



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 116 OF 2015

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

AND

IN THE MATTER OF THE TRAFFIC ACT, CAP 403

AND

THE NATIONAL TRANSPORT & SAFETY AUTHORITY ACT

AND

IN THE MATTER OF THE URBAN AREAS AND CITIES ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NAIROBI CITY COUNTY GOVERNMENT.....1ST RESPONDENT

CS, FOR TRANSPORT & INFRASTRUCTURE....2ND RESPONDENT

PS, STATED DEPARTMENT OF TRANSPORT....3RD RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....4TH RESPONDENT

KENYA ROADS BOARD.....5TH RESPONDENT

KENYA URBAN ROADS AUTHORITY.....6TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....7TH RESPONDENT

EX PARTE: HON. MIKE SONKO MBUVI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 20th day of April, 2015, the ex parte applicant herein, **Hon. Mike Sonko Mbuvi**, the Senator for Nairobi County commenced these proceedings against the **Nairobi City County Government** (hereinafter referred to as “the County Government”), the **Cabinet Secretary for Transport & Infrastructure** (hereinafter referred to as “the CS”), the **Principal Secretary, State Department of Transport** (hereinafter referred to as “the PS”), the **Kenya National Highways Authority** (hereinafter referred to as “KENHA”), the **Kenya Urban Roads Authority** (hereinafter referred to as “KURA”) and the **Attorney General** (hereinafter referred to as “the AG”), seeking the following orders:

1. THAT by way of Judicial Review, an order of prohibition do issue, prohibiting the 1st Respondent or any of the Respondents herein, and any person acting under their behest or direction, in purported enforcement of the 1st Respondent’s decision to restructure specific road arteries carrying motoring traffic into and out Nairobi County to eliminate the roundabouts on University Way, Kenyatta Avenue, Haile Sellasie, Bunyala Road, Nyayo Stadium, West Lands, intersecting with Uhuru Highway, or from creating signalled intersections in lieu of the said roundabouts, absent a fully approved plan of the said changes and sufficiently created diversions of equal surface quality afforded to the Ex Parte Applicant and all road users at the stated points and road traffic signs specifically erected and physically situate at these specific points on such roads.

2. THAT by way of Judicial Review, that an Order of Prohibition do issue, prohibiting the 1st Respondent from erecting any further barriers at the roundabouts on University Way, Kenyatta Avenue, Haile Sellasie, intersecting with Uhuru Highway, or from creating signalled intersections in lieu of the said roundabouts, absent the meeting of all antecedent conditions of creation and establishment of lawful diversions constructed within the prescription of the law and the Ex Parte Applicant, together with the rest of the Kenyan motoring public being afforded sufficient notice of such diversions.

3. THAT by way of Judicial Review, an order of mandamus do issue, compelling and directing the 1st Respondent to forthwith remove at its cost all road barriers it has erected at the roundabouts on University Way, Kenyatta Avenue, Haile Sellasie, Bunyala Road, Nyayo Stadium, West Lands, intersecting with Uhuru Highway, or from creating signalled intersections in lieu of the said roundabouts.

4. THAT by way of Judicial Review, an order of mandamus do issue, compelling and directing the 2nd Respondent and the 4th Respondent to forthwith remove at their cost the bumps and rumble strips erected along Thika Superhighway at the “Survey of Kenya” point and at Homeland/Kenya Breweries point, and they ensure that pedestrians use the provided footbridges along the said Thika Highway.

5. THAT by way of Judicial Review, an order of mandamus do issue, compelling and directing the 1st Respondent to within 30 days of the making of this Order or such period as this Honourable Court may direct, the appointment of the Nairobi City County Management Board and The Nairobi City Manager to execute the functions specified in the First Schedule of the Urban Areas and Cities Act.

6. THAT the costs of these proceedings herein be to the Ex Parte Applicant in any event.

Applicant’s Case

2. According to the ex parte applicant, these proceedings relate to the patent objection to the exercise of power by the County Government, in reconfiguring Nairobi County urban roads with large roundabouts affecting Uhuru Highway, Bunyala Road, Westlands, Lang’ata Road, and with the silent watch and

approval of KURA and the interface these actions have with the rest of the Respondents, entitling this Court to intervene:

(a). the unlawful cancellation of “right turns” on these major arteries without any lawful notification of road users and the provision of alternative routes serving as lawfully established diversions with a Public Notice in the print or electronic media with sufficient notice;

(b) the action of the County Government using concrete barriers in used oil barrels to serve as road markings in violation of the law posing grave and mortal danger to motorists who have used these roads before but without notification of the presence of these barriers;

(c) the failure of the 2nd, 3rd, and 6th Respondent to consult at all the motoring public on the best manner to resolve the traffic gridlocks afflicting many urban centers in Kenya let alone the Nairobi City County;

(d) the failure to provide alternative routes of diversion of equal surface construction as the closed roads;

(e) the unlawfulness of altering the structure of the affected roads without the necessary road engineering and structural maps necessary to execute such a task;

(f) the occasioning of economic loss and suffering to the Motoring public due to endless, extremely long and time consuming traffic grid locks as a result of these unlawful diversions;

(g). the unlawfulness of embarking on the removal of roundabouts at the affected points without providing the public with a time structure as to the period of the inconvenience during the alteration of the road structure;

(h) the unlawful allocation of funds by the 1st Respondent in the sum of Kshs. 400 million (Kenya Shillings 400 million) to effect the unlawful alteration of the road structures in the affected roads without the County Assembly approval, and even if such approval was ever granted (which is denied), there was no public participation to sufficiently, logistically and fully interrogate the fides, propriety and feasibility of such undertaking.

(i). the illegal usurpation of the powers of the County Board as envisaged under section 20 of the **Urban Areas and Cities Act**, by the 1st Respondent.

(j). The failure to appoint a County Manager and the County Management Board constitutes a violation of the law entitling the Court to intervene.

(k) The applicant also brought these proceedings in respect of the violations of the law by the CS to maintain and sustain illegal and obstructive road bumps and rumble strips on Thika Superhighway without any legal backing and which have ended creating unnecessary traffic grid locks on the said Super highway.

3. According to the Applicant it was the conduct of the County Government in proceeding to “enforce” the illegal and *ultra vires* decision so articulated in a manner that will directly aggrieve and touch upon him and the larger Kenyan motoring population, the PSV industry, and especially those who ferry passengers across the country using these arteries in and about Nairobi County, causing escalated and unwarranted financial losses and the motoring public in Kenya, that impelled him to institute these proceedings. He was also concerned about KENHA’s and KURA’s failure to ensure that the road network in Kenya (and in this case the urban road structures of the Nairobi County) is properly structured to carry the requisite motoring and pedestrian traffic in compliance with the law.

4. The applicant averred that he had been a user of Thika Superhighway and in spite of it being a superhighway there are unnecessary traffic grid locks due to bumps and rumble strips erected unlawfully

hence his move to seek an order compelling and directing the the CS and KENHA to forthwith remove at their cost the bumps and rumble strips erected along Thika Superhighway at the “Survey of Kenya” point and at Homeland/Kenya Breweries point, and to ensure that pedestrians use the provided footbridges along the said Thika Highway. He however was of the view that there ought to be a stoppage of the enforcement and further enforcement of the directive to remove the roundabouts on **University Way, Kenyatta Avenue, Haile Sellasie, Bunyala Road, Nyayo Stadium, West Lands**, intersecting with **Uhuru Highway**, or from creating signalled intersections in lieu of the said roundabouts at the said points.

5. The applicant disclosed that he had noted that the diversion of road traffic from the pre-existing road structures on **Haile Sellasie, Bunyala Road, Nyayo Stadium, West Lands**, intersecting with **Uhuru Highway**, the County Government was using barriers using used oil barrels filled with concrete or whatever material inside which were in themselves a safety hazard that ought to be removed forthwith. He recalled that on April 6th 2015 the Nairobi City County Governor purported to announce (with the approval and support of the CS) that it would eliminate the roundabouts on **University Way, Kenyatta Avenue, Haile Sellasie, Bunyala Road, Nyayo Stadium, West Lands**, intersecting with **Uhuru Highway**, purportedly to resolve traffic gridlocks in Nairobi City County. To the applicant, driving one’s fully insured, and mechanically fit motor vehicle is an integral aspect of the exercise of the Kenyans’ freedom of movement which is guaranteed under Article 39 of the Constitution of Kenya and as such any action that purports to constrict the scope and enjoyment of such a right cannot be sustained, absent lawful justification.

6. It was the applicant’s case that no citizen forum was called to seek the Nairobi County road users’ view on these issues before they were implemented, in violation of the **Urban Areas and Cities Act** and that this divested the right to public participation envisaged under the law, and enshrined in the Constitution. Consequently, the County Government’s unilateral affecting these specific road points created uneconomic environment with unnecessary and uncalled for traffic grid locks otherwise that would not have arisen which directly threatens the enjoyment and realization of this right.

7. According to the applicant, the framework legislation in respect of these issues is the **Urban areas and Cities Act** that circumscribe the operation of the affairs of the Nairobi County. However, there is no County Management Board, no County Manager, no County Forum as envisaged in section 22 of the said Act or even public involvement of the issues germane to these proceedings. Further, as a legal and Constitutional principle, administrative action envisaged under Article 47(1) of the Constitution of Kenya such as the action of the County Government to remove the stated roundabouts and replace them with intersections ought to be fair and expeditious. The applicant however contended that it was neither fair nor expeditious to pursue an action such as happened when the Nairobi City County Governor expressly admitted that the persons tasked to execute these changes were not aware of where the way leaves are, and this amounted to guesswork while motorists using these roads waited indefinitely for the works to end. In the applicant’s view, such structural changes in the road structure of the Nairobi County major road arteries ought to take into account the considerations of feasibility of the works, changes to be effected, the ease of movement of Kenyan motorists to access these administrative actions, and the overall cost benefit which were not considered.

8. It was further contended that a violation of Article 201(d); 232(1) (b), and 232(1)(d) of the Constitution had arisen because the cost of Kshs. 400 million to “eliminate” roundabouts at 5 intersections on Uhuru Highway by flattening the road into a box was imprudent and totally unjustified. The result is the usage of such money recoverable by way of tax burdens. To the applicant, Article 210(1) of the Constitution of Kenya prohibits such impositions not founded in law, and specifically prescribing that no fee or licensing fee may be waived, imposed, or varied, except as provided by legislation. In this case no County Assembly resolution to so act was passed, to his knowledge. In addition such services expedient to execute these alterations must be conducted in a manner commensurate with open and transparent tendering which the public and the applicant as the Nairobi County Senator can have opportunity to interrogate on a case by case bases, as envisaged under Article 227(1) of the Constitution. This, however was overlooked. The applicant asserted that having been elected to represent the Nairobi County citizenry in the Senate and himself being a motorist in his own right, he was entitled to defend the principle of the

Rule of Law in furtherance of that mandate.

9. The applicant disclosed that he was aware that Parliament had spelt out the scope of the creation of diversions in the event a road is placed under repair, reconstruction or construction where motorists use such a road. As at now, no lawful diversions exist at the points sought to be reconfigured and reconstructed by the County Government, and this breach of the law ought not be sanctioned. It was contended that every Kenya motorist using the affected intersections and roundabouts is entitled to know the specific points at which a diversion is, so as to organize their schedule and affairs in a manner that derives them the most economic usage of fuel and time on such roads. This was not possible with the manner in which the County Government executed the works complained of, even with no time lines indicated to the affected motorists. It was revealed that those using the Nairobi's Kenyatta International Airport now suffer the loss of missing their flights, increasing their travel costs, and the general pollution levels on these roads with static vehicles is accentuated, quite against their legitimate expectations.

10. The applicant reiterated that the used oil barrels used by the County Government at the affected roundabouts to act as barriers are in themselves illegal structures not envisaged under the relevant law. Conversely, the legitimate expectation that the applicant and the Nairobi motorists had was that such lawful road markings would be used as provided under the law has been breached. To the applicant, the public in general and in particular motorists were thus been misled into believing that the said actions of the County Government and sanctioned by the CS constituted compliance with the requirements of the law on diversion of roads, change on road structures, and reconfiguring of roads as affected, which was not the case.

