



**Bluaxis Contraction Limited v Kenya National Highways Authority (Constitutional Petition E001 of 2024) [2024] KEHC 9693 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9693 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CONSTITUTIONAL PETITION E001 OF 2024**

**FN MUCHEMI, J**

**JULY 30, 2024**

**IN THE MATTER OF AN APPLICATION FOR  
ORDERS OF CERTIORARI & PROHIBITION**

**AND**

**IN THE MATTER OF ARTICLES 19, 21, 22, 23, 27, 31, 40, 64 & 259 OF THE  
CONSTITUTION OF KENYA 2010, THE ENFORCEMENT OF THE BILL OF RIGHTS**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS UNDER ARTICLE 19, 20, 21, 22, 23,  
31, 40(1), 40(3), 64 & 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF  
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE & PROCEDURE RULES**

**AND**

**IN THE MATTER OF SECTION 339 OF THE PENAL CODE, CAP 63 LAWS OF KENYA**

**BETWEEN**

**BLUAXIS CONTRUCTION LIMITED ..... PETITIONER**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... RESPONDENT**

**JUDGMENT**

**Brief Facts**

1. This petition dated 4<sup>th</sup> January 2024 seeks for the following orders:-



- a. A declaration that the respondent's actions of 21/12/2023 of maliciously damaging the petitioner's parked and locked motor vehicle registration number KDE 210Q by breaking, entering, hot wiring and commandeering it to its weighbridge in Juja in the absence of any representative of the petitioner were unconstitutional, illegal and a violation of the law.
  - b. A declaration that the respondent's subsequent actions of 21/12/2023 of proceeding to weigh motor vehicle registration number KDE 210Q and impose a penalty on the petitioner in their absence for allegedly overloading were unconstitutional, illegal, null and void.
  - c. A declaration that the respondent's actions of impounding and seizing motor vehicle registration number KDE 210Q was illegal and unlawful were unconstitutional, illegal and a violation of the law.
  - d. A declaration that the deprivation of the petitioner's quiet enjoyment and use of motor vehicle registration number KDE 210Q is a contravention of its constitutional rights.
  - e. An order that motor vehicle registration number KDE 210Q be released unconditionally to the petitioner.
  - f. A permanent injunction be issued against the respondent and/or any other servants, agents or representatives acting under them, prohibiting them from in any way harassing, intimidating, and denying the petitioner from dealing with the motor vehicle registration number KDE 210Q in so far as the events of 21/12/2023 are concerned.
  - g. General damages for malicious damage to the petitioner's motor vehicle registration number KDE 210Q and for loss of business, lost business opportunities and loss of profit while the vehicle has remained impounded by the respondent.
  - h. Exemplary damages to remedy the oppressive, arbitrary and unconstitutional actions of the respondent.
  - i. Costs of the petition.
2. The respondent filed a replying affidavit dated 16<sup>th</sup> February 2024 in opposition to the petition.

### **The Petitioner's Case**

3. The petitioner is a limited liability company duly incorporated under the [Companies Act](#) No. 17 of 2015 Laws of Kenya and the legal and beneficial owner of motor vehicle registration number KDE 210Q Isuzu FTR Lorry/truck. The respondent is a statutory entity established under Section 3 of the [Kenya Roads Act](#) No. 2 of 2007 and is a body corporate with perpetual succession and a common seal capable of suing and being sued in its corporate name.
4. The petitioner states that the respondent is the institution responsible for the actions of its officers who on 21/12/2023 unconstitutionally and illegally broke into motor vehicle registration number KDE 210Q while it was parked outside a residential building within Ruiru Township and unlawfully hot wired and drove it to its Juja Weighbridge where they proceeded to weigh the lorry/truck and impose a fine for alleged overloading in the absence of the petitioner's authorized representatives thereby breaching the petitioner's constitutional rights, particularly Articles 10, 19(1) & (2), 20(1) & (2), 21(1), 27(1), 28, 31, 40(1), 258(1) and 259(1).
5. According to the petitioner, on 21/12/2023, the motor vehicle registration number KDE 210Q was parked outside a residential area within Ruiru Township when the designated driver returned to the parking spot and found the suit motor vehicle missing. The driver reviewed CCTV footage of the area



and discovered that officers of the respondent disembarked from a KENHA branded vehicle, milling around the motor vehicle and broke a window of the vehicle, gaining access and driving off.

6. The petitioner states that its driver was informed by a security guard manning the premises that the respondent's officers had indicated that they were commandeering the vehicle to Juja Weigh Bridge and the driver rushed to the Juja Weigh Bridge and found the vehicle had been broken into with the right side window smashed and the ignition system ripped apart.
7. The petitioner further states that its driver was not offered any explanation as to the errant conduct of the respondent's officers but was instead issued with a weigh bridge ticket requiring him to pay a penalty of Kshs. 1,077,612/- for alleged overloading. The petitioner avers that the respondent has seized and impounded the said vehicle and is demanding that the said penalty and daily parking charged be paid as a condition for its release.
8. The petitioner further avers that it has reported the break in incident and malicious damage to its property by officers of the respondent at Ruiru Police Station and secured OB No. 60/02/01/2024.
9. The petitioner argues that the actions by the respondent amount to stealing pursuant to Section 268 as read with Section 278A of the Penal Code which undermine the requirements of integrity, transparency, equity, social justice, accountability, rule of law, human dignity, equality, non discrimination as provided by Article 10 of *the Constitution*. Furthermore, the petitioner argues that the respondent's actions violated its right to privacy, which includes the right not to have its possessions seized and property searched as proscribed by Article 31 of *the Constitution* and that the respondent has arbitrarily deprived its property as protected under Article 40(2) of *the Constitution*.

### **The Respondent's Case**

10. The respondent is a body corporate established under Section 3 of the *Kenya Roads Act* No. 2 of 2007 whereby Section 4 of the Act lists its functions and responsibilities. Pursuant to Section 22(1)(c) of the Act, the respondent states that it has the power to measure and assess the weights, dimensions and capacities of vehicles using any road and provide measures to ensure compliance with rules relating to axle load control, other provisions of the *Traffic Act* and any regulations under the Act.
11. The respondent states that the vehicle was intercepted on 21/12/2023 while being driven along Nairobi Thika Highway after the said vehicle was spotted by the respondent's inspection and enforcement officers on suspicion of being heavily overloaded. The suspicion was on account of the fact that water was noted to be dripping from the motor vehicle from the wet river sand loaded and under transport.
12. The respondent states that instructions were given by its duty manager to the driver of the motor vehicle which was flagged down to stop by the roadside. However, the driver of the motor vehicle declined to stop following which the respondent's inspection and enforcement team retreated to seek reinforcement from officers from National Police Service stationed at Juja Weighbridge Police Station.
13. The respondent states that the motor vehicle was noted to have been moved from the highway and abandoned at a Total Energies Petrol Station adjacent to the highway with the driver of the vehicle absent from the scene. The respondent's team by way of telephone made a call for reinforcement from the Juja Weighbridge Station and Athi River Weighbridge Station to assist in the escort of the suit motor vehicle to the weighbridge for weight confirmation. The respondent states that the chain of events was corroborated by statements recorded at the Juja Weighbridge Police Station by Police Constable Patrick Muchoki (No. 97070) stationed at the weighbridge station, PC Festus Wachira (No. 123333) stationed at Athi River Weighbridge Station, Police Sergeant Humphrey Kaguki (No.



