REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 15 OF 2013

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE KENYA ROADS ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

EX PARTE:

ADOPT –A- LIGHT LTD

JUDGMENT

The Application

1. The ex-parte Applicant herein, Adopt-A-Light Limited (hereinafter "the Applicant") is a limited liability Company, carrying on business of street lighting in Kenya, while the Respondent is a statutory body created under section 3 of the Kenya Roads Act, and is responsible for the management, development, rehabilitation and maintenance of national roads.

2. On 28th March 2002, the Applicant entered into a contract with the City Council of Nairobi, and was permitted to advertise on street poles within the city of Nairobi. It was also subsequently given approval by the Ministry of Roads and Public Works by a letter dated 7th January 2003 confirming the number of billboards that the Applicant could erect on specified roads. The Applicant claims that on 21st December 2012, it became aware of an advertisement put up by the Respondent in the *Daily Nation* newspaper of 17th December 2012, and that on 28th December 2012, some of its billboards were marked with red crosses by the Respondent as a sign of intended demolition, on the allegation that they were unauthorised installations.

3. The Applicant consequently moved this Court through a Notice of Motion application dated 21st January 2013, and seeks the following orders:

> **1. An order of judicial review by way of an order of prohibition directed to the Kenya National Highways Authority to prohibit the Kenya National Highways Authority from enforcing the notice of intended removal of billboards and advertisements on streetlights dated 17th December 2012.**
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> **2. An order of judicial review by way of prohibition directed to the Kenya National Highways Authority to prohibit the Kenya National Highways Authority from commencing, instituting or proceeding with any other enforcement actions against the Applicant in relation to and /or on account of the notice of intended removal of billboards and advertisements on streetlights dated 17th December 2012.**
>
> **3. An order of judicial review by way of an order of prohibition directed to the Kenya National Highways Authority to**

prohibit the Kenya National Highways Authority from performing any further defacement of the applicants billboards by placing a red cross or any other mark or symbol on the applicants billboards and advertisements on streetlights or any other interferences howsoever with the Applicant's billboards and advertisements on streetlights.

4. An order of certiorari to remove to this court and quash the decision of the Kenya National Highways Authority contained or evidence by the advertisement carried on page 33 of the Daily Nation edition of 17th December 2012 to remove the Applicant's billboards and advertisements on streetlights.

5. An order for the costs of this application to be awarded to the Applicant.

4. The application was supported by a statement of facts dated 18th January 2013, and an affidavit sworn on the same date by Esther Muthoni Passaris, a director of the Applicant. The Applicant in the said affidavit stated that its contract with the City Council of Nairobi provided for arbitration as the dispute resolution method, and disclosed the details of several suits, namely HCCC No. 637 of 2006, HCCC No. 254 of 2009 and CA No. 159 of 2006, that the Applicant filed in the High Court and in the Court of Appeal, after the employees and/or agent of Nairobi City Council removed advertisements placed by the Applicant on street lights.

5. The Applicant averred that after the impugned actions by the Respondent, it wrote to the Minister of Roads through a letter dated 7th January 2013, clarifying that it had all the requisite authorisations and forwarded them, but did not get a response. Further, that the Applicant's Director met the Respondent's General Manager Planning and Environment, who was non-committal on the request that their bill boards would not be removed.

6. Therefore, that as a result of the Respondent's flagrant disregard of the approval dated 7th January 2003, the Applicant risks having its business destroyed. The Applicant elaborated on the risks as being loss of money as some of its customers would refuse to pay; substantial loss of business; loss of goodwill; claims of compensation from its clients; and that it will also cause the Applicant to be in breach of the agreements entered into by various firms.

7. The main grounds put forward by the Applicant for the instant application are that the threatened removal of the billboards is not within the mandate of the Respondent, and that the Respondent acted illegally and *ultra vires* section 49 of the Kenya Roads Act in marking the Applicant's billboards for removal, whilst the Applicant has all the requisite authorisations for the billboards which were saved under section 4(1) of the Fourth Schedule to the said Act.