11. It was contended by the applicant that public policy and good order in a democratic society such as Kenya espousing fair play, openness, transparency, Rule of Law, and just Orders issued in fairness and upon facts that are beyond doubt. Absent the legal mandate and the involvement of the County Manager, the County Management Board, it was clear that the County Government had no capacity to execute the changes that it sought to do at the expense of the Kenyan motoring public and the applicant's rights as such, hence its was abusing its statutory powers under the **Traffic Act**, the **Urban Areas and Cities Act**, and the **County Government Act** to the detriment of the motoring Kenyan public in harassing them with such illegal and costly actions.

12. The Respondents, it was averred, have national responsibility to Kenyan motorists and in particular the County Government and the CS who execute their terms of reference under the **Traffic Act**, the **Urban Areas and Cities Act**, and the **County Government Act** in public, at public expense. To the applicant the regulation of motoring issues engaged in by the County Government forming the bases of these proceedings is a grave matter, and it has not been shown that there are any prospects of ensuring legality that was breached and has been breached so far is in the hope of being rectified, necessitating the intervention of the Court. In the applicant's view, the allegations of the County Governor that they had engaged in what were essentially breaches of the law to protect public safety and spare the motorists expensive traffic grid locks were a bare and thin veil to breach Article 10(2) of the Constitution, which is an abuse of the County Government's powers. It was the applicant's case that the County Government and the Cabinet Secretary as well as KENHA, the Board and KURA owe a fiduciary duty to the motoring citizens of the Republic of Kenya using these specific roads, and to the Kenyan school going children especially and in particular, and they acted in bad faith and in a manner against the Public interest when they failed to ensure that they provided the Nairobi motorists and indeed all motorists using these roundabouts with appropriately constructed diversions that were lawfully created.

13. According to the applicant, the practical reality was that with the closure of all right turns on these roads and the illegal erection of barriers on these roundabouts law abiding citizens motoring on these points ended using longer routes, caused graver traffic grid locks while running away from this confusion and some wrongfully arrested by officers under the County Government (and even prosecuted wrongfully to their financial detriment) for taking the "wrong" courses.

14. It was charged that if the County Government and the CS were acting in good faith to rid Kenyan roads of traffic congestion that is otherwise unwarranted, then it is clear they cannot contest the plea

herein made that an order of *mandamus* ought issue. The applicant disclosed that he uses Thika Superhighway constantly in the course of representing the Nairobi County citizenry and was persuaded that an order ought to issue to compel and direct the CS and KENHA to forthwith remove at their cost the bumps and rumble strips erected along Thika Superhighway at the specific point identified as “Survey of Kenya” and at Homeland/Kenya Breweries point, and to ensure that pedestrians use the provided footbridges along the said Thika Highway.

15. The applicant asserted that there was no point in diverting Kshs. 400 million to eliminate roundabouts in Nairobi along Uhuru Highway allegedly to eliminate Traffic gridlocks with no commensurate action to eliminate traffic grid locks on the Thika Superhighway caused by entirely unnecessary bumps and rumble strips. It was therefore averred that the foregoing demonstrates bad faith on the cited Respondents, and which necessitates the issuance of the plea of *mandamus* herein sought.

16. The applicant averred that the alleged Kshs. 400 million to remove roundabouts without overpasses was no solution to the traffic problem of Nairobi County since the same level traffic flow cannot provide a solution to the traffic grid locks but would increase traffic further. His position was that the penchant for instant and ill thought solutions by the County Government to the problems bedeviling Nairobi City County without involving the citizenry as envisaged under section 22 of the ***Urban Areas and Cities Act*** was a violation of the principle of Good Governance under Article 10(2) of the Constitution. To him, the right to administrative action under Article 47 of the Constitution stipulates that it must be, *inter alia*, lawful, and reasonable. Along and at each of the affected roundabouts are already functional traffic lights (already installed at a declared cost of 400 million by the County Government) hence there was no need for new and additional traffic lights. It was reiterated that it was perverse to spend Kshs. 400 million merely for the alterations proffered by the County Government with no transparency involved.

17. The applicant recalled that in April 2011, the then Prime Minister of Kenya **Hon. Raila Odinga** (under whose docket the Ministry of Roads was) had stated publicly that the Nairobi Urban Toll road and Bypass project would ensure that the Mombasa Road/Waiyaki Way where these affected roundabouts are situated would have overpasses and the road design had been done. However the County Government departed from this and adopted an unplanned and wasteful use of Kshs. 400 million. In addition to the foregoing, the County Government and the CS in acting in the manner complained of, abused their powers and in particular the CS, as he had no power to abridge rights conferred under a statute or Articles of the Constitution without a reciprocal amendments to the relevant law. The CS was accused of having acted in an arbitrary way with no time frames accorded to complete and that no legal framework was established for a forum to have the CS exercise the power objectively. To the applicant, the function was too subjective and prone to abuse.

18. In a rejoinder to the Respondent’s case, the applicant averred that the allegation that approximately Ksh.90 billion is lost annually due to traffic grid locks is not backed by any empirical evidence. This, according to the applicant, went to the root of his application, confirming that the Respondents have relied on anecdotal and speculative “evidence” to justify unlawful acts.

19. While acknowledging CS’s right to consult on such issues as implicate transport matters in Nairobi, the applicant believed that such mandate ought not to be abused to cloak and gloss over wasteful and baseless actions that cost Nairobi motorists dearly in the process of implementing such decisions. This position was based on the applicant’s reading of the Terms of Reference of the “***Taskforce on Decongestion of Traffic in Nairobi City***” as stated in Gazette Notice No. 1558 of 2nd March 2015 exhibited by the Respondents through which the applicant noted that there was no room for consultations or public participation at all in the process of the said Task force work. However, to the applicant, given the grave implication of the outcome of such endeavours on the motoring public, public participation and consultation ought to have featured pertinently therein.

20. It was averred that no form of public participation ever was undertaken by this task force in even arriving at its proposals and in addition, the said “task force” constitute no member of the motoring fraternity anywhere, pedestrians, association of motorists, let alone the Nairobi County Members of County Assembly, yet public participation and consultation are an integral part of such process as

mandated by the Constitution. It was therefore averred that the entire process of arriving at the Report of the said Task Force was flawed, invalid, and violated the Principle of Public Participation as articulated in Article 10(2)(b) of the Constitution.

21. The applicant surmised that on account of the absence of the CS's own Affidavit to elaborate on what his input was, it can only be concluded such these "views" mentioned by **Engineer John Kipng'etich Mosonik** in his deposition attributable to the CS are adverse to the 2nd, 3rd, & 7th Respondents' case and hence their non-disclosure. The applicant's view of the said report was that it would be sheer confusion as they are Left-hand-drive oriented and the Task Force, in presenting such an official document for adoption to the 1st and 4th Respondents clearly intended to implement a confusing and totally illegal traffic configuration at such intersections that is based on left-hand-drive road configurations and motor vehicles.

22. By a further affidavit, the applicant deposed that following this Court's ruling dated 15th October, 2015 disallowing the application for the Court to visit the scene, the CS made an express admission of the veracity of his plea to remove the bumps and rumble strips clogging traffic along Thika Superhighway. To the applicant, despite raising the monumental cost of these unnecessary aspects of Thika Superhighway the CS never filed any opposition to the said. It was therefore the applicant's case that the said admission warrants the grant of the plea set out in prayer 4 of his motion, necessitating a determination of the motion with finality. The applicant further disclosed that as the County Government of Nairobi has already removed the obstructing old oil barrels at the points he had objected to originally, he wished to abandon that aspect of the claim. He however reiterated that to date there was no Nairobi County Manager appointed in furtherance of the mandatory provisions of the **Urban Areas and Cities Act**, hence his plea to that effect.

23. In its submissions, which were highlighted by his learned counsel, **Mr. Harrison Kinyanjui**, the applicant clarified that he had abandoned prayers 2 and 3, since they had been overtaken by events (when these proceedings were lodged, the following day the County Government of Nairobi removed the blockades constituting the gist of prayer 2 and 3 of the Notice of Motion). It was accordingly explained that what remained for consideration now was Prayer 1, 4, 5, and 6 of the Notice of Motion dated 20th April 2015.

24. It was submitted on behalf of the applicant that on April 6th 2015 the 1st Respondent's Nairobi City County Governor purported to announce (with the approval and support of the 2nd Respondent, the CS) that it would eliminate the roundabouts on University Way, Kenyatta Avenue, Haile Sellasie, Bunyala Road, Nyayo Stadium, West Lands, intersecting with Uhuru Highway, purportedly to resolve traffic gridlocks in Nairobi City County.

25. It was submitted that this Court is enjoined to uphold the Constitution in examining the case at hand, as a primary duty, as was held in the case of **Njoya & 6 Others vs. Attorney General & Another [2004] 1 KLR 232**, at pp 255 - 256 where the Court held that:

"... the Court's first role should be to uphold Constitutionalism and the sanctity of the Constitution. We think such a role cannot be well performed by shutting the door of the Court on the face of persons who seek to uphold the Constitution on the ground that such persons have no peculiarly personal stake in the matter which belongs to all. Furthermore, if the matter were to be left to the intervention of the Attorney General, we think that one might as well hope to reach a mirage."

26. The applicant also relied on paragraph 56 of **Institute of Social Accountability & another vs. National Assembly & 4 others [2015] eKLR**, where the Constitutional Court held:

"First, this Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values, and principles, advances the rule of law, human rights, and fundamental freedoms in the Bill of Rights and that contributes to

good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.”

27. It was submitted that since driving one’s fully insured, and mechanically fit motor vehicle is an integral aspect of the exercise of the Kenyans’ freedom of movement which is guaranteed under Article 39 of the Constitution of Kenya, any action that purports to constrict the scope and enjoyment of such a right cannot be sustained, absent lawful justification. The 1st Respondent’s unilateral affecting these specific road points has created uneconomic environment with unnecessary and uncalled for traffic grid locks otherwise that would not have arisen which directly threatens the enjoyment and realization of this right. Consultation in contemplated changes as sought in prayer 1 of the Notice of Motion ought to be engaged in. This enables planning and individuals to use diversions that will meet the same standard as the road being repaired. The essence of this prayer, according to the applicant, is consumer protection since road users consume the service of public roads and hence, it makes no sense to be driving on a tarmacked road and suddenly there is a diversion into the bush with mud, no lighting or signs. To him, there is no prejudice demonstrated by the Respondents that would be occasioned by the grant of such a plea.

28. It was submitted that pursuant to Article 47(1) of the Constitution, the Ex Parte Applicant is entitled to demand of and from the 1st Respondent lawful administrative action that pertains to and relates to the purported reconfiguration of the Nairobi Roads within the County Government’s jurisdictional zone. Expedition, according to the applicant, in a requirement of such administrative action, yet the ex parte applicant has shown that no time frame has been designated by the County Government within which to execute the purported works. It was contended that the public is entitled to good roads that have diversions that are lawfully made and reasonably constructed. This is a legitimate expectation of Article 47(1), entitling this Court to grant prayer 1.

29. It was submitted that the cost of Kshs. 400 million to “eliminate” roundabouts at 5 intersections to flatten the road into a box is imprudent and totally unjustified especially when the result is the usage of such money recoverable by way of taxes. To the applicant, Article 210(1) of the Constitution of Kenya prohibits such impositions not founded in law, and specifically prescribing that no fee or licensing fee may be waived, imposed, or varied, except as provided by legislation.

30. Such services expedient to execute these alterations must be conducted in a manner commensurate with open and transparent tendering which the public and the Ex Parte Applicant can have opportunity to interrogate on a case by case bases, as envisaged under Article 227(1) of the Constitution. To the applicant, as there was no material placed before the Court by the 1st Respondent Nairobi County Government to demonstrate that prayer 1 of the Motion would inflict any harm or injury in its execution of County Government infrastructural obligations, this Court ought therefore to grant the prayer.

