IN THE TRANSPORT LICENSING APPEALS BOARD AT NAIROBIAPPEAL CASE NO 20 OF 2016

FIGKOMBA SACCO LTD .....APPELLANT

VERSUS

NATIONAL TRANSPORT AND SAFETY AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. The Appellant is a Sacco that is registered under the Cooperative Societies Act (Cap 490). It was registered on the 22nd of December 2010 and it is licensed by the Respondent Authority to operate public service vehicles.

2. The Respondent, National Transport and Safety Authority, 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 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.

The Appellant's Case

3. The Appellant filed an appeal at the Transport Licensing Appeals Board (TLAB) on the 11th of November 2016 on the grounds that the Respondent had failed to amend its Road Service License (RSL) to include the name "Mathare North" and to rectify the representation of "Ngara" and "Figtree" as two different destinations, as they denote one destination.

4. It was the Appellant's case that, since 2010, they had been operating along the following route: Mathare North, Ngara Gikomba, Kiambiu, and back i.e. routes number 3, 7B, and 30

5. However, during the time that NTSA was transitioning from the Transport Licensing Board in 2013, the name "Mathare North" was omitted from the RSL. Their route now reads as follows: Figree, Ngara, Gikomba, Kiambiu, and back.

6. On the 14th of March 2013, the Appellant wrote to the Respondent complaining of the omission of the name "Mathare North" on the RSL. The Respondent did not respond to the said letter. The Appellant wrote to the Respondent again about the same issue on the following diverse dates: 13th of June 2015; 14th of January 2016; and 1st of August 2016. The Respondent did not respond to these letters, copies of which were produced in court.

7. On receiving the letter of 1st of August 2016, an officer of NTSA advised the Appellant to apply for a route extension instead of complaining of an omission in the RSL. Following this advice, the Appellant applied for a route extension on the 18th of August 2016.

8. By the time of applying for the route extension, the appellant Sacco was compliant with the law, as it had 44 vehicles that had complied with the PSV Regulations 2014.

9. The Respondent authority responded to the application in a letter dated 15th of September 2016, whereupon it refused the application for route extension "due to several considerations which include current operators on the same route and need to avoid uneconomical competition."

10. The Appellant wrote again to the Respondent on the 20th of September 2016 requesting the appellant to reconsider its decision. The Appellant attached a copy of their original TLB license that allowed them to operate along the following route: Mathare North, Juja Road, and Gikomba.

11. The Respondent reverted back to the Appellant through a letter dated the 11th of November 2016, which stated that "the Committee deliberated on your request and declined the request due to several considerations which include current operators on the same route and based on the necessity approach used it to avoid uneconomical competition. You are therefore advised to continue operating on your authorized route strictly."

12. The failure to have the name "Mathare North" inserted into the RSL has caused the police, on numerous occasions, to arrest vehicles belonging to Figkomba

Sacco and this has made it difficult for the Sacco to operate along the Mathare North route.

13. The Appellant averred that it is not the case that the addition of the name "Mathare North" to their RSL would result in uneconomical competition, as it is only one other Sacco that operates in that route and that is MNGN Sacco. This Sacco has been operating on the same route together with Figkomba Sacco. It is not the case, as claimed by the Respondent, that Manmo Sacco operates on route number 30. It was the Appellant's case that Manmo operates in route number 29/30 that plies between Mathare North (NYS), Thika Road, Commercial (City Centre).

14. The Appellant prays for orders to have their RSL amended to read as follows: Mathare North, Ngara, Gikomba, Kiambiu and back (and NOT Figtee, Ngara, Gikomba, Kiambiu, and back).

The Respondent's Case

15. It was the Respondent's case that the refusal to include the name "Mathare North" in the RSL of the Appellant was as a result of the failure to comply with regulations on the part of the Appellant. The Respondent avers that at the time of application for route extension, out of the Appellant's 34 vehicles that were allowed to operate, only eight (8) drivers and four (4) conductors had badges as required by the law.

16. Given that there are two Saccos, MNGN and Manmo Saccos, operating in the same route and with a fleet of 61 and 65 vehicles respectively, the Respondent was of the opinion that allowing another Sacco to operate there would bring uneconomical competition considering the population in Mathare North.

17. The Respondent also averred that the Committee in charge of route extensions has stopped extension and allocation of routes pending an audit that is to be conducted before the process resumes.

