



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CASE NO. 368 OF 2013

IN THE MATTER OF THE TRAFFIC ACT CAP 403, LAWS OF KENYA

IN THE MATTER OF THE NATIONAL TRANSPORT AND SAFETY AUTHORITY ACT NO. 33 OF 2012

AND

IN THE MATTER OF THE COUNTY GOVERNMENT’S ACT NO. 17 OF 2012

AND

IN THE MATTER OF ACTS BY THE OFFICER COMMANDING TRAFFIC NAIROBI AREA, THE CHIEF CITY ENGINEER OF THE NAIROBI CITY COUNTY AND THE DIRECTOR GENERAL OF THE NATIONAL TRANSPORT & SAFETY AUTHORITY TO FRUSTRATE THE OPERATIONS OF THE EX-PARTE APPLICANT (METROTRANS [E.A] LTD) ALONG THE RACECOURSE ROAD (ST. PETERS CLAVERS) AND MWIKI ROAD

AND

IN THE MATTER OF THE PURPORTED CONTRAVENTION OF TRAFFIC REGULATIONS AND TERMINI BY LAWS

AND

IN THE MATTER

REPUBLIC APPLICANT

VS.

THE OFFICER COMMANDING TRAFFIC NAIROBI AREA.....1ST RESPONDENT

THE NAIROBI CITY COUNCIL.....2ND RESPONDENT

THE NATIONAL TRANSPORT & SAFETY AUTHORITY.....3RD RESPONDENT

EX-PARTE: METROTRANS (E.A) LTD

JUDGEMENT

Introduction

1. The ex parte applicant herein, **Metrotrans (EA) Limited**, moved this Court by way of a Notice of Motion dated 11th November, 2013 seeking the following orders:
1. **THAT this honourable court be pleased to issue orders of Mandamus directed to the 3rd Respondent, the National Transport and Safety Authority compelling them to issue the requisite licenses to the ex-parte Applicant's public service vehicles allowing them to operate along the bus stops, bus lay-bys and terminal on the Race Course (St. Peters Clavers) and Mwiki routes the applicant's vehicles having met the requisite requirements to be issued with the same.**
2. **THAT this Honourable Court be pleased to issue orders of Prohibition against the 1st and 2nd Respondents, the Officer Commanding Traffic Nairobi Areas and the Nairobi City Council respectively restraining them from using the officers in whatsoever manner to frustrate the operations of the ex-parte applicant's public service vehicles by hindering them from operating along the bus stops, bus lay-bys and termini on the Race Course (St. Peters Clavers) and Mwiki routes the applicants having been issued with the necessary licenses to operate along the said routes.**
3. **THAT this Honourable Court be pleased to issue orders of Certiorari quashing the decision of the 2nd Respondent contained in its confidential internal memo of 30th August, 2013 pursuant to an advertisement by them in the People Daily of 29th August 2013.**
4. **THAT the Respondents do bear costs of this application.**

Ex Parte Applicant's Case

2. The application is supported by a statement of facts and a verifying affidavit sworn by **Oscar Omurwa Rossana**, one of the Directors of the Applicant on 18th October, 2013.
3. According to the deponent, the Applicant is in the business of providing public transport along various routes within the Republic. By a letter dated 12th April 2013 the Applicant applied to the 2nd Respondent's Chief City Engineer to be allowed to pick and drop public commuters at the Race Course St. Peters Clavers lay-by to which the 2nd Respondent's Chief City Engineer responded by advising the Applicant to only use the St. Peters Clavers bus lay-by as a picking and dropping zone for passengers and not as a terminus which the Applicant obliged and proceeded to do so diligently.
4. However by a letter dated 17th July, 2013, the 1st Respondent urged the 2nd Respondents' Chief City Engineer to rescind the permission the latter had accorded the Applicant to operate along the Race Court St. Peters Clavers lay-by on grounds which according to the deponent, were unconvincing and unjustified and which he believed amounted to an interference with the 2nd Respondent's mandate by the former.
5. According to the deponent, the 1st Respondent's letter of 17th July 2013 referred to above was for all intents and purposes, discriminatory and ill intended because it only picked on the ex-parte Applicant and another Commuter Company known as **Lucky Transported Company Ltd** yet there are other public service vehicles which continue to operate from the same lay by that the Respondents have denied the Applicant's access to operate from.
6. Vide a letter dated 24th July 2013 the 2nd Respondent's Chief City Engineer acting on the 1st Respondent's letter moved to revoke his letter on 6th June 2013 stating that the Applicant was to use the gazetted terminus which is the Central Bus Station an act the deponent believed was ill advised, riddled with malice and an afterthought calculated to deny the Applicant an equal right of access to commuters at the St. Peters Clavers lay-by. The said action, according to the deponent, promotes unfair trade practices championing the brute force of unfair market competition amongst the public service industry. However, following the 1st and 2nd Respondents actions the Applicant's vehicles plying the subject route despite having the requisite Transport Licensing Board (TLB) Certificates, having been arrested and impounded at the command of the 1st

