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Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	George Vincent Odunga
Citation:	Republic v Attorney General & 7 others Ex Parte Risen Company Limited [2017] eKLR
Advocates:	Mr Oduor for Mr Kinyanjui for the applicant Mr Ndolo for the 5th interested party and holding brief for Mr Maingi for the 1st to 4th interested parties Mr Odhiambo for the 1st and 3rd Respondents
Case Summary:	-
Court Division:	Constitutional and Human Rights
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County:	Nairobi
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Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**(CONSTITUTIONAL & HUMAN RIGHTS DIVISION)**

**JUDICIAL REVIEW CASE NO. 549 OF 2016**

**(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**ORDERS OF CERTIORARI, MANDAMUS & PROHIBITION**

**AND**

**IN THE MATTER OF THE TRANSPORT AND AUTHORITY ACT, (ACT NO.33 OF 2012)**

**AND**

**IN THE MATTER OF VIOLATION OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND BREACH OF ARTICLE 25(C), 47(1), AND 48 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF A JUDICIAL REVIEW APPLICATION**

**BETWEEN**

**REPUBLIC**

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL TRANSPORT**

**& SAFETY AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**TRANSPORT LICENSING APPEALS BOARD.....3<sup>RD</sup> RESPONDENT**

**AND**

**MWAMBA SACCO.....1<sup>ST</sup> INTERESTED PARTY**

**UMMOINER SACCO.....2<sup>ND</sup> INTERESTED PARTY**

**UTIMO SACCO.....3<sup>RD</sup> INTERESTED PARTY**

CITY TRAM LTD.....4<sup>TH</sup> INTERESTED PARTY

MARVELOUS SHUTTLE LTD.....5<sup>TH</sup> INTERESTED PARTY

RISEN COMPANY LIMITED.....EX PARTE APPLICANT

## JUDGEMENT

### Introduction

1. By a Notice of Motion dated 22<sup>nd</sup> November, 2016, the *ex parte* applicants herein, **Risen Company Limited**, seeks the following orders:

a) THAT by way of Judicial Review an order of prohibition do issue, prohibiting the 2<sup>nd</sup> Respondent from unlawfully blocking the Ex Parte Applicant's access to its (NTSA) portal for the Ex Parte Applicant's members' PSV vehicles operating as such PSV along the Umoja – Komarack- Ronald Ngala – Nairobi CBD route, from Ronald Ngala Road Joska, Market, Umoja, or any other place within their licensed RSL route.

b) THAT by way of Judicial Review an Order of prohibition do issue, prohibiting the 2<sup>nd</sup> Respondent from unlawfully deregistering the Ex Parte Applicant as such PSV operator along the Umoja – Komarock – Ronald Ngala – Nairobi CBD route, from Ronald Ngala Road Joska, Market, Umoja, or any other place within their licensed RSL route.

c) THAT by way of Judicial Review, an order of prohibition do issue, prohibiting the 3<sup>rd</sup> Respondent from further proceeding with any aspect of Appeal No. 019 of 2016 between the Interested Parties and the Ex Parte Applicant until the final determination of Nairobi HC JR 527 of 2016 between the said parties.

d) THAT by way Judicial Review, an order of mandamus issue, compelling the 2<sup>nd</sup> Respondent to forthwith open up the Ex Parte Applicant's access to its (NTSA) portal for the Ex Parte Applicant's members PSV vehicles operating as such PSV along the Umoja – Komarock – Ronald Ngala – Nairobi CBD route, from Ronald Ngala Road Joska, Market, Umoja, or any other place within their licensed RSL route.

e) THAT by way of Judicial Review, an order of certiorari do issue, to bring to this Court for purposes of quashing, and to be quashed, the 2<sup>nd</sup> Respondent's decision made on 29<sup>th</sup> October 2016 in relation to motor vehicle KCD 712T, KCH 078N, and KCF 626U.

f) THAT the costs of these proceedings be to the Applicant in any event.