Determination

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

a. Whether the Appellant had complied with the PSV Regulations 2014 by the time he was applying for a route extension.
b. Whether allowing another operator in route number 30 (Mathare North) would give rise to uneconomical competition.
c. Whether the Appellant's constitutional right to a fair administrative action has been violated by the respondent.

Compliance with the PSV Regulations 2014

19. The ground of denying the route extension on the basis of non-compliance with the PSV Regulations 2014 was relied upon by the Respondent. However, it is worth noting that the two letters written by the Respondent informing the Appellant of the decision to refuse their application for a route extension never cited non-compliance with regulations as the basis for declining the request. The Appellant took the position that he had complied with all regulations. If, indeed, it was the case that he had not complied, we see no reason why the Respondent could not have said so clearly in their written communication to the Appellant. In the circumstances, we are not convinced by the Respondent's argument that there was non-compliance with the PSV Regulations 2014.

Uneconomical Competition Arising from the Licensing of Another Operator

20. It was the Respondent's case that allowing another operator in route number 30 would bring uneconomical competition, as there are already two Saccos operating in that route. However, the Appellant contested this and averred that it is only one other Sacco, MNGN, that operates in that route, as Manmo Sacco follows a different route. Again, if it was the case that uneconomical competition would arise as a result of the addition of the Figkomba Sacco to the route, the Respondent ought to have clearly identified, in their letter to the Appellant, the number of Saccos operating in route number 30 so as to justify their decision of refusal on the grounds of uneconomical competition. The failure on the part of the Respondent to give detailed reasons exhibiting the existence of many vehicles on the route in question clearly breaches the Appellant's right to be given reasons for the decision taken. It is the case that Article 47 of the Constitution now gives every person the right to be given written reasons for any administrative action taken. As Kaluma observes:

> "The necessity of reasons is manifest in the fact that the reasons given may by themselves reveal jurisdictional error such as failure to take into account relevant considerations, unreasonableness, bias, bad faith etc, thereby

> bringing the decision within the purview of judicial review ... an authority may be unable to exonerate itself from an imputation of unreasonableness if it fails to give reasons for its decisions. When reasons are given, suspicion is removed. A body that fails to explain its decisions satisfactorily exposes itself to being condemned as unreasonable." (Peter Kaluma, *Judicial Review: Law Procedure and Practice* (LawAfrica, Second Edition, 2012), p. 192).

21. It follows, therefore, that the failure of the Respondent to explain clearly how uneconomical competition would arise in the event that the word "Mathare North" was inserted into the RSL of the Appellant amounts to a failure to give satisfactory reasons for the decision. It is worthy of note that the law requires ***full***, rather than partial, reasons to be given. As the English *Committee on the Administrative Tribunals and Enquiries* (Franks Committee) noted, a person who is not given ***full*** reasons for a decision is not able to satisfy himself that the prescribed procedure has been followed (*Committee on the Administrative Tribunals and Enquiries*) 24, 75 (1957). As Kaluma notes, for the reasons to be sufficient, the decision maker needs to "detail out the relevant facts of the matter in question, the decision made, and the justification for the decision in the circumstances of the case. A bare repetition of statutory language in a decision does not suffice." (Peter Kaluma, *Judicial Review: Law Procedure and Practice* (LawAfrica, Second Edition, 2012), p. 194).

22. As was evident from the testimony of the Appellant, they had complained about the administrative omission of the word "Mathare North" from their RSL. Whilst refusing the application, the Respondent neither addressed this issue nor did they give full reasons or outline the reasoning process that led them to conclude that there would be uneconomical competition in the event that the Appellant was allowed back into the Mathare North route. This clearly breaches the Appellant's right to be given reasons for the decision taken.

23. Besides, the wording of the two refusal letters from the Respondent clearly show that the full reasons for their decision were not disclosed. The letter reads that "due to several considerations which include current operators on the same route and need to avoid uneconomical competition." The words "*several considerations which include*" demonstrate that there were other undisclosed considerations and reasons apart from "current operators" and the "need to avoid uneconomical competition." This is because when the word "include" precedes a list of items, it means that the list that follows is not exhaustive. Indeed, according to the *Merriam-Webster's Collegiate Dictionary* (11th edition, 2003) and the *American Heritage Dictionary of the English Language* (4th edition, 2000), the verb "include" is

not synonymous with the verb "are." The *American Heritage* states that the word "include" means "to take in or comprise as a part of a whole or group." Likewise *Merriam-Webster's* posits that the word "include" suggests the containment of something as a constituent, component, or subordinate part of a larger whole." It is, therefore, the case that the wording of the refusal letter only disclosed two reasons, but concealed the other reasons.

