



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 211 OF 2017

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS FOR
ORDERS OF CERTIORARI & PROHIBITION**

AND

**IN THE MATTER OF THE NATIONAL TRANSPORT AND AUTHORITY ACT, (ACT NO. 33
OF 2012)**

AND

IN THE MATTER OF THE FAIR ADMINISTRATION ACTION ACT, 2015

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

STARWAYS EXPRESS LIMITED.....APPLICANT

VERSUS

THE NATIONAL TRANSPORT & SAFETY AUTHORITY1ST RESPONDENT

THE TRAFFIC COMMANDANT.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

(On exemption under section 9(4) of the Fair Administrative Action Act, 2015)

1. For determination is the applicant's application by way of notice of motion dated 3rd May 2017 seeking from this court orders that the court do grant leave to the applicant to lodge Judicial Review proceedings pursuant to Section 11 of the Fair Administrative Action Act, 2015 notwithstanding that the applicant has not pursued an appeal to the Transport Licencing Appeals Board for special reasons stated by the applicant; that upon grant of such leave, the process filed herewith for the court to form it is opinion on the justification of the order sought in prayer 3 above be deemed as properly filed

under Section 9(4) of the Fair Administrative Action Act, 2015, upon payment of the necessary court fees and prosecuted henceforth; and that costs be in the cause.

2. The motion is brought under the provisions of Section 9(4) of the Fair Administrative Action Act, 2015, Article 48 of the Constitution of Kenya, and the inherent powers of the court.

3. The applicant has listed what is considered to be special circumstances warranting invocation of Section 9(4) of the Fair Administrative Action Act, 2015.

4. The application is also supported by the applicant's supporting affidavit sworn by Ali Mohammed Abubakar who is a Director of the applicant company.

5. According to the applicant, its members operate 47 Public Service Vehicles/buses plying the long distance route of Nairobi- Mombasa Malindi and by letter dated 28th April 2017 purportedly from the 1st respondent's Director General, all the buses have been ordered grounded at a speed of 97 kilometers per hour.

6. That the applicant's members are servicing bank loans for the 47 buses and that although one was involved in a road accident, it is harsh and disproportionate to order the grounding of all the 46 buses minus one which was involved in the accident.

7. Further, that the appeal process with National Transport and Safety Authority involves administrative procedures which take a minimum of 14 days, and that any delay in disposing off the dispute will occasion financial haemorrhage and cripple the applicant's members operating 42 unaffected buses.

8. That punishing 46 buses amounts to collective punishment not envisaged in the Constitution and that their grounding will lead to the liquidation of the said members.

9. That the applicant was never given fair hearing before adverse action was taken against them by the 1st respondent and that the said actions violates Section 4 of the Fair Administrative Action Act, 2016.

10. That there is no justification for grounding 46 buses when only 5 buses are said to be on the offensive, as per the letter of 28th April, 2017.

11. That moreso, the impugned letter was signed by one Leparan C. Tialal, yet he is not the Director General of National Transport and Safety Authority, contrary to Section 7(2)(g) of the Fair Administrative Action Act which Section outlaws such an act since it is an act acted on the direction of a person not authorized or empowered by any written law to give such directions.

12. That the National Transport and Safety Authority Act does not sub-delegate such drastic action by a non gazetted appointed officer of the National Transport and Safety Authority, rendering the act amenable to Judicial Review as opposed to an appeal hence this plea.

13. That an appeal will take long to be heard and determined, to the financial detriment of the applicant's members and that the applicants' over 2000 employees will lose employment and livelihoods unless this court intervenes.

14. That the suspension of the Road Service Licences of the entire 47 Public Service Vehicles of the applicants violated Article 47(2) of the Constitution as no reasons have been given to the bus owners and in writing for the said blanket action by the 1st respondent.

15. That the collective punishment is offensive to Article 33 of the Fourth Geneva Convention, to which Kenya is a party.

