



**TRANSPORT LICENSING APPEALS BOARD**

**AT NAIROBI**

**APPEAL CASE NO 8 OF 2020**

**MAKOS SAVINGS & CREDIT COOPERATIVE SOCIETY LTD ....APPELLANT**

**-VERSUS-**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY.....RESPONDENT**

**GRAVITAS EAGLE LIMITED.....INTERESTED PARTY**

**RULING**

***Introduction***

1. The Appellant is a savings and credit cooperative society (Sacco) that is licensed by the Respondent to operate public service vehicles.
2. The Respondent, National Transport and Safety Authority (NTSA), is established under section 3 of the National Transport and Safety Authority Act No. 33 of 2012 and has the responsibility to: advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety, implement policies relating to road transport and safety; plan, manage and regulate the road transport system; ensure the provision of safe, reliable, and efficient road transport services and to administer the Traffic Act.
3. The interested party is a company that is licensed by the Respondent to operate public service vehicles.

**The Appellant's Case**

4. Through a Memorandum of Appeal dated 28<sup>th</sup> July 2020, Makos Sacco challenged NTSA's decision to grant a Road Service License (RSL) to Gravitas Eagle Ltd. The license was issued on 15<sup>th</sup> July 2020 and Gravitas was permitted to operate along the following routes: (1) Afya Centre - Machakos (via Mbsa Road) - Kitui - Mutomo - Kibwezi and back (2) Afya Centre - Machakos (via Mbsa Road) - Wote - Makindu - Kibwezi and back.
5. The grant of license was challenged on the basis that: NTSA failed to consider the objection raised by Makos in granting the RSL; Gravitas had included motor vehicles that were registered under Makos Sacco to obtain the RSL; and that Gravitas Eagle had not complied with the provisions of Regulation 5 of the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations 2014.
6. Makos Sacco sought to get the following orders that: NTSA's decision to grant Gravitas Sacco an RSL be set aside and quashed; the said RSL be revoked; and costs be awarded to Makos Sacco.

7. Makos Sacco relied on the evidence of its Chairman, Jackson Mumo Bernard, who confirmed that Makos Sacco had a dispute with its former Chairman, Jonathan Muthoka Mutua, who had registered a rival company, Makos Wayes Ltd. As a result, Makos obtained an order from the Machakos Law Courts on 15<sup>th</sup> May 2020 restraining Jonathan Mutua and Macos Wayes Ltd from obtaining a letter of no objection from NTSA to operate, manage and/or otherwise carry on the business of public service vehicles for a maximum period of 14 days (*Makos Sacco v Macos Wayes Ltd and Jonthan Muthoka Mutua* Civil Suit 144 of 2020, Chief Magistrate Court, Machakos).

8. Subsequently, it was alleged that Jonathan Muthoka Mutua, through his agents, registered Gravitas Eagle Ltd on 26<sup>th</sup> June 2020 and sought to obtain an RSL from NTSA. A copy of the registration document from the Registrar of Companies indicated that Gravitas Eagle was registered by David Mwangangi Mutua (Director/Shareholder), Peter Mutie Musyoki Director/Shareholder, and Kitua Mutisya (Director/Shareholder). Makos Sacco indicated that David Mwangangi Mutua is a younger brother and employee of Jonathan Muthoka Mutua. It was also contended that the minutes of the meeting held at NTSA offices in Machakos on 19<sup>th</sup> May 2020, Kitua Mutisya attended the meeting as a representative of Macos Wayes.

9. Makos Sacco objected to the grant of the RSL through a letter to NTSA dated 21<sup>st</sup> July 2020. It was Makos' contention that upon receipt of the objection letter, NTSA issued a RSL to Gravitas Eagle on 22<sup>nd</sup> July 2020.

10. Makos Sacco alleged that Gravitas Eagle should not have been granted an RSL, as it had not complied with the provisions of Regulation 5 of the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations 2014 because:

a. Some of the motor vehicles used to obtain the RSL were registered under Makos Sacco, including motor vehicle registration number KCD 817A. In his testimony in court, the Chairman of Makos Sacco, Jackson Muryao Bernard, confirmed that motor vehicle registration number KCD 817 A was still in the system of Makos and was used to register Gravitas. Other vehicles used to register Gravitas when they still belong to other Saccos were: KCB 259B (Namak Sacco); KAW 173L (Namak Sacco); KBB 086K (Manatwa Sacco); KBH 697S (Makos Sacco); KCD 817A (Makos Sacco). As proof that they are registered under other Saccos, pictures annexed to the affidavit were relied upon. Jackson Muryao indicated that vehicles should not be in two sacco portal and, as such, he was not sure how this was possible.

b. Gravitas Eagle did not have in its employment drivers, inspector, office manager, accounts clerk, qualified mechanic or employment contracts.

c. Gravitas Eagle did not have a documented management system.

d. Motor vehicle registration numbers KCY 063Y to KCY 072Y that were used to obtain RSL for Gravitas belonged to Macos Wayes as indicated in a letter from Toyota Kenya. Jonathan Muthoka Mutua's replying affidavit in the case of *Makos Sacco v Macos Wayes Ltd and Jonthan Muthoka Mutua* (Civil Suit 144 of 2020, Chief Magistrate Court, Machakos) indicated that Jonathan Muthoka Mutua was a director of Macos Wayes Ltd and that Macos Wayes had purchased 15 vehicles from Toyota Kenya.