31. While submitting on the principle of legitimate expectation, the applicant relied on Judicial Review Case No. 2 of 2014, **Kenya Country Bus Owners’ Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer & 8 others vs. Cabinet Secretary for Transport & Infrastructure & 5 Others [2014] eKLR** in which this Court held that:

“In exercising its judicial authority, this Court is enjoined by Article 159(2)(e) of the Constitution to be guided by inter alia the need to protect and promote the purpose and principles of the Constitution and one such principles is good governance. Good governance in my view dictates that the public ought not to unduly shoulder the burdens of persons whose actions are themselves contrary to their expectations.”

32. It was submitted that Parliament has spelt out the scope of the creation of diversions in the event a road is placed under repair, reconstruction or construction where motorists use such a road. No lawful diversions exist, at the points sought to be reconfigured and reconstructed by the 1st Respondent. Every Kenyan motorist using the affected intersections and roundabouts is entitled to know the specific points at which a diversion is, so as to organize their schedule and affairs in a manner that derives them the most

economic usage of fuel and time on such roads. This is not possible with the manner in which the 1st Respondent is executing the works complained of, even with no time lines indicated to the affected motorists. In the applicant's view, it is not enough for the County Government to assert that the "contract" to effect the roundabout changes has been awarded to third parties yet this is not founded on vires of the relevant statute. Prayer 1 of the Motion ought therefore be granted. In support of this position the applicant relied on the decision of **Hobhouse LJ** in the case of **Credit Suisse vs. Allerdale Borough Council [1997] QB 306**, where he stated (at 350 D-F):

"Where a statutory corporation purports to enter into a contract which it is not empowered by the relevant statute to enter into, the corporation lacks the capacity to make the supposed contract. This lack of capacity means that the document and the agreement it contains do not have effect as a legal contract. It exists in fact but not in law. It is a legal nullity. The purported contract which is in truth not a contract does not confer any legal rights on either party. Neither party can sue on it...Any third party dealing with a local authority should be aware of that fact [of limited capacity and competence] and of the potential legal risk."

33. The applicant disabused the Respondents of the notion that this Court has no jurisdiction to hear and determine this matter, merely because it was within the province of a "Task force" to so do. To the applicant, this is a Public Interested Litigation and the right to challenge before a Judicial Review Court the exercise of power remains. In this respect the applicant relied on Trinidad & Tobago case of **T & T Civil Rights Association vs. AG [2006] 3 LRC, 294** at pg 305, para c – e, where it was held in respect of a Bill that would have taken away legal rights in public interest litigation that:

"The express aim of the Bill was to remove the jurisdiction of the Court in public interest litigation...I therefore hold that the Executive cannot lawfully promote a policy which aims to remove even a limited part of the supervisory jurisdiction of the High Court. The objective of such a policy is to redefine the characteristics of the Supreme Court as contemplated by the Constitution".

34. It was the applicant's case that the allegations of the 1st Respondent's County Governor that they have engaged in what are essentially breaches of the law to protect public safety and spare the motorists expensive traffic grid locks are a bare and thin veil to breach Article 10(2) of the Constitution, which is an abuse of the 1st Respondent's powers. It was further submitted that the entire action complained of was not based on any good faith and reliance was placed on the English case of **Downes, Re Application for Judicial Review [2006] NIQB 77 (05 July 2006)**, in para 21 that:

"The duty of good faith and candour lying in a party in relation to both the bringing and defending of a judicial review application is well established. The duty imposed on public bodies and not least on central government is a very high one. That this should be so is obvious. Citizens seeking to investigate or challenge governmental decision-making start off at a serious disadvantage in that frequently they are left to speculate as to how a decision was reached. As has been said, the Executive holds the cards. If the Executive were free to cover up or withhold material or present it in a partial or partisan way the citizen's proper recourse to the court and his right to a fair hearing would be frustrated. Such a practice would engender cynicism and lack of trust in the organs of the State and be deeply damaging of the democratic process, based as it is upon trust between the governed and the government,...

A breach of the duty of candour and the failure by the Executive to give a true and comprehensive account strikes at the heart of a central tenet of public law that the court as the guardian of the legal rights of the citizen should be able to rely on the integrity of the executive arm of government to accurately, fairly and dispassionately explain its decisions and actions."

35. It was the applicant's submission that the 1st Respondent, 2nd Respondent Cabinet Secretary and the 4th, 5th and 6th Respondents owe a fiduciary duty to the motoring citizens of the Republic of Kenya using

these specific roads, and to the Ex Parte Applicant especially and in particular, have acted in bad faith and in a manner against the Public interest when they he failed to ensure that they provide the Nairobi motorists and indeed all motorists using these roundabouts with appropriately constructed diversions that are lawfully created. To the applicant, the practical reality is that with the closure of all right turns on these roads and the illegal erection of barriers on these roundabouts law abiding citizens motoring on these points have ended using longer routes, caused graver traffic grid locks while running away from this confusion and some wrongfully arrested by officers under the 1st Respondent (and even prosecuted wrongfully to their financial detriment) for taking the “wrong” courses. According to the applicant, if the 1st and 2nd Respondents were acting in good faith to rid Kenyan roads of traffic congestion that is otherwise unwarranted, then it is clear they cannot contest the plea herein made that an order of mandamus ought issue, to compel and direct the 2nd Respondent Cabinet Secretary in charge of Infrastructure and the 4th Respondent Kenya Highway Authority to forthwith remove at their cost the bumps and rumble strips erected along Thika Superhighway particularly in light of the admission by the Cabinet Secretary.

36. On lack lack of public participation, the applicant relied on **Republic vs. The Attorney General & Another ex parte Hon. Francis Chachu Ganya, Nairobi High Court (Judicial Review Division) Miscellaneous Application No. 374 of 2012**, where this Court expressed itself as follows:

“One of the issues raised in these proceedings is that the ex parte applicants were not consulted before the decision affecting them was made. It is not in dispute that under Article 10 of the Constitution the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. It is also true that under Article 10(2) of the Constitution, national values include participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised and good governance, integrity, transparency and accountability. Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate their views.”

37. It was submitted that section 11(d) of the *Urban Areas and Cities Act* envisages institutionalized active participation of the Nairobi County residents in the management of such affairs as are the subject of these proceedings, but through the County Management Board. Section 21(1)(g) vests in the County Management Board (which does not exist in the case of Nairobi County) with the power to “ensure participation of the residents in decision making, its activities and programs in accordance with the Second Schedule in the said Act. To date no such consultations were ever made with the citizenry and which amounts to abuse of power by the 1st Respondent. In this respect the applicant relied on **A.H.F.I. Training Board vs. Aylsbury Mushrooms Ltd [1972] 1 WLR 190** where it was held that:

“The essence of consultation is the communication of a genuine invitation, extended with a receptive Minister of Town and County Planning. If the invitation is once received, it matters not that it is not accepted and no advice proffered. Were it otherwise, organizations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding, there can be no consultation.”

38. The applicant therefore asserted that an order of mandamus as sought in prayer 5 of the Motion is imperative to ensure that the 1st Respondent complies with the law specified in the *Urban Areas and Cities Act* to have the Manager and Management Board in place. To him, consultation of the motoring public before such drastic actions as affect them are executed and the exploration of the alternative modes of resolving the issue at hand is a function of Article 10(2)(b) of the Constitution that engenders consultations. This was violated through and through.

39. The County Government and the CS were accused of having abused their powers and in particular the CS, as he had no power to abridge rights conferred under a statute or Articles of the Constitution without reciprocal amendments to the relevant law. The CS was further accused of acting in an arbitrary way with no time frames accorded to complete and that no legal framework was established for a forum to have him exercise the power objectively hence the function is too subjective and prone to abuse. In support of this submission the applicant relied on the **R (Bhatt Murphy) vs. Independent Assessor [2008] EWCA Civ 755** .

40. In the foregoing premises the Ex Parte Applicant urged the Court grant the Judicial Review Motion dated 20th April 2015 in terms of prayer 1, 4, 5, and 6 as prayed.

1st Respondent's Case

41. The application was opposed by the 1st respondent.

42. It was the County Government's case that the entire application herein seeks to challenge the merits of the decision of the Respondents to decongest Nairobi Metropolitan Area, comprising Nairobi City County, Kiambu County, Machakos County, Kajiado County and Muranga County, thus not propitious for judicial review remedy. It was contended that the Respondents have a Constitutional mandate to control traffic and regulate the use of County roads and National Trunk roads, including Uhuru Highway, Bunyala Road, Westlands and Langata Road.

43. The County Government therefore averred that an action of the Respondents to decongest Nairobi Metropolitan Area, is legitimate and valid, as the mandate to undertake to undertake such action derives from the Constitution itself which vests the mandate on the Respondents.

44. It was revealed that on the 21st day of October 2014, the Ministry of Transport and Infrastructure, Nairobi County, Kiambu County, Machakos County, Kajiado County and Muranga County entered into a Memorandum of Understanding to create a framework for collaboration, consultation, joint planning with a view establishing an effective Mass Rapid Transport System in Nairobi Metropolitan region comprising of Nairobi City County, Kiambu County, Machakos County, Kajiado County and Muranga County. By the said memorandum, it was recognised that:

(a) The Government of Kenya through the Ministry of Transport and Infrastructure already undertook various steps including studies and designs for the implementation of an effective Mass Rapid Transport System in Nairobi Metropolitan region;

(b) It is the mandate of the Ministry of Transport and Infrastructure to formulate national transport policy and administer the transport sector;

(c) It is the mandate of County Governments to regulate public transport within their respective counties;

(d) A transportation system that is efficient, safe, reliable and sustainable is critical to the development of Counties and the Country; and

(e) The need for collaborative efforts by both the national government and counties in the Nairobi Metropolitan region to achieve an effective Mass Rapid Transport System in the region.

45. It was the County Government's case that the collaborative efforts by the National government and counties in the Nairobi Metropolitan region to achieve an effective Mass Rapid Transport System in the region was anchored in the Constitution of Kenya, particularly at Article 189(1)(c) of the Constitution of Kenya which provides for the cooperation between the County and National Governments.

46. Pursuant to the said Memorandum of Understanding the National Government and the Counties in the

Nairobi Metropolitan Area, agreed to constitute an inter-governmental and inter-county authority known as Nairobi Metropolitan Transport Authority (NAMETA) to oversee the operation of the mass Rapid Transport System in the Nairobi Metropolitan region. It was averred that to implement the said Memorandum of understanding, including establishment of Nairobi Metropolitan Transport Authority (NAMETA), the parties to the Memorandum of understanding agreed to constitute a steering body of 8 members comprising of three members nominated by the Ministry of Transport and Infrastructure; one member appointed by Nairobi City County; one member appointed by Kiambu County; one member appointed by Machakos County; one member appointed by Kajiado County; and one member appointed by Muranga County with the secretariat being provided by Ministry of Transport and Infrastructure, while the host county would provide the Chair of the Steering body, alternating on a rotational basis.

47. It was disclosed that in terms of financing of the Mass Rapid Transport System, it was the mandate of the Steering Body agreed upon in the Memorandum of Understanding, not an exclusive duty of the Nairobi County Government as deleteriously contended by the ex Parte Applicant, to raise funds from multiple sources to finance the projects.

48. It was disclosed that pursuant to the Memorandum of Understanding between the National Government and the counties in the Nairobi Metropolitan region, in a Gazette Notice No. 1558 of 13th March 2015, the Cabinet Secretary for Transport and Infrastructure appointed a Taskforce on decongestion of Traffic in Nairobi City with the following terms of reference:

- a. To identify factors responsible for traffic congestion;
- b. To recommend corrective measures;
- c. To categories implementation of corrective actions into immediate; short term; and medium term;
- d. To Prepare cost estimate for each corrective measures;
- e. To draw implementation matrix with clear timelines apportioning responsibilities to various institutions;
- f. To oversee the implementation of the interventions identified;
- g. To monitor the impact of the interventions; and
- h. To advice the Ministry of Transport and Infrastructure and road Authorities on implementation of the identified interventions.

