



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT MISC. APPLICATION NO. E004 OF 2021

IN THE MATTERS OF: ARTICLES 1, 1, 3(1) & 2,5(3), 28, 41 (1), 47(10), 48, 50 (1) (2)

(A) & (O) & 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 27(1) (2) AND (3), 28, 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULE 4, 10, 11,13 & 20 OF THE CONSTITUTION

OF KENYA (SUPERVISORY AND PROTECTIONS OF FUNDAMENTAL

RIGHTS AND FREEDOMS) (HIGH COURT PRACTICE AND PROCEDURE RULES 2013)

AND

IN THE MATTER OF VIOLATION OF ARTICLE SECTION 4(3)

OF THE FAIR ADMINISTRATIVE ACT NO. 4 OF 2015

BETWEEN

KINATWA PRESIGE LTD.....PETITIONER/APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KITUI.....1ST RESPONDENT

DIRECTOR-KITUI COUNTY

INSPECTORATE DEPARTMENT.....2ND RESPONDENT

MARTIN MUMO.....3RD RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER

LIUD COUNTY GOVERNMENT OF KITUI.....4TH RESPONDENT

KINATWA CO-OPERATIVE SAVINGS

RULING

1. The phrase “**two wrongs do not make a right**” captures well what has been placed before me. Put in another way, one cannot use a wrong to correct a wrong.

2. By a Notice of Motion dated 29th September 2021, the petitioners have approached this court seeking the following Orders: -

i. That this application be certified as urgent and the same be heard ex parte in the first instance

ii. That pending the hearing and determination of this application inter partes, a conservatory order be and is hereby issued staying the decision of the 1st Respondent cancelling the Petitioner’s license no. Z1182306423 contained in the letter dated 16th September 2021 and the Petitioner be at liberty to use slots 17 and 18 as allocated to them in the letter dated 31st May 2021 issued by the 3rd Respondent

iii. That pending the hearing and determination of this application inter partes, this Honourable Court be pleased to issue a conservatory order restraining the Respondents, their servants, employees, agents and/or directorate of city inspectorate or such other persons or entity from harassing, intimidating, arresting or in any manner whatsoever interfering with the running of the applicant’s lawfully licensed matatu transportation business at Kitui bus stage in Kitui Central town within Kitui County, including clamping, impounding, seizing, confiscating, damaging and or towing the applicant’s and applicant’s members’ motor vehicles.

iv. That the officer commanding station (OCS) Kitui Police Station, the OCPD (Officer Commanding Police Division) of Kitui, and the Traffic Base Commander Kitui to enforce these orders

v. That pending the hearing and determination of the Petition, a conservatory order be and is hereby issued staying the decision of the 1st Respondent cancelling the Petitioner’s License No. Z1182306423 contained in the letter dated 16th September 2021

vi. That pending the hearing and determination of the suit, this Honourable Court be pleased to issue a conservatory order restraining the Respondents, their servants, employees, agents and/or directorate of city inspectorate or such other persons or entity from harassing, intimidating, arresting or in any manner whatsoever interfering with the running of the applicant’s lawfully licensed matatu transportation business at Kitui bus stage in Kitui Central town within Kitui County, including clamping, impounding, seizing, confiscating, damaging and or towing the applicant’s and applicant’s members’ motor vehicles.

vii. That costs of this application be in the cause.

3. The application is premised on 16 rounds which in summary are that the 1st Respondent cancelled the Applicant’s operating license on 16th September 2021 citing non-payment of transportation Saccos/company’s per vehicle per year by the Applicant. The Applicant avers that it has made all statutory payments to the 1st Respondent and as such cancellation of its license was unlawful. The applicant insists that the cancellation is causing the applicant to suffer irreparable loss as it is unable to access and operate its picking and dropping points at Kitui bus park as well its parcel office at the said bus park.

4. In support of this application, Clinton Wambua has sworn an affidavit sworn on 29th September 2021. In his affidavit, the applicant’s director further avers that the applicant was not given an opportunity to be heard by the 1st Respondent prior to cancellation of the said license.

5. The applicant has also filed a supplementary affidavit sworn by Clinton Wambua on 13th October 2021, where it avers that the Respondents are using public resources to fight economic wars between it and the 5th Respondent. It also alleges that the notice of intention to surcharge issued by the Ministry of Agriculture, Livestock, Fisheries and Co-operatives State Department for Co-operatives has been challenged by the applicant’s directors and as such the letter should not have informed cancellation of their license.

6. The deponent also avers that the contention that the applicant misled the 1st Respondent into believing that it was the 5th Respondent is false as the two parties are different entities. Finally, the applicant avers that its right to fair administrative action was breached as they were not given an opportunity to be heard before their license was cancelled.

