



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CONSTITUTIONAL PETITION NO 440 OF 2018**

**LATEMA SACCO.....1<sup>ST</sup> PETITIONER**  
**NAZIGI SACCO.....2<sup>ND</sup> PETITIONER**  
**HANNOVER TRANS LTD.....3<sup>RD</sup> PETITIONER**  
**SUPER METRO LTD.....4<sup>TH</sup> PETITIONER**  
**KANGEMI MATATU OWNER SACCO.....5<sup>TH</sup> PETITIONER**  
**MARIMBA INVESTMENTS LTD.....6<sup>TH</sup> PETITIONER**  
**SONY CLASSIC SHUTTLE.....7<sup>TH</sup> PETITIONER**  
**RUKAGUNA SACCO.....8<sup>TH</sup> PETITIONER**  
**MADIWA MATATU OWNERS GROUP LTD.....9<sup>TH</sup> PETITIONER**  
**EASTLEIGH ROUTE SACCO LTD.....10<sup>TH</sup> PETITIONER**  
**EXPRESS LTD.....11<sup>TH</sup> PETITIONER**  
**ZURI GENESIS COMPANY LTD.....12<sup>TH</sup> PETITIONER**  
**FORWARD TRAVELERS SACCO.....13<sup>TH</sup> PETITIONER**  
**LOPHA MULTI PURPOSE SACCO.....14<sup>TH</sup> PETITIONER**  
**RISEN COMPANY LTD.....15<sup>TH</sup> PETITIONER**  
**MANMO SACCO.....16<sup>TH</sup> PETITIONER**  
**SERIAN SACCO.....17<sup>TH</sup> PETITIONER**  
**GANAKI SACCO.....18<sup>TH</sup> PETITIONER**  
**OBAMANA SACCO.....19<sup>TH</sup> PETITIONER**  
**NAKATHI TRAVELERS SACCO.....20<sup>TH</sup> PETITIONER**  
**FOURTY FOUR OWNERS CO LTD.....21<sup>ST</sup> PETITIONER**

EASTERN BYPASS SACCO.....22<sup>ND</sup> PETITIONER  
DIGITAL LUXURY TRAVELERS LTD.....23<sup>RD</sup> PETITIONER  
EMBASSAVA COOPERATIVE SAVINGS  
& CREDIT SOCIETY LTD.....24<sup>TH</sup> PETITIONER

VERSUS

NATIONAL TRANSPORT &  
SAFETY AUTHORITY.....1<sup>ST</sup> RESPONDENT  
HON ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT  
THE INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT  
CABINET SECRETARY STATE DEPARTMENT  
OF INTERIOR & COORDINATION OF  
NATIONAL GOVERNMENT.....4<sup>TH</sup> RESPONDENT  
CABINET SECRETARY STATE DEPARTMENT  
OF TRANSPORT, INFRASTRUCTURE,  
HOUSING & URBAN DEV. ....5<sup>TH</sup> RESPONDENT  
TRAFFIC COMMANDANT.....6<sup>TH</sup> RESPONDENT  
KENYA BUREAU OF STANDARDS.....7<sup>TH</sup> RESPONDENT  
REGIONAL METROPOLITAN  
TRANSPORT LTD.....8<sup>TH</sup> RESPONDENT

AND

UBER CHAP CHAP.....1<sup>ST</sup> INTERESTED PARTY  
TAXIFY.....2<sup>ND</sup> INTERESTED PARTY  
KENYA TAXI CABS OWNERS ASSOC..3<sup>RD</sup> INTERESTED PARTY

RULING

1. Before court is an application by twenty four Petitioners/Applicants dated 6<sup>th</sup> December 2018. The applicants moved this Court seeking conservatory orders suspending actions by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents meant to enforce traffic rules and regulations requiring the applicants, public service vehicle operators, to comply with traffic rules famously known as “**The Michuki Rules**”. The applicants were required to among other things fit speed governors and seat belts in the public service vehicles.

