



REPUBLIC OF KENYA



**Busia Sugar Industry Limited & 2 others v Kenya National Highways Authority & 2 others
(Constitutional Petition E009 of 2022) [2023] KEHC 278 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION E009 OF 2022**

JN KAMAU, J

JANUARY 24, 2023

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 20,
21, 22, 23, 24, 40 AND 259 (1) OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF DOCTRINE OF LEGITIMATE EXPECTATION

AND

IN THE MATTER OF FLAGRANT DISREGARD OF COURT ORDERS

BETWEEN

BUSIA SUGAR INDUSTRY LIMITED 1ST PETITIONER

MOSES ODUORY OBARA 2ND PETITIONER

ALI AHMED TAIB 3RD PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT

GOKHAN & MASTER SPACE JV LIMITED 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

Introduction

1. In their Notice of Motion dated and filed on May 10, 2022, the Petitioners herein sought orders that pending the hearing and determination of the present application, the court do issue a conservatory order staying the hearing of Mumias PMC Tr Case No E037 of 2022, Mumias PMC Tr Case No E038



of 2022, Eldoret CMC Tr Case No E434 of 2022, Eldoret CMC Tr Case No E435 of 2022, Nyando PMC Tr Case No E066 of 2022, Nyando PMC Tr Case No E067 of 2022 and Kikuyu PMC Tr Case No E126 of 2022.

2. The 2nd Petitioner swore an affidavit in support of the said application on May 10, 2022. He averred that he was a driver in the 1st Petitioner's employ and that on April 22, 2022, he was assigned to deliver construction chips to Busia Municipality using Motor Vehicle Registration Number KCF 439R pulling trailer Registration No ZF 5310 (hereinafter referred to as "the subject Motor Vehicle"). He added that upon arriving at the Busia Weighbridge, at around 8.00am, the subject Motor Vehicle was weighed and found to be carrying weight within the legal limits.
3. He stated that the Weighbridge staff demanded Kshs 2000/= from him which he refused to give out whereupon he was asked to park the said subject Motor Vehicle by the roadside on grounds that the truck had previous excess load tags dating from the year 2020-2021 at Kikuyu, Mumias, Eldoret/ Webuye and Ahero Weighbridges.
4. He further asserted that with the instructions of the 1st Petitioner, he requested to be arraigned in court that morning, which request was rejected and that he was told that he would be in court on April 25, 2022. He added that upon the 1st Petitioner's instructions advocates filed Busia CMC Misc Traffic Application No 45 of 2022 Busia Sugar Industry Limited v Republic and a Release order for the said subject Motor Vehicle was obtained.
5. He contended that despite service of the Release order upon the Busia Weighbridge's staff, they declined to release the said subject Motor Vehicle and instead served him and the 3rd Petitioner herein various notices to attend court in Mumias, Eldoret, Nyando and Naivasha. He stated that the notice to attend court at Naivasha on April 29, 2022, which was a public holiday, was deferred for plea taking at Kikuyu Law Courts on May 5, 2022.
6. He further stated that, he and the 3rd Petitioner were charged in Mumias PMC Tr Case No E037 of 2022, Mumias PMC Tr Case No E038 of 2022, Eldoret CMC Tr Case No E434 of 2022, Eldoret CMC Tr Case No E435 of 2022, Nyando PMC Tr Case No E066 of 2022, Nyando PMC Tr Case No E067 of 2022 and Kikuyu PMC Tr Case No E126 of 2022.
7. He further averred that he was released on cash bail of Kshs 560,000/=. He asserted that Nyando and Kikuyu Law Courts also issued the Petitioners with Release orders for the said subject Motor Vehicle, which plied Kenyan public roads and was insured between 2020 and 2022, but the 1st and 2nd Respondents had refused to comply.
8. It was his contention that preferring stale charges against the Petitioners across various courts in the Republic of Kenya in a span of one (1) week on charges relating to one (1) subject Motor Vehicle amounted to oppressive prejudice as against them. He added that that was accentuated with witch-hunt, malice and amounted to violation of human rights.
9. He pointed out that they had been subjected to great monetary expense and loss of profits at a minimum of Kshs 5,000,000/= as a result of the proceedings for which they held the 1st and 2nd Respondents accountable. He asserted that the charges against the 3rd Petitioner at Mumias and Nyando Law Courts amounted to double jeopardy which was clear of the malice complained of.
10. He was emphatic that the proceedings ought not proceed but be terminated because if they were left unchecked, they would provide room for the Respondents to corruptly destroy private enterprise.



