



**Republic v Transport Licensing Appeals Board; National Transport & Safety Authority & 2 others (Interested Parties); Uber B.V (Ex parte Applicant) (Judicial Review Application E063 of 2023) [2025] KEHC 9340 (KLR) (Judicial Review) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9340 (KLR)

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

**JUDICIAL REVIEW APPLICATION E063 OF 2023**

**RE ABURILI, J**

**JUNE 30, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**TRANSPORT LICENSING APPEALS BOARD ..... RESPONDENT**

**AND**

**NATIONAL TRANSPORT & SAFETY AUTHORITY ..... INTERESTED PARTY**

**BOLT OPERATIONS OU COMPANY ..... INTERESTED PARTY**

**DAVID MUTERU (I.D. NO.XXX JUSTIN NYAGA (I.D. NO.XXX} PAUL MWAI (I.D. NO. XXX) DANIEL MANGA (I.D. NO.XXX) GIDEON NYAGA (I.D. NO. XXX) WYCLIFFE ATULALA (I.D. NO. XXX) SAMUEL MBURU (I.D. NOXXX FRANCIS KARIUKI (I.D. NO. XXX) POLYNE NJERU (1.D. NO. XXX) SARAH MAINA (1.D. NO. XXX) SAMUEL KARIUKI (I.D. NO. XXX EMMANUEL OCHIENG (I.D. NO. XXX) DAVID MUNENE (I.D. NO. XXX) SARAH MASAKHWI (I.D. XXX) PETER WAHOME (I.D. NO. XXX) KINYERU MWAGO (I.D. NO.XXX) PATRICK OMBONGI (I.D. NO. XXX) STEPHEN NDONGA (I.D. NO. XXX) WILBERFORCE NGIE (I.D. NO. XXX) SAMUEL MWAURA (1.D. NO. XXX) PETER MWANGI (I.D. NO. XXX) ..... INTERESTED PARTY**

**AND**

**UBER B.V ..... EX PARTE APPLICANT**



## JUDGMENT

1. Pursuant to leave granted on 25<sup>th</sup> May 2023, the ex parte Applicant filed a Notice of Motion application dated 8<sup>th</sup> June 2023. The application is brought under Order 53 Rule 3 of Civil Procedure Rules, 2010 and is supported by a statutory statement and verified by the affidavit of Imran Mahmood Manji.
2. In the said application, the ex parte Applicant, UBER B.V, seeks the following orders:
  - a. That this Honourable Court be pleased to grant an order of Certiorari to remove into this Honourable Court for the purposes of quashing the Respondent's Order dated 19<sup>th</sup> May 2023 in Consolidated TLAB Appeals No. E008 and E009 of 2023-David Muteru & Others v. National Transport Safety Authority & 2 Others.
  - b. This Honourable Court be pleased to grant an order of Certiorari to remove into this Honourable Court for the purposes of quashing the entirety of the proceedings before the Transport Licensing Appeals Board in Consolidated TLAB Appeals No. E008 and E009 of 2023 - David Muteru & Others v. National Transport Safety Authority & 2 Others.
  - c. The costs of this Application be provided for.
3. The ex parte Applicant's case is that these proceedings arise out of an appeal No. TLAB Appeal No. E008 of 2023-David Muteru & 20 Others vs. National Transport and Safety Authority & Uber B.V dated 15<sup>th</sup> May 2023 filed before the Respondent Transport Licensing Appeals Board, by David Muteru, listed as number 1 of the many interested parties who are cited as the 3<sup>rd</sup> interested parties and 20 Others, who are taxi drivers operating in Kenya.
4. According to the exparte applicant, the appeal is said to challenge the decision of the National Transport and Safety Authority, the 1<sup>st</sup> interested party herein, dated 28<sup>th</sup> October 2022, wherein the 1<sup>st</sup> interested party is said to have granted the exparte applicant Uber B.V., a license to operate as a Transport Network Company (TNC) under the National Transport and Safety Authority (Transport Network Companies, Owners, Drivers, and Passengers) Regulations, 2022 (the 2022 Regulations).
5. The ex parte Applicant avers that a review of the Appeal reveals that it is with respect to issues arising under Regulation 9 of the above stated 2022 Regulations, and the issues include- that the Applicant allegedly continues to charge a commission of 29% as against the stipulated 18% in the 2022 Regulations, that the Applicant has allegedly refused to share its Deactivation Policy with the drivers and vehicle owners; That the Applicant has allegedly never consulted, concurred, or shared their Revenue Sharing Agreement and/or Pricing Mechanism with the drivers and vehicle owners; and that the drivers and vehicle owners have no way of ascertaining the safety of their private data and ensuring that it is being used in accordance with the laws of Kenya.
6. The ex parte Applicant states that the Respondent TLAB has jurisdiction to hear and determine appeals from the decisions of the 1<sup>st</sup> Interested Party NTSA and that the conditions under which an aggrieved person or entity may appeal against the decision of the 1<sup>st</sup> Interested Party to grant license to a Transport Network Company are provided for under section 38(1) of the NTSA Act.
7. The ex parte Applicant also states that while the 3<sup>rd</sup> Interested Parties as listed by name in the citation of this matter have filed the aforementioned Appeal dated 15<sup>th</sup> May 2023 from the decision of the 1<sup>st</sup> Interested Party dated 28<sup>th</sup> October 2022 on the grounds specified within the Appeal, they did not