2. The applicants also sought to prohibit the 1<sup>st</sup> respondent from implementing paragraphs 4(2) and 4(3) of Legal Notice No 179 of 2014 which were intended to ban licensing of new public service vehicles and renewing licences for vehicles with carrying seating capacity of less than 25 passengers. The applicants also as object to Taxis being on the road without continuous yellow Line as required by The Traffic Act.

3. The application is based on the grounds the 1<sup>st</sup> respondent is acting contrary to law in particular section 102 (2) of the Traffic Act by prohibiting PSV vehicles of less than 25 passengers capacity from being on the road. They also consider it objectionable to the respondents forcing them to comply with “*Michuki*”rules” which they argue do not exist given that **Legal Notice No 161 of 2003** was quashed by the decision in *Republic v Minister for Transport and Communication & 6 others* [2004]eKLR(Misc. Application No 109 of 2004). The

applicants further argue that since the said legal notice was quashed, there is no law that can be applied to effect the “**Michuki Rules**” hence the respondents’ actions are unlawful.

4. The application is also supported by the affidavit of **Samuel Kago Kanyi**, a Director with 11<sup>th</sup> applicant sworn on behalf of the 11<sup>th</sup> applicant and that of the other 23 applicants, all PSV operators. He deposes that the respondents’ actions violate the applicants’ constitutional rights to fair, just and lawful action in respect to their business given that they are being forced to comply with a non-existent law. He further deposes that the respondents merely issued a press announcement on 4<sup>th</sup> November 2018 demanding that the applicants comply with the “**Michuki**” rules which were contained in Legal Notice No 161 of 2003 yet that particular legal Notice had been invalidated.

5. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents filed grounds of opposition dated 5<sup>th</sup> December 2018 opposing the motion. They contend that the motion does not meet the threshold for grant of conservatory orders and relied on the case of **Ezra Chiloba v Wafula Wanyanyi Chebukati & 7 Others** [2018]eKLR: that orders sought in the motion are final in nature and, therefore, cannot be issued at interlocutory stage, and that the rights alleged to be violated are not absolute.

6. The five respondents further contend that the demand that the applicants comply with the law is neither irrational nor unconstitutional but is meant to enhance safety on the roads and protect general Public. According to these respondents, the applicants have not demonstrated the prejudice they will suffer if the orders are not granted. They have, therefore, argued that the applicants have not demonstrated that there is real and imminent danger posed by the impugned actions to warrant grant of conservatory orders.

7. The 7<sup>th</sup> response filed a replying affidavit by **Birgen Rono** sworn on 18<sup>th</sup> December 2018 in opposition to the motion and petition. He deposes that the 7<sup>th</sup> respondent which is in charge of standards has established standards known as the **Kenya Standards** and that all products must comply with the said standards. Regarding the matter at hand, **Mr Rono** deposes that the 7<sup>th</sup> respondent has, in addition to the **Kenya Standards**, the East African Community Standards (**EACS**). He further deposes that there are standards with specifications for the seat belts for motor vehicles namely: **KS 06 -664:1985** confirmed in 2015, **EAS 465 – 2007** and **K 5822-1987** confirmed in 2012.

8. According to **Mr Rono**, every commodity whether imported, manufactured or processed for consumption or use in the local market, has to undergo inspection and testing at the country of origin for the purposes of ascertaining the standards of the goods. Regarding the petitioners’ questions on the standards of the seat belts, **Mr. Rono** contends that the petitioners have not demonstrated that the seat belts do not meet the required standards. He deposes that inspection of goods to ascertain their conformity with standards is done by officers appointed by the 7<sup>th</sup> respondent in the country of origin, and that the 7<sup>th</sup> respondent’s primary duty is to ensure that substandard products do not enter the local market.