11. In opposition to the said application, Eng Kennedy Ndugire, a Senior Engineer with the 1st Respondent, swore a Replying Affidavit on behalf of the 1st Respondent herein on June 20, 2022. The same was filed on June 22, 2022.
12. The 1st Respondent averred that the Petitioners' application was premature and bad in law and should be dismissed. It stated that the processes leading to the establishment of the weight of the vehicles, determining the overload and the issuance of a weighing ticket were carried out in conformity with the [Kenya Roads Act](#), 2007 and [Traffic Act](#) Cap 403 (Laws of Kenya) to ensure equality, equity and fairness in the discharge of its mandate.
13. It was categorical that in discharging its mandate as set out in Section 4(2) of the [Kenya Roads Act](#), it was obligated to construct, upgrade, rehabilitate and maintain national roads under its control, to control national roads and roads reserve and access to roadside developments, to implement road policies in relation to national roads and to ensure adherence to the rules and guidelines on axle load control prescribed under the [Traffic Act](#) and Regulations under the [Kenya Roads Act](#).
14. It contended that Section 4(2)(d) of the [Kenya Roads Act](#) empowered it to ensure adherence to the Rules and Guidelines on axle load control prescribed under the [Traffic Act](#) and under any Regulations under the [Kenya Roads Act](#).
15. It pointed out that in the performance of its mandate, on April 22, 2022, it captured the subject Motor Vehicle which had several virtual tags. It outlined various dates that the said subject Motor Vehicle was found to have overloaded along the Southern Bypass Kikuyu, Ahero-Kisumu road and Mayoni-Mumias road. It added that the said subject Motor Vehicle was inspected by one Evans Odera, a Police Officer at the Busia Weighbridge Station acting under Section 106 and 107 of the [Traffic Act](#) and was found to have been in contravention of Section 55 and 56 of the [Traffic Rules](#) in respect to loading and construction of vehicle.
16. It pointed out that this led to the filing Mumias PMC Tr Case No E037 of 2022, Mumias PMC Tr Case No E038 of 2022, Eldoret CMC Tr Case No E434 of 2022, Eldoret CMC Tr Case No E435 of 2022, Nyando PMC Tr Case No E066 of 2022, Nyando PMC Tr Case No E067 of 2022 and Kikuyu PMC Tr Case No E126 of 2022 by the Petitioners herein.
17. It further contended that it issued one Ali Ahmed Taib the 1st Petitioner a Notice to attend court and that the subject Motor Vehicle was detained at the Busia Weighbridge Station pending compliance. It added that the 2nd Petitioner was arraigned before the Mumias, Kikuyu and Nyando Law Courts to answer to the charges against them.
18. It pointed out that the Traffic (Amendment) Rules 2018 provided for the fines payable for contravening the provisions of Section 56 as read with Section 58 of the [Traffic Act](#). It asserted that the aforesaid laws required that in instances where an overload had been detected, the overloaded vehicle was detained and charged in court and such detained vehicle could only be released upon determination of the matter in court. It pointed out that the Petitioners were charged with the offence of permitting the use of a motor vehicle on a public road with a load greater than the one specified contrary to Section 56 as read with Section 58 of the [Traffic Act](#). It argued that this occurred on several dates which fact that had not been disputed.
19. It added that although the Petitioners had alleged contravention of the fundamental rights and freedoms as enshrined under Article 20, 21, 22, 24, 40 and 259(1) of the [Constitution](#) of Kenya, 2010 no particulars of the same had been provided in their pleadings and hence the same remained mere allegations.



20. It asserted that the practise the Petitioners were contending for detaining motor vehicles was under the Traffic Act and hence the Petitioners had no basis to seek the orders sought as there was no legitimate expectation demonstrated or created. It stated that the Petitioners were using this court to operate with impunity by carrying overloads that caused damage to expensive roads which were constructed and maintained from the public coffers.
21. It further averred that the loss occasioned on the Petitioners' business in loss of profits, general damages and punitive damages was self-inflicted due to the overloads. It urged the court to dismiss the said application.
22. On June 10, 2022, the 3rd Respondent filed Grounds of Opposition dated June 14, 2022. It contended that the application was wanting in form and strange to law and practice as the Petitioner was seeking to implement court orders by way of Petition. It added that the orders sought had already been issued to the Petitioners in Busia Misc Appl No 45 of 2022, Kikuyu Criminal Case No E 126 of 2022 and in Nyando Tr Case No E066 of 2022 and hence the Petition herein was merely intended to execute the orders contrary to the law and practice.
23. It was categorical that the application and the entire Petition did not meet the minimum laid down threshold for constitutional petitions and was hence a clear abuse of the court's special constitutional jurisdiction and court process. It further asserted that the application and the Petition ought to have been filed in the High Court close and within the jurisdiction where the subject vehicle was allegedly held which was within the jurisdiction of Busia High Court.
24. It was its contention that by dint of the mandatory provisions of Article 156 4(b) and Articles 157 of the Constitution, it had been enjoined without a proper cause of action rendering the application and the entire Petition incompetent.
25. The Petitioners' Written Submissions were dated June 22, 2022 and filed on June 23, 2022 while those of the 1st Respondent were dated June 28, 2022 and filed on July 25, 2022. The 2nd and 3rd Respondent did not file any Written Submissions. This Ruling is therefore based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

