



John Kipkoech Maritim t/a Jolly Super Enterprises Limited v Kenya National Highways Authority & 7 others (Petition E006 of 2021) [2022] KEHC 3366 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEHC 3366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
PETITION E006 OF 2021**

RPV WENDOH, J

MAY 26, 2022

IN THE MATTER OF ARTICLES: 2,3,19,20,21, 22 (1), (3), 25, 27 (1), AND (2), 28, 29 (A), (B), (D) AND (F), 31 (1), 40 (1), (2) AND (3), 47, 48, 159 (1), (2), (A), (B), AND (E) & 165 (3) (A) (B) OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF : CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 20, 21, 22(1), (3),25, 27(1) AND (2), 28, 29 (A), (B), (D) AND (F), 31 (B), 39 (1), 40 (1), (2) AND (3), 47, 48 OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE CONSTITUTION

AND

**IN THE MATTER OF VIOLATION OF THE RIGHT TO PROPERTY,
DIGNITY AND PROTECTION OF FREEDOM OF SECURITY OF PERSON**

AND

**IN THE MATTER OF THAT VEHICLE REGISTRATION
NUMBER KCY 266N MITSUBISHI FUSO TRUCK**

BETWEEN

**JOHN KIPKOECH MARITIM T/A JOLLY SUPER ENTERPRISES
LIMITED PETITIONER**

AND

**KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT
INSPECTOR GENERAL OF POLICE 2ND RESPONDENT
HEAD OF TRAFFIC POLICE DEPARTMENT 3RD RESPONDENT**



OFFICE COMMANDING STATION, RONGO WEIGHBRIDGE 4TH
RESPONDENT

CABINET SECRETARY, MINISTER OF INTERIOR AND CO-ORDINATION OF
NATIONAL GOVERNMENT 5TH RESPONDENT

MINISTRY OF TRANSPORT AND INFRASTRUCTURE 6TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 7TH RESPONDENT

ATTORNEY GENERAL 8TH RESPONDENT

JUDGMENT

1. The petitioner John Kipkoech Maritim T/A Jolly Super Enterprises Limited filed a petition dated 5/8/2021. The claim revolves around motor vehicle registration number KCY 266N Mitsubishi Fuso Lorry. The petitioner claims violation of his fundamental rights and freedoms collectively by the respondents herein and sought the following reliefs:-
 - i. A declaration that the actions of the 1st, 2nd, 3rd, 4th, 5th and 6th respondents are illegal, an abuse of the criminal justice, unfair and a violation of the petitioner's constitutional rights.
 - ii. A declaration that the actions of the 1st, 2nd, 3rd, 4th, 5th and 6th respondents of detaining motor vehicle registration no. KCY 266N Mitsubishi Fuso Lorry have outrightly violated the rights of the petitioner under Articles 20, 21, 22, (1), 23 (1), (3), 25, 27 (1), AND (2), 28, 29, (a), (b), (d), and (f), 31 (b), 39 (1), 40 (1), (2), and (3), 47, 48 of *the Constitution*.
 - iii. An order directing the 4th respondent to release the said motor vehicle registration no. KCY 266N Mitsubishi Fuso Lorry belonging to the petitioner.
 - iv. A declaration that the actions of the 4th respondent are in breach of Chapter 6 of *the Constitution* hence unfair to hold public office anywhere in Kenya.
 - v. A declaration that the 7th and 8th respondents have abdicated their constitution and legal roles and thereby occasioned undue infringements of the petitioner's rights.
 - vi. Damages for loss of user.
 - vii. General damages.
 - viii. Petitioner do pay the costs of the petition.
2. The petitioners' case is contained in their petition dated 5/8/2021, the supporting affidavit sworn by the petitioner dated evenly and a further supporting affidavit dated 23/8/2021.
3. The petitioner avers that he is a director of Jolly Super Enterprises Limited and the registered owner of motor vehicle registration number KCY 266N a Mitsubishi Fuso Lorry ('suit motor vehicle'); that on or about 23/7/2021 the suit motor vehicle was in use in its ordinary course of business along the Rongo - Kisii road when it was ordered to be removed from the road and detained at Rongo Police Station by the respondent's agent namely Cpl. Charles Chacha on allegations of overloading; that the motor vehicle has been illegally since then detained and to date nobody has been charged with any offence in court; that the actions of the 4th respondent in detaining the motor vehicle, under the directions of the 1st and 3rd respondent is a violation of his constitution rights to quiet, peaceful and unrestricted use of



