



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 591 OF 2017

TRANSAFARIS SACCO LIMITED.....1<sup>ST</sup> PETITIONER

RUTH CAREN OBALA.....2<sup>ND</sup> PETITIONER

VERSUS

CLASSIC LUXURY SHUTTLE.....1<sup>ST</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

THE COUNTY GOVERNMENT OF NAIROBI...3<sup>RD</sup> RESPONDENT

**JUDGMENT**

1. *Transafaris Sacco Limited* and *Ruth Caren Obala*, the Petitioners, filed this petition against *Classic Luxury Shuttle*, *The Hon Attorney General* and *the City County Government of Nairobi*, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively, alleging violation of their Rights and Fundamental Freedom.

2. The petitioner contended that on or about 4<sup>th</sup> of December 2017, the 3<sup>rd</sup> respondent's officers impounded motor vehicle registration *No KCH 321J* belonging to the 1<sup>st</sup> petitioner at the petitioner's parking slot along Mfangano Street, Nairobi, despite the fact that the 1<sup>st</sup> petitioner has been using that parking slot which is adjacent to the 1<sup>st</sup> respondent's since 2015.

3. The petitioner averred that the 1<sup>st</sup> respondent in cahoot with the 3<sup>rd</sup> respondent's agents impounded the vehicle thus interfering with the petitioner's business and had declined to release the motor vehicle as at the time of filing the petitioner. They petitioners stated that they could no longer carry on business due to the interference from the 1<sup>st</sup> and 3<sup>rd</sup> respondents which, they aver, violates their rights under Article 27(1), 29(c) and (d) and 47 of the Constitution. They therefore sought the following reliefs:-

- a. *A declaration that the fundamental rights and freedoms of the petitioners under Article 27, 28, 40, 41, 43, and 47 of the Constitution have been violated by the respondents.*
- b. *A declaration that the actions of the respondents are in violation of Article 10, 19, 20, 22, 23, and 41 of the Constitution of Kenya.*
- c. *An order of prohibition issues against the respondents, its servants, employees, and/or agents prohibiting the unlawful acts of impounding, threatening and actual assaults on the 1<sup>st</sup> petitioner servants, employees, and/or agents.*
- d. *An order of mandamus compelling the respondents not to continue with the ongoing acts which frustrate, endanger the lives of the 1<sup>st</sup> respondents employees and smooth running of their business and release of the motor vehicle impounded.*
- e. *Costs of this petition.*

*1<sup>st</sup> Respondent's response*

4. The 1<sup>st</sup> Respondent filed a replying affidavit by **Emanuel Namutala Nasibo** sworn on 27<sup>th</sup> February 2018, contending that the petition does not raise constitutional issues against the 1<sup>st</sup> respondent; that the petition does not show with precision the rights that have been violated; and that the motor vehicle was impounded after the petitioner failed to comply with mandatory county regulations relating to dropping and picking zones.

5. The 1<sup>st</sup> respondent further contended that the subject motor vehicle had already been released although the petitioners was acting unlawfully by encroaching other parties' picking and dropping zones. According to **Mr. Nasibo**, the slot the petitioners are complaining about belongs to **Simba County Links Ltd** who had not been enjoined into these proceedings. He therefore contended that the petition was not well founded.

### **3<sup>rd</sup> Respondent's response**

6. The 3<sup>rd</sup> respondent filed a replying affidavit by **Violate. A Oyangi**, Acting Director of Legal Affairs of the 3<sup>rd</sup> respondent, sworn on 13<sup>th</sup> March 2018. She deposed that the 3<sup>rd</sup> respondent is discharging its mandate to control and oversee decongestion within the Central Business District of the County and to achieve this, the 3<sup>rd</sup> respondent has promulgated By-Laws that regulate the conduct of PSV operations in the City.