### Ex Parte Applicant's Case

2. According to the applicant, a duly registered company under the Companies Act, 2015 on 6<sup>th</sup> July, 2016 under Certificate of Registration No. PVT/2016/017225, it is involved in the public transport sector within the Republic of Kenya, plying their *matatus* between Umoja-Komarock-Ronald Ngala and the City of Nairobi and popularly known as "Umoja Route". It further averred that it is duly licenced as a PSV operator by the 2<sup>nd</sup> Respondent, the **National Transport & Safety Authority** (hereinafter simply referred to as the "NTSA,").

3. It was averred that as such Registered Company, the Ex parte applicant has duly registered Memorandum and Articles of Association that bind all its members and that its core business is the operation of licenced Public Service Vehicles between Umoja-Komarock and the CBD, within the County of Nairobi via Jogoo Road, carrying fare paying passengers as authorized by the 2<sup>nd</sup> Respondent, NTSA. These members, it was averred, have associated themselves to form the Ex parte Applicant as a consequence of the relevant statutory body authorizing the formation of SACCOS, companies, and such associations by PSV operators to ease registration. Further, the Ex parte Applicant is governed in accordance with the existing law as and the Nairobi City County Government's Laws, all its members who has voluntarily sought to join in abide by its states Articles of Association.

4. The ex parte applicant however averred that it was aggrieved by:-

a. The 2<sup>nd</sup> Respondent's unilateral decision to suspend 3 of its PSV buses without affording them a hearing of any sort and for no justifiable reason ;

b. The fact that upon service of the Order issued by this court in Nairobi HC JR 527 of 2016 to the 2<sup>nd</sup> Respondent and the interested parties therein (and also who are cited here), the 2<sup>nd</sup> Respondent unilaterally and without any reasonable cause or notification to the Ex parte Applicant closed its access to the NTSA portal;

c. That further the Interested Parties purported to lodge an "appeal" with the 3<sup>rd</sup> Respondent for a nonexistent decision of the 2<sup>nd</sup> Respondent, solely to curtail the said JR 527 of 2016;

d. The right to access Justice by the Ex parte Applicant is thus in grave jeopardy;

e. I believe also that the right to a fair trial in Nairobi JR 527 of 2016 is also in grave jeopardy because of having parallel "appeal" proceedings lodged by all the Interested Parties before the 3<sup>rd</sup> Respondent, the intention is to sabotage and eventually abort the JR 527 of 2016 proceedings;

f. The right to fair administrative action as guaranteed by Article 47(1) of the Constitution as expounded in what our advocates on record have explained to me is the Fair Administrative Action Act, 2015 is also in jeopardy because the 2<sup>nd</sup> Respondent is in the unlawful habit of making calls to the officials of the Ex parte Applicant without anything in writing and it becomes impossible for the membership of the Ex parte Applicant to be accurately informed of the administrative actions of the 2<sup>nd</sup> Respondent vis a viz our PSV business;

g. The overall acts of the 2<sup>nd</sup> respondent in relation to the Ex parte applicant and its PSV business have been oppressive and visited them with injustice and economic losses entitling this court to intervene;

h. Failure to uphold the Rule of Law.

5. It was the applicant's case that Article 25(c) of the Constitution guarantees everyone in Kenya a fair trial, and this right cannot be abridged.

6. The applicant disclosed that it filed before this Honourable Court and obtained orders in its favour vide Judicial Review Case No. 527 of 2015 on 31<sup>st</sup> October, 2015. However while ware that the said matter was pending for trial and indeed upon being served with the same, the said Interested Parties ceased perpetrating violence against the Ex Parte Applicant's members PSVs but proceeded to lodge a purported "Memorandum of Appeal" on 7<sup>th</sup> November 2016 with the Transport & Licencing Appeals Board (3<sup>rd</sup> Respondent herein) seeking to have the Ex parte Applicant deregistered as a PSV provider.