68269) stationed at Athi River Weighbridge Station, Sammy Gitara Kigo and William Gitahi who are employees of Ebenezer Commercial Works Limited based at Juja Weighbridge.

14. The respondent further states that the motor vehicle was weighed and found to be overloaded by 9,510 kilograms on the gross vehicle weight having carried 27,510 kilograms which is in excess of the legally permissible limit of 18,000 kilograms on the gross vehicle weight. Further, the respondent states that the suit motor vehicle had an overload of 9,380 kilograms having loaded 19,880 kilograms in excess of the legally permissible limit of 10,500 kilograms on the group two axle grouping. The respondent states that the driver of the motor vehicle availed himself at the point where the vehicle was being weighed.
15. The respondent states that they calculated the overload fees and was assessed at USD 6,979.95/- which upon conversion is Kshs. 1,077,612.145/- at the prevailing dollar rate at the time. The computation was based on the provisions of the East African Community Vehicle Load Control Act 2016 (EACVLCA) read together with the East African Community Vehicle Load Control (Enforcement Measures) Regulations, 2018.
16. The respondent states that the petitioner did not settle the overloading fees subsequent to its generation and the vehicle has since been detained at the Juja Weighbridge holding yard pursuant to Section 17(6) of the EACVLCA. The petitioner is yet to settle the overloading fees plus the accrued daily detention charge of USD 50 which continues to accrue until settlement of the outstanding sums in full.
17. The respondent argues that the petitioner has not expressly identified the alleged breached of *the Constitution* and has failed to demonstrate the said alleged breach. The respondent further argues that the petition has not been supported by an affidavit and neither has the petitioner produced any documentation in support of the events pleaded in the petition and the alleged constitutional violations which is contrary to Rule 11 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
18. The respondent states that the petitioner has not produced any evidence to show that Fredrick Ngunyi is an employee of the petitioner and there is reasonable apprehension that the said deponent lacked the locus standi to depose the affidavit as he did. The respondent argues that the supporting affidavit ought not to be considered at all for the purposes of the instant petition. Further, the respondent states that the various documents annexed to the supporting affidavit by Fredrick Ngunyi are of no evidentiary value.
19. The respondent argues that the photographs as annexed by the said deponent are inadmissible as no certificate of electronic evidence in compliance with Section 106B of the *Evidence Act* has been adduced for purposes of verifying their authenticity. The respondent further states that the photographs do not prove that the lorry appearing therein is the motor vehicle described for the registration number in those photographs does not appear. The respondent further argues that the photographs do not prove that the persons appearing are their employees. Additionally, the respondent states that the photographs are of no evidentiary value in so far as any alleged violation of the petitioner's constitutional rights is concerned.
20. The respondent states that the weighbridge ticket and the OB record as annexed by the petitioner do not demonstrate any alleged violation of the petitioner's constitutional rights. As such, the respondent argues that the petitioner has not demonstrated the alleged breach of its rights under *the Constitution* in the absence of an Affidavit and documents in support thereto.
21. The respondent states that it has not violated the petitioner's constitutional rights as the rights alleged to have been violated were limited as a consequence of the provisions of the EACVLCA and



- the regulations which provide that the respondent and its officers were empowered and entitled by statutory and procedural laws to take actions against the suit motor vehicle as they did.
22. The respondent states that although the petitioner alleges that the suit vehicle was maliciously damaged, they have not demonstrated the same by way of evidence. Further, the offence stealing as provided by the petitioner in respect of the respondent cannot be determined by this court as a constitutional court as the offence does not demonstrate any alleged breach of the petitioner's rights under *the Constitution*. The respondent argues that the petitioner has not provided any evidence to demonstrate the alleged breach of Article 10 of *the Constitution*. The respondent states that it recovered the abandoned suit motor vehicle for weighing pursuant to the provisions of EACVLCA and regulations and the petitioner was issued with a weighbridge ticket indicating the charged overloading fees. The petitioner was also furnished with the details to facilitate payment of the said fees. The respondent further argues that they produced witness statements giving the account of events leading up to the recovery and weighing of the suit motor vehicle. And no contradictory evidence has been adduced. Further the security guard alleged to have directed the petitioner to the whereabouts of the suit motor vehicle has not been named, and has not filed an affidavit to corroborate the petitioner's alleged account of events.
  23. The respondent states that the petitioner did not dispute the overloading fees as assessed and if he was aggrieved of the same he ought to have against the same per the procedure provided in Section 17(4) of the EACVLCA read together with Regulation 17 of the Regulations but he did not. As such, the respondent states that its actions were transparent, equitable, justiciable and accountable. Furthermore, the respondent argues that the petitioner has not demonstrated that its actions breached the petitioner's right to human dignity, equality and non discrimination.
  24. The respondent argues that there was no such alleged breach of the petitioner's right to privacy under Article 31 of *the Constitution*. Pursuant to Section 15(1)(b) of the EACVLCA, the respondent's officers could enter the motor vehicle and inspect any record relating to any load carried in or on the vehicle. Further Section 15(1)(j) of the Act allowed the respondent's officers to cause the motor vehicle to be driven to a designated location if the driver is incapable or unwilling to comply with an instruction of the officer, which the respondent states are the circumstances that transpired in the matter when the petitioner's driver refused to stop along the Nairobi Thika Highway only to abandon the motor vehicle. Section 15(1)(m) of the Act additionally empowers the respondent's officers to cause to be performed, tests or examinations as provided for in the Act in respect of the vehicle or any load carried in or on the vehicle. As such, the respondent argues that all its actions taken by its officers were in accordance to the law.
  25. The respondent further argues that it did not violate the petitioner's right to property under Article 40(2) of *the Constitution*. The respondent argues that the specific provision does not apply to the petitioner and is incapable of being breached with reference to the petitioner. As such, the respondent states that the petitioner is not entitled to any of the reliefs as sought in the petition as it has not demonstrated any breach of the petitioner's constitutional rights under *the Constitution*.
  26. The respondent states that the only way to procure the release of the motor vehicle is for the petitioner to fully settle the overloading fees plus the accrued detention charge which stands at USD 2,550/-.
  27. The petitioner filed a Further Affidavit dated 8<sup>th</sup> April 2024 and states that the respondent's response does not address the very specific grave and serious constitutional violations of its officers that are criminal in nature. The petitioner further states that from the respondent's response it is undisputed that the subject motor vehicle was parked at Ruiru Total Energies Petrol Station approximately 8 ½ kms from the respondent's weighbridge. Further, the respondent's officers gained access to the suit



motor vehicle by breaking its window and improvising a way to start the engine, which is evident in the witness statement by Police Sergeant Humphrey Kaguki. Additionally the driver of the suit motor vehicle was not present when the respondent's officers broke into the motor vehicle, hot wired the said vehicle, drove it off to Juja Weighbridge and weighed it at the Juja Weighbridge. Thus, the petitioner avers that it is not true that the subject motor vehicle was intercepted while being driven along the Nairobi Thika Highway as alleged by the respondent.