16. The applicant however, does not seek exemption of the 5 allegedly offensive vehicles to scrutiny of the National Transport and Safety Authority.

17. The applicant annexed its Certificate of Incorporation and the impugned letter of 28th April 2017 suspending the operations of the applicant's vehicles until certain conditions are met.

18. The 1st respondent filed grounds of opposition and notice of preliminary objection dated 8th May 2017 contending that the application is fatally defective, does not lie in law and or fact and is an abuse of the due process of the court.

19. That on 28th April 2017 the authority invited the applicant for a meeting to discuss the non compliance with the National Transport and Safety Authority Act and Regulations culminating in the accident of 28th April 2017 at Kalulu Mtito Andei where 27 innocent passengers died but the applicant refused to accept the proposals to have all its vehicles inspected hence the temporary suspension of the operations of the vehicles until the conditions imposed are fulfilled to determine road worthiness of the fleet and that 5 vehicles were found to be unroadworthy contrary to Section 34(1) (a) of the National Transport and Safety Authority Act.

20. That to allow the operations of the fleet would defeat the purposes of the National Transport and Safety Authority Act and Regulations and that the applicant has been unable to manage its members hence the decision to revoke the licences was for the public interest and safety of passengers and taken in good faith to save many lives as opposed to promoting commercial interests of the applicant.

21. That the suspension of operations was a temporary inconvenience that cannot be equated to the health and lives of passengers who perish hence the 1st respondent should be left to do its job to ensure road safety and reduce road carnage.

22. In the preliminary objection notice, the 1st respondent contends that this court lacks jurisdiction to entertain the application by virtue of express provisions of Section 9(2) of the Fair Administrative Action Act as read with Sections 38(1) (c) and 39 of the National Transport and Safety Authority Act, 2012; That the application seeks to restrain the 1st respondent from carrying out its lawful mandate as stipulated under Sections 4,29,30 and 34 of the National Transport and Safety Authority Act and that the application is vexatious, frivolous and premature and an abuse of the court process.

23. As the application was certified urgent on 4th May 2017, the applicant dutifully served the respondents and on 10th May 2017 the application was canvassed orally between the applicant and 1st respondent before me.

24. According to the applicant through Mr H. Kinyanjui advocate, it was submitted that Section 9(4) of the Fair Administrative Action Act is to be applied on a case by case basis and is intended to ameliorate the loss and suffering of parties, in furtherance of Article 48 of the Constitution. That the applicants stand to lose heavily as they have taken loans which they are servicing and that the respondents will in no way be prejudiced if the orders of leave sought are granted and Judicial Review instituted. That the 1st respondents decision is irrational, illegal and unconstitutional in that the 1st respondent has refused to isolate the offenders and instead collectively punished the applicants.

25. In opposition, Mr Agwara counsel for the 1st respondent submitted that Section 9(2) of the Fair Administrative Action Act is clear that a party must exhaust available remedies and only in exceptional circumstances would the court hear by way of Judicial Review. That exceptional circumstances must be looked at in light of facts of the case and that the court must determine whether the tribunal must hear and determine the dispute.

26. That the suspension of operations of the buses was done in the public interest for the applicant to comply with the law and that there is no evidence of loans and losses. That Article 159(2) of the

Constitution is clear on Alternative Dispute Resolution Mechanisms hence the matter should first be exhausted by the tribunal, and that in any event, the suspension was only temporary.

27. Counsel for the 1st respondent urged the court to safeguard public interest and lives as there is no allegation of delay on the part of the tribunal in considering the appeal if filed.

28. On the part of the 2nd and 3rd respondents, Miss Ngelechei associated herself with the submissions by Mr Agwara albeit she had not filed any response in writing.

29. In a brief rejoinder, Mr Kinyanjui submitted that the applicants had demonstrated loss occasioned by the suspension of the applicant's vehicles operations which letter of suspension is not signed by the Director General.

