



Case Number:	Petition 521 of 2015
Date Delivered:	31 Oct 2016
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Onguto Joseph Louis Omondi
Citation:	City Riders Sacco & 11 Others v County Government of Nairobi & 3 Others [2016] eKLR
Advocates:	-
Case Summary:	<p><b>The Nairobi County Government has the mandate to issue a ban on the operations of motorcycle taxi service operators within the Nairobi Central Business District.</b></p> <p><b>City Riders Sacco &amp; 11 others v County Government of Nairobi &amp; 3 others</b></p> <p><b>Petition No 521 of 2015</b></p> <p><b>High Court at Nairobi</b></p> <p><b>Constitutional and Human Rights Division</b></p> <p><b>J L Onguto, J</b></p> <p><b>October 31, 2016</b></p> <p><b>Reported by Beryl A Ikamari</b></p> <p><i><b>Constitutional Law-devolution-functions of the National Government and the County Government-transport and communication and county transport-</b></i></p>

*regulation of traffic, parking and public road transport within a county-whether a County Government had the mandate to issue a ban on the operations of motorcycle taxi service operators in the Nairobi Central Business District-Constitution of Kenya 2010, article 186; Fourth Schedule to the Constitution of Kenya 2010, part one, section 18 & part two section 5.*

**Constitutional Law**-devolution-conflict of laws between national legislation and county legislation-transport and communication-whether registration of a Society under the Cooperative Societies Act gave the Society the mandate to undertake its operations within a specific area-whether county laws which banned the operations of motorcycle taxi service operators within the Nairobi Central Business District was in conflict with the Cooperative Societies Act-Constitution of Kenya 2010, article 186; Fourth Schedule to the Constitution of Kenya 2010, part one, section 18 & part two section 5; Cooperative Societies Act (Cap 490), section 6.

**Constitutional Law**-enforcement of fundamental rights and freedoms-socioeconomic rights, the right to fair administrative action, the right to equality and freedom from discrimination-standard of proof required to establish that there had been violations of socioeconomic rights, the right to fair administrative action, the right to equality and freedom from discrimination- effect of a ban on the operations of motorcycle taxi service operators in the Nairobi Central Business District on the operators' socioeconomic rights, the right to fair administrative action, the right to equality and freedom from discrimination-Constitution of Kenya 2010, articles 27, 43 & 47.

**Constitutional Law**-enforcement of fundamental rights and freedoms-right to property-alleged arbitrary impounding of motorcycles, storage for unspecified periods and imposition of storage charges- standard of proof required to establish that motorcycles had been impounded, stored for unspecified periods and storage charges had been imposed-whether under the circumstances there had been a violation of the motorcycle operators' rights to property-Constitution of Kenya 2010, article 40.

### **Brief facts**

Through a Notice in the newspapers, the Nairobi City County Government informed all motorcycle (*boda boda*) taxi service operators that a ban had been imposed to prohibited them from ferrying passengers to and from the Nairobi Central Business District.

The Petitioners argued that the ban negatively affected their livelihoods and socioeconomic rights recognized under article 43 of the Constitution and that it also discriminated against two wheeled motor cycle owners as it was not applicable to other persons operating four or three-wheeled taxis. The Petitioners added that the notice was issued arbitrarily and was to take effect immediately and it was a violation of the right to fair administrative action provided for in article 47(2) of the Constitution. They said that the notice did not give reasons as to why motorcycles were to cease operations at the Central Business District in favour of taxis.

The Petitioners pointed out that transport and communication was a function given to both the National Government and the County Government under the Constitution. They said that with respect to transport and communication there was a conflict of laws between national legislation and county legislation and that national legislation, the Cooperative Societies Act, ought to supersede County legislation. The Petitioners stated that they were registered under the Cooperative Societies Act and were thereby given the mandate to operate in the Nairobi Central Business District.

The Petitioners also complained that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents violated their rights to property by arbitrarily impounding their motor cycles and storing them for unspecified periods and imposing storage charges.

### **Issues**

1. Whether the County Government had the

mandate to issue a notice banning the operations of motorcycle (*boda boda*) taxi service operators in the Nairobi Central Business District.

2. Whether there was a conflict of laws between national legislation and county legislation as related to the transport and communication function.
3. Whether the ban on the operations of motorcycle (*boda boda*) taxi service operators in the Nairobi Central Business District, was a violation of the motorcycle operators' socio-economic rights, right to fair administrative action, right to equality and freedom from discrimination.
4. Whether in impounding motorcycles, storing them for unspecified periods and imposing storage charges, the officials of the Nairobi City County Government violated the motor cycle operators' rights to property.

