



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 10 OF 2019

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 40 47, 50 AND 174 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 27, 28, 47 & 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT, 2015

BETWEEN

NANYUKI EXPRESS CABS SAVINGS

AND CREDIT SOCIETY LIMITED.....PETITIONER

AND

THE COUNTY GOVERNMENT OF ISIOLO.....RESPONDENT

R U L I N G

1. It is provided in *Article 47 of the Constitution of Kenya*, as follows: -

- “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.***
- 3) ... “***

2. Pursuant to the said *Article*, Parliament enacted the *Fair Administrative Act, 2015 (“the Act”)*. *Section 4(3) of the Act* provides:-

- “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) ...***
 - d) ...***
 - e) notice of the right to legal representation, where applicable;***
 - f) ...***

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

3. From the foregoing, it is clear that every person has a fundamental right to fair administrative action. That before any action is taken whose effect may affect a person negatively, he has to be given notice of the same, be advised of the right to legal representation thereof and above all, accorded a hearing before such action is taken.

4. The petitioner is a Co-operative society duly registered under the Co-operative Societies Act, Cap 40. It has various vans owned by various individuals. It operates a matatu transport business plying, *inter alia*, the Nanyuki-Isiolo road. It has a picking and dropping Bay in front of Morning Star Hotel, Isiolo Town having been duly granted the relevant licences by the respondent. It has about 200 matatu vans plying that route.

5. On 3rd April, 2019, the petitioner received a letter dated 18th March, 2019 from the respondent suspending its operating licence in Isiolo. The letter read in part:-

“ ... this is to inform you that your operating licences in Isiolo are hereby suspended forthwith ...

The effect of this letter is that all your operations in Isiolo Bus Park and other loading bays within Isiolo Town shall cease until further notice ... Our officers shall be at hand to ensure strict compliance”.

6. By a Petition dated 16th April, 2019, the petitioner alleged that its fundamental rights and freedoms under **Articles 27, 47 and 50 of the Constitution** had been violated. It had not only been discriminated upon, but its right to fair administrative action had been violated. The petitioner prayed for various declarations and other reliefs.

7. Together with the petition, the petitioner lodged a Motion on Notice seeking a conservatory order suspending the aforesaid letter pending the hearing and determination of the petition. In the Motion, it was alleged that the acts of the respondent were in blatant violation of the petitioner’s rights under **Articles 27, 28, 47 and 50 (2) of the Constitution**; that its members continue to suffer losses because of the aforesaid violations.

8. In response, the respondent contended that; the interested party had petitioned the County Assembly of Isiolo in December, 2017 regarding the unfair treatment it had been subjected to by the County Government of Laikipia regarding its use of Nanyuki Bus terminus; that upon consideration, the Isiolo County Assembly made various recommendations including the streamlining of the Matatu business in Isiolo; that the petitioner had engaged goons as touts thereby contravening the conditions under which its licence had been issued.

9. The interested party also filed a replying affidavit sworn by **Mworia M’Mwarania**. contended that; the County Government of Laikipia had in 2017 revoked loading bay at Nanyuki after consultation with the petitioner; that the suspension of the petitioner’s licence by the respondent was due to trade imbalance between the Counties of Laikipia and Isiolo.

10. It was submitted by **Mr. Wahome**, Learned Counsel for the petitioner, that the petitioner’s fundamental rights had been violated and that the order sought should be granted. Counsel relied on the decision in **Stephen Ndungu Gachau T/A Ark Road Academy vs Kenya National Examinations Council [2016] eKLR** in support of those submissions.

11. On the other hand, **Mr. Muriuki**, Learned Counsel for the respondent submitted that; the decision being challenged was made by the County Assembly of Isiolo who had not been enjoined in these proceedings; that the court should consider that in considering whether or not to grant a conservatory order, the court should weigh the public interest involved. The case of **Platinum Distillers Ltd v. Kenya Revenue Authority [2019] eKLR** was cited in support of those submissions.

12. Counsel further submitted that, under **sections 102 to 115 of the County Governments Act**, the respondent has power to plan its towns and the act of suspending the petitioner’s licence was in exercise of those powers. He urged that the application be dismissed. On his part, **Mr. Kiunga**, Learned Counsel for the interested party fully associated himself with the submissions of **Mr. Muriuki**.

13. The issue before this court is only one; whether a conservatory order in the manner sought by the petitioner should issue. The petitioner’s case is very simple; that it holds a licence for operating Matatu transport business for over 200 vans belonging to its members. That this business includes Nanyuki-Isiolo route; the said business has now been put in jeopardy by the respondent suspending its licence vide its letter of 18th March, 2019. That the said suspension was effected without being accorded the right under **Article 47 of the Constitution**.

