



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

PETITION NO. 3 OF 2019

**In the Matter of: Articles 1, 1, 3(1) & 2, 5(3), 28, 41(1), 47(10 &
(2) & 48, 50 (1) (2) (A) & (O) & 258 of the Constitution of Kenya, 2010**

And

**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

Alleged Contravention of Fundamental Rights And Freedoms

Under Articles 27 (1) & 28, 47 (1) & 50 (1) (2) (A) of the Constitution of Kenya

And

Fair Administrative Action Act, 2015

BETWEEN

NANYUKI EXPRESS CABS SAVINGS AND CREDIT SOCIETY LIMITED.....PETITIONER

AND

COUNTY GOVERNMENT OF MARSABIT.....RESPONDENT

JUDGMENT

[1] By a petition dated 22nd May 2019, the petitioner seeks among other orders; a declaration that the act of the respondent in suspending their operating licenses in Marsabit County is in breach of petitioner's and its member's rights under **Article 27 (1) (2) and (3), 28, 47 and 50 of the Constitution**; a declaration that the said suspension is in breach of Nanyuki Express Cabs Savings and Credit Society Limited and its members constitutional rights as enshrined in **Articles 27 (1) (2), 28, 47 (1) and 50 of the Constitution**; an order directing the respondent to reinstate the petitioner's operating license in Marsabit County; and an order of judicial review in nature of certiorari to bring into this court the letter by the respondent dated 17th April 2019 and quashing the same.

[2] The petitioner is a co-operative society with 540 members running a matatu transport business with over 200 vans in various towns such as Marsabit, Nanyuki, Meru, Isiolo, Nyeri and Nairobi. The petitioner held a single business permit for its members' matatu vans in Marsabit County. On 17th May 2019 the petitioner received a letter dated 17th April 2019 suspending their operating license in Marsabit without being given a chance to be heard or a notice to show cause. That this is blatant violation of their Constitution rights as neither the petitioner nor any of its members have been found guilty of having been in breach of the Traffic Act.

[3] The respondent's replied to the petition through the replying affidavit of Boru Golicha Gababo, town administrator and acting municipal manager of Marsabit municipality town, sworn on 4th June 2019. He deposed that via a letter dated 16th October 2018 the respondent wrote to all Saccos' operating *matatu* and bus service business within Marsabit town including the petitioner informing them of the respondent's plan of the *matatu* stage. The petitioner failed to fulfill the requirements in the letter and provided no explanation.

[4] On 9th May 2019 a joint consultative meeting was called between all the officials of matatu operators and respondent to notify them of the progress made towards streamlining their operations and also handle issues of breach of peace between the petitioner and Meiso Sacco. The petitioner's officials disregarded this and instead arrived at the governor's office with over 20 touts, got into an altercation with the officials of Meiso Sacco which caused a disruption that halted operations at the governor's office. After briefing them of the intended plan and taking their views into consideration a consultative committee of the respondent was constituted that recommended the suspension of operations of the two Saccos for two business days.

[5] The petitioner was advised to comply with the requirements in the letter dated 16th October 2018 by noon 13th May 2019 and informed of the possible consequence of non-compliance according to the terms on which the permit was issued since apart from obtaining the single business permit the petitioner was operating without being issued with a picking and dropping bay.

[6] According to the respondent, a follow up meeting was held on 13th May 2019 between the petitioner and consultative committee where the former was found to be in breach of the directive issued on 9th May 2019 regarding letter of 16th October 2018 and it was recommended by the committee that a 30 days suspension of the petitioner's operation pending compliance and resolution of all issue pertaining the petitioner. The petitioner continued operations necessitating its suspension until further notice. The issuing authority under the conditions prescribed on the permit can cancel the permit if any county laws are contravened and implementation by the respondent of these regulations cannot be said to be contravening the petitioner's right.

Submissions

[7] This matter was canvassed by way of written submissions. At the time of writing this judgment, only the petitioner had filed their submissions.

[8] The petitioner submitted that the respondent did not adhere to the procedure set out in the **Fair Administrative Action Act and the Constitution** before arriving at their decision. They relied on **Kenya Human Rights Commission v Non- Governmental Organizations Co-ordination Board [2016] eKLR**, **Kenya Human Rights Commission & another v Non- Governmental Organizations Co-ordination Board & another [2018] eKLR** and **Nanyuki Express Cabs Saving and Credit Society Limited v County Government of Isiolo; Meiso Sacco Limited (Interested Party) [2019]eKLR** to support their submissions.

ANALYSIS AND DETERMINATION

[9] The issue for determination is: -

a. **Whether the act by the respondent of suspending the petitioner's license to operate in Marsabit county is in breach of the petitioner's and its member's rights to fair administrative action.**

[10] According to **Article 47 of the Constitution of Kenya**: -

47. Fair administrative action

(1) Every person has 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.

[11] Accordingly, fair administrative action is a constitutional right. It must also be expeditious, efficient, lawful, reasonable and procedurally fair. According to the Constitution, 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.

[12] Parliament also enacted **the Fair Administrative Action Act 4 of 2015** to give effect to this constitutional right. **Section 4(3) of this Act** states:

“(3) 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, where applicable;**
- d. **a statement of reasons pursuant to section 6;**
- e. **notice of the right to legal representation, where applicable;**
- f. **notice of the right to cross-examine or where applicable; or**

g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.”