In the meantime as of November 11<sup>th</sup> 2016, the duly licenced 36 buses and vans of the Ex parte Applicant's members (whose RSL licences remain valid) could operate due to the 2<sup>nd</sup> Respondent (NTSA) having unilaterally cut the Ex parte Applicant off the portal that gives them access to the NTSA PSV portal. They have now no access to the said portal. This action, it was contended was taken after the 2<sup>nd</sup> Respondent's one **Mr. John Muya** was contacted by the Interested Parties to mete harassment on the applicant's members after the Order of this Court in Nairobi H CJR 527 of 2016 was served on him, the NTSA, and all the parties in the said Judicial Review proceedings.

7. The applicant disclosed that the said person contacted the applicant on 9<sup>th</sup> November, 2016 and asked it to attend a meeting at the NTSA to "resolve" the matter only for him to threaten deregistration of the Ex parte applicant. It was this that formed the basis of the applicant's belief that the intended "appeal" before the 3<sup>rd</sup> Respondent was aimed at completely cutting off the Ex parte Applicant from the seat of Justice and to ensure that the said Nairobi HC JR 527 of 2016 aborts. Based on legal counsel the applicant contended that this is the mischief sought to be curtailed by Article 25(c) of the Constitution, and this Court cannot countenance a scenario it is seized of proceedings and a third party seeks to negate the Court's jurisdiction instead of subjecting itself to the court lawfully. It was also persuaded that this was a calculated intention to defeat Article 25 (c) of the Constitution and also to short circuit the Ex parte Applicant's access to justice under Article 48 of the Constitution.

8. The applicant however averred that there was no decision protested with the 2<sup>nd</sup> Respondent NTSA in the first instance as against the Ex parte Applicant warranting or justifying an "appeal" to the 3<sup>rd</sup> Respondent Transport Licencing and Appeals Board. The actions of the said **John Muya** and the Interested Parties, in the applicant's view smacked of naked abuse of power to which the Ex parte Applicant had written to the said **Mr. John Muya** but the latter had not denied by way of a rejoinder.

9. The applicant disclosed that it had been summoned through telephone calls by the said **John Muya** to the NTSA offices to answer to allegations concerning the said JR No. 527 of 2016 which action in its view was unprocedural, since no formal documentation exists to demonstrate the infractions the Ex parte Applicant was accused of.

10. The applicant asserted that it was its legitimate expectation that the 2<sup>nd</sup> Respondent and officers under it would proceed with administrative actions in a formal manner since the ex parte applicants is accountable to its members and they need and require to see the written bases of such decisions as are purportedly made by the 2<sup>nd</sup> Respondent concerning their business. However, no formal communication been has made to the Ex parte Applicant as to why its portal at the NTSA website has been blocked since the service of the Order herein issued in Nairobi HC JR 527 of 2016 was made.

11. Based on counsel's advice the applicant believed that this was an express violation of the **Fair Administrative Action Act, 2015** as well as Article 47(1) of the Constitution. Accordingly, it was contended that the 2<sup>nd</sup> Respondent NTSA was acting in an oppressive and high handed manner to protect the Criminal activities of the Interested Parties. To the applicant, it was being 'punished' for seeking legal redress to unravel the cartel that the interested parties created to block out fair competition in the Umoja-Komarock-City Center PSV route, and once licence and fully compliant, a competitor such as the Ex parte Applicant ought to be allowed to compete as well. It was its assertion that the provisions of Article 27(1) of the Constitution confer upon it the right to protection of the law.

12. The applicant further averred that its buses and vans were attacked even after the Order of this Court was served on the 2<sup>nd</sup> Interested Party on November 2<sup>nd</sup> and 3<sup>rd</sup> 2016 and the 2<sup>nd</sup> Respondent's **Mr. John Muya** expressly ordered the Buru Buru OCPD (served with the order in Nairobi HC JR 527 of 2016) not to obey the said order. He was further placed on speaker phone by the said officer after the

applicant went to protest at the violation of the Court Order, and the applicant heard it.

