the newly introduced shuttle services Ltd, the Double M Ltd and the Kenya Bus Management Ltd and pay more fare to reach the City Centre or walk an extra two kilometers, a situation that other Nairobi residents who do not use Jogoo Road are not subjected to.
5. The Petitioners contend that the purported amendment and implementation of the said By-Laws is unconstitutional, null and void for contravention of sections 3 and 82 of the constitution.

A brief factual background of this petition is that on the 20th March, 2002, the Minister for Local Government Pursuant to section 72(1) of the Traffic Act Chapter 403 Laws of Kenya, published a notice in a special issue of the Kenya Gazette Supplement No 21, Legislative Supplement No. 15, Legal Notice No. 37 known as **THE CITY OF NAIROBI (OMNIBUS STATIONS) AMENDMENT BY-LAWS 2008** which barred most of the omnibus including those of the 1st and 2nd Petitioners from accessing the City Centre of Nairobi. At the time of implementing the said **By-Laws**, some omnibuses belonging to the business rivals of the 1st and 2nd Petitioner namely Citi Hoppa Ltd, the Double M Ltd and the Kenya Bus Services Management Ltd were allowed to access the City Centre of Nairobi. The petitioners have alleged that the implementation of the said By-Laws has discriminated against them and created an unfair business environment for them while favouring their three competitors namely, Citi Hoppa Ltd, the Double M Ltd and the Kenya Bus Service Management Ltd.

The Respondent has opposed the Petition before court. The Respondent's grounds of objection to the petition are:-

1. The petition is bad in Law and an abuse of the due process of the law.
2. The petition has no merit in Law or at all.
3. The petition does not establish any form of discrimination against the petitioners.
4. the By-Laws that are alleged to be discriminatory do not give advantage to others whilst taking it from

the Petitioners.

The Respondent contends discrimination under section 82(3) of the Constitution means, affording different treatment to different persons attributed wholly or mainly to their respective description by race, tribe, place of origin or residence, or other local connexion, political opinions, colour, creed or sex whereby persons of such description are subjected to disabilities or restrictions to which persons of another such description are not made subject to or accorded privileges or advantages which are not accorded to persons of another such description.

The Respondent further argues that the allegation by both the omnibus operators as well as commuters has to be looked at in perspective of the definition given in the Constitution of the word discrimination.

The Respondent avers that the omnibus operators have not demonstrated how they have been discriminated against as contemplated by section 82 of the Constitution and all they allege is that their competitors namely Citi Hoppa, Double M and Kenya Bus Service Management have an unfair advantage over them and that they are allowed into the Central Business District. The Respondent has argued that:-

(a) Rule 23 which makes provision for the authorized routes and designated parking areas for omnibuses does not whatsoever make any mention of Citi Hoppa, Double M or Kenya Bus Service. The rule only talks about a CBD shuttle and it cannot be rightly said that there are operators who are given an unfair advantage over others.

The Respondent argues that all what the Petitioners who are omnibus operators need to do is to seek the approval of the Town Clerk to operate outside the omnibus station and they have not demonstrated that they have sought the approval of the Town Clerk and the approval denied by reason of discrimination.

The Respondent has contended that the commuter petitioners who feel discriminated against are those who use Jogoo Road and individual road users do not even come under the classification of residents contemplated under section 82 of the Constitution and further not all users of Jogoo Road are residents of a particular area.

The Respondent contends that the petitioners do not constitute groups of people capable of being discriminated against as envisaged by section 82 of the Constitution. It is the Respondent's case that the by-laws under challenge are directed purely for the interests of traffic within the City of Nairobi.

