



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 199 OF 2019

**IN THE MATTER OF: THE NATIONAL AND SAFETY AUTHORITY
ACT 2012, THE TRAFFIC ACT, THE EAST AFRICAN COMMUNITY
VEHICLE LOAD CONTROL ACT 2016, THE KENYA ROADS (KENYA
NATIONAL HIGHWAYS AUTHORITY) THE REGULATIONS 2013 AND
KENYA ROAD ACT NO 2 OF 2017**

AND

**IN THE MATTER OF: VIOLATION OF ARTICLES 10,22,23,47 & 165
OF THE CONSTITUTION OF KENYA, 2010 BY THE RESPONDENT**

AND

**IN THE MATTER OF: DETENTION OF MOTOR VEHICLES
REGISTRATION NO KCK 031C BY KENYA NATIONAL HIGHWAY
AUTHORITY (KeNHA) AND THE DECISION THAT THE PETITIONER PAYS**

TO (KeNHA) KSHS 109,825/= PRIOR TO THE RELEASE OF THE SAID MOTOR VEHICLE

BETWEEN

CHANIA GENESIS LIMITED.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY (KeNHA).....RESPONDENT

AND

NATIONAL TRANSPORT & SAFETY AUTHORITY.....INTERESTED PARTY

JUDGMENT

1. The Petitioner is a company incorporated under the Companies Act CAP 486 of the Laws of Kenya and carrying out transport business within the country. The Respondent is a statutory body established under Section 3 of the Kenya Roads Act no 2 of 2007 and which is responsible for the management, development, rehabilitation and maintenance of national roads. The Interested Party is a statutory body established under the National Transport and Safety Authority Act 2012 whose functions include to plan, manage and regulate the road transport system in Kenya.

The Petitioner's Case

2. The Petitioner states that it is duly licensed by the interested party to carry out transportation business and has a valid transport licensing certificate issued by the interested party. That one of its buses is motor vehicle KCK 031C whose principal weight is 12,000.0 and its gross weight is 19,500.0. That the Petitioner had been issued with an inspection certificate No. G432151 over operation of the said bus and the same expired on 13th December 2019.

3. On 8/11/ 2019 the bus was carrying 32 passengers against the normal capacity of 48 passengers when it was stopped by the Respondent's personnel at Dongo Kundu weighbridge station and informed that the bus had excess load of 2,660kgs and where the Petitioners were ordered to pay Kshs 109,825/= at the risk of the bus being detained. The bus was detained by the Respondent which forced the passengers and the bus crew to spend the night at the weighbridge station. The petition before court is informed by the Respondent's actions and it is the Petitioner's case that their fundamental rights to be treated in a credible and accountable manner, and to enjoy a legal system as per Article 10 of the constitution, the right to enjoy fair administrative action as per Article 47 of the constitution, the right to natural justice as per Article 50 of the Constitution were infringed. It is the Petitioner's case that the Respondent acted in excess of the legal powers conferred to it by confiscating the Petitioner's property while citing sections 55,56,58,106 and 107 of the Traffic Act as read with section 7 of the East African Community Vehicle Load Control Act 2016. Further that the power to control and supervise passenger transport motor vehicles is placed on the Interested Party while the Respondent can only supervise and regulate cargo transport. The Petitioner prayed for payment of aggravated and exemplary damages by the Respondent at the tune of Kshs 30,000 per day until the vehicle is released.

4. The Petitioner prays for the following orders:

(a) A declaration that the directive made by the Respondent on 8/11/2019 with regard to the detention of motor vehicle registration No KCK 031C belonging to the Petitioner and the further order that the same will remain detained at the Respondents Dongo Kundu yard until the sum of Kshs 109,825/= is paid to the Respondent be declared to be an order that was made in contravention of natural justice rule and the said decision be quashed for all purposes through an order of certiorari and consequently the said motor vehicle Registration No KCK 031C be released to the Petitioner by the Respondent unconditionally.