#### **Held**

1. Article 186 of the Constitution, provided that the functions of the National Government and the County Government were set out in the Fourth Schedule to the Constitution. Section 18 of part one of the Fourth Schedule to the Constitution, provided that the functions of the National Government included transport and communication. Additionally, section 5 part two of the Fourth Schedule provided that the functions of County Governments included county transport including county roads, street lighting, traffic and parking, public road transport and ferries and harbours excluding the regulation of international and national shipping and matters related thereto.
2. It was clear that County Governments had a constitutional mandate with regard to county transport, including the regulation of traffic, parking and public road transport. There was no doubt that the 1<sup>st</sup> Respondent had the mandate to regulate public transport matters within Nairobi City County. It was not disputed that the Petitioners were offering taxi services

which were within the purview of public transport.

3. The Petitioners' registration under the Cooperative Societies Act did not entitle them to operate within the Nairobi Central Business District. The Commissioner of Cooperative Societies had powers to register cooperative societies under the Act but the powers did not extend to allocating parking or areas within which a registered Society could undertake its activities. The registration by the Commissioner was not a licence to carry out business which was outside of the Regulations and laws enacted by the County Government.
4. Section 6 of the Cooperative Societies Act did not grant the Commissioner of Cooperative Societies powers to allocate areas of business and more specifically, parking space or areas of operation for taxi businesses. There was no conflict between the functions of the County Government in regulating public transport within the county and the general authority of the Commissioner of Cooperatives had in regulating cooperative societies generally.
5. Article 27 of the Constitution provided for equality and freedom from discrimination. Discrimination entailed differential treatment and treating equals unequally.
6. It was absurd to expect three and four-wheeled taxis/vehicles to be equated with two-wheeled vehicles as alleged by the Petitioners. Discrimination entailed a failure to treat all persons equally where no reasonable distinction could be found between those favoured and those disfavoured. The ban on two-wheeled motor vehicles could therefore not be said to be discriminatory since, two wheeled vehicles could not be equated to three-wheeled or four-wheeled vehicles. The three were not in one category and there was a reasonable distinction.
7. The Petitioners alleged that they had been discriminated against but they did not address the Court on the grounds upon which they were discriminated. They merely stated that they had been

	<p>discriminated against compared to persons operating three or four-wheeled taxis. Article 27(4) of the Constitution provided for the grounds upon which a person could be discriminated and the Petitioners had not adduced evidence of any ground of discrimination.</p> <p>8. Article 40 provided for the right to property. It guaranteed the right to own property and precluded the State from enacting any law that permitted arbitrary deprivation of property.</p> <p>9. The Petitioner alleged that officials of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had been arbitrarily impounding their motorcycles and taking them to be stored for unspecified periods and imposing storage charges but they did not offer evidence in support of the allegations. The material placed before the Court did not disclose a violation of the right to property.</p> <p>10. It would have been prudent for the Petitioners to provide details in terms of who the officials/employees were, the amount of charges imposed, any receipts indicating the payment of such charges, the dates when the events complained of occurred and the specific persons particularly affected by such actions. The Petitioners' claim was too generalized to be of any benefit to the Petitioner or the Court in as far as proof of the allegations was concerned.</p> <p>11. Whereas the Petitioners claimed a violation of article 47 of the Constitution, they did not seek any order with respect to that alleged violation and therefore the Court did not have to address the allegation. Additionally, there were no specific attempts made to prove that allegation.</p> <p><i>Petition dismissed.</i></p>
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-

History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.

**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTION AND HUMAN RIGHTS DIVISION**

**PETITION NO. 521 OF 2015**

**BETWEEN**

CITY RIDERS SACCO .....1<sup>ST</sup> PETITIONER  
FLIGHT RIDERS SACCO .....2<sup>ND</sup> PETITIONER  
TUMOTER SACCO .....3<sup>RD</sup> PETITIONER  
TRANSCITY SACCO .....4<sup>TH</sup> PETITIONER  
KIRINYAGA SACCO .....5<sup>TH</sup> PETITIONER  
NYAKAMPALA SACCO .....6<sup>TH</sup> PETITIONER  
SAFE RIDE SACCO .....7<sup>TH</sup> PETITIONER  
LATEMA UNIQUE RIDERS SACCO .....8<sup>TH</sup> PETITIONER  
UNIQUE BODA BODA SACCO .....9<sup>TH</sup> PETITIONER  
NAIROBI RIDERS SACCO .....10<sup>TH</sup> PETITIONER  
FOUR WAYS BODA BODA SACCO .....11<sup>TH</sup> PETITIONER  
CBD BODA BODA SACCO .....12<sup>TH</sup> PETITIONER

