



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**CONSTITUTIONAL PETITION NO 24 OF 2014**

**FORWARD TRAVELLERS SACCO .....PETITIONER**

**VERSUS**

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

**MWAMBA TRAVELLERS SACCO ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner is a society registered under the Societies Act involved in the business of public passenger transport. It states that it has a substantial fleet of vehicles plying various routes in and around the City of Nairobi and its environs. It has brought this petition alleging violation of its rights by the respondents in that it has been stopped from using Mfangano Lane in Nairobi as its parking lot for its vehicles for the purpose of pick-up and drop off of passengers.
2. In the petition dated 20<sup>th</sup> January 2014 and supported by an affidavit sworn by one **John Macharia Gichigi** on the same date, the petitioner seeks the following orders:
  - a. *A declaration that the 1<sup>st</sup> respondents purported withdrawal of permission for the Petitioners to pick and drop passengers along Mfangano Street is unlawful and is likely to violate the Constitutional rights of the Petitioner and its members to a fair hearing.*
  - b. *An order of Judicial Review to prohibit the 1<sup>st</sup> Respondent from withdrawing its permission to the petitioner to pick and drop passengers along Mfangano Street Nairobi.*
  - c. *A declaration that the 1<sup>st</sup> respondent by impounding the petitioner's motor vehicles is likely to violate the petitioner's constitutional rights not to be deprived of their property or interest is properly arbitrarily.*
  - d. *An injunction to restrain the 1<sup>st</sup> Respondent from impounding the petitioner's motor vehicles when they pick and drop passengers along Mfangano Street Nairobi.*
  - e. *A declaration that by allowing the 2<sup>nd</sup> Respondent to pick and drop passengers along Mfangano Street Nairobi is likely to violate the Petitioner's Constitutional right not to be discriminated against and to have equal protection of the Law.*

- f. *A declaration that the purported withdrawal by the 1<sup>st</sup> respondent of permission allowing the petitioner to pick and drop passengers along Mfangano Street Nairobi is likely to violate the petitioner's Constitutional right to fair Administrative action.*
- g. *Costs of this petition.*
- h. *Any other or further relief that this Court may deem just and expedient.*

### **The Petitioner's Case**

3. In presenting the petitioner's case, Learned Counsel Mr. Nyoike, relied on the application dated 20<sup>th</sup> January 2014 supported by the affidavit of John Macharia Gichigi sworn on the same date. In the said affidavit, Mr. Gichigi, the Legal and Administrative Manager of the petitioner, avers that the petitioner has been licensed by the Transport Licensing Board to operate its business along routes 19/60 – Kayole OTC – Muthurwa, 17(a) Kayole – Eastleigh- Gikomba, and 18C Komarock Juja Road. The licensing has been done in accordance with the requirements of section 7 of the **Transport Licensing Act Cap 404**.
4. According to the petitioner, it approached the 1<sup>st</sup> respondent for a pick up and drop off point for its route 18C by its letter of 2<sup>nd</sup> December 2013; that its attention was drawn to Kenya Gazette Notice Nos. 3124 of 19<sup>th</sup> May 2000 and 37 of 2008 with regard to the terminus where public service vehicles may start or terminate their trips within the City of Nairobi.
5. The petitioner claims, however, that the 1<sup>st</sup> respondent authorised its enforcement officers to physically identify the point at which the petitioner may pick and drop passengers using the service route 18C within the City of Nairobi; that due to the non-availability of space at the Central Bus Station, the 1<sup>st</sup> respondent's enforcement officers took the petitioner's official to a lay by along Mfangano Street which is adjacent to the Central Bus Station and directed the petitioner to be picking and dropping passenger utilizing route 18C from there. It avers that it immediately commenced operations from the said lay by.
6. The petitioner contends that the 2<sup>nd</sup> respondent, who is also a public transport operator on route 19C servicing Komarock-Outering Road Jogoo Road – Nairobi, was also picking and dropping passengers from the Mfanagano Lane lay by and it complained to the 1<sup>st</sup> respondent regarding the petitioner's authorization to share the lay by. Mr. Gichigi avers that the 1<sup>st</sup> respondent advised the 2<sup>nd</sup> respondent that the said lay by was to be shared by operators servicing the Komarock route; that the petitioner's officials were present at the meeting when the 2<sup>nd</sup> respondent's complaint was being discussed; and that the 1<sup>st</sup> respondent drew the 2<sup>nd</sup> respondent's attention to its letter addressed to the 2<sup>nd</sup> respondent regarding sharing of the termini and designated lay bys with other operators along the same route.
7. The petitioner contends that the complaint having been resolved, it continued its operations for route 18C, picking and dropping passengers at the lay by along Mfangano Street, sharing the lay by with the 2<sup>nd</sup> respondent, openly lawfully and peaceably and with the full knowledge and consent from the 1<sup>st</sup> respondent; and that due to the fact that it was a disciplined, responsible and competent entity, it quickly established a reputation among passengers and became the preferred service provider to passengers of Komarock, much to the chagrin of the 2<sup>nd</sup> respondent. It contends that as the 2<sup>nd</sup> respondent was unable to march the superior service offered by the petitioner, it hatched a plot with officials of the 1<sup>st</sup> respondent to withdraw the petitioner's authorization to pick and drop passengers along Mfangano Street for route 18C. Consequently, the said authorisation was withdrawn on 10<sup>th</sup> January 2014.
8. The petitioner contends that it was not given any notice or a hearing with regard to the intended

