



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**PETITION NO. 10 OF 2019**

**IN THE MATTER OF ARTICLES 1,1, 3(1) & 2, 5(3), 28, 41(1), 47(1) & (2) & 48, 50 (1) (2) (A) & (O) & 258 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27 (1) & 28, 47 (1) & 50 (1) (2) (A) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015**

**BETWEEN**

**NANYUKI EXPRESS CABS SAVINGS AND CREDIT SOCIETY LIMITED.....PETITIONER**

**AND**

**COUNTY GOVERNMENT OF ISIOLO .....RESPONDENT**

**MEISO SACCO LIMITED .....INTERESTED PARTY**

**J U D G M E N T**

1. By a petition dated 16<sup>th</sup> April 2019, the petitioner sought among other orders; a declaration that the act of the respondent of suspending its operating license in Isiolo County is in breach of petitioner's and its member's rights under *Article 27 (1) (2) and (3), 28, 47 and 50 of the Constitution*; an order directing the respondent to reinstate the petitioner's operating license in Isiolo County; and an order of judicial review in the nature of certiorari to bring into this court the letter by the respondent dated 18<sup>th</sup> March, 2019 and quashing the same.
2. The petitioner is a co-operative society with 540 members running a matatu transport business with over 200 vans in towns such as Nanyuki, Isiolo, Meru, Marsabit, Nyeri and Nairobi. The petitioner held a single business permit for its members' matatu vans in Isiolo County. On 3<sup>rd</sup> April, 2019 the petitioner received a letter dated 18<sup>th</sup> March, 2019 suspending its operating license in Isiolo County without being given a chance to be heard.
3. The petitioner came to court contending this to be a blatant violation of the Constitution as neither the petitioner nor any of its members had been found guilty of having violated the conditions of the operating license or the Traffic Act.
4. The respondents replied to the petition through the replying affidavit of Osman Halake sworn on 17<sup>th</sup> May, 2019. He deponed that the interested party, Meiso Nissan Operators Sacco Ltd, had via a petition dated 7<sup>th</sup> December 2017, petitioned the County Assembly of Isiolo citing unfair treatment by the County government of Laikipia at Nanyuki. The matter was deliberated upon by the County Assembly of Isiolo where several recommendations were made of which one of them was the revocation of the petitioner's operating license.
5. The deponent contended that the petitioner had engaged goons who had been violently handling passengers which was contrary to the kind of conduct that needed to be adhered to as indicated in the letter dated 26<sup>th</sup> January, 2017. That the respondent had relocated most of the matatu loading bays due to the extension of the retail market of which the petitioner will be affected. That the petitioner has already been allocated another loading bay to conduct its business and had done so comfortably.

6. The interested party, through the replying affidavit of Mworira M’Mwarania sworn on 30<sup>th</sup> April 2019, stated that they had a loading bay in Nanyuki but was later revoked. That the County Government of Laikipia had stated that the decision was made after consultation with the petitioner. The interested party therefore petitioned the County Assembly of Isiolo who met the County Assembly of Laikipia to seek an amicable solution but none was arrived at. That therefore, the county executive of Isiolo followed the recommendation of the County Assembly of Isiolo and suspended the petitioner’s operations because of the tension between the interested party and the petitioner.

7. The court ordered the parties to file their respective submissions. The petitioner filed its submissions outside the timelines given and by dint of the order made on 6<sup>th</sup> May, 2019, its submissions stood struck out at the time of the purported filing.

8. The respondent filed its submissions on time. It submitted that it was erroneously sued as it was not at any time privy to the proceedings and subject decision. It only communicated to the petitioner the decision made by the County Assembly of Isiolo. Its intention was innocent though the mode and form of communication may have been wrong. That certainly, there was no infringement of the petitioner’s constitutional rights or that of its members.

9. The issue for determination is ***whether the act of the respondent in suspending the petitioner’s operating license in Isiolo County is in breach of petitioner’s and its members’ rights.***

10. The respondent had contended that it was erroneously sued. That the correct party who should have been sued was the County Assembly of Isiolo. In its ruling of 6<sup>th</sup> May 2019, the court had held that: -

**“The letter may have been instigated by the Isiolo County assembly but it was written by the 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.”**

I need say no more.

