



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO. 4 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS FOR AN ORDER OF CERTIORARI**

**AND**

**IN THE MATTER OF NAKURU CHIEF MAGISTRATE COURT'S CIVIL CASE NO. 861 OF 2016**

**BETWEEN**

**HAZARY ROTICH.....1<sup>ST</sup> APPLICANT**

**MICAH CHIRCHIR.....2<sup>ND</sup> APPLICANT**

**SARAH MAGUT.....3<sup>RD</sup> APPLICANT**

**ELDORET CROSSROAD SACCO.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF NAKURU.....1<sup>ST</sup> RESPONDENT**

**JOEL M. KAIRU (QS).....2<sup>ND</sup> RESPONDENT**

**DEPARTMENT OF ROADS, TRANSPORT & PUBLIC WORKS.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. By Notice of Motion dated 13<sup>th</sup> March, 2017, the *ex-parte* Applicants herein, sought the following orders:

*i. That an order of certiorari be issued to remove into this Honourable Court to quash the letter dated 8<sup>th</sup> February 2017 issued by the 2<sup>nd</sup> Respondent to the Applicants cancelling authority letter ref: NESC/PARKING BAY/2015/VOL.1 dated 16<sup>th</sup> March, 2015 which was issued to the Applicants.*

*ii. That costs of this matter be borne by the Respondents.*

2. The Application is based on the following grounds:

*i. That the Applicant's Sacco is a duly registered Sacco under Co-operative Societies Act.*

*ii. That on 5<sup>th</sup> March, 2015 the Applicants herein applied to the 1<sup>st</sup> respondent requesting for (2) two loading and picking bays along Mburu Gichua between Shabab Stage and 2NK stage for dropping and picking passengers.*

*iii. That on 16<sup>th</sup> March, 2015 the 1<sup>st</sup> Respondents approved the Applicants request allowing the Eldoret Crossroad Sacco to drop and pick passengers along Mburu Gichua between Shabab Stage and 2NK stage.*

iv. That subsequently, on 12<sup>th</sup> April, 2016 Eldoret Crossroad Sacco was issued with a trade license to operate their business by the 1<sup>st</sup> Respondent which license they paid for.

v. That the Applicants were allocated a reserved parking and a booking office within Nakuru County by the County Government of Nakuru which they use to pick and drop passengers.

vi. That the Applicants have been paying the required parking and booking fees without fail for the entire space.

vii. That on 22<sup>nd</sup> July, 2016 the Nakuru Line Sacco came to the Applicants office where the Sacco operates from and threatened to remove the Applicants from the stage.

viii. That the Applicants then filed Civil Case Number 861 of 2016, Eldoret Crossroad Sacco & 3 Others v Nakuru Line Sacco & 2 Others in the Chief Magistrates Court Nakuru where a temporary injunction was issued restraining Nakuru Line Sacco from removing, disrupting, dividing the parking space and interfering with the Applicants parking space.

ix. That the 1<sup>st</sup> Respondent herein is a party to the said suit and through the 2<sup>nd</sup> Respondent has opted to cancel the letter dated 16<sup>th</sup> March, 2015 issued to the Applicants allowing the Applicants to drop and pick passengers along Mburu Gichua between Shabab Stage and 2NK stage for dropping and picking passengers.

x. That in the letter dated 8<sup>th</sup> February, 2017, issued to the Applicants by the 2<sup>nd</sup> Respondents are required to vacate the (2) two loading and picking bays along Mburu Gichua between Shabab Stage and 2NK stage for dropping and picking passengers with immediate effect.

xi. That the Applicants are likely to suffer loss and damage if the said letter dated 8<sup>th</sup> February, 2017 is not quashed.

xiii. That the said letter has been made in bad faith, without considering the interest of the Applicants.

xiii. That the tension at the stage is evident and a likelihood of a breach of peace.

3. The verifying affidavit dated 13<sup>th</sup> March, 2017 is sworn by Micah Chirchir. His averments mirror the grounds set out above and provide a detailed background and factual basis to the application. The application was opposed by the Respondents vide the affidavit dated 7<sup>th</sup> March 2017 sworn by Joel Maina Kairu, the second Respondent herein.

4. The application proceeded by way of written submissions. The Applicant's submissions are dated 14<sup>th</sup> September, 2017 while those of the Respondents are dated 12<sup>th</sup> October, 2017.

