



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI LAW COURTS)**

**JUDICIAL REVIEW NO. 341 OF 2014**

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

**BETWEEN**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**NAIROBI CITY COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY GOVERNMENT EXECUTIVE  
COMMITTEE MEMBER, ROADS, PUBLIC**

**WORKS AND TRANSPORT.....2<sup>ND</sup> RESPONDENT**

**AND**

**TRIPLE S SERVICES CO. LTD.....INTERESTED PARTY**

***EX-PARTE:* NUCLEUR INVESTMENTS LTD.....1<sup>ST</sup> APPLICANT**

**ZIPPORAH WANGARI KIMANI**

**t/a JAMAA GROCERS.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. The *ex parte* applicants herein, **Nucleur Investments Ltd**, and **Zipporah Wangari Kimani T/A Jamaa Grocers** moved this Court by way of a Notice of Motion dated 11<sup>th</sup> September, 2014 seeking the following orders:

**1) THAT by way of Judicial Review, an order of certiorari do issue, to remove to this Honourable Court for purposes of being quashed, and to quash, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' decision to allocate an unauthorized loading zone to the Interested Party as expressed in the**

**2<sup>nd</sup> Respondent's letter dated 14<sup>th</sup> August 2014 for being ultra vires and unconstitutional.**

**2) THAT by way of Judicial Review, an order of prohibition do issue, prohibiting the Respondents from deliberating, acting upon, taking any proceedings, issuing any directive or directives, or doing anything in any manner effecting and/or enforcing any aspect of the decision contained in the letter dated 14<sup>th</sup> August 2014.**

**3) THAT by way of Judicial Review, an order of mandamus do issue, compelling the Respondents to annul and revoke the allocation of the 2 loading zones that are Passenger picking and dropping of bays to the Interested Party outside the 2<sup>nd</sup> Applicant's shop on L. R. No.209/136/18.**

**4) THAT the costs be to the Applicants in any event.**

### **Ex Parte Applicant's Case**

2. The application is supported by a statement of facts and a verifying affidavit filed on 10<sup>th</sup> September, 2014.

3. According to the applicants, 1<sup>st</sup> Applicant is a duly incorporated limited liability company under the **Companies Act** and is duly authorized and permitted to conduct P.S.V business as per the memorandum & Articles of Association. It has 36 duly registered shareholders and has entered into franchise Agreements with other P.S.V. operators so that the total P.S.V vehicles under the 1<sup>st</sup> Applicant are 376 vehicles.

4. According to them, all the licences due for the operation of the 1<sup>st</sup> Applicant from the junction of Cross Road and Mwimbi Road on L. R. 209/136/20 where our booking office is (sic).

5. It was contended that based on information obtained from **Hon. Mr. Alex ole Magelo** that one **Stephen Mwangi Karitu**, aka "*Wariire*", went to the 1<sup>st</sup> Respondent's County Assembly Speaker **Hon. Magelo** and purported to impersonate the Applicants' Chairman in need of "further parking space" for the 1<sup>st</sup> *Ex parte* Applicant, for 2 parking slots in addition to the existing slots and while misrepresenting to the 1<sup>st</sup> Respondent and acting in cahoots with the 2<sup>nd</sup> Respondent purported to be part of the Applicants' group so that he could secure space for his vehicles in the Interested Party to unfairly compete with the Applicants.

6. It was the Applicants' case had the 2<sup>nd</sup> Respondent accorded them a fair hearing prior to the impugned decision, they would have unmasked the Interested Party's said agent and servant **Stephen Mwangi Karitu**, and demonstrated his true intent and character. Thus the Interested Party was able to unlawfully secure these 2 unwarranted "loading zones" through misrepresentation and unlawful action, thus tainting the decision with illegality.

7. It was contended that the Interested Party has only 8 PSV vehicles that ply the Nyahururu-Nairobi route and it is unfair for the Respondents to oppress the Applicants to grant the loading zones disproportionately as against the Applicants' over 300 vehicles using 4 slots. In their view, the sudden, draconian and arbitrary decision to allocate a "loading zone" to the Interested Party as contained in the letter of the 2<sup>nd</sup> Respondent dated 14<sup>th</sup> August 2014 and the subsequent purported enforcement thereof without the Applicants' participation, especially the 2<sup>nd</sup> Ex-parte Applicant whose business stands to be decimated, literally closed off, denies and deprives them of the opportunity of the protection of the law through valid objections prior to the allocation of the stated loading zones. It was averred that no opportunity was accorded to them via public participation over the making of the impugned decision for them to demonstrate that the allocation of loading zone to the Interested Party as complained of herein amounted to an administrative action within the scope of Article 47(1) of the Constitution.