30. Further, that the Principles of Article 10(2)(b) of the Constitution on proportionality bind the 1st respondent as there are innocent vehicles affected by the blanket collective suspension of the fleet operated by the applicant. Counsel urged the court to grant the prayers sought.

DETERMINATION.

31. I have considered the foregoing and in my humble view, the main question to be answered in these proceedings is whether the application for leave under Section 9(4) of the Fair Administrative Action Act, 2015 to exempt the applicant from exhausting alternative remedy or pursuing its remedy through an established forum which is an appeal to the Transport Licencing Appeals Board is merited.

32. Article 165(b) of the Constitution vests in the High Court supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi judicial function but not over a superior court.

33. The above is the jurisdiction which the applicant herein wishes to invoke to seek leave of court to quash the decision of the 1st respondent. The applicant claims that the 1st respondent unilaterally and unreasonably suspended its fleet of vehicles from operating long distance travels because of one accident that claimed 27 lives and 5 vehicles out of its 47 vehicles being found to have been defective. That the 1st respondent's decision was illegal and amounted to collective punishment hence the decision should be subjected to Judicial Review proceedings and not an appeal to the Transport Licencing Appeals Board owing to the urgency of the matter such that any delay in the determination of the matter will occasion more financial haemorrhage and economic loss to the applicants and over 2000 employee's livelihoods.

34. The 1st respondent on the other hand maintains that the Transport Licencing Appeals Board is the right avenue for considering any appeals regarding the suspension of Public Services Licences (PSL) since the Board is a specialized body of experts in handling such disputes as contemplated in the National Transport and Safety Authority Act.

35. Further, that no special circumstances have been demonstrated from the facts, to warrant exemption from the exhausting available legal mechanisms as stipulated in Article 159(2) (e) of the Constitution which commands the courts in exercising judicial authority, to be guided by the principle that alternative Dispute Resolution Mechanisms including reconciliation, mediation, arbitration mechanisms shall be promoted, subject to clause 3.

36. According to the 1st respondent, the suspension of the fleet is in the public interest for public safety and preservation of lives and that it is a temporary measure subject to the applicant meeting the set conditions of subjecting all its vehicles for inspection on their road worthiness and retesting of their drivers but which the applicant refused.

37. Article 47 (1) of the Constitution stipulates that every person has the right to administrative action

that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-

a) Provide for the review of administrative action by a court or, if appropriate an independent and impartial tribunal; and

b) Promote efficient administration.

38. Under Article 50(1) of the Constitution, ***every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

39. Section 34 of the National Transport and Safety Authority Act confers on the Authority- 1st respondent herein, the power to revoke licences or suspend them where the licence, inter alia, fails to comply with a condition for the issuance of the licence or (b) fails to operate the motor vehicle with respect to which the licence is issued for a period of three months during the period for which the licence is issued. And where the Authority revokes or suspends the licence it shall, at the request of the licensee give reasons for such revocation or suspension, in writing.

40. In this case, the letter of 28th April 2017 which is impugned herein only suspended the operations of the fleet and directed the applicant to submit its vehicles for inspection as to their road worthiness in order to safeguard the safety of the passengers and to retest their drivers including their eye sight following a fatal road accident on 25th April 2017 at Kalulu bridge near Mito Andei where 27 passengers died.

41. There is no indication that the applicant complied with the two conditions given by the 1st respondent and there is no allegation that the applicant is incapable of complying with the said conditions or that the said conditions are illegal or irrational or unreasonable in the circumstances of the case.

42. There is also nothing to show that the applicants sought for reasons for the suspension of the fleet and were denied, as such reasons are clearly spelt out in the letter of 28th April 2017.

43. Albeit there is a claim that the suspension of the operations of the vehicles was indefinite, the impugned letter is clear that the suspension was to enable the applicant comply with the two conditions and the 1st respondent Authority even offered to assist the applicant to comply with the conditions to enable the applicant resume its normal operations.