The Petitioners have also relied on the skeleton arguments and or written submissions to support their case. The petitioners feel aggrieved and discriminated against by the enforcement of ***THE CITY OF NAIROBI (OMNIBUS STATIONS) AMENDMENT BY-LAWS 2008*** on the following grounds among others:-

1. It has not been shown or proved that the motor vehicles congesting the City of Nairobi are only coming through Jogoo road or from Eastlands. There is no criteria used in the decision to bar the public service vehicles from Eastlands access to the City Centre as opposed to the Public Service vehicles from other regions of Nairobi.
2. According to the new Ministry, Nairobi Metropolitan Development, Nairobi is congested by private motor vehicles and not public service motor vehicles and the Minister has therefore recommended that private vehicles be relocated to packing spaces in peripheries of the City as opposed to the Public Service Vehicles.
3. The said By-Laws are intended to decongest the City of Nairobi but in the enforcement thereof, only motor omnibuses coming to Nairobi from the Eastlands through Jogoo road have been barred from accessing the City Centre of Nairobi and more particularly, certain omnibuses coming to Nairobi through Jogoo Road have been allowed access to the city Centre to exclusion of the omnibuses owned by the Petitioners and others.

4. The decision to allow the preferred omnibuses namely Citi Hoppa Ltd, Double M Ltd and Kenya Bus Services Management Ltd to access the City centre was reached by a committee known as Nairobi City Traffic Management Committee whose membership comprise among others, the proprietors of the preferred omnibuses which depict a conflict of interest as they allocated their buses the access to the City Centre to the exclusion of the ones owned by the Petitioners and others.

5. The Petitioners feel discriminated against in the application and or enforcement of the said By-Laws for the following reasons:-

(i) While omnibuses owned by the Petitioners have been denied access to the city Centre of Nairobi, those owned by their business rivals have been allowed to access the city centre of Nairobi thereby according the said rivals unfair business.

(ii) While the Petitioners have withdrawn their omnibuses from the city centre of Nairobi in compliance with the said By-Laws, the City Centre of Nairobi, more especially along Moi Avenue between Haile Selassie Avenue roundabout and Kencom stage is still jammed with omnibuses belonging to just three companies namely Citi Hoppa Ltd, Double M Ltd and Kenya Bus Service Management Ltd.

(iii) It is apparent that the aforementioned owners of the preferred omnibuses have increased their fleet of buses to replace the other omnibuses which have been barred from accessing the City Centre of Nairobi thereby rendering the enforcement of the said By-Laws futile.

6. The Petitioners are of the view that the enforcement of the said By-Laws did not comply with Act No.3 of 2005 - Public Procurement and Disposal Act as there was no tendering for NCBD shuttles.

The Petitioners also relied on the following authorities:-

(a) ***NAIROBI H C MISC CIVIL APPLICATION NO. 118 OF 2004 PETER K WAWERU v REPUBLIC***

(b) ***TANZANIA HC 6 OCTOBER 1992 MWANZA, LAUSA ALFAN SALUMU AND 116 OTHERS v MINISTER FOR LANDS.***

The Court has considered the submissions made by Counsel for the Petitioners and the Respondent. The Court has also given careful attention to the cited cases and the principles relied on. Before examining the authorities cited in this case, I wish to address the ***CITY OF NAIROBI (OMNIBUS STATIONS) AMENDMENT BY-LAWS 2008*** which are the subject under challenge. It appears to the Court that the petitioners are challenging not the entire set of the by laws, but mainly, by laws 5 and 23. The said by laws provides:-

“5.” No omnibus, whilst plying for hire or reward and carrying passengers, shall, without the prior written permission of the Town Clerk, be parked in any place other than an omnibus station.

Provided that nothing in the by-law shall apply to any omnibus standing at any stopping place designated as an omnibus stop for the purpose only of -

(a) picking up passengers on the outward journey for destinations outside the omnibus station or

(b) setting down passengers from outside the omnibus station on the onward journey.”

23. “The following are the authorized routes and designated parking areas for omnibus

| Terminus | Route | Destination | Route Discrimination |
|-----------------|--------------------|------------------------|--------------------------------|
| Circular | CBD shuttle | Circular within | Muthurwa - Globe cinema |

| | | | |
|-----------------|--------------------------------|--------------------------------------|---|
| | | CBD | round about (via Haile Selassie Avenue-Moi Avenue-Murunga Road) Community (via Tom Mboya Steet - Cabral Street-Moi Avenue - Kenyatta Avenue-Ngong Road) and back to Muthurwa (via Ngong Road - Haile selassie avenue) |
| Circular | CBD shuttle B | Circular within CBD | Muthurwa-Community (via Haile Selassie Avenue and Ngong road) Globe Cinema Roundabout (via Ngong Road-Kenyatta Avenue - Moi Avenue-Murunga Road) and back to Muthurwa (via Tom Mboya Street - Moi avenue - Haile Selassie Avenue |

The Petitioners have argued that the implementation of the said by-laws has contravened section 3 and 82 of the Constitution. The said sections provide as follows:

3. “This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of inconsistency, be void.