withdrawal of the authorisation in breach of Article 47 and 50; and that the 1<sup>st</sup> respondent violated the rules of natural justice.

9. The petitioner contends further that the 1<sup>st</sup> respondent's action was not lawful, reasonable or procedurally fair as the author of the notice to withdraw the authorisation did not have the 1<sup>st</sup> respondent's mandate to issue the notice, was not from the relevant department; and did not act with the authority of the Chief Executive Officer of the 1<sup>st</sup> respondent. The letter of 10<sup>th</sup> February 2014 is written by one Jared Nyauma, the personal Assistant to the County Executive Committee Member for Roads, Public Works and Transport, whom the petitioner alleges did not have the authority of the 1<sup>st</sup> respondent.
10. The petitioner alleges further that the 1<sup>st</sup> respondent discriminated against it in favour of the 2<sup>nd</sup> respondent and failed to treat the petitioner and the 2<sup>nd</sup> respondent equally. In support of this contention, it alleges that on 14<sup>th</sup> of January 2014 the 1<sup>st</sup> respondent in execution of the notice proceeded to the lay by along Mfangano Street and impounded the petitioner's motor vehicles, but the said motor vehicles had been released at the time of the hearing of this matter. The petitioner contends that the 1<sup>st</sup> respondent arbitrarily deprived it and its members of their right to property without good cause, and alleges the violation of its members' rights under Articles 27, 40, 47 and 50 of the Constitution.
11. To the respondent's contention that the petitioner's vehicles were operating without a valid licence and against the National Safety Authority and TLB requirements, the petitioner contends that these issues had not been raised before the withdrawal of authorisation to operate from the lay by by the letter of 10<sup>th</sup> January 2014; that the petitioner had been given a licence, a fact it alleges was confirmed by the 1<sup>st</sup> respondent; and that it was operating lawfully and with the 1<sup>st</sup> respondent's permission.
12. To the 1<sup>st</sup> respondent's contention that the Mfangano lay by was not gazetted as a terminus it was the petitioner's submission that if the street is narrow as alleged, then it should affect all operators and not just the petitioner.
13. The petitioner conceded that the 1<sup>st</sup> respondent had the duty of allocating parking slots to public transport operators in the City. It maintained, however, that the 1<sup>st</sup> respondent had allocated it a slot, and whether the slot was gazetted or not is not the issue; that having been shown the slot, the petitioner did not have an obligation to find out whether it was gazetted. It was the petitioner's contention that in any event, the law which required gazettement had been repealed, and even if the slot has not been gazetted, there are many operators using Mfangano Street with the permission of the 1<sup>st</sup> respondent. Mr. Nyoike therefore urged the Court to find in favour of the petitioner and grant the orders sought in the petition.
14. Finally, Mr. Nyoike conceded that the petitioner had no claim against the 2<sup>nd</sup> respondent, and that the decision of the Court on the application would dispose of the petition.