8. In addition, that the Applicant had the legitimate expectation that having acquired all the requisite authorisations, the Respondent would not mark its billboards for destruction, and that section 4(1) of the Fourth Schedule to the Roads Act would be obeyed.

9. Lastly, that the Respondent thereby abused the powers bestowed upon it by the Kenya Roads Act, unreasonably exercised its power, and will subject the Applicant to excessive hardship and infringement of its rights, and its decision to mark the Applicant's billboards for removal was irrational and lacked any adequate justification in the circumstances of the case.

The Response

10. The application was opposed by the Respondent through a replying affidavit sworn on 13th May 2013 by Engineer Samuel O. Omer, its General Manager in charge of Planning and Environment. It was stated therein that the Respondent came into operation on 7th September 2011 through the Kenya Roads (Kenya National Highways Authority) Vesting Order 2011, when all functions relating to the management, development, rehabilitation and maintenance of all national roads and their related road reserves were also transferred to it.

11. It was the Respondent's case that it was not a party to the contract between the Applicant and the Nairobi City Council, and is therefore not bound by its terms, but nonetheless pointed out that the contract was for a period of five years signed in the year 2002 and expired in the year 2007. Furthermore, that it has never been a party to any of the suits mentioned by the Applicant, namely HCCC No. 637 of 2006, HCCC No. 254 of 2009 or CA No. 159 of 2006.

12. On the approval given to the Applicant by the Ministry of Roads and Public Works, the Respondent averred that the same was subject to terms and conditions communicated to the Applicant, which were enumerated by the Respondent in its replying affidavit, who also annexed correspondence on the said conditions. Further, that it is over ten years since the approval was issued and it cannot be valid forever, and it is unreasonable for the Applicant to rely on the letter dated 7th January 2003, when one of the conditions was that the Government reserved the right to request the removal of the installation during future road development.

13. The Respondent admitted that pursuant to its statutory mandate, it notified the public, and specifically persons who had erected unauthorized billboards and advertisements on road reserves, to remove the same within a thirty day period as provided in law, and proceeded to mark the unauthorized structures along Mombasa Road. The Respondent refuted the averments made by the Applicant that it secured the Respondent's authorization, and stated that the Applicant opted to seek redress with the Minister of Roads instead of the Respondent within the requisite period.

14. The Respondent contended that it has discretion under section 49 of the Kenya Roads Act to decline permission on erection, construction or establishment of structures on road reserves. In addition, that under section 22 of the Act, the Respondent is granted wide powers to prohibit, control or regulate the roads under its jurisdiction. Thus, in issuing the notice of intended removal of billboards and advertisements on streetlights dated 17th December 2012, it acted within its powers and discretion under the Kenya Roads Act, and should be allowed to proceed and remove the unauthorised structures.

15. Lastly, it was the Respondent's averment that a number of players have sought its approval since the impugned notice was issued, which applications are being reviewed. However, that the Applicant has never formally approached the Respondent on the grant of permission to erect its billboards and advertisement on the road reserve.

The Determination

16. The application was canvassed by way of written submissions. Hamilton Harrison and Mathews Advocates, the advocates for the Applicant, filed submissions dated 3rd November 2017; while Waweru Gatonye & Company Advocates, the advocates on record for the Respondent, filed submissions dated 7th December 2017.

17. I have considered the pleadings and submissions filed, and find that there are four issues for determination. These are firstly, whether the Respondent's notice of intended removal of the billboards and advertisements dated 17th December 2012 was illegal, *ultra vires* and in abuse of power. Secondly, whether the Respondent's acted unreasonably and irrationally in the circumstances. Thirdly, whether the Respondent has violated the Applicant's legitimate expectation; and lastly, whether the Applicant is deserved of the reliefs sought.

18. It is prudent to establish at the outset the purpose and reach of judicial review. In the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** the Court of Appeal stated that in judicial review:

> **"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 relevant matters or did he 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 an appeal court 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 – and that, as we have said, is not the province of judicial review."**

19. The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question. As was held in **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited, (2008) eKLR,** the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

20. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that while** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, , the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.**

21. On the first issue of whether the Respondent's notice was illegal and/or ultra vires, the Applicant relied on the definition of illegality provided in **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300,** and **Council of Civil Service Union and Others vs Minister for the Civil Service (1984) 3 All E.R. 935,** and submitted that section 49 (5) of the Kenya Roads Act requires the Respondent to order the removal of offending material, only where a party has not sought authority from the Respondent pursuant to section 49(1) and 49(2) of the said Act.

