



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISCELLANEOUS APPLICATION NO. E336 OF 2020**

**SONSAM (KENYA) LTD.....APPLICANT**

**-VERSUS-**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY...1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. **SONSAM (KENYA) LTD**, The Applicant, approached this court by way of a Notice of motion dated 17<sup>th</sup> day of December, 2020 seeking the following orders;

*a. ....(spent)*

*b. That pending the hearing and determination of this application, a temporary injunction do issue restraining the 1<sup>st</sup> Respondent, its servants and /or agents from impounding the Applicants motor vehicles and/or harassing, intimidating and arresting the Applicants drivers and /or agents*

*c. That an injunction do issue restraining the 1<sup>st</sup> Respondent, its servants and/or agents from impounding the Applicants Motor vehicles and or harassing, intimidating and arresting the Applicants drivers and / or agents*

*d. That this Honourable court be pleased to order the 1<sup>st</sup> Respondent to issue the Applicant with the Road Service License.*

2. The application is premised on grounds that the Applicant is engaged in transport business within Nairobi-Kisii and elsewhere within the Republic of Kenya; while engaging in its day to day activities and in order to be compliant with the 1<sup>st</sup> Respondent's directive requiring a road license (RSL) sought to be issued with the license that the 1<sup>st</sup> Respondent has declined;

3. That as a result, the Applicant has been unable to carry out its business as its vehicles have been subjected to constant harassment and impounded by the police due to lack of RSL; and that, it stands to be greatly prejudiced if orders sought are not granted as it will suffer immense loses including but not limited to redundancy of employees who solely depend on it for survival.

4. The application is supported by an affidavit deposed by Samson Nyangoto, the Director of the Applicant who avers that; their company has thirty one (31) motor vehicles and that all their vehicles were taken for inspection and passed but on applying for the Road Service License the same was rejected with no valid reason; As a result of the rejection, their vehicles have been subjected to constant harassment and impounding from the police due to lack of the license and that if orders sought are not granted, the Applicant will suffer immense losses. That; they have been forced to reduce its employees and scale down services; they have lost business from hirers and lost tenders from various institutions

5. The 1<sup>st</sup> Respondent filed a Preliminary Objection on the 3<sup>rd</sup> of February, 2021 on the following grounds: -

*a. That the Applicant has not exhausted the internal appeal mechanism to the Transport Licensing Appeal Board established under section 39 of the National Transport and Safety Authority Act.*

**b. That the Applicant has not made any application to be exempted from such exhaustion of internal appeal mechanism**

**c. That this court does not have jurisdiction to hear and entertain the Application dated 17<sup>th</sup> December, 2020 as the same is the preserve of the Transport Licensing Appeal Board as provided for in Section 39 of the National Transport and Safety Authority Act 2012.**

**d. That the Application is an abuse of the court process as there is no Criminal Aspect in the said application to warrant the issuance of the said orders.**

6. The application was canvassed by way of written submissions. The 1<sup>st</sup> Respondent submitted that this court did not have jurisdiction to handle the matter before it because it is the preserve of the Appeals Board under section 39 of the National Transport and Safety Authority Act (NTSA Act) and the Applicant should therefore lodge this issue with them.

7. That the Applicant did not apply to be exempted from the exhaustion of the internal appeal mechanisms and therefore cannot be before this court without that exemption.

8. That this application is an abuse of the court process for want of jurisdiction and that the Application should therefore be dismissed as its allegations are baseless and unfounded.

9. In response thereto, the Applicant in its submissions opposing the Preliminary Objection, urged that Section 38 as read with section 39 of the NTSA Act do not oust the jurisdiction of the court. That traffic offences are criminal in nature; therefore, the court has jurisdiction to hear and determine the issue raised.

10. Issues for determination in this matter are;

**a. Whether section 38 and 39 of NTSA Act ousts the jurisdiction of this court.**

**b. Whether the application is an abuse of the court process.**

11. The Applicant seeks injunctive orders restraining the 1<sup>st</sup> Respondent from impounding or restraining its vehicles and general harassment. This follows allegations that the 1<sup>st</sup> Respondent had declined to issue the Applicant with the Road Service License (RSL) which meant that the Applicant and its agents could not operate. They also seek an order directing the 1<sup>st</sup> Respondent to issue them with the RSL.

12. This Court must therefore determine if the Preliminary Objection (P.O.) is meritorious? What consists of a P.O. herein is whether this court has jurisdiction to hear and determine this matter by virtue of the provisions of the law in the NTSA Act. The threshold of P.O. was set out in the case of Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696, and the position was repeated in the case of Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR as follows :

***“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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.”***

13. The Joho decision has been subsequently cited in Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014, [2014] eKLR; and in Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others, Application No. 50 of 2014, [2015] eKLR, in which the Court further stated:

***“Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”***

14. A party aggrieved by the decision of NTSA is expected to act pursuant to the provisions of section 38 of the Act that provides thus:

***“(1) A person who ---***

***(a) Being an applicant for the grant or variation of a licence, is aggrieved by the decision of the Authority on the application;***

***(b) Having made an objection to any such application as aforesaid, being an objection which the Authority is bound to take into consideration, is aggrieved by the decision of the Authority thereon; or***

***(c) Being the licensee, is aggrieved by the revocation or suspension thereof, may within the time and in the manner prescribed appeal to the Appeals Board established under section 39.”***

Section 39. (1) (5) of the Act provides thus:

***(1) There is established the Transport Licensing Appeals Board.***

***(5) The Appeals Board may, on any appeal, affirm or reverse the decision of the Authority, or make such other order as the Board considers necessary and fit.***

15. It is apparent that the 1st Respondent had the discretion to revoke or suspend the licence but the decision was appealable to the Transport Licensing Appeals Board. The 1st Respondent argues that the Applicant should have exhausted remedies available prior to approaching this court.

16. The view taken by the Applicant is however, that, the provisions of law alluded to are not mandatory. A reading of section 38 as read with section 39 of the NTSA Act, it gives the individual aggrieved the discretion to act as he envisages necessary.

17. Further, it is urged that a traffic offence being criminal in nature, this court sitting in a Criminal Division has jurisdiction to determine the issue raised. Looking at the relief sought, it is not criminal but injunctive in nature. The Applicant approached the court by way of Notice of Motion which was not filed within any substantive suit. The first prayer is for issuance of a temporary injunction while the second remedy sought is a perpetual injunction. Ordinarily, a perpetual injunction would be granted at a final stage (Judgment ) when the case is heard on merit. What the Court of Appeal in **Speaker of the National Assembly vs Njenga Karume Nairobi CA No. 92/1992** is notable. It was stated thus :

***“ There is considerable merit in the submission that where there is a clear procedure for redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure.”***

18. From the forgoing, it was a requirement for the Applicant to exhaust the appeal mechanism provided by the NTSA Act prior to seeking a remedy from this court. The Board, being a tribunal, has constitutional underpinning and the status of a subordinate court. This, therefore means that if at all the Applicant has to seek relief from this court, being a High Court should approach it through an appeal or review avenues that have not been resorted to, hence at this stage the jurisdiction of this court is ousted.

19. In the result, the Preliminary Objection raised succeeds, the Notice of Motion dated 17<sup>th</sup> December, 2020, is therefore struck out.

20. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF MARCH 2021.**

**L. N. MUTENDE**

**JUDGE.**