26. The Petitioners submitted that the 1st Respondent did not set out the prejudice it would suffer should the prayers they had sought were granted. They reiterated the averments in their Supporting Affidavit and argued that the most peculiar issue worthy of consideration was the fact that upon obtaining a release order for its vessel on April 22, 2022 and serving the Respondents who strangely declined service with the same, they opted thereafter to charge them three (3) days thereafter.
27. They contended that the manner in which they were to be charged clearly pre-supposed malice on the part of the Respondents considering that the 1st and the 2nd Petitioner were to appear in courts at Mumias, Eldoret, Nyando and Naivasha between April 25, 2022 and April 29, 2022.
28. They were emphatic that he who seeks equity must do equity and that the Respondents having disobeyed court orders, they were not worthy to be accorded a hearing for they held the court in contempt. They submitted that this court was empowered under Article 23(3)(c) of the Kenyan Constitution, 2010 to grant the conservatory and release orders they had prayed for.
29. It was that the 1st Respondent's assertions that it did not act ultra vires but fully complied with the provisions of the law within the powers conferred to it. It reiterated its mandate under the Kenya Roads Act and Traffic Act and argued that the detention of the said subject Motor Vehicle and the arrest of the



- driver was lawful and was within its mandate. It termed the Petitioners' allegations that the continued detention of the said subject Motor Vehicle was a violation of their right to own property guaranteed under Article 40 of the Constitution as misplaced.
30. It referred this court to Section 106 of the Traffic Act and submitted it was willing to release the said subject Motor Vehicle upon compliance of the Prohibition Order issued against the Petitioners and determination of the cases preferred against them in the various courts.
 31. It was categorical that it did not infringe any rights of the Petitioners as alleged but that the Petitioners habitually overloaded the subject Motor Vehicle which led to their rights being limited by its lawful actions. It added that there being no dispute as to the fact that there was an overload or the overload fees payable, the Petitioners were therefore not entitled to costs of the suit.
 32. In this regard, it relied on the case of Kiambu Civil Appeal No 5 of 2018 Abdi Ghafow Hilowle v the Director General, Kenya National Highways Authority (eKLR citation not given) where it was held that a party who showed scant respect of the rule of law could not expect the court to exercise its discretion in its favour.
 33. It asserted that the detained subject Motor Vehicle therefore ought not be released until the Petitioners abided by the law. It pointed out that in furtherance of its mandate, its officials often faced a near death experience in ensuring that Kenyans enjoyed that a quality resource. It relied on the case of Marius Wabome Gitonga v Kenya National Highways Authority [2019] eKLR where it was held that our roads and road users must be guarded and that it would be immoral to allow road users especially heavy transport vehicles to run rough and move about on the basis that a reason had to be given in writing before any action could be taken.
 34. In that respect, it relied on the case of Kenya Transport Association & 3 others v Attorney General & another [2012] eKLR where it was held that Rule 41(2) of the Traffic (Amendment) Rules, 2007 was consistent with Section 55(2) of the Traffic Act and that in the circumstances, the petitioners' rights had not been infringed by the aforesaid provisions.
 35. It reiterated that the Petitioners had approached the court with unclean hands, that they intended to use the court to operate with impunity and that they orchestrated the losses they allegedly sustained during the detention of the subject Motor Vehicle.
 36. It was its further contention that the Petitioner had not set out with precision the provisions of the Constitution of Kenya that had been infringed upon. In this regard, it placed reliance on the case of Anarita Karimi Njeru v R Miscellaneous Criminal Application No 4 of 1979 where it was held that if a person was seeking redress from the High Court on a matter which involved a reference to the Constitution, he was required to set out with a reasonable degree of precision the provisions that were said to have been infringed and the manner in which they were allegedly infringed upon. It also cited the case of Eldoret Grain Limited v Kenya National Highways Authority [2019] eKLR where the petition therein was unsuccessful as the petitioner therein failed to detail the rights that had been infringed.
 37. It also placed reliance on the case of Morris Mwavuo Ngonyo v Kenya National Highways Authority Constitutional Petition No 14 of 2015 (eKLR citation not given) where it was held that the most prudent decision was to detain or stop it at the weighbridge or nearest Police Station as this was intended to protect destruction of the road through overload.
 38. Notably, although this court took the view that the High Court Busia would have been best placed to hear and determine this matter as the subject Motor Vehicle was detained in its jurisdiction, any of the High Courts of Kisumu, Kakamega, Eldoret and Nairobi could have heard this dispute as the cases were filed in Mumias PMC Tr Case No E037 of 2022, Mumias PMC Tr Case No E038 of 2022,