44. The 1st respondent had more serious options stipulated in Section 34 (3) (4) of the National Transport and Safety Authority Act including that of expunging the vehicles from the licence but it did not invoke that option. The suspension of the operations of the applicant's vehicles, in my humble understanding was temporary and the applicant instead of complying as directed, on 4th May 2017, five days later, was in court seeking leave to apply for exemption from following the procedure laid down under the National Transport and Safety Authority Act for challenging the decision of the Authority.

45. Section 39 of the National Transport and Safety Authority Act establishes the Transport Licencing Appeals Board. Under Section 38 of the Act, a person who being a licensee is aggrieved by the revocation or suspension of a licence may, within the time and in a manner prescribed appeal to the Appeals Board established under Section 39 of the Act.

46. According to the applicant, there are special circumstances warranting exemption from appealing to the Appeals Board under the Act, and that it will take long to determine the Appeal thereby occasioning it and its employees economic hardship as there will be loss of livelihoods and the owners of buses could be liquidated due to the hefty loan that they are servicing. It is for that reason that the applicant seeks by this application as stipulated in Section 9(4) of the Fair Administrative Action Act, 2015 which implements Article 47(1) of the Constitution, to be exempted from exhausting the appeal mechanisms provided for under the National Transport and Safety Authority Act.

47. Section 9(2), 3 and (4) of the Fair Administrative Action Act, 2015 stipulates that:

(2) The High Court or a subordinate court under Subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted;

(3) The High Court or a subordinate court shall, if not satisfied that the remedies referred to in Subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under Subsection (1)

(4) Notwithstanding Subsection (3), the High Court or a subordinate court may in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

48. In this case, the applicant's first port of call is the appeals mechanisms stipulated under Section 38 of the National Transport and Safety Authority Act unless it is demonstrated that the Appeals Board shall not provide an efficacious remedy or that such remedy cannot be availed without undue delay or hardship.

49. The position espoused above is not new. It was articulated in **Republic vs National Environment Management Authority [2011] e KLR** where it was held that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for Judicial Review would be granted. The Court of Appeal observed as follows after examining several decisions:

“The principles running through these cases is where there was an alternative remedy and especially when parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it has necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. See for example Republic v Birmingham City Council ex parte Fenero Ltd case. The learned judge, in our respectful view, considered these structures and came to the conclusion that the appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute, with respect, we agree with the judge.”

50. The above decision followed /applied earlier decisions such as speaker of the **Speaker of the National Assembly vs Njenga Karume 2008] 1 KLR 425** and later in **Revital Health care(EPZ) Ltd & Another V Ministry of Health & 5 Others [2015] e KLR page 10** where Emukule J (as he then was) citing **Damian Belfonte V Attorney General of Trinidad and Tabago C.A. 84/2014** held:

“.....where there is a parallel remedy, constitutional relief should not be sought unless

the circumstances of which the complaint is made include some feature which makes it appropriate to take that course.

As general rule, there must be some feature, which at least arguably indicates that the means of least redress otherwise available would not be adequate.

To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the court's process."

51. In the instant case, there is a power conferred upon the 1st respondent under Section 34 of the Act, that of suspending the licence or even revoking it and circumstances under which that can be done as set out.

52. The Act also specifically provides for a specific remedy for an aggrieved licence by way of an appeal to the Appeals Board which Board, it has not been suggested, that it is inoperational or incapable of resolving the impasse and more so, as to whether the applicant should comply with the conditions set out in the suspension letter prior to resuming fleet operations or not.

53. That, in my view, should be the approach to take since the 1st respondent did provide reasons for the suspension of operations as stipulated in Section 34(3) of National Transport and Safety Act and Section 4 of the Fair Administrative Action Act, 2015.

54. The Appeals to the Appeals Board is an alternative forum contemplated in Article 159(2) (c) of the Constitution which courts and Tribunals are commanded to promote, especially where like in this case, it has not been demonstrated that the alternative mode of dispute resolution is inconsistent with the Constitution in particular, Articles 22 and 23 of the Constitution.