49. According to the County Government, section 45 of the **Kenya Roads Act** (Cap 408) empowered the Cabinet Secretary for Transport and Infrastructure to appoint the members of the Taskforce on Decongestion of Traffic in Nairobi City who upon being appointed, collected public views pursuant to advertisements carried in Newspapers of National Circulation inviting the public to submit memoranda and attend public hearings. Indeed, the taskforce held public hearings and facilitated other public consultation mechanisms through social and mainstream media television talk shows where the members throughout social and mainstream media television talk shows where the members of the Taskforce fielded questions from the public and responded to inquires from journalists on how best to decongest traffic in Nairobi City. Pursuant to the participatory public process, the taskforce identified the following as the causes of traffic jam in Nairobi City;

- a. Public Service Vehicles bus stops and termini;
- b. Flouting of traffic rules by motorist;
- c. Overstaying at bus stop;

- d. Right turning movements;
- e. Junction capacities;
- f. Uncoordinated traffic signalization;
- g. Uncontrolled licensing of Public Service Vehicles;
- h. Encroachment of road ways;
- i. Hand carts;
- j. Bumps on roads;
- k. Potholes on roads; and
- i. Unclear road signage and markings;

50. Acting on the recommendation of the Taskforce, it was averred that the Respondents closed a few roundabouts to assess the impact on traffic. More particularly, the Respondents closed roundabouts on University Way, Kenyatta Avenue, Bunyala Road, Nyayo Stadium, Westlands intersection with Uhuru Highway and Lusaka Road. Apart from that the Taskforce developed implementation matrices/ schedules of its report detailing the specific activity to be undertaken by the Respondents and the costing per item. It was contended that the Respondents duly notified the public through press conferences and mainstream media communication on the implementation of the Taskforce report which efforts to decongest traffic in Nairobi City County pursuant to the taskforce report were lauded by the residents and citizens of Nairobi City County, including the motoring public.

51. It was however discovered that because the Southern by pass was closed, most trucks used Uhuru highway and it was the closure of the Southern bypass not the few roundabouts that caused traffic on Uhuru Highway and Mombasa Road. The opening of the Southern bypass however opened the normal flow of traffic in Nairobi City County, thus the Application was overtaken by events.

52. According to the County Government, on the 13th day of April 2015, it resolved to review their decision to decongest County Roads and National Trunk Roads in Nairobi City County for greater efficiency. They accordingly opened roundabouts at University Way, Kenyatta Avenue, Bunyala Road, Nyayo Stadium and Lusaka Road hence making the flow of traffic in entire Nairobi City County is efficient. This reviewed decision of the Respondent coupled with the opening of the Southern bypass, it was averred, immensely improved the efficiency of the flow of traffic in the entire Nairobi City County, thus the Application is overtaken by events.

53. The County Government contended that the costing of decongestion of traffic program undertaken by the Respondents was done pursuant to the Taskforce Report an a Bill of Quantities submitted by a consultant to implement immediate, short term and medium term measures that would, in the long term, help achieve an effective mass Rapid Transport system in the Nairobi Metropolitan region comprising five Counties. To the County Government, the recommendations of the Taskforce that it implemented and reviewed were only the immediate ones, not the short term and medium term ones hence the cost of the implemented and reviewed recommendations was by less than Kshs, 30 Million, not the alleged Kshs. 400 Million maliciously exaggerated by the Ex parte Applicant.

54. The County Government insisted that the Respondents and the Taskforce on Decongestion of Traffic in Nairobi City duly consulted the Public in preparing and adopting a report on decongestion of Traffic in Nairobi City County and that on 9th day of March 2015, the Respondents and the Taskforce on Decongestion of Traffic in Nairobi City held a public consultative meeting at Nairobi City Hall to present a draft report of the Taskforce and to get the views of the public regarding the then intended implementation of the taskforce report. To the County Government, public consultative meeting of the 9th

day of March 2015 was attended by citizens and residents of Nairobi City County; media houses; private motorists; motorists operating Public Service Vehicles; Associations of Motorists operating Public Service Vehicles; Kenya Roads Authorities; and Parastatals. Subsequent to the public consultative forum, and having taken into account the views of the public on the decongestion programme, the County Government duly published a public notice on the revised traffic movement in Nairobi City County. The County Government however refuted the allegations that it spent Kenya Shillings 400,000,000.00 to reconfigure traffic movement on Uhuru Highway, Bunyala Road, Westlands and Langata Road and averred that it actually spent Kenya Shillings 5,519,995.00 for the project. It was therefore averred that in blatantly exaggerating the cost of reconfiguring traffic movement on Uhuru Highway, Bunyala Road, Westlands and Langata Road, it was evident that the real intention of the Ex Parte Applicant in filing this Application was not only vexatious, but also deliberately intended to blackmail the County Government where he serves Senator.

55. In the circumstances, it was the County Government's case that it is in the interest of fairness and justice that the Application be dismissed with costs to the County Government.

56. In its submissions, which were submitted by its learned counsel, **Miss Otieno**, the County Government relied on **Kenya National Examination vs. Republic ex-parte Geoffrey Gathenji Njoroge & 9 Others CA No. 266 of 1996 [1997] eKLR** with respect to the circumstances under which judicial review remedies are granted and submitted that the decision to decongest traffic in Nairobi City County is demonstrably already made, enforced and reviewed. It was disclosed that as of today, it is a matter of public knowledge that the respondents already reviewed their decision and removed the concrete barriers at Uhuru Highway, Bunyala Road, Lusaka Road and Langata Road hence judicial review orders of mandamus and prohibition are not available to the ex-parte in respect of a decision of the respondents which was already made, enforced and reviewed.

57. To the County Government, the basis for challenging of the decision of the respondents is primarily on the merits of the decision, not the process of decision making. More particularly, the Applicant's allegations that the decongestion program allegedly cost the public Kshs. 400 million; and that the respondents used concrete barriers to configure roundabouts concern merits of the decision over another, and are not efficacious grounds for granting judicial review orders sought.

58. According to the County Government, it is the legal mandate of the respondents to regulate public transport on National and county roads and relied on **Nairobi Metropolitan PSV Sacco's Union Limited & 25 others versus County of Nairobi Government & 3 others, Nairobi CA No. 42 of 2014** that it is the mandate of the 1st respondent under the provisions of the Fourth schedule, part 2, paragraph 5(a) and (c) of the Constitution, to regulate county roads and the mandate of the National Government under the provisions of the Fourth Schedule, Part 1, Paragraph 18 (a) and (b) of the Constitution to regulate National Roads.

59. While reiterating the contents the replying affidavit sworn in opposition to the application, the County Government submitted that what constitutes an effective public participation was deliberated upon by **Lenaola, J** in **Nairobi Metropolitan PSV SACCOS Union limited 7 25 Others vs. County of Nairobi & 3 Others**, (supra) at Paragraph 49 that:

“it cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. What is necessary is that the nature of the concern of different sectors of the public should be communicated to the law-maker and taken into account in formulating the regulations. In parliament this is done through the publication of a bill containing the provisions of the proposed legislation, hearings before parliamentary committees, and debates in Parliament where matters of principle raised by sectors of the public affected by the law can be contested. Where laws are made through legislative administrative action, the procedure of publishing draft regulations for comment serves this purpose. It enables people who will be effected by the proposals to make representation to the lawmaker, so that these concerns can be taken into account in deciding whether changes need to be made to the draft...this does not mean that the minister

who makes the regulations has to study thousands of pages received from the general public and respond to them. The analysis of these responses can be left to officials whose responsibility it is consider the comments received and to report to the Minister on them.”

60. The County Government argued that based on the evidence before the Court, the respondents effectively involved the public in establishing an effective Mass Rapid transport system in Nairobi Metropolitan region.

61. While denying the County Government spent Kshs 400,000,000.00 to reconfigure traffic movement on Uhuru Highway, Bunyala Road, Westlands and Langata road the County Government submitted that it is not the mandate of judicial review court to determine the cost of the decongestion program and relied on **Nairobi Metropolitan PSV SACCOS Union Limited & 25 Others vs. County of Nairobi and 3 Others**, (supra).

62. The County Government asserted that respondents followed due process of law and acted lawfully in decongesting traffic in Nairobi City County. In the circumstances, we urge you to dismiss the application with costs to the 1st respondent.

4th Respondent's Case

63. On behalf of the 4th Respondent, KENHA, the following grounds of opposition were filed:

1. The suit herein discloses no reasonable cause of action against the 4th Respondent herein and is otherwise an abuse of the due process of this honourable court.

2. The Ex parte Applicants by way of a notice of motion application dated 20th April 2015 and filed in court on the same day seeking orders that:-

a. An order of prohibition do issue prohibiting the 1st Respondent or any of the respondents herein from enforcement of the 1st respondents decision to restructure and eliminate roundabouts along University Way, Kenyatta Avenue, Haile Sellassie, Bunyala Road, Nyayo Stadium, Westlands intersecting with Uhuru Highway

b. An order of Prohibition do issue against the 1st respondent from erecting any further barriers at roundabouts on University Way, Kenyatta Avenue, Haile Sellassie, Bunyala Road, Nyayo Stadium, Westlands intersecting eith Uhuru Highway absent the meeting of all antecedent conditions of creation and establishment of ;awful diversions as prescribed by law.

c. An order of mandamus do issue compelling a directing the 1st respondent to forthwith remove at its cost all rod barriers erected on roundabouts around University Way, Kenyatta Avenue, Haile Sellassie, Bunyala Road, Nyayo Stadium, Westlands intersecting with Uhuru Highway.

d. An order of mandamus do issue compelling and directing the 2nd and 4th respondents to forthwith remove at their cost the bumps and rumble strips erected along Thika Superhighway at the “Survey Kenya” point and Homeland/Kenya Breweries point and ensure that pedestrians use footbridges along the said highway.

e. An order of mandamus do issue compelling and directing the 1st respondent appoint the Nairobi City County Management Board and the Nairobi City Manager.

3. Section 4 of the Kenya Roads Act Cap 408 Laws of Kenya providers that its functions are the constructing, upgrading,, rehabilitating and maintaining roads under its control;

controlling national roads and road reserves and access to roadside developments.

4. The authority is also tasked with implementing road policies in relation to national roads; ensuring adherence to the rules and guidelines on axle load control prescribed under the Traffic Act (Cap 403) and under any regulations under this Act; ensuring that the quality of roads works is in accordance with such standards as may be prescribed by the minister.

5. In addition, the authority is expected to act in collaboration with the ministry responsible for Transport and Police Department, overseeing the management of traffic and road safety on national roads; collecting and collating all such data related to the use of national roads as may be necessary for efficient forward planning under this Act.

6. Further, the authority is responsible for monitoring and evaluating the use of national roads; planning the development and maintenance of national roads; advising the minister on all issues relating to national roads, preparing the road works programmes for all national roads; liaising and coordinating with other road authorities in planning and on operations in respect of roads; and performing such other functions related to the implementation of this act as may be directed by the minister.

7. It is therefore clear from the foregoing that the 4th respondents mandate revolves around the constructing, upgrading, rehabilitating and maintaining of national roads only and not the control of traffic & regulation of the use of county roads.

8. The respondent further states that nowhere within its mandate are they obligated to reconfigure, manage and or administer the roundabouts of the Nairobi County urban roads.

9. Further, the 4th respondent states that the obligation to oversee the management of traffic and road safety on national roads is a duty specifically imposed in it by the Kenya Roads Act which mandate also allows it to determine measures it deems fit to improve road safety on national roads and that the applicants have not demonstrated its refusal or failure in executing its mandate doing so to warrant orders for the removal of bumps and rumble strips along Thika Road.

10. That the 4th respondent avers that it is a stranger to the contents of the ex parte applicants notice of motion application and supporting documents thereto and denies each and every allegation contained therein as though the same were set down herein and denied *seriatim*.