- object to the said decision by the NTSA, 1<sup>st</sup> Interested Party to license the exparte applicant, as required by Section 38(1)(b) of the NTSA Act.
8. The exparte applicant further states that while the Respondent was legally obligated to serve a notice of the Appeal on the exparte Applicant pursuant to Regulation No. 31 of the Transport Licensing Regulations, it instead served a Mention Notice on Uber Kenya Limited on 18<sup>th</sup> May 2023, advising Uber Kenya Limited that the Appeal would be mentioned before the Respondent on Friday 19<sup>th</sup> May 2023.
  9. That when the matter was mentioned before the Respondent on 19<sup>th</sup> May 2023, Uber Kenya Limited's legal Counsel advised the Chairman of the Respondent that whereas the Mention Notice had been served upon Uber Kenya Limited, the correct entity to which the appeal related is Uber B.V. That the Respondent was further advised that Uber B.V. is the holder of the license which the 3<sup>rd</sup> Interested Parties sought to challenge on appeal, with the result that service of the Appeal on Uber B.V. was necessary to ensure that it is afforded a right to a fair hearing.
  10. It is the ex parte Applicant's case that the above notwithstanding, the Chairman of TLAB unilaterally proceeded to consolidate the Appeal with TLAB Appeal No. E009 of 2023-David Muteru & 20 Others v National Transport and Safety Authority & Bolt Operations OU. That the said chairman further observed that that the Appeals TLAB Appeal No. E008 of 2023 and TLAB Appeal No. E009 of 2023 (the Consolidated Appeals) have generated public notoriety, and directed the 1<sup>st</sup> Interested Party to provide it with a list of all registered and licensed Transport Network Companies (TNCs) in Kenya so that they may all be enjoined to the proceedings as Interested Parties.
  11. That the Chairman of the respondent also permitted the joinder of Boda Boda Drivers as Appellants to the Consolidated Appeals, without hearing any of the parties on the issue of joinder and notwithstanding the fact that there was no formal application for joinder; and despite the National Transport and Safety Authority (Transport Network Companies, Owners, Drivers, and Passengers) Regulations, 2022 (the 2022 Regulations) expressly excluding Boda Drivers from the 2022 Regulations.
  12. Further, that the Chairman of the respondent also determined that its jurisdiction under the National Transport Safety Authority *Act, No. 33 of 2012* as read together with the 2022 Regulations is fairly wide, with the result that it would first like to confirm compliance by the TNCs with the 2022 Regulations by directing all TNCs to file a compliance matrix with the 1<sup>st</sup> Interested Party.
  13. The said Chairman is said to have held that in addition to investigating the narrow complaints raised within the Consolidated Appeals, the Respondent would also be considering issues under Articles 43, 46 and Article 47 of *the Constitution*.
  14. It is the ex parte Applicant's case that only persons referred to under section 38 of the NTSA Act have the locus standi to institute an appeal before the Respondent and as such, the 3<sup>rd</sup> Interested Parties as grouped together in the citation cannot originate proceedings through an appeal before the Respondent if they did not make an objection at the time the license was being granted.
  15. The ex parte Applicant's further complaint against the respondent is that the consolidated Appeals are with reference to matters provided for under Regulation 9 of the 2022 Regulations and that they are therefore under Regulation 10 subject to adjudication before a Kenyan Court or Tribunal and not the Respondent.
  16. According to the ex parte Applicant, the Respondent's decision to allow joinder of Boda Boda drivers as appellants within the consolidated Appeals is illegal, procedurally improper and indicative of the



Respondent's bias in favour of the many 3<sup>rd</sup> Interested Parties hereto for the reasons that there was no formal application for joinder by the Boda Boda riders.

