



**Mulandi v Kenya National Highways Authority (Petition
E010 of 2024) [2024] KEHC 16800 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 16800 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
PETITION E010 OF 2024**

NIO ADAGI, J

OCTOBER 31, 2024

**IN THE MATTER OF ARTICLES 2(1), 2(5), 3(1), 10,19, 20,
22(1), 23(3) & 24 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTIONAL
RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES
10,25,27,28,35, 40,43,46,47 AND 50 OF THE CONSTITUTION OF KENYA,2010**

AND

IN THE MATTER OF THE KENYA ROADS ACT, CAP 408 LAWS OF KENYA

AND

**IN THE MATTER OF THE KENYA ROADS (KENYA
NATIONAL HIGHWAY AUTHORITY) REGULATIONS,2013**

AND

IN THE MATTER OF THE TRAFFIC ACT, CAP 403 LAWS OF KENYA

BETWEEN

HARRISON MUNGE MULANDI PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY RESPONDENT

RULING

1. The Petitioner/Applicants' Notice of Motion application is dated 18th July 2024 and filed under Certificate of Urgency. It is premised on Articles 2(1), 2(5), 3(1), 10,19,20, 22(1), 23(3), 24, 25, 27, 28, 35, 40, 43, 46, 47 & 50 of *the Constitution* of Kenya, *Kenya Roads Act* Cap 408, The Kenya Roads



(Kenya National Highway Authority) Regulations, 2013 and the Traffic Act 403 of the Laws of Kenya. The application is supported by the affidavit sworn on the even date by the Petitioner/Applicant.

2. The Applicant herein prays to Court as follows:
 1. Spent;
 2. Spent;
 3. That this Honourable Court be pleased to issue a temporary Order of injunction restraining the Respondents, their servants, agents or any other person acting on their behalf, behest or direction from unlawfully, illegally or arbitrarily taking, keeping and holding the Petitioner's motor vehicle registration number KDH 471M pending the hearing and determination of the main Petition.
 4. That this Honourable Court do issue an order compelling the Respondent to unconditionally release the transporter's vehicle that has been unlawfully impounded pending the hearing and determination of this application
 5. That this Honourable Court do issue an order compelling the Respondent to unconditionally release the transporter's vehicle that has been unlawfully impounded pending the hearing and determination of this Petition.
 6. That costs of this application be provided for.
3. The application is further premised on the grounds on the face of the application. Among the grounds are that:-
 - a) The Respondent has detained the Petitioner's motor vehicle Registration Number KDH471M, a truck that is ordinarily used as the Petitioner's source of livelihood in a transportation business.
 - b) The Respondent has charged a colossal sum of Kshs.7,758,699 as a "fee" for 'overloading' in circumstances that are clearly illegal, an overstretch of the Respondent's supervisory role in breach of the Constitutional right to property without regard to statutory provisions applicable to the facts in question.
 - c) The Applicant's truck was acquired by way of a motor financing agreement and the bank is demanding for outstanding monthly premiums with the threat of execution against the Applicant.
 - d) The truck faces threat of sale by auction in the event the "fee" is not paid within 90 days yet the Applicant cannot afford the exorbitant amount
 - e) The truck was not overloaded as alleged by the Respondent and that it continues to waste due to continued stagnation in the deplorable conditions it has been kept by the Respondent. That the truck has been stripped off parts which are nowhere to be seen.
4. The application is opposed by the Replying Affidavit of Samson Kibet sworn on 27/8/2024. He deposes that he is working as a Road Superintendent in the Axle Load Control Department Directorate of maintenance and authorized and competent to swear the affidavit on behalf of the Respondent. He describes the Applicant's averments as falsehoods and states that the Respondent stands to suffer great prejudice should the orders sought be granted. He prays that the application be dismissed with costs.