5. I have considered the application, the respective affidavits, submissions and authorities cited by the parties. The application raises three issues namely:-

*i. Whether the application should be struck out for lack of form.*

*ii. Whether the Applicants right to a fair hearing was contravened.*

*iii. Whether the remedies sought are merited.*

*iv. Whether the application should be struck out for lack of form*

6. The Respondents raised a preliminary issue on the framing of the application. They submitted that the Applicants brought the application in their own name and not that of the Republic. They urged the court to strike out the application on that account. They relied on the case of **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486** where Ringera, J (as he then was) stated thus:-

***“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly instituted and accordingly, the orders of Certiorari, Mandamus or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue ...”***

7. I agree with the exposition of Ringera J as stating the correct position of the law. However, while I agree with the Respondents that the application ought to have been brought in the name of the Republic as required by law and practice, I take the view that to strike out the same on that account alone would be drastic. To the contrary, I see no prejudice to be suffered by the Respondents if the application is determined on merits. I am fortified in taking this position by **Article 159 (d) Constitution**. I shall therefore proceed to determine the petition on merits.

#### **Submissions of the Parties**

8. The Applicants submitted that on 5<sup>th</sup> March, 2015 they applied to the 1<sup>st</sup> Respondent requesting for two loading and picking bays along Mburu Gichua road between Shabab stage and 2NK stage for dropping and picking passengers. The request was approved on 16<sup>th</sup> March,

2015. They averred that on 12<sup>th</sup> April, 2016, the 3<sup>rd</sup> Applicant was issued with a trade license by the 1<sup>st</sup> Respondent to operate their business. The Applicants were consequently allocated a reserved parking and booking office within Nakuru County by the County Government for picking and dropping passengers. The licence was duly paid for and they continued paying the required parking and booking fees.

9. The Applicants further submitted that on 22<sup>nd</sup> July, 2016, Nakuru Line Sacco threatened to remove them from the stage. They submitted that this led the Applicants to seek a temporary injunction which was issued under Nakuru Chief Magistrates Civil Case Number 861 of 2016 restraining the said Nakuru Line Sacco from removing, disrupting, diving the parking space and interfering with the applicants' parking space. They submitted that the 2<sup>nd</sup> Respondent on 8<sup>th</sup> February, 2017 issued them with a letter directing them to vacate from the two loading and picking bays along Mburu Gichua road between Shabab stage and 2NK stage immediately.

10. The Applicants argued that they were never issued with prior communication by the Respondents of the intention to cancel the letter dated 16<sup>th</sup> March, 2015 and neither were they involved in the resolution to have them vacate the parking lot in question. They concluded that the Respondents' actions were in bad faith, unreasonable, irrational and did not consider the interests of the Applicants who stood to incur huge losses.

11. The Respondents admit that the Applicants had previously been allocated the parking bays in dispute. They argue however that the application lacked merit as it failed to prove that the action taken by the Respondents was arbitrary, malicious, was unconstitutional, unlawful and/or illegal. The Respondents further submitted that judicial review was concerned with the procedure of making a decision and not the quality of the decision. They argued that the Applicants had failed to demonstrate that the procedure was flawed. They further argued that the Applicants had failed to demonstrate the prejudice they stood to suffer in the event the application was not granted. They contended that it was within the mandate and duty of the Respondents to control traffic within Nakuru Town to enable other businesses to operate smoothly. They stated that the letter which was the subject matter of the application emanated from the Department of Roads, Transport and Public Works.

### Scope of Judicial Review

12. Before delving into the issues raised by the parties, it is important at this stage to recap the principles applicable in judicial review. In **Peris Wambogo Nyaga v Kenyatta University [2014] eKLR**, Odunga J cited the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which the Court of Appeal restated the principles thus:-

*“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself—such as whether there was or there was not sufficient evidence to support the decision.”*

#### *(ii) Whether the Applicants' right to a fair hearing was contravened*

13. It is clear from the pleadings of the parties and the submissions I have set out above that there is no contention that the Respondents issued the Applicants with a notice requiring them to vacate the parking lot and pick up and drop off points in issue. The letter dated 8<sup>th</sup> February 2017 was signed by the 2<sup>nd</sup> Respondent herein who is the County Executive Committee member of the 3<sup>rd</sup> Respondent. In issuing the impugned directive, the 2<sup>nd</sup> Respondent invoked Section 4(1)(a) of the Nakuru County Parking and Zoning Act and the County Government Act. It is also not disputed that there was no prior notice of the intended action to the Applicants. All that the letter communicated was the reason for the decision which was stated as the need to deal with the 'rampant traffic snarl up and increased traffic jam in Nakuru town.