17. It is stated that the Boda Boda Drivers have no locus to act as appellants within the consolidated Appeals by virtue of the fact that they are expressly excluded from the application of the 2020 Regulations by Section 2.
18. Additionally, the *ex parte* applicant claims that the Respondent's directive to the Applicant herein, as well as all other TNCs operating within Kenya, to provide the 1<sup>st</sup> Interested Party with a compliance matrix (showing the level of compliance with Regulations 5 -18 of the 2022 Regulations) is illegal, *ultra vires* and irrational.
19. The *ex parte* Applicant states that pursuant to Section 4(1) of the NTSA Act, the jurisdiction to plan, manage and regulate the road transport system in Kenya is vested in the 1<sup>st</sup> Interested Party NTSA while the Respondent's jurisdiction is provided for under Sections 38 and 39 of the NTSA Act and is limited to hearing appeals from the decisions of the 1<sup>st</sup> Interested Party to grant, vary, revoke, or suspend a license.
20. The many 3<sup>rd</sup> Interested Parties as grouped together filed a Replying Affidavit sworn on 7<sup>th</sup> June 2023 by David Muteru on behalf of 17 other persons. In the said affidavit, it is deponed that the 3<sup>rd</sup> Interested Parties consist of owners and drivers operating on various online transport platform networks in the country. Further, that the application subject of this judgment is premature to the extent that it seeks to challenge the decision of the Transport Licensing Appeals Board among others.
21. It is contended by the 3<sup>rd</sup> interested parties that when they appeared before the Respondent Appeals Board on 19<sup>th</sup> May 2023, their advocate on record Ms. Wambui Kibicho sought to come on record and that she was granted leave by the Appeals Board to amend the Memorandum of Appeal. The 3<sup>rd</sup> Interested Parties state that without the amended Memorandum of Appeal, this court cannot determine what is before the Tribunal for determination and cannot therefore rule on jurisdiction or any other issue in respect of what is or is likely to be placed before the Tribunal.
22. They further assert that a determination by this Court on the issue of whether the 3<sup>rd</sup> Interested Parties have locus standi to bring the appeal would be prejudicial and contrary to the rules of natural justice. Further, that the objections made by the 3<sup>rd</sup> Interested Parties do not fall within the ambit of Section 38(1) of the NTSA Act.
23. It is further averred that some among the 3<sup>rd</sup> Interested Parties together with other individuals and organisations did raise objections with the 1<sup>st</sup> Interested Party NTSA to the licensing of the Applicant, the 2<sup>nd</sup> Interested Party and other operators but that the 1<sup>st</sup> Interested Party did not address the objections raised.
24. That prior to lodging their objections, a group of drivers through an organisation known as RideHail attempted to negotiate a standard agreement required under the Regulations but that neither the Applicant nor the other operators acceded to their requests at that time.
25. It is also the 3<sup>rd</sup> Interested Parties' case that they were entitled to appeal to the Appeals Board against the decision of the 1<sup>st</sup> Interested Party to license the Applicant among others under Rule 23 of the National Transport and Safety Authority (Transport Network Companies, Owners, Drivers and Passengers) Regulations 2022 ("the Regulations") which provides that "A person aggrieved by any decision of the Authority may appeal to the Appeals Board".



26. According to the 3<sup>rd</sup> Interested Party, a Public Notice was sent by the 1<sup>st</sup> Interested Party informing the public of the decision to license the Applicant herein among others and that the public notice contained in it an invitation to any person who felt aggrieved by the decision to appeal to the Tribunal. The notice is said to have come complete with information on how and where the appeal could be lodged. The 3<sup>rd</sup> Interested Parties state that they understood from the Notice that the 1<sup>st</sup> Interested Party had not and would not entertain their objections, hence the appeal to the Tribunal, the respondent herein.
27. The 3<sup>rd</sup> Interested Parties also contend that the ex parte Applicant's claim of being denied a fair hearing, asserting that the Tribunal had assured service through counsel and that the Applicant's address for service was not provided despite a request.
28. It is further contended that the ex parte Applicant has not approached the court with clean hands. Further, that the Appeals Board acted within its statutory mandate under Sections 39(5) and 39(7) of the NTSA Act, properly exercised its discretion in making orders and that no prejudice was suffered by the Applicant from the consolidation of cases. The 3<sup>rd</sup> Interested Parties' defence is that the Tribunal's request for compliance matrices is a means to assist it in reaching a fair and just determination.

### **Submissions**

29. The application was canvassed by way of written submissions oral highlights were made by the respective participating parties' counsel on record.
30. The ex parte Applicant in its counsel's submissions as highlighted orally relies on the case of Pastoli vs. Kabale District Local Government Council & Others (2008) 2 EA 300 where the court set out the grounds for judicial review.
31. It is submitted that Chigiti J in his ruling determining the application filed by David Muteru & Others to set aside orders of the Court dated 25<sup>th</sup> May 2023 on grounds of non-disclosure of material facts by the Ex parte and also found that it was the 1<sup>st</sup> Interested Party's core function to issue, suspend and cancel licenses and as such, it could not suspend any further licenses issued to the ex parte Applicant.
32. The ex parte Applicant's counsel submits that despite the fact that the application was struck out, the 3<sup>rd</sup> Interested Parties still rely on the Affidavit sworn in support of the dismissed application and as such, a number of issues raised therein were heard and determined.
33. The ex parte Applicant relies on the case of Ganaki Multi-Purpose Cooperative Society v National Transport and Safety Authority & another; Latema Travelers Bus & Safaris Co. Ltd (Interested parties) [2021] eKLR where the court observed that upon a literal interpretation of section 38(1)(a)(b) and (c) there are three categories of applicants namely an applicant for grant or variation of license; an objector to an application as per (a) above and a licensee.
34. According to the ex parte Applicant, given that David Muteru & Others were neither applicants for the license nor licensees, they could only challenge the Ex parte Applicant's TNC license in the capacity of an objector. It is submitted that the alleged letters of objection were not compliant with the provisions of the 2022 Regulations and that the said letters were issued by the Digital Taxi Association of Kenya and the Organization of Online Drivers to the NTSA and not by David Muteru & Others as alleged.
35. The ex parte Applicant also submits that there is no prove David Muteru & Others were members of the Digital Taxi Association of Kenya and/or the Organization of Online Drivers.