11. It was Makos Sacco's case that section 29 of the NTSA Act requires NTSA, in refusing to grant a license, to have regard to the public interest, including the interest of persons requiring and those persons providing facilities for transport. It was their argument that public interest will be served when proxies and agents of persons that are barred by the court from operating public service vehicle business are not granted RSL.

#### ***NTSA's Case***

12. It was NTSA's argument that they had discretion under section 29 of the NTSA Act 2012 to grant or decline a license without consulting another transport operator and that Makos had not demonstrated the nature of prejudice they suffered, as all the players in the court were operational. To support this argument, NTSA relied on the cases of *Kangema Travellers Sacco and Four Others v NTSA and Namu Supreme Shuttle Limited* (TLAB Case No. 22 of 2019) and *Rukagina 44 Sacco Ltd v Sunbird Services and NTSA* (TLAB Case No. 6 of 2018).

13. NTSA indicated that they were not aware of any internal disputes affecting the parties in court and, as such, they gladly accepted the list of vehicles presented by Gravitas.

14. The licensing officer of NTSA, Daniel Parsaloi, confirmed in his testimony that Gravitas complied with all the licensing conditions, which included: registration certificate, plan of the requested route, postal address, county governments approval (Machakos, Kitui, and Nairobi), tax compliance certificate, list of directors, copies of log books, NSSF details etc.

15. He also confirms that after creating a sacco portal, the password is given to the Sacco chairman or the designated person to enable the sacco add or remove vehicles. It was his contention that a vehicle cannot belong to two sacco portals. Upon getting the application from Gravitas, they did not confirm whether the vehicles belonged to other Saccos.

16. Her averred that Gravitas was given a license on condition that they meet the requirements of having a minimum of 30 vehicles within 30 days.

17. He also confirmed that KCD 817 A was still in the portal of Makos Sacco.

18. NTSA's Deputy Director of Licensing, Cosmas Ngeso, confirmed, in his affidavit, that Gravitas had fulfilled all the licensing conditions and that NTSA has the discretion to grant licenses without consulting other operators.

### **The Interested Party's Case**

19. The Chairman of Gravitas Eagle, Kitua Mutisya, indicated that Gravitas was licensed to operated by NTSA after fulfilling all the set licensing conditions. He also contended that they needed not consult Makos Sacco before being issued with a license.

20. Kitua Mutisya also contended that Gravitas Eagle is a private company that has no connection with Jonathan Muthoka Mutua.

21. He also averred that motor vehicle registration number KCD 817A was withdrawn from Makos Sacco on 23<sup>rd</sup> June 2020 and does not operate under Makos Sacco Society and should, therefore, have been discharged from Makos portal with effect from 23<sup>rd</sup> June 2020. In his court testimony, he confirmed that KCD has not been withdrawn from Makos and it was also not in Gravitas. The vehicle was not operational. He averred that Gravitas got other vehicles when KCD could not join them.

22. In their submission, Makos indicated that Kitua Mutisya gave a general statement regarding compliance with the requirements of registration without producing any documents to support the allegation.

### **Determination**

1. Following the arguments adduced by the parties, the Transport Licensing Appeals Board has isolated the following issue to be the ones requiring a determination:

- a. Whether there are similarities between the case pending before the Chief Magistrate's Court in Machakos and the one pending before the Transport Licensing Appeals Board.

Whether there are similarities between the case pending before the High Court and the one pending before the Transport Licensing Appeals Board.

2. The alleged dispute within Makos Sacco gave rise to two causes of action. One case was filed at the Chief Magistrate's Court on 15<sup>th</sup> May 2020 and it was the case of *Makos Sacco v Macos Wayes Ltd and Jonthan Muthoka Mutua* (Civil Suit 144 of 2020). Jonathan Mutua, who was at one time Chairman of Makos Sacco, had registered Macos Wayes Ltd and sought to have it issued with a license by NTSA. As a result, Makos Sacco sued him for passing off Macos Wayes Ltd vehicles as the vehicles of Makos Sacco Ltd. Although the case is still pending final determination, the Principal Magistrate, Hon. Nyoike, gave temporary orders on 11<sup>th</sup> June 2020 to the effect:

- a. That the defendants/respondents be and are hereby restrained from obtaining a letter of no objection from NTSA to operate, manage and/or otherwise carry on the business of public service vehicles pending the hearing and determination of the instant

application.

b. That the defendants/respondents be and are hereby restrained from obtaining a letter of no objection from NTSA to operate, manage and/or otherwise carry on the business of public service vehicles pending the hearing and determination of the suit.