**AND**

COUNTY GOVERNMENT OF NAIROBI .....1<sup>ST</sup> RESPONDENT  
NATIONAL POLICE SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT  
INSPECTOR GENERAL OF POLICE .....3<sup>RD</sup> RESPONDENT  
THE HONOURABLE ATTORNEY GENERAL .....4<sup>TH</sup> RESPONDENT

**JUDGMENT**

**Introduction**

1. The Petitioners describe themselves as ‘boda-boda’ riders, registered pursuant to the **Transport Act** and the **Cooperative Societies Act, Chapter 490** of the **Laws of Kenya**. They state that their members

are two-wheeled taxi operators within the Central Business District (CBD) of Nairobi. They claim to be aggrieved by a decision to stop them from operating their motor-cycles within the central business district of the 1<sup>st</sup> Respondent. Such decision they say affects their and their families' livelihood. Additionally, such decision, they say, is discriminatory.

2. The 1<sup>st</sup> Respondent is a County Government established under **Article 176** of the **Constitution**; the 2<sup>nd</sup> Respondent, the National Police Service Commission, is a commission established pursuant to **Article 246** of the **Constitution** and is responsible for the management of the National Police Service; the 3<sup>rd</sup> Respondent, the Inspector General of Police Service, is responsible for the overall directions and deployment of police officers within the police service; and the 4<sup>th</sup> Respondent, the Attorney General, is the principal legal adviser to the Government and represents the national Government in legal proceedings, pursuant to **Article 156** of the **Constitution**.

### **Background facts**

3. The facts giving rise to the present Petition are not disputed.

4. On 11<sup>th</sup> November, 2015, the 1<sup>st</sup> Respondent through the County Secretary issued a Notice in the national dailies newspapers. The notice read as follows:

#### ***“BAN OF MOTORCYLCES (BODA BODA) OPERATORS FROM CENTRAL BUSINESS DISTRICT***

***Pursuant to the provisions of the Traffic Act CAP 403 of 2014 of the Laws of the Republic of Kenya, the Nairobi City County Government wishes to inform all motorcycle (bodaboda) operators ferrying passengers to and from the Central Business District (CBD) that such activities have been banned with immediate effect.***

***Any operator and passenger found contravening this law will be arrested for an offence punishable by hefty fines and long jail terms as provided for in the Traffic Act of 2014. Motorcycles ferrying goods are exempted.***

***Motorcycle operators must also note that the Nairobi City County Government has not designated any parking slots in the CBD.***

#### ***COUNTY SECRETARY”***

5. The Notice prohibited the Petitioners from operating within the central business district. The Notice also invited criminal sanctions in the event of disobedience.

6. The Petitioners were aggrieved by the notice, reproduced above, and filed the present Petition alleging infringement of their various fundamental rights and freedoms under the Constitution, as shall be seen shortly. The Petitioners therefore sought the following orders:

***a. An order of declaration do issue that the National Legislations are superior to the County Government legislations and where a national legislation clearly and unambiguously state and give powers to a body so established by the law, the same cannot be impeached by a county government law and when the National Transport and Safety Authority, within the powers confined upon the Cabinet Secretary of Transport issued regulations through Legal Notice No. 33 of 2012 directing the county governments to provide parking areas for the members of the Petitioners, the 1<sup>st</sup> Respondent is bound to comply and effect such regulations.***

*b. An order of declaration do issue that when the Petitioners were registered pursuant to the Cooperative Societies Act and given mandate to operate within the designated areas within the Central Business District of Nairobi, the activities of their members are lawful, legitimate and not subject to any interference except their business activities as a right can only be limited through lawful means.*

*c. An order of declaration do issue that when the 1<sup>st</sup> Respondent issued the directive in the daily newspapers on 11<sup>th</sup> November, 2015, the same directive discriminated the members of the Petitioners as taxi operators to the advantage of the three-wheeled and four-wheeled tax operators in contravention to Article 27 of the Constitution and the 1<sup>st</sup> Respondent did not provide for a fair trading practice. (sic)*

*d. An order of declaration do issue that under the common law principles, the vehicles are not amenable to commit crimes as they do not have minds and when a traffic offence is committed, it is the riders responsible and impounding of motor cycles on the basis that the riders have committed offences and where the impounding results in loss, damage and general economic constraints imposed on the owners of the motor cycles contravenes Article 40 (2) of the Constitution, and therefore Sections of the Traffic Act, Chapter 403 of the Laws of Kenya, that purports seizure and confiscation of the Petitioners' properties (motor cycles) is a deprivation of those properties. (sic)*