28. The petitioner avers that the response by the respondent is contradictory as the respondent claims that the suit motor vehicle was intercepted while being driven on the Nairobi Thika Highway. If the said vehicle was obstructed or prevented from continuing to its destination, how did the vehicle end up at Ruiru Total energies Petrol Station 8 ½ km away. Furthermore, the petitioner argues that the respondent did not state specifically where along the Nairobi Thika Highway the subject motor vehicle was intercepted. That notwithstanding, the petitioner argues that the respondent contradicted itself by stating that they intercepted the suit motor vehicle and then stating that the said motor vehicle was flagged down to stop by the roadside but the driver declined to stop. The petitioner further states that it has never had any person in its employment by the name of Samuel Gitara and further that the respondent has coincidentally annexed a witness statement by one Sammy Gitara Kigo who claims to be a driver at Ebenezer Commercial Works Limited. Thus it is unclear whether Sammy Gitara Kigo and Samuel Gitara refer to one and the same person.
29. The petitioner states that the respondent was not specific which Total Energies Petrol Station adjacent to the highway the vehicle was found abandoned but the police officers who witnessed the incident and recorded statements confirm that the vehicle was in Ruiru. The petitioner further argues that the witness statement by Police Sergeant Humphrey Kaguki contradicts that of the respondent as he stated that after they broke the suit motor vehicle's window to gain entry, they found the turn boy sleeping but he did not have the ignition key which proves that the petitioner's vehicle was not abandoned. Furthermore, the petitioner states that his version of events and the photographic evidence he produced is corroborated and validated by the respondent's witness, PC Festus Wachira and Police Sergeant Humphrey Kaguki.
30. The petitioner argues that although the East African Community Vehicle Load Control Act, 2016 (EACVLCA) expressly lists the powers of authorized officers, none of those powers involve breaking into a locked and parked motor vehicle, hot wiring, commandeering and weighing such vehicle in the absence of the petitioner's representative or driver. Further, the petitioner argues that the said criminal acts of the respondent's officers must be condemned in the strongest terms possible and if allowed to go unpunished, this will only embolden their resolve to carry on with such criminal acts with wanton impunity. Consequently, the petitioner avers that imposing a fine on the motor vehicle for allegedly overloading after admitting to having broken into, entered, hotwired and commandeered to its Juja Weighbridge are all tainted with illegality and should not be allowed to stand.
31. The petitioner states that the respondent ought to have waited for the driver of the motor vehicle or obtained a court order to seize, detain, break in the vehicle. Further the respondent could have clamped the vehicle or remove the registration number plates of the motor vehicle to immobilize it.
32. The petitioner states that following the court order for the release of the motor vehicle given on 24/1/2024, in the presence of the respondent's legal representative, despite being served with the order, the respondent declined to release the said motor vehicle until three weeks later on 14/2/2024. Upon securing the release of the said motor vehicle, the petitioner states that the motor vehicle while in the custody of the respondent, the window on the driver's side had been broken/shattered, its ignition system had been damaged, its tires had been shredded and deflated, its front bumper had been damaged and its battery had died and needed replacement. Upon further inspection by the mechanical experts at



Isuzu East Africa Limited, the petitioner found that the cylinder unit and the left hand rear leaf spring has also been damaged.

33. The petitioner states that the weighbridge ticket of 21/12/2023 reveals that the motor vehicle's allowed gross weight was 18,000kgs and that it was allegedly overloaded by a massive 9,510 kgs which is more than 50% of its allowed gross weight, which was logically and scientifically impossible. The petitioner avers that the Registration Certificate/Logbook of the vehicle indicates that its tare weight is 6,000kgs, its load capacity is 8,500kgs and its gross weight is 14,500kgs which makes the allegation by the respondent that the vehicle's gross weight was 27,510 kgs (close to double the weight recommended by the manufacturer) implausible and scientifically impossible. Further, the respondent did not bother to weigh the vehicle in the presence of the petitioner's driver prior to its release.
34. The respondent filed a Supplementary Affidavit dated 28<sup>th</sup> May 2024 and states that the authority annexed by Fredrick Ngunyi to the petitioner's Further Affidavit is an afterthought as the case number is typed meaning the deponent had no prior authority to the filing of the petition. Further, the date indicated on the said document does not cure the lack of the deponent's authority to depose the supporting affidavit as he did at the time of filing the petition.
35. The respondent argues that the certificate of electronic evidence dated 8<sup>th</sup> April 2024 does not capture the particulars of the devices allegedly used in the recording, storage and production of the electronic record being the photographs annexed to the supporting affidavit. Thus the petitioner has failed to comply with Section 106B 4(b) of the Evidence Act. The respondent further argues that the certificate does not capture the details on the manner of how the said photographs were recorded, stored and produced.
36. The respondent states that although the certificate indicates that the photographs were taken by the deponent's mobile phone device, the deponent has not given the particulars of the said mobile phone. Additionally, the deponent did not give the particulars of when the photographs were taken, the processes effected for the same to be retrieved from the deponent' unnamed and unidentified mobile device up to their production as annexures.
37. The respondent argues that the petitioner contradicted himself when he stated that the electronic records were produced from his review of the CCTV footage of 21/12/2023 at Ruiru Total Energies Petrol Station whereas nowhere in the petition was Ruiru Total Energies Petrol Station named as the source of the CCTV footage allegedly viewed by the deponent. The deponent in his affidavits averred that the suit motor vehicle was parked in a residential area within Ruiru Township and that the CCTV footage of the area allegedly reviewed by the deponent was from one of the establishments in the areas. Further, the CCTV footage which the petitioner allegedly viewed has not been obtained or otherwise produced in evidence.
38. The respondent further avers that Section 106(B) 4(d) contemplates that the certificate ought to have been signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant authorities yet the petitioner has not produced any evidence to demonstrate that the deponent occupies a responsible position in relation to the operation of the CCTV at Ruiru Total Energies Petrol Station. As such, the respondent argues that the photographs are inadmissible due to non compliance with Section 106B of the Evidence Act and expunged from the record.
39. The respondent states that although the petitioner has made reference to an inspection report by mechanical experts at Isuzu East Africa Limited and annexed a quotation for repairs, the said quotation has no evidentiary value as it does not specify that it relates to the motor vehicle or the parts that belong to the said motor vehicle. Further, the petitioner has not shown that the number 50089 as indicated as



the customer number belongs to the petitioner. As such, the respondent argues that the quotation is not conclusive evidence to demonstrate that the damage caused to the suit motor vehicle is attributable to the respondent.

40. The respondent states that the petitioner has for the first time challenged the results of the weighing of the suit motor vehicle as captured in the weighbridge ticket although no evidentiary basis has been laid for the same. The petitioner has only stated that the overloading was logically and scientifically impossible. The respondent further states that the certificate as annexed is a standard document prescribed under Regulation 9(4) of the Regulations, with the form itself appearing as Form No. EACV 1 in the Second Schedule of the Regulations.
41. The petition was disposed of by way of written submissions.