55. The applicant has not demonstrated that it will not get justice before the Appeals Board, for this court to find in its favour, that its in the interest of justice that an exemption be granted.

56. On the issue of delay in appeal, the court notes that the Appeals Board being a specialized body comprising experts in the road transport sector is best placed to consider and determine disputes between the Authority and Licensees upon which an aggrieved party can/may approach the court. There is absolutely no evidence or guarantee that the court is likely to conclude the dispute between these parties much faster through Judicial Review procedure as there are no time lines set in law for the determination of such disputes and even if there were such timelines, the courts are overloaded with a variety of disputes, compared to the available human resource capacity to consider and determine those disputes.

57. As an example, for nearly two months now, the Judicial Review Division of the High Court at Nairobi has been operating at half capacity of one judge who, besides the pending work, receives nearly 10 new cases for consideration on a daily basis. It is therefore my humble view that in the circumstances of this case, Judicial review would not be an appropriate avenue and remedy for the applicant and therefore an exemption from exhausting a statutory remedy of Appeal to the Appeals Board as stipulated in Section 38 of the National Transport and Safety Authority Act is not a viable option for the applicant.

58. In **Nasieku Tarayia V Board of Directors, AFC & another [2012] e KLR** the court held that Judicial Review is an alternative remedy of last resort and where alternative remedy exists, the court has to be satisfied that Judicial Review is the most efficacious, beneficial, convenient alternative remedy available for the court to grant.

59. As was observed by Mwera J.(as he then was) in **Safmarine Container N.V. of Antwerp vs Kenya Ports Authority Mombasa High Court Civil Case No. 263 of 2010**, courts and Tribunals cannot be said to be promoting alternative dispute resolution mechanisms espoused in Article 159(2) (c) of the Constitution when they readily entertain disputes which ought to be resolved in

other legal fora. (see also **Dickson Mukweluine vs Attorney General & 4 Others Nairobi HCC Petition No. 390/2012.**

60. I wholly ascribe to the principle that where there is an alternative remedy and procedure available for the resolution of the dispute, unless there are exceptional circumstances to warrant a departure, that remedy ought to be pursued and the procedure adhered to. This is because Parliament had good reasons for establishing. Such alternative processes for specific purposes of realizing, promoting and protecting certain rights.

61. In addition, I am of the view that even in cases where the alternative remedy is in addition to the right to access the court, courts ought not to interpret the provisions of the statute in such a manner as to render the provisions for alternative remedy illusory as that would defeat the whole purpose for making provisions for alternative remedies.

62. Therefore, where the alternative route does not necessarily lock out judicial process, the alternative remedies being a route provided under the relevant Act of Parliament ought to be adhered to unless circumstances militate against that route. Such circumstances would be such as where the alternative procedure is manifestly illusory with a result that it is practically a mirage and therefore would or is likely to negate the right to a fair hearing guaranteed under Article 50(1) of the Constitution. That is not the case here.

63. The applicant has not demonstrated that it shall be denied justice if its grievance is ventilated before the Appeals Board.

64. Accordingly, and for the above reasons, I find and hold that the applicant's application for exemption from exhausting the alternative remedy provided for under section 39 of the NTSA Act is not merited. I decline to allow the application for exemption and dismiss it. The applicant is at liberty to pursue the alternative remedy of Appeal before the Appeals Board as contemplated in Section 38 of the National Transport and Safety Authority Act.

65. I order that each party shall bear their own costs of this application.

Dated, signed and delivered in open court at Nairobi this 11th day of May 2017.

R. E. ABURILI

JUDGE

In the presence of:

Mr H. Kinyanjui for the Applicant

Miss Ngelechei h/b for Odhiambo for the 2nd and 3rd Respondents

Mr Agwara for the 1st Respondent

CA: Mohamed