82 (1) “Subject to subsections (4)(5) and (8), no law shall make any provision that is either discriminatory either of itself or in its effect.

(2) subject to subsections (6)(8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or public authority.

(3) In this section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law so far as that law makes provision -

(a) Whereby persons of a description mention in subsection (3) may be subjected to a disability or restriction or may be accorded privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any such description, is reasonably justifiable in a democratic society.

(8) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the Law in question makes provision whereby persons of a description mention in subsection (3) may be subjected to a restriction on the rights and freedoms guaranteed by sections 76,78,79,80 and 81 being a restricted authorized by section 76(2), 78(5), 79(2) 80(2), or paragraph (a) or (b) of section 81(3).

The Petitioners maintain that the implementation of the said by-laws is by and large discriminatory and has prevented the omnibuses for the 1st and 2nd Petitioners from accessing the City Centre of Nairobi and subjected the 3rd and 4th Petitioners to either pay extra fare or walk for an extra two kilometers in order to access the City Centre of Nairobi. From the foregoing, it becomes important to define discrimination in the legal sense and further to examine the legitimate discrimination as well as proscribed form of discrimination.

DISCRIMINATION

The Blacks Law Dictionary defines discrimination as follows:

“The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”

Wikipenda, the free encyclopedia defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. The Bill of Rights Handbook, Fourth Edition 2001, defines discrimination as follows:-

“A particular form of differentiation on illegitimate ground.”

The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The U.S case of *GRIGGS v DUKE POWER COMPANY 1971 401 US 424 91* is a good example of indirect discrimination, where an aptitude test used in job applications was found “to disqualify Negroes at a substantially higher rate than white applicants”

The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the Constitution may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including

- (a) the nature and importance of the limitation
- (b) the relation between the limitation and its purpose
- (c) less restrictive means to achieve the purpose.

Having defined discrimination and laid down the constitutional provisions relied on by the Petitioners and the by laws allegedly in breach of the Constitution, I now wish to state the issues which the court must determine in this matter. They are:-

1. Whether the challenged by-laws are discriminatory?
2. If the by-laws are discriminatory, is there any legitimate or lawful purpose justifiable in a democratic society?

3. Are the challenged by laws unconstitutional?

In our jurisdiction, in the case of *R.M. v ATTORNEY GENERAL, NBI HCCC NO. 1351 OF 2002 R.M. (suing thro' Next Friend) JOSEPHINE KAVINDA & ANOTHER v THE ATTORNEY GENERAL*, the court dealt with the issue of discrimination in depth and held:-

“We further hold that the principle of equality and nondiscrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:-

- (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and**
- (2) Are reasonable in the light of their legitimate aim.”**

But in comparative jurisdictions such as South Africa and U.S.A., discrimination has taken centre stage and courts have had to rise to the occasion to intervene. Section 8(2) of the Constitution of South Africa provides:-

“No person shall be unfairly discriminated against, directly or indirectly, and without derogating from the generality of this Provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sex orientation, age, disability, religion, conscience, belief, culture or language.”

Section 8(4) then continues,

“Proof of discrimination on any of the specified grounds in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.”

I must however observe that while the cited cases derived from comparable jurisdictions such as South Africa may be useful guides concerning the scope and definition of discrimination in the decided cases, we must be on the guard that their constitutional provisions as is clear from the above are not in pari materia with our constitution. They are therefore only useful to the extent of any constitutional convergence.