11. That in addition to the above the applicant does not provide particulars demonstrating any breach and/or threatened breach of the ex parte applicants rights by the 4th respondent rendering the application incompetent and an abuse of the due process of this court.

12. The foregoing notwithstanding, the 4th respondent states that it has never been notified by the applicant of his grievances to the bumps and rumble strips along Thika Road.

13. That the applicant being a Public Officer would better have served the greater public interest through first raising the issues herein with the respondents before rushing to court forcing the respondents to divert their resources from realizing their statutory mandate to defending against this law suit.

14. Reasons wherefore the 4th respondent prays that the Kenya National Highway Authority be struck out from this suit and the suit as against the 4th respondent be dismissed with the ex parte applicant condemned to pay costs of the 4th respondent for unjustifiably, frivolously and vexatiously including them in these proceedings.

5th Respondent's Case

64. The 5th Respondent, the Kenya Roads Board, on its part relied on the following grounds of opposition:

- 1. The suit herein discloses no reasonable cause of action against the 5th Respondent herein and is otherwise an abuse of the due process of this honourable court.**
- 2. The Ex parte Applicants by way of a notice of motion application dated 20th April 2015 and filed in court on the same day seeking orders that:-**
 - a. An order of prohibition do issue prohibiting the 1st Respondent or any of the respondents herein from enforcement of the 1st respondents decision to restructure and eliminate roundabouts along University Way, Kenyatta Avenue, Haile Sellassie, Bunyala Road, Nyayo Stadium, Westlands intersecting with Uhuru Highway**
 - b. An order of Prohibition do issue against the 1st respondent from erecting any further barriers at roundabouts on University Way, Kenyatta Avenue, Haile Sellasie, Bunyala Road, Nyayo Stadium, Westlands intersecting eith Uhuru Highway absent the meeting of all antecedent conditions of creation and establishment of ;awful diversions as prescribed by law.**
 - c. An order of mandamus do issue compelling a directing the 1st respondent to forthwith remove at its cost all rod barriers erected on roundabouts around University Way, Kenyatta Avenue, Haile Sellassie, Bunyala Road, Nyayo Stadium, Westlands intersecting with Uhuru Highway.**
 - d. An order of mandamus do issue compelling and directing the 2nd and 4th respondents to forthwith remove at their cost the bumps and rumble strips erected along Thika Superhighway at the "Survey Kenya" point and Homeland/Kenya Breweries point and ensure that pedestrians use footbridges along the said highway.**
 - e. An order of mandamus do issue compelling and directing the 1st respondent appoint the Nairobi City County Management Board and the Nairobi City Manager.**
- 3. The 5th Respondent is established as a statutory body corporate pursuant to Section 4 of the Kenya Roads Act of 1999 Laws of Kenya with inter alia the mandate to coordinate the optimal utilization of the Road Maintenance Levy Fund established by Section 7 of the Road Maintenance Levy Fund Act, 1993 (No 9 of 1993) to implement programmes relating to the maintenance, rehabilitating and development of the road works.**
- 4. Section 6 of the Kenya Roads Board Act further obligates the 5th respondent to manage the fund; recommend to the minister appropriate levels of road user charges, fines, penalties, levies or any sums required to be collected under the Road Maintenance Levy Fund Act, 1993 and paid into the Fund; recommend to the Minister such periodic reviews of the fuel levy as are necessary for the purposes of the Fund; and identity, quantify and recommend to the minister such other potential sources of revenue as may be available to the fund for the development, rehabilitation and maintenance of roads.**
- 5. It is therefore clear from the foregoing that the 5th respondents mandate revolves around the collection and distribution of roads maintenance levy fund and not the control of traffic & regulation of the use of county roads and national trunk roads.**
- 6. The respondent further states that nowhere within its mandate are they obligated to**

reconfigure, manage and or administer the roundabouts of the Nairobi County urban roads.

7. That the 5th respondent avers that it is a stranger to the contents of the ex parte applicants notice of motion application and supporting documents thereto and denies each and every allegation contained therein as though the same were set down herein and denied *seriatim*.

8. That in addition to the above the applicant does not provide particulars demonstrating any breach and/or threatened breach of the ex parte applicants rights by the 5th respondent rendering the application incompetent and an abuse of the due process of this court.

9. Reasons wherefore the 5th respondent prays that the Kenya National Highway Authority be struck out from this suit and the ex parte applicant condemned to pay costs of the 5th respondent for unjustifiably, frivolously and vexatiously including them in these proceedings.

65. It was submitted on behalf of the 4th and 5th Respondents, KENHA and KURA, by their learned counsel, **Mr. Agwara**, that whereas the Ex Parte Applicant herein seeks an order of prohibition against the Respondents prohibiting them from restructuring, and eliminating roundabouts along University Way, Kenyatta Avenue, Haile Selassie, Bunyala Road, Nyayo Stadium and Westlands intersecting with Uhuru Highway, the 4th Respondent herein, as established by section 3 of the **Kenya Roads Act** is mandated under section 4(2) of the Act to carry out functions that include; constructing, upgrading, rehabilitating and maintaining roads under its control, controlling national roads and road reserves and access to roadside developments. KENHA also implements road policies in relation to national roads and ensures adherence and compliance to the rules and guidelines on axle load control as prescribed under the **Traffic Act** and regulations.

66. In addition, it ensures that the quality of road works done is in accordance with such standards as may be prescribed the Minister. To this end, it is expected to work in collaboration with the Ministry responsible for transport and the Police Department, overseeing the management of traffic and road safety on national roads. It also monitors and evaluates the use of national roads, plans the development and maintenance of national roads, advises the Minister on all issues relating to national roads, prepares the road works programmes for all national roads, liaises and co-ordinates with other road authorities in planning and on all operations in respect of roads. It is also mandated to perform such other functions related to the implementation of the **Kenya Roads Act** as may be directed by the Minister.

67. It was therefore submitted that the control of traffic and regulation of the use of county roads is not within the mandate of KENHA. On the contrary, KENHA's functions are with regard to national roads and not county roads as are the subject of this suit. The same is solely within the preserve of the 6th Respondent (Kenya Urban Roads Authority) which is mandated in section 10 of the **Kenya Roads Act, 2007**.

68. With regard to the 5th Respondent (Kenya Roads Board), it was submitted that it is established by section 4 of the **Kenya Roads Board Act, 1999 (Revised 2012)** and mandated under section 6 to co-ordinate the optimal utilisation of the Roads Maintenance Levy Fund in implementation of programmes relating to the maintenance, rehabilitation and development of the road network, seek to achieve optimal efficiency and cost effectiveness in road works funded by the said Fund, manage the Fund and determine the allocation of financial resources from the Fund or from any other source required by road agencies for the maintenance, rehabilitation and development of the road network and to ensure that the allocation of funds is pegged to specific categories of roads.

69. It was submitted that from the foregoing, the **Kenya Roads Board Act** neither anticipates nor confers on the Board the mandate to restructure, or alter county roads and roundabouts. On the contrary it is charged with the overall management of the Roads Maintenance Levy Fund. Issues of reconfiguration, restructuring and/or alteration of urban roads and roundabouts are therefore not within the purview of its mandate.

70. It was therefore submitted that consideration of the facts now before court readily confirms that the 4th and 5th Respondents are not mandated to reconfigure, manage or alter urban roads and roundabouts and the Honourable Court ought to strike out this suit in as far as the same concerns the 4th and 5th Respondents.

71. According to the said Respondents, whereas the Ex Parte Applicant seeks an order of mandamus compelling the 2nd and 4th Respondent to remove at their cost the bumps and rumble strips erected along Thika Superhighway and ensure that pedestrians use footbridges along the said highway, the construction and removal of rumble strips, bumps and all other road safety features is however not within the mandate of the KENHA. On the contrary, the **National Transport and Safety Authority Act** places this responsibility on the National Transport and Safety Authority in **Section 4** which states *inter alia*;

(1) The functions of the Authority shall be to—

(a) Advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety;

(b) implement policies relating to road transport and safety;

(c) plan, manage and regulate the road transport system in accordance with the provisions of this Act;

(d) ensure the provision of safe, reliable and efficient road transport services; and

(e) administer the Act of Parliament set out in the First Schedule and any other written law.

(2) In the performance of its functions under subsection (1), the Authority shall-

(a) register and license motor vehicles;

(b) conduct motor vehicle inspections and certification;

(c) regulate public service vehicles;

(d) advise the Government on national policy with regard to road transport system;

(e) develop and implement road safety strategies;

(f) facilitate the education of the members of the public on road safety;

(g) conduct research and audits on road safety;

(h) compile inspection reports relating to traffic accidents;

(i) establish systems and procedures for, and oversee the training, testing and licensing of drivers;

(j) formulate and review the curriculum of driving schools;

(k) co-ordinate the activities of persons and organisations dealing in matters relating to road safety; and

(l) perform such other functions as may be conferred on it by the Cabinet Secretary or by any other written law.

72. It was therefore submitted that granting the order sought as prayed will therefore be in vain as KENHA does not have the necessary mandate to remove the said bumps and rumble strips. The same is only available to the National Transport and Safety Authority, which is not party to these proceedings.

73. It was submitted that this Honourable Court had previously made this observation and asked the Ex-Parte Applicant to include the ***National Transport and Safety Authority*** to these proceedings as a necessary Party which observation the Ex-parte Applicant declined to comply with but instead elected to seek these orders against the 4th and 5th Respondent who are not statutorily mandated to carry out the alleged acts. In addition to all the foregoing, it was noted that no grievances/complaints were forwarded to KENHA with regard to the said bumps and rumble strips yet the same may have been resolved amicably by relevant authorities on agreed terms. The action of the Ex Parte Applicant in rushing to court to commence this suit without first registering a complaint or seeking to understand and appreciate all the facts of the matter in effect serves to divert the much needed time and resources of the Respondents from realising their statutory mandate to defending this lawsuit.

74. It was contended that besides, rumble strips and bumps are put in place primarily to ensure the safety of drivers and other road users through the regulation of speed and not to purposely act as pedestrian crossing points. Removal of the same will therefore only act to put road users at risk. It is therefore in the public's interest that the same remain as is to regulate the speed of motorists and enhance road safety generally. It was therefore submitted that the order sought with regard to removal of bumps and rumble strips is misguided, frivolous and vexatious and that the same should not be granted by this Court otherwise public interest would have been defeated.

75. It was submitted on behalf of the 4th and 5th Respondents based on ***Black's Law Dictionary***, 9th Edition at page 251, **Tom Odhiambo Achillah T/A Achilla T.O & Co Advocates vs. Kenneth Wabwire Akide T/A Akide & Company Advocates & 3 Others [2015] eKLR** and **Drummond Jackson vs. British Medical Association [1970] 2 WLR 688** at p. 676, that the suit herein does not disclose any reasonable cause of action as against the 4th and 5th Respondents since the foregoing demonstrate that the 4th and 5th Respondents are not mandated to carry out any of the orders sought against them and that the suit as it stands does not disclose any basis for enjoining the two Respondents as none of the acts complained of by the Ex Parte Applicant are attributable to the 4th and 5th Respondents.

76. It was submitted that the suit is therefore at the risk of generating a judgment or order that is incapable of being enforced for the reason that the same would be directed at parties who do not have the requisite capacity for enforcement. To the said Respondents, the suit herein does not disclose particulars demonstrating any and/or threatened breach of the Ex Parte Applicant's rights by the 4th and 5th Respondents thereby rendering the application incompetent and an abuse of the due process of court. In support of this position the 4th and 5th Respondents relied on **Stephen Kimotho & Others vs. Attorney General & Others [2009] eKLR**, in which the case of **Anarita Karimi Njeru vs. Republic (No. 1) 1979 KLR 159** was cited.

77. It was the said Respondent's position that in any event, the Ex Parte Applicant's orders as sought are weak as against public interest since safety of all road users and resolving the long standing issue of congestion in the city is a matter of paramount importance. Therefore the public stands to suffer in case the same orders are granted as prayed.