13. The Ex parte applicant lamented that its members had acquired asset financing facilities with institutions to get their PSV buses to earn an income but were suffering daily losses of income when their vehicles were grounded due to the closure of the PSV portal without any reasons being proffered at all to date.

14. It was the applicant's case that as the RSL licences confirm the holder thereof are individuals, by reason of the 2<sup>nd</sup> Respondent's default in furnishing each of the Ex parte Applicant's affected members with the formal communication of the decision it made on 29<sup>th</sup> October, 2016 of the suspension of their individual RSL licences, they have been deprived of the full protection of the provisions of section 4(1) of the **Fair Administrative Act**. Accordingly, the Ex parte Applicant and its members who own the 3 vehicles so affected was thus denied its natural justice right to be heard as by law envisaged.

### **1<sup>st</sup> and 3<sup>rd</sup> Respondents' Case**

15. In response to the application the 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed the following grounds of opposition:

1. **THAT the Notice of motion application is defective has no merit and is based on a misconception of the law.**

2. **THAT the application offends the statutory provisions of section 9(2)(3) of The Fair Administrative Action Act, section 38 of The National Transport & Safety Authority Act, the legal principles of exhaustion of alternative dispute resolution mechanisms. See Cortec Mining Kenya Limited vs Cabinet Secretary Ministry Of Mining & 9 others {2015}eKLR Mutungi J and Megalith Mining Company Limited vs Hon AG & Cabinet secretary Ministry of Mining, Nrb ELC Misc (JR) Civil Application No 948 of 2015.**

3. **THAT this court has no jurisdiction to handle this matter in the first instance. Order 53 invoked on the face of the substantive motion does not confer jurisdiction on the court to grant the orders sought and renders the application wholly incompetent.**

4. **THAT by dint of section 38 of The National Transport & Safety Authority Act the Transport Licensing Appeals tribunal is best placed to deal with this matter. (See Centre for Rights Education and Awareness (CREAW) & Ors. v. A-G [2011] 1 EA 83)**

5. **THAT the High Court should exercise restraint to give first instance opportunity to relevant constitutional and statutory bodies to deal with a dispute without appearing to presume bad faith or inability to act on the part of such body or, otherwise put, the principle that where the Constitution or a statute prescribes a procedure for the resolution of particular disputes such procedure should be strictly followed. See Speaker of National Assembly v. Njenga Karume [2008] 1 KLR 425; Stephen Nyarangi Onsomu & Anor. v George Makhoha & 7 Ors., [2014] eKLR, and Stanley Mungatha Daudi & 5 Ors. v. Hon. Cyprian Kubai Kiringo & 3 Ors. [2013] eKLR**

6. **THAT granting the order of prohibition against the 3<sup>rd</sup> respondent will amount to curtailing its statutory powers and as such it should not be granted.**

16. In support of the said grounds the said Respondents relied on **Republic vs. Chief Magistrate Kisumu Ex-parte Micah Kisoo [2016] eKLR**, in which was held that save in the most exceptional circumstances, judicial review jurisdiction would not be exercised and the court must not exercise it

where there exist alternative remedy. According to the said Respondents, the parties herein have already instituted proceedings under section 38 of ***The National Transport & Safety Authority Act*** No. 33 of 2012 (hereinafter referred to as “the Act”) hence Appeal No. 019 of 2016.

17. It was their contention that the Transport Licensing Appeals Tribunal (hereinafter referred to as “the Tribunal”) is best suited to deal with the issues arising in this application and they relied on ***Republic vs. Chief Magistrate Nanyuki Law Courts ex parte Purity Gathoni Macheru [2016] eKLR*** in which the Court cited ***Administrative Law*** by **Beatson, Mathews, and Elliott** wherein it is stated that:

**“It is generally accepted that, at least in principle, judicial review is a remedy of last resort, to be invoked only when other avenues, such as rights of appeal... have been explored; if not then permission may be denied.”**