5. I have considered the application, the supporting affidavit, the replying affidavit, and the rival submissions filed by Parties' counsel as well as the judicial decisions relied upon. In my view, most of the issues raised are matters that can best be determined at the full hearing. More significant is the fact that Samson Kibet was not at the scene and there is no affidavit by the truck driver or a person who was at the scene to controvert the account offered by the Applicant or in the Respondent's replying affidavit.
6. In the instant application, the Applicant seeks an injunction restraining the Respondents, their servants, agents or any other person acting on their behalf, behest or direction from unlawfully, illegally or arbitrarily taking, keeping and holding the Applicant's motor vehicle registration number KDH 471M pending the hearing and determination of the main Petition and for an order compelling the Respondent to unconditionally release the Applicant's subject motor vehicle.
7. It is not disputed that the Respondent has confiscated the Applicant's motor vehicle registration No. KDH 471M. The Applicant has been asked to pay a fee of USD 5,327.90 (Kshs.7,758,648.891) for overloading fee together with parking fees the total which stood at Kshs.8,779,434.891 as at 27/8/2024, which the Applicant disputes.
8. The Respondent contends that it acted in conformity with the relevant provisions of the East African Community Vehicle Load Control Act, 2016 and that the said Act provides a detailed procedure to be adhered to in instances where overload is detected and does not require that a party to be charged in court. To the contrary, the transporter is required to pay overload fee as prescribed under the Act and the Regulations thereto (Enforcement Regulations 2018) and proceed to correct the loading levels prior to exiting the weigh bridge. In accordance with Section 17 (6) of the East African Community Vehicle Load Control Act, 2016 an overloaded vehicle is to be detained without charge for 3 (three days) of detention and thereafter a parking fee of USD.50 is to accrue after the third day of detention of the vehicle.
9. Before I proceed further, my attention has been drawn to the contention at paragraph 29 (c) of the Replying Affidavit regarding the application and supporting affidavit being fatally defective for failing to comply with the mandatory requirements of the *Oaths and Statutory Declarations Act*, that the affidavit sworn in support of the same is sworn in Machakos but witnessed by a Commissioner of Oaths in Nairobi.
10. Order 19 Rule 7 of the Civil Procedure Rules provides that the court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect, inter alia misdescription of the parties or otherwise in the titles or other irregularity in the form thereof or any other technicality. In my view, an affidavit which is commissioned by a Commissioner of Oaths from another part of the Country other than where the deponent swore the affidavit does not mean that the averments in the affidavit are totally false or defective. I am aware that advocates are at liberty to practice law in all courts and tribunals across this Republic and its common practice that majority of them who are Commissioners of Oath carry with them their Commissioning Stamps and can commission an affidavit or other such documents from anywhere when called upon to do so in the presence of a deponent so long as they are qualified to practice as advocates and Commissioner for Oath at that particular time unless it is proved otherwise which is not the case in this matter.

Section 2 of the Oaths and Statutory Declaration Act provides that only practicing advocates may be appointed as commissioners for oaths by the Chief Justice. It provides:

“The Chief Justice may by commission signed by him, appoint persons being practicing advocates to be commissioners for oaths and may revoke any such appointment.”



The Act provides for the powers of Commissioners of Oaths. Section 4 provides:

“A commissioner for oaths may, by virtue of his commission in any part of Kenya administer any oath or take any affidavit for the purpose of any court or matter in Kenya for the purpose including any matter ecclesiastical and matters relating to the registration of any instrument whether under an Act or otherwise and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court.”

12. I will therefore disagree with the Respondent that the application and affidavit by the Applicant are defective as alleged.
13. At this juncture, it is necessary to briefly examine the legal principles governing applications in the nature of interlocutory injunction, the onus is on the Applicant to satisfy the court that it should grant an interlocutory injunction. An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles. The Court of Appeal in the case of *New Ocean Transport Limited & Another v Anwar Mohamed Bayusuf Limited* [2014] eKLR expounded on the different types of injunctions where it stated: -