- Respondent's officers.
7. In response to a letter by the Applicant's advocates, the deponent contended, the 2nd Respondent by a letter dated 4th September 2013 which bore attachments including a notice that appeared in the People Daily on August 29th 2013 which reads as follows "***the revocation does not affect those operating from shared facilities such as bus stops, bus lay-bys and termini along the licensed route***". According to the deponent, it is evident that the shared facilities and bus lay-bys include that at St. Peters Clavers which the 1st and 2nd Respondents want to deny the Applicants vehicle access or to share for that matter with other public service commuter companies.
 8. It was further averred that the actions of the 1st and 2nd Respondents have led to the 3rd Respondent denying the applicant's vehicles the renewal or issuance of licences to operate on route Number 17B i.e. Mwiki Road and Racecourse Road (St. Peters Clavers) while other PSV companies i.e. Hannover, Mwi Sacco and MSL continue to be issued with the same to operate along the said routes which denial of licenses is unjustifiable or with no reasonable cause. The deponent reiterated that the refusal by the 3rd Respondent to issue licenses to the Applicant's vehicles while issuing to other is also discriminatory in the circumstances and smacks of malice and are a hindrance to free market competition.
 9. In the deponent's view, no proper reason has so far been advanced by the 3rd Respondent in denying the Applicant's vehicles licenses to operate along the Race Course (St. Peters Clavers) lay bys and along number 17B Mwiki Road and he was therefore apprehensive that if the actions of the Respondents are not checked they will injure the Applicant's business and accord its competitors unfair and undue advantage in the sector which should be a free for all market. Further the selective issuance of other Public Service Commuter Vehicles with licences by the 3rd Respondent and the denial and selective arrest and detaining of the Applicant's vehicles by the officers of the 1st Respondent has no place in this democracy save where is a cogent and valid reason so to do.
 10. There was also a supplementary affidavit sworn by the same deponent on 11th February, 2014 in which he deposed that by a letter dated 25th September 2013 the Applicant wrote to the 3rd Respondent's Director General complaining of the continued silence on the 3rd Respondent's part and inactivity to address issues the Applicant had on various occasions discussed with it in respect to issuance of the TLB licenses for route **17B** being in licenses by ply along the Mwiki Road termini, stages and bus lay bys. He contended that to ply to Mwiki Road and or Jacaranda Estate (Donholm area), the Applicant's vehicles need to pick and drop commuters along the St. Peters Clavers termini which the 1st and 2nd Respondent officers have continually frustrated the Applicant's drivers from accessing by arresting them whenever they drive by the said route as they pick and drop commuters thereby causing hardship in the Applicant's company's operations.
 11. He asserted that the Applicant has undertaken and has always met all requirements to be issued with the necessary licenses to operate its vehicles hence the Respondents have no justifiable reason to deny its vehicles the licenses applied for or renewal thereof, neither should their operations be frustrated by the Respondents. He averred that some of the licences expired in October 2013 and the Applicant's efforts to renew them have been futile as the 3rd Respondent has ignored and refused without any reason to re-issue the same or further issue new licenses to its vehicles.
 12. On behalf of the Applicant, it was submitted that under the ***National Transport and Safety Act***, No. 33 of 2012, the 3rd Respondent is tasked with the issuance of licences to public service vehicle operators pursuant to sections 4(2) and 27(a) of the said Act, a task which the 3rd Respondent has failed to perform despite the Applicant meeting all the requirements for issuance of Public Transport Operator's licence on the routes complained of.
 13. It was submitted that the 3rd Respondent has declined to either issue new licences or renew the existing ones without justifiable cause or reason to the Applicant's vehicles hence an order of mandamus ought to issue.
 14. While appreciating that the issuance of the said licences is an exercise of discretion the Applicant contended that the said discretion ought to be exercised in regard to public interest including interests of those acquiring licences and those providing facilities for transport including promotion of fair competition.