8. On the other hand, the 2<sup>nd</sup> *Ex parte* Applicant had on many previous occasions sought the allocation of a loading zone by the 1<sup>st</sup> Respondent outside her shop on Mwimbi Road on L. R. 209/136/18 (which has now been unlawfully allocated to the Interested Party), to no avail. Instead the 1<sup>st</sup> Respondent irrationally and without any notification or communication to her that her application for the said particular zone had been rejected proceeded to allocate the same to the Interested Party.

9. The applicants contended that they were entitled to be treated fairly in the circumstances, which they had not, hence the arising decision is illegal and unconstitutional. At the time of the secretive allocation of the 2 loading zones to the Interested Party, the applicants were and remained validly licensed to conduct and execute lawful picking and dropping of passengers at the designated loading bay as such PSV operators since the 1<sup>st</sup> Respondent Nairobi City County Government licensed them in consideration of the payment of the requisite fee and such licenses are still operative.

10. It was therefore contended that the right to be consulted as the resultant decision to allocate the loading zones in question by the impugned letter to not merely a competitor but an offshoot of their company was a violation of a fair administrative decision.

11. Due to the frosty relationship between the Applicants and the interested party, the Applicants contended that had the 2<sup>nd</sup> Respondent been made aware of the same, the Applicants could have ably shown and demonstrated to the 2<sup>nd</sup> Respondent that the resultant presence of the Interested Party's vehicles to the 1<sup>st</sup> Applicant's long held passenger boarding area was not healthy and could not augur well for a peaceful conduct of the business. In the end, the Respondents thereby illegally and unconstitutionally made a decision whose effect is to negatively impact the *Ex parte* Applicants' business in a manner injurious to them and not envisaged under Article 47(1) of the Constitution.

12. According to the Applicants, the 1<sup>st</sup> Respondent is vested with statutory power to make Regulations and by-laws under the **County Governments Act**, and the **Urban Areas and Cities Act** such as are questioned herein, yet the management and conduct of the matters germane to public service vehicles and parking in the Nairobi City County is the statutory province of the Nairobi City County Board as specified in the **Urban Areas Act under which** pursuant to Section 20(1)(d), the Nairobi City County Board is tasked, inter alia, with the object of controlling land use and zoning for purposes of "...public transport", such as engaged in by the 1<sup>st</sup> *Ex parte* Applicants herein. It was therefore the Applicants' position that the 2<sup>nd</sup> Respondent has no such power as purported to be exercised to the detriment of the applicants as impugned. Therefore, according to the Applicants, the Nairobi City County Board is the primary entity envisaged to regulate the parking and loading bays and levies arising thereby including such levies imposed on the 1<sup>st</sup> Applicant and all its members in the City of Nairobi and such specified per-urban areas hence the Nairobi City County Board is the proper party to monitor the impact and effectiveness of [parking] services..." by the Nairobi County Government, and certainly not the 2<sup>nd</sup> Respondent as has now happened.

13. It was contended that since by a letter dated 18<sup>th</sup> June 2012 the 1<sup>st</sup> Respondent's Engineer **S. K. Mburu** had squarely addressed the Interested Party's similar application and stated that "the Council does not allocate picking and dropping points to any operator, by resiling from this position and acting adversely to the interests of the *Ex Pate* Applicants', the Respondents violated the doctrine of estoppel and acted illegally.