36. It is also submitted that NTSA invited TNCs to apply for TNC licenses within 14 days of the notice and that it was therefore incumbent upon David Muteru & Others to object to the issuance of those licenses within the said period.
37. the ex parte applicant's counsel further argues that the alleged letters of objection cannot constitute an objection to the ex parte Applicant's application for the TNC license within the meaning of section 38(1)(b) of the NTSA Act as the letter dated 28<sup>th</sup> September 2022 was issued before a notice by the NTSA dated 3<sup>rd</sup> October 2022, directing TNCs to submit their licensing applications had been issued.
38. Additionally, it was submitted that the letter dated 9<sup>th</sup> November 2022 was issued after a TNC operating license had already been granted to the Ex parte Applicant on 28<sup>th</sup> October 2022. The ex parte Applicant submits that as was held in the case of Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others [2014] eKLR Regulations cannot supersede the provisions of the Act.
39. Further reliance is place don Republic v Retirement Benefits Appeals Tribunal & 2 others Ex parte Kenya Airports Authority Staff Superannuation Scheme(Suing Through Its Trustees Julius F.O. Onyango) & 22 others [2013] eKLR where the Court is said to have held that power must be expressly conferred.
40. On the issue of jurisdiction, the ex parte Applicant relies on the case Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR where the court is said to have held that jurisdiction flows from either *the Constitution* or legislation or both. Reliance is also placed on the locus classicus case on jurisdiction in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR.
41. The ex parte Applicant submits that its views and submissions were not sought before the determination to consolidate and join the Boda Boda Drivers therefore breaching the principle of audi alteram partem, under the rules of natural justice as was held in Kenya Airports Authority vs. Industrial Court of Kenya [2014] eKLR. It is submitted that the Boda Boda Drivers are governed by the provisions of the National Transport and Safety Authority(Operation of Motorcycles) Regulations 2022.
42. According to the ex parte Applicant, the Respondent's powers are limited to hearing an appeal to affirm or reverse the decision of the NTSA and issuing orders that will enable it to enforce its decisions. This mandate, it is submitted, does not extend to raising new issues such as consumer protection under Article 46, Fair Administrative Action under Article 47 and protection of socio-economic rights under Article 43 of *the Constitution*.
43. It is submitted that the respondent's actions entitle this Court to invoke its supervisory jurisdiction to review its actions as per the provisions of section 7(2) of the *Fair Administrative Action Act*.
44. It is submitted that the effect of the stay issued by the Court in its ruling of 25<sup>th</sup> May 2023, is that the Court suspended the TLAB Appeal proceedings as was set out in Halsbury's Laws of England, 4<sup>th</sup> Edition Volume 37, paragraph 437 therefore, as at 25<sup>th</sup> May 2023 the Memorandum of Appel dated 15<sup>th</sup> May 2023 is still validly on record, hence an order arising from the Respondent with regard to the same are the orders in contention before this Honourable Court and as such, the Judicial Review Application has not been instituted prematurely.
45. The 2<sup>nd</sup> Interested Party in its submissions reiterates that the scope of the matters to be determined by the Respondent is by statute set at section 38 of the National Transport & Safety Act. It is emphasized that the TLAB's jurisdiction is strictly appellate and not original. Further, that the respondent ought to have, pursuant to section 39(6) of the National Transport Safety Authority, 2012 summarily rejected