78. In the foregoing premises this Court was urged to uphold the due process by striking out and/or removing the 4th and 5th Respondents from the suit herein and condemning the Ex Parte Applicant to pay their costs.

Determination

79. I have considered the issues raised herein.

80. As is clear from the submissions made by the ex parte applicant, following certain developments

subsequent to the commencement of these proceedings, the following are the prayers that fall for determination in this judgement:

1) THAT by way of Judicial Review, an order of prohibition do issue, prohibiting the 1st Respondent or any of the Respondents herein, and any person acting under their behest or direction, in purported enforcement of the 1st Respondent's decision to restructure specific road arteries carrying motoring traffic into and out Nairobi County to eliminate the roundabouts on University Way, Kenyatta Avenue, Haile Sellasie, Bunyala Road, Nyayo Stadium, West Lands, intersecting with Uhuru Highway, or from creating signalled intersections in lieu of the said roundabouts, absent a fully approved plan of the said changes and sufficiently created diversions of equal surface quality afforded to the Ex Parte Applicant and all road users at the stated points and road traffic signs specifically erected and physically situate at these specific points on such roads.

2) THAT by way of Judicial Review, an order of mandamus do issue, compelling and directing the 2nd Respondent and the 4th Respondent to forthwith remove at their cost the bumps and rumble strips erected along Thika Superhighway at the "Survey of Kenya" point and at Homeland/Kenya Breweries point, and they ensure that pedestrians use the provided footbridges along the said Thika Highway.

3) THAT by way of Judicial Review, an order of mandamus do issue, compelling and directing the 1st Respondent to within 30 days of the making of this Order or such period as this Honourable Court may direct, the appointment of the Nairobi City County Management Board and The Nairobi City Manager to execute the functions specified in the First Schedule of the Urban Areas and Cities Act.

81. With respect to prayer 2 above, since the relief sought is in the nature of *mandamus*, it is important for the Court to set out the principles guiding the grant of the said relief. The Court of Appeal in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR expressed itself *inter alia* as follows:

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done..."

82. In Shah vs. Attorney General (No. 3) Kampala HCCM No. 31 of 1969 [1970] EA 543 Goudie, J expressed himself, *inter alia*, as follows:

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment.”

83. It is therefore clear that for an order of *mandamus* to go forth the applicant must satisfy the Court that the Respondent has a legal duty whether statutorily or at common law which the applicant expects the Respondent to fulfil and the Respondent has failed to do so. In other words *mandamus* cannot issue against a person or authority for performance of a duty that the Respondent is not mandated or obliged to perform.

84. In this case the applicant has not referred to any specific legal provision under which the 4th Respondent is obliged to remove the bumps and rumble strips and ensure that pedestrians use footbridges along the said highway. The said Respondent however referred the Court to section 4 of the *National Transport and Safety Authority Act* which provides that:

(1) The functions of the Authority shall be to—

(a) Advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety;

(b) implement policies relating to road transport and safety;

(c) plan, manage and regulate the road transport system in accordance with the provisions of this Act;

(d) ensure the provision of safe, reliable and efficient road transport services; and

(e) administer the Act of Parliament set out in the First Schedule and any other written law.

(2) In the performance of its functions under subsection (1), the Authority shall-

(a) register and license motor vehicles;

(b) conduct motor vehicle inspections and certification;

(c) regulate public service vehicles;

(d) advise the Government on national policy with regard to road transport system;

(e) develop and implement road safety strategies;

(f) facilitate the education of the members of the public on road safety;

- (g) conduct research and audits on road safety;*
- (h) compile inspection reports relating to traffic accidents;*
- (i) establish systems and procedures for, and oversee the training, testing and licensing of drivers;*
- (j) formulate and review the curriculum of driving schools;*
- (k) co-ordinate the activities of persons and organisations dealing in matters relating to road safety; and*
- (l) perform such other functions as may be conferred on it by the Cabinet Secretary or by any other written law.*

85. Apart from the foregoing, section 10 of the *Kenya Roads Act, 2007* provides *inter alia* that:

(1) The Urban Roads Authority shall have the responsibility for the management, development, rehabilitation and maintenance of all public roads in the cities and municipalities in Kenya except where those roads are national roads.

(2) For the purposes of discharging its responsibility under subsection (1) the Authority shall have the following powers and duties -

- (a) constructing, upgrading, rehabilitating and maintaining roads under its control;***
- (b) controlling urban road reserves and access to roadside developments;***
- (c) implementing roads policies in relation to urban roads;***
- (d) ensuring adherence by motorists to the rules and guidelines on axle load control prescribed under the Traffic Act and under any regulations under this Act;***
- (e) ensuring that the quality of road works is in accordance with such standards as may be defined by the Minister;***
- (f) In collaboration with the Ministry responsible for transport and the Police Department overseeing the management of traffic and road safety on urban roads:***
- (g) monitoring and evaluating the use of urban roads;***
- (h) planning the development and maintenance of urban roads:***
- (i) collecting and collating all such data related to the use of urban roads as may be necessary for efficient forward planning under this Act***
- (j) preparing the road works programmes for all urban roads;***
- (k) liaising and co-ordinating with other road authorities in planning and on operations in respect of roads:***
- (l) advising the Minister on all issues relating to urban roads: and***
- (m) performing such other functions related to the implementation of this Act as may be directed by the Minister.***

86. What comes out clearly from the foregoing is that the body concerned with the responsibility of the management, development, rehabilitation and maintenance of all public roads in the cities and municipalities in Kenya save for national roads; and planning the development and maintenance of urban roads is the Kenya Urban Roads Authority, the 6th Respondent herein. The applicant has not made any attempt to link KENHA with the management of the urban roads.

87. It is now trite 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. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon [1972] EA 525; Warburton vs. Loveland [1831] 2 DOW & CL. (HL.) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461; Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734 and Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981.**

88. The said sections however do not confer on KENHA the mandate to restructure, or alter county roads and roundabouts. I therefore agree that issues of reconfiguration, restructuring and/or alteration of urban roads and roundabouts are not within the purview of the KENHA's mandate.

89. This Court does not issue orders of *mandamus* in vain. It is therefore upon the applicant to satisfy the Court that the 4th Respondent is lawfully enjoined or obliged to undertake what he seeks to compel the said Respondent to do. Regrettably, there is no evidence placed before me on the basis of which I can make such finding.

90. From the foregoing discourse it is clear that prayer 2 above must fail in so far as it seeks an order of *mandamus* against the 4th Respondent.

91. With respect to the 2nd Respondent, it was contended that the CS acted pursuant to section 45 of the ***Kenya Roads Act***. The said provisions provides that:

(1) The Minister shall oversee the performance of the activities of an Authority under this Act and may, in writing, give the Authority directions on matters of policy not inconsistent with the provisions of this Act.

(2) The Minister may appoint an oversight committee for purposes of subsection (1).

92. According to the Respondents, it was in the exercise of the powers conferred upon the CS pursuant to section 45(2) that the CS appointed the Task Force.

93. In my view there is no rational basis for erecting rumble strips and bumps when the authorities concerned have erected footbridges for the benefit of pedestrians. That the pedestrians avoid the use of the said conveniences can only be explained on the failure by those concerned to enforce the law or the inability of the law enforcement agencies to provide them with security while using the said footbridges. In my view the failure by the authorities to enforce the law cannot be used as an excuse for unlawful shortcuts by those in authority.

94. It is therefore my view that it is irrational for the County Government either on its own or in conjunction with the CS to erect bumps on a highway where proper mechanisms have been put in place for the pedestrians to cross the road. This does not mean that the said Respondents are no longer answerable for the safety of the pedestrians. It is upon them to ensure that pedestrians adhere to the law

and that in so doing the safety of the pedestrians are assured. This Court takes judicial notice of the fact that some of the conveniences erected for use by pedestrians have fallen into disuse and are at the mercy of criminals and marauding gangs. It is the responsibility of the executive to ensure that thoroughfares and footbridges are secure and not handed over to criminals after a lot of taxpayers money has been spent in their construction.

95. The issue however is who is under an obligation to remove the said rumble strips and bumps. As already discussed hereinabove, under section 4 of the ***National Transport and Safety Authority Act***, it is the mandate of the NTSA to implement policies relating to road transport and safety and develop and implement road safety strategies. This Court appreciates that the NTSA also perform such other functions as may be conferred on it by the Cabinet Secretary. That however is purely at the discretion of the Cabinet Secretary. I am also aware of the instances when this Court may interfere with discretionary powers. It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive the Court may interfere or intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

96. Therefore where the Minister clearly fails to exercise statutory discretion reasonably, the Court may well be entitled to intervene. In this case, I have found that the erection of rumble strips and bumps in areas where footbridges have been constructed for use by pedestrians is clearly unreasonable. In my view pursuant to Article 24(1)(e) of the Constitution, there are less restrictive means of achieving the purpose for which the said rumble strips and bumps were erected which include the strict enforcement of the rules and regulations relating to the use of the footbridges and reinforcement of security thereat, proper education of the members of the public on road safety by the NTSA, efficient monitoring of speed by use of speed gadgets among other measures.

97. It is therefore my view that the failure by the Cabinet Secretary to properly exercise his discretion is unreasonable. The question however is how far should the Court go where the exercise of discretionary power is concerned. Ordinarily, the law in such circumstances was restated in **Kenya National Examination vs. Republic ex-parte Geoffrey Gathenji Njoroge & 9 Others** (supra), that where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way. In this case however, from the material on record, which has not been controverted it is clear that the Cabinet Secretary did appreciate that the said rumble strips and bumps ought not to be in place. It would therefore serve no useful purpose to issue an order compelling the 2nd Respondent, the CS, to act without directing him in the manner of doing so. In the special circumstances of this case therefore the Court ought to issue an order which would cure the mischief.

98. With respect to prayer 1 above, it is my view that those tasked with the management of the roads in this country are obliged to ensure that there are proper road signage on our roads to inform road users about the state of the roads so as to enable the said road users to make informed decisions in good time. It must be appreciated that Article 46 of the Constitution protects the consumer rights which include the rights:

- (a) ***to goods and services of reasonable quality;***
- (b) ***to the information necessary for them to gain full benefit from goods and services;***
- (c) ***to the protection of their health, safety, and economic interests; and***
- (d) ***to compensation for loss or injury arising from defects in goods or services.***

99. Article 20(3)(a) of the Constitution enjoins this Court to develop the law to the extent that it does not give effect to a right or fundamental freedom while Article 259(2)(c) enjoins this Court to interpret the Constitution in a manner that permits the development of the law. It is therefore my view and I hold that the consumers of the services offered by the executive both at county and national level including transport services ought to enjoy to the fullest extent possible the purpose of recognising and protecting their human rights and fundamental freedoms which under Article 19(2) is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.

100. It is therefore my view that where it becomes necessary for the members of the public to be inconvenienced, the public ought to be notified in good time and an approximate period for the said inconvenience ought to be notified to the public. In my view such notification ought not to be given only once in the media but there ought to be a continuous notification or warnings by way of billboards or otherwise at places where the inconvenience is intended informing the public about the same and the period for the same. I therefore agree with the applicant that every Kenyan motorist using the affected intersections and roundabouts is entitled to know the specific points at which a diversion is, so as to organize their schedule and affairs in a manner that derives them the most economic usage of fuel and time on such roads. This is what transparency and accountability under the Constitution is all about.

101. The executive must be alive to the fact that under Article 1(3) of the Constitution it exercises delegated authority. It cannot therefore ignore the public under the pretext that it knows best the menu to serve the public. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

102. Caution must therefore be taken so that such period of inconvenience be absolutely necessary for the purposes of carrying out the said works so as not to violate Article 47 of the Constitution. Therefore adequate steps ought to be taken to minimise the said inconveniences as much as possible. As this Court held in Judicial Review Case No. 2 of 2014, **Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer & 8 Others vs. Cabinet Secretary for Transport & Infrastructure & 5 Others [2014] eKLR:**

“It would be a grave dereliction of its constitutional obligation for the State to subject its citizens from whom it acquires its legitimacy and authority to govern them to such discomfort or ordeals. This Court bears the responsibility for casting the dignity concept in the legitimate course intended by the people. It behoves this Court to signal directions of compliance by State organs, with the principles, values and prescriptions of the Constitution; and as regards the purpose and objects of the Constitution, this Court bears the legitimate charge of showing the proper course.”

