



**Road Safety Association of Kenya Suing Through its Chairman David Kiarie v  
Cabinet Secretary for Transport & 7 others (Constitutional Petition 7 of 2021)  
[2023] KEHC 19497 (KLR) (Constitutional and Human Rights) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19497 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION 7 OF 2021**

**LM NJUGUNA, J**

**JUNE 14, 2023**

**IN THE MATTER OF RULE 3(3), (4), (5), 4, 13, 23(1) AND (2) OF THE CONSTITUTION  
OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS OF THE  
INDIVIDUAL) PRACTICE AND PROCEDURE RULES, 2013.LEGAL NOTICE 117 OF 2013.**

**IN THE MATTER OF CONTRAVENTION AND THREATENED CONTRAVENTION  
OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLE  
10,19,20,21,22,23,26,27,28 AND 57 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE NATIONAL TRANSPORT SAFETY AUTHORITY ACT, 2012**

**AND**

**IN THE MATTER OF KENYA STANDARD NO. KS2295 – 1 2018 AND KS 2295 -2- 2018**

**AND**

**IN THE MATTER OF STANDARDS ACT CAP 496 LAWS OF KENYA**

**BETWEEN**

**ROAD SAFETY ASSOCIATION OF KENYA SUING THROUGH ITS  
CHAIRMAN DAVID KIARIE ..... PETITIONER**

**AND**

**THE CABINET SECRETARY FOR TRANSPORT ..... 1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY MINISTRY OF INTERIOR & CO-ORDINATION  
OF NATIONAL GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**THE NATIONAL TRANSPORT SAFETY AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**



<b>THE INSPECTOR GENERAL OF NATIONAL POLICE SERVICE .....</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>THE COUNTY GOVERNMENT OF EMBU COUNTY .....</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>KETTNO SACCO .....</b>	<b>6<sup>TH</sup> RESPONDENT</b>
<b>CHRISTOPHER NJERU NYAGA .....</b>	<b>7<sup>TH</sup> RESPONDENT</b>
<b>HON. ATTORNEY GENERAL .....</b>	<b>8<sup>TH</sup> RESPONDENT</b>

## RULING

1. Before this court is a notice of preliminary objection dated February 14, 2023 wherein the applicants seek orders that the Honourable court lacks jurisdiction to hear the petition herein.
2. The petition is premised on the facts that when the 3<sup>rd</sup> respondent exercised its duties under the NTSA and the *Traffic Act*, deaths on Kenyan Roads reduced tremendously and the same was on a reducing trajectory until when the president purportedly amended the *NTSA Act* contrary to the laid down procedure and purported to usurp the legislative power of the NTSA Act ; that the president acted negligently by omission or commission in that the said action made the state cause the deaths of the victims of the Embu tragedy. That by removal of the 3<sup>rd</sup> respondent from the roads and limiting their functions and duties under the NTSA Act, the state breached the right to life of the 15 victims of the Embu tragedy.
3. The court directed that the notice of preliminary objection be canvassed by way of written submissions and that parties file and exchange the same.
4. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 8<sup>th</sup> respondents submitted that the petition herein having arisen out of a fatal road accident that occurred at Embu-Siakago road where the petitioner alleges the death of 15 elderly persons and others who sustained injuries was caused by the driver of motor vehicle KBK 483 X. It was argued that the procedure for compensation of road accident victims is well stipulated under the *Fatal Accidents Act* Cap 32 for loss of dependency under *Motor Vehicles Third Party Risks* Cap 405 Laws of Kenya. That the substance of the claim herein can rightly be canvassed in a civil cause and or in a judicial review forum because the core issue is compensation of damages arising out of an accident and to direct some of the respondents to do certain things that the petitioner feel are not being done especially by the 3<sup>rd</sup> and 4<sup>th</sup> respondents.
5. That the petitioner failed to exhaust the alternative avenues recognized in law including first seeking compensation from the 6<sup>th</sup> and 7<sup>th</sup> respondents as stipulated under section 3 of the *Fatal Accidents Act* for loss of life as stipulated under section 3 of the Fatal Accident's Act for loss of dependency and under the Motor Vehicles Third Party Risks Cap 405 Laws of Kenya. This court was directed to the principle/ doctrine of exhaustion of remedies to bar it from hearing the petition herein. Reliance was placed inter alia on the cases of *Communications Commission of Kenya & 5 Others Vs Royal Media Services Limited & 5 Others* [2014] eKLR and *South African case of S Vs Mhlungu*, 1995 (3) SA 867 (CC). It was reiterated that where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed. This court was therefore urged to down its tools for it lacked jurisdiction to deal in the matter herein for reasons that the petitioner had violated the principle of exhaustion of remedies. In the end, this court was urged to dismiss the petition herein with costs to the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 8<sup>th</sup> respondents.