14. The first onslaught against the application is that the suspension was as a result of a resolution and consequent recommendation by the County Assembly of Isiolo. That it is the said Assembly that should have been the respondent. It is true that vide a letter dated 10th December, 2018, the Isiolo County Assembly did communicate to the respondent its resolutions which included the suspension of the petitioner’s licence.

15. Perusal of the record will show that the letter of 18th March, 2019 was written by the respondent and not the County Assembly of Isiolo. The letter may have been instigated by the Isiolo County Assembly but it was written by respondent not the Assembly. Accordingly, it is the entity that wrote the impugned letter that should be a party and not the Assembly. Accordingly, I hold that the County Assembly of Isiolo need not have been enjoined in these proceedings. The correct respondent is in court.

16. The other contention was that the respondent was entitled under **sections 102 and 115 of the County Governments Act**, to undertake the action it took. Having perused the said provisions, it is not in dispute that the respondent has the power to organize and plan its towns,

including the expansion of markets and regulate transport business within its borders, however in doing so, it must be guided by the Constitution and the Law.

17. In the present case, it has been contended that it did not act according to **Article 47 of the Constitution and the Section 4 of the Fair Administration Act, 2015**. To the extent that it did not act according to law, its actions are questionable. This can only be proved at the hearing of the petition.

18. One fact that is not disputed is that, the act of suspending the petitioner's licence vide the letter dated 18th March, 2019, was an administrative action. It has not been denied that the detailed procedure set out in **section 4 of the Fair Administrative Act, 2015** was not followed before the said action was taken. As of now, the petitioner has been affected by the said action which it contends infringe **Article 47 of the Constitution**. In the circumstances, is conservatory order issuable?

19. When considering whether or not to issue a conservatory order, the court is not called upon to make any definitive findings on the case before it, be it of law or fact. That is the exclusive jurisdiction of the court that will hear the petition. All this court has to do is to carefully examine and evaluate the material before it and satisfy itself whether the petitioner has established a *prima facie* case that his rights have been or are about to be infringed. Further, the court must examine the material before it to satisfy itself if the alleged infringement will prejudice the petitioner to warrant the grant of a conservatory order to ameliorate or suspend, prevent or avoid further prejudice.

20. In **Gatirau Peter Munya v. Dicson Mwenda Kithinji & 2 Others [2014] eKLR**, the Supreme Court of Kenya delivered itself as follows:-

“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 the adjudicatory role of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as ‘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”.

21. As already noted, the alleged contravention of **Article 47 of the Constitution** and **section 4 of the Fair Administration Act, 2015** has not been denied. The petitioner has alleged that its members are and will continue to suffer extreme prejudice with the continued suspension of its aforesaid licence.

22. It was submitted by Learned Counsel for the respondent that public interest dictates that a conservatory order should not issue in the circumstances of this case. The case of **Platinum Distillers Limited v. Kenya Revenue Authority (supra)** was relied on. I agree with the submission that the court must at all times weigh public interest against individual rights when considering whether or not to issue conservatory orders.

23. While in the **Platinum Distillers Ltd’s case**, the respondent’s investigations was found to be jeopardized if a conservatory order was issued, that is not the case here. In the present case, there are no investigations that are pending. The letter of suspension states that the suspension was to continue until a political/business tiff between the County Governments of Laikipia and Isiolo is sorted out. All this time, the petitioner is expected to fold its hands and continue suffer, both businesswise as well as mentally on the part of its members!

24. To my mind, that won’t do. When the court weighs the scales of justice, the extent of prejudice to be suffered as a result of granting or declining to grant the conservatory order, the scales show that in declining, the prejudice to be suffered is huge as compared to that prejudice, if any, that may be suffered if it was granted.

25. In the premises, I find the Motion to be meritorious. I grant the same in terms of prayer number 2. Accordingly, pending the hearing and determination of the petition herein, the respondent’s letter dated 18th March, 2019 suspending the petitioner’s operating licence in Isiolo County is hereby stayed and/or suspended and the respondent is hereby directed to forthwith allow the petitioner’s matatu vans to operate normally as they were before the impugned letter was issued without any interference whatsoever by the respondent, its employees, agents and/or or servants.

26. The costs of the application shall abide the petition.

It is so ordered.

DATED and **DELIVERED** at Meru this 6th day of May, 2019.

A. MABEYA

JUDGE