15. Accordingly it was submitted that an order of prohibition also ought to issue to prohibit the Respondents from harassing the Applicant. In the same vein an order of certiorari also ought to issue to quash the decision to revoke all PSV operators' authority letters.

1st Respondent's Case

16. The 1st Respondent's response to the application was vide a replying affidavit sworn by **Edward M. Mwamburi**, an Officer Commanding Traffic Nairobi Area on 20th March, 2014.

17. According to him, he is in charge of overseeing control and management of traffic comprising both public and private transport within Nairobi City by virtue of the functions of his office as well as the **Traffic Act**. Among his duties is to maintain orderliness of motor vehicle and human traffic flow along all the roads within Nairobi County in accordance with the **Traffic Act** Cap 403 Law of Kenya and in discharging the same, he liaises and coordinates with the relevant authorities as well as stakeholders in the transport sector to ensure that motorists and pedestrians adhere to traffic rules as well as ensuring that traffic flow within the city is flowing smoothly.

18. According to him, Hakati road has no designated by layby and St. Peters Clavers bay is a congested road. He deposed that in discharging his duties together with officers working under him, he only arrest and charge the traffic offenders who violate traffic rules as laid down and this is done without any bias or ill will whatsoever. He however denied that he has at any given time either personally or through his officers harassed or frustrated through arrest or detention any of the ex-parte applicant's operations, its drivers as well as their vehicles while operating along the designated bus stops, bus lay-bys and termini on the Race Course Road and Mwiki routes as alleged.

19. In his view, the orders of prohibition sought against the office of the 1st Respondent cannot be issued as the same will amount to barring the 1st Respondent or any of its officers from exercising its mandate over the applicants in the course of discharging their public duties where the applicants herein are involved. He contended that traffic in Nairobi is a source of concern and a challenge to all residents of Nairobi as well as the concerned authorities within Nairobi County and as such it takes collective responsibility from the residents, public transport stake holders as well as all private motorists together with the relevant authorities to find a lasting solution. He therefore deposed that the traffic department is committed towards partnering with all stakeholders in ensuring proper management of traffic flow within and outside the City of Nairobi and in doing so, it discharges its duties taking into account the congestion in the city and the status of available transport infrastructure which are all shared resources and therefore there is need for sobriety in addressing and approaching matters pertaining to the situation.

20. These averments were reiterated in the 1st Respondent's Submissions.

2nd Respondent's Case

21. In opposition to the application, the 2nd respondent filed a replying affidavit sworn by **Engineer S K Mburu**, its City Engineer on 4th November, 2013.

22. According to the deponent, this application is an attempt by the Applicant to circumvent the *County Government Act*, and the 2nd Respondent's by-laws in running the affairs of the County both of which empower the 2nd Respondent to regulate and enforce its by-laws for the better management of the City and for General good and order. Toward the discharge of its legal duties and mandate in managing the Public Transport Sector in the City, the 2nd Respondent normally liaises with the Traffic Department of the Kenya Police Service to ensure smooth movement of traffic.

23. According to him, the Applicant herein is one of the many Public Service Motor Vehicle providers and is subject to such control and regulations as enacted by the 2nd Respondent and the **Traffic Act** which regulations and controls affecting PSV's providers without any exception. The said regulations were enacted vide Kenya Gazette Notices No. 37 of 2008 and No. 3124 of 19th May 2000 by the 2nd Respondent.