(b) An order of prohibition to prohibit the Respondent from ever detaining any of the Petitioners motor vehicles registration Nos. KBU 135V, KBS 155D, KCB105A, KCH488N, KCU 150C, KBQ195C, KBM 165B, KBP 775E, KCB 015P, KBZ 035W, KCK 020F, KCS164Z, KCS096M, KBV 494Y, KCB832F, KCW 028V, KBJ 631E, KCB 291P, KBP 175A, KBQ 104Z, KCO 453B, KCO728X, KBR 200B, KBS 100D, KBW 700A, KCK 031C, KCT 136A, KBM 190B, KCM 625N, KCM 628N, KCR 091A, KCG 992S, KCP 824M, KCD 829Z, KCA 150Q, KBV 250A, KBA 139N, KCT 092T, KBN 040V, KBK 129J, KCR 860M, KCR 089A, KBN 440N and KCT 184A with a clear directive that should any of those motor vehicle violate the law the same be dealt with through the recognized legal system whereby the traffic police prosecute and a court of law determines guilt or otherwise.

(c) The Petitioner be awarded damages in accordance with paragraphs 15 and 16.

(d) Costs of the Petition.

(e) The honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

5. The petition was filed alongside a notice of motion dated 20/11/2019 under certificate of urgency and whose prayer reiterated the ones set out in the petition. The petition was further supported by an affidavit sworn by Fredrick Mwenda Nduruhu.

The Respondent's Case

6. The petition and motion were opposed by grounds of opposition dated 4/12/2019 as follows:

(a) That the decision to detain motor vehicle registration no KCK 031C is well anchored in law under Section 58 of the Traffic Act.

(b) The Respondent has not acted ultra vires or unlawfully without or in excess of its jurisdiction.

(c) The Respondent has exercised its statutory powers within the parameters of law.

(d) The Respondent has acted within sections 55,56 and 58 of the Traffic act, Rule 41 and the twelfth schedule of the traffic act and section 17 of the East African community vehicle load control act 2016.

(e) The Respondent maintains that the Petitioner has not demonstrated any abuse of the law on its part.

(f) The Respondent prays that the notice of motion dated 20th November 2019 be dismissed with costs.

7. The Respondent further filed a replying affidavit dated 7/9/2020 sworn by Michael Maingi Gachara where it was deponed that vehicle registration no KCK 031C was weighed on 8/11/2019 at Dongo Kundu weighbridge and found to have an overload of 2,660kgs and an axle overload of 2,000kgs. The bus was detained and the driver served with a prohibition order.

8. Mr. Gachara deponed that the OCS Dongo Kundu weighbridge informed the Office of the Director of Public Prosecutions of the detention of the motor vehicle requesting the court to allow the station to detain the motor vehicle until payment of the overload charges was made.

9. The Respondent avers that the inspectors in ascertaining compliance with required load capacities are guided by regulation 41 of Traffic Rules amendment under Legal Notice No 118 of 2018 and by section 55 and 56 of the Traffic Act; that when a motor vehicle exceeds the maximum legal weight, it is removed from the road and the driver is charged in a court of law where he has an opportunity to be heard. The Respondent avers that the order of Certiorari is only issued to prevent abuse of power once the decision of the court has been made but in this event no decision has been made, and further that an order of Prohibition can only be availed to prohibit administrative authorities from exceeding their power, in this event the Respondent feels they have not exceeded or abused their power. The Respondent states that the Petitioner has not proved any loss as there has been no breach of duty of care or breach of the rules of natural justice. The Respondent prayed for the petition to be dismissed.

The Hearing

10. On 5/12/ 2019 a consent was recorded between the parties herein with regards to the motion dated 20/11/2019 in the following terms;

a. Petitioner to deposit Kshs 109,825/=to remain in court and await the determination of the Petition.

b. In consideration Respondent will upon that deposit being made release to the Petitioner unconditionally M/V Reg. No KCK 031C. The application was marked as closed.

11. Directions were given over the petition on 10/9/2020 for the petition to be heard viva voce and for the parties to file and exchange affidavit evidence within 30 days.