9. The deponent states that public service vehicle drivers have a responsibility to drive motor vehicles with due care and attention, and that the issues raised the petition touch on public interest and public policy hence commuters stand to suffer if the orders sought are granted. In **Mr. Rono’s** view, if conservatory orders are granted, public service vehicle operators will have been allowed to operate without safety belts and speed governors to the detriment of the general public.

10. During the hearing of the application, **Mr Kinyanjui** moved the motion urging the court to grant the orders sought. He argued that the “**Michuki rules**” introduced by **Legal Notice No 161 of 2003** were nullified in the case of **Republic v Minister for Transport and Communication & 6 others** (supra); that the 4<sup>th</sup> respondent made an oral announcement on 11<sup>th</sup> November 2018 directing all PSV operators to comply with non-existent legal notice ; and that there was no formal written order or any other formal communication that “**Michuki rules**” would be implemented immediately.

11. **Mr Kinyanjui** stresses that the law is clear on grant of conservatory orders contending that since the Legal notice no longer existed, the respondents cannot support to enforce a non-existent law. He therefore urged the court to grant prayers 3, 5, 7, 9, 10, 11, 12, and 14 of the motion pending the hearing and determination of the petition.

12. In learned counsel’s view, some of the rules, including rule 70 which required public service vehicles with a capacity of less than 25 passengers to have a continuous yellow line, had already been implemented. He also argued that PSV operators are being harassed through dubious arrests and detention in far flung police stations from where they are arrested. He submits that the 1<sup>st</sup> and 5<sup>th</sup> respondents had made a decision to phase out the 14 seater Public Service vehicles with effect from 1<sup>st</sup> January 2016 through Legal Notice No 179 of 2014, but the 1<sup>st</sup> respondent continued licensing those vehicles.

13. Learned counsel contends that the ban was, however, suspended in July 2014 to await policy guidelines, an action that allowed the 1<sup>st</sup> respondent continue to license 14 seater public service vehicles to operate. He also faulted the decision to force operators to fit seat belts and speed governors. In this respect, referred to the decision of this court (Odunga,J) **Republic v Cabinet Secretary for Transport & Infrastructure & 6 others** [2014] eKLR, in which digital speed governors had been successfully challenged and contended that the applicants are being forced to install the same speed governors which is injurious not only to the transport sector but also to the country. He also faults the decision not to license public service vehicles with less than 25 seating capacity.

14. **Mr Marwa** counsel for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents opposes the application arguing that Legal Notice No 161 of 2003 is not really the issue but rather compliance with the Traffic rules which are in the Traffic Act. According to counsel, there are Legal Notice **Nos. 23 and 179 of 2014** both of 2014 that regulate public service vehicle operations which are being implemented. He argues that Legal Notice No 161 of 2003 having been annulled, prayer 3 of the motion cannot be granted; that there are other legal instruments including the Traffic Act, subsidiary legislation section 22 (A)(1) to 6 which regulate the sector including fitting of seat belts; that section 102 of the Traffic Act relates to Taxis; that Legal Notice no 23 of 2014 – section 7(b) requires that long distance vehicles be checked by qualified mechanics and paragraphs (4(2) and 4(3) of Legal Notice No 179 of 2014 which prohibit licensing of public service vehicles with less than 25 passenger seating capacity in order to ease congestion.

15. Counsel further argues that the requirement of speed governors is in the law (section 41 A) of the Traffic Act which requires public service vehicles to fit speed governors and that speed governors must meet specifications set by the Cabinet Secretary. In learned counsel's view, the application does not merit. He relies on the decision in Martin Nyaga Wambora v Speaker County Assembly of Embu [2014]eKLR and Gitaru Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014]eKLR for the contention that the danger must be real as well as the grounds for granting conservatory orders respectively. He contends that there is need to consider public interest and, in his view, public interest in this petition outweighs the interest of the petitioners.

16. On behalf of the 7<sup>th</sup> respondent Miss Mokeira opposes the application and relies fully on their replying affidavit. Regarding speed governors, counsel contends that there is already an applicable standard which is the same case with seat belts since the standards have been set hence there is no violation of law or rights.