7. In its written submissions the Applicant contend that it has established a prima facie case warranting intervention by this court at this stage. It submits that it made all statutory payments to the 1st Respondent and that the said Respondent has not raised any query on the license fees or any fee arrears. It contends that the cancellation was unfair and unlawful.

8. The applicant insists that it was not given a chance to be heard by the 1st Respondent prior to the action being taken against it and avers that the action breached its right to fair administrative action. It relies on the case of ***Nanyuki Express Cab Savings and Credit Society Ltd. Versus County Government of Marsabit [2019] eKLR.***

9. The 1st to 4th Respondent have opposed this application through a Replying Affidavit sworn by Stephen Kyalo Maitha, the 1st Respondent’s County Executive Committee member in charge of Infrastructure, Transport, Housing and Urban Development. The 5th Respondent for the record did not file any response to this application.

10. In their affidavit, the 1st to 4th Respondents contend that the 1st Respondent licensed the 5th Respondent to operate a passenger transport business within the county but the applicant formed their business to compete with the 5th Respondent. They add that the Acting Commissioner Co-operative Development wrote to the Director General of the National Transport and Safety Authority (NTSA) requesting him to suspend the applicant's license for operating unlawful activities. It is deponed that the 1st Respondent also received a letter from the Ministry of Agriculture, Livestock, Fisheries and Co-operatives threatening to surcharge the four directors of the Applicant company for embezzling funds belonging to the 5th Respondent.

11. They aver that the Applicant had also deceived the County Executive Committee Member (CECM) in charge of infrastructure into believing that the applicant's name was the 5th Respondent's operating the business. As a consequence, the CECM wrote to NTSA instructing NTSA to issue the applicant with a TLB to operate a new route i.e Mwingi-Kitui-Mutomo-Kibwezi-Mutito Wa Ndei-Mombasa.

12. They contend, that the Applicant had also failed to pay for transportation, sacco's/ company fees per vehicle per year as stipulated by county laws. Finally, it is deponed that friction between the 5th Respondent and the Applicant caused disruption of public transport and business within the county. The respondents aver that the above misgivings by the applicant led to cancellation of the Applicant's operating license.

13. In respect to the right to be heard, the 1st to 4th respondents aver that they have tried through their officers including the Hon. Governor to hold meetings to resolve the impasse and help the applicant comply with regulations but the applicant in their view has been defiant and disrespectful and acting with a sense of superiority complex.

14. In their written submissions done through learned counsel Kimanthi and Associates, the respondent submit that the failure by the Applicant to pay the transportation sacco's/company per vehicle per year coupled with disruption of smooth flow of traffic and other businesses within the County justifies cancellation of its operating license.

15. According to the Respondents the applicant was given an opportunity to be heard during the meetings held at the governor's office on 27th & 28th May 2021 besides the meeting held on 17th September 2021. It is their submissions that the applicant's interest cannot supersede public interest. They rely on two decisions in that regard namely: -

1. Gitaru Peter Munya –versus- Delion Mwanda Kithinji & 2 Others [2014] eKLR.

2. James Marienga Otonyo & 2 Others versus Fund Manager Suna West National Government Constituency Development Fund Committee & Anor. [2020] eKLR.

16. This court has considered this application and the response made. The Applicant has moved this court under **Sections, 1A, 1B, 3A and 63 (c) of Civil Procedure Act** and **Order 40 Rule 2 of the Civil Procedure Rules**. It seeks a conservatory order to enable it to continue in its business uninterrupted pending the determination of the petition herein where it has substantially challenged the action taken by the 1st to 4th Respondent with respect to license for its fleet of vehicles operating within a stage in Kitui county.

An order of conservatory order is an equitable remedy which can be issued if a party is seeking it satisfies the court that its rights under the Constitution or any other law have been infringed or there are threats to them being infringed. That principle was well captured in the case of **Centre for Rights Education and Awareness (CREAW) and Anor. versus Speaker of the National Assembly & 2 Others [2017] eKLR** where the court held;

“A party who moves the Court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation, are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending cause or petition...”

A conservatory order would normally issue where there is real impending danger to violation of the Constitution or fundamental rights and freedoms with a consequence that a petitioner or the public at large would suffer prejudice unless the court intervenes and grants Conservatory orders. In such a situation, the Court would issue a conservatory order for purposes of preserving the subject matter of the dispute.”

17. Flowing from the above, the key principles to be satisfied before a grant of conservatory order are; -

a) An applicant must demonstrate that he/she has a prima facie case with a high chance of success and that unless the court grants the conservatory order sought there is real risk that prejudice will be occasioned as a result of violation or threatened violation of the Constitution.

b) That unless the conservatory is given, the petition will be rendered nugatory or academic.

c) The public interest is considered before grant of the conservatory order.