12. **PW1 Joseph Ng'ang'a Ndung'u** testified that he was the Petitioner's manager. He relied on the statement made by one Fredrick Mwenda filed on 19/11/ 2020 and the list of documents filed on even date. PW1 testified that the motor vehicle Reg. No KCK 031C was detained by the Respondent for 34 days. That in a day they would make Kshs 36,712/= which was Kshs 1,248,208/= per month. He further stated that the company had a fleet of 44 buses and had been operational since 1989 including his bus which had been detained by the Respondent. On cross examination the witness confirmed that he was not present on the particular day when the vehicle was impounded. That the driver was issued with a ticket and a prohibition but was not presented in court. The witness further testified that the fine of Kshs 109,825/= was paid on 6th December 2019 because the Respondent had refused payment earlier. PW1 testified that the issues of the ticket and that of the prohibition order had not been resolved and were the reason the petition was in court.

13. **DW1 Michael Maingi Gachara** was the Respondent's duty manager at Dongo Kundu and was on duty on 8/11/ 2019. He adopted his statement dated 27/11/2020. On cross examination the witness confirmed that the vehicle was detained from 8/11/2019 and the driver was issued with a ticket and a prohibition order; that the vehicle was released on 6/12/2019. It was his evidence that vehicles are detained as per the East African Community Road Control Act and that they levied fees for offences; that detention occurs in the event that the fees charged is not paid; that the prohibition order required the vehicle to be removed from the road and for the offending load to be removed or redistributed; that the motor vehicle in dispute was overloaded with passengers and goods and the action taken by the Respondent was within the law.

Submissions

14. Parties filed submissions which I have carefully considered together with the petition. In my view, the following is the issue to be determined by this Court;

(i) Whether or not in detaining the Petitioner's motor vehicle the Respondent was in contravention of the rules of natural justice.

15. It is the Petitioner's case that the Respondent acted ultra vires the Constitution of Kenya 2010 in impounding its motor vehicle. That the Respondent is not vested with the judicial authority to resolve disputes. Further that the provisions of regulation 15(3) of the **Kenya Roads (Kenya National Highways Authority) Regulations 2013** operates contrary to Articles 159 and 50 of the Constitution. Therefore, the Respondent's act of detaining and impounding the motor vehicle was illegal, unprocedural and amounts to gross violations of the fundamental rights to property and dignity. Reliance was placed on the holding in **Margaret Miano v Kenya National Highways Authority HC Petition No 23 of 2015**. The Petitioner further urged the court to uphold the provisions of section 60 of the Evidence Act which provides that the court is vested with power to take judicial notice of matters of common knowledge. The same was in relation to the prayer for damages incurred and compensation.

16. The Respondent submitted that the motor vehicle was legally detained and in accordance with the provisions of Sections 55, 56 and 58 of the Traffic Act. Further that section 17(1) of the East African Community Vehicle Load Control Act 2016 allowed the Respondent's enforcement officers to enforce direct prescriptions of the statute before any determination is made by the court. That the Petitioner had not disputed being served with an order to remove the vehicle from the road, or the weight found on the vehicle or the method used for weighing the motor vehicle. Reliance was placed on **Blue Jay Investment v Kenya National Highways Authority Civil Misc. App No 122/2014** and in **Buzeki Enterprises Limited v Kenya National Highways Authority**.

17. Regulations 14 and 15 of **Kenya Roads (Kenya National Highways Authority) Regulations 2013** provide for notification of the overloading and payment of the overload fee, and procedures to control overload as follows:

i. "14. (l) Subject to regulation 13, the notification in the weighbridge report form shall form the basis for imposing fees where the vehicle is found to be overloaded in accordance with these Regulations.