14. The Applicants lamented that in the face of the foregoing, the *Ex parte* Applicants and the 1<sup>st</sup> Applicant's members are left without recourse to the protection of the law should this Court not intervene as herein sought, as the Inspectorate Department and Engineering Officers of the 1<sup>st</sup> Respondent are now misusing and exploiting the allocated "loading zones" to the Interested Party to harass, intimidate, and may altogether clamp down and possibly detain unlawfully the *Ex parte* Applicant's members' vehicles not complying with the directive issued by the 2<sup>nd</sup> Respondent. In effecting their threats, the 1<sup>st</sup> Respondent sent its breakdowns on September 9<sup>th</sup> 2014 who then towed away the Applicants' 11 seater

shuttle PSV vans KBW 690H Toyota Hiace, KAX 095V, Toyota Hiace (plying the City County Nairobi-Nyahururu/Samburu County), and took them to their “storage yard”.

### **Interested Party’s Case**

15. In opposition to the application, the Interested Party filed a replying affidavit sworn on 5<sup>th</sup> November, 2015.

16. According to him, interested party is a registered business providing public transport along various routes within the Republic and its members have got Thirty Eight (38) motor vehicles plying different routes within the Republic which vehicles were all bought through financiers an indication that the interested party is a young company trying to build itself.

17. According to the interested party, it is entitled to all rights and privileges accorded to any other public transport companies in the republic by any authority, to be specific and in the context herein, the interested party had a right to apply for the two loading bays granted to them by the 1<sup>st</sup> Respondent. Accordingly, vide a letter dated 19<sup>th</sup> July 2014, the interested party applied to the 1<sup>st</sup> Respondent for the allocation of two loading bays and through the 1<sup>st</sup> Respondents letter dated 14<sup>th</sup> August 2014 the application was to be approved subject to meeting the stipulated conditions. After the approval and meeting all the conditions as stipulated, the interested party was required to pay a sum of Kshs.440,000/= which it did.

18. However after learning of the allocation to the interested party, the 1<sup>st</sup> applicant with ill motive and unfair competition through their letter dated 9<sup>th</sup> September, 2014 wrote to the 1<sup>st</sup> Respondent applying for six (6) loading bays adjacent to the interested party’s. In the interested party’s view, the move by the applicants to move to court seeking revocation of the allocations promotes unfair trade practices championing the brute free of unfair market competition amongst the public service industry. It averred that its vehicles ply Nyahururu route and have requisite Transport Licensing Board Certificates and that the 1<sup>st</sup> applicant being in the public transport sector that operates along Mwimbi Road and Crossroads, is well aware that it is not only the interested party and them alone who operate along these roads as there are other operators within the same area, plying the same routes hence it is so unfair that they are only targeting the interested party.

19. While conceding that some of the members of the interested party were at one time shareholders of the 1<sup>st</sup> applicant, the interested party contended that its exit was due to the mismanagement of the 1<sup>st</sup> applicant by the management that was dictatorial, unruly and selfish, and that this fact should not restrict the interested party members from operating public service vehicles within the disputed area as long they have met all the requirements from the various authorities. According to the interested party, the 1<sup>st</sup> applicant while operating Three Hundred and Seventy Six (376) motor vehicles compared to its Thirty Eight (38) motor vehicles, wants the authorities to treat them differently from other public service vehicles providers, by asking this court to revoke the allocation of two slots granted to the interested party’s business and accord its competitor unfair and undue advantage in the sector that should be a free for all market. To it, the 1<sup>st</sup> applicant’s intention is to injure the interested party’s business and accord its competitor unfair and undue advantage in the sector that should be a free for all market hence moving to this court by the applicants, is not only an abuse of the court process but the applicants are also trying to circumvent the **County Governments Act** and the 1<sup>st</sup> respondent by laws in running their affairs of the county both of which empower the 1<sup>st</sup> respondent to regulate and enforce by laws for better management of resources in the city and equally general good of the public.

20. It was contended that the two loading bays allocated to the interested party were not allocated to any person before and they were therefore available for allocation to anyone, therefore the averments by the applicants are unfounded and far from the truth. Further, members of the interested party have already suffered immense loss following the stay issued by this Honourable Court considering that their motor vehicles are not in operation and they are forced to pay loans advanced by their financiers from their

savings. To it, the applicant's application is an attempt to frustrate the interested party operation owing to their past differences and the court should not allow the big fish in the industry to kill the small fish through unfair competition.