24. He contended that with time, individual PSV Providers like the Applicant herein have been

- making individual requests to the County for special and separate consideration which requests have been responded to in the normal course of duty and one such request was the one made by the Applicant herein. As a result many PSV's operators operated without strict compliance with the aforesaid Gazette Notices which prompted the Nairobi Area Traffic department to raise the issues of PSV's creating a lot of Traffic jams as a result of picking and dropping passengers at places other than the Gazetted places. It was deposed that the Applicant is among the PSV operators who were floating the Traffic Rules and City by-laws which led to the warning issued to them vide a letter dated 24th July 2013.
25. He deposed that it is a matter of public knowledge that smooth flow of traffic along St. Peter Clavers and Race Course road is a nightmare and disorderly especially by the conduct of the PSV's. Therefore in order to bring order in the Public Service Transport and Traffic management, the 2nd Respondent issued a Public Notice in the Daily Newspaper of 29th August 2013 informing all PSV Service providers to observe the provisions of the Gazette Notices earlier indicated and the Applicant being one of the service providers is obliged to comply with the regulations issued by the 2nd Respondent and the Traffic Department.
26. In the deponent's view the essence of this application is that the Applicant seeks to be treated differently from other PSVs providers and to be exempted from complying with the City by-laws and this would amount to an illegality and unfair treatment to the rest of other PSV operators who are complying with the 2nd Respondent Public Notice hence it would be against public policy to allocate a single operator a terminus.
27. According to the deponent, the letter dated 6th June 2013 that the Applicant is relying on was not in any way an authorization to the Applicant to breach the City by-laws. To the contrary, the last paragraph of the said letter requested the applicant to comply and adhere with the law governing Public Service Vehicle operations and did not in any way pose a reason to imply that the County was authorizing the applicant to operate contrary to regulations. In fact, in the very letter dated 6th June 2013, it was clearly indicated therein that the City Council of Nairobi (Matatu Termini) by law 2007, Part III clause 12(2) and 12(3) prohibits matatu from parking at a designated bus stop for more than five minutes or 30 minutes at a terminus, it would therefore be contradicting if the County went ahead and authorized the same thing that its bylaws prohibits. Therefore, the Applicants implication that the letter dated 6th June 2013 served as an authorization from the County to operate contrary to regulations is not only farfetched but wishful because the County does not have the authority to grant such authorization against its by-laws.
28. It was further contended that there is no decision made by the 2nd Respondent capable of being quashed by way of Judicial Review since the letter dated 6th June 2013 is a mere restatement of the law and not a decision. Similarly, there is not positive decision made by the 2nd Respondent capable of being prohibited. To the 2nd Respondent, the applicant is attempting to use the court compel the 2nd Respondent to breach its bylaws. Further, the suit herein can only be argued in a civil court and not by way of Judicial Review hence incompetent, defective and an abuse of court process.
29. The deponent asserted that it is the statutory duty of the 2nd Respondent to regulate and control the business within its jurisdiction under the *Physical Planning Act* and *County Government Act* to ensure orderly conduct affairs.
30. Despite the 2nd and 3rd Respondent being directed to file submissions, none were filed on their behalf.

Determinations

31. I have considered the Notice of Motion filed herein and the affidavits in support thereof as well as the affidavits filed in opposition thereto together with the submissions on record.
32. The scope of and the grounds for the grant of judicial review orders were discussed in depth by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would

consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.....These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

33. In Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 was held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

34. In Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that 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 4th Edition Vol (1)(1) Para 60*.

35. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in

the Uganda case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300. In that case the Court cited with approval 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 and held:

“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.”

36.The reason for saying that these are broad grounds is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by Nyamu, J (as he then was) in Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:

“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”

37.Similarly in David Mugo vs. The Republic Civil Appeal No. 265 of 1997 the Court of Appeal held that so long as orders by way of judicial review remain the only legally practical remedies for the control of administrative decisions, and, in view, of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review orders shall continue extending so as to meet the changing conditions and demands affecting administrative decisions.

38.This is in tandem with the holding in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 that like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine

- of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of *Donoghue vs. Stephenson* in the last century.
39. Section 4(2) of the ***National Transport and Safety Authority Act*** empowers the National Transport and Safety Authority to inter alia regulate public service vehicles. Therefore it is my view that the 3rd Respondent in designating the routes to be operated on by the applicant was carrying out its mandate as provided for under the said provision and hence its action was not *ultra vires*.
40. It is however contended that the Applicant having been permitted to drop and pick commuters at the St. Peters Clavers Lay By, the 2nd Respondent later revoked the said permission based on unreasonable grounds. The Applicant in support of this contention relied on a letter dated 6th June, 2013 from the Interim County Secretary of the 2nd Respondent to the Applicant which was in response to the Applicant’s letter to the Chief City Engineer of the 2nd Respondent dated 12th April, 2013. It is the Applicant’s contention that the letter dated 6th June, 2013 advised the Applicant to share the bus lay-by along the route with other operators licensed to do so by the Transport Licensing Board. In the letter dated 6th June, 2013, the 2nd Respondent was categorical that the Applicant was supposed to use the designated terminus and designated bus laybys along the permitted route as per the TLB. Therefore in order for one to determine whether or not the layby at St. Peters Clavers was one of the laybys which the Applicant was permitted to use, one would have to look at the Applicant’s routes as licensed by the defunct TLB. Although in the supplementary affidavit the Applicant has exhibited copies of the Transport Licensing Board’s licences, a mere look at the same without something more does not inform one that the St. Peters Clavers layby is one of the laybys which are on the said vehicle’s routes as alleged.
41. In the letter dated 24th July, 2013, the 2nd Respondent alleged that the Applicant had contravened the Matatu Termini By-Laws 2007 by using the bus lay-by along Ngong Racecourse Road (St. Peters Clavers) as a Terminus based on the 2nd Respondent’s letter dated 6th June, 2013. It is clear that in the letter dated 6th June, 2013, the 2nd Respondent informed the Applicant that the bus layby at St. Peters Clavers was only for picking and dropping passengers and was not to be used as a terminus. This position the Applicant seems to have appreciated because in its letter dated 12th April, 2013, the Applicant clearly stated that it was not intending to use the said layby as a terminus. Whether or not the Applicant used the said St. Peters Clavers layby as a terminus thus justifying the 2nd Respondent’s action, is purely a matter of evidence. Judicial review applications as is well known is not the right forum to resolve disputed matters of evidence as to do so would require the parties to adduce *viva voce* evidence. As was held in ***Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354:***