*e. An order of declaration do issue that the Notice of the 1<sup>st</sup> Respondent appearing in the daily newspapers purporting to stop, restrain, prohibit and/or to interfere with the transport business of the members of the Petitioners and dated 11<sup>th</sup> November, 2015 is null and void and of no legal consequences. (sic)*

*f. An order of injunction do issue and to restrain the Respondents, their agents and/or servants from making arbitrary seizure, impounding, storing, and to interfere with the motor cycles which are the properties of the members of the Petitioners. (sic)*

*g. An order of injunction do issue and to restrain and prohibit the Respondents by their agents and/or servants from purporting to prohibit or stop or interfere with the lawful operations of the members of the Petitioners.*

*h. An order of injunction do issue and to suspend the operation of the notice of the 1<sup>st</sup> Respondent on 11<sup>th</sup> November, 2015.*

*i. The cost of this Petition be provided for.*

### **The Petitioners' Case**

7. The Petitioners' case is contained in their Petition dated 20<sup>th</sup> November 2015 together with their respective Affidavits in support verifying the contents therein and their Written Submissions dated

8. The Petitioners stated that their members are special groups recognized by the Constitution and they form the bulk of the labour force in the country. The Petitioners contend that the 1<sup>st</sup> Respondent has acted contrary to **Article 191** of the **Constitution** by issuing the Notice dated 11<sup>th</sup> November, 2015.

9. The Petitioners further contend that the "boda-boda" industry and its members have an inalienable right to carry business in any part of the country without any hindrance, subject to the law and as long as

they are plying on two-wheeled motorized vehicles within the National Transport and Safety Authority Regulations, the decision by the 1<sup>st</sup> Respondent is prejudicial, biased, discriminatory and amounts to an economic sabotage and unconstitutional.

10. It was also the Petitioners' contention that they are entitled to socio-economic rights under **Article 43** of the **Constitution** and that the decision by the 1<sup>st</sup> Respondent is discriminatory and contrary to **Article 27** of the **Constitution** as the same does not apply to other persons operating four or three-wheeled taxis. Furthermore, that motor cycles do not have any senses and in terms of criminal jurisprudence, they are incapable of committing any offence and when riders commit offences, the motor cycles must be divorced from the offences.

11. The Petitioners also alleged that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have been arbitrarily impounding their motor cycles and storing them for unspecified periods and further imposing storage charges. That, they argued, is an infringement of the right to property as guaranteed under **Article 40** of the **Constitution**.

12. Further, the Petitioners lamented that arbitrary towing charges are always imposed without any explanation being given to them and hence, the same has resulted in a lucrative business for towing companies which are owned by the associates of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' employees, at the expense of the vulnerable and struggling citizens.

13. In the Petitioners' view, the notice issued by the 1<sup>st</sup> Respondent was unconstitutional as the same infringed on the Bill of Rights and it did not ensure fair administrative action in terms of **Article 47 (2)** of the **Constitution**. Additionally, that the notice was issued abruptly and instantly took effect meant that the Petitioners were not given any prior notice and hence it is in contravention of **Article 47 (1)** of the **Constitution**.

14. In their Written Submissions, they maintained that the Respondents have jointly acted in utter disregard of **Articles 40 (2) (a), 43** and **47 (2)** of the **Constitution**. The Petitioners argued further that **Article 186** of the **Constitution** provides for respective functions and powers of national and county Governments and that the respective roles of the two Governments are set under **Part 1** of the **Fourth Schedule** which states that the function of the national Government includes transport and communication, including road traffic, while **Part 2** outlines the functions of the county Government to include public transport, that in their view, depicts a classical conflict of laws between national legislation and county legislation.

15. According to the Petitioners, the **Cooperative Societies Act**, as revised in 2012, and **Legal Notice No. 33 of 2012**, are applicable herein and they supersede county legislation and By-laws. In the result argued the Petitioner, the 1<sup>st</sup> Respondent's actions are unconstitutional. Furthermore, it was argued that the impugned notice does not give proper reasons or disclosures for the cessation of operations in favour of other taxis, who have not been asked to vacate the CBD.

16. The Petitioners relied on the decision in **D.T Dobie and Company vs. Muchina and Another (1978) KLR 9** for the proposition that a Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. As such, they urged the Court to dismiss the contentions by the Respondents that the suit ought to be dismissed. According to the Petitioners, the petition is of great public interest and the Court ought to grant the orders sought.

