REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

JUDICIAL REVIEW APPLICATION NO. 10 OF 2018

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATION ACTIONS ACT NO 4 OF 2015

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

NEW LIFE TRAVELLERS LIMITED..APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KIAMBU...............................1ST RESPONDENT

NATIONAL TRANSPORT AND SAFETY AUTHORITY.............2ND RESPONDENT

J U D G M E N T

The judgment substantive motion before me was filed on 23rd May, 2018, pursuant to leave granted by this court on 2nd May 2018. The subject of the motion is the decision/resolution made by the Kiambu Sub-County Transportation Committee (herein after the Committee) on 7th February 2018 to the effect *inter alia*, that three-wheeled taxis commonly known as "tuk -tuk" be move to an alternative operation place from the main stage where they previously operated; and prohibiting the operators from waiting for customers at matatu stages but instead use their designated locations. In respect of this decision, the Applicant seeks an order of certiorari to quash the decision, or in the alternative setting it aside and remitting the matter back to the committee, an order of prohibition against the County Government of Kiambu (the 1st Respondent and the National Transport and Safety Authority (NTSA 2nd Respondent) to prohibit the said Respondents from interfering with the operations of the Applicants within certain routes in Kiambu and damages other prayers appear unrelated to the substantive motion as they refer to the granting of leave. Michael Njiru swore the affidavit in support of the motion, describing him as a director, of New Life Travelers Ltd (the Applicant). He deposes that the Applicant is a limited liability company engaged in the transport business by use of tuk-tuk taxis since 2016, that the Applicant was duly authorized and licensed by relevant authorities to operate the taxi business within Kiambu; that the Respondents have since February/March 2018 maliciously restricted the operations of the Applicants on certain routes, the picking – dropping and waiting bays available to the Applicant causing the Applicant loss of business. The Applicant takes issue in particular with the resolution/decision impugned herein which effectively restricted the Applicant from picking and picking passengers on the way and at bus stops. In the Applicants view the decision is unlawful and malicious as the Applicant has operated within the law.

Although both Respondents were served with the application only the 1st Respondent filed a response, in the form of the Replying affidavit sworn by David Ng'ang'a the sub-county administrator, Kiambu Sub-County. The deponent states that he is employed in the capacity of Sub-County administrator by the 1st Respondent; that in line with its mandate in respect of transport/traffic function under Fourth Schedule of the Constitution, the 1st Respondent has established transport committees in the sub-counties with the responsibility of overseeing traffic and parking; that the committee members include relevant key stakeholders and that the Applicant, though from representatives participated in the meeting held on 22nd August, 2017 leading up to the impugned decision by which the 1st Respondent provided the tuk-tuk operators with designated waiting bays to operate from; that the decision was not malicious but intended to create order for the benefit of all players in the transport. Some of the depositions involve legal argumentation which is not suited to affidavit form.

The motion was canvassed by way of written submissions. On its part, the Applicant asserted, citing the famous Wednesbury principle that the decision under challenge was arrived at by taking into account irrelevant factors and ignoring relevant factors, and that the Applicant had

no opportunity to be heard. Pointing to the minutes of the committee held on 22nd August 2017, the Applicants assert that neither actual participation of the members was indicated, nor the ratification of the resolutions by those present to show consensus demonstrated. Taking issue with the meeting the Applicants assert that their involvement of its representatives was a veneer of participation as decisions had already been made by the committee. It was also argued based on facts not deposed to in the supporting affidavit that the impugned decision was irrational.

The 1st Respondent's submissions were to the following effect. That pursuant to paragraph 5(c) (a) of the Fourth Schedule, Part 2 and Section 72 A of the Traffic Act the 1st Respondent is responsible for the transport function in counties which includes the power to designate parking spaces and to regulate traffic. The 1st Respondent asserts that the Applicant's pleadings do not demonstrate how the decision impugned was unreasonable, and that subsequent reference in submissions to non-observance of the rules of natural justice was an attempt to share up a weak case. Pointing to the minutes of the meeting of the meeting of 22nd August 2017 the 1st Respondent argue that the reasons in decisions made are self-evident. The 1st Respondent argues that the Applicants are undeserving of the prayers sought, in particular prohibition as the court cannot prohibition as the court cannot prohibit a public body from carrying out its statutory duty – see **R v Minister if Roads and Public Works and Another Exparte Kyevaluki Services Ltd [2012] e KLR.**

The court has considered the material canvassed in respect of the motion. While the motion prayers and supporting affidavit refer to a resolution/decision made on 7th February, 2018 it is clear from the Applicant's annexure "MN3" being a copy of the minutes of the meeting of the committee, and the Applicant's own submissions that the decision in question is made on 22nd August 2017. It is also not in dispute that several of the Applicants representatives attended the meeting of 22nd August 2017. It is not clear to the court why the Applicants would repeatedly refer to the wrong date in respect of meeting, except perhaps out of fear that the application was filed outside the timelines anticipated under Order 53 rule 2 of the Civil Procedure Rules. That said, there is no dispute that the decision which is the subject of the motion was passed during the committee meeting held on 22nd August 2017 and that the Applicant was represented by four persons, namely, **George Kiratho, Sydrey Githinji, Peter Thuita** and **Samwel Wamweya.** The particular parts of the resolutions/decision that the Applicant is aggrieved with are the "solutions" No. iii and iv contained in the minutes which state:

> "iii) All tuk-tuk to be removed from the main stage and be allocated convenient place within the town from where they will be operating.
>
> iv) Tuk-tuk not to be stopping at matatu stage waiting for customers but to drop passengers and get back to their designated locations. They should also remove the touts they have employed at Kirigiti bus stop" (sic).

Under Agenda 2, it is clear from the minutes that the meeting was precipitated by "route conflict between Tuk-tuk operators, Bodaboda operations and the two PSV SACCOS namely Kiambu United and Tikagi (SACCO." (sic). As regards the legal mandate of the Committee and ultimately the 1st Respondent, there is no dispute that the facilitator relating to and regulation of traffic and parking in the county is the prerogative of the county government pursuant to the provisions of paragraph 5(c) and (d) of 2 of the Fourth Schedule to the Constitution and the Traffic Act.

There are no grounds on the face of the Applicant's motion but from paragraphs 4, 5, and 8 of the supporting affidavit, the Applicants view the committee decision as unreasonable and unfair, and actions in the enforcement thereof as unreasonable and unlawful because both entailed restrictions on the operations of the Applicant.

In submissions the Applicant asserted that the decision of the committee violated the rules of natural justice because the Applicants were not given a hearing prior to the decision, and that the decision was unreasonable for failing to take into account relevant factors and failing to take into account relevant factors. The Applicant further attempted to adduce evidence through submissions to support the claim, that the decision was irrational. It has been stated by the courts time without number that a party is bound by his own pleadings and it is not open to a party, having pleaded his case in a certain way, to adjust it as it progresses without making an application to amend.

It did appear from the submissions and material presented on both sides that the active litigants in this matter are the *ex parte* Applicant as pitted against the DPP (2nd) Respondent and the Interested Party. The scope of judicial review remains as stated by the **Court of Appeal in Municipal Council of Mombasa -v- Republic & Umoja Consultants Ltd. Civil Appeal No. 185 of 2001 (2002) e KLR**:

> **"(A)s the court has repeatedly said, judicial review is concerned with the decision – making process, not with the merits of the decision itself ……..**
>
> **The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision-maker take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of Judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider. Acting as a court of appeal over the decider 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."**

See also **R v Attorney General and 4 Others ex parte Diamond Hashim Lalji and Ahmed Hashmin Lalji [2014] e KLR.** In its pleaded case, the Applicant is asking the court to consider whether the impugned decision was arrived at by considering irrelevant matters while ignoring relevant matters. Or in other words, whether the Respondents decision is unreasonable. There could be much else to be said about the manner in which the decision was arrived at, but the pleadings confine themselves to unreasonableness and obliquely to the lawfulness of the actions of the Respondents. It is only after the Respondents had by their affidavit in reply referred to the participation of the Applicant in the meeting of 22nd August 2017 that the Applicant raided a new complaint that the Applicant was not given a proper hearing prior to the decision being made. This complaint ought to have been pleaded from the outset. In **Pastoli v Kabale District Local Government Council**

and Others (2008) EA 300 the court observed inter alia that:

> **"In order to succeed in an application for judicial review, the Applicant has to show that the decision is tainted with illegality, irrationality and procedural impropriety…."**

The Applicant's complaint with regard to unreasonableness on the part of the Respondents is stated to be the decision which imposed restrictions on the routes on which the Applicants could operate and pick/drop passengers within Kiambu town and its environs which the Applicants deem "unlawful." The regulations of traffic and parking is precisely the business of the Respondent and that is not contested. The Applicants have not demonstrated in their affidavit how the restrictions imposed on them were unreasonable. An attempt was made in submissions to assert that irrelevant factors were considered while relevant ones were ignored. The exact nature of the said factors were considered while relevant ones were ignored. The exact nature of the said factors was not set out in the affidavit. In addition the Applicants attempted to introduce evidence through submissions in support of the alleged irrationality of the Respondent's decisions by claiming that the designated stages assigned to Tuk-tuk operators were far from the matatu termini, a matter not deposed to in their supporting affidavit.

The five –Judge bench in **Kalpana H. Rawal V Judicial Service Commission and others (2015) eKLR** had occasion to consider the nature and application of the doctrine of legitimate expectation. Referring to the decision of the Supreme Court in **Communications Commission of Kenya and 5 others v Royal Media Service Limited and 5 others (2014) eKLR (CCK Case)** the said bench stated:

"The Supreme Court, in the **CCK case** dwelt at length on the principle of legitimate expectation stating at paragraphs 264 and 265 that:

> ***"[264] In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.***
>
> ***[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation."***

In this case, the Applicants have not attempted to demonstrate by their affidavit and even submissions what relevant matters ought to have been considered, or excluded by the committee in arriving at its decision, nor shown that the decision itself was so absurd as to be unreasonable. It is not enough for a party to merely alleged, without any demonstration, that a decision is unreasonable as the Applicants appear to have done in this case.

Section 7 of the Fair Administrative Act which the Applicants invoke on the face of the motion contains an elaborate set of circumstances in which the court may review an administrative action. Provisions of Section 7(2) a) iv), b, d, e, f, h, i, K relate to unreasonableness. The Applicants having invoked Section 7 of the Act and pleased unreasonableness ought to have brought their case within the provisions in order to justify review of the impugned decision/action of the Respondents. In my considered view the Applicants have failed to discharge the onus to establish their case. I consequently agree with the Respondents submission that the Applicants are not deserving of the prayers contained in the substantive motion. I dismiss the motion with costs to the 1st Respondent.

DELIVERED AND SIGNED AT KIAMBU THIS 18TH DAY OF JULY 2019

....

C. MEOLI

JUDGE

In the presence of: