REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 73 OF 2015

MATATU WELFARE ASSOCIATION (SUING THROUGH ITS REGISTERED OFFICIALS NAMELY DICKSON MBUGUA (NATIONAL CHAIRMEN SAMMY GITAU (SECRETARY GENERAL) AND BASIL NYAGA (DEPUTY SECRETARY-GENERAL.....PETITIONER

VERSUS

CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE.....1ST RESPONDENT

OKOA KENYA MOVEMENT.....1ST RESPONDENT

PRINCIPLAL SECRETARY, STATE DEPARTMENT OF TRANSPORT.....2ND RESPONDENT

NATIONAL TRANSPOR AND SAFETY AUTHORITY…3RD RESPONDENT

THE DIRECTOR OF MOTOR VEHICLE INSPECTION UNIT.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

KENYA BUREAU OF STANDARDS.....6TH RESPONDENT

RULING

Introduction

1. By a petition dated 27th February, 2015, the petitioner herein, **Matatu Welfare Association,** seeks a declaration that the Respondents' decision to revoke and suspend the approval of speed limiters and recorders for 11 firms the subject of the petition without consulting the stakeholders was unlawful and unconstitutional thus null and void; an injunction preventing the Respondents from implementing their decision or revocation and suspension of the aforesaid gadgets or interfering with the digital speed governors sold by the firms the subject of the petition to PSV investors prior

to the notice in question; an order compelling the Respondents to consult the Petitioner and other stakeholders with a view to addressing challenges of cashlite fare system prior to its implementation; General Damages for lost income; and General Damages for the digital speed governors.

2. As is usual in such matters, the Petitioner together with the petition filed a Notice of Motion dated 27th February, 2015 seeking a raft of conservatory orders. However, in this ruling the Court is only concerned with the prayer seeking a conservatory order to prevent the 1st, 2nd and 3rd Respondents from imposing a new requirement and compelling the Petitioner and PSV investors to produce cashlite gadget as a pre-condition for vehicles inspection and TLB licences pending e hearing and determination of this petition.

Petitioner's Case

3. The Petitioner's case as propounded by its learned Counsel **Mr Kurauka**, was that the requirement for the production of the cashlite gadget certificate (hereinafter referred to as "the gadget") before inspection was not anchored in law. It was submitted that there was no rule anchoring such a requirement hence the same was capricious and illegal. Moreso the requirement was unreasonable as it cannot guarantee the safety of motor vehicles.
4. As a result of the said requirement, it was contended that the applicant was adversely affected since the vehicles could not be inspected without the production of the aforesaid certificate. It was averred that the said gadgets are scarce in the market as a result of which the full implementation of the system is yet to kick-start due to some unresolved challenges.
5. In support of the submissions, learned counsel relied in Legal Notice No. 219 of 2013 which according to him provides for the documents to be submitted when applying for licensing. The said Legal Notice, it was contended does not incorporate the subject certificate as one of the requirements for licensing. It was therefore contended that it is illegal for a junior officer to write a letter including a requirement which is not provided

The case for the 3rd and 4th Respondents

6. It was submitted by **Mr Agwara**, learned counsel for the 3rd and 4th Respondents that the prayer the subject of this ruling was anchored on a document whose source was not disclosed. According to learned counsel, the letter in question was neither authored by the applicant nor copied to it. It was learned counsel's position that even if the document was a public document, it ought to have been obtained in a regular way and in support of this submission reliance was sought in section 87 of the ***Evidence Act*** as read with Article 35 of the Constitution under which the petitioner ought to have sought for the same in order to avoid situations where documents are secured from all corners. This Court was therefore urged not to take cognisance of the said letter.
7. According to the said Respondents conservatory orders are discretionary hence the Petitioner must come to Court with clean hands. It was contended that the said prayer (b) relates the implementation of the cashlite fare system hence what the petitioner was seeking was the obstruction of the implementation of the system through the backdoor.
8. It was contended that the Petitioner was aware of Judicial Review No. 447 of 2014 in which **Korir, J** on 9th December, 2014 declined to stay the implementation of the cashlite fare system. It was submitted that as the Petitioner confirmed that it was not opposed to the cashlite fare system and conceded that it was consulted on the Regulations which introduced the said system, the totality of the facts show that the Petitioner has no prima facie case warranting the grant of the conservatory orders sought.
9. With respect to Legal Notice No. 219 of 2013, it was disclosed that the Petitioner was well aware that the said Legal Notice was revoked in Petition No. 172 of 2014 and is nolonger in force. It was therefore averred that to base its case on the same Legal Notice which was revoked was in bad faith and was designed to mislead the Court. It was further contended that the said issue was res judicata. Apart from that it was contended that the Petitioner is aware that TLB Licences are nolonger in existence having been replaced by RSL Licences hence the orders sought cannot be granted.