Eldoret CMC Tr Case No E434 of 2022, Eldoret CMC Tr Case No E435 of 2022, Nyando PMC Tr Case No E066 of 2022, Nyando PMC Tr Case No E067 of 2022 and Kikuyu PMC Tr Case No E126 of 2022. Having filed the present Petition in this court, the Petitioners thus subjected themselves to its jurisdiction. This court was thus well seized of the dispute relating to the subject Motor Vehicle and could therefore make orders relating to that.

39. This court did not wish to analyse into the question of whether or not the Petitioners' had set out with the precision the alleged Articles of the *Constitution* that had been infringed and the manner in which their rights had been infringed or whether or not the 1st Respondent acted within its mandate when it detained the said subject Motor Vehicle as was submitted by 1st and 2nd Respondents as that would amount to delving into the merits of the Petition itself.
40. The question that concerned this court at this juncture was whether or not the Respondents would suffer any prejudice if the aforesaid cases were stayed pending the hearing and determination of the Petition herein. The Respondents did not demonstrate any prejudice they would suffer prejudice and/or that they were likely to suffer any prejudice if the aforesaid cases were stayed pending the determination of the Petition herein.
41. That notwithstanding, this court noted that when the matter came before the court on May 26, 2022, the 1st Respondent indicated that it was not opposed to the aforesaid cases being stayed pending the hearing and determination of the Petition herein.
42. Under Article 50(1) of the *Constitution* of Kenya, every party has a right to have his or her dispute heard and determined in a fair and public hearing before a court. Having considered the facts of this case, this court found and held that it was only be fair that the aforesaid cases be stayed as parties ventilated their issues in the main Petition. This would also avoid multiplicity of orders from subordinate courts where cases had been filed relating to the subject Motor Vehicle. Presently, the Petitioner had filed several matters seeking the unconditional release of the subject Motor Vehicle in different courts.
43. This court addressed the question of the release of the subject Motor Vehicle in its Ruling (2) that was delivered on January 24, 2023. Having said so, it noted that the prayer for the release of the subject Motor Vehicle in the present application had already been overtaken by events and/or was spent as the application had now been heard.
44. A perusal of the Petitioners' present application showed that they had only sought that a Release Order do issue that the subject Motor Vehicle be released unconditionally to them pending the hearing and determination of the present application (emphasis court). The said application did not seek a release order for the release of the subject Motor Vehicle pending the hearing and determination of the Petition, an issue this court would have heard and determined as a substantive issue in the Ruling herein.
45. It was also worthy of note that the Petitioners had sought that the court do grant orders to stay the aforesaid cases pending the hearing and determination of the application herein (emphasis court), which cases this court noted did not proceed while the present application was being heard and determined and that the court do grant orders to stay the aforesaid cases pending the hearing and determination of the Petition herein (emphasis court).

Disposition

46. For the foregoing reasons, the upshot of this court's decision was that the Petitioners' Notice of Motion Application dated and filed on May 10, 2022 was merited and the same be and is hereby allowed. The effect of this decision is that Mumias PMC Tr Case No E037 of 2022, Mumias PMC Tr Case No E038



of 2022, Eldoret CMC Tr Case No E434 of 2022, Eldoret CMC Tr Case No E435 of 2022, Nyando PMC Tr Case No E066 of 2022, Nyando PMC Tr Case No E067 of 2022 and Kikuyu PMC Tr Case No E126 of 2022 be and are hereby stayed pending the hearing and determination of the Petition herein. Each party will bear its own costs of the application.

47. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY 2023

J. KAMAU

JUDGE