- the appeals that are frivolous or vexatious as they did not meet the threshold to be admitted to hearing owing to jurisdictional bar.
46. According to the 2<sup>nd</sup> Interested Party, an appeal identifies a specific grievance that affects the person who presents the appeal on specific grounds of appeal. Section 38 of the NTSA Act is said to provide clearly that an appellant must be a person aggrieved by the decision.
  47. It is further submitted that there was no application by any Transport Network Operator to be enjoined in the appeals before the respondent as interested parties. The Respondent is said to have enjoined parties with no locus standi to appellate proceedings and as such, the same was done without jurisdiction and ultra vires section 38 of the National Transport & Safety Act.
  48. Reliance is placed on the case of Republic vs. Transport Licensing Appeal Board & 2 other Ex parte MNGN Sacco Ltd [2017] eKLR where it was held that the Statute creating the Respondent is clear that the Board only has appellate jurisdiction and not original jurisdiction.
  49. It is also submitted that if the 1<sup>st</sup> Interested Party required any information from any entity that is subject to its regulatory mandate, the 1<sup>st</sup> Interested Party would in its own right be entitled to request for the information and that it would not order the Respondent to discharge any of the responsibilities required of it under the National Transport & Safety Act.
  50. The 2<sup>nd</sup> Interested Party submits that the directive sought to have information that relates to third parties not before the Respondent introduced in an appeal outside the scope of the respective Memorandum of Appeal filed before the Appeals Board. That in essence, the Respondent was conferring upon itself a mandate to consider matters in an original jurisdiction stance as opposed to an appellate one that the statute sets.
  51. The 3<sup>rd</sup> Interested Parties in their submissions argue that although the Ex-Parte Applicant claims that the affidavits previously used in an interlocutory application, were res judicata, the court in *Nguruman Ltd v Jan Bonde Nielson (2014) KEHC 1718 (KLR)* clarified that rulings on interlocutory matters do not bar determination of the same issues at the merits stage. Further, that the affidavits, therefore, were not res judicata.
  52. Reliance is placed on *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others (2017) KECA 477 (KLR)* and in *Uhuru Highway Development Limited v Central Bank of Kenya (1999) eKLR*, where it was held that res judicata requires a final decision on merits, which is absent in the instant case.
  53. Further submission is that the Respondent's jurisdiction was properly invoked under Rule 23 of the 2022 National Transport and Safety Authority (Transport Network Companies, owners, Drivers and Passengers) 2022 Regulations, which allows any aggrieved person to appeal NTSA decisions.
  54. Additionally, it is submitted that while Section 38 of the NTSA Act limits who may appeal, Regulation 23 expands this scope to reflect the evolving ride-hailing sector. The 3<sup>rd</sup> Interested Party relies on the case of *Republic v Ministry of Health; Ex parte Pius Wanjala & 2 others* where the court is said to have held that "before the Court finds that a particular instrument or subsidiary legislation is inconsistent with the Act, it must be satisfied that the two provisions cannot stand together. What the Court is required to do is to construe the instrument with the necessary alterations, adaptations, qualifications and exceptions necessary to bring into conformity with the Act".
  55. Reliance is also placed on the case of *Uber BV v Aslam [2021] UKSC 5*, where the Court is said to have recognised the need to adapt legal frameworks to digital platforms as Uber drivers were not independent contractors but workers entitled to protections.



56. It is further submitted that the Respondent's decision to consolidate appeals was lawful and to support this position, reliance is placed on the case of *Kamau v Njoroge (2024)* and *Bwanyange Ltd v Alibhai (2023)*, which, it is submitted, affirm the court's discretion to consolidate related matters to save time and costs.
57. The 3<sup>rd</sup> Interested Parties submit that the Respondent also acted within its statutory powers in joining new parties, including Boda Boda riders, under Order 1 Rule 10(2) of the Civil Procedure Rules and Section 39(7) of the NTSA Act. It is submitted that their interests were directly affected, and excluding them would undermine Articles 43, 46 and 47 of *the Constitution*.
58. On the claims that TLAB introduced new issues, it is submitted that the same lacks basis, as no such orders appear on record. Further, that even if the Respondent considered broader constitutional questions, that was permissible given the appeal's subject matter and Articles 10, 43, 46, and 47 of *the Constitution*.
59. It is also submitted that the respondent did not act ultra vires but discharged its constitutional and statutory mandate faithfully. The 3<sup>rd</sup> interested parties urged this court to dismiss the application with costs for want of merit as no illegality, procedural irregularity or bias has been demonstrated.

### **Analysis and determination.**

60. This Court has considered the substantive Notice of Motion, the opposition thereto and the submissions both in writing and orally. The main issue for determination is whether the respondent had jurisdiction to entertain what the 3<sup>rd</sup> Interested Parties claim to be an appeal and whether there was any decision of the Authority capable of being appealed from by the respondent, the Transport Licensing Appeals Board.
61. Section 4(2)(c) of the NTSA Act provides that one of the functions of the Authority is to regulate public service vehicles. Section 54 of the same Act provides that the Cabinet Secretary may, in consultation with the Board of Directors of the Authority, make regulations for the better carrying into effect of the provisions of this Act.
62. According to the applicant, the 3<sup>rd</sup> Interested Parties had no locus standi pursuant to section 38(1) of the NTSA Act to institute the appeals before the Respondent Appeals Board, challenging the licensing of Uber B.V by the NTSA on 28<sup>th</sup> October 2022, which license was to operate as a Transport Network Company (TNC) under the National Transport and Safety Authority (Transport Network Companies, Owners, Drivers, and Passengers) Regulations, 2022 (the 2022 Regulations).
63. The 3<sup>rd</sup> Interested Parties contend that some of their members together with other individuals and organisations did raise objections with the 1<sup>st</sup> Interested Party to the licensing of the exparte Applicant, the 2<sup>nd</sup> Interested Party and other operators but that the 1<sup>st</sup> Interested Party did not address the objections raised.
64. Further, that prior to lodging their objections, a group of drivers through an organisation known as RideHail attempted to negotiate a standard agreement required under the Regulations but that neither the exparte Applicant nor the other operators acceded to their requests at that time.
65. It is also the 3<sup>rd</sup> Interested Parties' assertion that they were entitled to appeal to the Appeals Board against the decision of the 1<sup>st</sup> Interested Party to license the Applicant among others under Rule 23 of the National Transport and Safety Authority (Transport Network Companies, Owners, Drivers and Passengers) Regulations 2022 ("the Regulations") which provides that "A person aggrieved by any decision of the Authority may appeal to the Appeals Board".