22. Further, that the Fourth Schedule to the Act validates any authorities granted prior to the inauguration of the Respondent, and that the permissions granted by the Ministry of Roads and Public Works should have been deemed to be granted by the Respondent. Reliance was placed on the case of **Zacharia Wagunza and Another vs Office of the Registrar Academic Kenyatta University and 2 Others, (2013) eKLR** for the proposition that where a body takes into account irrelevant considerations in its decision, the same is illegal.

23. The Respondent on the other hand contended that it acted within its mandate in issuing the impugned notice, and relied on section 49 of the Kenya Roads Act, and the decision in **Republic vs Kenya National Highway Authority & 2 Others ex parte Amica Business Solutions (2013) e KLR** that the said section gives it the powers to control constructions on road reserves.

24. In considering this issue, this Court is alive to the circumstances under which orders of judicial review can issue, as was elaborated in the case of **Pastoli vs Kabale District Local Government Council & Others, (supra)** at pages 303 to 304 thus:

> **"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
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> **Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality…..**
>
> **Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph**

"E".

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."

25. In the present application, It is not in dispute that the Respondent published the impugned notice which was advertised in the *Daily Nation* newspaper of 17th December 2012, and read as follows:

"NOTICE FOR INTENDED REMOVAL OF UNAUTHORIZED BILLBOARDS AND OTHER ADVERTISEMENT STRUCTURES ON KENYA NATIONAL HIGHWAYS AUTHORITY'S ROAD RESERVES

Kenya National Highways Authority (KeNHA) is a State Corporation established under the Kenya Roads Act, 2007, with the responsibility for management, development, rehabilitation and maintenance of national roads (Class A, B & C roads).

It has come to the attention of the Authority that certain individuals and entities have erected billboards and other advertisement structures or things on the Authority's road reserves with total disregard to the provisions of Section 49 of the Kenya Roads Act, 2007 regarding the usage of road reserves.

Take notice that it is an offence punishable by law to erect such structures of Class A, B & C road reserves without the Authority's written permission.

Pursuant to Section 49, sub-section (4-6) of the Kenya Roads Act, 2007, all entities and individuals who have erected un-authorised billboards and other advertisement structures or things on Class A, B & C road reserves in the Country are hereby directed to remove them within thirty (30) days from the date of this notice failure to which the Authority will remove them without further reference to those responsible, and recover attendant costs from them accordingly.

At the lapse of this period, the Authority shall immediately embark on the removal of such structures.

Eng. M.O. Kidenda, MBS, HSC

DIRECTOR GENERAL"

26. The question is whether in issuing the said notice the Respondent acted illegally. This question has to be answered in light of the scope of the powers and duties given to the Respondent under the applicable law, which is the Kenya Roads Act. Specifically, whether in issuing the notice, the Respondent incorrectly interpreted a statutory provision as giving it power, or purported to exercise a power it did not possess.

27. The Respondent in this regard relied on section 49 of the Kenya Roads Act as the source of its powers and duties, and the said section provides as follows:

"(1) Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority's written permission or contrary to such permission—

(a) erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;

(b) make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or

(c) give permission for erecting, constructing, laying or establishing, any structure or that other thing on or over, or below the surface of, a road or road reserve or land in a building restriction area, or for any structural alteration or addition to any structure or other thing so situated.

(2) An Authority may, in its discretion, give or refuse to give permission under this section.

(3) When giving permission the Authority may prescribe—

(a) the specifications with which the structure, other thing, alteration or addition for which permission is requested must comply;

(b) the manner and circumstances in which, the place where, the conditions on which the structure, other thing, alteration or addition may be erected, constructed, laid, established or made; and

(c) the obligations to be fulfilled by the owner in respect of the land on which the structure, other thing, alteration or addition is to be erected, constructed, laid, established or made.

