REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 109 OF 2004

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION, MANDAMUS & CERTIORARI

AND

IN THE MATTER OF CAP 403, LAWS OF KENYA

AND

IN THE MATTER OF LEGAL NOTICE NO. 161 OF 2003

AND

IN THE MATTER OF GAZETTE NOTICE NO. 384 OF 2004

AND

IN THE MATTER OF NOTICE OF JANUARY 9TH, 2004 BY THE MINISTER FOR TRANSPORT & COMMUNICATIONS PUBLISHED IN THE *DAILY NATION* OF JANUARY 9TH, 2004

AND

IN THE MATTER OF THE TRANSPORT LICENSING ACT, CAP. 404

AND

IN THE MATTER OF TLB NOTICE OF JANUARY 30TH, 2004 IN THE *DAILY NATION* OF JANUARY 30TH, 2004

AND

IN THE MATTER OF

REPUBLIC

VERSUS

THE MINISTER FOR TRANSPORT & COMMUNICATIONS…....1ST RESPONDENT

THE REGISTRAR OF MOTOR VEHICLES…….....…..2ND RESPONDENT

THE TRANSPORT LICENSING BOARD…….....….3RD RESPONDENT

THE HONOURABLE THE ATTORNEY-GENERAL.....4TH RESPONDENT

THE COMMISSIONER OF POLICE…….....…….5TH RESPONDENT

AND

THE MATATU WELFARE ASSOCIATION……1ST AFFECTED/INTERESTED PARTY

THE MATATU OWNERS ASSOCIATION.……2ND AFFECTED/INTERESTED PARTY

KENYA BUS SERVICE LTD. .....….3RD AFFECTED/INTERESTED PARTY

KENYA BUREAU OF STANDARDS.....4TH AFFECTED/INTERESTED PARTY

JONATHAN MWANGI.....5TH AFFECTED/INTERESTED PARTY

EX PARTE

GABRIEL LIMION KAURAI…….....……..1ST APPLICANT

JOSEPH ENOCK AURA…….....……2ND APPLICANT

JUDGEMENT

A. THE BACKGROUND

The applicants' Chamber Summons application (dated 2nd March, 2004) for leave to institute the instant originating motion for judicial review orders, came up before ***Mr. Justice Lenaola*** on 3rd February, 2004. The learned Judge on that occasion certified the application as urgent; exempted it from the requirement, under Order LIII, rule 3 of the Civil Procedure Rules, of service of notice to the High Court Registrar prior to initiating such proceedings; and granted leave to file a substantive motion for judicial review. The record, however, shows that the Notice to the Registrar, dated 2nd February, 2004 was filed on 3rd February, 2004.

B. THE PRAYERS

The applicants' prayers may be set out in summary as follows:

(a) that, an order of certiorari do issue, to remove into the Court for the purpose of being quashed, the *first respondent's Legal Notice No. 161 of 2003 and* ***Gazette Notice*** *No. 384 of 2004;*

(b) that, an order of certiorari do issue, to remove into the Court for the purpose of being quashed, the *1st respondent's Notice of January 9, 2004 published in the Daily Nation of the same date;*

(c) that, an order of prohibition do issue*, prohibiting the 2nd respondent* from deliberating, acting upon, taking any proceedings, issuing any directive, or doing anything in any manner that effects L.N. No. 161 of 2003 and ***Gazette Notice*** No. 384 of 2004 emanating from the 1st respondent;

(d) that, an order of prohibition do issue, *prohibiting the 3rd respondent* from deliberating, acting upon, taking any proceedings, issuing any directive, or doing anything in any manner to effect L.N. No. 161 of 2003 and ***Gazette Notice*** No. 384 of 2004 emanating from the 1st respondent via *Daily Nation* publication of January 30, 2004;

(e) that, an order of certiorari do issue to remove into Court for the purpose of being quashed any *decisions of the 3rd respondent* made pursuant to the Notice published in the *Daily Nation* of January 30, 2004;

(f) that an order of prohibition do issue, *prohibiting the 3rd respondent* from deliberating, acting upon, taking any proceedings, or issuing any directives whatsoever prohibiting the 1st applicant from running his public transport business on the basis of L.N. No. 161 of 2003 and ***Gazette Notice*** No. 384 of the 1st respondent;

(g) that, an order of prohibition do issue *prohibiting the 5th respondent* from deliberating, acting upon, taking any proceedings, or issuing any directive, in any manner prohibiting the 1st applicant from operating his public transport business, or the 2nd applicant from using public transport that does not conform to L.N. No. 161 of 2003 and ***Gazette Notice*** No. 384 of 2004;

(h) that an order of mandamus do issue, *compelling the 2nd respondent* to produce before the Court records of manufacturers, dealers, and agents of motor vehicle makes Nissan Caravan 2.7 Diesel *matatus* registered as at January 31, 2004;

(i) that, an order of prohibition do issue, *prohibiting the 1st respondent* from issuing any directive akin to L.N. No. 161 of 2003 and ***Gazette Notice*** No. 384 of 2004 without consultation with the 1st applicant and the interested parties.

C. THE GROUNDS FORMING THE PREMISE OF THE APPLICATION

The "*general grounds*" forming the basis of the application have not been presented in a general form and are, unfortunately, extremely detailed. They may, however, be summarised as follows:

(i) The Transport Licensing Act (Cap. 404), section 3(1) (a) sets the number of members of the Transport Licensing Authority at 8 in addition to the Chairman; but while the incumbent Chairman had died and had not been replaced, the 3rd respondent had put up an advertisement in the *Daily Nation* of 30th January, 2004 inviting the 1st applicant among others for transport licensing meetings from 2nd February, 2004 to 6th February, 2004 pursuant to the 1st respondent's Legal Notice No. 161 of 2003.

(ii) Not only is the 3rd respondent's advertisement in conflict with section 3(1)(a) of the Transport Licensing Act (Cap. 404), it also violates section 6(2) of the same Act as it did not give a minimum of one month's statutory notice to the 1st applicant to raise objections or file applications in cases of exclusive licences.

(iii) In violation of section 6(2) of the Transport Licensing Act (Cap. 404), the 3rd respondent has published no ***Gazette Notice***, and so has not gazetted the names of those who will attend the meeting being called through newspaper advertisement.

(iv) By the Transport Licensing Regulations, 14-days' notice is required prior to the holding of a transport licensing meeting, but the 3rd respondent by its advertisement of 30th January, 2004 gave only one day's notice.

(v) Rule 65A (4) of Legal Notice No. 161 of 2003 is a violation of the applicant's constitutional right under section 80(1) of the constitution; and so the aforesaid rule is ***ultra vires.***

(vi) Rule 41A(3) of Legal Notice No. 161 of 2003 is ambiguous on the issue of responsibility for the fitting of speed governors to public service vehicles.

(vii) The 1st respondent's attempt by his direction published in the *Daily Nation* of 9th January, 2004 to obligate "either the manufacturer, dealer, or agents approved by the manufacturers or dealers" to fit vehicles with speed governors, is impossible of performance.

(viii) The 1st respondent, after failing to specify the public service vehicle speed governors he intended, only by ***Gazette Notice*** No. 384 of 2004 of January, 2004 now gave his requirements and he demanded compliance by 31st January, 2004 – only 8 days' notice.

(ix) The actions of the 1st, 2nd and 3rd respondents, enforced by the 5th respondent's officers without the 4th respondent pointing out the illegalities of the said directives, have hurt the 2nd applicant as a commuter who has no private means of travel.

The detailed grounds on the basis of which relief is sought, are set out in the Statement of Facts dated 2nd February, 2004 and filed on 3rd February, 2004 and amended on 13th April, 2004.

It is stated that Legal Notice No. 161 of 2003 is a violation of section 82(1) and (2) of the Constitution, as it purports to direct the 1st applicant's driver and conductor to wear an unidentified uniform. It is averred that the 1st respondent's Legal Notice No. 161 of 2003 violates the applicant's freedom of conscience, which is protected under section 78(1) of the Constitution of Kenya.

It is stated that the making of rule 70(1) in the impugned Legal Notice No. 161 of 2003 is in violation of section 31(b) of the Interpretation and General Provisions Act (Cap. 2); and that until section 102 (2) of the Traffic Act (Cap. 403) has been amended by Parliament, the 1st respondent has no power to require that *matatu* vehicles (such as owned by the 1st applicant) be painted with a continuous yellow band specified in the said section 102(2) of the Traffic Act to apply exclusively to taxi cabs. It is stated that if the 1st applicant paints his *matatu* with the yellow band as now directed under rule 70(1) of L.N. 161 of 2003, the applicant will be in violation of section 102(2) of the Traffic Act; and the compulsion to so breach the enacted law of Parliament is a violation of the conscience of the 1st applicant. Yet the 3rd respondent has directed that the 1st applicant must so act in breach of the law, as a precondition to being granted a licence of the Transport Licensing Board.

It is stated that since the 1st respondent is in breach of section 102(2) of the Traffic Act (Cap. 403), he has also acted ***ultra vires*** in purporting to amend rule 71(a) and (b) as well as rule 72(b) of the Traffic Rules – which rules are founded on the primary provision in section 102(2) of the Traffic Act. It is stated that since Parliament had reserved the original (unamended) rules 70, 71 and 72 of the Traffic Rules to apply only to *taxi cabs*, it is only Parliament that could have amended section 102(2) of the Traffic Act to extend its application to *matatus.*

The applicants aver that whereas Legal Notice No. 351 of 1987 was repealed on 10th November, 1995 by Legal Notice No. 352 of 1995, the 1st respondent has purported to have repealed that already

repealed Legal Notice by his impugned Legal Notice No. 161 of 2003 (paragraph 3); and that this misunderstanding has led to the making of an ambiguous subsidiary legislation which prejudices the rights of the applicants.

The 1st applicant avers that his option to convert his Nissan *matatu* to other uses have been prejudiced, as while rule 41A(1)(a) of L.N. No. 161 of 2003 requires that all public service vehicles except taxis and private-hire vehicles be fitted with speed governors, the 1st respondent's more recent ***Gazette Notice*** No. 384 of 2004 requires *all public service vehicles* to be fitted with speed governors; and the effect is that the Minister has made contradictory rules.

The 1st applicant states that while the 1st respondent, by rule 41A(1)(b) of L.N. No. 161 of 2003 requires that commercial vehicles with a tare weight exceeding 3,048 kg should be fitted with speed governors, no specification has been made on the applicable class or type of speed governors; and the effect is that commercial vehicles, unlike public service vehicles, are under no obligation to install speed governors – which entails discrimination against the 1st applicant and his *matatu* vehicle.

The applicants aver that the 1st respondent Minister did not lay before Parliament the rules contained in Legal Notice No. 161 of 2003, in contravention of s. 34(1) of the Interpretation and General Provisions Act (Cap. 2); and that in this way the Minister deprived the applicants of an opportunity to challenge the rules before they were gazetted into law.

The 1st applicant attributes illegalities to the provisions of Legal Notice No. 161 of 2003, and contends that he is not bound to comply with the same, and that the said Legal Notice and its related ministerial decisions (which are filed as "documents/directives sought to be quashed") should be quashed in this Court's exercise of its judicial review competence.

D. THE EVIDENCE

In the package of application papers were the verifying affidavit of the first applicant and that of the second applicant, both dated 2nd February, 2004. These were followed by the replying affidavits of ***Philip Kipsang Langat,*** Deputy Secretary in the Ministry of Transport and Communications (dated 25th March, 2004); and that of ***Cosmas Ngeso,*** Secretary to the Transport Licensing Board (dated 12th February, 2004). ***Philip Kpsang Langat*** later swore another affidavit dated 2nd May, 2004; and ***Cosmas Ngeso*** swore a second affidavit dated 1st March, 2004. The four affidavits, however, became the subject of interlocutory proceedings contesting their quality as evidence.

The basis of the applicants' challenge to the respondents' depositions was, firstly, that neither ***Philip Kipsang Langat*** nor ***Cosmas Ngeso*** had addressed the legality of the impugned instruments, Legal Notice No. 161 of 2003 and ***Gazette Notice*** No. 384 of 2004; and secondly, that neither had stated the source of his information or the basis of his averments, so that these deponents were not able to render their depositions in the first-person mode. Of the impugned regulations, ***Philip Kipsang Langat*** had averred (affidavit of 12th February, 2004, para. 5):

"THAT the regulations contained in Legal Notice 161/2003 are meant to improve the provision of services in the Transport Sector."

It was contended for the applicants, I believe, with justification, that the deponent had in that instance stated no source of information or basis of belief; and this was the general character of the whole affidavit and of the several other affidavits as well.

In aid of the submissions of learned counsel for the applicants, ***Mr. Kinyanjui***, a pertinent authority was cited, ***Standard Goods Corporation Ltd. v. Harakhchand Nathu & Co***. (1950) 17 EACA 99. The Court in that case stated (p. 100):

"The affidavit in question consisted of several paragraphs. Paragraph 2 was: 'The facts stated herein are within my knowledge'; and paragraph 7 was: 'What is stated above is true and correct to the best of my knowledge and information.' As regards paragraph 2, I would observe that facts can be within a person's knowledge in two ways: (1) by his own physical observation; or (2) by information given to him by someone else. It is clear that reading paragraphs 2 and 7 of the affidavit together, the deponent was stating facts without stating *which were from his own observation* and which from *information.* An affidavit of that kind ought never to be accepted by a Court as justifying an order based on the so-called 'facts'."

Counsel had submitted persuasively, with respect, that the respondents' affidavits did not satisfy the basic tests for admission, and had relied on other authorities as well. In ***Young v. J.L. Young Manufacturing Co. Ltd*** (1900), 2 Ch. 753 the Court had remarked (***Rigby, L.J.*** at p. 755):

"The point is a very important one indeed. I frequently find affidavits stuffed with irregular matter of this sort. I have protested against the practice again and again, but no alteration takes place. The truth is that the drawer of the affidavit thinks he can obtain some improper advantage by putting in a statement on information and belief, and he rests his case upon that. I never pay the slightest attention myself to affidavits of that kind, whether they be used on interlocutory applications or on final ones, because the rule is perfectly general – that, when a deponent makes a statement on his information and belief, he must state *the ground of that information and belief."*

Lord Alverstone, for his part, thus remarked:

"If such affidavits are made in future it is as well that it would be understood that they are worthless and ought not to be received in evidence in any shape whatever: and as soon as *affidavits are drawn so as to avoid matters that are not evidence* the better it will be for the administration of justice."

The East African Court of Appeal expressed its full agreement with the foregoing principles, in ***A.N. Phakey v. World Wide Agencies Ltd***, (1948) 15 EACA 1; in the words of ***Sir G. Graham Paul***, C.J. (at p.2):

"Respectfully and emphatically I agree with these authoritative pronouncements and I trust it will not again be necessary in this Court to draw attention to this very elementary matter of practice."