### **Determination**

17. I have considered the application and the responses thereto. I have also considered submissions on behalf of the parties as well as the authorities relied on. The application seeks conservatory orders to suspend the respondents' decisions intended to enforce certain traffic rules pending the hearing and determination of this petition. The applicants are engaged in public service transport and largely operate public transport vehicles of less than 14 passenger seating capacity.

18. The 1<sup>st</sup> respondent has moved to implement rules and regulation in the public service transport sector. They include enforcement of the ban on public service vehicles of less than 25 passenger seating capacity as well as installation and fitting of speed governors and seat belts. The traffic rules being enforced further required public service vehicles of less than 25 passengers to have a continuous yellow line. According to the applicants, however, this particular requirement, (continuous yellow line), has been already been complied with although they argue that it is a requirement for Taxis and not for public service vehicles.

19. In view of the requirement for immediate enforcement of the rules, the applicants feel aggrieved and have asked the Court to suspend the implementation pending the hearing and determination of the petition filed herewith. They contend that there are no rules known as "**Michuki rules**" since the Legal Notice that had introduced these (**Michuki**) rules was nullified by the Court and, therefore, there are no rules to implement.

20. The respondents on their part argue that there are rules and regulations in place including the Traffic Act, subsidiary legislations and legal notices (including Nos. 23 of 2014 and 17 9 of 2014) which are being implemented. It is the respondents' case that these rules and regulations cover the areas of the applicants' concern. The respondents further argue that enforcing the rules and regulations is for the public good hence there is no justification in suspending the respondents' lawful actions. In their view, public interest outweighs private or business interest and in enforcing paragraphs 4(2) and 4(3) of Legal Notice No 179, will help reduce congestion.

21. The applicants seek conservatory orders at least as a temporary measure to protect their rights and interests until the petition is heard and determined. The principles upon which a court may grant conservatory orders are now well settled. At this stage the court is not engaged in the determination of the main petition. Its duty is to consider whether there are sufficient grounds which an infringement or violation of rights and fundamental freedoms to justify intervention through grant of conservatory orders.

22. At this stage, an applicant must show that he has a prima facie case with a likelihood of success, and that if the conservatory order is not granted, he will continue to suffer prejudice in so far as his rights and fundamental freedom are concerned. In other words the applicant must demonstrate a clear case of violation or threat to violate or infringe rights and fundamental freedoms, and that failure to grant conservatory orders would perpetuate the violation or infringement.

23. In the case of Centre for Rights, Education and Awareness(CREW) & 7 Others v Attorney General [2011]eKLR, the court stated;

***"At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the conservatory order is granted, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution."***

24. In the case of Centre for Human Rights and Democracy & 2 Others v Judges and Magistrates Vetting Board & 2 Others (Petition No 11 of 2012) it was again observed that in deciding whether or not to grant conservatory orders, the court should consider the the credential of the petitioner, *prima facie* correctness or nature of information available to the court, whether the grievances expressed in applying for conservatory orders are genuine, legitimate, deserving or appropriate; whether the applicant has demonstrated the gravity or seriousness of the dispute, or whether the applicant is engaged in wild, vague, indefinite or reckless allegations.

25. Further, in Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 others (supra) the court was clear on the importance of demonstrating the real and imminent danger stating that; "***The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.***"

26. And in the case of Gitaru Peter Munya v Dickson Mwaura Githinji & 2 Others [2014] eKLR, the Supreme Court stated that;

***i. "Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within Public agencies, as well as to uphold adjudicatory authority of the court in the Public interest. Conservatory orders therefore are not unlike interlocutory injunctions linked to such private party issues on the prospects of irreparable harm occurring during the pendency of a case or high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently should be granted on the inherent merit of the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes."***

27. The jurisprudence flowing from these decisions is that an applicant must show clearly that there is a right that is being violated or threatened with violation or infringement; that the danger is real and imminent and that if the court does not act, the applicant will suffer prejudice. The court is also required to take into account public interest in such matters since the remedy of conservatory order is a public law remedy.