- his property; that the respondents in their various capacities failed to discharge their duties properly thus leading to miscarriage of justice and a violation of his rights.
4. Further, the petitioner particularized the violation of his rights by the 1st - 6th respondents and urged this court to ensure that his constitutional rights are protected by allowing his petition.
 5. Pursuant to a ruling of this court dated 11/11/2021, the 1st respondent weighed and released the petitioner's suit motor vehicle and released the same to him. In his supplementary affidavit, the petitioner annexed and marked as "JKM-1" a copy of certificate of compliance issued by the 1st respondent on 16/11/2021.
 6. The 1st respondent entered filed a reply to the petition dated 20/8/2021.
 7. While denying the claim of the petitioner, the 1st respondent contended that it is a State Corporation established pursuant to Section 3 of the Roads Act; that under various provisions of the law in the Traffic Act and East Africa Community Vehicle Load Control Act, it is tasked with the responsibility to manage, develop, rehabilitate, and maintain national roads. The 1st respondent admitted that on 23/7/2021, the suit motor vehicle which was loaded with sand, was impounded at the Rongo Static Weighbridge with an overload of 2,660Kgs; that the act of overloading was in contravention of Section 5 of the East Africa Community Vehicle Load Control Act and Section 6 of the Act, that stipulates payment of fees where overloading is detected; that pursuant to the foregoing, the suit motor vehicle was issued with Weighbridge Ticket No. KR021021464/1 and Serial No. KENHA/WBT271579 and required to pay the overload fees; that the suit motor vehicle was removed from the road pending the offloading of excess/redistribution of the load and payment of the prescribed fees and issued with a prohibition order on account of the said overload and was removed from the road pending the payment of the prescribed fees as per the provisions in Sections 6 (9) and 17 (2) of the East Africa Community Vehicle Load Control Act.
 8. Further to the foregoing, the 1st respondent stated that Sections 17 (3) and 17 (4) of the East African Community Vehicle Load Control Act makes provision for where there is an overload and the fee is not disputed and the procedure where the overload is disputed respectively, which neither have been disputed to date; that the penalties for overloading is a creature of statute and the 1st respondent is mandated to provide for payments of overloading fees at weighing stations or such other designated locations.
 9. In asking this court to dismiss the petition with costs, the 1st respondent averred that the petitioner has not demonstrated how the 1st respondent infringed his constitutional rights and therefore is not entitled to the protection of the same as sought in the petition; that the whole petition is misconceived; that the petitioner merely brought this petition to avoid payment of the fees and no evidence has been placed before this court to demonstrate the 1st respondent's actions were contrary to the law.
 10. The 1st respondent's replying affidavit sworn by its contracted Cluster Manager the Busia - Rongo Weighbridge 21/6/2021, reiterated the averments made in the 1st respondent's response to the petition save they annexed exhibit marked "WSWT-1" being the copy of the weighbridge ticket and prohibition order.
 11. The 2nd - 8th respondents did not enter appearance nor did they file any responses despite service.
 12. The petitioner filed submissions dated 8/2/2022. He submitted that by the actions of the officials of the respondents, his rights under Articles 40, 47 and 50 of the Constitution were violated; that the petitioner's vehicle was held in the 1st respondent's backyard for more than 24 hours without any charges; that by these actions, his rights under Article 40 of the Constitution of quiet and peaceful



possession of property was infringed; that the order to remove the suit motor vehicle from the road and the payment of the over load fees was made without affording the petitioner a chance to be heard contrary to Articles 24 and 50 of *the Constitution*; that on 24/7/2021, the petitioner visited the Rongo Weighbridge and was told that if he failed to pay the fees, then he would be summoned to court to answer the charges which summons he never received prompting him to file the instant petition.