Learned counsel, ***Mr. Kinyanjui*** considered it to be material that the impugned affidavits must have been prepared by counsel in the Attorney-General's office, and on this ground alone they must be subjected to a higher standard of scrutiny, which test they would not pass. The principle in counsel's argument is by no means novel. In ***Menteri Sumber Manusia & Another v. Association of Bank Officers, Peninsular Malaysia*** [2000] 2 LRC 606, Federal Court Judge, ***Joseph Jr***. had thus remarked, on the integrity of affidavits (at p.634):

"There can be no doubt that in the present case, the Minister had had the advantage of the services of the legal officers in the Attorney-General's Department to draft this affidavit. His reasons will thus have to be subjected to careful scrutiny."

Mr. Kinyanjui further noted that Order XVIII, rule 3(1) required a deponent to make averments out of his own knowledge, though with certain provisos. Counsel stated, quite correctly, with respect, that the importance of affidavits under Order LIII, is that they support *applications that seek final orders;* and that on this account such affidavits ought to specify the basis of the deponent's belief; and that the Court should on this account be able to assure itself of the veracity of averments in affidavits, where Order LIII is concerned. The inclusion of irrelevant material in affidavits had led, in ***Rossage v. Rossage & Others*** [1960] 1 All E.R. 600 to the striking out of whole affidavits, the English Court of Appeal holding (***Hodson, L.J.,*** at p. 602):

"Those affidavits contain material which is relevant, but contain also a great deal of material which is irrelevant – pure hearsay evidence which the Court cannot take into account in the form in which it stands. The proportion of that material to the relevant material is so high that if this matter is to be disposed of with any regard to convenience it is clearly right that the whole of those affidavits should be removed from the file rather than by seeking, by expunging irrelevant matter, to put the affidavits in order."

Learned counsel for the defendants, ***Mr. Njoroge,*** however took the position, in effect, that there would be hardly any impropriety in both ***Mr. Langat*** and ***Mr. Ngeso*** making general statements in their affidavits: because the agencies they represented are responsible for formulating the policies which go into the initiation of legislation that touches on the realities on the ground. Counsel urged that both ***Mr. Langat*** and ***Mr. Ngeso*** must be familiar with matters of government policy in relation to public service vehicles.

On the basis of the submissions of counsel I formed the impression, firstly, that the several affidavits in support of the respondents' case had not been co-ordinated or formulated in the best manner as required by Order XVIII of the Civil Procedure Rules; and secondly, that the impugned affidavits had adopted a rather general mode of expression and had not, in every respect, brought out the personalised identity such as would show their quality as statements made under oath by the deponents themselves. A large number of the paragraphs in the depositions of ***Mr. Langat*** and ***Mr. Ngeso*** were merely general statements rather than averments based on the personal knowledge of the deponents. Had I isolated such improper aspects and then struck them out, then the coherence of the affidavits would have been lost, and it would not then be possible to use them in arriving at a fair determination of the issues brought before the Court. I thus ordered all the affidavits sworn by ***Mr. Langat*** and ***Mr. Ngeso*** struck out. I did, however, allow the respondents ***locus poenitentiae*** to draw up, file and serve proper affidavits within 21 days, complying with the requirements of Order XVIII of the Civil Procedure Rules.

From the record, no more than one affidavit was thereafter filed, that of ***Hassan Arthur Malipe Ole Kamwaro***, Chairman of the 3rd respondent, dated 12th July, 2004 and filed on 3rd September, 2004. This affidavit, I would say, was of limited value; not only was it just as general as the ones I had earlier struck out, but it was almost wholly wanting in evidentiary character and was merely argumentative. The dogged history of affidavits sworn for the respondents, in the whole proceedings, would suggest that the respondents had set out from the very beginning to take their stand exclusively on *points of law*, and on the basis of the submissions of their counsel.

E. THE SUBMISSIONS ON POINTS OF LAW

1. Preliminary Information

The hearing of this matter was much interrupted and took about eight months. Owing to repeated adjournment, hearing of the substantive application did not commence until 22nd September, 2004 when

the applicants were represented by ***Mr. Kinyanjui,*** the respondents by ***Mr. Njoroge*** for the Attorney-General, the 4th Interested Party by ***Mr. Omulele***, and the 5th Interested Party by **Mr. Kamwendwa.**

2. Submissions for the Applicants

(a) Laying Ministerial rules before the National Assembly

Learned counsel, ***Mr. Kinyanjui,*** presented his clients' application as a prayer for orders of certiorari, prohibition and mandamus. He contended that Legal Notice No. 161 of 2003 made by the first respondent was ***ultra vires*** and unlawful as it offended against section 34 of the Interpretation and General Provisions Act (Cap.2).

Section 34 of the Interpretation and General Provisions Act (Cap. 2) provides as follows:

"(1) All rules and regulations made under an Act shall, unless a contrary intention appears in the Act, be laid before the National Assembly without unreasonable delay, and, if a resolution is passed by the Assembly within twenty days on which it next sits after the rule or regulation is laid before it that the rule or regulation be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the making of any new rule or regulation.

"(2) Subsection (1) shall not apply to rules or regulations a draft of which is laid before the National Assembly and is approved by resolution before the making thereof, nor the rules of Court."

The plain meaning of the foregoing provisions, I believe, is that if the content of a certain Act shows no contrary intention, then all rules or regulations made under that Act, unless already approved in draft by Parliament, shall be laid before the National Assembly, which may, within the first 20 days of its sitting, annul the same. But even if such annulment takes place as contemplated, actions already taken under the rules remain valid; and the power to make further rules also remains unaffected.

It was counsel's contention that the new rules introduced by L.N. No. 161 of 2003 had not been laid before the National Assembly, and that this was in breach of the Interpretation and General Provisions Act, and so the Minister's rules were ***ultra vires*** and void. Counsel submitted that the Minister had no powers, on his own and without Parliament's intervention, firstly to make the impugned traffic rules, and secondly, to gazette the same.

Learned counsel, ***Mr. Kinyanjui*** drew analogies between the powers to make by-laws (by the local authority) and the power to make rules (by the Minister) provided for in the Traffic Act (Cap. 403). Sections 72A(2) and 118A of that Act referred, in the case of the local authority, to the *making, approval*, and *publication* of by-laws in accordance with the provisions of the Local Government Act (Cap. 265). Counsel argued that the Traffic Act (Cap. 403) which empowered the Minister to make rules (s.119), was similarly to be taken to be subject to the procedures established under the Interpretation and General Provisions Act (Cap. 2). It was contended that the Minister had no powers to unilaterally make rules and then gazette the same; he would make the rules, but it was for Parliament to approve the same. It was hence argued that where, as in the instant case, the Minister made the rules, he could not then proceed on his own, and directly, to gazette them.

Counsel supported his argument with the case of ***The King v. Electricity Commissioners, ex parte London Electricity Joint Committee Co. (1920) Ltd & Others*** [1924] 1 KB 171, which refers to English

legislation and carries a relevant paragraph (p.191):

"….section 7 of the Act, it is said, provides that the Commissioners may make an order giving effect to a scheme, but that order has no force or effect in itself. It is merely a suggestion or advice to be passed on to the Minister of Transport, who may confirm or modify the scheme. Even then the order has no force. It must first be approved by each House of Parliament, and then, and not till then, has the order any force or effect. As soon as the order has been approved by both Houses of Parliament the section provides that it shall have effect as if enacted in the Act. The result, according to the respondents, is that any application to the Courts for a writ of prohibition or certiorari must be either premature or too late; premature if made before the order of the Commissioners becomes an Act of Parliament, too late if made after it has attained that status….The effect of accepting the argument of the Attorney-General on this point would be very far-reaching. It would amount to a decision that the subject has no longer the right in cases like the present, where this form of legislation is adopted, to come to a Court of law and demand an inquiry whether the action, or decision, of which he is complaining is *utra vires* or not. I question very much whether Parliament had any deliberate intention of producing this result by adopting this particular form of legislation."

Quite clearly, counsel for the applicant was here anticipating that the respondent would advance the argument that the Minister's rules had already become law, and been merged into the framework of the Traffic Act (Cap. 403) and it was no longer possible to obtain any orders of judicial review. This was apparently a pre-emptive submission. I think the main principle to be derived from the passage set out above, is that so far as possible, the Court would safeguard the judicial review recourse for an aggrieved party, in a proper case.

On the importance of laying the Minister's regulations before Parliament, before they enter into force, counsel cited ***The King v. Minister of Transport, ex parte Upminster Services Ltd.*** [1934] 1 K.B. 277. Counsel urged that the Minister lacked the power to make any rule he thought he could make, and then to gazette it all on his own; and in support of this contention the following passage in the judgement of ***Romer, L.J.*** was cited (p. 295):

"The appeal … was unsuccessful, and the decision of the Commissioner to grant the licence, which was the decision appealed from, should…have been affirmed. The Minister, nevertheless, conditionally revoked the licence, and seeks to justify his action on the ground that s.81, subs.2, of the Act enabled him to make any order that he thought fit. Plainly some limit must be placed upon the generality of the words used. No one can suppose that the Legislature intended to create a dictatorship in the person of the Minister of Transport, if and whenever an appeal happened to be brought before him under the section. It is equally incredible that the subsection should have been intended to give the Minister power to make any order he might think fit relating to road transport in general, or even road transport in the area affected by the matter brought before him on the appeal."

Learned counsel relied on the above passage also to support his contention that section 119 of the Traffic Act (Cap. 403) which empowered the first respondent to make regulations regarding the transport sector, did not give a blanket law-making authority. Blanket authority did not fall within the purview of the law, as had been unambiguously stated in the Malaysia case, ***Menteri Sumber Manusia & Another v. Association of Bank Officers, Peninsular Malaysia*** [2000] 2 LRC 606, (at p. 635 – ***Joseph Jr.,*** FCJ):

"…it is right to say, at the risk of being trite, that the idea of absolute or unfettered discretion has no place in public law."

That authority adopts unequivocal statements in ***Sir William Wade's Administrative Law*** (5th ed., 1982), pp. 355 – 357:

"**The common theme of all the passages quoted is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a judicial system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the intent and meaning of the empowering Act ….Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good…. Unreviewable administrative action is just as much a contradiction in terms as is unfettered discretion, at any rate in the case of statutory powers."**

This is consistent with the position taken by the English House of Lords in the famed decision in ***Padfield & Others v. Minister of Agriculture, Fisheries and Food & Others*** [1968] 997. In that case ***Lord Upjohn*** remarked:

"But the use of that pejorative adjective ['unfettered'], even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives."

Mr. Kinyanjui on the basis of the foregoing authorities, submitted that ministerial rules are constrained by a statutory framework, and they will be invalid if they fail to comply with those constraints; and he urged that "power to make rules was not synonymous with unilateral power to make and to publish rules."

Counsel submitted that the Traffic Act (Cap. 403) carried no provision which ousted the operation of section 34(1) of the Interpretation and General Provisions Act (Cap. 2); and therefore the first respondent had been duty-bound to lay his rules before the National Assembly before he published them in the ***Gazette*** as law. Were those rules laid before Parliament or not" From the depositions, it is clear that the applicants suppose that there had been no compliance with section 34(1) aforesaid; for ***Mr. Kinyanjui*** repeatedly tried to obtain an answer from the respondents' side, but the same was not forthcoming. On the assumption that a failure to lay the rules as required was more likely to have been the case than the alternative, counsel proceeded to submit that the requirements of the Interpretation and General Provisions Act (Cap. 2) run in tandem with section 30 of the Constitution, which confers upon Parliament the law-making competence of the State; and that in view of the supremacy of the Constitution over all other laws, the rules made by the first respondent were null and void.

In demonstrating the point regarding the mandatory duty placed upon the Minister by section 34(1) of the Interpretation and General Provisions Act (Cap. 2), counsel referred to the language adopted in various sections of the Traffic Act (Cap. 403): section 3(1) thereof stipulates that "The Minister shall, by notice in the ***Gazette,*** appoint a Registrar of Motor Vehicles"; whereas s. 11 provides: "The Minister *may,* by notice in the ***Gazette***…" Section 119(1) of the Act does not refer to the ***Gazette***, but merely says*: "The Minister may make rules prescribing…"* The essential argument of counsel was that the Minister, by such wording, was limited to the *making* of the rules and he could not then proceed to gazette, unless further

procedures had been complied with. Counsel relied on the case, ***Quebec Railway, Light, Heat and Power Company v. Vandry*** [1920] A.C. 662 for the proposition that Parliament meant no more and no less than what it specified in the statute; "*for the legislature is deemed not to waste its words or to say anything in vain*" (p. 676, per Lord Sumner). Counsel submitted that once the Minister had made the rules, the next step of gazettement would have to be taken only in accordance with the requirements of the Interpretation and General Provisions Act (Cap. 2). Failure to comply with the requirements of that Act, counsel submitted, had the effect of denying the 1st applicant his constitutional rights to raise objections through the voices of Parliament; and thus, the Minister had acted unconstitutionally.

The 1st applicant's newspaper advertisement of 9th January, 2004 was perceived by counsel for the applicant to have been an admission by the Minister that he was, indeed, in breach of the requirements of the Interpretation and General Provisions Act (Cap. 2). In that newspaper advertisement, the Minister for Transport and Communications states: *"Further to my earlier notice in which I reiterated* [that] *the deadline of 31st January, 2004 remains, I wish to elaborate on the following issues aimed at facilitating the implementation of the regulations*", and he then makes *further specifications regarding speed governors* (approved models; calibration of pumps), public service vehicle routes, badges, uniforms, taxi-cabs, and *matatus*.

But in such new changes, learned counsel saw yet another impropriety on the part of the Minister, a failing which called for the Court's intervention through judicial review. Although by section 68 of the Traffic Act (Cap. 403) the Minister was *empowered "from time to time to revise the highway code*", sub-section (2) thereof was unequivocal about compliance with the requirement such as is set out in section 34(1) of the Interpretation and General Provisions Act (Cap. 2). Section 68(2) of the Traffic Act states:

"The highway code and any alterations proposed to be made in the provisions thereof shall be laid before the National Assembly, and, if a resolution of the National Assembly is passed within thirty days of their being so laid that such a code be revoked or amended in accordance with such resolution, such code shall be deemed to be revoked or amended accordingly, but without prejudice to anything previously done or suffered by virtue thereof."

Learned counsel submitted that Parliament remained the ultimate legislative authority in relation to the highway code, and so the actions of the Minister in purporting to make and amend the code all by himself, was ***ultra vires*** both the Traffic Act and the Interpretation and General Provisions Act.

(b) Propriety and Legality of Ministerial rules

(i) The Yellow bands

One of the issues forming the applicants' gravamen is the manner in which the Minister has attempted to amend the provisions of the highway code in respect of yellow bands painted on the sides of certain public service vehicles. The pre-existing rule 70(1), in the Traffic Rules thus provided:

"Every taxicab shall have painted on both sides and on the rear a continuous horizontal yellow band having a width of 150 millimetres and of a consistency sufficient to enable such band to be clearly visible by day at a distance of not less than 275 metres."

This, by L.N. 161 of 2003 was substituted by the following provision:

"With effect from 1st January, 2004, every taxicab or *matatu* shall have painted on both sides and on the rear a continuous horizontal yellow band having a width of 150 millimetres and of a

consistency sufficient to enable such band to be clearly visible by day at a distance of not less than 275 metres."