17. The Petitioners pointed out further that the Court has the power to strike out a law or legislation which is unconstitutional and the same applies to any privileges or powers claimed by the 1<sup>st</sup>

Respondent which are in conflict with the Constitution and as such, the present matter is well before the Court.

18. For the foregoing reasons, the Petitioners urged the Court to allow the Petition and grant the orders sought therein together with costs.

### **The 1<sup>st</sup> Respondent's Case**

19. The 1<sup>st</sup> Respondent opposed the Petition through its Affidavit in reply sworn on its behalf by one Robert Ayisi, its then acting County Secretary, on 14<sup>th</sup> March 2016.

20. Its case was that the impugned newspaper notice and the consequent directive was regular, procedural and lawful, contrary to the erroneous allegations by the Petitioners. The 1<sup>st</sup> Respondent contended that its functions as outlined under **Part 2** of the **Fourth Schedule** of the **Constitution** include regulation of public road transport. In that regard, it was its argument that public road transport within the CBD is its function and that **Section 118A** of the **Traffic Act** mandates Local Governments and now county governments to make by-laws that regulate and control the operations of taxi cabs and by extension, motorbikes which operate as taxis within their areas of jurisdiction.

21. The 1<sup>st</sup> Respondent also contended that as a successor of the City Council of Nairobi, by virtue of **Section 33** of the **Sixth Schedule** to the **Constitution**, it has all the powers vested in a local authority and as such, it acted within the scope of its powers and functions in issuing the said Notice. According to the 1<sup>st</sup> Respondent, it was not under any obligation to explain itself to the Petitioners before exercising its powers and functions as conferred by statute and that even though it has not formulated By-laws for controlling taxi cabs and motorbike taxis, such are not mandatory as the relevant **Section 118A** of the **Traffic Act** is not couched in mandatory terms.

22. In the 1<sup>st</sup> Respondent's view, in the absence of any public road transport mandate vesting in the national Government, no conflict of law arises in the circumstance as contended by the Petition and that such a conflict of laws only arises within the meaning of **Article 191 (1)** of the **Constitution**.

23. According to the 1<sup>st</sup> Respondent, the Petitioners' argument that they are entitled to operate within the CBD by dint of being registered under the Cooperative Societies Act is misconceived and in instances where national legislation conflicts with a county legislation on a function conferred to the county Government, the county Government legislation prevails. Furthermore, that the **Cooperative Societies Act** is not only inconsistent with the County Regulations, but also inconsistent with **Section 5 (d)** of **Part 2** of the **Fourth Schedule** of the **Constitution**. They contended further that in the circumstances, the Cooperative Societies Act ought to be brought to conformity and must be structured with the devolved county Government structure in mind and it cannot supersede county legislation on an issue reserved exclusively for county Governments.

24. It was also the 1<sup>st</sup> Respondent's contention that the Cooperative Societies Act does not in any event confer the Petitioners the unlimited right to operate within the city unregulated. Furthermore, that it is in the public interest that motorbike taxis be regulated in the city by the 1<sup>st</sup> Respondent.

25. In its written Submissions dated 18<sup>th</sup> March, 2016, the 1<sup>st</sup> Respondent reiterated the depositions in its Affidavit and submitted further that the Petitioners' claim that they are entitled to operate within the CBD is misguided and misplaced. The 1<sup>st</sup> Respondent placed reliance on the case of **Nairobi Metropolitan PSV Saccos Union Limited and 25 Others vs. County Government of Nairobi [2013]eKLR** in support of its argument that once the Constitution or the Statute confers powers to a public body, then

even without the By-laws, such a body can still exercise such powers conferred to it by the Constitution since the Constitution and the statute are superior to By-laws.

26 As to the remedies sought by the Petitioners, it was its submissions that there exist different types of injunctions including, temporary, mandatory, permanent, and mareva, among others, and to which different principles apply. However, in the instant matter, the Petitioners have not specified which injunctions they are seeking and hence the Prayer ought to be struck out. Furthermore, that they have failed to demonstrate that they have a prima facie case to entitle them to any form of injunction and that in any event, an order of injunction cannot suspend the operation of the impugned notice.

27. Based on the foregoing, the 1<sup>st</sup> Respondent urged the Court to dismiss the Petition with cost.

### **The 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents' Case**

28. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents opposed the Petition and filed Grounds of Opposition dated 14<sup>th</sup> December, 2015 and Written Submissions dated 10<sup>th</sup> April, 2016.

29. It was their contention that the Petitioners have not demonstrated in any manner whatsoever how their constitutional rights have been violated. According to the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents, the Petitioners have simply made a baseless claim alleging that the Respondents have been arbitrarily impounding the Petitioners' motor cycles without adducing any evidence in support of those allegations.

30. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents also asserted that the Petitioners' interpretation of the Constitution is misleading, misconceived and self-serving and the Petition is presumptive and an abuse of the Court process which ought to be dismissed with costs. Further, that the grounds set out in support of the Petition do not raise any constitutional issue either for the enforcement of fundamental rights or interpretation of the Constitution and the Petition is frivolous to the extent that it purports to seek orders stopping police officers from executing their constitutional mandate.

31. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents asserted further that the Registrar of Societies has no mandate and power in law to allocate the Petitioners parking lots within the CBD as that is a function of the 1<sup>st</sup> Respondent and as such, the Petitioners' argument that their associations, having been registered under the Cooperative Societies Act, ought not be regulated by the 1<sup>st</sup> Respondent should be dismissed. Further, the Petitioners have not pointed out which specific provision under the Societies Act supports the Petitioners' position that they are to operate their businesses within the CBD.

32. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents also submitted that the Petition raises no constitutional issues and the matter was not properly before the Court and as the Prayers sought could be obtained through other avenues, the Petition is ill-conceived. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents placed reliance on the case of **Booth Irrigation vs. Mombasa Water Products Ltd., HCC Misc. 1052 of 2004**, for the proposition that an unchallenged Court order cannot be the basis of a constitutional application to prevent execution; non-disclosure of material facts is sufficient to warrant the dismissal of a constitutional application; a constitutional Court has inherent power to prevent abuse of its process; and that a constitutional application brought in violation of fundamental principles of law is incompetent and ought to be dismissed.

33. It was their position that they have always acted in good faith, and they are constitutionally mandated to provide security assistance to the 1<sup>st</sup> Respondents and any other Party, where necessary, and when called upon. That in any event, the Petitioners have not pointed out any specific breach of their rights and they have not tendered any evidence whatsoever linking the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent to the alleged

infringement of their rights. Further, that the orders sought herein are actuated by malice, in bad faith and through misrepresentation to the Court and are meant to tarnish the reputation of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, as well as to stifle the smooth running and exercise of their administrative actions.

34. That the Petitioners were also accused of being guilty of material non-disclosure and for seeking justice with unclean hands. As such, the Court was urged to exercise its discretion judiciously and deny the Petitioners for their failure to disclose material facts. Additionally, that it would be in the interest of justice that orders sought not to be granted so as not to be seen to interfere with the constitutional mandate of other public bodies including the legal mandate of the Respondents.

35. In the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents' view, the Court ought to strike a balance in enhancing competing interests of both parties. In this respect, there was the public interest of protecting and safeguarding discipline and public order in the transport sector on the one hand and the interest of protecting the personal and commercial interests of the Petitioners on the other hand. According to counsel, the enjoyment of individual rights is not absolute and the State, to a certain extent, is allowed to regulate the enjoyment of rights in order to protect the society's law and order and the present case shows acceptable limitations in a democratic society.

36. For the foregoing reasons, the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents urged the Court to find the Petition unmerited, misconceived, premature and an abuse of Court process and dismiss the same with costs.

#### **Determination**

37. The key issue for determination is whether there has been any violation of the Petitioners' rights as alleged. If the Court finds that there has been such violation, it would have to determine the appropriate remedy in the circumstances. In that regard, the Petitioners have alleged violation of their rights under **Articles 27 and 40** of the **Constitution**.

38. At the core of the dispute, however, is the question of whether the 1<sup>st</sup> Respondent had the mandate to issue the impugned notice.

39. In order to determine that question, it is imperative to investigate whether the 1<sup>st</sup> Respondent has the mandate to regulate motorcycle taxis within the CBD. On that note, it will be noted that **Article 186** of the **Constitution** provides for the exercise of the various powers and functions by both the County and national Governments. It states that:

***1. Except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule.***

40. As to the role of the national Government, **Section 18** of **Part One** of the **Fourth Schedule** to the **Constitution** outlines the functions of the national Government to include:

***Transport and communications, including in particular-***

***a. Road traffic;***

***b. The construction and operation of national trunk roads;***

***c. Standards for the construction and maintenance of other roads by counties;***

**d. ...**

41. As for county Governments, **Section 5 of Part Two** thereof provides that the function of county Governments shall include:

**County transport, including-**

**a. County roads;**

**b. street lighting;**

**c. traffic and parking;**

**d. public road transport; and**

**e. ferries and harbours, excluding the regulation of international and national shipping and matters related thereto.**

42. The foregoing makes it clear that county Governments have a constitutional mandate with regard to county transport and the same includes the regulation of traffic, parking and public road transport. Based on that, I have no doubt in my mind that the mandate of regulating public transport matters, within Nairobi City County, is within the mandate of the 1<sup>st</sup> Respondent. It is not in dispute that the Petitioners are engaged in taxi services which fall within the purview of 'public transport'. Furthermore, the Regulation of traffic and parking within Nairobi City County and moreover, the CBD is a mandate of the 1<sup>st</sup> Respondent and as such, it is under a constitutional obligation to regulate the same.