(4) Where a person, without the permission required by subsection (1) or contrary to any permission given thereunder, erects, constructs, lays or establishes a structure or other thing, or makes a structural alteration or addition to a structure or other thing, an Authority may by notice in writing direct that person to remove the unauthorised structure, other thing, alteration or addition within a reasonable period which shall be stated in the notice but which may not be shorter than thirty days calculated from the date of the notice.

(5) If the person to whom a notice has been issued in terms of subsection (4) fails to remove the structure, other thing, alteration or addition mentioned in the notice, within the period stated therein, such item may be removed by the Authority itself which may recover the cost of the removal from that person.

(6) A person who contravenes any of the provisions of subsection (1) commits an offence and is liable on conviction to a term of imprisonment not exceeding one year or to a fine not exceeding one hundred thousand shillings, or to both."

28. An examination of the above section shows that the Respondent clearly has the power to issue the notice under section 49(5). However, there is a statutory pre-condition to the exercise of that power , as argued by the Applicant, which is that the Respondent can only issue the said notice where a person constructs a structure on a road reserve without the permission required by 49(1) of the Act, or contrary to any permission given thereunder.

29. The Applicant also relies on section 4(1) of the Fourth schedule which allows any authority that was given by the Ministry of Roads before the commencement of the Act to remain in force, and which reads as follows:

"All lawful directions, orders, rules, authorizations and other things published, made, given or done by the Roads Department relating to national roads, or subsidiary legislation thereunder, subsisting at the inaugural date shall on and after that day be deemed to have been published, given, made or done by the Highways Authority."

30. In this respect where there is existence of a statutory precondition as to the exercise of a power, this Court as a judicial review Court will only interfere if the challenge is as to whether or not the precondition was satisfied, and there was a wrong finding made by the public body in this regard. Such factual precondition is what is otherwise known as a precedent fact, and a Court in judicial review proceedings will interrogate a conclusion made as the existence or otherwise of such a precedent fact.

31. This legal position was explained in **R v Secretary of State for the Home Department, ex parte Khawaja, [1984] AC 74,** where the House of Lords held that the question whether the applicants were "illegal immigrants" was a question of fact that had to be positively proved by the Home Secretary before he could use the power to expel them. The exercise of the power depended on them being "illegal immigrants" and any error in relation to that fact took the Home Secretary outside his jurisdiction to expel them.

32. What the Court cannot do in a claim for judicial review, is to itself determine whether the relevant statutory precondition is satisfied, as this is a merit review, and it is for the public body, as the primary decision maker to itself determine that matter. This distinction was made by Sir Bingham in **R vs Secretary of State for the Home Department ex parte Onibiyo (1996) QB 768 at 784-785** in the context of fresh claims for asylum under the English immigration laws as follows:

"Where an exercise of administrative power is dependent on the establishment of an objective precedent fact the court will, if called upon to do so in case of dispute, itself rule whether such fact is established to the requisite standard. Thus, for example, where power to detain and remove is dependent on a finding that the detainee is an illegal entrant, one who has entered clandestinely or by fraud and deceit, the court will itself rule whether the evidence is such as to justify that finding (see Khawaja v Secretary of State for the Home Dept [1983] 1 All ER 765, [1984] AC 74). By contrast, the decision whether an asylum-seeker is a refugee is a question to be determined by the Secretary of State and the immigration appellate authorities, whose determinations are susceptible to challenge only on Wednesbury principles (see Bugdaycay v Secretary of State for the Home Dept [1987] 1 All ER 940, [1987] AC 514). I am of opinion, although with some misgivings, that the judgment whether a fresh 'claim for asylum' has been made should be assimilated with the latter, and not the former, class of judgment. If the test propounded in (1) above is correct, the answer to the question whether or not a fresh 'claim for asylum' has been made, will depend not on the finding of any objective fact, nor even on a literal comparison of the earlier and the later claim, but on an exercise of judgment, and this is a field in which the initial judgments are very clearly entrusted to the Secretary of State." In giving effect, for example, to r 346 of the 1994 rules, it must be for the Secretary of State and not for the court to rule whether the applicant can demonstrate a relevant and substantial change in circumstances since his refusal of an earlier application."