The difference between the two is the addition of the *matatu* to the taxicab as a vehicle in respect of which the horizontal yellow band was required. But this addition has an implication for the law-making process, and for the hierarchy of law-making competence: who is superior, is it Parliament, or the Minister"

Counsel submitted, I believe correctly, that the basis of application of the original Traffic Rule 70(1) was the rational design of section 102(2) of the Traffic Act (Cap. 403) itself. That sub-section provides:

"No person shall own, drive or be in charge of any *taxicab* unless such vehicle is painted in such colour or colours or is permanently marked in such manner as may be prescribed, and *no vehicle, not being a taxicab*, shall be painted or marked in the manner prescribed for a taxicab."

Counsel's argument here is, with respect, a logical one. So long as section 102(2) of the parent Act remained unamended by Parliament, and so long as that section unequivocally placed taxicabs in their own special category with respect to the applicability of the requirement for the horizontal yellow band, was it permissible for the Minister to reverse the whole purpose and design of that legislation by admitting *matatus* to the category of taxicabs" Had Parliament been acting in vain" Is it for the Minister to proclaim so, and exclusively by his own authority" Learned counsel brought to my attention authority which would show that the legislature may not be contradicted in that manner***. Lord Denning, M.R***. in ***Lickiss v. Milestone Motor Policies at Lloyds*** [1966] 2 All E.R. 972 stated as a principle in laws made by Parliament, that "*The law never compels a person to do that which is useless and unnecessary*" (p. 975). This, I believe, is in aid of the construction that the Kenya Parliament must be taken to have had valid cause for placing taxicabs in their own class, in relation to the painting of horizontal yellow bands on the sides of and behind the vehicle.

In the circumstances as set out in the foregoing paragraph, counsel submitted, the obligation of the Court is to interpret the law and to reveal the impropriety shown in the relevant ministerial regulation. The Court of Appeal had held that to be the position which, in the circumstances, the Court should take, in ***Ngobit Estate Ltd v. Carnegie*** [1982] KLR 437. In the words of ***Potter, JA:***

"…the function of the judiciary is to interpret the statute law, not to make it. Where the meaning of a statute is plain and unambiguous, no question of interpretation or construction arises. It is the duty of the judges to apply such a law as it stands. To do otherwise would be to usurp the legislative functions of Parliament."

The basic point of application to the instant matter is that, by the law enacted by Parliament, *no motor vehicle not being a taxicab* should be adorned with a continuous horizontal yellow band. Counsel submitted that this was the principle to guide this Court, and for good measure drew my attention to a passage in the judgement of ***Grove, J***. in ***Richards v. McBride*** (1881) 8 Q BD 119 (at p. 123):

"…we must construe Acts of Parliament as they are, without regard to consequences, except in those cases where the words used are so ambiguous that they may be construed in two senses, and even then we must not regard what happened in Parliament, but look to what is within the four corners of the Act, and to the grievance intended to be remedied, or, in penal statutes, to the offence intended to be corrected."

The principle has the acceptance of the Court of Appeal in ***Italframe Ltd v. Mediterranean Shipping***

Company (1982 – 88) 1 KAR 937, at p. 945 (***Platt, Ag. J.A***.):

"**This analysis illustrates the general principle that it is not for the Court to assume a mistake in an Act of Parliament … It is not the business of the Courts to speculate on the policy intended by the draftsman. It is the duty of the Court to give a sensible meaning to the words of the statute which, if possible, makes it operative."**

Submitting that the terms of section 102(2) of the Traffic Act (Cap. 403) are clear enough for all requirements of application, learned counsel submitted that the first respondent herein had no power to override the intent of Parliament. This principle is clear from ***The Queen v. Bird & Others, ex parte Needes*** [1898] 2 Q.B. 340 (at p. 345, ***Wills, J***.):

"I desire in my judgement to adopt a broad principle which is too clear to need cases to be cited for its justification – the principle that where a power to make regulations is given to a public body by statute, no regulations made under it can abridge a right conferred by the statute itself."

And this principle is applied in many decisions of the Courts of the various Commonwealth jurisdictions. ***Lord Halsbury, L.C***. in ***Rossi v. Lord Provost & Co. of Edinburgh & Others*** [1905] A.C. 21 had remarked (p. 25):

"I do not know what the evil aimed at was. I can give, therefore, no general view of what is the intention and purpose of the statute. I can only look at the statute itself and construe it, and when I construe the statute I find there is in the statute itself a plain prohibition with respect to certain things."

Learned counsel submitted that there was a clear violation by the 1st respondent of the express provisions of s. 102(2) of the Traffic Act (Cap. 403), and that this merited condemnation by the Court. Condemnation because a rule of law made by Parliament can only be varied or revoked by Parliament itself. This reasoning, which in my view is entirely unanswerable as a legal proposition, is fully supported by the weight of the apprehension of learned judges. ***Lord Halsbury, L.C.*** in ***Janson v. Driefontein Consolidated Mines Ltd*** [1902] A.C. 484 (at p. 491) thus stated the position:

"A rule of law, once established, ought to remain the same till it be annulled by the Legislature, which alone has the power to decide on the policy or expedience of repealing laws, or suffering them to remain in force. What politicians call expedience often depends on momentary conjunctures, and is frequently nothing more than the fine-spun speculations of visionary theorists, or the suggestions of party and faction."

Counsel submitted that unless and until the Kenya Parliament amended s. 102(2) of the Traffic Act (Cap. 403) the Minister had no basis for the actions he took in relation to the yellow bands painted on taxicabs and *matatus.* This argument is unanswerable, in view of section 31(b) of the Interpretation and General Provisions Act (Cap. 2) which thus provides:

"no subsidiary legislation shall be inconsistent with the provisions of an Act."

On that basis counsel attributed ***ultra vires*** and illegality to the Minister's decision.

(ii) Displayed photographs of the driver

In the same category of ministerial decisions contested is the amendment to Traffic Rule 71, purportedly

made by the Minister. The original rule 71 thus reads:

“There shall be prominently exhibited in every taxicab a recent photograph of the head and shoulders of the driver for the time being of the taxicab taken full face without hat, of postcard size, such photograph being —

(a) **of such nature and so displayed as to enable any person riding in the back of the taxicab clearly to identify the driver thereof with the photograph…”**

The Minister, by Legal Notice No. 161 of 2003, purported to delete that rule and to replace it with one that reads:

“There shall be prominently exhibited in every taxicab or *matatu* a recent photograph of the head and shoulders of the driver who for the time being has charge of the taxicab or *matatu* and the photograph shall be taken full face without hat, of postcard size, and such photograph shall be —

(a) of such nature and so displayed as to enable any person riding in the back of the taxicab or *matatu* clearly to identify the driver thereof with the photograph…”

Learned counsel contended that the effect of this amendment would be to compromise the tenor and effect of the original rule which dealt only with *taxicabs*, and was based on the significant reality that a taxicab is a *short* vehicle, quite unlike the *matatu* where a passenger sitting at the extreme back side would be unable to recognise the facial features of the driver from a photograph of the driver hanging at the front of the vehicle. The mischief which had been the subject of the rule in its original formulation, can no longer be cured once the taxicab rule is applied to the *matatu.*

Taking into account the mischief sought to be suppressed, the Traffic Rules in their original formulation had dealt with different categories of vehicle separately; thus Part V was dedicated to “special provisions relating to motor omnibuses and *matatus”;* Part VI to “Special provisions relating to drivers, conductors and passengers of motor omnibuses or *matatus”;* Part VII to “special provisions relating to taxicabs”. Counsel submitted that the previous, better-structured regime of traffic rules had been disturbed by the first respondent, who in the process had made *unreasonable* rules.

Retaining a sense of purpose in rule-making; keeping in mind the context in which the rules are being made; taking account of the mischief that the parent Act seeks to cure, are central elements in proper formulation of ministerial regulations. This perception is adopted in case law. In ***Attorney-General v. H.R.H. Prince Earnest Augustus of Hanover*** [1957] 1 All E.R. 49, ***Viscount Simonds*** thus remarked (p.53):

“[I would dissent from a position that dictates] that I cannot obtain assistance from the preamble in ascertaining the meaning of the relevant enacting part. For words, and particularly *general words, cannot be read in isolation*; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in this context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia*, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.”

I think the essential point here is that interpretation of the law must proceed by fully acknowledging the context of the law, and the *practical considerations which necessitated the legislation* in the first place. I

understand learned counsel, ***Mr. Kinyanjui,*** to be urging that the rationality and propriety of the Minister's law-making in Legal Notice No. 161 of 2003 must be judged by considering the context in which the parent Act was made, and the mischief which the legislature had sought to curb. In this respect, counsel submitted, the Minister could not rightly bring *matatus* within the scheme of Traffic Rules 70, 71 or 72 – rules which previously had applied exclusively to *taxicabs.*

Counsel held the view that the Minister ought to have sworn an affidavit explaining the circumstances in which he made rules that were not in keeping with the practical concerns of Parliament when it had made the parent Act. Why did the Minister apply to *matatus* rules that had been applied exclusively to taxicabs" Counsel submitted that there was an opportunity, which the Minister had elected to forego, to explain such rule-making.

(iii) Matatus, motor omnibuses, taxicabs

Mr. Kinyanjui further contended that the Minister's inclusion of *matatus* in his new Traffic Rules 70, 71 and 72 was an act of discrimination against the owners of *matatus,* which fell in the same class of public service vehicles as omnibuses. The Traffic Act (s.2) defines a "*matatu*" as follows:

"…a public service vehicle having a seating accommodation for not more than twenty-five passengers exclusive of the driver…."

A "motor omnibus" is defined as:

"**A public service vehicle having seating accommodation for more than twenty-five passengers exclusive of the driver…."**

Whereas there were in place already traffic rules (part VI of the Traffic Rules) relating to motor omnibuses and *matatus,* the Minister now, by his Legal Notice No. 161 of 2003, has in addition applied taxicab rules (Part VII of the Traffic Rules) to *matatus* though not to motor omnibuses. In the words of learned counsel, "The Minister now gives the *matatu* driver two requirements instead of one, and this is a double jeopardy; the Minister's act in including *matatus* under rules 70, 71 and 72 contravenes the Constitution. Why should he include *matatus* but exclude motor omnibuses"" Counsel contended that the said act of the Minister was discriminatory in its effect, to the same class of public service vehicles. This discrimination, counsel argued, had its impacts upon the *person*; and so this would be a case of discrimination against the person.

(iv) Speed governors, gadgets

Section 119(1)(da) of the Traffic Act (Cap. 403) provides that the Minister may make rules prescribing "devices to be fitted to any class or type of vehicle for restricting their speed to a specified speed (and different devices and different speeds may be prescribed for different classes or types of vehicles)".

Learned counsel, ***Mr. Kinyanjui,*** submitted that the Minister had exceeded his powers under the said section 119(1)(da) of the Traffic Act and had acted ***ultra vires***. He submitted that what the Minister was authorised to do was to prescribe *devices*, but not *brands* for vehicular speed control. It was contended that whereas the Minister had been empowered to prescribe devices, he had gone further and prescribed calibration of equipment, and that this too was beyond his powers.

The 1st respondent's Traffic (Amendment) Rules, 2003 published in the impugned instrument, Legal Notice No. 161 of 2003 amended rule 41A of the original Traffic Rules to read as follows:

"(1) With effect from 1st February, 2004, the engine of -

(a) every public service vehicle except taxis and private hire vehicles;

(b) every commercial vehicle whose tare weight exceeds 3,048 kg shall be fitted with a speed governor which -

(i) is of a type approved in writing by the Minister;and

(ii) is adjusted so that at all times and in any load condition the vehicle cannot exceed 80 kph.

(2) In this rule 'governor' means a device to control the speed of the engine by any method."

The Minister then went further and set out his list, which he published in an advertisement in the *Daily Nation* newspaper, of *approved models* of speed governors indicating even the *countries where they were made* – South Africa and the United Kingdom. He then stated:

"These approved governors are the only ones to be fitted to vehicles by either the manufacturer, dealer or agents approved by the manufacturers or dealers. After installing the speed governor the dealer must test and certify that the governor fitted performs as desired and set at 80 kph. maximum speed. The agent, manufacturer or dealer who have fitted the governor must then sign the governor compliance certificate duly completed. The vehicle owner must then present the vehicle to any motor vehicle inspection centre in the country for testing and certification by a motor vehicle inspector who will in turn issue a valid vehicle inspection report for presentation to the Registrar of motor vehicles for registration purposes."

The Minister's newspaper advertisement also deals with the calibration of pumps. It says:

"Calibration of pumps is applicable to diesel vehicles fitted with injector pumps propelled by diesel. The calibration must be done by dealers, manufacturers or registered business firms specialised on fuel injector pump repairs. The agent, manufacturers and dealers who have done the calibration must then sign the calibration certificate duly completed. The vehicle owner must then present the vehicle to any motor vehicle inspection centre in the country for testing and certification by a motor vehicle inspector who will in turn issue a valid vehicle inspection report for presentation to the registrar of motor vehicles for registration purposes."

Learned counsel, ***Mr. Kinyanjui*** contended that the first respondent had no legal authority to prescribe specific brands of speed governors as he purported to do in his *Daily Nation* (9th January, 2004) advertisement; and neither had he been entrusted with the competence to prescribe calibrations for the devices he prescribed.

Relying on the authority of the Privy Council case, ***Municipal Corporation of the City of Toronto v. Virgo*** [1896] A.C. 88, ***Mr. Kinyanjui*** submitted that a ministerial power to regulate an activity did not incorporate the power to prohibit, whereas the Minister on the basis of his Legal Notice No. 161 of 2003, had proceeded through his *Daily Nation* (9th January, 2004) advertisement to impose certain *prohibitions* in relation to the management and plying of public service vehicles. In the opinion of ***Lord Davey*** in that case it is remarked (p.93):

"No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the

opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the *continued existence of that which is to be regulated or governed*. An examination of other sections of the Act confirms their Lordships' view, for it shows that when the Legislature intended to give power to prevent or prohibit it did so by express words."

The same principle is stated in the Eastern Africa Court of Appeal case, ***R. v. Timotheo Waiganjo wa Muni & Another*** (1939) 6 EACA 79***;*** and clearly, counsel's perception here was that the Minister's directions in the *Daily Nation* (9th January, 2004) advertisement amounted to *prohibitions*, as the licensing of a public service vehicle to operate depended on those directions being complied with. Such, I think, would be a somewhat stretched notion of prohibition, unless it was already determined that the Minister's directions were in the first place a nullity – an issue that I will return to later on.

Counsel further subjected the Minister's *Daily Nation* (9th January, 2004) directives to the test of *reasonableness*. Counsel considered it significant that the specifications of speed governors were not themselves contained in Legal Notice No. 161 of 2003, but they were only later specified in a notice, ***Gazette Notice*** No. 384 of 2004. Legal Notice No. 161 of 2003 was published on 3rd October, 2003 but it bore the date 24th September, 2003 and it gave no specifications of speed governors even though the Minister made a new rule 41A(1) which stated:

"With effect from 1st February, 2004 the engine of —

(a) every public service vehicle….