18. The first and key test to be considered by a court before issuance of conservatory order is demonstration of a good case or a prima facie case. So the question I ask myself in this matter is, has the petitioner/applicant established a prima facie case against the respondents? In the case of **Mrao Ltd versus First American Bank Ltd & 2 Others [2003] eKLR** the court made some useful observations as follows: -

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

19. The Applicant’s case indicates that there is an existing economic battle between it and the 5th Respondent and that the 1st Respondent has gotten involved in the dispute between the said parties by cancelling its operating licence handing in an unfair advantage to the 5th Respondent. The dispute between the two parties remain unresolved.

20. The Applicant has raised a fundamental issue involving its Constitutional right to a fair administrative action. It avers that it was not given an opportunity to be heard before the 1st Respondent cancelled its operating licence. A right to be heard is an inalienable right well enunciated under **Article 25 (c) and Article 47 (1) (2) of the Constitution of Kenya. Article 25 provides for fundamental rights and freedoms. One of the fundamental rights and freedoms is that;**

“ every person is entitled to a fair trial and one of the tenets of a fair trial under Article 50 is a right to be heard.”

21. Article 47(1) and (2) of the Constitution provides;

“(1) Every person had the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

22. Pursuant to **Article 47 (3)**, Parliament enacted the **Fair Administrative Act, 2015** and **Section 4(3)** the Act provides that; where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

“

a) Prior and adequate notice of the nature and reasons for the proposed administrative action;

b) An opportunity to be heard and to make representations in that regard;

c) Notice of a right to a review or internal appeal against an administrative decision, is applicable.

d) A statement of reasons pursuant to Section 6.

e) Notice of the rights to legal representation, where applicable;

f) Notice of the right to cross-examine or where applicable.”

g) Information, materials and evidence to be relied upon in making the decisions or taking the administrative action.

23. Having set out the clear provisions of the law, let me now consider the response by the 1st to 4th Respondent in respect to the applicant’s claim that its licence was cancelled without a chance of being heard. It is uncontested that the action taken by the 1st Respondent was administrative in nature.

The Respondent claim that there was a meeting held between the Applicants and Respondents at the Governor’s Office. The 1st Respondent has attached resolutions of a meeting held on 17th September 2021 between Kitui County Governor, 15 County Executives from the 5th Respondent and 15 counterparts from the Applicant. While I note that the resolutions appears to have been reached on 17th September 2021, the letter cancelling the applicant’s operating licence is dated 16th September 2021. The minutes of that meeting also do not show what was discussed. Therefore, on a prima facie basis, I find that as per **Mrao Ltd (Supra) decision**, the applicant has demonstrated a good case. This is because if a decision had already been reached to cancel the licence on 16th September 2021, what was the need of the meetings on 17th September 2021? Did the 1st respondent really gave a chance to the Applicant before cancelling its licence vide a letter dated 16th September 2021?

24. The Respondents’ contention that there were other meetings held on 27th May 2021 and 28th May 2021 hosted by Her Excellency the Governor Kitui is not supported by the facts because none have been presented to this court. The affidavit of Stephen Kyalo Maitha sworn on 8th October, 2021 in response to this application does not show their meetings where the applicant was granted a chance to be heard. In any event, there are no minutes exhibited to show that such meetings were held. The written submissions are simply facts presented from the bar. I do not find any evidence to support the same.

25. There is something else which the 1st Respondent stated in response to this application which has caught my eye. The 1st Respondent avers that the applicant’s licence was cancelled because it failed to comply with its regulations and that it did not pay the requisite fees to

operate and the question posed is why was the Applicant granted a licence to operate if it had not complied with all the statutory requirements?

26. The 1st Respondent has of course raised a legitimate issue which is in regard to feuds between the applicant and the fifth Respondent and the manner in which the Applicant began and operated its business. They may have infringed on the rights of the 5th Respondent and brought chaos in the transport sector, however, the manner in which the Respondents went about resolving the dispute appears to have run afoul of the cited constitutional provisions. As I have observed at the beginning of this ruling, you do not use a wrong to correct a wrong because, two wrongs don't make a right.

It is in that context that I find merit in this application. The same is allowed in the following terms: -

(i) A conservatory order is hereby issued restraining the Respondents, their servants, employees, agent and/or directorate of City Inspectorate or any other person from interfering with the running of the applicant's lawfully licenced matatu business at Kitui Bus Stage in Kitui Town. Pending the determination of the petition herein.

(ii) The applicant should however comply with all other administrative and regulatory requirements in place at the time of this ruling. For avoidance of doubt, this ruling does not mean that the applicant is granted free licence to operate without abiding with written laws and other regulations necessary to manage smooth running of transport business within Kitui town or any other place for that matter.

(iii) Costs shall be in cause.

(iv) The Petition herein, be prosecuted timely for the interest of justice.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 12TH DAY OF NOVEMBER 2021.

HON. JUSTICE R. K. LIMO

JUDGE