In the case of *PRINSLOO v VAN DER LINDE & ANOTHER 1997(3) SA 1012 (CC)* the Constitutional Court of South Africa stated:-

“In regard to mere differentiation the Constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be unconstitutional with the rule of law and the fundamental premises of the Constitutional state. The purpose of this equality is, therefore, to ensure that the state is bound to function in a rational manner.”

The said constitutional Court of South Africa laid down the enquiry needed to be done to determine whether differentiation amounts to unfair discrimination. In the case of *HARKSEN v LANE NO OTHERS 1998(1) SA 300(CC)* para 54 it held:-

“Firstly, does the differentiation amount to discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend on whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

If the differentiation amounts to ‘discrimination, does it amount to unfair discrimination? If it has been on a special ground, then unfairness will be presumed. If on unspecified ground, unfairness

will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.”

It is possible to rebut the presumption of unfair discrimination by examining the impact of the discrimination on the complainant. In the abovementioned case of *HARKSEN, Goldstone J* examined the factors relevant to the determination of unfairness and he stated:

“The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner ... in the final analysis it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of discrimination.”

Goldstone J listed some factors which have to be considered in order to determine whether the discriminatory provisions have impacted on the complainant. They are:-

(a) “the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether the complainants have in fact suffered the impairment in question.

(c) With due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

These factors, assessed objectively, will assist in giving ‘precision and elaboration’ to the Constitutional test of unfairness. They do not constitute a closed list.

In any event it is the cumulative effect of these factors that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair.”

In the United States of America, in the case of *UNITED STATES v ARMSTRONG (1996) 134 L Ed 2D 687 at p. 699*, the Supreme Court held that in cases under the equal protection clause, where indirect discrimination is in issue, it is necessary to prove that the conduct complained of “had a discriminatory effect and that it was motivated by a discriminatory purpose.”

The elements of discrimination and unfairness, must be determined objectively in the light of the facts of each particular case. In the case of the *PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & ANOTHER v JOHN PHILLIP HUGO 1997(4) SA I CC PARA 41* the Constitutional Court stated:

“We need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.”

One of the major differences between our law and the South Africa/U.S.A. law is that in our law, there is no presumption of discrimination and discrimination has to be fully proved.

ANALYSIS

Meaning of Discrimination

Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word “discriminatory” in section 82 of the Constitution.

Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by lawS must satisfy two conditions namely:-

- (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and
- (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question;
- (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification

Applying the above formulae to the situation before the Court, the differentia is the access to the CBD by some operators who ply along Jogoo Road in Nairobi while denying access to the majority. On the other hand the object to be achieved by the By law is the decongestion of the CBD. It follows therefore in order to decongest the CBD few operators have to be given access in order to achieve the objective of the By law. By law 5 and 23 empowers the Town clerk to give consent before an operator can access the CBD. The denial of access to the majority including the Petitioners cannot be said to be irrational. There is a clear rational relation between the differentia and the object of the By laws. Yes, the argument that the Jogoo road users are being treated differently from the others is correct but this does not constitute discrimination in law. As regards the general body of PSV owners and the three operators who have access to the CBD, the difference is based on the reason that to keep the CBD decongested it is reasonable to give consent to only a few.

The Rule of law and equality

The questions as to whether the by-laws are of general application to the City of Nairobi or whether they are just targatted at particular residents, is answered negatively in that it is rational, that in the implementation (although the By laws as framed are of general application,) a start was made in Eastlands, with a view to covering all other areas whose PSV operators impact negatively on the CBD congestion.

It seems to me that the objective of the by-laws is of general application to the City and the by-laws are meant to apply to the entire City although their implementation is being done in phases, the current phase being confined to the control of public service vehicles plying the Jogoo Road with their terminus at Muthurwa. Laws including by-laws must as much as is practically possible, deal in the same way with their targets who have the same traits, class or qualities or needs. If not, they cannot withstand the challenge of discrimination. The challenged by laws defy this challenge due to the definition of discrimination as outlined above. Thus, *A.V. DICEY*, an introduction to the study of the Law of the constitution pp 202-203 defines the rule of law:

“It means ... equality before the law, to the ordinary law of the land administered by the ordinary law courts; the rule of law in this sense excludes the idea of any example of officials or others from the duty of obedience to the law which apply other citizens or from the jurisdiction of the ordinary tribunals.”