7. According to **Miss Oyangi**, every Matatu operator has to observe Part III of the Matatu Terminus By-laws of 2007 which set clear rules and regulations to be followed. It was contended that the petitioners' motor vehicle was impounded for violating the By-laws and, therefore, the petitioners cannot claim violation of their rights when they are the one violating the law. It is the 3<sup>rd</sup> respondent's contention that no Constitutional right was violated and that the petitioner had not demonstrated breach of the Constitution

### **Petitioners' submissions**

8. **Mr Chimei**, learned counsel for the petitioners submitted, highlighting their written submissions dated 15<sup>th</sup> May 2018, that the respondents' actions violated the petitioners' fundamental rights and freedoms by denying them the right to use their parking slot within the CBD. Counsel contended that the 3<sup>rd</sup> respondent's action violated the petitioner's right to fair administrative action and the right to fair hearing both guaranteed under Articles 47(1) and 50(1) of the Constitution.

9. Learned counsel argued that the petitioners' right to equal protection of the law and against discrimination guaranteed by Article 27 of the Constitution was also violated. According to counsel, the 3<sup>rd</sup> respondent's action of impounding the motor vehicle and allow the 1<sup>st</sup> respondent to use the petitioners' slot is unreasonable and unjustifiable thus violates the petitioners' right to fair administrative action.

10. **Mr Chimei** contended that the petitioners and the 3<sup>rd</sup> respondent have been using the slot without any problem until when the 3<sup>rd</sup> respondent allowed the 1<sup>st</sup> respondent to use the same slot which is against the By-laws, thus violating the petitioners' right to equality. He submitted that this action subjected the petitioners to differential treatment in violation of Article 27(4) of the Constitution, and that no reason was given for the action of giving their slot to the 1<sup>st</sup> respondent. They relied on the case of **Omondi Michael Haya & 4 others v University of Nairobi** [2017] eKLR Which cited **Kenya Power & lighting Co. Ltd & another** for the submissions that it is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally; unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted. Counsel further relied on the case of **President of the Republic of South Africa and Others v South Africa Rugby Football Union & others** on the right to fair administrative action as a Constitutional right.

### **1<sup>st</sup> respondent's submissions**

11. **Mr Masaviru**, learned counsel for the 1<sup>st</sup> respondent, submitted highlighting their written submissions dated 10<sup>th</sup> October 2018, that according to the affidavit in support of the petition, the disputed is really over a parking slot hence that is not a Constitutional petition but a normal civil dispute.

12. According to learned counsel, the petitioners had not shown the sins committed by the 1<sup>st</sup> respondent which played no role leading to the impounding the petitioners' motor vehicle. In that regard, counsel submitted, the 1<sup>st</sup> respondent did not violate any of the petitioners' fundamental rights and freedoms or any Constitutional provisions as claimed. He also contended that the 1<sup>st</sup> respondent is not an administrative body that owed the petitioners an obligation and could not, therefore, violate their right to equal protection of the law.

13. According to learned counsel, even on the merit of the case, the petitioners had not shown that the disputed slot had been allocated to them. Referring to 1<sup>st</sup> respondent's replying affidavit, learned counsel submitted that the disputed dropping slot was allocated to **Simba County Link Ltd** who paid for the slot and have allowed the 1<sup>st</sup> respondent to use it. He stated that this fact had been admitted by the petitioners at paragraph 11 of their affidavit of 30<sup>th</sup> April 2018. It was learned counsel's submission, therefore, that in the absence of evidence to the contrary, the petition is misplaced and should be dismissed.

### **3<sup>rd</sup> respondent's submissions**

14. **Mr Nyakoe**, learned counsel for the 3<sup>rd</sup> respondent, submitted highlighting their written submissions dated 2<sup>nd</sup> November, 2018, that the 3<sup>rd</sup> respondent has mandate to control and oversee decongestion within the CBD so that passengers are picked and dropped at designated terminus or picking and dropping zones.