[13] Much judicial ink has been spilt on this subject of fair administrative action as a right in the Constitution. I will only cite some few decisions. For instance, in the case of *Dry Associates Ltd v Capital Markets Authority and Another* the Court observed;

“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.”

[14] See also the Court of Appeal where it stated in the case of *Judicial Service Commission v Mbalu Mutava & another* as follows:

“[23] Article 47(1) does not exclude the application of common law particularly the common law right to fair hearing. As I have endeavoured to show above, natural justice comprises the doctrine of or is synonymous with “acting fairly”. The term “procedurally fair” used in article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to right to fair administrative action. In construing the contents and scope of fair administrative action, the justice of the common law will greatly influence the future development of the administrative law under the Constitution.

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

[15] Of greater significance is that fair administrative action is now provided as a right in the Constitution- which is quite leap-frog enactment and development of law. The specific prescriptions and requirements enacted in section 4 of the Act follow after the natural law requirement whose sole aim is to ensure no one is condemned without being given an opportunity to be heard. This expressly kicks out the bill of attainder kind of justice out of our judicial system.

[16] The petitioner’s case is that it operates a matatu transport business for over 200 vans belonging to its members. The letter dated 17th April 2019 suspended its license without being accorded their right under **Article 47 of the Constitution**.

[17] The respondent was of a different view; that they are entitled to suspend the license under the regulations following the petitioner’s blatant disobedience of stipulations and requirements contained in the letter dated 16th October 2018. They accused the petitioner of continuing with their operations in spite of a temporary suspension of their operations by the County Government for not having a loading and picking up bay. Further accusations; the petitioner’s members stirred up a disruption at the governor’s office halting operations and service delivery.

[18] The respondent has tendered minutes for the meeting held on 9th May 2019 at the Governor’s Boardroom Marsabit. It was called to try and resolve the dispute between the petitioner and Meiso Sacco which had resulted into a disruption of operations at the governor’s office. The conclusion of the said meeting was that the two were to furnish the office of the county secretary with the necessary working documents for a conclusive decision. The next meeting was scheduled for 13th May 2019 where it was concluded that the petitioner’s license be suspended.

[19] From the onset, it seems that meetings were held in May 2019, except however, the suspension letter in controversy had already been written as it is dated 17th April 2019. From the record, the petitioner received the said letter on 17th May 2019. From these facts, it is fair and justifiable to conclude that the respondent had already made its administrative decision to suspend the petitioner’s license even before the said consultative meetings were held.

[20] Doubtless, the respondent has the power and is constitutionally mandated to manage the affairs of its County. I am also aware that under the regulations the issuing authority may cancel a permit if any county laws or conditions of the permit are contravened. Similarly, due implementation by the respondent of lawful regulations cannot be said to be a contravention of a right. Be that as it may, actions and decisions by the County or its organs which may affect the rights of persons, must, be guided by and be within the prescriptions in the Constitution and the Law. The respondent has been accused of noncompliance with **Article 47 of the Constitution and Section 4 of the Fair Administration Act, 2015** for it failed to give the petitioner an opportunity to be heard before making and implementing a decision to suspend the operations of the petitioner. Such decision was an administrative action, but as it affected the rights of the petitioner and its members, it ought to have been preceded by notice as well as due opportunity to be heard. This requirement is aimed at producing procedural fairness in all such administrative decisions.

[21] As such, adherence to these constitutional requirements attendant to the right to fair administrative action is not optional, but a mandatory legal obligation if the administrative action taken is to be lawful. This should be understood within the new dawn- justification of exercise of public power and outright abhorrence of dictatorial tendencies in the exercise of public power. In light of the facts of this case, it is apparent that the action by the respondent failed this constitutional test, and, thus, violated the petitioner’s right to fair administrative action. I am content to cite Mwita J in the case of **Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another** that: -

“40. Taking the above jurisprudence into account, there is no doubt in my mind, that acting as it did, the respondent

violated 1st petitioner's right to a fair Administrative Action contrary to Article 47 of the Constitution. Administrative Actions that flow from statutes, must now meet the constitutional test of *legality, reasonableness* and *procedural fairness*. According a party a hearing before taking action against him is no longer discretionary. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation.

41. This Court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void.”

[22] From the foregoing, I hereby declare a violation by the respondent of the petitioner's right to fair administrative action under article 47 of the Constitution. In the upshot, I find the petition to be meritorious and I allow it in the following specific declarations and orders:

a) A declaration is hereby issued that the action by the Respondent in suspending the petitioner's operating license in Marsabit County is in breach of the Petitioner's and its members' rights under Article 27 (1) (2) and (3), 28, 47 and 50 of the Constitution, and therefore, null and void for all purposes.

b) A declaration is hereby issued that the said suspension is in breach of Nanyuki Express Cabs Savings and Credit Society Limited and its members' constitutional rights as enshrined in Articles 27 (1) (2), 28, 47 (1) & 50 of the Constitution

c) An order is hereby issued reinstating the petitioner's operating license in Marsabit County.

d) An order of certiorari is hereby issued quashing the respondent's letter dated 17th April 2019 suspending the petitioner's license.

e) Costs to the petitioner.

Dated, signed and delivered at Meru this 7th day of October 2020

F. GIKONYO

JUDGE

Representation

Gikonyo for petitioner

Respondent absent

F. GIKONYO

JUDGE