33. In the present application, the impugned notice and actions by the Respondent related to intended demolition of unauthorized structures on road reserves. The Applicant therefore ought to have raised the issue of its prior authorization with the Respondent for consideration, before asking this Court to find in its favour and issue orders on account of the said authorization. The Applicant relied on a letter dated 7th January 2013 written to the Minister of Roads in which is raised concerns about the notice by the Respondent and informed on its prior authorization. The said letter was copied to the Respondent.

34. However, no specific correspondence on the authorization or impugned notice as between the Applicant and Respondent was attached by the Applicant, or of any decision made by the Respondent after such notification of the Applicant's authorization, for this Court to delve into the question whether or not the Respondent made the right or wrong conclusion as regards the Applicant's prior authorisation.

35. In the absence of a specific decision or finding made by the Respondent that the Applicant was subject to the impugned notice notwithstanding the approval previously granted to it by the Ministry of Roads , this Court cannot make a finding that the Respondent acted ultra vires the Kenya Roads Act. This is mainly for the reason that this Court as a judicial review Court cannot go into the merits of the

Applicant's arguments on whether it did or did not have prior authorization, as this is a duty and power which should be exercised by the Respondent.

36. Therefore, to this extent the Applicant's arguments on illegality on the part of the Respondent for reason of failure to consider its prior approval are premature, as the impugned decision of the Respondent is of its intended demolition of all unauthorized structures on road reserves, which was within its powers to make, and as no evidence was provided by the Applicant to demonstrate that a decision was made by the Respondent on demolition of the Applicant's structures after notification of the Applicant's prior authorization.

37. On the second issue as to whether the Respondent acted unreasonably, the Applicant submitted while relying on the decision of **Pastoli vs Kabala District Local Government Council And Others (supra)** that irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority addressing itself to the facts and the law before it would have made such a decision. It was its submission that in the Respondent did not respond to its letter dated 7th January 2013 nor give reasons for disregarding the provisions of section 4 (1) of the Fourth Schedule to the Kenya Roads Act which validates the authority obtained. Further, that the Respondent did not state whether the Applicant had breached any of the conditions in the authority, and made a unilateral decision without any grounds or basis.

38. The Respondent's submissions on unreasonableness were that the correspondence with the Applicant and Ministry of Roads and Public Works showed that the approval granted to the Applicant was subject to condition that the Government reserved the right to request for removal or reallocation of the installation during future development of the roads at no costs to the Government, and the installations were also subject to other conditions so as not to obstruct traffic. That in light of the conditions and taking into account the time period that had lapsed it's possible that some of the Applicant's billboards were poorly erected, amounting to illegal structures.

39. Further, that under section 49(2) of the Act the Respondent in its discretion may give or refuse to give permission, and under section 4 it has the mandate of management development and maintenance of national roads, and can revoke permission that has been granted where necessary. The Respondent submitted that the impugned notice was issued to the general public. and what a reasonable person ought to do is to seek audience with the authority and therefore lay out there case. That on the contrary the Applicant sought political intervention from the Minister for Roads, even though the Applicant knew the mandate of regulation belonged to the Respondent.

40. Lastly, the Respondent submitted that a statutory body carrying out its mandate as prescribed in law cannot be said to be acting unreasonably and maliciously without sufficient proof. Relying on the case of **Commissioner General, Kenya Revenue Authority Through Republic vs Silvano Onema Owaki T/a Marenga Filling Station (2007) eKLR** the Respondent submitted that it is in the context of relevant legislation that allegations of malice and unreasonableness are to be tested, and that in issuing the notice it acted pursuant to the express provision of section 49 of the Act.