(b) …..

shall be fitted with a speed governor which -

(i) is of a type approved in writing by the Minister…"

Mr. Kinyanjui submitted that the Minister was placing an unreasonable obligation by his Legal Notice No. 161 of 2003, since he had therein included no specifications to guide public service vehicle operators. The first applicant did not, in these circumstances, know what kind of speed governor had been approved even though he was required to comply with the said Legal Notice No. 161 of 2003. This, counsel submitted, was a case of *unreasonableness* on the part of the Minister; and on this subject counsel cited from ***Sir William Wade's Administrative Law***, 7th ed. (p.879):

"Just as with other kinds of administrative action, the Courts must sometimes condemn rules or regulations for unreasonableness. In interpreting statutes it is natural to make the assumption that Parliament could not have intended powers of delegated legislation to be exercised unreasonably, so that the legality of the regulation becomes dependent on their content."

Counsel saw even more unreasonableness in the fact that, while no law had imposed any obligation upon the Minister to specify models of speed governors to be fitted on public service vehicles, he himself, of his own volition, assumed that task, and then failed to perform by specifying the time within which such equipment was to be procured. He did not specify the *standards* of the speed governors to be fitted, a fact which was bound to lead to complaints about the requirement on speed governors. In this way, counsel submitted, the Minister misdirected himself; and such misdirection has been held to warrant the Court's intervention. In ***Regina v. Secretary of State for the Home Department, ex parte***

Mahmood Khan [1984] 1 WLR 1337 it was stated (***Watkins, LJ*** at p. 1352):

"So, if there are statutory provisions or rules which the Minister has failed to follow, or if he has taken into account matters outside such provisions or rules, then the Court may intervene, because he will have misdirected himself and so acted unreasonably.

"…The categories of unreasonableness are not closed, and in my judgement an unfair action can seldom be a reasonable one. The cases cited by *Parker, L.J*. show that the Home Secretary is under a duty to act fairly, and I agree that what happened in this case was not only unfair but unreasonable. Although the circular letter did not create an estoppel, the Home Secretary set out therein for the benefit of applicants the matters to be taken into consideration, and then reached his decision upon a consideration which on his own showing was irrelevant. In so doing, in my judgement, he misdirected himself according to his own criteria and acted unreasonably. I would allow the appeal and quash the refusal of entry clearance."

Counsel, I believe, was illustrating the point that the first respondent in the instant case, after assuming on his own the extra obligations attached to the specification of speed governors for public service vehicles, did not so prescribe standards or operative dates, as to render it practicable for the first applicant to duly comply; in which case there was a censurable unreasonableness or misguidedness, which should justify the intervention of the Court through quashing orders.

Counsel was further concerned that once the Minister had taken upon himself obligations which he failed to discharge, he now resorted to a public advertisement in the *Daily Nation* newspaper of 9th January, 2004, yet without amending his earlier call for compliance by 1st February, 2004. The said newspaper announcement is not even addressed to public service vehicle owners; it is a loosely designed announcement which simply bears the heading *"Road Safety Campaign."* Yet judging by its content, which begins *"Further to my earlier notice*", it must be assumed that the Minister is *covertly adding to his Legal Notice No. 161 of 2003.* Counsel wondered, and with considerable justification, with respect, how a governing instrument in the form of a gazetted ***Legal Notice*** could be completed through such a general advertisement in a daily newspaper. Nobody could understand the *Daily Nation* advertisement of 9th January, 2004 unless he had heard, or knew of Legal Notice No. 161 of 2003. *Was this newspaper announcement intended to carry any binding legal obligations*" Learned counsel submitted that the said *Daily Nation* (9th January 2004) directive published as an advertisement, was invalid. Counsel submitted that the Minister's act, which may be described as administrative, was required to comply with certain legal principles, which principles emerge clearly from the English case, ***Padfied & Others v. Minister of Agriculture, Fisheries and Food & Others*** [1968] A.C. 997 (at p 1006, ***Lord Denning, M.R.):***

"It is said that the decision of the Minister is administrative and not judicial. But that does not mean that he can do as he likes, regardless of right or wrong. Nor does it mean that the Courts are powerless to correct him."

Learned counsel submitted that the Minister in the instant matter, had proceeded as if no person, such as the 1st applicant, had a right to bring a grievance for the Minister's attention. The Minister had allowed no opportunity for any complaints to be addressed: and this entailed an impropriety. In the ***Padfield case [1968] A.C. 997*** (at p. 1006, ***Lord Denning, M.R.)*** the law had been thus stated:

"Good administration requires that complaints should be investigated and that grievances should be remedied. When Parliament has set up machinery for that very purpose, it is not for the Minister to brush it on one side. He should not refuse to have a complaint investigated without good reason."

Mr. Kinyanjui's contention was, in effect, that the Minister by his impugned regulations, had not only made subsidiary law that was ***ultra vires***, but had gone further to impose unlawful compliance deadlines which took it out of his power to entertain legitimate grievances and to address the same satisfactorily; and for this further reason, the illegality attending his acts had been compounded.

(v) Determining the number of passengers

Section 100(1) of the Traffic Act (Cap. 403) stipulates:

"The Registrar shall in respect of any public service vehicle determine the maximum number of passengers whether sitting or standing, and the weight of baggage or goods allowed to be carried at any time on such vehicle or on any vehicle of a similar class or description:

Provided that such determination shall have regard to the provisions of this Act with regard to construction, seating capacity and weight."

Counsel submitted that the operative Traffic Rules were ***ultra vires*** in so far as they implied that the Minister could delegate his functions to a different person known as a "*certifying officer."* Rule 86(b) provides:

"in the case of a vehicle registered as a *matatu*, the seating capacity shall be determined by the certifying officer at the time of mandatory inspection…"

Counsel contended that whereas Parliament, by section 100(1) had allowed standing passengers, the Minister, through his *"certifying officers*", had established a new rule which took away the scope for standing passengers.

(vi) Ministerial instrument in the official gazette and in a newspaper

The ***Kenya Gazette*** is stated to be a proper source of status statements to be admitted by the Court. Section 40 of the Evidence Act (Cap. 80) states:

"When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it shall be admissible which is made -

(a) in any written law of Kenya, or in any notice purporting to be made in pursuance of any such written law, where the law or notice (as the case may be) purports to be printed by the Government Printer."

Counsel submitted that a publication of traffic rules in the *Daily Nation* newspaper was not proper, if such rules were to carry any legal consequence of a public nature. This contention is validated by ***Mwangi s/o Gathigi & Another v. Rex*** (1950) 24(1) KLR 72, where it was held that where a regulation is published in the Government ***Gazette***, the Minister "cannot amend, vary, rescind or revoke any Order so published without again using the same medium, namely, publication in the Government ***Gazette"*** (at p. 75). Counsel submitted that the Minister, by publishing the regulations in the official Gazette, "had created legitimate expectations in the applicant that any further related publication would be carried in a legally binding publication", and anything else would be capricious and illegal. The validity of this argument was vindicated by the Court of Appeal decision in ***Republic v. Commissioner of Co-operatives ex parte Co-operative Savings & Credit Society Ltd,*** Civil Appeal No. 39 of 1997:

"**It is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allows anyone on whom it confers a power to exercise such power arbitrarily, capriciously or in bad faith."**

Counsel submitted that when the Minister published his regulations in the *Daily Nation* newspaper, he must have had the intention to *bind*, and such was a *quasi-legislative effect*. Owing to his intent to thus create legal obligations, he was bound under the law to be *reasonable*, and not capricious. As the Court of Appeal held in ***Oloo v. Kenya Posts & Telecommunications Corporation*** [1985] KLR 829 (at p. 834):

"The fair and reasonable opportunity to meet a prejudicial demand must be afforded in clear terms…"

Mr. Kinyanjui submitted that the Minister's attempt in a casual manner, by newspaper advertisement, to levy legal obligations on members of the public imposed upon him clear requirements of legal propriety, and if he failed in this respect, then his decisions must be held to be amenable to judicial review. His regulations, it was argued, lack the safeguards of ordinary enactments which are deliberated upon in Parliament, and therefore, much scrutiny is called for. In ***Patchett v. Leathem*** (1949) 65 TLR 69 the High Court in England had noted that:

"Whereas ordinary legislation, by passing through both Houses of Parliament or, at least, lying on the table of both Houses, is thus twice blessed, this type of so-called legislation [i.e., ministerial directives] is at least four times cursed. First, it has seen neither House of Parliament; secondly, it is … inaccessible even to those whose valuable rights of property may be affected; thirdly, it is a jumble of provisions, legislative, administrative or directive in character, and sometimes difficult to disentangle one from another; and, fourthly, it is expressed not in the precise language of an Act of Parliament…but in the more collocquial language of correspondence, which is not always susceptible of the ordinary canons of construction."

So if the impugned newspaper advertisement falls in the category thus described – which it probably does – then it certainly will have serious shortfalls in terms of juridical quality; and this would clearly justify the objections raised by learned counsel.

The Minister, therefore, counsel submitted, had no right to go beyond the original requirements of Traffic Rule No. 55 as he has purported to do. The original rule had thus provided:

"The owner of every motor omnibus or *matatu* shall cause to be painted or otherwise clearly marked in the English language in a conspicuous position on the *right or offside* of every such vehicle….

(a) the name and address of the owner of the vehicle;

(b) the registered tare weight of the vehicle in kg; and

(c) the number of passengers the vehicle is licensed to carry."

But the Minister has gone further and required that each *matatu* shall have a horizontal yellow band painted on both sides connected round the rear, and inside it to paint the route numbers.

(vii) Uniforms for drivers and conductors

New Traffic Rule 65A in the impugned regulations requires public service vehicle drivers and conductors to wear *"a special badge and uniform"* - the badge being supplied by the Registrar of Motor Vehicles upon payment of a prescribed fee. The equally impugned *Daily Nation* advertisement then goes on to provide:

"With effect from 1st February, 2004 every vehicle owner must fit uniform to the driver and conductor of his vehicle. The driver's uniform should be blue jacket and blue trousers while the conductor's uniform should be maroon jacket and maroon trousers."

Counsel submitted that it was ***ultra vires*** for the Minister to place such obligations in respect of uniforms upon the public service vehicle owner, by a newspaper advertisement, rather than by publication in the ***Kenya Gazette***. He submitted that the Minister had, moreover, no such powers, and that any powers of that kind would be lying with the second respondent only, namely, the Registrar of Motor Vehicles.

(viii) Appointing dealers in speed governors

On 19th January, 2004 the first respondent published ***Gazette Notice*** No. 384, bearing the heading "*Speed Governors for Public Service Vehicles"*. The fact that this is a "***Gazette Notice***" rather than a "***Legal Notice"*** is worth noting. Although this point was not canvassed by counsel, I think it is significant; because whereas a Legal Notice would be an active instrument of governmental regulation, within the framework of the empowerment in an Act of Parliament, a ***Gazette Notice*** is a more neutral indication, much more in nature of general information which may be used by a member of the public upon election.

But ***Gazette Notice*** No. 384 of 2004 aforesaid does purport to fill gaps in the earlier Legal Notice No. 161 of 2003, much in the same way as the *Daily Nation* advertisement of 9th January, 2004 had purported to complement the obligations prescribed in Legal Notice No. 161 of 2003.

Gazette Notice No. 384 of 2004 states:

"PURSUANT to rule 41A(b) of the Traffic Rules, 2003 it is notified for general information that the Minister for Transport and Communications has approved the types of speed governors listed in the schedule to be fitted in the engine of every public service vehicle".

What does the schedule provide" For "*Types of approved speed governors".*

Some of these may here be named:

"(a) VDORSL 11 – From Fuel-O-Mat (K) Limited.

(b) SR-Mark 002 – For diesel and petrol from Safe Rider Vehicle Technology Limited.

(c) Kit Kit Speed Limiter 104-SPEC-201 diesel with solenoid value – Markmann and Company Limited.

(d) Kit Kit Speed Limiter 104-SPEC-101- Markmann and Company Limited.

(e) Elson Truck Cruise – MPPS (1998) Limited and Markmann and Company Limited."

Learned counsel for the 1st applicant submitted that the attempt by the 1st respondent to appoint dealers for speed governors was contrary to law. For section 23(1) of the Traffic Act (Cap. 403) thus provides:

"The Registrar may issue to a dealer in, or manufacturer or repairer of, motor vehicles, upon application in the prescribed form and upon payment of the prescribed fees, such number of dealer's general licences as the applicant may require, and with each such licence shall issue two identification plates."

Counsel questioned, and I think, with considerable justification, the rational basis of the Minister's commitment to some particular speed governors and to certain named dealers, when the powers in that regard have been expressly conferred upon the *Registrar of Motor Vehicles.* Learned counsel saw as an objectionable aspect of the said commitment by the Minister to particular speed governors and particular dealers, the fact that non-compliance would disentitle an applicant to the grant of a licence to operate a public service vehicle – a definite legal consequence flowing from ***Gazette Notice*** No. 384 of 2004.

(x) Who should decide on the compliance of speed governors with specifications"

The impugned *Daily Nation* advertisement of 9th January, 2004 makes the grant of public service operating licence conditional upon certification by suppliers. *"The agent, manufacturer or dealer who has fitted the governor must then sign the governor compliance certificate duly completed*." ***Mr. Kinyanjui*** contested the legality of such a directive. For under the Traffic Act (Cap. 403), provision is made for public certifying officers. Section 3(3) of the Act provides:

""The Minister shall, by notice in the ***Gazette***, appoint -

(a) a certifying officer, who shall perform such duties under this Act and any rules made thereunder in relation to the examination of vehicles as the Minister may direct, and for the purpose of performing such duties the certifying officer shall have and may exercise the powers of an inspector under this Act; and

(b) such inspectors and driving test examiners as may be necessary for carrying out the provisions of this Act."

Learned counsel argued that it was ***ultra vires*** for the Minister to overlook the above provision of the law, and to involve private business enterprises in the certification process for speed governors.

Counsel also disputed the validity of the Minister's directives regarding speed-governor compliance certificates, since they were not provided for in the Traffic Rules forming part of the Traffic Act (Cap. 403).

(ix) Drivers, conductors, uniforms and constitutional rights

As already noted, the directives issued by the 1st respondent require that drivers and conductors of public service vehicles do wear certain specified kinds of uniforms. Counsel contested the constutionality of this requirement, in view of the fact that if the 1st applicant's driver were to fail to wear the prescribed uniform, then the 1st applicant himself would become liable to charges of breach of the law. The 1st respondent considered this new rule to be inappropriate by its "paternalism" and by its disregard for the autonomy of adult persons in personal-choice matters such as mode of dress. The design of the new rule would appear certainly to be in conflict with the basic libertarian culture attending the ***common law***, which in ***Woods v. Durable Suites Ltd*** [1953] 2 Q.B.D. 391 was thus typified (by ***Singleton, LJ*** at p. 395):

"I do not believe it to be part of the common law of England that an employer is bound, through

his foreman, to stand over workmen of age and experience, every moment they are working, and every time that they cease work, to see that they do what they are supposed to do. That is not the measure of duty at common law."

