



Embakasi Shuttle Ltd v Embasava Sacco; National Transport and Safety Authority & another (Interested Parties) (Appeal 027 of 2022) [2022] KETLABT 678 (KLR) (Civ) (6 July 2022) (Ruling)

Neutral citation: [2022] KETLABT 678 (KLR)

**REPUBLIC OF KENYA
IN THE TRANSPORT LICENSING APPEALS BOARD TRIBUNAL
CIVIL
APPEAL 027 OF 2022**

**DICK WAWERU, CHAIR, JOSEPH MCDONALD, LILLIAN
WAITHERA, JAMES NGOMELI & MARYAN HAJIR, MEMBERS**

JULY 6, 2022

BETWEEN

EMBAKASI SHUTTLE LTD APPLICANT

AND

EMBASAVA SACCO RESPONDENT

AND

**NATIONAL TRANSPORT AND SAFETY AUTHORITY . INTERESTED PARTY
NAIROBI METROPOLITAN SERVICES INTERESTED PARTY**

RULING

A. Introduction

1. The plaintiff/applicant is a Sacco that is registered under the [Cooperative Societies Act](#) (cap 490) and it has been licensed by the 1st interested party authority to operate PSV vehicles.
2. The defendant/respondent is a Sacco that is registered under the [Cooperative Societies Act](#) (cap 490) and it has been licensed by the 1st interested party, authority to operate PSV vehicles.
3. The plaintiff/applicant is a splinter Sacco from the defendant’s Sacco.
4. The 1st interested party, 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.

5. The 2nd interested party, Nairobi Metropolitan Services (NMS), is a citizen-centric public service that was formed on March 9th 2020 following an agreement that led to the transfer of four core functions from Nairobi City County Government to the National Government, under the Executive Office of the President. As per the Executive Order no 1 of 2020 (revised), the 2nd interested party, is mandated to perform *inter alia* functions related to county transport.

B. Plaintiff/applicant's case

6. On or about March 30, 2022; the applicant was granted a licensing as a transport operator by the 1st interested party; this is premised on a letter referenced as NTSA/DR&L/C/ADM/2022, dated March 30, 2022, marked and annexed ESL 1 in the applicant's pleadings.
7. On or about April 11, 2022 the applicant sought authority from the 2nd interested party, to operate transport services within Nairobi County. On or about April 20, 2022; the applicant was granted authority by the 2nd interested party, this is premised on a letter referenced as NMS/DRT&PW/Trans dated April 20, 2022, marked and annexed ESL 3 in the applicant's pleadings.
8. On or about May 16, 2022 there were correspondences from the 2nd interested party, communicating that there are no new allocation of parking facilities, and current registered, licensed affiliates and splinter groups from the defendant were encouraged to share and continue using existing facilities; as such the applicant was allocated 6 slots of parking, while the respondent was allocated 18 slots. This communication rests on a letter from the 2nd interested party referenced NMS/DRT&PW/Trans dated May 16, 2022, marked and annexed ESL 2 in the applicant's pleadings.
9. It is the applicant's contention that the respondent does not want to share the parking spaces as allocated by the 2nd interested party and it is using its employees, agents, servants and persons deriving authority from the respondent to harass and intimidate the applicant in a manner that affects the applicant's motor vehicles, their employee's servants and agents.
10. Aggrieved by this acrimonious state of affairs, the applicant, through a Certificate of Urgency, Notice of Motion, Complaint and Supporting Affidavit of Ben Nganga Ngata a director of the applicant, all dated July 4, 2022; sought to move to the tribunal and implored the Transport Licensing Appeals Board to issue interim orders to restrain the respondent or its agents, employees or servants from interfering with the business of the applicant.
11. The applicant was represented by Ms Cheronon holding brief for Messers Kagoma Advocates.

C. Defendant /respondent's case

12. The respondent was represented by Mr Mwangi of Mwangi Wambugu and Company Advocates.
13. Through an oral application, the learned counsel noted that the Notice of Motion was anchored primarily under sections 72A, 72G and 76 of Transport Act cap 402, which by itself was wrong because there is no such law as Transport Act; but even if we assume that the applicant meant cap 403, the Traffic Act then these were issues beyond the jurisdiction of the Transport Licensing Appeals Board.
14. Learned counsel for the respondent further opined that the TLAB derives its authority and mandate from section 38 (1) (a) (b) and (c) of the National Transport and Safety Authority Act no 33 of 2012 which basically are appeals from the decisions of NTSA either as an applicant, an objector or a licensee aggrieved by revocation or suspension of license, which was not the case in this instance.