41. It is now an established principle of law that the decision of a public body will be unlawful if it is irrational or unreasonable, in the sense of being a decision which no public body acting reasonably would have reached. This was principle was settled by the decisions in **Associated Provincial Picture Houses vs Wednesbury Corporation (1948)1KB 223** and **Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374**. This ground was also explained in **Pastoli vs Kabale District Local Government Council & Others, (supra)** as follows:

> **"…Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards…"**

42. It is not this Court's place to interrogate the approval given to the Applicant as to whether it is still subsisting and whether the terms and conditions thereunder were breached, as this would be going into the merits of the dispute between the Applicant and Respondent. My finding on this issue is limited to whether in the circumstances of, and events surrounding the impugned decision, the Respondent acted unreasonably.

43. It is instructive in this respect that the correspondence the Applicant relies on was a letter dated 7th January 2013 addressed to and seeking intervention from the Minister of Roads and not the Respondent. There was no indication and no evidence by the Applicant that the approvals relied on were brought to the attention of and/or received by the Respondent, or that the Respondent failed to act on the said approvals.

44. It is also notable in this respect that that the letter dated 7th January 2013 was written after publication of the impugned notice and actions by the Respondent, and it cannot therefore be argued that the Respondent relied upon the said letter in making the impugned notice and as evidence of unreasonableness on the part of the Respondent in this regard. Therefore in the absence of any other subsequent decisions or actions by the Respondent after the receipt of the said letter, and given that the impugned notice and actions were undertaken within the Respondent's discretion and powers as provided by section 49(5) of the Kenya Roads Act, I find that the Applicant has not met the threshold in showing unreasonableness or irrationality on the Respondent's part.

45. The third issue is whether there was violation of the Applicant's legitimate expectation. The Applicant relied o the authorization granted to it in 2003, and its validation by section 4(1) of the Fourth Schedule of the Kenya Roads Act, and submitted that its legitimate expectation that the provisions of the section would apply to it were violated by the Respondent when it issued the impugned notice which effectively declared that the Applicant's billboards as unauthorized, and which failed to take into consideration and disregarded the Applicant's authorization.

46. The decision in **Justice Kalpana H. Rawal vs Judicial Service Commission and 3 Others, (2016) e** KLR was cited by the Applicant for the position that legitimate expectation is a doctrine that is well recognised and established in administrative law and that it arises when a body by representation or past practice has aroused an expectation that is within its power to fulfil. The Applicant submitted that it relied on

the authority granted to it by the Ministry of Roads and Public Works to enter into contracts with various parties hired employees and put in monies into execution of contracts.

47. The Respondents on the other hand submitted that it is in contention whether the approval given to the Applicant was absolute and was to last forever which it alleged could not be the case , as the approval had conditions, and as read together with the contract entered into with the City Councl of Nairobi on 28th March 2002 had a limited time and could not be forever. The Respondent argued that a perusal of the contract shows that it was to last for five years commencing in the year 2002, and by the time the notice had been issued the period had already lapsed. Furthermore, that the legality of the contract was in dispute in the on going cases between the Applicant and the City Council of Nairobi, which rulings were analysed by the Respondent.

48. The Respondent also contended that the notice period was adequate for the Applicant to raise its grievances with it before coming to court but she deliberately avoided that path, and that the authorisations cannot have been disregarded when the notice was directed to the whole republic. In addition that outdoor advertising is now a competitive venture which the Respondent has to subject it to competitive biddings as required by the Constitution at Article 227 and the Public Procurement and Disposal Act 2015 as held in the case of **Republic vs Kenya National Highway Authourity & 2 Others ex-parte Amica Business Solutions (supra).**

49. A five judge bench of this Court in the case of **Kalpana H. Rawal v Judicial Service Commission & 4 others [2015] eKLR** exhaustively discussed the doctrine of legitimate expectation and various judicial decisions on the doctrine in a decision that was affirmed by the Court of appeal . The said bench observed as follows:.