- ii. (2) Upon issuance of the weighbridge report form, it shall be the duty of the driver to notify the registered owner of an overload offence and the registered owner shall be required to pay the overload fee.
- iii. (3) The registered owner of the motor vehicle pulling the trailer is in breach of regulation 10; the owner of the motor vehicle shall be liable for the overload offence and shall be required to pay overload fees.
- iv. (4) In order to secure payment of fees, an overloaded vehicle shall be detained free of charge by the Authority for the first three consecutive days, and subsequently, a fee of two thousand shillings shall be charged for each extra day until proof of payment is produced.
- v. (5) Subject to the provisions of this regulation detained vehicles shall be held under the owner's responsibility and payment of fees prescribed in Part I E of the Schedule shall be made either by cash or irrevocable bankers' cheque in United States dollars or its equivalent in Kenya Shillings.
- vi. 15. (1) Where a vehicle is overloaded or is in contravention of these Regulations, an authorized officer shall undertake overload control measures and enforce these regulations.
- vii. (2) Subject to sub-regulation (1), the driver shall follow all the instructions issued by an authorised officer so that road safety and overload control procedures can be adhered to.
- viii. (3) Where a vehicle is found to have bypassed or absconded from a weighbridge station, whether overloaded or not, the registered owner shall be liable to pay a bypassing or absconding fee of two thousand United States dollars or its equivalent in Kenya Shillings, and subject to the provisions of these Regulations if the vehicle is found to be overloaded, the overloading fee and charging procedures provided in these Regulations shall be instituted in addition to the absconding fee.
- ix. (4) Failure to adhere to the instructions of the Authority or the police shall constitute an offence, punishable by detention of the vehicle and cargo at the expense and risk of the registered owner.
- x. (5) If the fee provided in this regulation is not paid within ninety days from the date of imposition, the Authority shall issue a notice of sale by auction of the vehicle and the cargo.
- xi. (6) Subject to sub-regulation (5), before the cargo is disposed of, the Authority shall publish a notice in the Gazette and in two newspapers of national circulation within fourteen days after the motor vehicle or trailer has been impounded requiring the owner to claim for the goods failure to which the goods will be disposed off.
- xii. (7) The proceeds of any such sale shall cover the charges occasioned by sale and may include, the cost of the advertisement and removal of the vehicle or trailer while the remaining proceeds, if any shall be payable to the registered owner, or where the owner fails to claim within six months of the sale, the proceeds shall be deposited to the Authority.
- xiii. (8) For security reasons the Authority shall notify the nearest police station within twenty four hours concerning a vehicle detained at the weigh bridge station.”

18. In the matter before the court there is evidence that the motor vehicle had an overload of 2,660kgs and an axle overload of 2,000kgs. The bus was then detained and the driver served with a ticket and a prohibition order. The Respondent avers that the due process was followed in the weighing and detention of the motor vehicle. However, it has not been indicated anywhere that the Petitioner was given the opportunity to defend the overload allegations since the property belonged to them. The danger of not being informed of the charges against a party in the confiscation of their property by the Respondent is that the said property may after a certain period of time be sold by auction and or may accumulate the detention fee after three days. In the present case the motor vehicle was released upon this petition being filed in court and consent entered into by the parties over the said release. The release was on condition of a sum of Kshs 109,825/= being deposited in court. It is clear that the Petitioner's right to ownership of property was infringed by the Respondent's actions. The Petitioner was deprived of the use of his property without being accorded a hearing. The weighing ticket and prohibition order served upon the Petitioner's driver did not amount to explanation as to why the vehicle was being seized.

19. The right to a fair trial process is provided for under Article 50(2) of the Constitution in relation to the rights of an accused person, which includes the right to be informed of the charge with sufficient detail to answer it, the right to have adequate time and facilities to prepare a defence, and the right to a public trial before a court established under the Constitution.

20. The right to fair administrative action is now provided for under **Article 47 of the Constitution** 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.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(i) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(ii) Promote efficient administration.”

21. The provisions of Article 47 of the constitution are further expounded under Section 4(3) of the **Fair Administrative Action Act, 2015**, which provides as follows:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

prior and adequate notice of the nature and reasons for the proposed administrative action;

i. an opportunity to be heard and to make representations in that regard;

ii. notice of a right to a review or internal appeal against an administrative decision, where applicable;

iii. a statement of reasons pursuant to section 6;

iv. notice of the right to legal representation, where applicable;

v. Notice of the right to cross-examine or where applicable; or

vi. Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

22. The Petitioner has demonstrated to this court that the Respondent has violated its right to fair administrative action and to a fair hearing and has gone against the rules of natural justice by acting in excess of its power. **Article 25** expressly provides that certain rights may not be limited as follows:

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

i. freedom from torture and cruel, inhuman or degrading treatment or punishment;

ii. freedom from slavery or servitude;

iii. the right to a fair trial; and

iv. the right to an order of *habeas corpus*.”