10. To the Respondents the Petitioner having not challenged the Regulations, the order sought herein ought not to be granted and that it ought to comply with the Regulations which it participated in formulating and which Regulations have been in force since 1st July 2014.In the Respondents' submission the cashlite gadget is provided for under Regulation 7(f)
11. As the Petitioner does not allege ownership of any Public Service Vehicle, it was submitted that their application is not merited since there is no evidence that they eve applied for licences and were denied.

1st 2nd and 5th Respondents' Case

12. On behalf of the 1st, 2nd and 5th Respondents **Mrs Kamande** associated herself with the submissions of **Mr Agwara.**

Determination

13. I have considered the application the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited. Under what circumstances ought the Court grant conservatory orders?
14. Article 23(3)(c) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order. Therefore the first port of call is Article 22 of the Constitution and clause (1) thereof provides that:

Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened

15. For one therefore to properly bring himself or herself within Article 23(c) one must be claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed. From the Petition, what the Petitioner is contending is that the actions of the respondents are unlawful and unconstitutional. There are no averments that the Petitioner's rights or fundamental freedoms in the Bill of Rights have been denied, violated or infringed, or are threatened. As was held by **Trevelyan, J** in **Anarita Karimi Njeru vs. The Republic (No 1) [1979] KLR 154; [1976-80] 1 KLR 1272:**

"If a person is seeking redress from the High Court in a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they have been infringed."

16. In this case the Petitioner has failed to set out with a reasonable degree of precision the provisions of the Bill of Rights that have been denied, violated or infringed, or are threatened.
17. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a *prima facie* case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petition. However, apart from establishing a *prima facie* case, the applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him or her. See **Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General**, Nairobi HC Pet. No 16/2011, **Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission,** Mombasa HC Pet. No. 7 of 2011 and **V/D Berg Roses Kenya Limited & Another vs. Attorney General & 2 Others [2012] eKLR.**
18. In this case what is the clear danger which may be prejudicial to the Petitioner unless the conservatory order is granted? As correctly submitted on behalf of the Respondents, the Petitioner has not alleged that it owns any public service vehicles. Whereas under Article 258(1) of the

Constitution, every person has the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention, the mere fact that a person is entitled to bring such proceedings does not automatically entitle such a person to grant of conservatory orders. The person is enjoined to go further and show how the refusal to grant the said orders is likely to be prejudicial to him or her.

19. Whereas the Petition may well succeed on the issue whether the actions being undertaken by the Respondents are Constitutional, that *per se* does not necessarily merit the grant of the conservatory orders under Article 23(3)(c) of the Constitution.

20. This is not to say that a party seeking an order for a declaration that the Constitution has been contravened, or is threatened with contravention is necessarily undeserving of the conservatory orders under Article 23(2)(c) of the Constitution. What I am saying is that the applicant must go further and show that his allegations bring him within the provisions of Article 22 as well. This Court has of course held that in general conservatory orders are orders in rem and not in personam. However the Constitution itself gives an indicator as to when conservatory orders may be granted.