13. It was further submitted that the detention of the petitioner's vehicle for close to four (4) months unreasonably, restricted his right to use and enjoyment of the property as enshrined under Article 40 (2) of *the Constitution*; that the 14 tonne lorry would bring in an average of Kshs. 10,000/= per day. The petitioner asked this court to invoke its jurisdiction under Article 23 of *the Constitution* and award damages for loss of user of the suit motor vehicle.
14. The 1st respondent filed its submissions dated 14/2/2022 and submitted on five (5) issues for determination. The first issue is which law is applicable in the instant case. The 1st respondent submitted that it is the East African Community Vehicle Load Control Act (EACVLC) which is operational in Kenya by virtue of Article 2 (6) of *the Constitution*; that the EACVLC is applicable on regional trunk road networks and in Kenya it includes those in the Sirari corridor and its links; that pursuant to the EACVLC Act, a transporter operating a gross vehicle of 3,500 kilograms or more is required to present such vehicle to be weighed at every weighing station situated along the regional trunk road networks; that the petitioner's subject motor vehicle was within the regional trunk road network and therefore the provisions of the EACVLC Act are applicable.
15. On whether the procedures under the EACVLC Act were followed, it was submitted that the Act prohibits overloading of a vehicle and there are penalties thereof. One of the penalties is being payment of the overloading fees. Pursuant to that, the petitioner was issued with a weighbridge ticket number which he was required to pay. Further, the 1st respondent stated that the petitioner did not follow any of the appropriate remedies required under the Act before approaching this court and this petition is therefore premature.
16. On whether it was necessary for the respondent to prefer charges against the petitioner or his driver, it was submitted that the EACVLC Act, there is no requirement to charge an errant party over and above payment of an overload fee where it is assessed and determined to be due. The effects of the provisions under the Act is to decriminalise overloading and dispense with the requirement for charging; that the Act grants the 1st respondent the mandate to detain the overloaded vehicle for a period of 60 days pending the payment of the prescribed overloaded fees with the option of exercising statutory power of sale if the overload fees remain unpaid. The petitioner herein did not challenge the fact that the vehicle was being driven on the road while overloaded, rather it challenged the fact that there were no criminal charges brought against the driver and that the vehicle was detained.
17. On whether the petitioner's Constitutional rights were violated, it was submitted that the petitioner did not challenge the overloaded vehicle as required under Section 17 of the Act. The decision to detain the vehicle is well anchored under the Act and the 1st respondent did not act ultra vires or breach the rules of natural justice on its part. On the damages for loss of user, the 1st respondent stated that there is no evidence which has been tendered before this court to show that the petitioner suffered loss of user of Kshs. 300,000/= per month. The loss of user was not particularized or proved. On the issue of costs, the 1st respondent asked this court to act judiciously.
18. I have carefully considered the petition as well as the response thereto, respective exhibits and submissions. On that account, it is this court's opinion that the issues for determination that arise therefrom are: -