### **Petitioner's Submissions**

42. The petitioner relies on the cases of *Space Geo Enterprises Limited vs Kenya National Highways Authority* [2019] eKLR; *Leo Investments Ltd vs Trident Insurance Co. Ltd* (2014) eKLR and *Republic vs Registrar General & 13 Others* (2016) eKLR and submits that the absence of a resolution is not fatal to a suit. The petitioner further states that the authority given to Fredrick Ngunyi is annexed to the Further Affidavit sworn on 8/4/2024 and therefore the proceedings can be ratified using the same.
43. The petitioner submits that the photographic evidence in the petition and Further Affidavit is corroborated and validated by the respondent's own eye witnesses, PC Festus Wachira and Police Sergeant Humphrey Kaguki confirming that the respondent's officers broke into the petitioner's parked and locked motor vehicle, hotwired the vehicle and commandeered it to Juja Weighbridge. The petitioner argues that although the respondent seems to justify their criminal acts by citing the EACVCLA the actions of the respondent's officers must be carried out within the confines of the law and should not be criminal in nature. The petitioner argues that an authorized officer charged with enforcing the Act must be gazetted yet it remains unclear whether the respondent's officers who broke into the petitioner's motor vehicle were authorized within the meaning of Section 14 of the Act. Section 15 of the Act provides for the powers of the authorized officer which do not include breaking into a parked and locked motor vehicle. Further, the petitioner submits that the suit motor vehicle was a lorry with a high sided open top body which implies that the load it was carrying could be easily ascertained without the need to break in.
44. The petitioner further submits that neither the respondent's officials nor the two police officers have attempted to demonstrate that they had reasonable cause to suspect that the petitioner's parked and locked vehicle was being used in the commission of, or to facilitate the commission of an offence. There are no warrants issued to impound and detain the petitioner's property. Further the petitioner argues that the respondent has not shown or pleaded that the police officers who accompanied them demanded to search the petitioner's vehicle or that they gave notification to the petitioner of their intentions thus falling short of the requirement of Section 57 of the *National Police Service Act*. Section 60 of the National Services Act provides for power to search without warrants in special circumstances which the respondent has not shown was applicable in the instant case.
45. The petitioner argues that Article 31 of *the Constitution* provides that every person has a right to privacy which includes the right not to have their person, home or property searched and their possession seized. The petitioner further relies on the cases of *Samura Engineering Ltd & Another vs Kenya Revenue Authority Nairobi Petition No. 54 of 2011* and *Samson Mumo Mutinda vs Inspector General National Police Service & 4 Others* [2014] eKLR and submits that there is no justification why the



- respondent did not obtain warrants of search of the suit motor vehicle. Thus the actions by the respondent's officers amounted to stealing a motor vehicle pursuant to Section 268 and 278A of the Penal Code. The petitioner further argues that there is no justification why the respondent's officers opted to take the law into their hands in the pretext of enforcing the EACVLCA.
46. Relying on the cases of Robert Mwangi Mugo vs OCS Nyahururu Police Station & 2 Others [2022] eKLR and Standard Newspaper Ltd & Another vs Attorney General & 4 Others [2013] eKLR, the petitioner submits that whilst the respondent has a duty to ensure that the EACVLCA is enforced and that overloading is punished in accordance with the letter of the law, they must like everyone else, abide by the law and there must be due process in everything that they do in exercise of their mandate to prevent the commission of crime. As such, the petitioner submits that the respondent acted in excess of its powers causing infringement of its rights to property under Article 40(1) and right to fair administrative action under Article 47 of *the Constitution*. Furthermore, the petitioner argues that the nefarious conduct of the respondent's officers in searching, seizing and confiscating its motor vehicle was arbitrary and in breach of its right to privacy and dignity guaranteed under Article 31 of *the Constitution*.
  47. On the right to property, the petitioner submits that the respondent has not contested that the motor vehicle belonged to the petitioner. The petitioner avers that the breaking in of its parked and locked motor vehicle by the respondent's officers and subsequent hotwiring, commandeering and weighing was arbitrary and was done without its consent. Thus, the imposition of a fine following the respondent's criminal acts cannot be allowed to stand as the imposition of the fine was tainted with multiple illegalities and cannot be rubber stamped by a court of law.
  48. The petitioner submits that the suit motor vehicle remained unlawfully detained and impounded by the respondent from 21/12/2023 until 14/2/2024 for about 56 days. The petitioner further submits that it has produced photographic evidence showing the damage caused to the motor vehicle by the respondent's officers. Additionally the petitioner submits that it has produced a copy of the log book for the motor vehicle indicating that it is in the commercial class and it was laden with sand at the time it was broken into by the respondent's officers. The petitioner therefore submits that it lost revenue for the 56 days the respondent impounded its vehicle. In assessing damages for loss of revenue the petitioner urges the court to be guided by the cases of Cotecna Inspection S.A. vs Hems Group Trading Company Limited [2007] eKLR and Intraspeed Logistics Ltd & 15 Others vs Commissioner of Police & Another [2018] eKLR.
  49. The petitioner relies on the case of Nkuene Dairy Farmers Co-op Society Ltd & Another vs Ngacha Ndeiya [2010] eKLR and submits that special damages in a material damage claim need not be shown to have actually incurred and urges the court to award it costs of repairs as per the quotation produced.
  50. On the issue of lost business as a result of the unlawful detention of the petitioner's vehicle, the petitioner cites the cases of Samuel Kariuki Nyangoti vs Johaan Distelberger [2017] eKLR; Wambua vs Patel & Another [1986] KLR 336; Team for Kenya National Sports Complex & 2 Others vs Chabari M'Ingaruni (Civil Appeal No. 293 of 1998) and Peter Njuguna Joseph & Another vs Anna Moraa (Civil Appeal No. 23 of 1991) and submits that it has proved on a balance of probabilities that it lost business due to the unlawful detention of its vehicle.
  51. Relying on the case of *Space Geo Enterprises Limited vs Kenya National Highways Authority Constitutional Petition 3 of 2019*, the petitioner urges the court to award it general damages at Kshs. 2 million for the violation of its rights by the respondent.



52. The petitioner further relies on the case of Peter Muriuki Ngure vs Equity Bank (K) Ltd [2018] eKLR and submits that the respondent should be condemned to pay costs of the suit following its illegal and unlawful conduct.

### **The Respondent's Submissions**

53. The respondent relies on the case of Christopher Mutiambu Machimbo & 3 Others vs County Surveyor, Trans Nzoia & 4 Others [2022] eKLR and submits that in the event a company intends to institute a suit, a resolution has to be made to that effect. In the instant suit, the respondent argues that Fredrick Ngunyi stated in the affidavits that he is an employee of the petitioner although he did not produce any evidence to support the same. Further, the said deponent did not adduce any evidence to show that he is a director of the petitioner. Therefore in the absence of a resolution and/or authority issued by the petitioner, he cannot do anything to bind the petitioner in so far as the petition and proceedings are concerned. The respondent further submits that pursuant to Section 34(1) of the *Companies Act*, only the petitioner's directors have the power to bind the petitioner or authorise others to do so. Furthermore, no evidence has been produced to demonstrate the persons listed as the petitioner's directors in the authority annexed in the Further Affidavit dated 8<sup>th</sup> April 2024 are the directors of the petitioner and therefore capable of authorising Fredrick Ngunyi to appear in the instant petition.
54. The respondent submits that the authority annexed to the Further Affidavit was likely fabricated to give an illusion that it was granted prior to the filing of the petition when an examination of the document demonstrates that it was not. Further, the date of 4<sup>th</sup> January 2024 indicated on the document does not cure the lack of the deponent's authority to depose the supporting affidavit, as he did, at the time the petition was filed. As such, the respondent submits that the petition ought to be struck out as the deponent Fredrick Ngunyi lacked the authority to appear in the petition and depose the affidavits on the petitioner's behalf and therefore he lacks the locus standi to prosecute the petition.
55. The respondent submits that the case of Space Geo Enterprises Limited vs Kenya National Highways Authority [2019] eKLR cited by the petitioner is not distinguishable and does not apply to the instant petition as no challenge was raised by the respondent on the issue of lack of the petitioner's authority to a deponent to appear in the matter. That notwithstanding, the respondent submits that should the court consider and apply the said decision to the instant petition, the said decision supports the respondent's contentions that a company could only sue with the sanction of its board of directors by a general or special resolution.
56. The respondent further submits that it is not sufficient for the petitioner to merely state the rights under *the constitution* which it alleges have been violated in the absence of a demonstration of how the rights were violated as alleged. Relying on the decisions in Robert Amos Oketch vs Andrew Hamilton & 8 Others (Sued in their personal capacities and as trustees of the National Bank of the Kenya Staff Retirement Benefit Scheme) & 4 Others [2017] eKLR and *Kweri vs Beehive Media Limited; Capwel Industries Limited (Interested Party) (Constitutional Petition E321 of 2021)* [2023] KEHC 2684 (KLR), the respondent submits that the petitioner has not satisfied the required threshold by demonstrating to the required standard how its rights and fundamental freedoms have been violated, infringed or threatened.
57. The respondent further submits that the petitioner's rights as alleged to have been infringed were limited by law particularly the East African Community Vehicle Load Control Act, 2016 read together with the East African Community Vehicle Load Control (Enforcement Measures) Regulations, 2018, pursuant to Article 24 of *the Constitution*.