18. In this case, it was submitted that it has not been demonstrated that judicial review is the most convenient, beneficial, efficacious remedy available to the applicant in the circumstances. It was further submitted that this application offends the principle of alternative dispute resolution as the grievances addressed in the application herein have a prescribed mode of redress provided for within the provisions of section 38 of the Act and as such Order 53 of the ***Civil Procedure Rules*** invoked on the face of the substantive motion does not confer jurisdiction on the court to grant the orders sought and thus renders the application wholly incompetent. In this regard the said Respondents relied on ***The Speaker Of The National Assembly vs. The Hon James Njenga Karume, Civil Application No 92 of 1992.***

19. It was contended that the duty of the judicial review court is to check the respondent’s impugned decision for any illegalities, unreasonableness or procedural improprieties, that is non-compliance with the rules of natural justice – a view that was reiterated by the Court of Appeal in ***Oluoch Dan Owino & 3 others vs. Kenyatta University [2014] eKLR*** where the court relied on the finding in ***Civil Appeal No. 180 of 2013- Isaack Osman Sheikh -vs- IEBC & Others*** that:

**“A judicial review of administrative, judicial and quasi-judicial action and decisions of inferior bodies and tribunals by the High Court in exercise of its supervisory jurisdiction flowing from Article 165(6) of the Constitution is not in the nature of an appeal. It concerns itself with process and is not a merit review of the decision of those other bodies. And it does not confer on the High Court a power to arrogate to itself the decision-making power reserved elsewhere.”**

20. They also relied on ***Hangsraz Mahatma Ganahi Institute & 2 Others [2008] MR 127*** it was stated that;

**“Judicial Review is not a fishing expedition in uncharted seas. The course had been laid down in numerous case laws. It is that this court is concerned only with reviewing, not the merits of the decision reached, but of the decision making process of the authority concerned. It would scrutinize the procedure adopted to arrive at the decisions to ascertain that it is in uniformity with all elements of fairness, reasonableness and most of all its legality. It must be borne in mind and which had been repeated many times by this court that it is not its role to substitute itself for the opinion of the authorities concerned. This court on a judicial review application does not act as a court of appeal of the decision of the body concerned and it will not interfere in any way in the exercise of the discretionary power which the statute had granted to the body concerned. However it will intervene when the body concerned had acted ultra vires its powers, reached a decision which is manifestly unreasonable in the Wednesbury sense; had acted in an unfairly manner and the applicant was not given a fair treatment.”**

21. It was the said Respondents' case that this Court must exercise restraint and first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute as provided in the relevant statute as was well articulated by the Court of Appeal in **International Centre for Policy and Conflict & 5 Others vs. The Attorney General & 4 others** which the Court held that:-

**“An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant bodies or state organs to deal with the dispute under the relevant provision of the relevant statute.....”**

22. According to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, in granting the orders sought such as prohibiting the 3<sup>rd</sup> Respondent from further proceeding with any aspect of Appeal No. 019 of 2016 between the interested parties and the Ex parte applicant until the final determination of Nairobi HC JR 527 of 2016 between the said parties will amount to an assumption that the tribunal or lower court in question will perpetrate an injustice should it proceed with the appeal and will be perceived as a total disregard of the judicial hierarchical system as was held by **Mohammed Ibrahim, JSC** in **Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 Others [2014] eKLR** where it was stated that:

**“A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court”.**

23. The said Respondents relied on **Republic v National Transport And Safety Authority & 2 others Ex-Parte Metrotrans East Africa Ltd [2016] eKLR**, and contended that these proceedings are aimed at harassing the Respondents' efforts in settling the issues arising in Appeal No. 019 of 2016 and furthermore amounts to abuse of the process of the Court. As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**.

#### **1<sup>st</sup> to 4<sup>th</sup> interested parties' case**

24. The application was also opposed by the 1<sup>st</sup> to 4<sup>th</sup> interested parties.

25. According to the said interested parties, this application is an abuse of the Court process, is premature and the same is *frivolous* and *vexatious*. It was averred that the said interested parties are duly registered by the **NTSA** to operate Public Service Vehicles (**PSVS**) along the **Umoja-Komarock-Ronald Ngala-Nairobi CBD Route** (hereinafter referred to as “the Route”) and to this end have been issued with **RSL PSV** Licenses.