“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.....Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce evidence* and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at

a full hearing where oral evidence would be adduced.....It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce evidence* at another forum preferably the Civil Courts.”

42. The Applicant has further alleged that the Respondents’ decision to permit its competitors to use the said layby is an act of discrimination and amounts to promoting unfair trade practices. This contention calls for a determination of what constitute discrimination and under what circumstances the court can interfere in allegations of discrimination. The *Black’s Law Dictionary* defines discrimination as follows: “The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” *Wikipedia, the free encyclopedia* defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. *The Bill of Rights Handbook, Fourth Edition 2001*, defines discrimination as follows:- “A particular form of differentiation on illegitimate ground.”

43. In his decision in *Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688*, Nyamu, J (as he then was) held:

“The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification... The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the Constitution may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including (a) the nature and importance of the limitation (b) the relation between the limitation and its purpose (c) less restrictive means to achieve the purpose. The principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:- (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim.”

44. In the above case, Nyamu, J was dealing with a matter with striking similarities to the present one where the petitioners alleged that by being denied access to the Central Business District, the Respondents had discriminated against them. The learned Judge expressed himself on that issue as follows:

“Discrimination which is forbidden by the Constitution involves an element of unfavourable bias.

Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word “discriminatory” in section 82 of the Constitution. Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:- (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question; (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification...Applying the above *formulae* to the situation before the Court, the differentia is the access to the CBD by some operators who ply along Jogoo Road in Nairobi while denying access to the majority. On the other hand the object to be achieved by the By law is the decongestion of the CBD. It follows therefore in order to decongest the CBD few operators have to be given access in order to achieve the objective of the By law. By law 5 and 23 empowers the Town clerk to give consent before an operator can access the CBD. The denial of access to the majority including the petitioners cannot be said to be irrational. There is a clear rational relation between the differentia and the object of the By-laws. Yes, the argument that the Jogoo road users are being treated differently from the others is correct but this does not constitute discrimination in law. As regards the general body of PSV owners and the three operators who have access to the CBD, the difference is based on the reason that to keep the CBD decongested it is reasonable to give consent to only a few.”

45. In the letter dated 17th July, 2013, the Officer in Charge of Traffic Nairobi Area, similarly cited the issue of congestion as the ground for limitation of access to use St. Peters Clavers drop off point. In my view it would be unreasonable to permit all public service vehicles to use the same termini as that would cause congestion of the CBD. If the Respondents were to do so, it would amount to reneging on their mandate to regulate traffic flow within the Central Business District of Nairobi. It is important that the flow of traffic in and out of Nairobi be regulated in order not to unduly congest the city and the need to do this may justify certain amount of justifiable “discrimination” in the access to the CBD. To do so is not in my view inherently unreasonable. This position was appreciated by Nyamu, J in the above cited decision when he pronounced himself as follows:

“The Town Clerk must of course be aware that the implementation of the by-laws must be anchored in reasonableness and fairness and they must be aimed at achieving the legitimate purpose namely decongestion of the CBD and to a achieve a reasonable traffic flow and a semblance of order in the CBD. He would obviously defeat the legitimate objectives by giving consent to an unreasonable number of operators who would in turn flood the CBD. In the circumstances the court finds that the Town Clerk’s duty is to act fairly and reasonably and his having consented to the three operators at the initial stages of the project and as a temporary measure, demonstrates that he has properly addressed himself to the two requirements. Whether or not the consent to allow a few operators is subject to the Procurement Act has not been clearly shown and the onus was on the Petitioners. All the same, a breach of the Procurement Act would not necessarily result in the selection of the three constituting discrimination under the Constitution. My judgment on this point has proceeded on the premise that the selection of the three operators is on a temporary basis, in order to avoid a vacuum. However, in the long term, the Town Clerk must publicly come up with a criteria for selection and thereafter adhere to Procurement regulations relating to services. If he fails to meet both requirements within a reasonable time, this part of the by-laws could still be challenged. He cannot allow the players to be judges in their own cause.”