Yet the Minister presumed to make prescriptions regarding uniforms without giving any explanation at all. Failure to *give reasons* in this manner while purporting to discharge public duty is frowned upon by the public law which governs the process of judicial review, and, in a proper case, will lead to ministerial acts being quashed. Such is the valid legal position within the entire common law family, to which Kenya belongs. In a constitutional decision of this Court, in ***Re Hardial Singh and Others*** [1979] KLR 18 it had been held (***Simpson, J*** at p. 27):

"I agree, however, with *Platt, J* that, in the ordinary way and particularly in cases which affect life, liberty or property, a Minister should give reasons and if he gives none the Court may infer that he had no good reasons."

And in ***Padfield and Others v. Minister of Agriculture, Fisheries & Food and Others***, [1968] AC 997 it was clearly stated (***Lord Pearce***, at pp 1053 – 54):

"This [a Minister overlooking a statute] was clearly never intended by the Act. Nor was it intended that he could silently thwart its intention by failing to carry out its purposes. I do not regard a Minister's failure or refusal to give any reasons as a sufficient exclusion of the Court's surveillance. If all the prima facie reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatsoever for taking a contrary course, the Court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions."

Learned counsel attributed illegality to the fact that when the first respondent made and published Traffic Rule 65A(1) (by L.N. 161 of 2003) requiring public service vehicle drivers and conductors to wear uniforms, he did not specify the uniform, and he only did so belatedly in his ***Legal Notice*** No. 83 of 2004. This created a state of uncertainty and a compromise to the individual freedoms; hence an unconstitutionality was entailed. Counsel submitted that the Court should not hold such instruments to have validity, citing the South African case, ***State v. Mbatha*** [1996] 2 LRC 208 where it had been stated (***Langa, J*** at p. 224):

"…it would be undesirable for the Courts to continue applying a provision which is not only manifestly unconstitutional, but which also results in grave consequences for potentially innocent persons…"

The 1st respondent provided by Legal Notice No. 161 of 2003 (Traffic Rule No. 65A(4)) that:

"Every owner of a public service vehicle shall employ one driver and one conductor who shall be security vetted."

Noting that this rule did not contemplate that one public transport operator could have *several vehicles,* nor that he might well consider it proper to employ *relief drivers*, the rule was, in counsel's submission, *vague and unreasonable*, and deserving of being quashed by judicial orders. Section 98 of the Traffic Act (Cap. 403) moreover makes special provision for "*a person who has hired a public service vehicle for the purpose of driving the vehicle himself*"; and such a person will not need to employ a driver. The Minister's impugned regulations, in effect, contradicted that provision of the governing

statute. Here is a classic case in which the Minister's directive breaks down by itself, in many ways like the poorly drafted statute referred to in ***Donovan v. Cammell Laird & Co. & Others*** [1949] 2 All E.R. 82, in respect of which ***Devlin, J.*** remarked (pp. 86 – 87):

"The trouble is that the draughtsman has legislated only for an *assumed state of affairs* in which more than one ship is never being repaired in a dry dock at the same time, and in which a shipowner never repairs his own ship and no one repairs it except under a contract with him, and he never contracts with more than one person at a time. When these assumptions break down, as they do in this case, it is difficult, if not impossible, to apply the proviso."

I think ***Mr. Kinyanjui*** is right that the Minister in the instant matter, in requiring that *"every owner of a public service vehicle shall employ one driver and one conductor*", was making his rules for a wholly *assumed state of affairs* which was destined to be contradicted by the operational reality. Therefore, that was an unreasonable rule which cannot be sustained as a matter of law. In ***Donovan v. Cammell Laird***, it was held that the Court cannot take it upon itself to fill such a void; but I take cognisance that in that case, this was because it would be improper for the Court to contradict the Legislature; in the present *case the offending rule is not that of Parliament but of the Minister;* and I hold that

it is the responsibility of the Court to vacate such a rule, applying basic principles for dealing with acts ***ultra vires*** the statute law.

Could the Minister validly limit the number of employees in the employ of one person" Counsel submitted that this was not possible and the attempt to do so was plainly unconstitutional. It could not be done under the Employment Act (Cap. 226); and the established law of employment would not allow it. This law is thus stated in ***N.M. Selwyn's Law of Employment*, 6th ed. (London: Butterworths, 1988):**

· **"…the terms of employment are bilateral, i.e. they are part of the agreement made between the employer and employee, whereas the conditions of employment are unilateral instructions which are laid down by the employer" (p.53).**

· **"A term will specify the number of hours he shall work; a condition will instruct him as to when he shall work those hours. A term will specify his employment duties, a condition will lay down how he shall perform those duties. The fact of payment is a term; the mode of payment is a condition" (p.53).**

In ***Horwood v. Millar's Timber and Trading Co. Ltd*** [1917] 1 K.B. 305 the fundamental characteristic of service in a position of employment was considered; and ***Lord Cozens – Hardy, M.R.*** quoted with approval (p.312) from ***Davies v. Davies*** (1887) 36 Ch. D. 359, 393:

"The law…allows a man to contract for his labour, or allows him to place himself in the service of a master, but it does not allow him to attach to his contract any servile incidents."

Lord Cozens – Hardy, M.R. then observed (p. 312):

"It seems to me that that observation is just as good in a case of this kind, which is a contract for a loan, as it is in the case of a contract for service. It is part of the common law."

Mr. Kinyanjui submitted that the first respondent by his attempt to control the terms and conditions of service for public service vehicle conductors and drivers, had run afoul of a fundamental principle which guides parliamentary action; this principle is clearly stated in the English case***, Reg. V. Hallstrom &***

Another ex parte W. [1986] 1090 (at p. 1104 — ***McCullough, J):***

"There is …no canon of construction which presumes that Parliament intended that people should, against their will, be subjected to treatment which others, however professionally competent, perceive…to be in their best interests. What there is is a canon of construction that *Parliament is presumed not to enact legislation which interferes with the liberty of the subject without making it clear that this was its intention."*

Safeguards to workers' rights to contract for their delivery of services are ingrained in the common law, and ought on this account to be treated as basic individual rights which the Constitution protects under section 70(a). The point is emphatically stated by ***Lord Denning, M.R.*** in ***Nagle v. Feilden*** [1966] 2 Q.B. 633:

· **"The common law…has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it*. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The Courts will not give effect to it*" (p.645).**

· **"I have said before, and I repeat it now, that a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as the Courts will intervene to protect his rights of property, they will also intervene to protect his right to work" (p.646).**

And in the same case ***Salmon, LJ*** remarked (pp.654 – 655):

"One of the principal functions of our Courts is, whenever possible, to protect the individual from injustice and oppression. It is important, perhaps today more than ever, that we should not abdicate that function. The principle that Courts will protect a man's *right to work* is well recognised in the stream of authority relating to contracts in restraint of trade. The Courts use their powers in the interests of the individual and of the public to safeguard the individual's right to earn his living as he wills and the public's right to the benefit of his labours."

Counsel submitted that the impugned rules made by the Minister in the instant matter unjustly excluded from work those drivers who already were employed; and that the Court ought not to give effect to such rules.

(c) Was the Transport Licensing Board properly constituted and could rightly call meetings for 2nd – 6th February, 2004 for the purpose of implementing rules made by the Minister"

By notice in the *Daily Nation* newspaper dated 30th January, 2004 the third respondent called meetings of the Board. ***Hassan Arthur Malipe Kamwaro,*** on 12th July, 2004 and for the purpose of these proceedings, swore an affidavit in which he describes himself (1st paragraph) as Chairman of the 3rd respondent. Counsel challenged the deponent's status, as he had not stated in his depositions when exactly he had become the Chairman of the Transport Licensing Board. By the time the said notice went out, the Board's Chairman, ***Francis Sompisha,*** had died. There was no notice of his replacement published. Counsel submitted that the Transport Licensing Act (Cap. 404), section 3(1)(a) constituted the Board a legal entity the membership of which would only be complete when there was a Chairman, appointed by the President, and eight other persons appointed by the Minister. In the circumstances, learned counsel, ***Mr. Kinyanjui***, submitted, the notice issued by the 3rd respondent on 30th January,

2004 was invalid.

The legal implications of such a situation were considered on the basis of the East African Court of Appeal case, ***Masaka District Growers Co-operative Union v. Mumpiwakoma Co-operative Society Ltd & Others*** [1968] E.A. 630, where the question was whether an arbitrator had been validly appointed. Delivering the majority judgement, ***Spry, J.A.*** thus stated:

"…the main question that we have to consider is whether or not there was a valid appointment of an arbitrator. If there was, *an application for prohibition would be in the discretion of the Court* and having regard to the long acquiescence by the appellant society in the arbitration proceedings, I would think that the learned judge was right to refuse the application in the exercise of that discretion. If, however, the appointment was bad and there could be said to be a patent lack of jurisdiction, the appellant society is entitled to an order as of right…and no amount of acquiescence will affect that right… Incidentally, *there is no presumption of jurisdiction…*"

Mr. Kinyanjui, on the basis of this authority, submitted that if the Chairman of the Transport Licensing Board (3rd respondent) had not been appointed in accordance with the law, then the Board had no jurisdiction, and its acts were null and void; and since ***Mr. Ole Kamwaro*** had been appointed Chairman only on 28th May, 2004, this meant that during the period running from ***30th January, 2004*** to ***28th May, 2004*** there was no valid Transport Licensing Board vested with jurisdiction. Counsel submitted that the Board had acted illegally all through, right up to 28th May, 2004.

(d) Transport Licensing Board's meetings convened by *Daily Nation* notice of 30th January, 2004

This public notice stated as follows:

"The Transport Licensing Board will hold licensing meetings in Nairobi (Railways Sports Club) from 2nd February, 2004 to 6th February, 2004 to issue TLB licences for the year 2004.

"All owners of vehicles used for carriage of passengers or goods (Pick-ups, Lorries, *Matatus*, Trailers, Trucks and Buses) are invited to attend and obtain TLB licences.

"The applicants should bring the following documents:

· **Copy of current Vehicle Inspection Report**

· **Copy of Vehicle Log Book**

· **Original Vehicle Identity Certificate for renewal (accompanied with inspection report)**

· **Certificate of compliance (for those who have the speed governors)**

"Please note that *licences will only be issued to vehicles that have complied with the traffic regulations contained in Legal Notice No. 161 of 3rd October, 2003.*"

Counsel contested the validity of the above notice, for allowing a period shorter than 14 days (as required by the Transport Licensing Regulation 13) for those affected to make their applications. He demonstrated the legal effect of the 14-day rule by citing the English case, ***Graddage v. Haringey London Borough Council*** [1975] 1 WLR 241. In that case, there had been a statutory requirement under s. 166 of the Housing Act, 1957 that a notice from a local authority shall be signed "by their clerk

or his lawful deputy". It was held that a local authority could not "duly give" a notice unless that notice was signed by their clerk or his lawful deputy***. Walton, J*** thus remarked (p.249):

"This conclusion appears to me to be fully in line with both principle and authority and I am content to follow it. Accordingly, I come to the conclusion that none of the alleged demands relied upon by the local authority in this case are valid demands within the meaning of the Housing Act, 1957, and that the plaintiff need not to pay to any of them the slightest attention whatsoever."

Rule 13 of the Transport Licensing Regulations (made under section 30 of the Transport Licensing Act (Cap. 404)) thus states:

"The Licensing Authority shall, *not less than fourteen days* before holding a meeting under subsection (10) of section 3 of the Act, cause to be published in the *Gazette* and in a newspaper circulating in the district in which such meeting is to be held a notice stating the date, time and place of the meeting, and, in the *Gazette* only, a list of all applications which will be considered by the Licensing Authority at the meeting…"

Mr. Kinyanjui submitted that the 3rd respondent had not complied with the requirement of rule 13 of the Transport Licensing Regulations; it had made no publication at all in the ***Gazette,*** and it had not allowed the 14 days required, following publication of notice. The only notice published was in the newspaper; and it was not signed by the Chairman of the Transport licensing Board (3rd respondent), but by the Minister (1st respondent); this was in breach of s. 3(16) of the Act itself (Cap. 404) which stipulates:

"All licences issued under this Act and all communications from the Licensing Authority shall be under the hand of the chairman or of some person duly authorised by the Chairman; and notification of any such authorization shall be published in the Gazette under the hand of the Chairman."

Counsel submitted, and with eminent justification, as I see it, that the respondents had acted in breach of the clear provisions of the Transport Licensing Act (Cap. 404). What, in law, would be the consequence" That is clear from the holding of ***Edmund Davies, J*** in ***Cullimore v. Lyme Regis Corporation*** [1962] 1 Q.B. 718, at p. 728:

"….having come to the conclusion that the council were here exercising statutory powers it seems to me beyond dispute that it was obligatory on them to comply with the provisions of section 7(5). In other words, it was essential for them, were they to act regularly and effectively, that within the period of six months specified in their scheme they determine the charges to be levied. That, it is admitted, they have not done, and *I cannot accordingly regard their purported action as having any validity at all."*

In the case ***Resley v. Nairobi City Council*** [2002] 1 E.A. 233 (CCK) similarly, a public authority had failed to comply with the requirements

of the law, and this Court was compelled to take the following position (***Rawal, J*** at p. 249):

"In any case I shall have to go back to the notices. The notices which are questioned by the applicant admittedly are illegal and *void ab initio* and the City Council cannot now deny that the Gazette notices do nothing but…act upon those invalid notices *ex post facto.* Either way, the notices are invalid, improper and void and cannot be relied upon or acted upon by the City

Council."

Learned counsel, ***Mr. Kinyanjui,*** submitted that the Minister by virtue of the Traffic Act (Cap. 403) and the Transport Licensing Act (Cap. 404) had been entrusted with wide powers, and it was now a trite principle of law that whenever such powers are reposed in any public office-holder, then they must be exercised within the framework of the law, short of which the Court would be obliged to intervene. This principle is founded on good authority. In ***Allingham & Another v. Minister of Agriculture and Fisheries*** [1948] 1 QBD 780 ***Lord Goddard, CJ*** thus stated (p. 781):

"….in these days, when various bodies and various persons get wide powers given to them by a variety of regulations and Orders which are issued so frequently that it is very difficult for anybody to know whether they are obeying the law or not, it is extremely important that the bodies which are given these wide powers should act strictly in accordance with them and it is the duty of this Court to see that they do so."

Mr. Kinyanjui submitted that the 3rd respondent's failure to comply with the notice rules in Traffic Regulation 13, before holding licensing meetings, amounted to a breach of rules of natural justice, as the 1st applicant thereby lost an opportunity for a hearing in respect of the licensing of competing exclusive licence applicants. Although the independent merits of this contention remained unclear, it suffices to recall the mode of application of the rules of natural justice in a matter such as the instant one. This is clear from the East African Court of Appeal case in ***Hypolito Cassiano de Souza v. Chairman and Members of the Tanga Town Council*** [1961]] E.A. 377. The principles are excerpted from the case ***General Medical Council v. Spackman*** [1943] A.C. 627 (at p. 644 – ***Lord Wright***) and set out at p. 388:

"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. That decision must be declared to be no decision."