26. However, **Mr. Isaac Karanja** the Sole Director of the applicant having registered his company on 6<sup>th</sup> July 2016, embarked on a well orchestrated scheme to fraudulently and unprocedurally acquire **RSL PSV** licenses for the Route and due to its infractions, the applicant was granted Licenses to operate the said routes though the same was predicated on misrepresentation of facts and forgery of documents. It was averred that on realising the grant of **RSL** to the Applicant, the 5<sup>th</sup> Interested Party wrote protest letters to **NTSA** seeking revocation of the Applicant's License. However following the refusal by the **NTSA** to review the processes of granting the Applicant a License in the contested routes, the Interested Parties in exercise of the rights conferred under section 38 of the Act filed Appeal No. 19 of 2016 with the Transport Licensing Board which appeal was premised on the letter from the **NTSA** dated 15<sup>th</sup>



September 2016 bespeaking the decision to license the Applicant.

27. Based on their counsel's advice, the said interested parties were of the view that the orders sought herein amount to interfering with the independence of the Transport Licensing Tribunal and the powers donated under the **NTSA Act (2012)**. To them, the Applicant's suit is wont on legalising and /or sanitising illegally acquired licenses and also in allowing the Applicant to breach NTSA rules whereby they operate vehicles which have been blacklisted whereof the same will be detrimental to the validly licensed operators of the routes in issue.

28. It was contended that the reason for coming up with the rules to control the industry was to bring sanity and some level of organisation which the Applicant now seeks to destabilise. In their view, the Applicant is hell-bent on avoiding accountability in respect of its illegally acquired licence hence the spirited effort to avoid determination of Appeal No. 19 of 2016 which action offends the principle of exhaustion of alternative remedies before filing a Judicial Review Application.

29. The interested parties took the position that this Court cannot determine the substantive grievances between the parties and the NTSA and that the forum best placed to deal with the issues surrounding the licensing of the Applicant is the Tribunal. Accordingly they urged the Court to dismiss the application.

30. To the said interested parties, the prayer sought present practical problems in its execution if granted and such state of affairs is frowned upon by the courts when exercising Judicial Review powers. Such orders also will require close supervision by the court thereby creating public inconvenience. They further took the view that the rival factual position of the case *militates* against the exercise of the discretion in favour of the Applicant and relied on **Republic -vs- Principal Secretary Ministry of Industrialization & Enterprises & Another ex-parte Rishit Metals Limited (2013) eKLR.**

31. Based on **Kenya National Examination Council -vs- Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR**, it was submitted that the prayers for Mandamus as sought by the *Ex-parte* Applicant cannot issue as the same seek court usurpation of exercise of discretionary powers and the manner in which the said powers ought to be exercised. The foregoing is not the function of the remedy sought by the *Ex-parte* Applicant. The duties and obligations borne by the Respondent are donated by Statute and the contemplation is that the bearers exercise the same do so independently. For instance, the Applicant seeks for investigation of the complaints by the Applicant.

32. It was submitted that when the Applicant approached the seat of Justice, he was duty bound to present all material facts which would enable the court to reach a just determination of the case. The Applicant did not disclose the apparent dispute over issuance of its Road Service License.

#### **5<sup>th</sup> Interested Party's Case**

33. According to the 5<sup>th</sup> interested party, the ***National Transport and Safety Authority Act*** No.33 of 2012 Laws of Kenya under Section 39 establishes the Transport Licensing Appeal Board (herein referred to as the Appeals Board) for the purpose *inter alia* to receive appeals from any party aggrieved by the Authority and affirm, reverse the decision of the Authority or make such orders as the Board considers necessary and fit.