24. Courts have been consistent in quashing decisions that are not supported by satisfactory reasons. Illustrative of this is the case of *Jopley Constantine Oyieng v Public Service Commission of Kenya and Others*, where Gachuhi J had recorded the entire proceedings of the case as follows:

> "Application for leave to apply for an order of certiorari refused, for mandamus granted. Cost in the cause, Gachuhi J."

When an appeal was lodged challenging this decision on the basis that the judge failed to adduce reasons for his decision and, therefore, erred in law, Madan JA agreed with the appellant and quashed the order noting that:

> "The learned judge erred in not stating any reasons for his decision. The record of proceedings before him is so skimpy that it is impossible for us to determine in what manner his mind was working when he refused the application. We allow his appeal, set aside the order of the High Court." (Civil Appeal No. 32 of 1981 (Unrep).

Constitutional Right to a Fair Administrative Action

25. As observed above, it is the case that Article 47 of the Constitution of Kenya 2010 now guarantees every person the right to administrative action that is fair, efficient, and reasonable. This constitutional provision is implemented through the Fair Administrative Action Act of 2015. According to section 4 of the Fair Administrative Action Act (2015):

> "4 (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
> (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
> (a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;
(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
(d) a statement of reasons pursuant to section 6;
(e) notice of the right to legal representation, where applicable;
(f) notice of the right to cross-examine or where applicable; or
(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

26. The Appellant averred that they had been operating in route number 30 since 2010 and this was only changed through an administrative error that caused the omission of the word "Mathare North" from the RSL. Given that they had been operating there since 2010, they had a legitimate expectation to continue doing so as provided for under section 7 (2) (m) of the Fair Administrative Action Act 2015. The law would require that any changes that affect their operations ought to be implemented within the purview of the law. This would entail: being given reasons for omitting the word "Mathare North" from the RSL; being given prior and adequate notice before the change is effected; being given an opportunity to be heard etc.

27. Although the omission might have been made by the predecessor to NTSA, namely the Transport Licensing Board, the Respondent had an opportunity to rectify the omission when the Appellant alerted them about the same on the 14th of March 2013; 13th of June 2015; 14th of January 2016; and 1st of August 2016. The obligation to act would arise from the transitional provisions of the National and Transport and Safety Authority Act 2012, which provides, at section 56, that "all rights, obligations and contracts which, immediately before the coming into operation of this Act, were vested in or imposed on the Transport Licensing Board shall by virtue of this section, be deemed to be the rights, obligations and contracts of the Authority."

28. The failure to act on the Appellant's complaints for such a long period amounts to a breach of their constitutional right to fair administrative action that is not only reasonable but efficient.

29. From the above, it is clearly the case that an administrative decision was taken against the Appellant without regard to the requirements of the law on the need for being given ***prior*** notices, reasons for the actions, and hearing. It is now an established principle of administrative law that a decision that is taken without due regard to the rules of procedurally fairness cannot be allowed to stand. This was the position espoused in the case of *Onyango Oloo vs. Attorney General* [1986-

1989] EA 456,where the Court of Appeal held that the "denial of the right to be heard renders any decision made null and void *ab initio.*"

30. Having considered the facts and the law applicable to this case, the Transport Licensing Appeals Board hereby makes the following declarations and orders:

1. A declaration that the Appellant's constitutional right to fair administrative action was violated.
2. An order of **Certiorari quashing** the Respondent's decision to refuse the Appellant's application to have the word "Mathare North" inserted into their RSL.
3. An order of **Mandamus compelling** the Respondent to reconsider the Appellant's application and make a lawful decision.
4. That this order be served upon the NTSA and Traffic Commandant with a view to ensuring that Figkomba vehicles are allowed to operate along the Mathare North route until the Respondent makes a lawful decision as per order No. three (3) above.

Delivered, dated, and signed in Nairobi by the Transport Licensing Appeals Board on this 7th day of December 2016.

Dick Waweru	**Chairman**	**.....**
Prof. Kiarie Mwaura	**Member**	**.....**
Nkanata Johnson Gitobu	**Member**	**……**
Aden Noor Ali	**Member**	**…….**
Betty Chepng'etichBii	**Member**	**…….**