43. The foregoing was reiterated by the Court in **Kenya Taxi Cabs Association (suing through its registered officials) Peter Waweru Mburu and 4 Others vs City Council of Nairobi, Petition No. 37 of 2012**, where the court pointed out thus:

***"[48] I say so because the purpose of the by-laws is to allow the City Council of Nairobi to regulate the taxi cab business operating within its jurisdiction. Although this legislation (the Local Government Act, Chapter 265 of the Laws of Kenya) was enacted prior the coming into effect of the 2010 Constitution, this purpose is still relevant because the Constitution gives local/county government the exclusive competence to regulate county transport. The relevant provision in this regard is Article 185(1) and(2) of the Constitution read together with the Fourth Schedule to the Constitution."***(Emphasis added)

44. Public transport as well as parking within a county's jurisdiction is to be regulated by the county. Public transport would in that respect include any party or person licensed as a public transport medium whether a motor vehicle or cycle.

45. Having so held, can it then be said that the Petitioners are entitled to operate within the CBD as per their registration under the **Cooperative Societies Act**? My answer to that is in the negative. I hold so because, whereas the Commissioner of Cooperative Societies is vested with powers to register societies and associations under the said Act, he does not have such powers to allocate parking or areas of operation within which a registered Society may carry out its undertakings.

46. In the instant case, while the powers to allocate parking and control public transport and road traffic have been explicitly granted to the county Governments by the **Constitution**, no such powers, be it

explicit or implied, exists to the Commissioner of Cooperative Societies and as such, the registration by the Commissioner cannot operate as a license to undertake business outside the Regulations and laws enacted by the County Government in exercise of powers vested by the Constitution...

47. **Section 6** of the **Cooperative Societies Act** outlines the procedure of registration of cooperative societies in the following terms:

**1. An application to register a society shall be made to the Commissioner in the prescribed form, and be signed—**

**a. in the case of a primary society, by at least ten persons qualified for membership of the society under section 14;**

**b. in the case of a secondary or apex society, by a person duly authorized in that behalf by each co-operative society or co-operative union, as the case may be, who are members thereof.**

**2. The application shall be accompanied by four copies of the proposed by-laws of the society in English and the person or persons by whom or on whose behalf such application is made shall furnish such information with regard to the society as the Commissioner may require.**

**3. If the Commissioner is satisfied that a society has complied with the provisions of this Act and any rules made thereunder and that its proposed by-laws are not contrary to this Act or any rules made thereunder, he may register the society and its by-laws under this Act.**

48. The foregoing provision does not in any way grant the Commissioner of Cooperative Societies powers to allocate areas of business more specifically, parking space or areas of operation for taxi businesses. The Commissioner of Cooperatives is also not mandated to even licence co-operators who are taxi or public transport operators.

49. In light of clear constitutional provisions, I see no conflict between the functions of the county government in the realm of regulating public transport within the county and the general authority that the Commissioner of Cooperatives has in regulating cooperative societies generally.

50. The next question that I must also answer is whether the Petitioners constitutional rights have been violated as alleged.

*Freedom from Discrimination*

51. **Article 27** states that:

**1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

**2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**

**3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**

**4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age,**

*disability, religion, conscience, belief, culture, dress, language or birth.*

**5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).**

6. ...

52. Discrimination entails differential treatment. It entails treating equals unequally. This position was affirmed by the Court in **Peter K Waweru vs. Republic, Misc. Civil App. 118 of 2004** where it defined discrimination in the following terms thus:

***“Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by...sex whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex among others, a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”*** (Emphasis added)

53. In the present case, it will be noted that the Petitioners assertion is that they have been treated differently from persons operating three and four-wheeled taxis. Can that be said to be discriminatory? My answer is no. I say so because, it is absurd to expect three and four-wheeled taxis/vehicles to be equated with two-wheeled vehicles as alleged by the Petitioners. Since discrimination entails a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured, the ban on two-wheeled motor vehicles can therefore not be said to be discriminatory since, two wheeled vehicles cannot be equated to three-wheeled or four-wheeled. The three are not in one category and there is a reasonable distinction.

