



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISCELLANEOUS APPLICATION NO. 641 OF 2017

IN THE MATTER OF NATIONAL TRANSPORT AND SAFETY AUTHORITY ACT, 2012

BETWEEN

NATIONAL TRANSPORT & SAFETY AUTHORITY.....APPLICANT

VERSUS

TRANSPORT LICENSING APPEALS BOARD.....1ST RESPONDENT

SUNRISE TRAVELLERS LIMITED/DADID KURIA.....2ND RESPONDENT

JUDGEMENT

Introduction

1. According to the ex parte applicant herein, **National Transport & Safety Authority**, wrongly described as the applicant, on or about 26th May, 2017, the 2nd Respondent's driver was arrested and charged with contravening the stipulated speed limit while driving motor vehicle registration number KCJ 417. Upon his arrest, the ex parte applicants' agents confiscated the motor vehicle's Road Service Licence and the driver's licence and proceeded to blacklist the 2nd Respondent's motor vehicle for a period of 30 days.

2. Being aggrieved by the said decision, the 2nd Respondent appealed to the 1st Respondent, the **Transport Licensing Appeals Board** (hereinafter referred to as "the Board") whose jurisdiction is confined to affirming or reversing the decision of the ex parte applicant or making such other orders as it considers necessary and fit.

3. However the 1st Respondent, in its judgement found that the Applicant acted within its powers in suspending the driver's driving licence and the vehicle's road service licence for breach of the condition of speed limit on the licence. It was averred that the 1st Respondent further held that besides the requirement to act within its powers, the Applicant was obliged to inform the licensee, the 2nd Respondent herein, in writing the reasons for such revocation and the general notice of December, 2015 did not suffice. As such the 2nd Respondent issued prerogative writs and awarded damages against the ex parte applicant.

4. According to the ex parte applicant, the 1st Respondent has no jurisdiction to issue prerogative writs of

certiorari and mandamus which writs can only be issued by the High Court upon leave being granted. It was therefore contended that the Board acted out of the purview of the Constitution and the ***National Transport & Safety Authority Act, 2012*** in issuing prerogative orders against the ex parte Applicant. In so acting, it was contended that the 1st Respondent committed a grave procedural flaw hence its action was a nullity.

5. The ex parte has now moved this Court vide a Notice of Motion dated 5th November, 2017 seeking the following orders:

a. An order of Certiorari do issue to remove into this Honourable Court for the purposes of quashing the decision of the 1st Respondent in Case No. 049 of 2017.

b. The costs of this application be provided for.

6. The application was not opposed.

Determination

7. I have considered the Notice of Motion filed herein and the supporting documents.

8. As was held by **Ochieng, J** in **Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 Of 2003**, a Tribunal may have jurisdiction to hear and determine issues, but it may give orders, which were in excess of its powers. In effect, if a tribunal made orders beyond its powers, that is not necessarily synonymous with the tribunal lacking jurisdiction to entertain the dispute in the first place. Jurisdiction may, in my view, therefore be conferred at two levels. It may be that the Court lacks jurisdiction to entertain the dispute *ab initio*, in which case it ought to down its tools before taking one more step as was held in **Owners of The Motor Vessel “Lilian S” vs. Caltex Oil (K) Ltd [1989] KLR 1**. It may also be that though the Court has jurisdiction to enter into the inquiry concerned it lacks the jurisdiction to grant the relief sought or issued.

9. This clarification was made succinctly by **Madan, J** (as he then was) in **Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC NO. 1546 of 1971 (HCK) [1972] EA 525** where he held:

“Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction. What is forbidden is to question the correctness of a decision or determination which it was within the area of their jurisdiction to make.”

10. As I understand the ex parte applicants the challenge to jurisdiction falls within the second context.

11. Section 39(5) and (6) of the ***National Transport and Safety Authority Act, 2012*** provides as hereunder:

(5)The Appeals Board may, on any appeal, affirm or reverse the decision of the Authority, or make such other order as the Board considers necessary and fit.

(6) Where the Appeals Board has received an appeal under this section, it shall consider that appeal and, if it determines that the grounds of appeal are frivolous or vexatious or do not disclose sufficient reason for interfering with the decision of the Authority, may summarily reject the appeal.

12. The said provisions were considered by this Court in **Jaset Enterprises Limited vs. Director General National Transport and Safety Authority [2017] eKLR** in which this Court expressed itself as

hereunder:

“The phrase *such other order as the Board considers necessary and fit* coming after affirmation or reversal of the decision of the Authority in my view ought to be read *ejusdem generis* to the two expressly specified reliefs. Further, such other reliefs can only be issued pursuant to section 11 of the *Fair Administrative Action Act* which provides for remedies which the High Court or a subordinate Court may grant. The orders of *certiorari*, *mandamus* and prohibition are NOT some of the orders which the subordinate court is expressly empowered to issue under the said provision. It ought to be noted that such orders have a long history and whereas the effect of grant of the orders under section 11 aforesaid may well be the same as the grant of the said orders, I am not prepared to hold that subordinate courts have the powers to issue orders of *mandamus*, prohibition and *certiorari*. This must necessarily be so since under section 8(2) of the *Law Reform Act*, it is only the High Court that is expressly empowered to issue orders in the nature of prerogative writs. It ought to be appreciated that such orders are usually in the nature of supervisory reliefs issuable pursuant to Article 165(6) of the Constitution which only confers jurisdiction for their issuance on the High Court and Courts of equal status subject to the conferment of such jurisdiction by Parliament...It is trite that an executive body or authority has no inherent powers. In Choitram vs. Mystery Model Hair Salon [1972] EA 525, Madan, J (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them. It was in appreciation of the foregoing position that the Court in Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirti R (Kirti) Raval Nairobi HCMCC No. 246 of 1981 held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration.”

13. The Court continued that:

“It is therefore clear that the powers of an executive authority must be conferred by the Statute under which the said authority exercises its powers which instrument must necessarily set out its powers expressly. Unless such powers are expressly donated by the parent instrument, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530 it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others...Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies or executive authorities. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on

certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them...I therefore have no hesitation in holding that the Board has no powers to issue orders in the nature of *certiorari*, *mandamus* and *prohibition*.”

14. It is therefore clear that the 1st Respondent though had the jurisdiction to inquire into the allegations made before it, had no jurisdiction to issue the reliefs it purported to have issued.

Order

15. In the premises this application succeeds and an order of certiorari is hereby issued removing into this Court for the purposes of being quashed and quashing the 1st Respondent’s decision in Case No. 049 of 2017.

16. Considering the relationship between the ex parte applicant and the 1st Respondent herein and the fact that the application was wrongly intituled in the name of the ex parte applicant rather than the Republic, there will be no order as to costs.

17. It is so ordered.

Dated at Nairobi this 6th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Ooko.