66. The Transport Licensing Appeals Board has appellate jurisdiction over the administrative actions or decisions of the National Transport and Safety Authority, NTSA. Tis jurisdiction is set out in section 38 of the *National Transport and Safety Authority Act*, 2012. This section provides for appeals against decisions of Authority as follows:

“ A person who—

- a) being an applicant for the grant or variation of a license, is aggrieved by the decision of the Authority on the application;
- b) having made an objection to any such application as aforesaid, being an objection which the Authority is bound to take into consideration, is aggrieved by the decision of the Authority thereon; or
- c) being the licensee, is aggrieved by the revocation or suspension thereof, may within the time and in the manner prescribed appeal to the Appeals Board established under section 39.”

67. The above section 38 sets out the elements that have to be satisfied in order to confer jurisdiction of a matter, on the Appeals Board. In essence, it provides that TLAB can only assume jurisdiction when NTSA has made a licensing decision.

68. In the instant case, David Muteru & 20 Others filed appeals before the Appeals Board and they assert that they sought to challenge the decision of the National Transport and Safety Authority dated 28<sup>th</sup> October 2022, pursuant to which it granted Uber B.V. a license to operate as a Transport Network Company (TNC) under the National Transport and Safety Authority (Transport Network Companies, Owners, Drivers, and Passengers) Regulations, 2022.

69. Under section 38(1) of the NTSA Act, there are three categories of persons who may appeal to the Respondent TLAB and these are: an applicant, an objector or a licensee. The 3<sup>rd</sup> Interested Parties were neither applicants nor licensees and the only way they could approach the NTSA was through Section 38(1)(b), as objectors to the ex parte Applicant’s licence application. The objection had to be lodged with NTSA in the first instance and only after NTSA gives a decision would the 3<sup>rd</sup> interested parties lodge an appeal with the TLAB.

70. In the case of Kangemi Matatu Owners Sacco Society Ltd v National Transport & Safety Authority & 2 others; Westland Watch for Peace, Gender & Development & 2 others (Interested Parties) [2021] KETLABT 652 (KLR) it was observed that:

“ A literal interpretation of section 38 (1) (a), (b), and (c) shows that the provisions refer to three categories of applicants, namely:

- a. Under section 38 (1) (a) – An applicant for grant or variation of license;
- b. Under section 38 (1) (b) – An objector to an application as per (a) above.
- c. Under section 38 (1) (c) – A licensee.

.....

“ 28. Interpreting section 38 (1) (a) and (b) in a manner that would exclude third party objectors who are not applicants for license would clearly offend Article 22 of *the Constitution*. Besides,



construing an objector as the same person as an applicant could mean that a person could apply for a license and then object to its issuance, a scenario that is not feasible. We find that the applicant and objector, as envisaged under Section 38, are two different persons.”

71. However, although their case is that an objection was lodged by some of its members together with other individuals and organisations, I note that the letter that the 3<sup>rd</sup> interested parties are referring to is dated 28<sup>th</sup> September 2022 and it has been drafted by the firm of Wambui Shadrack advocates and addressed to the Cabinet Secretary, Ministry of Transport, Infrastructure Housing, Urban Development and Public Works and also to the Director of National Transport and Safety Authority.
72. The letter’s subject reads “uber’s Non- Complinace With The Legal Notice No.120 The National Transport And Safety Authority (transport Network Companies, Owners, Drivers And Passengers) Regulations,2022”.
73. The first sentence of the letter reads as follows;