15. Learned counsel disputed the petitioners' claim that their rights and fundamental freedoms had been violated. He contended that the petitioners did not adduce evidence that they have a parking slot assigned to them by the 3<sup>rd</sup> respondent. He argued that the slot claimed by the petitioners was given to **Simba County Link Ltd** who paid for it and allowed the 1<sup>st</sup> respondent to use it but not the petitioners. He argued therefore, that on that basis, the 3<sup>rd</sup> respondent did not violate the petitioners' rights. He argued, instead, that it is the petitioners who violated the law by operating and parking a vehicle at a slot allocated to another party.

#### **Determination**

16. I have considered this petition, responses thereto and submissions made on behalf of the parties together with the authorities relied on. The petitioners have alleged violation of their rights guaranteed by the Constitution including the right against discrimination, equality before the law, the right to fair administrative action and the right to fair hearing.

17. The petitioners' contention is that its parking slot was given to the 1<sup>st</sup> respondent and their motor vehicle impounded without any reasonable justification. They also contended that they were discriminated against. The 1<sup>st</sup> and 3<sup>rd</sup> respondents have denied the petitioners' allegations over violation of rights and fundamental freedoms contending that there was no such violation. They have also contended that the petitioner did not have any slot and, therefore, there was no violation of the right to equal protection of the law as alleged.

18. The Constitution guarantees every person's right to equal protection of the law in terms of Article 27(5) of the Constitution. In addition, Article 47(1) of the Constitution guarantees every person a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. This is a Constitutional standard against which administrative actions must be gauged. A party claiming violation must, however, clearly show that an administrative action was taken against him or her to enable the court gauge the action taken against the Constitutional standards in Article 47(1).

19. In **Judicial Service Commission v Mbalu Mutava Musyimi** [2015] eKLR the Court of Appeal stated 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”.***

20. It has been laid as a fundamental principle of constitutional litigation, that there should be accuracy in the identification of the provisions of the constitution said to have been infringed on the grounds that the breach is inconsistent with the Constitution or fundamental rights and freedoms. The constitutional challenge must also be explicit, with due notice to all those affected in order to ensure that the interested parties have an opportunity to suitably respond to the allegations and lead relevant evidence where necessary. (*see Sali v National Commissioner of South African Police Service & others* [2014] ZACC19), *Phillips & others v National Director of Public Prosecutions* [2005] ZACC 15; 2006(1) SA 505(CC).

21. For one to challenge an action as violating fundamental rights and freedoms, there must be a right in the first place. The petitioners contended that the parking slot allocated to them had been taken away without justification, reasonable grounds or any form of hearing and given to the 1<sup>st</sup> respondent. They have, however, not shown through evidence that there was such an allocation to them.

22. The 3<sup>rd</sup> respondent stated that there are By-laws that govern parking within the CBD a fact not disputed by the petitioners. There is a further statement by the 3<sup>rd</sup> respondent that one has to have been designated to park at a particular slot and paid for it. The petitioners have not shown that they had a slot designated to them and that they had paid for such a slot to give rise to a right capable of protection. They have also not shown that the slot was taken away despite such allocation. On the contrary, the evidence on record shows that the disputed slot was allocated to a different entity that has allowed the 1<sup>st</sup> respondent to use it.

23. On the basis of the evidence on record it is clear to the court that the petitioners have not been able to demonstrate that there was a right that was either violated or infringed upon by the respondents and which the court could redress. The petitioner's assertions that their rights were violated have not been substantiated. They at best remain mere allegations without tangible evidence.

24. For the above reason, this court is unable to discern any acts of violation or threat to violate rights or fundamental freedoms known to law to warrant its intervention. The upshot is that the petition dated 7<sup>th</sup> December 2017 is declined and dismissed with costs to the 1<sup>st</sup> interested party.

**Dated Signed and Delivered at Nairobi this 1<sup>st</sup> Day of February 2019**

**E C MWITA**

**JUDGE**