> **"207. The doctrine of legitimate expectation was developed by English courts to hold rulers to their promises. In the 4th Edition, 2001 Reissue, of Halsbury's Laws of England the authors at page 212, paragraph 92 explain the concept behind the development of the principle as follows:**
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> ***"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.***
>
> ***The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other* requirement of procedural fairness. A *legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker."***

50. The said bench also reviewed various decisions on the doctrine, including the decision by Nyamu, J (as he then was) in the case of **Keroche Industries Ltd v Kenya Revenue Authority and others (2007) eKLR** and that of Lord Diplock in the case of **Council of Civil Service Unions Minister for the Civil Service** (supra). It was noted by the Bench that in order to successfully rely on the doctrine of legitimate expectation there is need to demonstrate that the promise was made by an authorised public officer; was reasonable; and was within the law. Further, that any promise made outside the law cannot be legitimate and thus cannot give rise to any expectation, and that it is also necessary that an applicant places all the facts before the public authority before the assurance was given to him or her.

51. The Supreme Court in the **Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others, (2014) e KLR** also explained the principle of legitimate expectation as follows:

> **"[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.**
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> **[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."**

52. The said Court further laid down the principles that govern a successful invocation of the doctrine of legitimate expectation as follows:

> **"[269] The emerging principles may be succinctly set out as follows**:
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> **a. there must be an express, clear and unambiguous promise given by a public authority;**
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> **b. the expectation itself must be reasonable;**
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> **c. the representation must be one which it was competent and lawful for the decision-maker to make; and**
>
> **d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution."**

53. Applying these principles to the present case, this Court is in no doubt that the Applicant had a legitimate expectation, based on the

express written approval granted to them by the Ministry of Roads and Public Works to install billboards and streetlights on specified roads in a letter dated 7th January 2003 which was at the time the lawful authority to do so and which is not disputed. This authority was saved by section 4(1) of the Fourth Schedule to the Kenya Roads Act when the Respondent took over the functions of the Ministry of Roads and Public Works, and is also protected by section 49(5) of the Kenya Roads Act, and is therefore not contrary to statute.

54. What this court is unable to find is that there was a violation of this legitimate expectation by the Respondent, particularly in the statutory and factual context in which the legitimate expectation arose, and in which the alleged violation is said to have taken place. Two factors in this respect are relevant. Firstly, as noted in the foregoing, the impugned notice was of an intended demolition that was addressed to the whole world, and no evidence has been brought to show that it was specifically addressed to or affected the approval granted to the Applicant.

55. Secondly, at the time of representation being made, the Respondent was not in existence and although bound by the representation, it is not the one that made the representation relied upon to the Applicant. In addition, no evidence has been brought to show that the said representation was brought to its attention or knowledge before the impugned notice was given. This Court therefore finds that as no evidence has been brought of unfair conduct on the part of the Respondent, the Respondent did not violate the Applicant's legitimate expectation.

56. On the last issue as regards the relief sought, the Applicant has sought orders of certiorari and prohibition and relied on the scope of the said orders as stated in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge (1997) e KLR.** It was urged that by issuing the notice of 17th December 2012 the Respondent effectively decided that the Applicant's billboards and advertisements had been put up without authorization, and ought to be quashed.

57. The Respondent on its part submitted that judicial review orders are granted at the discretion of the Court, which must be exercised on the basis of evidence and legal principles as held in **R vs Judicial Service Commission ex parte Pareno, (2004) 1 KLR 203-209.** Further, that in the circumstances of this case the public interest in the regulation of road reserves outweighs the private commercial interests of the Applicant, and the Applicant's case has no merit.

58. The Court of Appeal held in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge (supra)** *inter alia* as follows as regards the nature of the two judicial review orders sought by the Applicant:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings….Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."**

59. This Court has found that the Respondent was acting within its powers and mandate and powers, and did not act unreasonably or violate the Applicant's legitimate expectation, since the impugned notice dated was issued to the whole world and was not specifically addressed to the Applicant. In addition, the Applicant has not brought evidence to prove that that the said notice was issued after the Respondent had considered the authorization given to the Applicant to construct billboards and streetlights. Lastly, the Respondent cannot be prohibited from exercising its statutory powers and duties. The orders of prohibition and certiorari sought by the Applicant do not therefore lie for these reasons.

60. In the premises, I find the Applicants Notice of Motion dated 21st January 2013 is not merited, and it accordingly fails. The same is hereby dismissed, and each party shall bear their own costs.

61. Orders accordingly**.**

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE