



TRANSPORT LICENSING APPEALS BOARD AT NAIROBI

APPEAL CASE NO 6 OF 2020

GANAKI MULTI PURPOSE COOPERATIVE SOCIETYAPPELLANT

VERSUS

NATIONAL TRANSPORT AND SAFETY AUTHORITYFIRST RESPONDENT

THE HON ATTORNEY GENERALSECOND RESPONDENT

AND

LATEMA TRAVELLERS BUS & SAFARIS CO LTD.....INTERESTED PARTY

RULING

Introduction

1. The Appellant is a savings and credit cooperative society (Sacco) that is licensed by the First Respondent to operate public service vehicles.

2. The First 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 Second Respondent is the Hon. Attorney General established under Article 156 of the Constitution and the principal legal adviser to the Government mandated to represent the Government in legal proceedings.

4. The Interested Party is a limited liability company that is licensed by NTSA to operate public service vehicles.

NTSA's Case

5. Through a preliminary objection dated 9th June 2020, NTSA contended that the appeal filed by Ganaki Sacco at the Transport Licensing Appeals Board (TLAB) on 15th May 2020 fell outside the jurisdiction of TLAB on the following grounds:

a. That Ganaki was a third party who had not made an application for a license to NTSA and cannot, therefore, be aggrieved by the decision of NTSA under section 38 of the NTSA Act.

b. That the appeal did not fall among appeals that can be filed against the decisions of NTSA as provided for under section 38 of the NTSA Act.

c. That NTSA does not have enforcement powers to maintain law and order on the roads as the same is the preserve of the Kenya Police by virtue of section 54 of the National Police Service Act.

6. Ganaki had lodged an appeal at the Transport Licensing Appeals Board on 15th May 2020 seeking orders to compel NTSA to respond to their complaint letters of 25th November 2019 and 5th December 2019. The complaint to NTSA was about the fact that Latema Travellers had invaded Karura and Kihara routes and had remained in those routes to the detriment of Ganaki Sacco. In the supporting affidavit of Earnest Kamau Hinga dated 15th May 2020, he contended, in paragraph 25, that NTSA had “not made any response and/or any action at all.” Ganaki also sought costs of the appeal as well as interest.

7. NTSA averred that, through a letter dated 28th November 2019, they responded to Ganaki and invited the officials of Ganaki to a meeting, which was also attended by officials of Latema Travellers. NTSA contended that paragraph 20 of Ganaki’s Memorandum of Appeal confirmed that the meeting was held on 3rd December 2019 and it was resolved that both parties would restrict themselves to the routes prescribed in their licenses.

8. NTSA averred in the preliminary objection that Ganaki could not make an application to TLAB under section 38 (1) of the NTSA Act, as Ganaki was not an applicant for the grant or the variation of a license. Section 38 (1) provides that:

A person who

(a) being an applicant for the grant or variation of a license is aggrieved by the decision of the Authority on the application,

(b) having made an objection to any such application as aforesaid, being an objection which the Authority is bound to take into consideration, is aggrieved by the decision of the Authority; or

(c) being a licensee, is aggrieved by the revocation or suspension thereof, may within the time and in the manner prescribed appeal to the Appeals Board established under section 39.

9. NTSA took the position that the objector referred to under (b) above had to be an applicant for the grant or variation of license.

10. It was NTSA’s argument that TLAB did not have jurisdiction to hear the appeal, as it raised constitutional matters that ought to be determined by the High Court given that the appeal was relying on Articles 1, 2, 10, 22, 46, 47 (1), 75, 159 (1) and 232. To support its arguments, NTSA relied on the cases of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696; and Owners of Motor Vessels’ Lilian v Caltex Oil (K) Ltd (1989) KLR.

The Case of Latema Travellers

11. Latema Travellers supported the preliminary objection and argued that Ganaki should have sought the remedy from the High Court as the orders sought (compelling NTSA to respond to Ganaki’s complaint) were judicial review orders. It was their case that section 39 (5) of the NTSA Act gives TLAB appellate rather than original jurisdiction.

12. Latema Travellers relied on the case of Republic v Transport Licensing Appeals Board and 2 Others Ex Parte MNGN Sacco Ltd [2017] eKLR, which found that TLAB went outside its jurisdiction by making judicial review orders of certiorari and mandamus. The other authority relied upon was Republic v Cabinet Secretary Ministry of Education Ex Parte John Njomo [2017] eKLR.

The Case of Ganaki Sacco

13. Ganaki averred that NTSA had not handled its two complaints satisfactorily and that the failure to do so had affected its business.

14. It was Ganaki's case that the objector envisaged under section 38 (1) (b) of the NTSA Act was different from the applicant under section 38 (1) (a) and, therefore, a person who was not an applicant for grant or variation of a license, a third party, could still make an appeal to TLAB.

15. Ganaki argued that the jurisdiction of TLAB as provided under section 38 (b) of the NTSA Act should be read within the ambit of Articles 10 and 47 of the Constitution as well as section 6 of the Fair Administrative Actions Act.

16. Ganaki also argued that the failure to respond to the complaint was actionable, as it was an omission, which is an administrative action under the Fair Administrative Action Act.

17. Ganaki averred that the preliminary objection was not merited, as it relied on matters of fact rather than law. According to Ganaki, the preliminary objection did not meet the threshold set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, which require a preliminary objection to be based purely on a crisp point of law rather than facts. According to Ganaki, the issues raised by NTSA's objection could not be determined without looking at the factual issues.

18. Ganaki contended that the written submissions of NTSA and Latema Travellers indicated that NTSA had addressed all the complaints made by Ganaki. However, this was contested by Ganaki, as they are still aggrieved by NTSA's inaction. According to Ganaki, whether the complaints had been addressed or not is a factual issue that ought to be determined in the main trial. Ganaki contended that there was no evidence of conclusive determination of the complaints.

19. To support their arguments, Ganaki relied on the cases of *Nakili Sacco & 3 Others v NTSA and 2 Others* [2016] eKLR, *Narok Line Services Ltd v NTSA* [2019] eKLR, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, *Independent Electoral & Boundaries Commission v 141 Jane Cheperenger & 2 Others* [2015] eKLR, *David Karobia Kiiru v Charles Nderitu Gitoi & Another* [2018] eKLR, and *Matatu Owners Association (Meru Branch) v NTSA* [2018] eKLR.

Determination

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

- a. Whether the preliminary objection met the threshold of the law by not dealing with disputed facts.
- b. Whether section 38 (1) of the NTSA Act enables an objector (a third party) to make an appeal to TLAB.
- c. Whether TLAB can make compelling orders against NTSA.

Whether the preliminary objection met the threshold of the law by not dealing with disputed facts

21. Ganaki Sacco contended that the preliminary objection did not meet the threshold set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, and *Independent Electoral & Boundaries Commission v 141 Jane Cheperenger & 2 Others* [2015] eKLR, which require a preliminary objection to be based purely on a crisp point of law rather than facts.

22. The dicta of Justice Ojwang in the case of *Oraro v Mbaja* [2005] eKLR 141, observed that:

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details **liable to be contested** and in any event, to be **proved through the process of evidence**. Any assertion which claims to be a preliminary objection and yet it **bears factual aspects calling for proof** or seeks to **adduce evidence for its authentication** is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to **investigate facts**, a matter can be raised as a preliminary objection anything that purports to be a preliminary objection must **not deal with disputed facts** and it must not itself **derive its foundation from factual information** which stands to be tested by normal rules of evidence.”

23. The preliminary objection raised by NTSA is based on the contention that Ganaki is a third party who had not made an application for a license to NTSA and could not, therefore, be aggrieved by the decision of NTSA under section 38 of the NTSA Act. It was also the contention of NTSA that they had dealt with all the complaints of Ganaki. The application of the test in *Oraro v Mbaja* entails establishing whether the assertions by NTSA were contested, had factual aspects calling for proof, called for investigation of facts, dealt with disputed facts, derived its foundation from factual information.

24. The pleadings as well as submissions from Ganaki indicated that Ganaki was a third party indeed, as it had not made an application for license to NTSA. As such, Ganaki did not contest its status as a third party. In fact, it was through the status of a third party that Ganaki made the case for objecting to the issuance of the license under section 38 (1) (b).

25. As to whether the preliminary objection was derived from factual information, the written submissions of NTSA and Latema Travellers indicated that NTSA had addressed all the complaints made by Ganaki. However, this was contested by Ganaki, as they are still aggrieved by NTSA’s inaction. As such, we cannot say with certainty that all the complaints had been addressed. This is a factual issue that ought to be determined in the main trial.

Whether section 38 (1) of the NTSA Act enables an objector (a third party) to make an appeal to TLAB.

26. It was NTSA’s argument that the objector under section 38 (1) (b) of the NTSA Act had to be an applicant for grant or variation of a license.

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

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

28. NTSA preferred an interpretation that views the semi colon between sentences (a) and (b) as playing the role of conjoining the two sentences. This would, therefore, mean that a party making an objection under (b) had to qualify first as an applicant under (b). If this were the case, then it would mean that a third party, such as a community based organisation, aggrieved by a decision of NTSA would be unable to object to the issuance of a license. It is noteworthy that the administrative acts of NTSA, which is a public body, are subject to the scrutiny of the Constitution under Article 47, which guarantees the right to fair administrative action. This article falls under the bill of rights, whose enforcement is provided for under Article 22 and which provides that:

“22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by— (a) **a person acting on behalf of another person who cannot act in their**

own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a person acting in the public interest; or (d) an association

29. Interpreting section 38 (1) (a) and (b) in a manner that would exclude third party objectors who are not applicants for license would clearly offend Article 22 of the Constitution. Besides, construing an objector as the same person as an applicant could mean that **a person could apply for a license and then object to its issuance**, a scenario that is not feasible. We find that the applicant and objector, as envisaged under Section 38, are two different persons.

30. Ganaki Sacco, as an objector, has the standing to make an appeal to the Transport Licensing Appeals Board under section 38 (1) (b). Whether Ganaki

Sacco succeeds or not is a totally different matter to be determined in the main trial.

Whether TLAB can make compelling orders against NTSA.

(i) The Constitutional Foundation of Fair Administrative Action in Licensing

31. Article 47 of the Constitution entitles every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Similarly, where an administrative action affects or is likely to adversely affect a person, that person has the right to be given written reasons for the action. Article 47(3) contemplated legislation to give effect to the right to fair administrative action and provides for the review of administrative action by a court or, if appropriate, an independent and impartial **tribunal**; and promote efficient administration.

32. To this end, the Fair Administrative Action Act, 2015 is the statute contemplated. The Act defines “administrator” as any person who takes an administrative action or who makes an administrative decision. In turn, “administrative action” is broadly defined as extending to: (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) any act, **omission** or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. In exercise of its licensing authority, the NTSA is therefore an administrator and its decisions amount to administrative actions.

33. The jurisdiction of the Transport Licensing Appeals Board over the administrative actions of the National Transport Authority is set out in section 38 of the National Transport and Safety Authority Act, 2012 in the following terms:

Appeals against decision of Authority

a. A person who—

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

34. In the exercise of its jurisdiction under section 39 (5) of the NTSA Act, the Board has the powers to affirm or reverse the decision of the NTSA, or **make such other order as the Board considers necessary and fit.**"

35. Section 39(5) of the NTSA Act expressly empowers the Board in hearing an appeal to affirm or reverse the decision of the Authority, or **make such other order as the Board considers necessary and fit.** This can include any order necessary to enforce the decision of the Board on an appeal. Whilst commenting on the scope of the term "**such other order as the Board considers necessary and fit**" under section 39 (5) of the NTSA Act, Justice Odunga in *Jaset Enterprises Ltd v The Director General National Transport and Safety Authority* (JR Misc Civil Application No. 17 of 2017) says that:

"The phrase such other order as the Board considers necessary and fit coming after affirmation or reversal of the decision of the authority in my view ought to be read ejusdem generis to the two expressly specified reliefs. Further, such other reliefs can only be issued pursuant to section 11 of the Fair Administrative Action Act 2015 which provides for remedies which the High Court or a Subordinate Court may grant." (It is worthy of note that section 11 of the Fair Administrative Action Act 2015 empowers courts and tribunals to grant any order that is just and equitable, including **compelling the performance by an administrator** of a public duty owed in law and in respect of which the applicant has a legally enforceable right).

36. Section 38 (1) does not prescribe the specific grounds of appeal that can be relied upon and, therefore, permits TLAB to consider all grounds so long as they touch on the licensing decisions of NTSA. As such, some of the appeals made to TLAB will be based on grounds that are envisaged under Article 47 of the Constitution, which is implemented through the Fair Administrative Actions Act 2015. Justice Odunga clearly confirms this position in the case of *Jaset Enterprises Ltd v The Director General National Transport and Safety Authority* (JR Misc Civil Application No. 17 of 2017). It is the case that the Fair Administrative Actions Act has made significant changes to the orders that can be made under a judicial review application.

37. The Administrative Action Act treats the failure to take action (omission) the same way as the making of a decision. This was also supported by Latema Travellers during the hearing when they indicated that "the failure to make a decision is a decision in itself" and therefore Ganaki should be satisfied that NTSA had made a decision. As such, we find that the ejusdem generis rule would extend affirmation or reversal of a decision under section 39 (5) of the NTSA Act to cover reliefs for failing to make a decision, a factor that is contemplated by the phrase "**such other order as the Board considers necessary and fit.**"

38. Section 7 of the Fair Administrative Action Act, 2015 underpins the administrative review jurisdiction of tribunals by permitting any person who is aggrieved by an administrative action or decision of the NTSA to apply for review of the administrative action or decision to this **tribunal** in exercise of its jurisdiction conferred under section 38.