- i. Whether this petition is premature.
 - ii. Whether the rights of the Petitioner (if any) have been violated.
 - iii. What are the appropriate and just orders this court can make in respect to the petition?
19. The petitioner's case is that his rights under Articles 40, 47 and 50 of *the Constitution* have been infringed by the respondents following the detention of his motor vehicle registration number KCY 266N Mitsubishi Fuso Lorry (suit motor vehicle) on 23/6/2021. Article 40 provides as follows:-
- (1) 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 any part of Kenya.
 - (2) Parliament shall not enact a law that permits the State or any person –
 - a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
- Article 47 provides as follows:-
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
20. The petitioner contend that the actions of the 1st respondent to detain the suit motor vehicle without preferring any charges against anyone after the lapse of 24 hours was unconstitutional. In addition, the decision contained in the order for the removal of the suit motor vehicle without according the petitioner a chance to be heard was a violation of his rights under Articles 24 and 50 of *the Constitution*.
21. It was further argued by the petitioner that he was condemned unheard in contravention to Article 47 of *the Constitution* and he was unreasonably denied the use of the suit motor vehicle for close to 4 months, thereby he suffered economic loss.
22. The petitioner is not disputing the alleged overload of 2,600Kgs of the suit motor vehicle. The dispute surrounds the manner in which the issue of the overloaded vehicle was handled.
23. On the first issue, Section 17(1) the EACVLC Act provides that when an authorized officer determines that a vehicle is carrying excess load, he shall issue a weighing report setting out the overload particulars and the fees payable. In the event there is a dispute of the same, Section 17(4) (a) and (b) provides:-
- (4) 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 a designated place at the cost of the transporter.

24. Undeniably, there is a dispute resolution mechanism under the Act. It is twofold. One, the transporter can opt to pay the requisite fee on a without prejudice basis to secure the release of the vehicle and lodge an appeal against the fees as provided for by the regulations under the Act. Secondly, the transporter can opt to appeal against the fees using the regulations under this Act during which period, the vehicle shall remain detained at a designated place at the cost of the transporter.
25. The procedure of the appeal process is supposed to be elaborated by the regulations of the EACVLC Act. The 1st respondent has not pointed out to this court the particular regulations which are envisaged under the Act. This court has taken the time to whether such regulations exist but there are none. This begs the question, if at all there is a dispute as the one by the petitioner, which is the proper laid down procedure to resolve the dispute? Certain questions come to mind for instance, is there a prescribed form which the dispute ought to be presented? Who is the officer (s) and are there certain qualifications for the officer (s) mandated to hear the dispute? Is there a particular dispute resolution tribunal gazetted to hear such disputes? After how long should the dispute be determined? If at all the complainant is dissatisfied with the decision, do they have a recourse?
26. In the absence of clear regulations under the EACVLC Act what should a transporter aggrieved by the decision to detain his vehicle on the allegation of excess load and payment of the fees do? Can there be a wrong without a remedy? I think not. This remains a serious loophole under the EACVLC Act. Perhaps, the 1st respondent can take up this challenge and move with speed to propose the prescribed regulations. It does not make legal sense for the 1st respondent to issue a prohibition order and at the same time make a determination on the same prohibition order. This is akin to the police arresting and charging an offender; and instead of presenting them to an impartial tribunal for the case to be heard and determined, the same police officers proceed to pass sentence against the offender. However, there can never be a vacuum in the law, where there is no specific legal remedy or avenue for redress, the High Court has unlimited jurisdiction in all matters and that is the route the petitioner should have taken. He had counsel on record.
27. The 1st respondent stated that there is no evidence that the petitioner challenged or contested the overload fees. I have considered the further supporting affidavit by the petitioner dated 23/8/2021. In his affidavit, he annexed 'JM1' a letter from his Counsel dated 26/7/2021 addressed to the Manager of the Rongo Weighbridge Station. The contents of the letter are an objection to the assessment of the overload fees amounting to USD 1608.30. In the absence of a proper procedure or forms which guide a transporter on how to present his objections on the fees, the letter in my view serves as a contention/objection of the overload fees. In absence of a clear procedure on lodging of complaints under the EACVLC Act, the petitioner, through should have paid the sum charged and moved this court for redress through Judicial Review or Petition as he has done. He was not withdraw redress.
28. Article 40 of *the Constitution* gives the citizens of this Republic to own property. The State or its agencies are prohibited from depriving one from the enjoyment of the right unless the deprivation is for public purpose or in the public interest and is carried out in accordance with *the Constitution* and any Act of Parliament.
29. Section 15 (1) (h) of the EACVLC Act provides that an authorised officer shall have powers to detain a motor vehicle until such a time when the overloading fees has been paid or proof thereof in the manner