58. The respondent submits that it disputed the photographs of the suit motor vehicle broken into by the respondent's officers and the certificate of electronic evidence dated 8<sup>th</sup> April 2024 which falls short of the evidentiary threshold required under Section 106B of the *Evidence Act*. Relying on the cases of Peter Ngethe t/a P.N.N Funeral Services vs Standard Group Limited PLC & Another [2020] eKLR; William Odhiambo Oduol vs Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR and Samwel Kazungu Kambi vs Nelly Ilongo the Returning Officer, Kilifi County & 2 Others [2017] eKLR, the respondent submits that certificate produced by the petitioner does not capture the particulars of the devices allegedly used in the recording, storage and production of the electronic record nor did it capture the details on the manner of how the said photographs were recorded, stored and produced in so far as to be filed in the proceedings. Furthermore, the certificate indicated that the photographs were taken using the deponent's mobile phone device yet the deponent did not give the particulars of the said mobile phone device. Additionally, the deponent did not give the particulars of when the photographs were taken, the processes effected for the same to be retrieved from the deponent's unnamed and unidentified mobile device up to their production as annexures.
59. The respondent argues that the petitioner contradicted himself when he stated that the electronic records were produced from his review of the CCTV footage of 21/12/2023 at Ruiru Total Energies Petrol Station whereas nowhere in the petition was Ruiru Total Energies Petrol Station named as the source of the CCTV footage allegedly viewed by the deponent. The deponent in his affidavits averred that the suit motor vehicle was parked in a residential area within Ruiru Township and that the CCTV footage of the area allegedly reviewed by the deponent was from one of the establishments in the areas. Further, the CCTV footage which the petitioner allegedly viewed has not been obtained or otherwise produced in evidence. Additionally, the respondent submits that Section 106(B) 4(d) contemplates that the certificate ought to have been signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant authorities yet the petitioner has not produced any evidence to demonstrate that the deponent occupies a responsible position in relation to the operation of the CCTV at Ruiru Total Energies Petrol Station. Consequently, the respondent argues that the photographs are inadmissible due to non compliance with Section 106B of the *Evidence Act* and expunged from the record.
60. The respondent further submits that its actions in seizing the control of the motor vehicle did not breach the petitioner's rights under *the constitution* as under the EACVCLA, its officers were empowered to recover the motor vehicle as they did pursuant to Section 15(1)(b), (j) and (m). Furthermore Sections 15(1)(h) as read with Section 17(6) to 17(11) and Regulation 13 in Part III of the Regulations, the respondent's officers were empowered to detain the motor vehicle until the overloading fees were paid in full. Relying on the case of High Court Constitutional Petition No. E001 of 2020 Frank Kiprotich Mutai vs Kenya National Highway Authority, the respondent submits that by enforcing mechanisms under the EACVLCA and the regulations does not breach the rights of the owner or transporter. The respondent argues that the purpose behind the enactment of the EACVLCA was to achieve efficient control of vehicle overloading in the EAC region as a basis for reducing accelerated deterioration of road networks and as a consequence, reducing total transport costs.
61. The respondent submits that the petitioner was issued with a weighbridge ticket dated 28<sup>th</sup> December 2023 which is not disputed by the petitioner nor has the petitioner adduced contradicting evidence to demonstrate that the motor vehicle was not overloaded. Further, the respondent submits that it issued the petitioner with a weighbridge certificate which was not disputed and which contains the respondent's findings on the overloading of the suit motor vehicle. No evidence has been adduced by the petitioner to challenge the weight of the motor vehicle as assessed and recorded in the weighbridge



- ticket and certificate. The petitioner only states that the overloading was logically and scientifically impossible.
62. The respondent further states that the EACVLCA and the Regulations do not require the respondent to obtain a search warrant or court order to seize and/or search the motor vehicle. That notwithstanding, the respondent argues that the petitioner cannot at the submissions stage raise doubts as to the gazettement of its authorized officers pursuant to Section 14 of the EACVLCA as the issue was not raised in the petition or the further affidavit. In any event, the respondent argues that the petitioner has not challenged the weighbridge ticket and overland fees invoice issued by the respondent for the payment of the overloading fees.
  63. The respondent relies on the cases of ODPP vs Juma Chemomenyu Batuli (no citation given) and Frank Kiprotich Mutai (no citation given) and submits that the provisions of the EACVLCA take precedence over any laws in Kenya and therefore the provisions of the National Police Service Act do not apply. The respondent further argues that even if the court were to find that the National Police Service Act applied, the procedure under Section 57(2) was properly exercised.
  64. The respondent submits that the damages sought by the petitioner for the alleged loss of business and income are in the form of special damages which must be specifically pleaded and proved. Relying on the case of Peter Ndegwa Kiai t/a Pema Wines & Spirits vs Attorney General & 2 Others (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR) (17 December 2021) (Judgment), the respondent submits that the petitioner has not satisfied the required threshold to be awarded special damages as it has neither quantified nor proven the entitlement to any specific sum in the petition.
  65. On the issue of general damages, the respondent urges the court to decline to award the petitioner any general damages as the petitioner has not proven any alleged loss it suffered. The respondent further submits that Sections 16(1)(h), 17(6) and (7) of the EACVLCA and Regulations 13(1) and (2) of the Regulations gave the statutory basis for the detention of the suit motor vehicle by the respondent and the regulations absolved the respondent of any loss/damage incurred by/on the motor vehicle during the period of detention as per Regulation 13(7) of the Regulations. The respondent further submits that no prejudice has been demonstrated to have been suffered by the petitioner on account of the release of the motor vehicle to it pursuant to the court's orders made on 24<sup>th</sup> January 2024 which release was effected by the respondent on 14<sup>th</sup> February 2024.
  66. The respondent argues that the quotation produced by the petitioner giving the costs of the repairs the damaged motor vehicle is of no evidentiary value and does not demonstrate any alleged loss/damage suffered as the quotation does not specifically state the motor vehicle registration number. The respondent further submits that the quotation does not specify that the parts belong to the make and model of the suit motor vehicle and further the document does not establish whether the parts listed were damaged by the respondent whilst in its custody. The document only indicates a customer number of 50089 but no evidence has been adduced to demonstrate that the number belongs to the petitioner. As such, the respondent submits that the quotation is not conclusive evidence of the damage alleged to have been caused to the suit motor vehicle is attributable to them. The respondent is apprehensive that they risk being condemned for damage which was not caused by it or its officers and to a motor vehicle which has not been confirmed to be the suit motor vehicle.
  67. The respondent relies on the case of Shiverenje Simani vs Star Newspaper & Another [2021] eKLR and argues that the petitioner is not entitled to exemplary damages as it has failed to demonstrate that the respondent's actions were oppressive, arbitrary and/or unconstitutional. Furthermore, there has been no demonstration that the respondent's conduct was calculated to procure him some benefit whether or not financial at the petitioner's expense.