103. It is my view that by way of example, where road construction is intended, preparations ought to be put in place to ensure that the pollution in form of dust and noise resulting therefrom is contained so as not to subject the users thereof or the residents thereabout to unwarranted vagaries of developments and nature.

104. It is however noteworthy that prayer 1 seeks an order of prohibition. As was held in **Kenya National Examination vs. Republic ex-parte Geoffrey Gathenji Njoroge & 9 Others** (supra):

“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... [Emphasis added].

105. It is therefore clear that for an order of prohibition to be granted, the act which is sought to be prohibited must be in contemplation of the respondent. In this case, the order of prohibition is sought to prohibit the 1st Respondent or any of the Respondents herein, and any person acting under their behest or direction, in purported enforcement of the 1st Respondent's decision to restructure specific road arteries carrying motoring traffic into and out Nairobi County to eliminate the roundabouts on University Way, Kenyatta Avenue, Haile Sellasie, Bunyala Road, Nyayo Stadium, West Lands, intersecting with Uhuru Highway, or from creating signalled intersections in lieu of the said roundabouts, absent a fully approved plan of the said changes and sufficiently created diversions of equal surface quality afforded to the Ex Parte Applicant and all road users at the stated points and road traffic signs specifically erected and physically situate at these specific points on such roads. It is clear as rightly contended by the Respondents that the decision to decongest traffic in Nairobi City County was made, enforced and reviewed in the sense that the respondents removed the concrete barriers at Uhuru Highway, Bunyala Road, Lusaka Road and Langata Road. There is no evidence that the Respondents intend to carry the said reviewed actions. In my view for an order of prohibition to issue there must be evidence of a contemplated action since such orders are not issued at large.

106. For that reason prayer 1 cannot be granted in the manner framed.

107. I agree with the applicant that those entrusted with the exercise of public power and authority cannot rely on public interest or safety in order to perpetrate breaches of the law. As this Court held in **Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer & 8 Others vs. Cabinet Secretary for Transport & Infrastructure & 5 Others** (supra):

“It is upon the government to ensure that whatever measures it takes towards the protection of Kenyans while travelling, the provisions of Article 24 of the Constitution are adhered to. Such considerations include the nature and extent of the limitation and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. It is further stipulated that the relevant provision shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.”

108. It is now trite that contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute as was held in **Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya [2014] eKLR** thus:-

“There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision.”

109. It was contended by the applicant that the closure of all right turns on these roads and the illegal erection of barriers on these roundabouts law abiding citizens motoring on these points have ended using longer routes, caused graver traffic grid locks while running away from this confusion and some wrongfully arrested by officers under the 1st Respondent (and even prosecuted wrongfully to their financial detriment) for taking the “wrong” courses. It is clear that the decision on the management of the

roads is a matter of policy. Policy matters are discretionary and as long as the discretion is not being exercised un-judiciously, the Court ought not to interfere. It is in that context that I understand the following various decisions dealing with policy decisions.

110. In **Republic vs. The Council of Legal Education ex parte James Njuguna and 14 Others, Misc Civil Case No. 137 of 2004 [2007] eKLR** it was held that:

“It would not be improper or right for the court to veto powers conferred by Parliament on a public authority or body...and for the court to substitute its own view from that of the [body] to which discretion was given except where the discretion has been improperly exercised as enumerated in the ten situations above.”

111. In other words it is not the Court’s view on the suitability of the decision that should determine whether or not the Court should interfere with the same. Where it is not shown that the decision was unreasonable, I associate myself with the decision of the Court of Appeal in **Eunice Cecilia Mwikali Maema vs. Council of Legal Education and 2 Others Civil Appeal No. 121 of 2013** that:

“...it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the Regulations.”

112. I also wish to associate myself with the decision in **Susan Mungai vs. The Council of Legal Education & 2 Others Constitutional Petition No. 152 of 2011** in which Mumbi Ngugi, J expressed herself as follows while citing with approval the case of **Republic –vs- The Council of Legal Education ex parte James Njuguna and 14 Others, Misc Civil Case No. 137 of 2004 (unreported)**:

“The decision was made on merit and this Court has no reason to intervene. The Regulations and the policy behind the rules were properly made pursuant to the Act and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the regulations...a Court of law would only be entitled to inquire into the merits of a decision in circumstances where the decision maker abused its discretion, exercised its decision for an improper purpose, acted in breach of its duty to act fairly, failed to exercise its statutory duty reasonably, acts in a manner which frustrates the purposes of the Act which gives it power to act, exercises its discretion arbitrarily or unreasonably, or where its decision is irrational or unreasonable as defined in the case of Associated Provincial Picture Houses Ltd. –v- Wednesbury Corporation [1947] 1 KB 223..”

113. It is however my view that it is one thing to say that the Court ought not to interfere with policy decisions and another to investigate the manner in which such policy decisions are arrived at. While the Court may not set about investigating the merits of the policy decisions, there is nothing barring the Court from investigating the manner and the process through which such policy was arrived at. This Court appreciates the position in the holding of the Court of Appeal in **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others, Nairobi CA No. 42 of 2014**, which affirmed that it is the mandate of the County Government under the provisions of the Fourth Schedule, Part 2, paragraph 5(a) and (c) of the Constitution, to regulate County Roads and the mandate of the National Government under the provisions of the Fourth Schedule, Part 1, paragraph 18(a) and (b) of the Constitution to regulate National Roads. The Court therefore does not doubt the powers of the County Government to decongest Nairobi Metropolitan Area, which action in my view is in principle, desirable, legitimate, valid and laudable. However, the Respondents in implementing their policy decisions geared towards the achievement of the said goal must adhere to the national values and principles of governance. Whereas, the Court does not relish the habit of interfering with policy decisions of those entrusted with the mandate of implementing the same, it is only after they comply with the relevant Constitutional and statutory provisions in implementing the policy that this Court would be barred from interfering with the decision. Article 10(1)(c) of the Constitution binds all State organs, State officers, public officers and all persons to the national values and principles of governance thereunder whenever any of them makes or implements public policy decisions.

114. Based on the aforesaid decision the Nairobi County Government cannot wriggle away from its Constitutional and Statutory obligations to regulate Nairobi County Roads by simply entering into a Memorandum of Understanding with the neighbouring counties. In other words the County Government must still retain the ultimate responsibility of managing the said roads notwithstanding any other arrangements it may enter into.

115. I therefore associate myself with the opinion of **Laws, LJ** in **R (Bhatt Murphy) vs. Independent Assessor [2008] EWCA Civ 755** in paragraph 50 of the Judgement that:

“A very broad summary of the place of legitimate expectations in public law might be expressed as follows. The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation).

If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power.”

116. However this Court cannot interfere with the exercise of discretion simply on the basis that the policy inconveniences members of the public. Development agenda on occasions necessitates public inconvenience and sometimes compulsory seizure of property by the public as happens in instances compulsory acquisition of property. What is however required is that the due process be followed where it becomes necessary that some measure of discomfort be meted to the public.

117. As regards the issue whether the cost of Kshs. 400 million to “eliminate” roundabouts *per se* is unjustified, this Court cannot in these proceedings make a determination on the fact unless it is satisfactorily shown that the use of such sum is irrational in the circumstances. The applicant has not adduced any comparable evidence on the basis of which this Court can find that the expenditure of such magnitude of the works in question is unreasonable. Whether the same was lawful is of course another issue altogether. To this extent I associate myself with the position adopted by **Lenaola, J** in **Nairobi Metropolitan PSV SACCOS Union Limited & 25 Others vs. County of Nairobi and 3 Others**, (supra) that a court:

“...cannot enter into the arena of deciding what fee is reasonable, convenient or proper to be levied. That is the exclusive jurisdiction of the 1st and 2nd Respondents. This court will only intervene if the petitioners had demonstrated that in charging the parking fees, the respondents have violated the existing law or acted in contravention of the law.”

118. It was contended by the applicant that it is perverse to spend Kshs. 400 million merely for the alterations proffered by the 1st Respondent with no transparency involved. To the applicant, Article 210(1) of the Constitution of Kenya prohibits such impositions not founded in law, and specifically prescribing that no fee or licensing fee may be waived, imposed, or varied, except as provided by legislation. In this case no County Assembly resolution to so act was passed, to his knowledge. The applicant averred that the unlawful allocation of funds by the 1st Respondent in the sum of Kshs. 400 million (Kenya Shillings 400 million) to effect the unlawful alteration of the road structures in the affected roads without the County Assembly approval, and even if such approval was ever granted (which is denied), there was no public participation to sufficiently, logistically and fully interrogate the fides, propriety and feasibility of such undertaking.

119. What I can deduce from the foregoing is that the applicant was not sure whether or not the approval

of the County Assembly was obtained before the alleged amount was expended. In **East African Community vs. Railways African Union (Kenya) and Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

120. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that:

“It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”

121. I agree that judicial review orders by their nature are serious orders with far reaching ramifications on administrative actions. The curb represented by the need for the applicant to show beyond peradventure is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers. See **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8.**

122. It is therefore my view and I hold that applications for judicial review must be based on hard facts and not speculation and conjectures. Based on the evidence presented before me I cannot possibly made a definite finding that the said sum was not approved by the Nairobi County Assembly.

123. It was contended that such services expedient to execute these alterations must be conducted in a manner commensurate with open and transparent tendering which the public and the Ex Parte Applicant can have opportunity to interrogate on a case by case bases, as envisaged under Article 227(1) of the Constitution. Pursuant to the said Article Parliament enacted the repealed ***Public Procurement and Disposals Act*** which has since been replaced by the ***Public Procurement and Asset Disposal Act***. The said pieces of legislation have elaborate provisions for challenging a process of procurement of public services. Whereas, this Court is alive to the fact that the procedure provided thereunder is not a bar to any other legal remedy, such remedy can only be resorted to where the applicant proves that the remedy provided under the Act is not appropriate for the circumstances under which the applicant finds himself. In this case, no sufficient material has been placed before me to make a determination on the matter.

124. The next issue is whether there was public participation in the process leading to the decision to decongest the City.

125. Section, 11(d) of the ***Urban Area and Cities Act*** provides that the governance and management of urban areas and cities shall be based on institutionalised active participation by its residents in the management of the urban area and city affairs. This is clearly a restatement of the principle of public participation which is one of the national values and principles of governance decreed in Article 10 of the Constitution which Article binds all State organs, State officers, public officers and all persons to the national values and principles of governance thereunder whenever any of them makes or implements public policy decisions.

126. As was held by Sachs, J in **Doctors for Life International vs. The Speaker of the National Assembly and Others [2006] ZACC 11:**

“A vibrant democracy has a qualitative and not just a quantitative dimension. Dialogue and deliberation go hand in hand. This is part of the tolerance and civility that characterise the respect for diversity the Constitution demands. Indeed, public involvement may be of special importance for those whose strongly-held views have to cede to majority opinion in the

legislature. Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy. Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections. Public involvement accordingly strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits...A long-standing, deeply entrenched and constantly evolving principle of our society has accordingly been subsumed into our constitutional order. It envisages an active, participatory democracy. All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws. An appropriate degree of principled yet flexible give-and-take will therefore enrich the quality of our democracy, help sustain its robust deliberative character and, by promoting a sense of inclusion in the national polity, promote the achievement of the goals of transformation.”

127. In an attempt to prove that there was public participation in the impugned process, the County Government averred that upon being appointed, the Task Force on Decongestion of Traffic in Nairobi City (hereinafter referred to as “the Task Force”) collected public views pursuant to advertisements carried in Newspapers of National Circulation inviting the public to submit memoranda and attend public hearings and that indeed, the taskforce held public hearings and facilitated other public consultation mechanisms through social and mainstream media television talk shows where the members of the Taskforce fielded questions from the public and responded to inquires from journalists on how best to decongest traffic in Nairobi City. To prove that this process took place the County Government exhibited copies of the audited list of participants at the Public Consultative meeting, Task Force’s presentation report, implementation matrices and the public notice on the revised traffic movement in the City and averred that pursuant to the participatory public process, the taskforce identified various causes of traffic jam in Nairobi City.