### **The 1<sup>st</sup> Respondent's Case**

15. The respondent filed a replying affidavit sworn by **Mr. James Mbugua Nganga** on 14<sup>th</sup> February 2014 and written submissions dated 21<sup>st</sup> February 2014. The position of the 1<sup>st</sup> respondent is that it does not allocate routes for public services vehicles, such mandate being the mandate of the National Transport and Safety Authority and the Transport Licensing Board. It contends that its sole mandate is to deal with the parking of public transport vehicles and that it only gazettes areas for parking and cannot alter routes issued by the Transport Licensing Board and the National Transport Safety Authority.

16. According to the 1<sup>st</sup> respondent, the route to be used by the petitioner is Kayole – Juja Road – Bus Station, and its terminus is supposed to be the Bus Station, not Mfangano Street. Counsel for the 1<sup>st</sup> respondent, Mr. Abwao, submitted that the 1<sup>st</sup> respondent does not issue licences but only grants permits by way of a letter from the City Engineer; that there was no evidence that the petitioner had got such permit; that the petitioner applied to use the Mfangano lay by for 2 vehicles but instead used six vehicles which were impounded from the Mfangano lay by. The petitioner had then filed Civil Case No 100 of 2014 and an order was issued for the release of the vehicles upon payment of certain monies.
17. The 1<sup>st</sup> respondent took the position that the petitioner should have joined the National Transport and Safety Authority and the Transport Licensing Board to this petition; that the petition offends the provisions of Order 53(3)(2) of the Civil Procedure Rules 2010 in that all parties required to be in the suit have not been joined in the suit; that it lacks merit and should be struck out with costs to the respondent.

### **The 2<sup>nd</sup> Respondent's Case**

18. Mr. Ntabu's submissions on behalf of the 2<sup>nd</sup> respondent were that it had no idea why it had been dragged into Court. As the petitioner had conceded that it had no claim against the 2<sup>nd</sup> respondent, all it sought were its costs for the petition. The 2<sup>nd</sup> respondent had, however, filed an affidavit in reply sworn by one **Samuel Nganga Githuka** on 11<sup>th</sup> February 2014. In light of the concession by the petitioner that it has no claim against the 2<sup>nd</sup> respondent, I will make no further reference to it.

### **Determination**

19. I have considered the pleadings of the parties to this matter and their submissions, oral and written. In my view, the success or failure of the petitioner turns on a determination of the question whether the 1<sup>st</sup> respondent has violated the petitioner's rights under Articles 27, 40, 47 and 50 of the Constitution.
20. It is uncontested that the petitioner holds a licence to operate its public service vehicles on route 18C, Komarock - Juja Road - Bus Station as is evident from annexure **JMG1**. The date on the licence is 30<sup>th</sup> of October 2013. The petitioner however requested by its letter of 2<sup>nd</sup> December 2013 (**JMG2**) to the County Engineer, to be allocated a different parking space as it had no space at the Bus Station. In its letter of the same date, the 1<sup>st</sup> respondent referred the petitioner to two Gazette Notices and a public notice appearing in the *People Daily*. It concluded as follows: ***"Kindly therefore liaise with the enforcement officers to identify and direct you to the termini as per the notice and the TLB indicating of (sic) the licensed route you should use for your operations."*** (Emphasis added). As noted above, the license was to operate from Komarock via Juja Road to Bus Station. The petitioner alleges that it was shown the Mfangano lay by by the 1<sup>st</sup> respondent's enforcement officer and authorised to use the lay by as its terminus.
21. The Gazette Notices were annexed to the affidavit of **James Mbugua Nganga** as **CAO1**. Gazette Notice No. 37 of 2008 contains the **City of Nairobi (Omnibus Stations) Amendment By-Laws, 2008**. Regulation 3 provides as follows:

***"(1) No driver of an omnibus when carrying passengers for hire or reward shall, without the prior written permission of the Town Clerk, start or terminate any journey at any place other than an omnibus station.***

***(2) Every driver of an omnibus when carrying passengers for hire or reward shall follow such routes as are laid down by the Council for the purpose of starting or terminating any journey."***