“ We have been instructed by the members of Digital Taxi Association of Kenya (Hereinafter referred to as “Our Client”) to address you in reference to the above and further as under.”
74. The 3<sup>rd</sup> Interested Parties also produced a letter dated 9<sup>th</sup> November 2022 written by the firm of Lumumba & Ayieko Advocates. The subject reads “DEmand For Full Implementation Of The National Transport And Safety Authority (transport Network Companies, Owners, Drivers And Passengers) Regulations 2022 And Immediate Supspension/cancellation Of Licenses Of Uber Bv And Bolt Operations Ou Until Their Full Compliance With The Regulations”.
75. The said law firm indicates that their client is Organization of Online Drivers.
76. This Court observes from the record that no evidence has been adduced to show that any of the 3<sup>rd</sup> Interested Parties are members of Digital Taxi Association of Kenya or members of Organization of Online Drivers. There is also no evidence adduced before this court to prove that the two named entities are parties in the Appeal or that the 3<sup>rd</sup> Interested Parties are officials of the said entities and as such were suing on behalf of those two entities.
77. It has been urged by the 3<sup>rd</sup> Interested Parties that the purpose of the mention before the Respondent on 19<sup>th</sup> May 2023 was to give directions on a Memorandum of Appeal dated 17<sup>th</sup> May 2023 which they had intended to amend and as such, the application before this court is premature.
78. On this issue, I am not persuaded that the pendency of an intended amendment to the Memorandum of Appeal deprives this Court of jurisdiction to determine the legality of the Respondent’s proceedings or the impugned decision. The record shows that the Respondent proceeded to issue substantive directions and findings, including the consolidation of appeals, joinder of new parties, and the issuing of binding directives all based on the unamended Memorandum of Appeal dated 17<sup>th</sup> May 2023. These actions were not of a mere interlocutory or procedural nature; they engaged the Appeal Board’s jurisdiction and affected the rights of the exparte Applicant. Accordingly, the question before this Court is not whether the appeal before the Transport Licensing Appeals Board was in a final form, but whether the Respondent had jurisdiction to entertain the appeal, in the first place. That jurisdiction must exist at the threshold and lack thereof cannot be cured by amendment of pleadings or subsequent procedural steps taken by the respondent.



79. Moreover, an amendment to a pleading cannot confer jurisdiction. Jurisdiction is either conferred by *the Constitution*, statute, or principles of common law, not by the parties and certainly not by the content of pleadings or their amendment. See the Supreme Court’s decision in the case of Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR.
80. The statutory framework under the NTSA Act contemplates a process where objections to licence applications are raised before NTSA makes its decision. It is only if the NTSA considers and dismisses such an objection or refuses to consider the objection as contemplated in the *Fair Administrative Action Act*, that the objector may appeal to TLAB. Without such prior engagement before the Authority, the jurisdiction of the Appeals Board does not arise.
81. In the case of Ganaki Multi-Purpose Co-operative Society v NTSA & Another; Latema Travellers Bus & Safaris Co. Ltd (Interested Party) [2021] eKLR, the High Court interpreted Section 38(1)(b) to mean that an objector must demonstrate that they raised an objection before the Authority, and that the Authority rendered a decision on the same. Absent such a process, TLAB cannot assume appellate jurisdiction.
82. I add that a failure to take action or make a decision when required to do so, is a ground for challenging an administrative decision by way of judicial review. This is informed by the provisions of section 2 of the *Fair Administrative Action Act* which defines an administrative action to include a failure to act. The section provides:
- “Administrative action” includes a decision, a failure to make a decision, a failure to provide reasons, or any other act or omission by a public body in exercising a public function.
83. The 3<sup>rd</sup> Interested Parties’ assertion that the Respondent derived jurisdiction from Regulation 23 of the 2022 Regulations cannot stand where such regulation is subsidiary legislation and is inconsistent with the parent statute.
84. It is trite law that subsidiary legislation cannot confer jurisdiction not provided in the enabling Act. Section 31 (b) of the *Interpretation and General provisions Act*, Cap 2 Laws Of Kenya provides that:
31. Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—
- (a) ...
- (b) no subsidiary legislation shall be inconsistent with the provisions of an Act;
85. Thus, subsidiary legislation must conform to the parent Act and cannot exceed the scope or contradict it. As was held in *Evans Kidero & 4 Others v Ferdinand Waititu & 4 Others* [2014] eKLR, the Court reiterated that regulations cannot override provisions of a statute. Similarly, in *Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Court affirmed that jurisdiction must be expressly conferred.
86. See also in *Jared Odoyo Okello & another v Independent Electoral & Boundaries Commission & 6 others* [2014] eKLR where the Court of Appeal stated:
- “We need not belabor the first principle that subsidiary legislation cannot, in our jurisdiction, be inconsistent with the principal legislation under which it is made, let alone *the Constitution* (See section 31(b) of the Interpretations and General provisions Act, cap 2 Laws of Kenya). It cannot possibly be that jurisdiction which is not expressly limited by



the Constitution in Art 164(3) is left to be limited by subsidiary legislation. We do not buy the argument at all. In Peter Gichuki King'ara v IEBC & 2 Others (Supra), that argument was disposed of as follows:

“We hold that rule 35 of the Elections Petition Rules, being a subsidiary legislation within procedural rules, is not a jurisdictional rule and cannot confer or limit the jurisdiction of the Court of Appeal to hear and determine Election Petitions. We further hold that Rule 35 of the Elections Petition Rules cannot limit the jurisdiction of the Court of Appeal as granted under Art 164(3) of the Constitution and as operationalized by section 85A of the Elections Act. A subsidiary legislation cannot expand, add to or reduce the jurisdiction of any court as spelt out in the Constitution or by statute. Jurisdiction is neither derived nor does it emanate from regulations or rules; jurisdiction is either from the Constitution or statute. A rule cannot limit the jurisdiction of a court of law.”[emphasis added]