28. This petition involves public service transport operators against the respondents. The respondents argue they are enforcing the law for the greater public good. Various aspects of the respondents' decisions have been challenged in the petition and application. They include fitting of speed governors, seat belts and arrest and harassment of touts and conductors; Taxis and the continuous yellow line among other issues.

29. The public service transport sector is very important in this country. Its regulation, management and control is of significant importance to everyone. The issues raised in the application and petition are not therefore moot. They go to the heart of the success of the sector when it comes to its regulation, control and management.

30. The applicants have challenged the respondents' directives that public service vehicle fit seat belts as well as speed governors. They contend that there are no rules capable of enforcement since Legal Notice No 161 of 2003 which embodied the "**Michuki rules**" was nullified by the Court's decision in the case of **Republic v Minister for Transport and Communication & 6 others** (supra). The respondents on their part argue that despite that annulment, there are other legal instruments including the Traffic Act, subsidiary legislations and Legal Notice Nos. 23 and 179 both of 2014 which are being implemented hence the respondents are acting within the law.

31. I have considered rival submissions on the issue. The fact that there are other legal instruments is not deniable for the respondents have identified those legal instruments they say they are enforcing. However, the petitioners contend that there are no such instruments. Whether or not these legal instruments exist is a factual issue that will be determined in the petition. The issue at the moment is whether or not the intended implementation should be suspended pending the hearing of the petition.

32. In dealing with the issue one must bear in mind that laws are made to regulate human conduct and that courts should only interfere where there is a clear case of invalidity and or serious violation or threat to violate rights and fundamental freedoms. In that regard, on the issue of fitting seat belts and speed governors the view I take is that it is for greater public good not to interfere at this interlocutory stage of the proceedings. That is an issue that should be decided upon hearing the petition so that all parties are allowed to put their case across for the court's determination after considering all relevant matters to the petition.

33. The petitioners also raised the issue of harassment of conductors and touts as well as the continuous yellow line, which they argue, is for Taxis and not public service vehicles of 14 seating capacity. These issues should as well be resolved after the hearing of the petition. In any case, it is the petitioners' case that they have already complied with the requirement of the continuous yellow line. Whether or not the yellow line is legally meant for Taxis or other public service vehicles, is a matter to be determined at the trial after the hearing of the petition. Harassment and arrests should also await the hearing of the petition where evidence will be fully considered.

34. There is one issue, however, that I find to be critical in this application. It has to do with the implementation of paragraphs 4(2) and 4(3) of Legal Notice No 179 of 2014. Paragraph 4(2) states that; **The Authority** (the 1<sup>st</sup> respondent) **shall not license any new Public Service Vehicle whose seating carrying capacity is less than twenty- five passengers**. Paragraph 4(3) on the other hand provides that **The Authority shall not, with effect from the 1<sup>st</sup> January, 2016, renew the licence of any Public Service Vehicle whose seating carrying capacity is less than twenty- five passengers**.

35. The import of the twin provisions was to phase out the public service vehicles operated by the petitioners. The 1<sup>st</sup> respondent was required to stop licensing new vehicles and renewing licenses for those vehicles already licensed if their seating carrying capacity is below twenty five passengers. The ban was however suspended thus allowing the 1<sup>st</sup> respondent to continue licensing the target public service vehicles, until the latest attempt to enforce the ban hence this application and petition.

36. Starting with paragraph 4(3), it is undeniable that the petitioners, as players in the public service transport sector, have been in the business for quite a while. The law introduced in 2014 was to have taken effect on 1<sup>st</sup> January 2016, giving a window of about two years. It was, however, suspended in what the 1<sup>st</sup> respondent said was to allow formulation of policy guidelines by the responsible ministry. The reason given by the 1<sup>st</sup> respondent in seeking to implement the ban was and still is, to ease congestion on the roads. The petitioners argue that they have invested heavily in the public transport industry and refusal to renew their PSV licences will negatively affect their right to do business and recoup their investment.