### Determinations

21. I have considered the application, the affidavits filed and the submissions on record.

22. The broad grounds upon which the Court grants judicial review remedies were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, in which the Court citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at 479 the Court expressed itself as follows:

**“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”**

23. The applicants' case is that the decision to allocate a “loading zone” to the interested party by the respondent without the participation of the *ex parte* applicant whose business stands to be decimated and literally closed denied and deprived the applicants the opportunity of the protection of the law through valid objections prior to allocation of the said loading zones. It was contended that whereas the 2<sup>nd</sup> *ex parte* applicant had previously sought the allocation of a loading zone outside her shop the same had not be availed hence the 2<sup>nd</sup> applicant had not been fairly treated.

24. As was held in **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR**, the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60***. Accordingly, the court is perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice. See **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC MISC. APPL. No. 81 of 2002 [2002] 1 KLR 486; [2008] 2 KLR (EP) 393**.

25. The *ex parte* applicants' case on this issue is that the decision to allocate the interested party the two loading bays is likely to subject the applicant to unfair competition since not only is the interested party their rivals but it was a former member of the applicant. In my view, whereas the *ex arte* applicants are entitled to be protected in carrying out their businesses, this protection ought not to be interpreted to mean

that the *ex parte* applicants have exclusive right to use the areas allocated to them by the Respondent. To do so would result to the stifling of competition in the business world, a situation which would be conducive to promotion of monopolistic policies rather than free market economy to the detriment of the consumers of transport services. Article 46(1)(c) of the Constitution protects the rights of the interests of the consumers.

26. From the applicants' own evidence, the 2<sup>nd</sup> applicant had sought to be allocated a loading bay at the place where the interested party was allocated the said loading bays. Clearly therefore it cannot be contended that the area was not suitable for the allocation of loading bays. The decision as to who ought to have been allocated the same was a decision which rested with the relevant authorities and the mere fact that they allocated one person and not the other does not necessarily justify the grant of the orders of judicial review. If the decision not to allocate the loading bay to the 2<sup>nd</sup> applicant was unfair and unreasonable, the option in my view would have been to seek an order compelling the Respondent to do so rather than to quash a decision to allocate a loading bay to another person.

27. However Article 47 of the Constitution requires that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that 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. The applicants contend that the decision to allocate the two loading bays to the interested party was likely to adversely affect them hence they ought to have been heard before the decision was made.

28. Whereas I agree that the provisions of Article 47 of the Constitution ought to be adhered to each case must be decided on the facts and the prevailing circumstances. For example where a public transporter applies for a licence to operate on a public road, where several such operators ply their trade, whereas to licence such an operator would affect the existing operators in one way or the other, it would be unreasonable to expect that every time before a new operator is licensed the existing operators have to be heard on the issue. That would make life intolerable. Where however a particular area has been designated for a particular operator, it would only be reasonable that the views of that operator be taken into account before a new operator is permitted to venture into the area. In this case, however it has not been contended and no evidence has been adduced to show that the area in question was reserved for the exclusive operation of the *ex parte* applicants. The mere fact that they were licensed to operate thereat did not preclude other operators from venturing into the area.

29. It was further contended that the power to control land use and zoning for purposes of public transport is by virtue of the *Urban and Cities Act*, No. 13 of 2011 reserved for the Nairobi County Board and not the Respondents. The applicants have however not disclosed from whom they obtained their operation licences.

30. As stated in *Halsbury's Laws of England* 4<sup>th</sup> Edn. Vol. 1(1) para 12 page 270:

**“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account *the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief.* Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. *Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order* and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made**

**unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’ [Emphasis mine].**

31. Even if the applicants’ contention that the Respondents’ action is not supported by the law, this Court would be entitled to look at the effect of the orders sought on the members of the public so that if the effect of granting the same would be to inconvenience third parties who have dealt with the Respondents in the past and have as a result obtained and continue enjoying benefits accruing from the actions of the Respondents it would not be in the public interest to grant the orders sought even if merited.

### **Order**

32. Having considered the foregoing, in the exercise of my discretion I decline to grant the orders sought in the Notice of Motion dated 11<sup>th</sup> September, 2014 which Motion is hereby dismissed with costs to the interested party.

**Dated at Nairobi this day 3<sup>rd</sup> of March, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Kinyanjui for the ex parte applicant***

***Mr Kiarie for the interested party***

***Cc Patricia***