34. Pursuant to said provisions of the ***National Transport and Safety Authority Act***, the 5<sup>th</sup> interested party lodged an Appeal with the Appeals Board vide appeal Number 019 of 2016 at the National Licensing Appeals Tribunal filed on 7<sup>th</sup> November 2016 on the grounds that:

- (a) The Applicant used forged documents for registration;
- (b) The Applicant company is owned by a single Director who does not own any Public Service Vehicle (PSV);
- (c) The 2<sup>nd</sup> Respondent allowed access of the 5<sup>th</sup> Respondents portal for the Applicant to release the 5<sup>th</sup> Respondent's and transfer to the Applicant.
- (d) The 2<sup>nd</sup> Respondent negligence in verifying document presented for registration led to the irregular licensing of the Applicant Company;
- (e) The 2<sup>nd</sup> Respondent to a light administrative action on the Applicant by blacklisting the three (3) motor vehicles hacked from the 5<sup>th</sup> Respondent as portal; and
- (f) The 2<sup>nd</sup> Respondent did not take any legal action against the Applicant and or the 2<sup>nd</sup> Respondent's employees for hacking the 5<sup>th</sup> Respondent's portal.

35. Based on the actions above by the applicant and based on a written complaint by the 5<sup>th</sup> interested party as to the process of it's **NTSA** portal being hacked and having three vehicles under their management being taken away by a letter dated the 25<sup>th</sup> October 2016 the NTSA wrote the letter to the applicant on the 29<sup>th</sup> October 2016 requesting that the road service licenses for the vehicles.

36. It was contended that as section 34 of the **National Transport Authority Act** Legal Notice 33 of 2012 gives circumstances under which a PSV can be revoked by the Authority, the applicant's application is pre-emptive of the situation and therefore cannot come under Judicial Review since such action is yet to be taken. In this case the reason why the 5<sup>th</sup> interested party moved to the 3<sup>rd</sup> respondent was to cancel the PSV of the applicant and the procedure for commencement of matters is by way of appealing against the PSV issued.

37. It was contended that without going to the merit of **Appeal 019 of 2016** at the tribunal the applicant herein is yet to respond to the same and therefore a decision has not been rendered. To the 5<sup>th</sup> interested party, the Applicant is fully aware that the Appeals Board is yet to adjudicate over the Appeal and therefore the application has no sufficient grounds upon which an Order for Judicial Review should be granted. In this respect the 5<sup>th</sup> interested party relied on **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996**, **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR**, **Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60**, **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, in which the Court citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479**.

38. It was the 5<sup>th</sup> interested party's case that the application for Judicial Review by the Applicant has been brought in bad faith and that by seeking Judicial Review, that Applicant is indeed trying to stop the Appeals Board from carrying out its legal mandate under the relevant law. The court was urged in its unfettered discretion not be seen to assist the Applicant by granting the orders but instead to dismiss the application with costs to allow the 5<sup>th</sup> interested party proceed with the Appeal before the Appeals Board.

#### **Determination**

39. I have considered the issues raised in this application.

40. The scope of and the grounds for the grant of judicial review orders were discussed in depth by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision....Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings....The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way....These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons”.**

41. In this case the applicants’ case is that the 2<sup>nd</sup> Respondent’s unilaterally suspended 3 of its PSV buses without affording them a hearing of any sort and for no justifiable reason. The applicant’s grievances stemmed from the fact that upon service of the Order issued by this court in Nairobi HC JR 527 of 2016 to the 2<sup>nd</sup> Respondent and the interested parties therein, the 2<sup>nd</sup> Respondent unilaterally and without any reasonable cause or notification to the Ex parte Applicant closed its access to the NTSA portal.