54. That notwithstanding, based on the materials before me, whereas the Petitioners allege that they have been discriminated against, they have not addressed the Court on the grounds upon which they have been discriminated against. They have merely asserted that they have been discriminated against compared to persons operating three and four-wheeled taxis. **Sub-clause (4) of Article 27** sets out the various grounds upon which a person may be discriminated against and the Petitioners have not adduced any ground to warrant the Court to make a finding in that regard. In the absence, I am unable to find that they have been discriminated against in any way.

#### *Protection of the Right to Property*

55. **Article 40 (2)** provides that ***Parliament shall not enact a law that permits the State or any person-***

***a. to arbitrarily deprive a person of property of any description of any interest in, or over, any property of any description.***

***b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).***

56. The **Article** guarantees the right to own property and precludes the State from enacting any law that permits the arbitrary deprivation of property.

57. In the instant case, in as far as the impugned notice is concerned, the 1<sup>st</sup> Respondent seeks to regulate motorcycle operators ferrying passengers within Nairobi County. Based on the material before this Court, I am unable to find any violation of the Petitioners' right to property. In any event, whereas the Petitioners allege that they have been under persistent attacks by the employees and officials of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who have been arbitrarily impounding their motorcycles and taking the same to be stored for unspecified periods and imposing storage charges therein, no evidence has been placed before this Court in support of those contentions. It would have been prudent for them to give details in terms of who the said employees are, the amount of charges imposed, any receipts indicating the payment of such charges, the dates when such events occurred, and the specific persons particularly affected by such actions among others. In the absence of any such evidence, the Petitioners' assertions remain bare statements and as such, this Court cannot make a conclusive finding on the same.

58. The Petitioners' claim in this respect was too generalized to be of any benefit to either the Petitioners or to the court in so far as proof of the allegations was concerned.

## Conclusion

59. As I conclude, I note that whereas the Petitioners alleged violation of **Article 47** of the **Constitution** by the Respondents, they did not seek any order to that effect and as such, I need not to address myself to that. Besides, no specific attempts were made to prove any violation of the rights under Article 47 of the Constitution.

60. I conclude by stating that the 1<sup>st</sup> Respondent was in my view executing a constitutional and statutory mandate. That of regulating the transport sector within the county. Failure to do so would only assist in promoting the already chaotic scenes witnessed daily in the sector. Such regulation would be to the benefit of the public at large. Such regulation ought not to involve the Commissioner of Cooperatives as well.

61. I must also at this point reiterate the holding by this Court, in the Ruling delivered by Mumbi J. on 19<sup>th</sup> February, 2016, while dismissing the Application by the Petitioners for the grant of Conservatory Orders in the present matter, where the Learned Judge rendered the position that:

**“[22] ... a reading of the Co-operative Societies Act does not indicate any powers vested in the Commissioner of Co-operatives to licence members of savings and credit societies to operate as public transport operators in any part of the country. The petitioners did not also, in their petition, application or submissions, point out to the Court the provisions of the Co-operative Societies Act that entitles them to operate within the central business district, or that give the Commissioner of Co-operatives the mandate to licence their operations within the city of Nairobi or elsewhere in the country.**

**[23] That mandate, from the material before me, lies with the 1<sup>st</sup> respondent with respect to the County of Nairobi. This is in view of the provisions of section 118 of the Traffic Act and Part 2 of the Fourth Schedule to the Constitution which vests matters of road transport in county governments....**

**[26] Lastly,... let me make a few observations with respect to the public interest principle. As I have noted above, the material presented before me suggests that the 1<sup>st</sup> respondent is carrying out its constitutional and statutory mandate with regard to regulation of road transport within the city of Nairobi. That being the case, the public interest consideration is in favour of allowing it to do what the law, on the face of it, allows it to do.”** (Emphasis added)

62. I do not see any reason to depart from that reasoning and as I have demonstrated elsewhere in this judgment, the Petition must fail. I need only confirm that the law allows the 1<sup>st</sup> Respondent to do what it is doing: regulating public transport within its jurisdiction and this includes pointing where the public transporters may or may not go, park or pass. This Court therefore declines the invitation by the Petitioners, to inhibit the 1<sup>st</sup> Respondent from undertaking its constitutional mandate.

### **Disposition**

63. As a result of my findings above, I am unable to find any violation of the Petitioners' rights or any contravention of the law by the Respondents and as such, the Petition dated 20<sup>th</sup> November, 2015 is hereby dismissed for want of merit.

64. As to costs, each Party shall bear its own costs.

**Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of October, 2016.**

***J.L.ONGUTO***

***JUDGE***



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)