15. Learned counsel for the respondent Mr Mwangi was of the view that this was a civil matter that would be best canvassed in civil courts.
16. Finally, the learned counsel contended respectfully, that TLAB does not have jurisdiction to entertain this application. He relied on the famous case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR to support his position.

D. The 1st interested party's case (NTSA)

17. The 1st interested party (NTSA) was represented by learned counsel, Mr Jerome Mwaniki. He greatly aligned his position with that of his senior, Mr Mwangi buttressing the point that the honourable TLAB had no jurisdiction to hear the application.
18. He further contended that the 2nd interested party gave the applicant license to operate and that the said license is not being impugned and therefore NTSA has been wrongly enjoined in the matter. Unless the applicant was challenging its own license then NTSA, has no dog in the fight.

E. The 2nd interested party's case (NMS)

19. The 2nd interested party was represented by learned counsel Ms Wanjeri holding brief for Mr Munene. In her argument she aligned herself with the views of the two learned counsels for the respondent and 1st interested party. She did not add anything else

F. Issues for determination

20. Following the arguments adduced by the parties, the Transport Licensing Appeals Board has isolated the following issue to be the one requiring a determination i.e.

Whether TLAB has jurisdiction to entertain this matter.

21. The respondent contends that TLAB has no jurisdiction to entertain the matter on the grounds that the Notice of Motion is premised on under sections 72A,72G,76 of the *Traffic Act* Cap 403, which is beyond the mandate of the TLAB.
22. TLAB first has to consider whether the PO meets the legal threshold as set out in in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696*, and *Independent Electoral & Boundaries Commission v 141 Jane Cheperenger & 2 Others* [2015] eKLR, which require a preliminary objection to be based purely on a crisp point of law rather than facts.
23. On this point TLAB is satisfied that the PO raised by the respondent meets the threshold; since they raised a point of law namely the jurisdiction of the TLAB.

G. Analysis of the law

24. Transport Licensing Appeals Board derives its powers, authority and mandate from section 38 (1) of the *National Transport and Safety Authority Act* no 33 of 2012

Section 38 (1) provides that:

A person who

- a. being an applicant for the grant or variation of a license is aggrieved by the decision of the authority on the application,



- b. having made an objection to any such application as aforesaid, being an objection which the authority is bound to take into consideration, is aggrieved by the decision of the authority; or
 - c. being a licensee, is aggrieved by the revocation or suspension thereof, may within the time and in the manner prescribed appeal to the appeals board established under section 39.
25. The application did not adduce any evidence to show how the sections relied upon on the Notice of Motion relates in any form or shape to the import of section 38 (1) above.
 26. Secondly learned counsel for the applicant seemed to have not been properly instructed (as she was merely holding brief) and she did not tender any evidence to support any of the orders being sought.
 27. It is the board's view that the arguments presented by the learned counsel of the respondent, that the board does not have jurisdiction to entertain this matter is pertinent.
 28. Borrowing from the famous dicta of Nyarangi J (as he then was) in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. (emphasis added)

29. TLAB mandate is derived from section 38 (1) of the *National Transport and Safety Authority Act* no 33 of 2012 and the legal foundation on which the application is anchored falls, outside the mandate of TLAB.
30. Again, borrowing from Owners of Motor Vessel "Lillian S" (*supra*)

"By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given" (emphasis added)

H. Determination of the tribunal

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



- a. That the preliminary objection (orally filed and argued) by the learned counsel for the respondent in open court dated July 6, 2022 is hereby allowed.
- b. That the Honourable TLAB has no jurisdiction to entertain this matter.
- c. That each party to bear their own costs.

GIVEN UNDER THE HAND AND SEAL OF THIS HONOURABLE APPEALS BOARD THIS 6TH JULY 2022

HONOURABLE TRANSPORT LICENSING AND APPEALS BOARD

ISSUED AT NAKURU THIS 6TH JULY 2022

SIGNED AND DATED AT NAKURU LAW COURTS BY THE TRANSPORT LICENSING APPEALS BOARD ON THIS 6TH DAY OF JULY 2022.

Dick Waweru chairman

Joseph McDonald member

Lillian Waithera member

James Ngomeli member

Maryan Hajir member