23. This court associates itself with the wordings of Emukule J. in **Margaret Miano v Kenya National Highway Authority**, (**supra**) where the learned Judge held as follows:

“The judicial function under Articles 23 and 159 of the Constitution as delegated by the people of Kenya to the Judiciary and relevant tribunals is to interpret and declare what the law is. It is not, again with profound respect, and we take great exception to the suggestion by the Respondent’s Engineer in paragraphs 16, 17 and 18 of his Replying Affidavit, to protect and shield any litigant who is alleged to have violated axle load or other regulations by bypassing or absconding from a weighbridge. All that the litigant seeks in this case, is to establish the legitimacy of the fee collected at the Mtwapa and other Weighbridges in the country. The inquiry into that legitimacy is what is called due process...The Kenya National Highways Authority is however not any of the tribunals established under the Constitution for resolution of disputes. The provisions of Regulation 15(3) may have unwittingly and therefore unlawfully constituted an Authority with powers of a Kangaroo court, that is to say, an improperly constituted body, a tribunal before which a fair trial is impossible. The provisions of Regulation 15(3) may also be contrary to Article 159 of the Constitution by purporting to confer upon the Kenya National Highways Authority power to collect fee/fines without due process by donating to such fines the euphemism of a “fee”. The provision may therefore be inconsistent with, and be a violation of the right to fair trial guaranteed under Article 50 of the Constitution, and to that extent therefore null and void under Article 2(4) of the Constitution.”

24. The Petitioner has *inter alia* sought orders of certiorari and prohibition. The Court of Appeal held as follows in **Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge** Civil Appeal No. 266 of 1996 as regards the grant of the said orders:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person,

corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done... Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

25. I find and hold that the Respondent has violated Articles 47, 50, 159 and 25 of the constitution, and that the Respondent acted in excess of the powers vested upon them and in contravention of the law. I also find that the Petitioner has proved the petition on a balance of probabilities and is entitled to orders as indicated hereunder. However, a blanket prayer of prohibition as prayed in prayer No. b hereof is incapable of being granted, is ambiguous as it will be to some extent preventing the Respondent from carrying out its functions even at times when it is acting within the law. That prayer is therefore not merited.

26. What remains now is to issue remedies to address the losses incurred as a result of the aforesaid breaches and impurity by the Respondent. The vehicle was detained for 34 days, during which the Petitioner was deprived of income from its use. The evidence annexed by the Petitioner indicate varying figures on the net profit. The same are between Kshs 15,400/= and Kshs 44,650. In finding a balance between those figures the court will use the sum of Kshs 25,000 with a multiplicand of 34 for the days the said motor vehicle was in detention. As indicated by the Respondent, the court can only rely on credible documentary evidence in support of special damages. However, in business there is credible variation on daily income, and this Court is entitled to make an educated guess for credible business variation. I therefore assess damages of Kshs. 850,000/= which I award to the Petitioner on account of loss of income.

27. Other orders granted are as follows:

a. A declaration is hereby made that the directive made by the Respondent on 8/11/2019 with regard to the detention of motor vehicle registration no KCK 031C belonging to the Petitioner and the further order that the same will remain detained at the Respondent's Dongo Kundu yard until the sum of Kshs 109,825/= is paid to the Respondent was made in contravention of natural justice rule and the said decision is hereby quashed for all purposes through an order of *certiorari* and consequently the said sum of Kshs. 109,825/= which was deposited in Court shall be released to the Petitioner pursuant to these orders.

b. The Petitioner be and is hereby awarded the sum of Kshs 850,000/= as damages suffered from the loss of business from the said motor vehicle for 34 days at Kshs. 25,000/= per day.

c. Costs of the petition are hereby awarded to the Petitioner.

It is ordered accordingly.

DATED, SIGNED & DELIVERED AT MOMBASA THIS 29TH DAY OF JUNE, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Gikandi for Petitioner

No appearance for Respondent

Ms. Peris Court Assistant