Of course, in modern times exemptions have been made to the rule - e.g. according to parliamentarians privileges while in Parliament and immunity of judicial officers from civil liability in the discharge of their responsibilities. However, the rule is still of general application. If the example the by-laws would ultimately only apply to the public service vehicles from the Eastlands and not to all public service vehicles from all areas which impact on the traffic flow in the CBD area a challenge of discrimination or reasonableness of the by-laws could be sustained.

I find no discrimination either in the by-laws themselves or their implementation because rule-making is a process by which the administration lays down new prescriptions to govern future conduct of those subject to his authority. Rule-making is general and looks only to the future. By targeting Eastlands or Jogoo Road the by-laws do not cease to be general, since they have a legitimate purpose aimed at easing the congestion in the CBD and must of necessity ultimately apply in all directions or areas which impact on the CBD congestion.

Duty of the decision makers

The Petitioners claim that they were discriminated against in not being allowed to enter the CBD whereas three other companies have been allowed to enter and give their services on some defined routes in the CBD.

Under the relevant by-laws PSV owners are at liberty to apply to the Town Clerk in order to be allowed to operate in the CBD and there is no challenge that the three operators did not apply pursuant to the by-law. On the other hand the petitioners have not offered any evidence that they did invoke the by-law by applying to the Town Clerk to be allowed to operate in the CBD. There is therefore no differential in the treatment of the two groups at all. The criteria for operating in the CBD is applying to the Town Clerk and unless a Petitioner has applied there cannot be different treatment and any discrimination in law. The legal basis for the Applicants applying to the three operators under a franchise has no basis in law and it has no linkage to the provisions of the By laws.

The Town Clerk must of course be aware that the implementation of the by-laws must be anchored in reasonableness and fairness and they must be aimed at achieving the legitimate purpose namely decongestion of the CBD and to a achieve a reasonable traffic flow and a semblance of order in the CBD. He would obviously defeat the legitimate objectives by giving consent to an unreasonable number of operators who would in turn flood the CBD. In the circumstances the court finds that the Town Clerk's duty is to act fairly and reasonably and his having consented to the three operators at the initial stages of the project and as a temporary measure, demonstrates that he has properly addressed himself to the two requirements. Whether or not the consent to allow a few operators is subject to the Procurement Act has not been clearly shown and the onus was on the Petitioners. All the same, a breach of the Procurement Act would not necessarily result in the selection of the three constituting discrimination under the Constitution. My judgment on this point has proceeded on the premise that the selection of the three operators is on a temporary basis, in order to avoid a vacuum. However, in the long term, the Town Clerk must publicly come up with a criteria for selection and thereafter adhere to Procurement regulations relating to services. If he fails to meet both requirements within a reasonable time, this part of the by laws could still be challenged. He cannot allow the players to be judges in their own cause.

Legitimate Expectation

Legitimate expectation is a principle rooted in fairness. The claim by the petitioner that they had a legitimate expectation of being heard prior to the commencement of the by-laws is not properly grounded. Firstly, the City fathers had published a notice of the intended making of the by-laws in March 2006 by a notice in the local daily. The by-laws came into force on 20th March 2008. It follows therefore the Petitioners had more than ample time to challenge the by-laws and were given an opportunity of being heard. The right of hearing as understood in law does not have to take the shape of a baraza or an oral hearing and an opportunity of making written submissions is adequate. Surely in cases where there is no legitimate expectation as in this case, there cannot be a right of hearing as well. As regards the two communities from Eastlands the fact that they are now required to pay additional fare does not in my

view set them apart from any other fare paying residents of Nairobi. The state of affairs is such that the residents of Ongata Rongai for example could be paying more than those from Eastlands but this differential is not based on discrimination but on economic dynamics.

Is the decision to have a PSV terminus for Jogoo Road based on local connection as per s 82 of the constitution?