(e) Summarising the applicant's gravamen

Learned counsel, ***Mr. Kinyanjui*** concluded his submission by remarking

that the applicants were not mere busybodies and did have ***locus standi*** to bring their grievances before the Court, seeking relief. The 1st applicant is an owner of a public service vehicle, and he did swear a supporting affidavit attaching copy of his motor vehicle registration book, and giving his address. The Minister's Legal Notice No. 161 of 2003 was addressed to all public service vehicle owners such as the 1st applicant, just as was the Minister's notice published in the *Daily Nation* newspaper of 9th January, 2004; and just as was the 3rd respondent's *Daily Nation* newspaper notice of 30th January, 2004. The Minister's

Gazette Notice, No. 384 of 2004 was also addressed to public service vehicle operators like the 1st applicant. All these notices required the 1st applicant to comply with the directives in the Minister's Legal Notice No. 161 of 2003 if he was to be allowed to continue in his business as a public service vehicle owner. Although the respondents issued a threat against non-compliance with the directives in Legal Notice No. 161 of 2003, it was shown on the 1st applicant's Log book (page 3) that he was duly licensed to operate his public service vehicle, for the time being, upto ***31st August, 2004*** and his licence was current and valid. In these circumstances, learned counsel submitted, the 1st applicant had ***locus standi*** to seek redress in Court.

The 2nd applicant, in his affidavit of 2nd February, 2004 annexed details of his national identity card, and swore that he was a commuter who had been prejudiced by the 1st respondent's directives. The 2nd applicant came before the Court as a consumer of public transport services, claiming compromises to his freedom of movement, occasioned by the Minister's directives in the shape of Legal Notice No. 161 of 2003.

Assertion of ***locus standi*** was grounded on principle, and a decided case carrying that principle was cited, ***Reg. v. Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd***. [1982] A.C. 617. The words of ***Lord Diplock*** (at p. 644) are relevant:

"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, *or even a single public-spirited tax-paye*r, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the Court to *vindicate the rule of law and get the unlawful conduct stopped*….. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; *they are responsible to a Court of justice for the lawfulness of what they do, and of that the Court is the only judge*."

That principle lying at the foundations of ***locus standi,*** I will hold, must be fully accepted in Kenya today, as its rationality rings out unanswerably throughout the common law world, where control of public power is perceived as the centrepiece of civilised governance. That principle must inform the public law of Kenya now and in the future; and its manifestation in ***locus standi*** issues is that which is stated in ***Reg. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd.*** [1995] 1 WLR 386 (at p. 393 – *Rose, L.J.):*

"It cannot be said that the applicants are 'busybodies', 'cranks' or 'mischief-makers'. They are a non-partisan pressure group concerned with the misuse of aid money. If there is a public law error, it is difficult to see how else it could be challenged and corrected except by such an applicant."

3. Submissions for the Respondents

(a) Preliminary matters

The main thrust of the respondents' submissions, made by learned counsel from the Honourable Attorney-General's Chambers, ***Mr. Njoroge***, was founded on law and on issues presented as bearing common notoriety; and this was to be expected because after I struck out the rather general affidavits from the respondents' side, on 28th May, 2004 no advantage was taken of the leave I gave to file any much better depositions. For evidence, therefore, ***Mr. Njoroge*** was largely limited to the averments in the rather cursory affidavit sworn by the Chairman of the 3rd respondent, ***Hassan Arthur Malipe Ole Kamwaro***, on 12th July, 2004. It is clear that this limitation was apparent to learned counsel, for on the basis of certain complaints, he did remark, on 16th November, 2004 that all his submissions "*will be made in protest"* notwithstanding that his clients were praying for a striking out of the judicial review application. My directions at that point were as follows:

"Submissions cannot be made in protest; because they lead to final Court orders; and therefore they must be transparent and complete. They must be made in good faith."

(b) Public perceptions

Learned counsel, ***Mr. Njoroge,*** began by recounting the public perceptions of the propriety of the impugned ministerial directives, in relation to the goals of good order in the public service transport sector. He was drawing his information from daily newspaper reports attached to certain affidavits on file. When he cited the content of the *Daily Nation* report of 4th February, 2004 ***Mr. Kinyanjui*** raised objections, as the reports relied on were not suitably integrated into the affidavits in question as required. But ***Mr. Njoroge*** responded that the said newspaper reports were an important element in the affidavits, and he should have the liberty to refer to them; and that this would accord the Court an opportunity subsequently to assess the overall weight of the evidence. Learned counsel also pleaded that the Court could exercise a discretion under Order XVIII rule 7, and allow the use of such information attached to affidavits. I gave directions as follows:

"I do not….think these proceedings are concerned with an ordinary matter of litigation. The question of the proper operation of *matatus* and other public service vehicles within the law, naturally elicits lots of comments that show possible directions on management principles.

"Therefore, it makes practical sense to have a more robust hearing for this matter than would normally be the case.

"On the basis of this principle I would allow counsel representing the State Law Office to build his case broadly enough, and I would permit him to make reference to the press reports that have been appended to the affidavits. Of course, at the end of the day, the Court will reserve its authority to carefully analyse all submissions on the merits."

From the newspaper reports appended to affidavits, ***Mr. Njoroge*** described negative aspects of the public service transport sector that have in the past manifested themselves: there has been a high rate of accidents – something in the order of 3000 fatalities each year; loss of money and property; touting and crude and offensive conduct of public service vehicle staff; manhandling and harassment of passengers; overcrowding and attendant discomfort to passengers. From different newspapers, *Daily Nation* and *East African Standard*, counsel submitted, the picture was the same: a chaotic public service transport sector in which much crudeness, recklessness and harm towards ordinary service-users were the order of the day. Many drivers and conductors were unqualified and unlicensed, and they posed a real danger to life and limb, for innocent passengers. Counsel stated from the newspaper reports that, as practically important in the economy as the public service transport sector was, it was operated in an orderless manner, and formed a shady, marginalised sector which also served as a refuge for criminals intent on violating different laws and causing harm to the national population.

Mr. Njoroge cited the *Daily Nation* of 15th February, 2004 as a demonstration that members of the public welcomed the reforms in the public service transport sector introduced by Legal Notice No. 161 of 2003, and observed that the public had shown a preparedness to make a sacrifice, in terms of suffering interruptions in the availability of transport vehicles, while the Minister's restrictions entered into effect to improve the quality of delivery in the public service transport sector. It was reported in the *East African Standard* of 2nd February, 2004 that the public had welcomed the enforcement of the new regulations imposed by the 1st respondent. In the *East African Standard* of 4th February, 2004 it was reported that insurance companies had also welcomed the changes effected by the 1st respondent in the public service transport sector, and that the improved quality of transport service had enabled the insurers to reduce premiums payable to them by public service vehicle owners. The *Daily Nation* of 2nd February, 2004 attributed the drop in insurance premiums to the safety measures introduced by the Minister through Legal Notice No.; 161 of 2003. It was reported in the *East African Standard* of 2nd February,

2004 that the purpose of the new public service vehicle regulations was to save life and property.

Mr. Njoroge submitted that the impugned traffic regulations were part of a national campaign to achieve road safety, and so all persons were required to abide by those regulations, including commuters; the commuters were the direct beneficiaries of the protective measures. In his replying affidavit of 12th July, 2004 ***Hassan Arthur Malipe Ole Kamwaro*** says:

"…from the information available to me as the Chairman of the Transport Licensing Board the brief transport crisis on the roads was unavoidable and owed its occurrence to the acts of the 1st and 2nd interested parties and their members when they deliberately and in keeping with their past history of lawlessness and without any apparent reasonable justification, refused to comply with Legal Notice No. 161/2003 and called a strike which failed due to the fact that the general public who are the consumers of the road transport services, massively supported the implementation of Legal Notice 161/2003….."

(c) Specific Legal issues

Mr. Njoroge did admit that Legal Notice No. 161 of 2003 had been incomplete, in so far as it had not prescribed the colour of the uniforms to be used by drivers and conductors, but that this omission had now been rectified by the Minister's ***Legal Notice*** No. 83 of 2004.

Learned counsel submitted that it was in accordance with the law (Traffic Act (Cap. 403), s. 119(h)) for the Minister to prescribe uniforms for public service vehicle drivers and conductors. Section 119 empowers the Minister to make rules under the Act, and he may make such rules in respect of —

"the regulation of the conduct of drivers and conductors of public service vehicles, and the wearing by them of special badges and uniforms, and the fees to be paid for any badges provided by an authority."

This empowerment, counsel submitted, would include prescribing the colour or shape of the uniforms. Learned counsel submitted that there would be no impropriety in drivers and conductors being required to wear prescribed uniforms, as they were one identifiable group of workers, in the domain of public service transport. He further submitted that the Traffic Act (Cap. 403), at sections 15, 17A, 95 – 97, 98(3), 98(5), 99, 103, 110, 111 and 116 showed the importance which Parliament had attached to the public service transport sector as a special category meriting measures such as the Minister had put in place. Although the industry is in private hands, it is the subject of considerable public interest. Sections 15 and 17 of the Act required the formal inspection of public service vehicles, something not required in the case of purely private vehicles. And public service vehicles required special licences by virtue of sections 95, 97, 98 and 99 of the Act. There were still further controls in respect of vehicles in this category: s. 103 (touting); s.110 (owner to furnish name and address of driver); s. 111 (owner to keep list of drivers employed).

Learned counsel disputed the claim that the Minister's regulations were in any manner in conflict with the provisions of the Constitution. There was no discrimination against any party contrary to section 82(4) of the Constitution, as the Minister had exercised his powers by virtue of the provisions of the Traffic Act (Cap. 403), and had been mindful of the rights of passengers in relation to those of the public service vehicle crews; to the interests of the public and the rights of the public service vehicle operators.

Mr. Njoroge submitted that Legal Notice No. 161 of 2003 should not be nullified for not having given specifications on uniforms, because such specifications were later given in ***Gazette Notice*** No. 384 of

19th January, 2004. If Legal Notice No. 161 of 2003 can on this score be challenged on a technicality, counsel raised the principle that such a technicality be not used to nullify the merits of the Legal Notice. He sought reliance on ***Sheffield City Council v. Graingers Wines Ltd*** [1977] 1 WLR 1119, at p. 1123 (***Lord Denning, MR***):

"I think it is far too technical a way in which to construe the resolution. It is a well known maxim of the law that documents and transactions are to be construed so as to give them validity; and not perish or fail."

Mr. Njoroge also submitted that the Minister's directives could not be nullified, because he was acting in a legislative capacity and was exercising *legislative powers,* and these were not amenable to the review jurisdiction of the Court. In his words:

"Quashing the Legal Notice [161/2003] would be the same thing as quashing a substantive section of a statute."

For this proposition learned counsel relied on ***Bates v. Lord Hailsham of St. Marylebone & Others*** [1972] 1 WLR 1373. In that case ***Megarry, J*** (p.1378) remarked:

"In the present case, the committee in question has an entirely different function: it is legislative rather than administrative or executive. The function of the committee is to make or refuse to make a legislative instrument under delegated powers. The order, when made, will lay down the remuneration for solicitors generally; and the terms of the order will have to be considered and construed and applied in numberless cases in the future. Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy. Of course, the informal consultation of representative bodies by the legislative authority is a commonplace; but although a few statutes have specifically provided for a general process of publishing draft delegated legislation and considering objections…, I do not know of any implied right to be consulted or make objections, or any principle upon which the Courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given. I do accept that the fact that the order will take the form of a statutory instrument does not *per se* make it immune from attack, whether by injunction or otherwise; but what is important is not its form but its nature, which is plainly legislative."

Reliance on this statement of legal principles by counsel for the respondents, without a doubt, presents an issue that must be resolved in these proceedings. For it represents a square joinder of issues, considering that the applicants have come to Court on the basis that the actions of the Minister (1st respondent) are amenable to judicial review. I will address this matter further on.

Learned counsel, ***Mr. Njoroge,*** conceded that by Traffic Rule No. 55, the yellow band painted on *matatus* was required to be only on the *right-hand side*, and not on both sides and in the rear, as the Minister had ordered by his Legal Notice No. 161 of 2003; but he insisted that *"the Minister for Transport is the person administratively in charge, and in this capacity he may issue any other guidelines*." This, however, was not a convincing argument as it would give the impression that if the Minister is administratively in charge," then he thereby becomes superior to Parliament itself and may do just as he chooses, without acting within the constraint of the law. Such a notion, with much respect, goes against

the grain and is palpably coloured with illegality. I would hold, on that principle, that the Minister becomes clearly amenable to judicial review, and such act on his part cannot but be quashed for being ***ultra vires***. It is noteworthy that counsel's spirited argument in that regard, carried the paradoxical concession that the Minister's directives were administrative, and not legislative!

On the applicants' challenge to the Minister's requirement that public service vehicle owners paint "*route numbers*" on their vehicles, when no such numbers have ever been assigned by any public office under the law, ***Mr. Njoroge*** cited the powers reposed in the Minister by s. 119(1) (p) of the Traffic Act (Cap. 403), which states that the Minister may make rules prescribing *"measures for generally restricting or regulating the use of vehicles in such manner as the circumstances and safety on the roads may appear to him to require, and for the further, better or more convenient carrying out of any provisions of this Act*." Learned counsel contended that *"the Minister is given power to take any measures for regulating the use of vehicles."* This argument did not appear in my view to carry much conviction, as the Minister had not at any time used the said powers to create and assign route numbers. Which route numbers, therefore, should the *matatu* owners paint on their vehicles" Rules of such a kind can only create uncertainty and confusion on the part of the vehicle owner who, however, is required to comply, failing which he will be denied an operating licence. Such an inscrutable yet punitive rule is ill-designed for responsible, law-abiding conduct, and on this account I would consider it to be illegal.

On the question whether the Minister could properly add to and amend his Legal Notice No. 161 of 2003 by newspaper advertisements or ordinary ***Gazette notices***, ***Mr. Njoroge*** submitted that *"the Minister must be at liberty to rectify rules that he had made by virtue of the provisions of s.119(1)(p) of the Traffic Act (Cap. 403), and that such amendment does not have to be in the form of a Legal Notice*." It did not appear to me, however, that learned counsel was here addressing the vital considerations of law which could lead to a resolution of matters of principle.

In Kenya, the ***Legal Notice*** is the Executive's instrument of implementation of obligations under the Constitution or the statute law. Every Legal Notice will cite the Act of Parliament under the authority of which it is being made. For this reason, such an instrument becomes part of the organic framework built around the Act itself, and together they form the governing law on a given question. The use of the Legal Notice by a Minister is essential where new duties are being imposed on the public, or a framework for penalties is being instituted to which members of the public may become amenable. These ends cannot be achieved by bare information-type advertisements in daily newspapers, or general ***Gazette notices.***

From the foregoing principle it follows that the only way the first respondent's Legal Notice No. 161 of 2003 could be enforced with its additions and changes, was by publishing all the obligation-creating rules and directions in a Legal Notice in the first place. I have no doubts that the position of counsel for the applicants on this question carries far more merit than that of counsel for the respondents.

