

**Jaset Enterprise Ltd v National Transport & Safety Authority [2016]
eKLR**



**IN THE TRANSPORT LICENSING APPEALS BOARD AT NAIROBI APPEAL
CASE NO 22 OF 2016**

JASET ENTERPRISE LTDAPPELLANT

VERSUS

THE NATIONAL TRANSPORT & SAFETY AUTHORITYRESPONDENT

JUDGMENT

Introduction

1. The Appellant Company is a corporate body that is registered under the Companies Act, Cap 486 of the Laws of Kenya. It has applied for a license from the Respondent 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

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3. The Appellant filed an appeal, on the 5th of December 2016, at the Transport Licensing Appeals Board (TLAB) on the following eight (8) grounds, that:
 - a. The Respondent had delayed, unreasonably, to act on the Appellant's application for a Road Service License.
 - b. The negative verbal decisions by the Director General and Mr Jamleck, which were made on the 7th of November 2016 and 22nd November 2016 respectively, were procedurally unfair.
 - c. The hostility of the Director General towards the Chair of the Appellant Company, Lucy Mathenge, affected her right to be heard.
 - d. Despite receiving letters from the appellant dated 14th November 2016 and 25th November 2016, the Respondent failed to give written reasons for the administrative decision not to process the Appellant's application.
 - e. The Respondent's administrative action and verbal decision violated the legitimate expectations of the Appellant.
 - f. The Respondent failed to take into account relevant considerations that, despite the Appellant not having 30 vehicles, there were vehicles operating under other Saccos in the same route that wanted to join the Appellant Company.
 - g. The Respondent failed to supply the Appellant, within thirty (30) days of lodging its Application, with reasons for its decision.
4. The Appellant had applied in writing for a Road Service License on the 29th of April 2016. The Appellant only got a response to this application on the 29th of August 2016, that is, four months after.
5. By the 3rd of November 2016, the Appellant had 14 vehicles rather than 30 which is the minimum required for a company to be registered. However, the Appellant had made arrangements to have the remaining sixteen (16) vehicles to be transferred to it once the Road Service License was issued. This, however, took long and the vehicles were reluctant to be transferred without an RSL, as they would not be able to operate.
6. The 14 vehicles that have been transferred to the Appellant Company have not been operating since the 3rd of November 2016 as per the Respondent's direction and, as a result, the owners are incurring losses amounting to KES 10, 000 per vehicle per day.
7. The Respondent was not willing to license a limited liability company and was imposing unreasonable conditions requiring that the 30 owners of motor vehicles must be directors or shareholders of the appellant.

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8. The Respondent was not willing to act on the application of the Appellant, who operates in the Ongata Rongai Route, owing to the Judgment passed by this Tribunal against the Respondent in the case of *Ongataline Ltd v NTSA*.
9. It was the Appellant's prayers that the Respondent be condemned to compensate the Appellant for loss of business arising from the 14 vehicles that have not been operational since the 3rd of November 2016. The rate of compensation requested was KES 10, 000 per day per vehicle.

The Respondent's Case

10. It was the Respondent's case that the Appellant had not qualified to be issued with a Road Service License, as they did not have a minimum of 30 vehicles. The Respondent relied upon Regulation 5 of the National Transport and Safety Authority (Operation of Public Service Vehicle Regulations 2014), which states as follows:
 - " (1) A person desirous of operating public service vehicles shall be a member of a body corporate which shall
 - (a) be licensed to operate if the body corporate owns a minimum of thirty serviceable vehicles registered as public service vehicles."
11. It was also the Respondent's case that the appeal filed before the Transport Licensing Appeals Board was premature, as the Transport and Safety Committee had not made a decision on the matter. The Respondent was of the view that the Appellant should wait for the decision of the Transport and Safety Committee.
12. The Respondent averred that it did breach the rules of natural justice because, despite making the first response to the application after four months, it has lately been in communication with the Appellant.
13. The Respondent confirmed that the Transport and Safety Committee considered the application on the 8th of December 2016, but the Committee could not make a decision, as it needed to make some clarifications.
14. The Respondent was of the opinion that the Appellant was not entitled to damages, as constitutional remedies ought to be forward looking rather than punitive.

Determination

15. 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 appeal filed at the Transport Licensing Appeals Board was premature.

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- b. Whether the Appellant's constitutional rights to a fair administrative action were violated by the Respondent.
- c. Whether the Appellant ought to have been given a license on the basis of having 14 vehicles.
- d. Whether the Appellant is entitled to damages.

Whether the appeal filed at the Transport Licensing Appeals Board was premature.

16. It was the Respondent's case that the appeal before this Tribunal was premature because the Transport and Safety Committee of NTSA had not made a conclusion on the application. However, it is worthy of note that the Appellant made the application for a license on the 29th of April 2016 and, seven months down the line, the Respondent has not made a decision on the application. It is the case that Article 47 of the Constitution of Kenya 2010 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. A delay of seven (7) months in making a decision cannot be said to be efficient. In the circumstances, we find that the Appellant had a genuine reason to appeal to the Transport Licensing Appeals Board and, therefore, the appeal was not premature.

Whether the Appellant's constitutional right to a fair administrative action was violated by the respondent.

17. The Appellant raised several allegations touching on the right to a fair administrative action, which were not contested by the Respondent. These included: the negative verbal decision made by the Director General on the 7th of November 2016, which was not supported by written reasons; the hostility of the Director General towards the Chair of the Appellant Company, Lucy Mathenge, an act that affected her right to be heard; the failure on the part of the Respondent to act on the application of the Appellant Company, which operates in Ongata Rongai, due to the fact that they were aggrieved by the decision of this Tribunal in the case of *Ongataline Ltd*, which also operates in Ongata Rongai.

18. 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.

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(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.

19. 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 written reasons for the actions and a fair hearing devoid of intimidation. It also follows that the failure to make a decision on the basis of an earlier decision of this Tribunal in the case of *Ongataline Ltd v NTSA* amounts to fettering the discretion of the Respondent, which is against the rules of natural justice. It is now an established principle of administrative law that a decision that is taken without due regard to the rules of procedural 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*.” We, therefore, find that the verbal decisions made against the Appellant were unlawful.

Whether the Appellant ought to have been given a license on the basis of having 14 vehicles.

20. The Respondent argued that the Appellant had not satisfied the requirements of Regulation 5 of the National Transport and Safety Authority (Operation of Public Service Vehicle Regulations 2014), which provide that:

- “ (1) A person desirous of operating public service vehicles shall be a member of a body corporate which shall
- (a) Be licensed to operate if the body corporate owns a minimum of thirty serviceable vehicles registered as public service vehicles.”

21. This decision has, however, not been communicated formally to the Respondent and we, therefore, find that the Respondent needs to arrive at a decision and

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communicate the same to the Appellant giving detailed reasons for any decision that will be made. In the event that the Appellant is not satisfied with the decision, an appeal can still be made at the Transport Licensing Appeals Board.

Whether the Appellant is entitled to damages.

The Appellant seeks damages as a result of the loss of income occasioned by the 14 vehicles that have not been operating. On this issue, we follow the precedent of Judge Onguto in the case of *Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board [2016] eKLR*, where it was held that

“constitutional remedies should be forward-looking, community-oriented and structural. However, an award for damages is not a forward looking remedy. It requires the court to look back to the past in order to determine how to compensate the victim or even punish the violator.”

According to Justice Onguto, instances that would make a court award damages include, where decisions are made completely outside the legitimate scope of the empowering provision. In this case, the Respondent Authority has argued that the Appellant has not complied with Regulation 5 of the National Transport and Safety Authority (Operation of Public Service Vehicle Regulations 2014). Although it would be unlawful to delay a decision on the basis of this as the Respondent has done, we note that the Respondent has not made a decision outside the legitimate scope of the empowering provisions and we, therefore, make no orders for damages.

21. 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 rights to a fair administrative action were violated by the Respondent.
2. An order of **Certiorari quashing** the Respondent’s verbal decisions that were made on the 7th of November 2016 and 22nd of November 2016.
3. An order of **Mandamus compelling** the Respondent to make a decision and give written reasons for the same within 21 days.