21. I am not satisfied that the Petitioner has satisfied this requirement.

22. In the Privy Council Case of **Attorney General vs. Sumair Bansraj (1985) 38 WIR 286 Braithwaite J.A**. expressed himself follows:

"Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, … but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of … the provisions" of the Constitution…In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) "subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have…the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too…The critical factor in cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state."

23. The aforesaid principles were adopted by the High Court of the Republic of Trinidad and Tobago in the case of **Steve Furgoson & Another vs. The A.G. & Another Claim No. CV 2008 – 00639 – Trinidad & Tobago**. The **Honourable Justice V. Kokaram** in adopting the reasoning in the case of ***Bansraj*** above stated:

"I have considered the principles of *East Coast Drilling –V- Petroleum Company of Trinidad And Tobago Limited (2000) 58 WIR 351* and I adopt the reasoning of BANSRAJ and consider it appropriate in this case to grant a Conservatory Order against the extradition of the claimants pending the determination of this motion. The Constitutional challenge to the Act made in this case is on its face a serious one. The Defendant has not submitted that the Constitutional claim is unarguable. The Claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect and which will render the matter of the Constitutionality of the legislation

academic."

24. Back home, **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre For Rights Education and Awareness (CREAW) & 7 Others** stated that:

"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

25. In **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held by a majority as follows:

"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."

26. The next issue for determination is therefore whether the Petitioner has established a *prima facie* case. A *prima facie* case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues.
27. The Petitioner in this case has expressly stated that it does not challenge the cashlite fare system. What it is challenging is in effect the inclusion of the cashlite gargets and certificate as a precondition for the inspection of the public service vehicles. In other words, it is challenging the manner in which the system is being implemented. In my view, and it has been held before, Court orders must be meaningful in substance and ought not to be granted purely for academic purposes. In other words Courts do not grant orders in vain. In this case, even if this Court was to grant the conservatory orders in the manner sought, nothing would prevent the Respondents from ensuring the vehicles which have no gargets or certificates are not on the road. In other words the process of inspection would not achieve the purpose for which the Petitioner is seeking the conservatory order: that is to ensure that the public service vehicles operate on the road.
28. In my view, an applicant for conservatory order under Article 23(2)(c) of the Constitution ought to bring himself or herself within the provisions of Article 22 of the Constitution by pleading and establishing on a *prima facie* basis that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
29. As was held in **Kemrajh Harrikissoon vs. Attorney General of Trinidad and Tobago [1979] 3 WLR 63**:

"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to

entitle the applicants to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

30. I also agree that a party seeking the conservatory orders must also do so as soon as the threat of violation to his rights is brought home to him. Where a party waits until the last minute to bring the application, the Court may frown upon such conduct and may decline to grant such an applicant the reliefs he or she seeks.
31. In matters where there appears to be apparent competing interests and rights, the Court ought to invoke the principle of proportionality so as to balance the same in order to secure the rights and freedoms in question. The basis upon which conservatory orders/or interim relief are granted are requirements of balancing the interests of the parties and the need to preserve the subject matter of the claim. Fundamental rights cannot be enjoyed in isolation and by selected few while they trample on others or tread upon their rights since the enjoyment of fundamental rights and freedoms contemplates mutuality and an atmosphere of respect for law and order including the rights of others and the upholding of the public interest. The function of the Court when faced with the task of establishing or determining the rights on the one hand and determining the limitation and restrictions on the other hand is to do a balancing act and in this balancing act are principle values, objectives to be attained, a sense of proportionality and public interest and public policy considerations. See **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743**.
32. Having considered the foregoing, it is my view that the public interests consideration outweighs the interests of the petitioner for now. The petitioner by not questioning the introduction of speed limiters clearly appreciates the importance of the said gadgets for the public good.
33. It follows that the Notice of Motion dated 27th February, 2015 is unmerited.
34. Consequently, the application is dismissed. The costs will be in the petition. It is so ordered.

Dated at Nairobi this 9th day of April, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Agwara for the Respondents

Mr Kurauka for the Petitioner

Cc Richard