- 22.Regulations 7 provides the manner in which omnibuses may be parked and at whose directions, while regulation 8 authorises a station supervisor or police officer to remove a vehicle left in a manner otherwise than authorised by the Traffic Act.
- 23.Legal Notice No 3124 of 2000 contains the parking areas designated as omnibus stations. For the Kayole Komarock routes, the then designated parking were Hakati Road and Gikomba within Nairobi. As noted earlier, the TLB license issued to the petitioner gave its terminus as the Bus Station.
- 24.In considering the allegations of violation of rights, the Court must weigh them against the provisions of the law set out above and the licence issued to the petitioner. The petitioner's argument is that even though its licence says its journey should terminate at the Bus Station, it was physically taken to the Mfangano lay by by the 1<sup>st</sup> respondent's enforcement officers. There is nothing presented to the Court to support this contention.
- 25.The correspondence with the 1<sup>st</sup> respondent, namely the letter dated 2<sup>nd</sup> December 2013 cited above, expressly refers the petitioner to the Gazette Notices cited above and its TLB licence. There is nothing before me that shows that the Clerk to the County gave authority in writing to allow the petitioner use of the Mfangano lay by. In the circumstances, the allegation that the 1<sup>st</sup> respondent violated its right to property guaranteed under Article 40 by impounding its vehicles from the lay by has no basis.
- 26.The second argument advanced by the petitioner is that by allowing the 2<sup>nd</sup> respondent to use the Mfangano lay by and not according the same right to the petitioner, the 1<sup>st</sup> respondent has violated its rights to non-discrimination and equality before the law under Article 27.
- 27.The petitioner concedes that the 1<sup>st</sup> respondent has the authority to designate and regulate parking of public transport vehicles within the city. Indeed, a reading of the provisions of Legal Notice No. 37 and 3142 makes it clear that the 1<sup>st</sup> respondent has a duty to ensure that there is public transport order in the city, and that any parking authority given to any party must be in writing, and must be accordance with the law. In the present case, the argument seems to be that if the 1<sup>st</sup> respondent allows the 2<sup>nd</sup> respondent to park in violation of the regulations, then it must accord the petitioner the same right, otherwise it will have been in violation of the equality provisions of the Constitution.
- 28.This is an argument that the Court cannot accept. The 1<sup>st</sup> respondent has a duty under the law to maintain order in the public transport sector in the city. It is in the interests of all residents of the city that it does so in accordance with the law and the Constitution. That it allows one party to breach the law cannot, in my view, form the basis for a constitutional claim. To do so would effectively be to say that all should be given equal opportunity to break the law. It is an argument that flies in the face of all the national values and principles set out in Article 10 of the Constitution, including the rule of law and good governance.
- 29.For the above reasons, I find no merit in the petitioner's application. As was conceded by Counsel for the petitioner, and as is obvious from the analysis above, determination of the application disposes of the petition. In the circumstances, both the application and petition are hereby dismissed.
- 30.With regard to costs, under **Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, the award of costs is at the discretion of the Court. In the circumstances of this case, and given the concession by the petitioner that it has no claim against the 2<sup>nd</sup> respondent, I am satisfied that the 2<sup>nd</sup> respondent is entitled to costs. I therefore direct that the petitioner bears the 2<sup>nd</sup> respondent's costs.

31. However, the Court is concerned that the 1<sup>st</sup> respondent has not conducted itself in accordance with its mandate under the law, and much of the blame for the current state of affairs can be laid at its feet. It has express legal provisions directing it on how it should conduct its affairs with regard to the designation of parking spaces for public transport omnibuses yet its officers on the ground appear to give information and directions to public transport operators which is contrary to the law.

32. It is only when the 1<sup>st</sup> respondent and its officers act in fealty to the law that any kind of order can be established in the city. Consequently, even though the petitioner has not been successful in its claim against it, I believe the interests of justice militate against an award of costs in favour of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent shall therefore bear its own costs.

33. It is so ordered.

**Dated, Delivered and Signed at Nairobi this 7<sup>th</sup> day of May 2014**

**Mumbi Ngugi**

**Judge**

**Mr. Nyoike instructed by the firm of Nyoike Associates & Co Advocates for the Petitioner**

**Mr. Abwao instructed by the firm of Abwao Erick Odhiambo & Co. Advocates for the 1<sup>st</sup> Respondent**

**Mr. Ntabu instructed by the firm of Eric Ntabo & Co. Advocates for the 2<sup>nd</sup> Respondent**