11. On the main issue, the petitioner who operates a matatu transport business in several towns including Isiolo had its operating license suspended. The letter of suspension dated 18<sup>th</sup> March 2019 stated the reason for the suspension as being the unfair trade practices brought about by the Laikipia government against the interested party. The letter dated 18<sup>th</sup> March 2019, contained the decision to suspend the petitioner’s license. That was an administrative action on the part of the respondent.

12. Before an administrative action is made, certain procedures need to be adhered to. **Article 47 of the Constitution of Kenya** stipulates that fair administrative action ought to be *expeditious, efficient, lawful, reasonable and procedurally fair*. 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.

13. In order to operationalise that **Article**, Parliament enacted the **Fair Administrative Action Act No. 4 of 2015** to give effect to this constitutional right. **Section 4(3) of this 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. notice of a right to a review or internal appeal against an administrative decision, where applicable;**

**d. a statement of reasons pursuant to section 6;**

**e. notice of the right to legal representation, where applicable;**

**f. notice of the right to cross-examine or where applicable; or**

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

14. In **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR**, the Court of Appeal held:-

**“Article 47(1) does not exclude the application of common law particularly the common law right to fair hearing. ...**

**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.”

15. And, in Dry Associates Ltd v Capital Markets Authority and Another [2012] eKLR, the Court observed:-

**“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.”**

16. When the interested party experienced unfair treatment in the County of Laikipia, it tabled its grievances to its County Assembly in Isiolo. The latter made recommendations by which the respondent sought to and actually suspended the license of the petitioner, who hails from Laikipia County, vide its letter of 18<sup>th</sup> March 2019.

17. There was nothing to show that before issuing the administrative action impugned, the petitioner was provided an opportunity to attend the proceedings that culminated in the recommendations to suspend its license. Further there was nothing to show that after the recommendation was made, the respondent gave the petitioner an opportunity to be heard before effecting the recommendation to suspend its licence.

18. The right to fair administrative action is a constitutional requirement that should be met by state actors. In Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR, Mwita J held:-

**“Administrative actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. According a party a hearing before taking action against him is no longer discretionary. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation.**

**This Court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void.”**

19. In this regard, I am of the firm view that the decision to suspend the petitioner’s license was made unfairly and discriminatory. The petitioner seem to be a victim of the dispute between the counties of Laikipia and Isiolo which is unfair. The petitioner was not accorded any opportunity of being heard before the decision to suspend its operating license was made. That was in breach of its right to fair administrative action under *Article 47 of the Constitution*.

20. It was submitted that since the conservatory orders were made and complied with, there was no need of allowing the petition. That the petition had become superfluous. I do not think so. The conservatory orders were to last until the petition is heard and determined. They will lapse after the judgment. If no orders are made, the respondent may as well go back and enforce its illegal and unconstitutional order by which time the petitioner will have no right to return to court and re-litigate the same complaint.

21. Accordingly, I find the petition to be meritorious and I make the following orders: -

**a) a declaration hereby issues that the act of the respondent of suspending the petitioner’s operating license in Isiolo County is in breach of the Petitioner’s and its members’ rights under Article 27 (1) (2) and (3), 28, 47 and 50 of the Constitution and the same is null and void for all purposes and intents;**

**b) a declaration hereby issues that the said suspension is in breach of Nanyuki Express Cabs Savings and Credit Society Limited and its members’ constitutional rights as enshrined in Articles 27 (1) (2), 28, 47 (1) & 50 of the Constitution;**

**c) an order of certiorari hereby issues quashing the decision of the respondent contained in its letter dated 18<sup>th</sup> March 2019 suspending the petitioner’s license;**

**d) an order hereby issues to reinstate the petitioner’s operating license in Isiolo County;**

**e) costs of the petition and interest thereon to the petitioner.**

It is so decreed.

**DATED and DELIVERED at Meru this 19<sup>th</sup> day of September, 2019.**

**A. MABEYA**

**JUDGE**