87. In addition, Regulation 23 cannot be interpreted as expanding TLAB's jurisdiction beyond what Section 38 of the NTSA Act permits, as subsidiary legislation cannot confer jurisdiction which is not provided for in the parent Act.
88. In this case, there is no evidence that any of the interested parties not even the 2<sup>nd</sup> Interested Party lodged any objection to the issuance of a licence to the exparte Applicant by the NTSA or that the NTSA considered such an objection.
89. The memorandum of appeal filed before the Respondent simply raised complaints against the exparte Applicant's alleged conduct but the complaints did not arise from any decision made by NTSA upon an objection by the 3<sup>rd</sup> Interested Parties. The purported appeal is therefore a disguised attempt to invoke the appellate jurisdiction of the Respondent without the foundational requirement of a prior NTSA decision.
90. In effect, the Respondent assumed original jurisdiction by entertaining first instance complaints that had never been placed before NTSA for consideration. This offends the principle of separation between regulatory and appellate functions as envisioned in the NTSA Act.
91. For all the above reasons, it is my finding and holding that the Respondent acted without jurisdiction in allowing and making substantive orders in the appeal filed by the 3<sup>rd</sup> Interested Parties. The 3<sup>rd</sup> Interested Parties had no locus standi under Section 38 of the NTSA Act to lodge the appeal, having not made any objection to the Applicant's licence before NTSA.
92. The 3<sup>rd</sup> Interested Parties have also argued that a Public Notice was sent by the 1<sup>st</sup> Interested Party informing the public of the decision to license the Applicant herein among others contained in it an invitation to any person who felt aggrieved by the decision to appeal to the Tribunal. The notice is said to have come complete with information on how and where the appeal could be lodged. The 3<sup>rd</sup> Interested Parties argue that they understood from the Notice that the 1<sup>st</sup> Interested Party had not and would not entertain their objections, hence the appeal to the Tribunal.
93. Although this may have constituted a persuasive argument in different circumstances, it is important to emphasize that a party's personal interpretation or perception of a notice cannot supersede statutory or regulatory obligations. Where the law requires that an appeal to a tribunal must be founded on a formal decision conveyed through a prescribed procedure, such a requirement cannot be displaced by assumptions or inferences drawn from a public notice. Furthermore, NTSA cannot donate or confer its jurisdiction to the TLAB



94. The ex parte Applicant also argues that the 3<sup>rd</sup> Interested Parties have relied on the affidavit they relied on in support of their application to set aside and as such the affidavit is res judicata.
95. It is this court's opinion that the mere reliance on an affidavit that was previously filed and relied upon in an earlier matter does not, in itself, render the present application or any part of it res judicata. The doctrine of res judicata, as codified under Section 7 of the *Civil Procedure Act*, is concerned with the final determination of issues between the same parties, involving the same subject matter and cause of action, by a court of competent jurisdiction.
96. An affidavit constitutes evidence in support of a party's case; it does not, without more, amount to an adjudication of the issues it addresses. Accordingly, unless it can be demonstrated that the substantive issues raised in the present matter were directly and substantially in issue, and were conclusively determined in the earlier proceedings, the principle of res judicata cannot be invoked merely on account of the reuse of an affidavit.
97. With regard to the order of 19<sup>th</sup> May 2023, it is evident from the material placed before this Court that the Respondent, on that date, proceeded to assume jurisdiction by issuing several substantive directives, including the consolidation of TLAB Appeals Nos. E008 and E009 of 2023, the joinder of new parties such as Boda Boda riders as appellants and the initiation of compliance-related directives against all TNCs.
98. These actions were not administrative case management steps but indicative of the Respondent's decision to hear and determine matters that properly fell within the original jurisdiction of the NTSA. The order of 19<sup>th</sup> May 2023 thus constituted the commencement of proceedings conducted ultra vires the Respondent's statutory mandate. Since jurisdiction is a question of law that must exist before a tribunal can undertake any adjudicative steps, the actions taken by the Respondent on that date were without legal foundation and are amenable to quashing by this Court.
99. Accordingly, I allow the application dated 8<sup>th</sup> June, 2023 filed by the exparte applicant and make the following orders:
- a. An order of Certiorari to remove into this Honourable Court for the purposes of quashing the Respondent's (Transport Licensing Appeals Board) Order dated 19th May 2023 in Consolidated TLAB Appeals No. E008 and E009 of 2023-David Muteru & Others v. National Transport Safety Authority & 2 Others is hereby issued removing the said order and quashing it.
  - b. An order of Certiorari to remove into this Honourable Court for the purposes of quashing the entirety of the proceedings before the Transport Licensing Appeals Board in Consolidated TLAB Appeals No. E008 and E009 of 2023 - David Muteru & Others v. National Transport Safety Authority & 2 Others is hereby issued and the said proceedings are hereby removed into this Court and quashed.
  - c. As the Respondent, a public body, acted outside the scope of its jurisdiction, I order that each party shall bear their own costs of these proceedings.
100. This file is closed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE, 2025**

**R.E. ABURILI**

**JUDGE**