37. Without making a final determination on this issue, I am persuaded that the petitioners have a point. The government enacted the law in the form of Legal Notice No 179 of 2014. It, however, suspended the coming into force of this key provision to enable it come up with policy guidelines. In the meantime, the 1<sup>st</sup> respondent continued to allow public service operators import, register and operate 14 seater public service vehicles.

38. At this interlocutory stage, it is not clear to the court, first, whether policy guidelines have been formulated. Second, the government is not, at least at the moment, involved in public transport, leaving this important sector in the hands of private operators. Third, the ban target operations across the country at a time when there is no clear indication from the 1<sup>st</sup> respondent how the issue of public transport will be handled in the rural areas, given that there may be no high capacity public service transport vehicles operating in the countryside. Even in cities and towns, it is not clear whether there are enough high capacity public service transport vehicles to meet public transport demands.

39. That being the reality of the matter with regard to public transport, there is justification in the petitioners' contention that immediate enforcement of paragraph 4(3) of Legal Notice 179 of 2014 is prejudicial to them in so far as renewal of their public service licences is concerned before they have their day in court. That is not all. The general public depends on this mode of transport. Abrupt withdrawal of these vehicles from the road at this stage will not be in the public interest given that the petition is yet to be heard and all issues addressed.

Public interest, would in my view, favour continued renewal of these licences pending the hearing and determination of the petition.

40. In taking this view, I agree with **Ojwang, J**, (as he then was), that in cases like this **“the Court should always opt for the lower risk rather than the higher risk of injustice if it should turn out to have been wrong”** (See **Suleiman v Amboseli Resort Limited** [2004] 2 KLR 589). The lower risk in the circumstances of this petition is to allow renewal of licences of those public service vehicles already licensed so that if in the end the petitioners were to fail in their petition, the respondents will not have suffered any prejudice for they will proceed with the ban. To the contrary, the loss to be suffered by the petitioners if the court were to decline the application but they eventually win after they have been kept out, will be immense. The public will not have been spared either.

41. Regarding paragraph 4(2) which seeks to ban licensing of new public service vehicle with lower seating carrying capacity than twenty-five passengers, I do find any violation and I do not think it is the duty of court to decide who should be licensed unless there is an immediate infringement of rights if the case of decline to licence. I would, therefore, see no reason to suspend this paragraph at this stage.

42. However, there could be those who had already invested and purchased vehicles within the window period but had not been licensed by the time the ban was being enforced. As a court of justice, it would not be proper to shut them out since it was not their mistake. The view I take is that they should be allowed to operate subject to meeting other legal requirements. In that respect, therefore, those vehicles that are in the country by the date of this ruling should be licensed pending the hearing and determination of the petition.

43. That being my view of the matter, I am persuaded that there is need to intervene, albeit in a limited way, since that will be in the best interest of the public. Consequently, the application dated 5<sup>th</sup> December 2018 is allowed and I make the following orders;

**1) A conservatory order is hereby granted prohibiting the National Transport and Safety Authority, the 1<sup>st</sup> respondent, from enforcing paragraph 4(3) of Legal Notice No. 179 of 2014, pending the hearing and determination of this petition.**

**2) An order is hereby issued suspending paragraph 4(2) of Legal Notice No. 179 of 201, limited only for purposes of enabling the National Transport and Safety Authority, the 1<sup>st</sup> respondent, to receive, consider and approve, if satisfied, applications for licensing of Public service vehicles that are in the country as at the date of this ruling but have not been licensed. The 1<sup>st</sup> respondent shall, thereafter, be at liberty to enforce paragraph 4(2), pending the hearing and determination of the petition.**

**3) Costs of the application be in the cause.**

**Dated, Signed and Delivered at Nairobi this 15<sup>th</sup> Day of February 2019**

**E C MWITA**

**JUDGE**