



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW CASE NO. 2 OF 2014**

**IN THE MATTER OF AN APPLICATION**

**FOR JUDICIAL REVIEW ORDERS OF PROHIBITION & CERTIORARI**

**AND**

**IN THE MATTER OF LEGAL NOTICE NO. 219 OF 2013**

**(THE NATIONAL TRANSPORT AND AUTHORITY (OPERATION OF PUBLIC SERVICE VEHICLES) REGULATIONS, 2013)**

**AND**

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

**AND**

**IN THE MATTER OF THE NOTICE OF DECEMBER 25<sup>TH</sup>, 2013 IN *THE DAILY NATION*  
NEWSPAPER OF DECEMBER 27<sup>TH</sup>, 2013**

**AND**

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

**AND**

**IN THE MATTER OF A JUDICIAL REVIEW APPLICATION BY:**

**KENYA COUNTRY BUS OWNERS' ASSOCIATION**

**(Through PAUL G. MUTHUMBI – CHAIRMAN,**

**SAMUEL NJUGUNA – SECRETARY,**

**JOSEPH KIMIRI – TREASURER).....1<sup>ST</sup> APPLICANT**

**MBUKINYA BUS SERVICE (KENYA) LTD.....2<sup>ND</sup> APPLICANT**

CROWN BUS SERVICE LTD.....	3 <sup>RD</sup>
APPLICANT	
KAMPALA COACHS LTD.....	4 <sup>TH</sup>
APPLICANT	
TRATICOM ENTERPRISES LTD.....	5 <sup>TH</sup>
APPLICANT	
UGWE BUS SERVICES LTD.....	6 <sup>TH</sup>
APPLICANT	
TRISHA COLLECTIONS LTD.....	7 <sup>TH</sup>
APPLICANT	
PANTHER TRAVELS LTD.....	8 <sup>TH</sup>
APPLICANT	
NENO COURIER SERVICES LTD.....	9 <sup>TH</sup>
APPLICANT	
VERSUS	
CABINET SECRETARY FOR TRANSPORT & INFRASTRUCTURE.....	1 <sup>ST</sup>
RESPONDENT	
PRINCIPAL SECRETARY -	
STATE DEPARTMENT OF TRANSPORT.....	2 <sup>ND</sup>
RESPONDENT	
THE NATIONAL	
TRANSPORT	
& SAFETY AUTHORITY.....	3 <sup>RD</sup>
RESPONDENT	
THE INSPECTOR GENERAL OF THE POLICE.....	4 <sup>TH</sup>
RESPONDENT	
THE TRAFFIC COMMANDANT.....	5 <sup>TH</sup>
RESPONDENT	
THE HONORABLE ATTORNEY GENERAL.....	6 <sup>TH</sup>
RESPONDENT	

**RULING**

**Introduction**

1. By a Notice of Motion dated 22<sup>nd</sup> May, 2014, the Applicants herein seek, in the main leave of this Court to institute Contempt of Court proceedings against the 1<sup>st</sup> Respondent herein, **Engineer Michael Kamau**, the 3<sup>rd</sup> Respondent's Director General, **Francis Mooke Meja**, and the 5<sup>th</sup>

Respondent, **Charlton Muriithi Muruiki**, for acting, and being in contempt of Court.

### Applicants' Case

2. The application was supported by a supporting affidavit sworn by **Paul G. Gathumbi**, the Chairman of the 2<sup>nd</sup> Applicant on behalf of the other applicants.
3. According to the applicants, this Court rendered its judgement on 14<sup>th</sup> March 2014 in respect of Legal Notice No. 219 of 2013 in the presence of counsel for the Respondents by which the said Legal Notice was declared null and void. The same day the Court found that the specific aspects of the Legal Notice No. 23 of 2014 which the 1<sup>st</sup> Respondent had replicated from Legal Notice No. 219 of 2013 remained a nullity and hence unenforceable.
4. According to the deponent, the 3<sup>rd</sup> Respondent's **Francis Meja** was personally informed of the consequences of failing to comply with the said Court order as well as penal notice. Having expressly lauded the said decision in his affidavit filed in Judicial Review Case 124 of 2014, it was contended that he cannot claim lack of knowledge of the said judgement.
5. It was contended that whereas the Respondents had no legal or factual mandate to enforce any aspect of Legal Notice 219 of 2013 as the Court had decreed the same to be null and void, the 3<sup>rd</sup> Respondent, however, has been insisting on the already declared illegal speed governors that were the subject of the said proceedings be fitted in the Applicants' PSV buses. According to the Applicants, all their buses have been fitted with speed governors which were legally permissible before the illegalities of the Legal Notice No. 219 of 2013 came about which speed governors they continue to have.
6. It was deposed that the Applicants' members are not legal vagabonds or violators of the law and that the 3<sup>rd</sup> Respondent has no evidence ousting the licences issued to them under the old TLB regime or the new NTSA regime. To the applicants, Legal Notice No. 23 of 2014 is null and void by operation of section 11(4) of the **Statutory Instruments Act**.
7. It was deposed that on 21<sup>st</sup> May, 2014, the 1<sup>st</sup> Respondent called a news conference in his office at which he insisted that the 'night ban' travel was still in force and when the applicants' members resumed night travel of their duly licensed PSV buses pursuant to the order issued on 14<sup>th</sup> march, 2014 as affirmed on 14<sup>th</sup> April, 2014 in judicial review case No. 124 of 2014, traffic officers under the behest of the 5<sup>th</sup> Respondent, **Charlton Muriithi Muruiki** stopped and detained the said PSV buses KBT 368V and KBX 670Z among others and that this information was confirmed by one **Aisha Ibrahim** and one **Bernard Okul**.