Mr. Njoroge's submission on the judicial review status of the Minister's *Daily Nation* notice of 9th January 2004 and the Transport Licensing Board's *Daily Nation* notice of 31st January, 2004 indeed would confirm agreement with the principles which I have set out above. He argued that the *Daily Nation* as a forum of publication of the traffic rules and requirements, was *not a prescribed medium*; but this was in aid of his contention that, therefore, those publications in the newspaper should not be quashed. He contended that the newspaper notice should be perceived as a *guideline*, and not as a legal statement; and he stated that even the language and the layout of the newspaper statements did not meet the description of a legal instrument.

Were learned counsel to be held to be right, then the respondents would have had their cake and eaten it. They would have succeeded in subjecting public service vehicle owners to a panoply of legal

regulations some of which are casually recorded in newspapers and general notices that would escape the scrutiny of the judicial process. This certainly would amount to a subterfuge in the governance of matters relating to the public service transport sector, designed to enforce compliance while the rule makers remain entirely shielded from the requirements of the legal process. The effect would be to undermine the safeguards of public law, that take the form of judicial review; and consequently I hold that the respondents must remain subject to the law in respect of (i) ***Legal Notice*** No. 161 of 2003; (ii) ***Gazette Notice*** No. 384 of 2004; (iii) *Daily Nation* Notice of 9th January, 2004; and (iv) *Daily Nation* Notice of 31st January, 2004.

On the question whether the Minister's directives had interfered with a person's right to work, and to negotiate terms with his employer, ***Mr. Njoroge*** contended that there was no such interference, because Legal Notice No. 161 of 2003 had not fixed the salaries payable, and so the parties were at liberty to make their own contracts as suited them.

Counsel for the applicants had contended that the Transport Licensing Board (3rd respondent) was not properly constituted when it issued its notice of 30th January, 2004 to public service vehicle owners. I did not get the impression that this submission was being seriously contested, as counsel for the respondents responded that no injustice had, as a result, been caused to the applicants. On this question he doubted whether the 1st applicant had ***locus standi***, and remarked: "*He [the first applicant] should show there was a set of circumstances which made it impossible for there to be justice; he could not challenge decisions he knew not about; there was no prejudice to him."* He recalled that section 3(8) of the Transport Licensing Act (Cap. 404) provided that in the absence of the Chairman, the members are to choose one of their number to act in his place; and that it was not necessary to consider the reason for the Chairman's absence.

Mr. Njoroge disputed a point made by ***Mr. Kinyanjui,*** that the impugned measures taken by the Minister had been dictated by political party interests; but he maintained that the Minister had been guided by public policy considerations.

Learned counsel for the respondents submitted that even if the Court were to find illegalities in the measures taken by the respondents, the principle should be applied which saves the actions and processes already in place. In support of this proposition he cited the case, ***Salmon v. Duncombe & Others*** (1886) 11 (p.627). The headnote in the report of this case reads:

"…these words ought not to be construed as to destroy all that has gone on before, and therefore should be treated as immaterial…"

4. Response of the Applicants

Counsel for the applicants responded by addressing several questions:

(i) did the respondents prove that the public benefit of illegal rules outweighs instruments made within the law"

(ii) did the respondents prove that a vacuum would result if the impugned directives are quashed"

(iii) would quashing L.N. 161 of 2003 impair the efficacy of existing traffic rules"

(iv) is it proved that L.N. 161 of 2003 can be retained in the law book"

Counsel would not accept the respondents' stand, that L.N. 161 of 2003 is in the public interest; because there is a superior public interest – to uphold the rule of law and the sanctity of the Constitution at all times; and the rule of law is to be perceived as a check against abuse of ministerial power.

Counsel submitted, quite correctly, with respect, that although s. 119(1) of the Traffic Act (Cap. 403) had been considered by the Minister to be giving unlimited powers, the correct position in law is that all subsidiary legislation must comply with the governing law enacted by Parliament.

Although the Minister is represented as having acted under s.119 of the Traffic Act in furtherance of the public interest, he is required to adhere to the rule of law, and this requirement is a veritable expression of the public interest. Counsel submitted that the Minister was not allowed to heap upon himself powers transcending those of Parliament; and he was required to comply with the legal procedures of laying his regulations before Parliament, as ordained by the Interpretation and General Provisions Act (Cap. 2) and by the Traffic Act (Cap. 403). The Minister had not shown any difficulties in complying with the two Acts; and he made no depositions regarding the legal advice which he may or may not (but should) have received from the State Law Office.

Mr. Kinyanjui submitted that ***ultra vires*** subsidiary legislation was discordant with known judicial policy and the Court could not enforce it merely because the Minister had published it. Notwithstanding that the Minister's "*legislation*" may have certain social benefits, the Courts first concern was the legality and validity of such *"legislation*". Counsel submitted that Legal Notice No. 161 of 2003 could only serve the cause of short-term expediency; but upon the Court, rested a higher duty to uphold the rule of law. As stated by ***Langa, J*** in the South African case, ***State v. Mbatha*** [1996] LRC 208 (at p. 221), *"A legislative limitation motivated by strong societal need should not be disproportionate in its impact to the purpose for which that right is limited*."

Learned counsel submitted that the respondents had been unable to prove any state of fact which would justify the making of the impugned directives. They brought little by way of depositions, and they lacked data or statistics; so they opted for easy recourse to general newspaper accounts; but they had no right of silence, and ought to have adduced evidence. In this way, counsel submitted, the respondents failed to discharge the evidential burden resting upon them.

Counsel for the respondents had submitted that judicial review was inappropriate in this matter, and that the applicants should have initiated a constitutional reference. ***Mr. Kinyanjui*** submitted that public law concerns, of the kind raised in this matter, are quite appropriately canvassed by way of judicial review, and that in those cases wherein occur an overlap between basic constitutional issues and judicial review issues (as in the present case), it was not possible to effect a separation, and the relief sought should be dealt with compositely.

Counsel submitted that it would be undesirable that the Court should save any acts of the respondents which had been effected without complying with the law. Cited to support this position was ***Lord Denning, M.R.'s*** opinion in ***Bromley London Borough Council v. Greater London Council & Another*** [1983] A.C. 768 (at p. 777):

"My conclusion is that the actions here of the G.L.C. went beyond their statutory powers and are null and void. Even if they were within their statutory powers, they were distorted by giving undue weight to the manifesto and by the arbitrary and unfair nature of the decision. The supplementary precept must be quashed: and a declaration made accordingly.

"I realise that this must cause much consternation to the G.L.C. and the L.T.E. They will be at

their wits' end to know what to do. But it is their own fault. They were very foolish not to take legal advice before they embarked on this sequel to their election. Even after legal proceedings were intimated to them…, they went ahead with their plans and put them into operation… *They must unscramble the affair as best they can."*

Learned counsel submitted that there was no proof that there would be a legal vacuum if the impugned "*instruments*" of the respondents were quashed. There was always a dependable panoply of traffic laws and regulations, save that enforcement was not effective. An example is section 102(5) of the Traffic Act (Cap. 403), which provides that *"No person shall drive or permit to be used a public service vehicle in a dirty or neglected condition*." Section 55 has always provided that: *"No vehicle shall be used on a road unless such vehicle and all parts and equipment thereof, including lights and tyres, comply with the requirements of this Act, and such parts and equipment shall at all times be maintained in such a condition that the driving of the vehicle is not likely to be a danger to other users of the road or to persons travelling on the vehicle."* Section 17(2) has always provided that before licence is renewed, inspection is to take place. Section 103(1) has always addressed the problem of touting on public service vehicles. Rule 66(1)(d) has always made provisions against overloading. Rules 63, 65 and 68 of the Traffic Act (Cap. 403) have always outlawed rudeness of public service vehicle crew towards passengers. Traffic Rule 65E has always prohibited drunkenness or intoxication of any sort, among the public service vehicle crew (same as s.45(1) of the Act itself). Counsel was of the view that it was precisely the making of the impugned directives, that had created the impression that a new solution had now been found for suppressing disorder in the public service vehicle sector.

Learned counsel submitted that the respondents had only claimed a political justification for the impugned directives; no evidence had been tendered to show that the Minister was respecting the decisions of Parliament; he was acting ***ultra vires.*** He should have sworn an affidavit on the question whether legislation was lacking in the traffic sector, and so he was now the one supplying that omission; he never did, but instead, he overstepped the scope of the power which Parliament had laid out for him.

Counsel submitted that Legal Notice No. 161 of 2003 should not remain in the books as part of the country's traffic law. As no poll had been taken to show who supported the new rules, they could not just be supposed to be in the public interest and deserving of perpetuation.

Counsel impugned for ***ultra vires*** some of the decisions imposed by the Minister — such as outlawing of standing passengers; reducing capacity from 16 to 14 passengers.

F. ANALYSIS AND FINAL ORDERS

The elaborate nature of these proceedings is occasioned firstly by the expansiveness of the issues that have generated grievance; secondly, by the robust manner in which he applicants' complaints have been articulated; thirdly, by the novelty attending the ministerial actions raising complaint; fourthly, by the strategic importance in the country of the subject matter in respect of which ministerial acts have been brought to the test of legality. Consequently, this Court is called upon, in the performance of its constitutional mandate of dispute resolution, to make a decision that is important not just in so far as it vindicates legality in public governance, but also in the measure in which it sustains the public interest in civilised service delivery, in the passenger transport sector. A judicial decision of this nature must be heedful simultaneously of both legal principle and the concerns of social direction.

Many questions have arisen in these proceedings, which call for resolution within the framework of judicial review. It is, however, my assessment that disposal of the more elemental ones will clear all the supplementary questions, and so they do not all have to be made the subject of specific findings.

Depending on how the fundamental questions are answered, consequential decisions will then have to be taken on the applicants' prayers for judicial review orders, in the context of Court discretion which is a core factor in the dispensation of such orders.

The critical questions may be set out as follows:

(1) Are the impugned "*instruments",* namely the 1st respondent's Legal Notice No. 161 of 2003; the 1st respondent's ***Gazette Notice*** No. 384 of 2004; the 1st respondent's *Daily Nation* Notice of 9th January, 2004; and the 3rd respondent's *Daily Nation* Notice of 31st January, 2004 properly made within the powers allowed by Parliament, by virtue of the Traffic Act (Cap. 403), s. 119 and the Transport Licensing Act (Cap. 404), s.3"

(2) Was it consistent with the law that once the 1st respondent had made and published his rules in Legal Notice No. 161 of 2003 he could amend the same, or supply any omissions, through informal publications such as ***Gazette Notices*** and daily newspapers"

(3) Was it within the contemplation of the statute law that the said Legal Notice No. 161 of 2003 could be obligatorily enforced, on the basis of additions to it informally published in newspapers or such other media"

(4) When administrative decisions are set out not in prescribed instruments, but in informal media, such as in the case of ***Gazette Notice*** No. 384 of 2004, or in the *Daily Nation* of 9th January, 2004, or in the *Daily Nation* of 30th January, 2004, are they, as a matter of law, capable of being made the subject of judicial review orders"

(5) Is it the case that the Minister (1st respondent), when he made and published Legal Notice No. 161 of 2003, or ***Gazette Notice*** No. 384 of 2004, or the directives carried in the *Daily Nation* newspaper, was performing purely legislative functions which are, on that account, not amenable to the review jurisdiction of the High Court"

(6) Did the Minister comply with the requirements of section 34 of the Interpretation and General Provisions Act (Cap. 2) and section 68(2) of the Traffic Act (Cap. 403) which require that the regulations made be laid before the National Assembly within a defined period" And what is the consequence, if there was no compliance"

(7) Is the Minister's new rule 70(1) which regulates taxicabs and *matatus* in the same way for certain purposes, consistent with the provisions in section 102(2) of the Traffic Act (Cap. 403)" And what compliance obligations are placed on the 1st applicant"

(8) Does section 119(1)(da) of the Traffic Act (Cap.403) which empowers the Minister to prescribe "*devices to be fitted to any class or type of vehicle for restricting their speed,*" allow the Minister to go further and not only specify models of speed governors, but even name the dealers who should supply the same"

(9) Does the Minister's rule published in Legal Notice No. 161 of 2003 which prohibits the carrying of standing passengers in public service vehicles, comply with the provisions of section 100(1) of the Traffic Act (Cap. 403) which allows standing passengers in specified numbers"

(10) Does the Minister's requirement that public service vehicle conductors and drivers wear specified uniforms, stand in conflict with the individual freedoms specified in the Constitution"

(11) Do the Minister's regulations published as aforesaid entail any unreasonableness, especially the following aspects"

· the requirement that every public service motor vehicle owner must employ only one driver;

· compliance of speed governors with specifications, being overseen by dealers and merchants, rather than certifying officers appointed under the Traffic Act (Cap. 404);

· speed governor compliance certificates being issued by dealers and merchants, rather than by certifying officers appointed under the Act.

My earlier analysis of the law, on the basis of the submissions of learned counsel, will have answered most of the relevant questions. I will, however, revert to the questions enumerated above, and answer them as follows:

Question (1)

Powers of government, which are exercised by Ministers, are and must always be, drawn from parliamentary enactments. Just as those enactments are formally expressed, so must also be the plan of exercise of those powers by Ministers. The exercise of such powers has major legal consequences: it may render important social advantages to the public, thus enabling members of the public to entertain legitimate expectations, or even acquire new interests and rights; and it may also impose compliance obligations on the members of the public. Therefore, Ministers must proceed in their execution of tasks entrusted to them by Parliament, through legal gazettement in the first place, of their regulations – provided always that their gazetted rules must not purport to outstrip the authority contained in the Act of Parliament.

It is quite evident that certain aspects of the Minister's Legal Notice No. 161 of 2003 are not in keeping with the terms of the statutes that delegated the powers to him.

Question (2)

It is now obvious that the first respondent could not lawfully elaborate and amend Legal Notice No. 161 of 2003 through informal publications in ***Gazette notices*** and daily newspapers. That he did so, was clearly in breach of the law and an excess of the powers reposed in him by the Legislature, to exercise as a trust and in the public interest. It is the law, as was clearly stated in ***Mwangi s/o Gathigi & Another v. Rex*** (1950) 24(1) KLR 72 that where a regulation is published in the ***Gazette***, the Minister "*cannot amend, vary, rescind or revoke any Order so published without again using the same medium, namely, publication in the Government Gazette*" (p.75).

Question (3)

It could not have been the contemplation of the statute law that Legal Notice No. 161 of 2003 could be obligatorily enforced, on the basis of additions published in newspapers or such other media.

Question (4)

The operational situation following the Minister's publication of Legal Notice No. 161 of 2003 is evidenced by one course of governmental action in the reform of the public service transport sector; and thus it may be assumed that all the impugned publications have merged into Legal Notice No. 161 of

2003, and all of them must be seen and treated as one single category, in the perception of the law. Therefore, all of them should, as I hold, be perceived as falling within the framework of one public decision-making process, for purposes of the play of the judicial review jurisdiction.