14. The grievances of the Applicants must be considered against the delimitation of the scope of judicial review aforesaid. To restate, judicial review is not concerned with the merits of the decision but the decision making process and whether or not the decision maker had jurisdiction, acted within that jurisdiction and that the decision making process was fair.

15. **Article 47** of the **Constitution** stipulates:

*(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.*

16. Section 7 of the Fair Administrative Action Act, 2015 reads:

*(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to—*

*(a) a court in accordance with section 8; or*

*(2) A court or tribunal under subsection (1) may review an administrative action or decision, if—*

*(a) the person who made the decision—*

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

17. In **Republic v Nairobi City County Ex parte Registered Trustees of Sir Ali Muslim Club [2017] eKLR** Odunga J stated:-

*“In a nutshell, the rule of law also allows for predictability of actions by public bodies and the fact that law would be uniformly and objectively applied. Part of our Constitution (Article 10) asserts that transparency and accountability are some of the hallmarks that define the rules that bind a state organ. Since the rule of law enforces minimum standards of fairness, both substantive and procedural it follows that before a decision adverse to the interest of a person is made, that person must be accorded a hearing as stipulated in Article 47 of the Constitution as read with sections 4 and 7 of the Fair Administrative Actions Act.”*

18. The learned judge went on further to cite **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, in which the Court of Appeal held that:-

*“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.”*

19. In the present case, it has been shown that the Applicants were not given prior notice of the decision that affected them. Indeed there's nothing in the pleadings or submissions of the Respondents to disprove that the Applicants were not given a hearing before the decision was made. The letter only communicated a decision already made by the County authorities. While it is not disputed that the Respondents had the mandate and duty under the law to take administrative action to ease the town of traffic congestion, they were expected to take the decision in a procedurally fair manner by giving those who were to be affected the right to be heard. They trampled on that right and only issued a directive. In so doing, they violated the rules of natural justice, **Article 47** of the **Constitution** and **Section 47** of the **Fair Administrative Act, 2015** aforesaid.

20. Following the above, I find that the Applicants merit the order of certiorari. In **Republic v Chairman Business Premises Rent Tribunal & 2 Others Ex-parte Abdulkadir Hubess (2017) eKLR** which cited the court of appeal decision in **National Examinations Council ex-parte Gathenji & Others, Civil Appeal No. 266 of 1996** the court stated in respect to an order of certiorari thus:-

*“Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons”.*

**(iii) Whether the orders should be granted**

21. It is not in every case that the court will grant judicial review even when it is merited. Judicial review orders are discretionary. The applicable principles in exercising discretion were summed up in the case of **Republic v Ministry of Health & 3 others Ex-parte Kennedy Amdany Langat & 27 others [2018] eKLR** where the court cited **Halsbury's Laws of England 4th Edn. Vol. 1(1) para 12 page 270** as follows:-

*“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus). . . are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant . . .*

*Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. . .” (Emphasis added)*

22. In the present case, the impugned letter reorganised traffic flow in Nakuru town. While the respondents must be censured for the manner in which they arbitrarily reorganised the parking bays and issued the notices, it is the view of the court that to quash the decision would cause administrative chaos and hardship to the wider public. The order therefore though merited cannot be granted.

23. In the end, these are my final orders:-

**(i) A declaration that the letter dated 8<sup>th</sup> February 2017 directing the Applicants to vacate specified parking bays was issued contrary to the rules of natural justice.**

**(ii) The order of certiorari though merited is denied.**

**(iii) The 1<sup>st</sup> Respondent shall pay the Applicants the costs of the petition.**

Orders accordingly.

**Judgement signed**

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**R.LAGAT KORIR**

**JUDGE**

**Judgment delivered, dated and signed at Nakuru this 12<sup>th</sup> day of February, 2019**

.....

**JANET MULWA**

**JUDGE**

**In the presence of:**

..... **Court Clerk**

..... **For the Applicants**

..... **For the Respondents**