### 3<sup>rd</sup> Respondent's Case

8. In response to the application the 3<sup>rd</sup> Respondent filed a replying affidavit sworn by **Francis Meja**, its Director General on 9<sup>th</sup> June, 2014.
9. According to the deponent, the application is simply meant to harass and bully the respondents with a view to forcing them to stop carrying out their respective lawful mandate under the Constitution and the **National Transport and Safety Act** as well as the **Traffic Act** and the Rules and Regulations made thereunder and hence the same is filed in bad faith.
10. According to him there are no existing Court orders capable of being breached in this matter. Following the omission to adhere to the provisions of section 11 of the **Statutory Instruments Act** Legal Notice No. 219 of 2013 became void and the Respondents gazetted fresh Regulations under Legal Notice No. 24 of 11<sup>th</sup> March 2014 which was submitted to and approved by Parliament though this fact was not within the knowledge of the Advocates before the Court. In its judgement in this matter, the deponent deposed the Court considered the substance of the Regulations and proposed a series of actions to be taken by the Respondents and the Applicants with a view of ensuring public road safety and compliance.
11. Following the revocation of the earlier Legal Notice and enactment of Legal Notice No. 23 of 2014, the Applicants moved the Court and the quashing of the earlier Legal Notice No. 219 of 2013 on the ground that it no longer existed which position the Court agreed with. On realisation of the fact that the Legal Notice No. 219 of 2013 was no longer being enforced, the applicants sought

- to have Legal Notice No. 23 of 2014 quashed which application is still pending. It is therefore contended that it is in bad faith for the applicants to institute contempt of court proceedings based on proceedings which were concluded since there are no Court orders capable of being breached and/or disobeyed hence leave ought not to be granted.
12. In the deponent's view, contempt of court proceedings ought not to be used to bully and harass the Respondents and prevent them from carrying out their legal mandate. It was further contended that the applicants have carried out themselves in a very presumptuous and dishonourable manner undeserving of the orders sought herein.
  13. According to the deponent, the Applicants have not complied with the rules and the law relating to application for leave.
  14. He deposed that as far as he is aware the Respondents have not breached any court order and/or judgement since the Court has never stayed the implementation of Regulation 10(2)(b) and 12 of Legal Notice No. 23 of 2014.

### **Applicants' Submissions**

15. On behalf of the Applicants, it was submitted that the basis of seeking leave is to act as a sieve, to weed out at the preliminary stage such applications as are without merit or whose frivolity is so patent as to warrant the refusal to proceed with the application.
16. It was submitted that the Respondents have disobeyed court orders made herein which orders have not been challenged and are hence valid. It was submitted that personal service was made on the contemnors which orders the Respondents were aware of. To the applicants, the Court expressly forbade the Respondents from truncating the applicants' buses travel under the subsisting and legal TLB licenses. However there is evidence of truncating of these journeys under the guise of enforcing these void and illegal Notices 219 of 2013 and 23 of 2014. Further the Respondents still insist on digital speed governors which were outlawed on 14<sup>th</sup> April, 2014.
17. It was further contended that the Court ought to avoid determining the application on technicalities but ought to do so on merits where no injustice is occasioned to the other party. The Applicants therefore relied on Article 159(2)(d) and (e) of the Constitution as well as Rule 13.2 of the UK Practice Note No. 37A.
18. In support of the submissions the applicants relied on inter alia on **Hadkinson vs. Hadkinson [1952] 2 All ER 567**, at 569, **Harban Singh Soor vs. Fatima Alo Mohamed Nairobi HCCA No. 10 of 2005**, **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**, **Faza Holdings Limited T/A Down Town Hotel vs. John Kagonye Ngururi & Another [2014] eKLR**.

### **3<sup>rd</sup> Respondent's Submissions**

19. On the part of the 3<sup>rd</sup> Respondent, it was submitted, while reiterating the contents of the replying affidavit that since there are no orders capable of being breached the applicants ought not to be allowed to abuse the court process by filing applications which lack merits.
20. Relying on section 5 of ***the Judicature Act***, Cap 8 Laws of Kenya as read with the ***Contempt of Court Act, 1981*** of England which was dealt with by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others** (supra), it was submitted that the present application is incompetent and ought to be struck out with costs.