68. The respondent submits that the petitioner is not entitled to the grant of permanent injunction as it has not made any submissions on the claim and thereby deemed to have abandoned the same. Additionally, the respondent argues that the petitioner has not satisfied the principles for the grant of a permanent injunction as provided by the Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR. The respondent argues that the petitioner has not demonstrated a prima facie case with any chance of success as the petitioner has failed to show that the actions by the respondent in the retrieval, assessment and charging of overloading fees and detention of the suit motor vehicle breached the petitioner's rights under Article 10, 31 and 40 of *the Constitution*. Having failed to satisfy the first condition for the grant of the order of permanent injunction, the order cannot be issued and the respondent argues that the court ought not to interrogate the remaining two conditions to be satisfied for the order to be granted. That notwithstanding, the respondent argues that the petitioner has failed to demonstrate that it shall suffer irreparable harm that cannot be compensated by way of damages. Furthermore, the respondent submits that the balance of convenience is tilting in favour of the petitioner being denied the orders as prayed and the respondent being given an opportunity to pursue the entire overloading fees as assessed in the weighbridge ticket and weighbridge certificate as the suit motor vehicle was released subsequent to the petitioner's conditional deposit of the sum of Kshs. 1 million in court. Furthermore, the overloading fees computed at Kshs. 1,077,612.145/- remains unpaid to date plus the detention charges for 56 days and thus greater inconvenience has been occasioned to the respondent. The respondent further submits that it is not in a position to recover any outstanding sums due owing from the petitioner as the motor vehicle is already in the petitioner's possession.
69. Relying on Rule 26 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and the decision in *Haraf Traders Limited vs Narok County Government* [2022] eKLR, the respondent submits that it has shown why the court ought to exercise its discretion in its favour and award costs as the petitioner has failed on the whole of the petition.

### Issues for determination

70. The main issues for determination are:-
- a. Whether the petition is fatally defective for want of filing a resolution authorizing Fredrick Ngunyi to plead on behalf of the petitioner.
  - b. Whether the petition meets the threshold for a constitutional petition.
  - c. Whether the petitioner's rights to privacy and property were violated.
  - d. Whether the petitioner is entitled to the orders sought.

### The Law

#### **Whether the petition is fatally defective for want of filing a resolution authorizing Fredrick Ngunyi to plead on behalf of the petitioner.**

71. The respondent is seeking for the petition to be struck out on the ground that the petitioner did not file a resolution or authority authorizing Fredrick Ngunyi, an employee of the petitioner to swear the affidavits on the petitioner's behalf.
72. The petitioner acknowledged that in their Further affidavit dated 8<sup>th</sup> April 2024, the petitioner annexed an authority granted to Fredrick Ngunyi to act on behalf of the petitioner thereby fixing this anomaly as at the inception of the petition, the petitioner failed to file the resolution of authority.



73. The matter before me is a constitutional petition and there is no requirement under the applicable law that a board of resolution be filed along with a petition. This principle was enunciated in the case of *Offshore Trading Company Limited vs Attorney General & 2 Others* [2021] eKLR where it was held:-

The matter pending before this court is a Constitutional Petition in which Civil Procedure Rules are not applicable in regard to filing of Constitutional petitions. The applicable law and procedure for filing constitutional petitions is provided for under the Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules, 2013 otherwise known as Chief Justice Mutunga Rules which provide the procedure for filing of constitutional petitions and which have no requirement that the petitioner must exhibit a board resolution or swear a verifying affidavit. In addition thereto *the Constitution* abhors technical objections of this nature expressly at Articles 22 (3)(b) & (d) and 159 of *the Constitution*.

74. It is trite law that even where such a resolution is a requirement, the courts have consistently held that the board resolution may be filed at any time before a suit is fixed for hearing. In the case of *Leo Investments Ltd vs Trident Insurance Company Ltd* (2014) eKLR where the court stated:-

...such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore not fatal to the suit.

75. The Court of Appeal in the case of *Spire Bank Limited vs Land Registrar & 2 Others* [2019] eKLR stated as follows:-

It is essential to appreciate that the intention behind Order 4 Rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.

76. From the foregoing, it is clear that the deponent produced the authority permitting him to swear the affidavits on behalf of the petitioner. Although the respondent argues that the said deponent was unauthorized, no evidence to that effect has been produced. Accordingly, this court is bound by Article 159(2)(d) of *the Constitution* which enjoins the court to administer justice expeditiously and without undue regard to procedural technicalities and finds that finding that the petitioner did not file the requisite authority whilst filing the petition will amount to a procedural technicality which would impede to the administration of justice. In any event, the deponent of the petitioner remedied the situation by filing the requisite authority permitting him to act on behalf of the petitioner in the instant proceedings.

#### **Whether the petition meets the threshold for a constitutional petition.**

77. It is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions



that are alleged to have been violated threatened to be violated and the manner of the violation and/or threatened violation. This principle was enunciated in *Anarita Karimi Njeru vs Republic* (1979) KLR where the court stated as follows:-

If a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with precision that of which he complains the provisions said to be infringed and the manner in which they are alleged to be infringed.

78. The principle in *Anarita Karimi* was further enunciated in *Mumo Matemu vs Trusted Society of Human Rights Alliance* (2014) eKLR where the court said:-

We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by the court.

The principle in *Anarita Karimi Njeru* underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution*. Procedure is also a handmaid of just determination of cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenant of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* that established the rule that requires reasonable precision of framing of issues in Constitutional petitions is an extension of this principle.

79. It is thus clear from the above case law that it is not sufficient to merely cite constitutional provisions. One must provide the particulars of the alleged infringement to enable the respondent to be able to respond and/or answer the allegations or complaints. Furthermore, one must provide the manner in which the alleged violations were committed and to what extent by adducing.
80. In the instant case, the petitioner has premised its petition on Articles 19, 21, 22, 23, 27, 31, 40, 64 and 259 but substantively the petition focuses on the rights as guaranteed under Articles 31 and 40(1) of *the Constitution* of Kenya. The petitioner has explicitly alleged that its rights to privacy and property under Articles 31 and 40 (1) of *the Constitution* were violated by the respondent. The manner of violation was stated to be through the respondent breaking into the petitioner's motor vehicle registration number KDE 210Q, hotwiring the same and commandeering it to the respondent's weighbridge at Juja and weighing the same without the petitioner's consent and his availability. It is therefore my considered view that the petition passes the test of constitutional petitions. The petitioner has therefore met the threshold required.