42. The Respondent has not sufficiently addressed these issues but simply opted to argue that the applicant ought to have appealed against the said decision before coming to this Court. With due respect such an argument cannot be countenanced by this Court. Where a party deliberately sets out to steal a

match against both the applicant and the Court by taking an action whose intention is meant to remove the rug from the feet of the Court by rendering the proceedings pending before the Court superfluous, the Court will not readily accept the argument that there are alternative remedies available. To deliberately set out to render existing court orders and proceedings inconsequential demeans the court process and in my view not just injurious to the applicant's interests but amounts to an abuse of the court process and such an action cannot be justified based on availability of alternative remedies.

43. The applicant further avers that since there was no decision made by the NTSA, there could not possibly be an appeal to the Tribunal hence the purported appeal did not exist but that the alleged appeal was only meant to scuttle the proceedings in JR 527 of 2016. On their part the interested parties contend that pursuant to the provisions of the **National Transport and Safety Authority Act**, the 5<sup>th</sup> interested party lodged an Appeal with the Appeals Board vide appeal Number 019 of 2016 at the National Licensing Appeals Tribunal on 7<sup>th</sup> November 2016 on the grounds that the Applicant used forged documents for registration; that the Applicant company is owned by a single Director who does not own any Public Service Vehicle (PSV); that the 2<sup>nd</sup> Respondent allowed access of its portal for the release and transfer of the said vehicles to the Applicant; that that the 2<sup>nd</sup> Respondent negligence in verifying documents presented for registration led to the irregular licensing of the Applicant Company; that the 2<sup>nd</sup> Respondent did not take any legal action against the Applicant and or the 2<sup>nd</sup> Respondent's employees for hacking the 5<sup>th</sup> Respondent's portal.

44. Section 38 of the Act provides that:

***A person who—***

***(a) Being an applicant for the grant or variation of a licence, is aggrieved by the decision of the Authority on the application;***

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

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

45. In my view section 38 only comes into force after a decision has been made by the NTSA. Therefore one cannot invoke the jurisdiction of the Tribunal before a decision is made by the NTSA. In this case there is no contention that there was a decision made by the NTSA. Accordingly and without deciding, the applicant's case that the action of lodging the appeal was meant to scuttle its case before this Court may well have substance.

46. Having considered the issues raised in this application, I find merit herein and issue the following orders:

**1) Prohibition prohibiting the 2<sup>nd</sup> Respondent from unlawfully blocking the Ex Parte Applicant's access to its (NTSA) portal for the Ex Parte Applicant's members' PSV vehicles operating as such PSV along the Umoja – Komarock- Ronald Ngala – Nairobi CBD route, from Ronald Ngala Road Joska, Market, Umoja, or any other place within their licensed RSL route.**

**2) An Order of prohibition prohibiting the 2<sup>nd</sup> Respondent from unlawfully deregistering the Ex Parte Applicant as such PSV operator along the Umoja – Komarock – Ronald Ngala – Nairobi**

CBD route, from Ronald Ngala Road Joska, Market, Umoja, or any other place within their licensed RSL route without the due process of the law being followed.

3) An order of mandamus issue, compelling the 2<sup>nd</sup> Respondent to forthwith open up the Ex Parte Applicant's access to its (NTSA) portal for the Ex Parte Applicant's members PSV vehicles operating as such PSV along the Umoja – Komarock – Ronald Ngala – Nairobi CBD route, from Ronald Ngala Road Joska, Market, Umoja, or any other place within their licensed RSL route.

4) An order of certiorari bringing to this Court for purposes of quashing, and quashing the 2<sup>nd</sup> Respondent's decision made on 29<sup>th</sup> October 2016 in relation to motor vehicle KCD 712T, KCH 078N, and KCF 626U.

5) THAT the costs of these proceedings are awarded be to the Applicant to be borne by the 2<sup>nd</sup> Respondent.

47. Orders accordingly.

Dated at Nairobi this 6<sup>th</sup> day of October, 2017

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Oduor for Mr Kinyanjui for the applicant***

***Mr Ndolo for the 5<sup>th</sup> interested party and holding brief for Mr Maingi for the 1<sup>st</sup> to 4<sup>th</sup> interested parties***

***Mr Odhiambo for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents***

**CA Ooko**



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