### **1<sup>st</sup> and 5<sup>th</sup> Respondents' Submissions**

21. On behalf of the 1<sup>st</sup> and 5<sup>th</sup> Respondents it was submitted that based on **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others** (supra), leave, now called "permission" is not required where committal proceedings relate to a breach of a judgement, order or undertaking

### **Determinations**

22. As appreciated by the counsel for the parties herein the first port of call with respect to the

procedure for institution contempt of Court proceedings in this country is section 5 of the **Judicature Act** Cap 8 Laws of Kenya. That section provides:

***(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.***

***(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.***

23. I have said before and it bears repetition that it is unfortunate and regrettable that 50 years after independence our procedure, with respect to punishment for contempt in our Court is referable to the procedure in the High Court of Justice in England and that it is saddening that the entities entrusted with updating and drafting our laws have not seen the urgency of enacting our own law relating to such an important aspect of the Rule of Law. That being the position, ours is not to enact the law but to interpret the law as enacted.
24. Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others** (supra). In that case the Court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the **Judicature Act**.
25. The High Court of Justice in England comprises three (3) divisions – the Chancery, the Queens Bench and the Family Divisions. It is true that following the implementation of **Lord Woolf’s “Access to Justice Report, 1996”**, the **Rules of the Supreme Court** of England are being replaced with the **Civil Procedure Rules, 1999** and pursuant thereto the Court of Appeal in the above decision recognised that on 1<sup>st</sup> October, 2012 the **Civil Procedure (Amendment No. 2) Rules, 2012**, came into force and Part 81 thereof effectively replaced Order 52 of the **Rules of the Supreme Court** which was the Order dealing with the procedure for seeking contempt of Court orders in the High Court of Justice in England, in its entirety. Under Rule 81.4 which deals with breach of judgement, order or undertaking, referred to as “application notice”, the application is made in the proceedings in which the judgement or order was made or undertaking given and the application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. The Court of Appeal held that leave or permission is no longer required in such proceedings (relating to a breach of a judgement, order or undertaking) as opposed to committal for interference with the due administration of justice or in committal for making a false statement of Truth or disclosure statement. The Court of Appeal proceeded to strike out the application with costs.
26. Although the applicants in their submissions have attempted to distinguish the Court of Appeal decision from the instant case by contending that the said decision was made in reference to proceedings before the Court of Appeal, in my view a reading of section 5 of the **Judicature Act** together with Part 81 of the **Civil Procedure Rules** of England makes it clear that section 81.4 applies to contempt of court proceedings both in the High Court and in the Court of Appeal.
27. In the premises I have no hesitation in finding that in the instant case no leave was required to apply for contempt since the allegations made are with respect to disobedience of the orders of this Court.
28. The only issue for determination is whether this Court ought to proceed and strike out or dismiss the application. In arriving at the decision to strike out the application the attention of the Court of Appeal seems to not have been drawn to the provisions of sections 3A and 3B of the **Appellate Jurisdiction Act** which provisions the same Court has had occasion to deal with. In **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009** the said Court expressed itself as follows:

***“the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice.”***

29. Similarly, in **Kenya Commercial Finance Company Limited Vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** the said court held that *the applicant’s submissions that the omission to include primary documents rendered the appeal incurably defective would have had no answer to them if they were made before the enactment of section 3A and 3B of the Appellate Jurisdiction Act. To the Court the advantage of the current Civil Procedure Rules over the previous rules is that the court’s powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out and in applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives. In this case the court declined to strike out the appeal on the ground that if the record of appeal was struck out, it was certain that the appellant would return to the court with an application for extension of time, which would result in further delay of the final disposal of the case and would inevitably result in further increase in costs. The court then allowed a supplementary record to be filed to incorporate the omitted hitherto primary documents.*
30. It is clear that the instant application was wholly unnecessary but it is also clear that the making of the application did not occasion any prejudice or injustice to any of the parties to these proceedings. Perhaps the applicant out of abundant caution and in light of the fact that we do not have our own legislation dealing with contempt of court proceedings may have overlooked the recent developments in England.
31. It has been said time and again that Courts do not make orders in vain. To strike out the instant application, in my view would be in vain as that order will not benefit any of the parties. Likewise to grant the orders sought will not be of any benefit to any of the parties.
32. Accordingly, the order which commends itself to me is that the Notice of Motion dated 22<sup>nd</sup> May, 2014 is marked as settled. The costs thereof are awarded to the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents in any event. The applicants are at liberty to proceed with the substantive application for contempt.

**Dated at Nairobi this 1<sup>st</sup> day of July 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Harrison Kinyanjui for the Applicants***

***Mr Agwara for the 3<sup>rd</sup> Respondent and holding brief for Mr Bitta for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents***

**Cc Kevin**