### **Whether the petitioner's rights to privacy and property were violated.**

81. The petitioner has argued that their rights under Articles 31 and 40 of *the Constitution* have been infringed.
82. Articles 31 and 40(1) of *the Constitution* stipulate as follows:-Article 31 provides:-
1. Every person has the right to privacy, which includes the right not to have-
    - a. Their person, home or property searched;
    - b. Their possessions seized;



- c. Information relating to their family or private affairs unnecessarily required or revealed; or
- d. The privacy of their communications infringed.

Article 40(1) provides:-

Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

- a. Of any description; and
- b. In part of Kenya.

83. The petitioner deposes that on 21/10/2023, its driver parked its motor vehicle registration number KDE 210Q Isuzu Lorry/Truck outside a residential area within Ruiru Township when the driver returned to the parking spot only to find that the suit motor vehicle was missing. The petitioner argues that he reviewed CCTV footage of the area and discovered that officers of the respondent broke a window to the suit motor vehicle, gaining access and commandeered the said vehicle to Juja Weighbridge. Upon reaching the weighbridge, the petitioner states that its driver found their motor vehicle had been broken into and the ignition system ripped apart. The petitioner argues that no explanation was offered to its driver as to the errant conduct of the respondent's officers but instead its driver was issued with a weigh bridge ticket requiring him to pay a penalty of Kshs. 1,077,612/- for allegedly overloading.
84. The respondent argues that they did not violate the rights of the petitioner for they intercepted the petitioner's motor vehicle whilst it was being driven along the Nairobi Thika Highway which was heavily overloaded and when the driver of the suit vehicle Mr. Samuel Gitara was flagged down to stop by the roadside he declined to do so. The respondent states that they noted that the suit motor vehicle was moved from the highway and abandoned at Total Energies Petrol Station adjacent to the highway and the said driver was not at the scene. Thus the respondent called for reinforcements from the Juja Weighbridge Station and Athi River Weighbridge Station to assist in the escort of the motor vehicle to the weighbridge for weight confirmation. At the weighbridge, the respondent states that they weighed and found the suit motor vehicle to be overloaded and they calculated the fees as required under the East African Community Vehicle Load Control Act 2016 (EACVLCA) read together with the East African Community Vehicle Load Control (Enforcement Measures) Regulations, 2018. Upon being presented with the ticket for the overloading fees, the petitioner did not pay the said charges and as such the respondent continued to detain the motor vehicle. In the respondent's view, their actions and subsequent detention was well within the law and being sanctioned by the law, their actions and detention of the motor vehicle cannot be said to be unlawful or illegal deprivation as from 21<sup>st</sup> October 2023 up to the date of release.
85. On perusal of the record, it is evident that the respondent's officers broke into the petitioner's motor vehicle. The facts are supported by the respondent's witnesses particularly Police Sergeant Humphrey Kaguki and PC Festus Wachira who indicated that they found the suit motor vehicle and broke the right window to gain entry. Police Sergeant Humphrey Kaguki further provided that they found the turn boy sleeping but he did not have the ignition key. The officers then hotwired the vehicle and drove it to Juja weighbridge where they weighed the suit motor vehicle. On further perusal of the witness statement by the police sergeant, I have noted that he indicated that on arrival at Total Energies Petrol Station, he found that the Juja team had already removed the number plates of the suit motor vehicle but they still broke into the suit motor vehicle and drove it to Juja Weighbridge.



86. Furthermore, from the replying affidavit by the respondent, it is silent on how the respondent managed to get the suit motor vehicle to the weigh bridge for weight confirmation.

87. I have further perused Section 15 of the EACVLCA which the respondent relies on to justify why it entered the petitioner's vehicle and the said provision provides:-

An authorised officer shall have the power to-

- a. Require the driver of a vehicle to stop the vehicle for the purposes of weighing and inspecting the vehicle;
- b. In accordance with relevant laws, enter the vehicle and inspect any record relating to any load carried in or on the vehicle;

88. It is very clear from Section 15(1)(b) of the Act that entry and inspection of a motor vehicle is to be carried out in accordance with the law. The respondent is surely attempted to mislead the court by staling that the provisions of the EACVLCA overrides any other laws in the Republic of Kenya. According to the hierarchy of laws applicable in the Republic it is evident that *the Constitution* is the supreme law of the land followed by statutory laws and international laws. It is therefore, not correct to say that the EACVCA supersedes *the Constitution* or the statutory laws within the Republic. Article 24 of *the Constitution* on limitation of rights was relied on by the respondent. However, I find it not applicable in this case.

89. That notwithstanding, Section 15 of the EACVLCA does not allow the authorized officers of the respondent to break into private property of an individual. The respondent, like any other institution is bound by the law to respect private property unless there is resistance or non-compliance by the owner. The respondent said that its officers found a loader sleeping inside the vehicle although it was not explained exactly where in the vehicle he was lying. Was it the rear where the sand load was? If this statement by the respondent's officers was true, the loader would have given them the phone of driver to raise him and call him to the scene to come and open the vehicle drive it following the officers to the way bridge. The respondent went ahead and broke into the vehicle damaging the window as well as other parts by hot wiring. The respondent's officers were said to have removed the number plates at the time Sgt. Kagumbi and his colleague arrived.

90. The powers of an authorised officer under the Act include:-

Section 15

- (a) to require the driver of a vehicle to stop the vehicle for purposes of weighing and inspecting the vehicle;
- (b) .....
- (c) .....
- (d) .....
- (e) .....
- (f) .....
- (g) .....
- (h) .....



- (i) .....
- (j) to cause a vehicle to be driven to a designated location if the driver is incapable or unwilling to comply with instruction of the officer.

91. It is not clear what transpired at the place on the highway, if at all, where the authorised officer noticed the vehicle was overloaded. The respondent did not give the name of the place or even explain what happened at the place of detention of the overloading or even describe the event that may have led the driver to go to Ruiru Total Energies Service Station. The question is whether the driver was stopped and instructed to drive his vehicle to the weigh bridge and whether he was unwilling to do so. The respondent's case is centred around the place the vehicle was found parked.
92. The respondent argued that the law does not require its authorised officers to obtain a search warrant to access a vehicle but it was not shown that an exemption law exist. Although such a legal requirement is not contained in the EACVLCA, article 31 of *the Constitution* protects property of an individual from arbitrary search. The petitioner is entitled to enjoyment of the said right which cannot be limited as argued by the respondent. Article 17 of the International Convention on Civil and Political Rights (ICCPR) seeks to guard against arbitrary search or other infringement of the right of privacy. It provides: -
- No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation.
- Article 31 of *the Constitution* expressly provides for protection of privacy as regard one's "person, home, or property" search.
93. The respondent through his officers is obligated by *the Constitution* and other laws to protect the rights of the people they deal with in the course of their work, even where one is suspected of committing an offence. As for the petitioner's driver, the respondent has not adduced any evidence to the effect that he was unwilling or incapable of driving the vehicle to the weigh bridge for confirmation of the weight.
94. In my considered view, act of removing the number plate of the vehicle was sufficient to mobilise it. The respondent had sufficient security as shown by the record to what it took to prevent any act of off loading the weight at the scene. The act of breaking into the vehicle, hot wiring it thereby causing damage was a violation of the petitioner's constitutional rights of privacy of his property.
95. The petitioner further argued that its rights under Article 40(1) of *the Constitution* were infringed. There is uncontroverted evidence on record by way of a log book that the petitioner is the registered owner of motor vehicle registration number KDE 210Q and that on 21/12/2023 the said motor vehicle was detained in respect of overloading fees at the sum of Kshs. 1,077,612.145/-.
96. On perusal of the record, it is noted that the respondent weighed the motor vehicle at Juja Weighbridge and found it to be overloaded by 9,510 kilograms on the gross vehicle weight having carried 27,510 kilograms which is in excess of the legally permissible limit of 18,000 kilograms on the gross vehicle weight. This fact has been confirmed by the weighbridge ticket produced by the respondent which the petitioner had not expressly disputed at the onset but did so in its Further Affidavit. Section 17(4) of the EACVLCA provides:-

Where the fact of overloading is disputed by the transporter, the authorized officer weighing the vehicle shall indicate such dispute in the weighing report and a copy of the disputed report shall be issued to the transporter who may-



- a. Pay the requisite overloading fees on a without prejudice basis to ensure the release of the vehicle, make such necessary adjustment on the load as may be directed by the authorized officer and lodge an appeal against the fees as provided in the regulations made under this Act; or
- b. Appeal against the fees, using regulations made under this Act, during which period the vehicle will remain detained at such designated place at the cost of the transporter.