“We appreciate that an injunction is an order of the Court directing a party to the proceedings to do something or refrain from doing a specified act. It is granted in cases in which monetary compensation does afford an inadequate remedy to an injured party. See Halsbury’s Laws of England 3rd edition, vol. 21 at pg. 343. Basically, there are 2 types of injunctions; positive and negative. The positive injunction would direct a party to do something whereas a negative one will restrain such a person from doing something. Among the positive injunctions will be mandatory injunction. This injunction orders some act to be done. Part of this family is the restorative injunction being sought by the applicants in the instant application. This type of injunction requires the person against whom it is directed to undo a wrongful act, to restore the status quo ante so that the damage does not continue. Then there is the mandatory injunction per se which compels a party to carry out some positive act to remedy a wrongful omission. As for negative injunctions, these would include prohibitory, perpetual, interlocutory and Quia Timet injunctions.” [Emphasis added]

14. From the foregoing, it is clear that the injunctive orders the Applicant is seeking in the application are both negative and positive. Negative to the extent that the Applicant is seeking to restrain the Respondents, their servants, agents or any other person acting on their behalf, behest or direction from unlawfully, illegally or arbitrarily taking, keeping and holding the Petitioner’s motor vehicle registration number KDH471M pending the hearing and determination of the main Petition and Positive because the Applicant is seeking to compel the Respondent to unconditionally release its truck that has been impounded pending the hearing and determination of this application.
15. In the celebrated case of *Giella v Cassman Brown & Co. Ltd* (1973) EA the conditions for grant of injunction were elaborated as follows:
 - a) The Applicant must first establish a prima facie case with a probability of success.
 - b) The Applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.
 - c) Where there is doubt on the above, then the balance of convenience should tilt in favour of the Applicant.



16. Similarly, in the case of *Nguraman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal held that:

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to; establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted, and ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially.”

17. The above principles were authoritatively captured in the famous Canadian case of *R.J.R Macdonald v Canada (Attorney General)* where the three part test of granting an injunction were established as follows:-

- i. Is there a serious issue to be tried;
- ii. Will the Applicant suffer irreparable harm if the injunction is not granted;
- iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits (often called “balance of convenience”)

18. The above principles have been cited with approval in numerous cases in Kenya to the extent that they have acquired the singular force of law. In *Mbuthia vs Jimba Credit Corporation Ltd*, Platt JA echoed the position adopted in the American *Cyanamid* case and stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the Parties cases.

19. A prima facie case in a civil application includes but not limited to genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.

20. The first question that begs for an answer is, does the Applicant have a prima facie case with a likelihood of success. The answer is yes. The action complained of is grounded on the provisions of Section 17 (6) of the East African Community Vehicle Load Control Act, 2016 which provide that:-

6.

- (1) A person shall not drive, use, cause or permit to be driven or used, any vehicle on the Regional Trunk Road Network while overloaded.
- (2) Any person who drives, uses, causes or permits to be driven or used, any vehicle on the Regional Trunk Road Network while overloaded shall be liable to pay overloading fees to the national roads authority or any institution designated by a Partner State where the overloading is detected, such overloading fees as may be from time to time be prescribed and published in the Gazette by the Council.
- (3) The liability under sub-section (2) shall be on the transporter.



- (4) A vehicle is said to be overloaded when used on any part of the Regional Trunk Road Network in contravention of the weight limits set out in the Second and Third Schedules.
- (6) The costs, charges or expenses charged under subsection (5) shall be certified by the national roads authority in a damage assessment report to be prepared within such period as may be prescribed in regulations made under this Act.
- (7) Where an assessment is disputed by the transporter, the assessment shall be subject to an independent expert determination by a qualified engineering expert appointed by the national professional body of engineers of the Partner States where the damage is caused on application by the transporter, and the cost of such independent expert assessment shall be borne by the transporter.
- (8) Where the determination under sub-section (7) is disputed by either party, the matter shall be referred to a national court for determination.
- (9) Where it is established while a journey is being undertaken, that a vehicle is carrying a load in excess of the legal load limit, the vehicle in question shall not continue with its journey unless the overloading fees is paid and the excess load is offloaded or redistributed and the vehicle upon being re-weighed conforms to the load limit.