23. Although the case in the Chief Magistrate's Court was to do with the passing off claim, Makos Sacco made a number of factual claims that could be of assistance to the case pending at TLAB. It was Mako's case in the Chief Magistrate's court that:

a. That Jonathan Mutua was at one time the Chairman of Makos Sacco, and still remains a member of the Sacco as well as an executive committee member. He was, however, suspended as Chairman. In his defence, Jonathan Mutua confirmed that he was the Chairman from 2011 to 2019, but contested the fact that he is still an executive committee member given that he was removed as Chairman as indicated in the Makos Sacco minutes dated 11<sup>th</sup> March 2020. He also asserted that he is no longer a member of Makos Sacco.

b. That Jonathan Mutua forged letters of introduction purporting that they emanated from Makos Sacco to obtain authority to operate public service vehicles that rival Makos Sacco. In his defence, Jonathan denies the alleged forgery.

c. That Jonathan Mutua continues to illegally hold the instruments of Makos Sacco to wit: seal stamps, original certificates, and audited accounts. In his defence, Jonathan denies that he has been holding the instruments of Makos illegally.

d. That as a member of Makos Sacco, Jonathan Mutua transferred irregularly vehicles from Makos Sacco to Macos Wayes Ltd.

e. That Jonathan Mutua owns a motor vehicle, KCD 817A, which is still part of Makos Sacco.

f. That a majority of the vehicles and drivers that are listed as belonging to Macos Wayes actually belong to Makos Sacco.

24. It is alleged by Makos Sacco that, after getting the order from the Chief Magistrate, Jonathan Mutua was indirectly involved in registering another company, Gravitas Eagle Ltd, on 26<sup>th</sup> June 2020. It is because of this development that Makos Sacco filed a suit against NTSA and Gravitas at TLAB on 28<sup>th</sup> July 2020.

25. It was Mako's case at TLAB that:

a. Jonathan Mutua used agents and proxies to register Gravitas Eagle Ltd. The agents were alleged to be David Mwangangi Mutua (Director/Shareholder - younger brother and employee of Jonathan Mutua), Peter Mutie Musyoki Director/Shareholder, and Kitua Mutisia (Director/Shareholder - according to the minutes of the NTSA meeting of 19<sup>th</sup> May 2020, he attended the meeting as a representative of Macos Wayes).

b. Just like Jonathan Mutua and Macos Wayes were alleged to have done, Gravitas was also alleged to have used vehicles that were registered under Makos Sacco to obtain a license from NTSA.

c. That motor vehicle, KCD 817A, which is owned by Jonathan Mutua and which was used to irregularly register Macos Wayes was also used to register Gravitas Eagle.

d. That motor vehicle registration number KCY 063Y and KCY 072Y that were used to register Gravitas Eagle also belonged to Macos Wayes as indicated in the documents filed at the Magistrate's Court.

26. The facts adduced in both the TLAB case and the one pending at the Chief Magistrate's Court clearly show that there is a close connection between the two cases. For example, the vehicle belonging to Jonathan Mutua, KCD 817A, was used to register Macos Wayes as well as Gravitas Eagle. The same applies to the other two vehicles, KCY 063 and KCY 072Y. We note that the Chief Magistrate's Court is yet to make a final determination on the allegation of forgery/fraud on the part of Jonathan Mutua, which, if proven, could have made possible the illegal transfer of vehicles from Makos Sacco to Macos Wayes and Gravitas Eagle.

27. We note that the Chairman of Gravitas Eagle, Kitua Mutisya, contended that Gravitas Eagle is a private company that has no connection with Jonathan Muthoka Mutua. On the other hand, Makos Sacco argued that the licensing of Gravitas Eagle was tainted by fraud, some of which could be traced back to the actions of Jonathan Mutua. Given that fraud is one of the accepted grounds for lifting the veil of incorporation of a company, proving the allegation of forgery/fraud on the part of Jonathan Mutua will guide TLAB on whether or not to lift the veil of incorporation of Gravitas Eagle so as to assess the actions and intentions of the parties behind its incorporation. Given that the question of forgery/fraud is still under consideration at the Chief Magistrate's court, it would be premature for TLAB to make a determination on the same.

28. We find that it would be in the interest of justice to stay our proceedings first so that the case pending at the Chief Magistrate's Court can be concluded. We exercise this discretion by virtue of section 39 (7) of the NTSA Act, which provides that "the Appeals Board shall regulate its procedure and proceedings as it may consider appropriate."

29. Having considered the law applicable to this matter, the Transport Licensing Appeals Board makes the following orders:

**THAT the case before the Transport Licensing Appeals Board is stayed pending the determination of the Chief Magistrate's Case of Makos Sacco v Macos Ways Ltd and Jonthan Muthoka Mutua Civil Suit 144 of 2020 (Machakos).**

**DELIVERED, DATED, AND SIGNED IN MACHAKOS BY THE TRANSPORT LICENSING APPEALS BOARD ON THIS 6<sup>TH</sup> DAY OF SEPTEMBER 2021**

Dick Waweru	Chairman	.....
Prof. Kiarie Mwaura	Member	.....
Betty Chepng'etich Bii	Member	.....
Aden Noor	Member	.....
Moses Parantai	Member	.....



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