46. The other issue which was raised was the refusal by the 3rd Respondent to renew the Applicant’s licences. As was rightly held in Republic vs. Kenya National Examinations Council ex parte Gathenji & Others (supra) where a general duty is imposed, a *mandamus* cannot require it to be done at once and that where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot

command the duty in question to be carried out in a specific way. It is true that one of the grounds for interfering with discretionary power is failure to exercise a discretion imposed by law. See **Republic vs. Minister For Home Affairs And Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.**

47. However even in such circumstances, the Court would only compel the authority concerned to consider the application by the applicant but not to consider it in a particular manner. It is only after the same has been considered and a decision made that the Court may investigate the reasonableness of the decision made and whether in arriving at the decision the body or authority took into account irrelevant matters or failed to consider relevant ones.

48. It must however be appreciated that when it comes to purely policy matter the Courts are ill-equipped to deal with the same. As was held in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarsteth [1985] LRC:**

“so long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of the efficaciousness of such rules and regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair.”

49. From the application the order of certiorari is sought to quash the decision of the 2nd Respondent contained in its confidential memo of 30th August, 2013 pursuant to an advertisement by them in the People Daily of 29th August, 2013. A perusal of the said internal memo clearly shows that it was not a determination but a communication. The Notice appearing in the said media was on the other hand a Notice to all Public Service Operators within Nairobi City Council. None of these documents purport to be the decisions. In **Republic vs. Commissioner of Lands & Others ex parte Landhurst Limited Nairobi High Misc. Application No. 23 of 2010** this Court stated as follows:

“In my view the Statement attributed to the Minister was not a decision. If there was any decision it would have been the directive to the Commissioner for Lands. On the other hand there is no evidence that the Commissioner acted on the said press release with respect to the suit parcel of land. In *Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354*, Wendoh, J expressed herself as follows:

“The notice that is under challenge in these proceedings gave the applicants 14 days to vacate the disputed land. The letter (Notice) was written based on the findings of the Ndungu Report on land whose recommendations have not acquired any statutory form. They are mere recommendations and have no force of law and it is doubtful whether the said Report can be a basis for issuance of such notice as the one under attack in this application.”

In my view the Press Release in question may be termed as mere recommendations to the Commissioner of Lands to take the necessary legal steps for the revocation of the affected titles and was not a basis for the said revocation. The Minister must have known that neither the Commissioner nor the Registrar of the High Court had powers to revoke the said titles. Why for example would the Registrar of the High Court be involved in the revocation of the titles apart from the facilitation of the legal proceedings? Accordingly there is nothing before the Court capable of being quashed. If, on the other hand, there was that decision but the *ex parte* applicant was unable to secure the same, it should have taken the advantage of the provisions of Order 53

rule 7(1) aforesaid and accounted to the satisfaction of the Court its failure to avail the same. This, it has not done and failure to do so renders the prayers for certiorari incompetent.”

50. I therefore agree that no decision has been exhibited which is capable of being quashed and as was held in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) prohibition and mandamus are not efficacious where a decision has been made without quashing the same.
51. Apart from that it is now trite that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** and **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**
52. Even if the Applicant's application was merited, if to grant the orders sought would lead to congestion of the CBD of Nairobi, this Court would still have not acceded to the same as that would clearly cause administrative chaos and public inconvenience. In the result I find no merit in the Notice of Motion dated 11th November, 2013.

Order

53. In the result I find no merit in the Notice of Motion dated 11th November, 2013 which I hereby dismiss with order as to costs to the 1st and 2nd Respondents.

Dated at Nairobi this day 12th of June, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Odhiambo for the 1st Respondent and holding brief for Mr Agwara for the 3rd Respondent

Mr Ilako for 2nd Respondent and holding brief for Mr Kuloba for the Applicant

Cc Kevin