The argument that the Petitioners have been discriminated on the basis of their residence or any other “**local connection**” being one of the categories set out in s 82 of the constitution is far fetched firstly because there is no proof that the PSV vehicles have been targatted because they are owned by owners who hail from Eastlands or Jogoo Road. The by-laws would apply to the same PSV vehicles plying that route but owned by people from Westlands or Ongata Rongai or any other place in Nairobi. Secondly, the reason for the treatment is the decongestion of the CBD and the differential in treatment cannot be attributed to the description of the Petitioners by way of race, tribe, place of origin or residence or other local connection political opinions, colour, creed or sex. In other words the Petitioners do not fall under any of the categories enumerated in s 82. The by-laws have not categorized them under any of the headings and given their discriminatory treatment. Under s 82 the word “discriminatory” means:

“Affording different treatment to different persons attributable wholly or mainly to their respective description by race, tribe, place of origin or residence, or other local connection, political opinions, colour, creed or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

The treatment being accorded the Petitioners is certainly not based on any of the categories set out above. Moreover the privilege or advantage of operating in the CBD has not been confined to a particular group - it is left open to all PSV operators subject to the Town Clerk’s approval. Any application of the Procurement Act or Procurement Procedures would not materially affect the position on the ground because if the objective of the by-laws is to decongest the CBD only a small group of operators would be allowed even if the selection was through a tender process.

Not all forms of discrimination violate the Constitution. What is prohibited is what falls within the categories set out in s 82 and even the, the treatment becomes unconstitutional if it is different treatment based on the named categories.

Even where a Petitioner satisfies the requirements of s 82 (3) of the Constitution, the treatment would still not be said to be unconstitutional, if the restriction or disability is reasonably justifiable in a democratic society. In this regard City fathers have in many cities in the democratic societies taken steps to decongest the CBDs. In decongesting the City they use various strategies, and they are invariably given the discretion to depart from old strategies. The fact that the new Metropolitan Ministry has come up with rooftop or high sounding proposals which will perhaps take ages to implement including use of helicopters would not negate step by step or common sense strategies now being tried. In the circumstances, it cannot reasonably be suggested that by doing so they acted in a manner that cannot reasonably be justifiable. Section 82 (5) gives the Court a margin of appreciation that takes into account the public interest and the common good, involved in decongesting the Cities including our own City. Even on this ground alone I would disallow the petition.

In addition the Petitioners have invited the Court to give the word discrimination a meaning that is a stranger to the literal meaning of s 82 and the spirit which the Court ought to derive from the wording of the section as analysed above. The Constitution is not a concrete or a stone monument erected in 1962, to regulate this nation’s affairs forever, regardless of the circumstances which face the nation in the course of its history. One good illustration is the amendment to s 82 of the Constitution which was effected in 1998 by adding a new category against which one cannot discriminate namely “sex”. This explained the dynamic and living nature of the Constitution and the need to interpret it with the values, philosophies, public interest and other ideals of the nation in view. In this regard, this Court would again wish to repeat the apt observations of Justice McIntyre in the Canadian case of *IN REFERENCE REPUBLIC*

SERVICE EMPLOYEE RELATIONS ACT, LABOUR RELATIONS ACT AND POLICE OFFICERS COLLECTIVE BARGAINING ACT (1987) 38 DLR 4TH 161 where the Judge held:-

“While a liberal and not or every legislative approach should be taken to constitutional interpretation the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the Charter, as of all constitutional documents is constrained by the language, structure and the history of the constitutional text, by constitutional traditions and by the history, traditions and underlying philosophies of our society.

Thus, not every different treatment ought o be construed as constitutional discrimination under the Constitution. Instead we should use constitutional interpretation in a manner which lights up the dark spots of our nation and which uplifts the values and the ideals she intends to attain from time to time.

It is with this in view that I find no discrimination as defined in our Constitution or the treatment as violating what is justifiable or practiced in a democratic country such as this country.

The petition is accordingly dismissed with costs to the Respondents (except to the three operators who did not participate in the proceedings).

DATED and delivered at Nairobi this 10th day of July, 2008.

J.G. NYAMU

JUDGE

ADVOCATES

Mr Omoti for Applicant

Mr Onguti for Respondent/Applicant

Miss Mburu for 3rd interested party`