Question (5)

The very essence of judicial review of administrative action is that, Ministers of the government who head the structures of administration, and who carry responsibility for the implementation of the statute law, should be held to the remit created in the enactment itself; and the control in this regard falls squarely upon the Court. Therefore I do not agree with counsel for the respondents when he argues that "*Quashing the Legal Notice would be the same thing as quashing a substantive section of a statute."*

Question (6)

Although the question of laying the Minister's regulations before Parliament as required by statute was actively canvassed by counsel for the applicants, I was not convinced that if ministerial instruments are not laid before the National Assembly they become utterly void. It is clear at the very least, that all things done under such rules will not become void, even if the National Assembly were to revoke the rules in question. General national practice is a highly relevant consideration in such a matter. If it were to be found that routinely, the Executive rarely lays regulations before Parliament and Parliament itself does not regularly call upon Ministers to comply with the requirement, so that large amounts of ministerial rule-making has gone on without Parliament raising a finger, then the Court would have to take judicial notice of that practice. Although in the present matter, there was no positive evidence that Legal Notice No. 161 of 2003 had been or had not been laid before the National Assembly, the appearances are that it was not laid. Yet much activity on the ground has taken place, during times when the National Assembly has indeed been in session; and yet the point has, apparently, never once been raised at that forum. I think the practical judicial attitude in such a situation is to look to fundamental issues only. The *"laying*" requirement is not meant to serve the judiciary in the first instance; it is intended primarily for Parliament, to enable it to perform its political and legislative function of controlling the conduct of government. Applying that general principle to the present case, I would be reluctant to invoke the Court's quashing powers where the real gravamen belongs pre-eminently to Parliament and , indirectly, to the electorate. I would add, however, that good and responsible conduct of governmental affairs dictates that Ministers ought to comply with the statutory requirement of laying their rules and regulations before the National Assembly, for approval, disapproval or acquiescence. That is the responsible position in law.

Question (7)

The application by the Minister of taxicab rules to *matatus* is puzzling. The Traffic Rules in their earlier edition, were well-structured, and there would have been good reason for the differential arrangements made for taxicabs on the one hand, and *matatus* on the other. Such differentiation was, moreover, consistent with s.102(2) of the Traffic Act (Cap. 403); and the argument that the Minister has acted in breach of that section is, I would hold, a valid one. It is surprising this could happen, in view of the role of the State Law Office in providing professional legal advice to the various Departments of Government.

Question (8)

It is obvious that the Minister departed from the requirements of section 119(1)(da) when he went out of his way to prescribe brands of speed governors and to name dealers from whom these were to be obtained.

Question (9)

Similarly, the Minister's probably good intentions regarding the reduction of crowding in public service vehicles, were not put into effect in accordance with the law, which at present is clearly stated in section 100(1) of the Traffic Act (Cap. 403). This is surprising, considering that the Minister is expected to rely on professional advice form the State Law Office.

Question (10)

Counsel for the applicants maintained that the requirement for uniforms for public service vehicle drivers and conductors was contrary to their constitutional liberties, whereas counsel for the respondents cited the provision of section 119(h) of the Traffic Act (Cap. 403), which expressly empowered the Minister to prescribe uniforms for such categories of employees.

On this question, it would be important to bear in mind the practical purposes of passenger transport law in this country today. From the tone of my judgment so far, it should have became clear that this is an issue of great public interest; and constitutional rights such as that being urged by the applicants in this respect, must be viewed in the broad context of the prevailing social interests, which themselves cannot fail to carry the ingredients of constitutional rights for the population as a whole; and so there is, in effect, a balancing of constitutional rights to be taken into account by the Court. This broader context may be read from a passage in the judgment of ***Nyamu, J.,*** in ***Charles Kanyingi Karina v. The Transport Licensing Board****,* Misc. Civil Application No. 1214 of 2004 (P.6):

"It is…. clear to the Court that the relevant law on suspension does not stipulate the right of hearing. If this right was to be legitimately expected it would defeat the purpose of the law which is *to ensure road safety, road disciple* and the giving of a human face to the use of the Kenyan roads especially by this class of road users commonly known as 'matatu' operators. There was therefore need for strict liability and imposition of sanctions…..".

Question (11)

As I have stated, the role of the State Law Office in providing Government Ministries with professional advice is an important one. Section 26(2) of the Constitution states: *"The Attorney-General shall be the principal legal adviser to the Government of Kenya*." With the best professional advice, it is unlikely that the Minister would have published a bald rule which requires every public service vehicle owner to employ only *one* driver; or which places the certification of speed governors on traders over whom the Government has no control. Such regulations are clearly unreasonable in their concept and formulation, and should not be upheld by the Courts. They have no basis in legislation, and they lack justification.

What are the applicants' prayers" They are, in the shortest summary,

· that Legal Notice No. 161 of 2003 be quashed;

· that the *Daily Nation* Notice of 9th January 2004 be quashed;

· that the 2nd respondent (Registrar of Motor Vehicles) be prohibited from giving effect to Legal Notice No. 161 of 2003 and ***Gazette Notice*** No. 384 of 2004;

· that the 3rd respondent (Transport Licensing Board) be prohibited from taking any action by way of giving effect to Legal Notice No. 161 of 2003 and ***Gazette Notice*** No. 384 of 2004;

· that the 3rd respondent (Transport Licensing Board) be prohibited from imposing obligations upon the 1st applicant by virtue of Legal Notice No. 161 of 2003 and ***Gazette Notice*** No. 384 of 2004;

· that the 5th respondent (Commissioner of Police) be prohibited from taking any action against the 1st applicant as he plies his passenger transport business, by virtue of Legal Notice No. 161 of 2003 and ***Gazette Notice*** No. 384 of 2004;

· that the 1st respondent (the Minister for Transport) be prohibited from ever again giving directives in the nature of legal Notice No. 161 of 2003 and ***Gazette Notice*** No. 384 of 2004.

I have already noted two signal fact-situations that dominate the setting of these proceedings, namely (i) the Minister for Transport was attempting to establish his control over the strategic sector of passenger transport, a sector that for years was marked by anarchy, mayhem and severe compromises to normal human expectations of civilized services, what ***Mr. Justice Nyamu*** has typified as "*the source of senseless accidents in Kenya's roads…. [with] a culture of road madness, impunity and invisibility to law enforcement agencies*" (***Charles Kanyingi Karina v. Transport Licensing Board***, Misc. Civil Application No. 1214 of 2004); and (ii), either as a consequence of the euphoria shoring up the new public initiative, or due to unavailability of professional advice, the Minister's panoply of instruments paid scant regard to fundamental principles of public law, and so these instruments fell liable to appropriate judicial review orders. Must the Court rest its decision on the second of the two scenarios, and thus automatically grant the prayers made by the applicants" That would be the case if the position were taken that, in the good life of the Kenyan people, only the relevant principles of public law, and nothing else, must be upheld, and any other claims must be tossed to the winds. However, the entire body of law in force in this country, of and by itself, would have no more than a conceptual significance if it was not held to be the handmaiden of social purpose. I must hold that the law, and its processes and institutions, is established so that it may serve the social purpose.

For this reason, I will take the position that the Court, in coming to its decision, must strike a balance between the two scenarios described above – the public yearning for an effective, humane and civilized passenger transport sector, and the juridical imperatives of compliance with the law as it has been enacted.

Such an attempt to find a balance will show that there are no cut and-dried borderlines between the social purpose, on the one side, and the sacrosanct law, on the other. Social purposes are more dynamic, sometimes feeding into the domain of legal norms, and there earning acceptance and sanctification by the jurist; but sometimes not getting quite there, and so remaining pre-legal, even though they still represent part of normal human venture and endeavours towards improved quality of life.

These are by no means entirely novel ideas to guide me in addressing the specific prayers made by the applicants. I think they have always conditioned the judicial approach to applications for prerogative orders. It is an established principle in the law of judicial review, that an applicant does not become *entitled* to an order of certiorari, or mandamus or prohibition just by producing a certain check-list of fulfilled conditions. ***Judicial discretion*** is all-important. This is clear from the work ***Judicial Review : Legal Limits of Official Power*** (London : Sweet and Maxwell, 1986) by ***C.T Emery and B. Smythe***. The learned authors thus write (P.280):

"With the exception of damages, the remedies available by means of applications for judicial review are *all discretionary*. This does not mean that they may be granted or refused at the whim of the Court. It means in fact that, in addition to the question of whether or not the applicant has

succeeded in establishing that the defendant has acted unlawfully, *the court must have regard to other factors*".

The said other factors include, as presented by the two scholars, the conduct of the applicant; whether the applicant is sufficiently interested; whether the remedy is futile; whether the remedy is unnecessary.

C.T Emery and ***B. Smythe*** in their work, ***Judicial Review***, have proposed a still more flexible approach to the exercise of judicial discretion, in relation to applications for the relevant orders. They state:

"It should be recognized that it is not necessarily in the public interest that public authorities should be compelled in every case to keep within the precise letter of the law merely because one litigant is able to establish a technical infringement of some statutory requirement. It is to be hoped that the Courts no longer believe that 'Even if chaos should result, still the law must be obeyed' [*Lord Denning* in *Bradbury v. Enfield* L.B.C. [1967] 1 W.L.R. 1311 at p. 1324] is an appropriate maxim in cases in which no private law rights are infringed. There are indications that the Courts are prepared to adopt a more realistic attitude and to refuse a remedy where, for example, only one of two alternative grounds for a decision is open to criticism ……"

I would apply my discretion in the instant matter by reviewing critically a number of the specific prayers made by the applicants.

If Legal Notice No. 161 of 2003 is quashed as prayed, how would the reality on the ground be affected" How would the integrity and the authority of the law fare" Would it preserve the dignity of the Court"

Although I have already recognized that Legal Notice No. 161 of 2003 in several ways contradicts the Parent Act, and thus if I were to move on a purely technical plane I could well strike it out, it is clear as already noted, that that instrument is the foundation of major positive changes that have been in place, in relation to the public passenger transport sector, for just over a year. While I acknowledge the accounts in the newspaper reports attached to several of the affidavits on file, and indeed take judicial notice of the facts there reported, that the changes in the passenger transport sector have significantly, if perhaps transitorily, limited the number of public service vehicles on the road, I similarly take judicial notice of the fact that remarkably improved *quality* has been the positive goal achieved thanks to the initiatives of the first respondent. I think most Kenyans who use public service vehicles should appreciate the beneficial aspects of such qualitative improvement, and perhaps they would be ready to make sacrifices, to the intent that such quality do become a permanent feature of the passenger transport sector. But more importantly, it must be the case that the one full year of an improved passenger transport system has established a ***status quo*** significant enough to require legal endorsement, and to present a potential challenge to any claims for change in the direction of the previous status quo. There is, therefore, a judicial responsibility to apply the law in such a manner as to vindicate and uphold the new ***status quo*** and its legitimate expectations.

This is the basis on which I will be making appropriate orders, in relation to the first prayer of the applicants. It is also the basis upon which I will deal with the second, third and fourth prayers enumerated above. The fifth prayer set out presents a special problem. If I were to maintain the current status quo in the passenger transport sector, would it be tenable that I could prohibit the Transport Licensing Board from imposing obligations upon the 1st applicant by virtue of Legal Notice No. 161 of 2003 and ***Gazette Notice*** No. 384 of 2004" I do not think so; for it would lead to a state of chaotic competition which would easily impair the climate for the proper functioning of law in the passenger transport sector. Therefore, I must refuse the prayer in question. And for the same reason I will refuse also the next prayer as listed above. The last prayer listed above is inappropriate, and must be refused;

for by virtue of the Traffic Act (Cap 403) and the Transport Licensing Act (Cap. 404), the Minister must always be at liberty to make such traffic rules as may be necessary. When he does so, of course, he is required to comply with the statute law, failing which his regulations will be liable to quashing, for being ***ultra vires.***

The foregoing analysis leads me to make the following orders in this judgment:

1. The 1st respondent shall effect necessary amendment to Legal Notice No. 161 of 2003 within six months of the date hereof, failing which the same shall be removed into the High Court and quashed by order of certiorari now issued but suspended till the expiration of that period of time.

2. The 1st respondent shall amend Legal Notice No. 161 of 2003 so as to incorporate amended provisions of ***Gazette Notice*** No. 384 of 2004, within the period of time specified in the first order herein; or in the alternative, the 1st respondent shall amend ***Gazette Notice*** No. 384 of 2004 and convert it into a Legal Notice within the period of time specified in the first order herein, failing which the same shall be removed into the High Court and quashed by order of certiorari now issued but suspended till the expiration of the said period of time.

3. The 1st respondent shall amend the text of the *Daily Nation* notice of 9th January, 2004 and shall incorporate its content into Legal Notice within the period of time specified in the first order herein, failing which the same shall be removed into the High Court and quashed by order of certiorari now issued but suspended till the expiration of the said period of time.

4. An order of prohibition is hereby issued but suspended for a period of six months, to enter into force against the 2nd respondent if the 1st respondent should fail to comply with the first three orders herein.

5. An order of prohibition is hereby issued but suspended for a period of six months, to enter into force against the 3rd respondent if the 1st respondent should fail to comply with the first three orders herein.

6. The applicants' prayer that an order of certiorari do issue to remove into Court for the purpose of being quashed any decisions of the 3rd respondent made pursuant to the Notice published in the *Daily Nation* of January 30, 2004, is refused.

7. The applicants' prayer that an order of prohibition do issue, prohibiting the 3rd respondent from deliberating, acting upon, taking any proceedings, or issuing any directives whatsoever prohibiting the 1st applicant from running his public transport business on the basis of L.N. No. 161 of 2003 of ***Gazette Notice*** No. 384 of the 1st respondent, is refused.

8. The applicants' prayer that an order of prohibition do issue prohibiting the 5th respondent from deliberating, acting upon, taking any proceedings, or issuing any directive, in any manner prohibiting the 1st applicant from operating his public transport business, or the 2nd applicant from using public transport that does not conform to Legal Notice No. 161 of 2003 and ***Gazette Notice*** No. 384 of 2004, is refused.

9. The applicants' prayer that an order of mandamus do issue compelling the 2nd respondent to produce before the Court records of manufacturers, dealers, and agents of motor vehicle makes Nissan Caravan 2.7 Diesel matatus registered as at 31st January, 2004, is refused.

10. The applicants' prayer that an order of prohibition do issue prohibiting the 1st respondent from issuing any directive akin to L.N No. 161 of 2003 and ***Gazette Notice*** No. 384 of 2004 without consultation with the 1st applicant and the Interested Parties, is refused.

11. There will be no order as to costs.

DATED and **DELIVERED** at Nairobi this 4th day of March, 2005.

J.B. OJWANG

JUDGE

Coram : Ojwang, J.

Court Clerk : Mwangi

For the Applicants : Mr. J.H Kinyanjui, instructed by M/s J. Harrison Kinyanjui & co. Advocates

For the Respondents : Mr. M. Njoroge, instructed by the Hon.

The Attorney General

For the 4th Interested Party: Mr. Omulele, instructed by M/s Christopher Omulele & Co. Advocates

For the 5th Interested Party: Mr. Kamwendwa, instructed by M/s Kimani Micheni & Co. Advocates