128. The principle of public participation was discussed extensively in Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR. I do not wish to reproduce that decision verbatim. I however adopt the reasoning therein in this matter. I however reiterate the Court’s position in the said case that:

“In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public *barazas* national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that...In my view to huddle a few people in a 5 star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting

constitutional and legislative threshold. Whereas the magnitude of the publicity required may depend from one action to another a one day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation.”

129. In this case, the sum total of the County Government’s case with respect to public participation based on the evidence before me is that there was a meeting of the said Task Force at which the issue of the decongestion of the City was purportedly discussed and resolutions arrived at. There is however no evidence as to how this meeting was organized. Was there a public notification inviting views on the issue or was attendance by way of “card only” as happens in private weddings? How were the stakeholders identified? From the list exhibited it is clear that a majority of those who attended were from the various media houses. What was the criteria adopted by the County Government in selecting those who were supposed to give their views? Was an alternative provided to the members of the public to send memoranda or the presentation of the views was restricted to physical attendance before the Task Force? All these are queries that beg answers.

130. In this case I am not satisfied that there was an appropriate forum availed to the members of the public at which they could adequately air their views on the proposed steps to be taken to decongest the City. The Constitution expresses the will of the people and that will must be respected at all times. Where the people provide that they ought to be consulted before decisions affecting them are made, that position must be upheld at all times and this Court will not readily listen to the argument that since a decision has been taken it would be chaotic to undo the same. This is akin to what **Mutunga, CJ&P** had in mind in Petition 23 of 2014 between **Nicholas Kiptoo Arap Korir Salat and Independent Electoral and Boundaries Commission and Others** where the learned President of the Supreme Court expressed himself as follows:

“All Courts must consider the principles and values of the rule of law, participation of the people, equity, inclusiveness, equality, human rights, transparency and accountability. This is because the four corners of due process of the law, specifically the right to be heard and the right to a fair hearing requires that both parties be heard if an issue is raised before the court in order to accord the court the opportunity to pronounce itself on the issue. The Bench majority, with greatest respect, in commenting, making a finding and a holding based on the said letter violated all these constitutional national values and principles. This action on the part of my learned sisters and brothers smacks of “judicial utado?” a worrying form of judicial impunity...In my considered opinion, this is yet another example of the Bench majority subverting an existing precedent. I have always argued that judicial officers should not even decide cases on the sole basis of an authority they dig up in the comfort of their chambers without allowing counsel to address them on the said authority. Due process is a fundamental pillar of the rule of law and our progressive constitutionalism.”

131. In my view to uphold the Respondents’ position hook, line and sinker, would amount to yielding to what I may, to rephrase **Mutunga, CJ&P**, call, **“executive utado?” a worrying form of executive impunity’**. The general position is similarly reflected in **Resley vs. The City Council of Nairobi [2006] 2 EA 311**, to the effect that:

“In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid...The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent’s statements that the Court’s role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is

one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed...If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of “chaos” and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty’s subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place.”

132. What is the option available to the Court in such circumstances? **Sachs, J** in Doctors for Life Case (supra) dealing with the available options to invalidity of the decision held:

“On the facts of this case I accordingly agree with the orders of invalidation made by Ngcobo J, subject to the terms of suspension he provides for. In doing so I do not find it necessary to come to a final conclusion on the question of whether any failure to comply with the constitutional duty to involve the public in the legislative process, must automatically and invariably invalidate all legislation that emerges from that process. It might well be that once it has been established that the legislative conduct was unreasonable in relation to public involvement, all the fruit of that process must be discarded as fatally tainted. Categorical reasoning might be unavoidable. Yet the present matter does not, in my view, require us to make a final determination on that score...New jurisprudential ground is being tilled. Both the principle of separation (and intertwining) of powers in our Constitution, and the notions underlying participatory democracy, alert one to the need for a measured and appropriate judicial response. I would prefer to leave the way open for incremental evolution on a case by case in future. The touchstone, I believe, must be the extent to which constitutional values and objectives are implicated. I fear that the virtues of participatory democracy risk being undermined if the result of automatic invalidation is that relatively minor breaches of the duty to facilitate public involvement produce a manifestly disproportionate impact on the legislative process. Hence my caution at this stage. In law as in mechanics, it is never appropriate to use a steam-roller to crack a nut.”

133. This, in my view was the position adopted in in Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 at page 305 that:

“When Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done (though in some cases it has been said that there must be “substantial compliance” with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision of the appropriate category. The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequences of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if a serious public inconvenience would be caused by holding them to be mandatory or if the Court is for any reason disinclined to interfere with the act or decision that is impugned. In a nutshell, the above principles indicate that to determine whether the legislature intended a particular provision of Statute to be mandatory, the Court must consider the whole scope and purpose of the Statute. Then to

assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act, Court must consider the protection of the provision in relation to the rights of the individual and the effect of the decision that the provision is mandatory.”

134. In other words the Court must balance between the effect of non-compliance and the nullification of the effects of such action. **Francis Bennion** in *Statutory Interpretation*, 3rd Edition at page 606, opines that:

“it is the basic principle of legal policy that law should serve the public interest. The court... should therefore strive to avoid adopting a construction which is in any way adverse to the public interest”.

135. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution while under Article 1(3)(c) sovereign power under this Constitution is delegated *inter alia* to the Judiciary and independent tribunals. Dealing with a similar provision in **Rwanyarare & Others vs. Attorney General [2003] 2 EA 664**, it was held with respect to Uganda that Judicial power is derived from the sovereign people of Uganda and is to be administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in **Konway vs. Limmer [1968] 1 All ER 874** that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

136. It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence hence it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.

137. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589**.

138. I defer the Court to the case of **East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board And Another [2007] eKLR** where the Court of Appeal set out principle of public interest;

“We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable”

139. It was submitted that section 11(d) of the *Urban Areas and Cities Act* envisages institutionalized active participation of the Nairobi County residents in the management of such affairs as are the subject of these proceedings, but through the County Management Board. Further section 21(1)(g) vests in the County Management Board (which does not exist in the case of Nairobi County) with the power to “ensure participation of the residents in decision making, its activities and programs in accordance with the Second Schedule in the said Act.

140. Section 12 of the *Urban Areas and Cities Act* provide as follows:

(1) The management of a city and municipality shall be vested in the county government and administered on its behalf by—

(a) a board constituted in accordance with section 13 or 14 of this Act;

(b) a manager appointed pursuant to section 28; and

(c) such other staff or officers as a the county public service may determine.

141. The functions of the said Board are provided for in section 20 of the same Act and as rightly pointed out by the applicant, section 21(1)(g) vests in the County Management Board (which does not exist in the case of Nairobi County) with the power to “ensure participation of the residents in decision making, its activities and programs in accordance with the Second Schedule of the said Act. The section however subjects this power to the Constitution and any other written law. Section 53 of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya provides as follows:

Where by or under a written law a board, commission, committee or similar body, whether corporate or un-incorporate, is established, then, unless a contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by—

(a) a vacancy in the membership thereof; or

(b) a defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof.

142. It is therefore clear that the mere fact that there is a vacancy in the constitution of the membership of the Board does not *ipso facto* affect its powers. However where the executive sets out to constitute a Board or Authority other than in the manner decreed by the law, such Board or Authority as constituted is illegal and its actions are a proper candidate for quashing by an order of certiorari. Similarly where the authority tasked with the constitution of a Board drags its feet in order to micro-manage the affairs Board for an unnecessarily long period, this Court will step in to bring to an end such abuse of power. As this Court held in **Republic vs. Cabinet Secretary for Ministry of Interim & Co-ordination of National Government & 2 Others Ex-Parte Patricia Olga Howson [2013] eKLR:**

“A power which is abused should be treated as a power which has not been lawfully exercised...Thus the Courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens...the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations... A public authority must not be allowed by the Court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the ex-parte Preston where he stated the principle of intervention in these terms: “I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority

in purported exercise of a power conferred by law.” The same principle was affirmed by the same Judge in the House of Lords in *Reg. vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: “Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers”. Abuse of power includes the use of power for a collateral purpose, as a set out in *ex-parte Preston*, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further, find as in the case of *R (Bibi) vs. Newham London Borough council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the Courts intervention in assuming jurisdiction and giving the necessary relief.”

143. With respect to the obligation to exercise administrative power expeditiously, Article 47(1) of the Constitution provides:

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

144. I must stress that there was a good reason why Parliament in its wisdom enacted that the cities must have boards and managers. Parliament went ahead to set out the composition of the said Boards which in my view is meant to take into account the interests of all stakeholders in the City. In so doing Parliament restated the need to take into account the constitutional principles with regard to gender equity, representation of persons with disability, youth and marginalised groups. Therefore to deliberately set out through inaction to evade compliance with this requirement necessarily calls for the Court’s intervention in order to uphold the rule of law. **Findings**

145. Having Considered the issues raised in this case I make the following findings:

1) Those tasked with the management of the roads in this country are obliged to ensure that there are proper road signage on our roads to inform road users about the state of the roads so as to enable the said road users to make informed decisions in good time.

2) There is no rational basis for erecting rumble strips and bumps when the authorities concerned have erected footbridges for the benefit of the pedestrians.

3) It is the responsibility of the executive to ensure that thoroughfares and footbridges are used and are secure.

4) Where it becomes necessary for the members of the public to be inconvenienced, the public ought to be notified in good time and an approximate period for the said inconvenience ought to be stated. However caution must be taken so that such period of inconvenience be absolutely necessary for the purposes of carrying out the said works so as not to violate Article 47 of the Constitution and in the meantime, adequate steps ought to be taken to minimise the said inconveniences as much as possible.

5) There is no sufficient material on the basis of which this Court can find that the expenses incurred in respect of the decongestion programme was not approved and was unreasonable.

6) The 1st Respondent, the Nairobi County Government has failed to carry out its statutory

obligation of constituting the Management Board and the appointment of the mangers.

7) There was no public participation before the decision was made to decongest the City. However to reverse the effects of what has been taken would cause more harm to the public than the effects of the failure to comply with the law.

8) The 4th Respondent is not under a legal obligation to remove the offending rumble strips and bumps.

9) The 1st Respondent, the Nairobi County City Government in conjunction with the 2nd Respondent, the Cabinet Secretary for Transport & Infrastructure are obliged to facilitate the removal of the said rumble strips and bumps.Order

146. In the result I make the following orders:

1) An order of mandamus do issue, compelling and directing the 1st Respondent in conjunction with the 2nd Respondent to within 60 days remove at their cost the bumps and rumble strips erected along Thika Superhighway at the “Survey of Kenya” point and at Homeland/Kenya Breweries point, and ensure that pedestrians use the provided footbridges along the said Thika Highway.

2) An order of mandamus compelling and directing the 1st Respondent to within 60 days of this Order facilitate appointment of the Nairobi City County Management Board and The Nairobi City Manager to execute the functions specified in the First Schedule of the Urban Areas and Cities Act.

147. With respect to the issue of costs, these proceedings were commenced by the ex parte applicant both in his personal capacity and in his capacity as the Senator of Nairobi County. This was clearly public interest litigation. I however commend the Petitioner for taking the bold step as required of him both as a Senator and by virtue of Article 3(1) of the Constitution to protect and uphold the Constitution and the Rule of Law. Taking all those factors into consideration as well as the fact that the application has not been wholly successful, each party will bear own costs of these proceedings.

148. Those shall be the orders of the Court.

Dated at Nairobi this 7th day of February, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kinyanjui for the ex parte applicant

Miss Otieno for the 1st Respondent

Mr Agwara for the 3rd and 4th Respondents

CA Mwangi