- that has been prescribed. Section 17 also gives the authorized officer the powers to detain a motor vehicle in case there is overloading.
30. The suit motor vehicle was detained because of the alleged excess of 2,600Kgs. Since it is conceded by both parties that the EACVLC Act is the applicable law, it was proper for the officer to detain and inspect the suit motor vehicle on suspicion of the excess overload. It is in the public interest that motor vehicles which carry excess loads be subjected to payment of the fees charged. Public roads are constructed using taxpayers money. All citizens have a right to enjoy the use of the same roads without inconvenience from other road users who destroy the roads by overloading their vehicles and not following the relevant laws of the land.
 31. It is my finding that the detaining of the petitioner's motor vehicle was not in any way a violation of the petitioner's rights. There was a justifiable reason under the law to do so.
 34. The petitioner also contended that his rights to fair administrative review as contemplated under Article 47 of *the Constitution* were i.e. right to fair administrative action infringed. Similarly, his rights under Article 50 to fair hearing were infringed.
 35. As I have observed before, the action of the 1st respondent to detain the motor vehicle on suspicion of being overloaded was proper. The 1st respondent proceeded to issue a weighbridge ticket, prohibition order and fees and thereafter, on 26/7/2021 the petitioner through his Counsel Mr. Onesmus Langat challenged the overload fee of USD 1608.30. As earlier noted, there being no specific avenue for lodging complaints, the High Court was available as a court with unlimited jurisdiction.
 36. From the annexures produced by both parties, there is no specific one which shows the fees that was required to be paid to the 1st respondent. Even in the main petition, the petitioner did not plead the fee that he was required to pay. In the supplementary affidavit dated 17/1/2022, the document annexed, shows that a certificate of compliance was issued to the petitioner after weighing the suit motor vehicle afresh. The compliance must be pursuant to this court's order vide the ruling read on 11/11/2021. It means that the petitioner has not yet paid the overload fees.
 37. Whether the petitioners rights were infringed due to the detention of the subject vehicle from 23/7/2021 to 16/11/2021; Under Section 17(4) of EALVLC Act, the petitioner had the option of paying the fees charged on without prejudice basis, to secure the release of his vehicle then lodge his appeal. The petitioner did not pay but later filed this petition in September 2021. He who seeks equity must do equity. The petitioner had not denied that he had overloaded his lorry. All that needed to be resolved was by how much did he overload and what was he supposed to pay. He did not mitigate his loss by paying the fee charged and filing objection. I believe Section 17 EACVLC Act was enacted to take care of such situations. So that pending appeals or awaiting objections to be resolved or to avoid such scenarios of congestions of detained lorries and for parties avoiding unnecessary loses, one would pay without prejudice and pursue their right of appeal/ objection. In my view, the applicant has only himself to blame for not mitigating his losses. If his objection was determined in his favour he would get a refund though it may have taken a long process, but it would be cheaper and less inconvenient. If he suffered any loss, I think that the petitioner brought this loss upon himself and he is not entitled to payment of damages.
 38. In the end, I find that this petition is without merit. It is hereby dismissed with each party bearing its own costs.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 26TH DAY OF MAY, 2022

R. WENDOH



JUDGE

Judgment delivered in the presence of

.....for the Petitioner.

.....for the 1st Respondent.

.....for the 2nd Respondent.

.....for the 3rd Respondent.

.....for the 4th Respondent.

.....for the 5th Respondent.

.....for the 6th Respondent.

.....for the 7th Respondent.

.....for the 8th Respondent.

Nyauke Court Assistant