21. My attention has been drawn to the provisions of Section 17 (4) (a) and (b) of the East African Community Vehicle Control Act (EACVC Act) which comes prior to the provisions under which the act complained of is brought in this matter. It 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 secure 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 for by 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.”

22. From the above provision the issuance of a copy of the disputed report upon the transporter is coached in mandatory terms. The fact of overloading is disputed by the Applicant/transporter herein. There is nothing to show that the Respondent’s authorized officer who weighed the subject vehicle complied with the above provision. In the Replying Affidavit at paragraph 25, it is confirmed that the Applicant was notified and advised to pay an overload fee of USD.5,327.90 (Kshs.7,758,648.891). In fact, what is annexed as “SK-05” is an overload fee invoice and not the disputed overload report. In addition, there is no proof that a copy of the overload report was served upon the Applicant. It is my considered view that the Applicant could only have paid the requisite overloading fees or appealed against it if he had properly been issued with a copy of the overload disputed fee report.

I therefore find that the Applicant has established a prima facie case with probability of success.

23. On whether the Applicant stands to suffer irreparable loss that cannot be adequately compensated through damages, the Applicant submits that the vehicle was acquired by way of a motor vehicle



financing agreement and the bank is demanding for outstanding monthly premiums with the threat of execution and repossession of the vehicle as a result of which the Applicant will lose the vehicle. In addition, the Applicant avers that the vehicle has been kept in deplorable conditions and that when he last saw the vehicle some parts had been stripped off and were nowhere to be seen and the conditions worsens by day due to continued stagnation of the motor vehicle and in the end it will be worthless. That the Applicant will be kept away from the ordinary use of the vehicle for his livelihood thus subjecting him to loss of livelihood and that the bank is on his neck for premiums in satisfaction of the loan finance agreement. The safety and security of the Applicant's hefty investment is not guaranteed. On this second principle, I too find that the Applicant has demonstrated that he stands to suffer irreparable loss that is incapable of being compensated by an award in damages if the interlocutory injunction order sought is not granted. On the other hand, the Respondent's claim against the Applicant is monetary in nature and can easily be compensated in damages.

23. Having found that the Applicant has satisfied the first and second conditions for grant of an injunction, it turns out that the balance of convenience tilts in favour of the Applicant.

24. The second question I am invited to answer is whether the Applicant is entitled to the mandatory injunction sought to compel the Respondent to unconditionally release its truck that it impounded. The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 of Halsbury's Laws of England 4th edition paragraph 948 which reads: -

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff... A mandatory injunction will be granted on an interlocutory application

25. In the case of Kenya Breweries Ltd vs Washington O. Okeyo, the Court of Appeal quoted with approval an English case of Locabail International Finance Ltd vs Agroexport & Others where it stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”

26. The principles of law arising from the above decisions is that a court considering an application for interlocutory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear and that the applicant has a good case with a likelihood of success. As stated above, the provision Section 17 (4) (a) of the East African Community Vehicle Load Control Act, 2016 on the issuance of a copy of the disputed report upon the transporter is couched in mandatory terms. The fact of overloading having been disputed by the Applicant/transporter herein and in the absence of anything to show that indeed the Respondent's authorized officer who weighed the subject vehicle complied with the above provision. In short, the facts before me satisfy the test for granting the mandatory injunction sought by the Applicant.

27. I conclude, therefore that there is merit in the application dated 18th July 2024. In the result:



- a. A temporary Order of injunction be and is hereby issued restraining the Respondents, their servants, agents or any other person acting on their behalf, behest or direction from unlawfully, illegally or arbitrarily taking, keeping and holding the Applicant's motor vehicle registration number KDH 471M pending the hearing and determination of the main Petition.
- b. An order be and is hereby issued compelling the Respondent to forthwith and unconditionally release the Applicant's motor vehicle registration number KDH 471M pending the hearing and determination of the main Petition.
- c. The costs of the application shall abide the outcome of the Petition.

28. It is so ordered.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST OCTOBER 2024

JUSTICE NOEL I. ADAGI