6. The other parties did not participate in the application herein.
7. I have considered the preliminary objection herein and the written submissions by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 8<sup>th</sup> respondents and I find that the sole issue for determination is whether the same is merited.
8. In the case of *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that:
 

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”
9. It is trite that if a preliminary objection is allowed, the same may dispose off the entire suit without giving parties the opportunity to be heard. Therefore, this has to be done with caution given that the court has a duty to hear all parties and determine the case on merit. In addition, this court has also a duty to safeguard itself against abuse of its process.
10. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 8<sup>th</sup> respondents have argued that this court has no jurisdiction to entertain the matter herein for the reason that the petitioner has violated the principle of exhaustion of remedies. A perusal of the petition herein shows that the petitioner sought for orders that:
  - i. A declaration that the rights and fundamental freedoms of the 15 deceased persons that perished in the Siakago accident were infringed; most specifically their rights under Article 26, 27, 28 and 57 of the *constitution* by the respondents jointly and severally.
  - ii. A declaration that the removal of the 3<sup>rd</sup> respondent from the roads yet they empowered under the NTSA Act was unconstitutional and the same amounted to the president usurpation of the legislative power of the National Assembly to amend the NTSA Act, which power he did not have.
  - iii. A declaration that the 3<sup>rd</sup> and 4<sup>th</sup> respondent functions under the empowering legislation are complimentary and thus they must work together in all relevant aspects under the NTSA and the Traffic Act.
  - iv. An order of mandamus be issued compelling the 3<sup>rd</sup> respondent to return to the roads and conduct among others patrols, raids, enforcement and ensure implementation and administration of the NTSA Act and Traffic Act, the standards KS. 2295 -1-2018 and standard KS2295-2-2018bas well as other regulations thereto.
  - v. General damages be provided for the families of the 15 deceased individual that perished in the Embu tragedy and those injured in the accident that occurred at Siakago occasioned by the motor vehicle registration number KBK 483X to be shouldered jointly and severally by the respondents.
  - vi. General damages to be paid to the families of the 15 deceased persons and the injured by the 6<sup>th</sup> and 7<sup>th</sup> respondents jointly and severally.
  - vii. Special damages to be paid to the 15 deceased persons and the injured by the 6<sup>th</sup> and 7<sup>th</sup> respondents as shall be proved by the productions of receipts by the families of the said persons.
11. From the above listed prayers by the petitioner, apart from seeking general and special damages arising from the deaths and the injuries sustained by the passengers, the petitioner seeks further orders in relation to the functionality of the 3<sup>rd</sup> and the 4<sup>th</sup> respondents; a declaration by the president removing



the 3<sup>rd</sup> respondent from the roads yet they are empowered by the NTSA Act; an order of mandamus compelling the 3<sup>rd</sup> respondent to return to the roads and conduct amongst other things, patrol, raids enforcement etc.

12. It therefore follows that this objection calls upon this Court to inquire from the pleadings and ascertain whether or not the allegations by the petitioner against the respondents can be granted.
13. In the same breadth, Article 48 of the Constitution guarantees every person access to justice, in addition, under Article 50(1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. In the instant case, the petitioner has approached this court with a desire to be heard, it is therefore my humble view that he should be accorded an opportunity to prosecute his case and the same to be determined to its logical conclusion and on its merits.
14. As such, I find and hold that:
  - i. The Notice of preliminary objection dated February 14, 2023 by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 8<sup>th</sup> respondents is not merited and the same is hereby dismissed.
  - ii. Given that the other parties did not participate in the application herein, there will be no order as to costs.
15. It is so ordered.

**Delivered, dated and signed at Embu this 14<sup>th</sup> day of June, 2023.**

**L. NJUGUNA**

**JUDGE**

.....**for the Petitioner**

.....**for the Respondents**