97. From the foregoing provisions, even if the petitioner was challenging the overloading fees, he ought to have paid the fees on a without prejudice basis for the release of the motor vehicle and then lodge an appeal against the fees as provided for in the regulations. It is trite law that where an alternative procedure has been provided for in statute, the same be strictly adhered to before the jurisdiction of the court can be invoked. Thus in *Speaker of National Assembly vs Karume* [1992] KLR 21 it was held that:-

Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

98. Consequently, since the petitioner did not contest that its motor vehicle was overloaded at the onset, there was justifiable cause for the detainment of the said motor vehicle on 21/12/2023. It is not in doubt that the conduct of the respondent in the detainment of the vehicle were illegal. However, the fact that is not disputed is that the motor vehicle was overloaded called upon the petitioner to take the necessary action as provided by the law. Section 17(6) of the EACVLC provides for detainment of an overloaded vehicle without a charge by the National Roads Authority for the period prescribed in the regional operation and procedures regulations and thereafter a fee as prescribed by the Authority or its agents who may be operating the parking lots where the vehicle is detained shall be charged for each extra day until proof of payment is produced. Thus, it is evident that the respondent had justifiable cause to detain the suit motor vehicle on account of it having been found overloaded. The petitioner is precluded from contesting the overloading fees in this forum as the Act has provided for a resolution mechanism in the event of contesting the fact of overloading. It is therefore my considered view that the petitioner has failed to prove that its rights under Article 40(1) of *the Constitution* was infringed.
99. The prayer for release of motor vehicle was spent on the strength of the orders of release granted on 24/01/2024.
100. In regard to the prayer for a permanent injunction to restrain the respondent prohibiting them from harassing, intimidating and denying use of the motor vehicle reg. No.KDE 210 Q. It is noted that no submissions were made on this prayer. The orders sought are for future events to which this court will not be in control of upon determining this petition. The respondent cannot be prevented from doing its job in the future in regard to the vehicle in question or any other in question or any other vehicle. For these reasons, I will not go into dealing with principles of granting a permanent injunction. As the applicant in my view would not be entitled to grant of the said prayer.
101. As for the claim of exemplary damages, I have considered the arguments of both parties as well as the law. Exemplary damages are awarded in cases where the actions of the defendant were oppressive and arbitrary as well as where the defendant's conduct was calculated to procure him some benefit at the expenses of the plaintiff.



In my considered view, the respondent's actions though unconstitutional to some extent do not pass the test of an award for exemplary damages. This prayer is therefore not successful.

**Whether the petitioner is entitled to the orders sought.**

102. Article 23 (3) of *the Constitution* provides:-

- a. In any proceedings brought under Article 22, a court may grant appropriate relief including-
- b. A declaration of rights;
- c. An injunction;
- d. A conservatory order;
- e. A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- f. An order for compensation; and
- g. An order of judicial review.

The petitioner has made its case that its rights under Article 31 of *the Constitution* were violated and as such it is entitled to the declaration of rights in respect of prayers 1, 3 and 4.

103. As regards damages, it is well settled that an award of compensation is an appropriate and effective remedy for redress of an established infringement of a fundamental right under *the constitution*.

104. On the question of damages, the Court of Appeal in the case of *Peter Ndegwa Kiai t/a Pema Wines & Spirits vs Attorney General & 2 Others (Civil Appeal 243 of 2017)* [2021] KECA 328 (KLR) (17 December 2021) (Judgment) stated:-

.....that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.

105. Having found that the actions of the respondent violated the petitioner's constitutional rights to privacy, the court hereby find that the petitioner is entitled to general damages which I hereby assess at KSh.500,000/=.

106. The petitioner has further sought for general damages for malicious damage to its motor vehicle, loss of business, lost business opportunities and loss of profit for the period the suit motor vehicle was impounded.

107. As for the damages on the vehicle which was qualified in a report, this court will not deal with the said prayer in that it would be exceeding its mandate as a Constitutional court. The petitioner stated that he reported the case of the malicious damage to the police at Ruiru which could still be under investigation. Being a material damage claim, the petitioner is at liberty to approach a civil court for a remedy.

108. On the award of loss of business, the Court of Appeal in *Nyamogo & Nyamogo Advocates vs Barclays Bank of Kenya CA 69 of 2005* held that loss of business must be specifically pleaded and proved. Evidently, the award of loss of business is a special damage claim in nature and therefore it must be specifically pleaded and proven. The petitioner in this case has sought the said award however it has not specifically pleaded by quantifying the loss of business at a certain amount and more so the petitioner



has not produced any evidence to show how it lost business and to what amount. Consequently, the petitioner has failed to prove that it is entitled to special damages of loss of business.

109. On the claim for loss of profits, the court in *Desert Commercial Shipping Limited & Another vs OCPD Changamwe Police & 2 Others* (Petition No. E071 of 2021) [2022] KEHC 14452 (KLR) (31 October 2022) (Judgment) provided that lost profits are damages for the loss of net income to a business and broadly speaking, reflect income from lost business activity, less expenses that would have been attributable to that activity.

110. The court further went ahead to state that:-

The court must consider whether there is evidence upon which a reasonable man might find for the plaintiff. The foregoing being the position, then one wonders how the petitioners expected to successfully mount a claim for breach of loss of profits in a constitutional petition which is prosecuted by affidavit evidence as opposed to a civil suit where they can do so by way of oral evidence. Loss of profits is essentially a matter of evidence. The question here is whether the petitioner attained this evidential threshold to establish the alleged loss.

111. In the instant case, the petitioner did not produce any evidence to support its claim for loss of profits. The petitioner simply pleaded the same and did not quantify the same or adduce evidence in support of the same.

### **Conclusion**

112. I am of the view that the petition dated 4<sup>th</sup> January 2024 is partly merited and grant the following orders: -

- a. A declaration that the acts of the respondent of 21/132/2023 of breaking, entering and damaging the petitioner's vehicle reg. No. KDE 210 Q in the absence of the petitioner or his representative were unconstitutional, illegal and a violation of the law.
- b. The petitioner is hereby awarded general damages for the violations at KSh.350,000/=.
- c. Due to the nature of the petition and its partial success each party will meet their own costs.

113. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 30<sup>TH</sup> DAY OF JULY 2024.**

**F. MUCHEMI**

**JUDGE**