39. In applications for review of the decisions of the NTSA, the Board has vast powers conferred under section 11 of the Fair Administrative Action Act 2015 in the following terms:

11. Orders in proceedings for judicial review.

(1) In proceedings for judicial review under section 8

(1), the court may grant any order that is just and equitable, including an order-

(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;

(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;

(d) prohibiting the administrator from acting in particular manner;

(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

(f) **compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;**

(g) prohibiting the administrator from acting in a particular manner;

(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;

(i) granting a temporary interdict or other temporary relief; or

(j) for the award of costs or other pecuniary compensation in appropriate cases.

40. It is clear that the Board has the jurisdiction to grant any order that is just and equitable, including an order to compel the performance by NTSA of a public duty owed in law and over which an appellant has a legally enforceable right or to prohibit the NTSA from acting in a particular manner.

(ii) Constitutional Underpinning of the Transport Licensing Appeals Board

41. The Board, being a tribunal, has constitutional underpinning and the status of a subordinate court. In *Cornel Rasanga Amoth v Jeckonia Okungu Ogutu* [2017] eKLR it was held that:

It is without a doubt that jurisdiction is granted by the Constitution or statute or both, Article 169 of the Constitution provides that **Subordinate Courts** are the Magistrate Courts; the Kadhi Courts; the Court Martial; and any other Court or **local tribunals** as may be established by an Act of Parliament, other than the courts established under Clause (1). The Constitution therefore recognizes tribunals as part of the subordinate courts, which are established and given jurisdiction and power by their parent Acts.

42. The power to compel NTSA to act is one of the factors that enables this Board to remain standing authoritatively. The people of Kenya have delegated their sovereign authority under Article 3(c) of the Constitution to this tribunal and it would be a misuse of that sovereign authority for this Board to spend scant public resources presiding over licensing disputes without the ability to issue compelling orders. According to Article 20 (1) of the Constitution, the Transport Licensing Appeals Board, as a public body and state organ, is bound to apply the bill of rights, including Article 47, and cannot make decisions that are inconsistent with the Constitution.

43. In *Elijah Gachuki v Jubilee Party* [2017] Eklr, Mwongo J affirmed the Constitutional standing of tribunals as follows:

There is a misguided perception both among legal practitioners and the laity, that tribunals are incapable or inadequately enabled to undertake serious legal and even constitutional adjudicatory roles. In our constitutional architecture, tribunals are recognised under **Article 1(3)(c)** of the **Constitution** as one of the state organs to which the peoples' sovereign power is delegated. Under **Article 159 (1)** of the **Constitution** tribunals are among the organs to which the people of Kenya vest judicial authority to be exercised by or under the Constitution. Under **Article 159(2)** of the **Constitution**, they operate by and are guided in accordance with the same principles for the exercise of judicial authority as are the courts. Subject to their mandate, they carry the same heavy burden as the courts of applying the Constitution in obedience to the national values and principles of governance.

44. The Board is guided by this legal position rather than the one adopted by Justice Aburili in *Republic v Transport Licensing*

Appeals Board Ex Parte MNGN Sacco Ltd (JR No. 37 of 2017). To allow tribunals to make compelling or quashing orders, we note that the Fair Administrative Actions Act did not use the words prerogative orders, such as certiorari and mandamus, which are a preserve of the High Court. As such we find that TLAB can lawfully make orders that have the same effect as the traditional judicial review orders so long as it does not use such words as certiorari and mandamus. For example, reversing the decision of NTSA under section 39 (5) of the NTSA Act would have the same effect as a certiorari order from the High Court. The case of Republic v Transport Licensing Appeals Board and 2 Others Ex Parte MNGN Sacco Ltd [2017] eKLR, is distinguishable on the basis that it found that TLAB to have gone outside its jurisdiction by using the words certiorari and mandamus. In the event that TLAB had not used those words, the decision would have been allowed to stand.

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

1. THAT the preliminary objection dated 9th June 2020 is dismissed.
2. THAT Ganaki Sacco, as an objector, has the standing to make an appeal to the Transport Licensing Appeals Board under section 38 (1) (b).
3. THAT each party bears its own costs.

DELIVERED, DATED, AND SIGNED IN NAIROBI BY THE TRANSPORT LICENSING APPEALS BOARD ON THIS 27TH DAY OF SEPTEMBER 2021.

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

Delivered in the presence of:

Mr. Thuku instructed by CM Thuku and Company Advocates for Ganaki Sacco. Mr Wachira instructed by Waruiru, Karuku & Mwangale Advocates for Latema Travellers.

Ms Koech holding brief for Ronald Cheruiyot/NTSA.

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