



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

JUDICIAL REVIEW APPLICATION NO. 2 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO THE ORDER 53 OF THE CIVIL PROCEDURE RULES 2010 LAWS OF KENYA.

AND

IN THE MATTER OF LEAVE FOR THE ORDERS OF MANDAMUS PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES AND SECTION 8 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

BETWEEN

EXON INVESTMENT LIMITED.....APPLICANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

RULING

By a Notice of Motion application dated 3rd October 2020, the applicant seeks:-

- 1. An order of mandamus compelling the respondent to release Motor Vehicle Registration Number KCF 732M, ZF 2644 and KCF 740M now held at Webuye Weighbridge yard, the applicant further with being the registered owner.**
- 2. An order of mandamus restraining the respondent and its agents from detaining and or removing from the following motor vehicles from the road without prior notice KCF 733M, ZF 2645, KCF 742M, ZFU 2654, KBN 139X ZD 5711, KBP 139X ZD5711, KBP 224F ZE 2916, KBN 934M ZD 5416.**

The application expressed to be brought under the provisions of order 53 Rule (1) and (2) of the Civil Procedure Rules is supported by grounds on the face of the motion and a supporting affidavit sworn by ATEET JETHA, the applicant's managing Director annexed to the Motion.

Briefly, the applicant depones that it is the owner of a number of Motor trucks carrying on business of transportation across the East and Central Africa and their trucks are loaded according to government axle weight regulations.

The applicant depones that they have been in operation since 2011 February and that on 17th June 2020, the applicant's driver was apprehended at Webuye weighbridge accused of overloading on several occasions between July 2019 and May, 2020 and the truck cannot be released until overload fees of Kshs 2,000,000/= is paid.

The applicant depones that the respondent cannot backdate alleged charges and that the respondent has threatened to detain more of the applicant's motor vehicles.

Directions were given for the parties to file written submissions. The applicant filed theirs submitting that the alleged offences date back to January, 2019 and that no evidence has been given to them.

The application is not opposed hence the applicant's disposition is factually uncontroverted.

The law on judicial review is found in Order 53 of the Civil Procedure Rules. Rule 1 thereof deals with the requirement for leave of the court which was granted on 27th July, 2020.

Rule 2 thereof states;

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

The applicant complains that its Motor Vehicles have been detained at Webuye Weighbridge on allegations of being overloaded. The applicant states that the offences are alleged to have been committed between January, 2019 and May, 2020. The applicant states that the alleged contraventions of the Traffic Act had not been brought to its attention prior to the apprehension/detainment of the trucks.

The applicant complains that it has not been given an opportunity to explain itself contrary to the provisions of Article 50 of the Constitution.

The applicant has annexed to its affidavit a number of Logbooks which its states are about to be detained by the respondent on allegations of the offence mentioned above. The applicant alleges that the respondent is subjecting it to a dubious and an opaque process which is unlawful, unreasonable and procedurally unfair.

Article 50 of the constitution provides for fair hearing. It provides thus;

1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

2. Every accused person has the right to a fair trial, which includes the right—

a) to be presumed innocent until the contrary is proved;

b) to be informed of the charge, with sufficient detail to answer it;

c) (c) to have adequate time and facilities to prepare a defence;

The applicant's contention on the issue is that the respondent has violated its rights by condemning it to pay the fine of Kshs 2,000, 000/= without being accorded an opportunity to defend itself. That it has had no notice of the alleged offences and no one has been charged over the alleged offences.

The applicable law regarding offences of overloading along the Mombasa-Malaba Trunk Road is the East African Community Vehicle Load Control Act (EACVLCA) which came into force on the 1st October, 2016 vide Legal Notice No. EAC/94/2016 published on 18th November, 2016.

It is no doubt the truck was apprehended for over loading at Webuye weighbridge which is well within the Regional Trunk Road Network (RTRN). Section 3 of the Act states that the Act shall apply to the implementation of vehicle load control along the Regional Trunk Road Network set out in the First Schedule. The Act is thus applicable to the matter at hand.

The Act establishes an elaborate dispute resolution mechanism whenever one is found to have an over load at any weighbridge within the Regional Trunk Road Network. Section 17 provides;

(2) Where an authorized officer, while a journey is being undertaken, determines that a vehicle is carrying a load in excess of the legal load limit, the authorized officer shall in consultation with relevant implementing agencies, not allow the vehicle in question to continue its journey, unless the load is redistributed and the vehicle is, upon being reweighed, found to be within the legal load limit, or the vehicle is offloaded to lower its weight to the legal load limit and—

a. any amounts due under subsection (1) have been paid to the national roads authority or its duly appointed agent; or

b. a guarantee in the prescribed format is provided by the transporter that such amounts shall be paid.

(3) Where the fact of overloading is not disputed by the transporter, the transporter shall sign and acknowledge the weighing report in the prescribed manner and the transporter shall be liable for the overload fees which may be recovered as a summary debt by the national roads authority.

(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

such designated place at the cost of the transporter.

The Act therefore presupposes that before one moves court for reliefs relating to overloading, the appropriate procedure is to follow the laid down mechanism therein before approaching court. It is trite law that when a certain procedure is prescribed by law, that procedure must be exhausted first. This doctrine was propounded in the case of **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR** where the Court of Appeal held;

..... It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

In the instant case, the applicant contends that its truck was impounded and issued with a Prohibition Notice No. 14096. The same is annexed to the application. As it stands, the applicant has neither challenged the fact of overloading nor is there evidence that he admitted the fact pursuant to the provisions of Section 17 of the Act. He has not complied with the prohibition order. This position was reiterated in the case of **Timothy Fondo t/a Ruwa Cargo Contractors V Kenya National Highways Authority (2020) eKLR** where it was held;

It is clear that the Petitioner has not provided any evidence to demonstrate his attempt to comply with the prohibition order and he has also not provided any evidence to show that he had requested for re-weighing of the subject motor vehicle. The Petitioner always had an option: either to comply with the Prohibition Order or Appeal the order. This Petition is not an Appeal against the Prohibition Order. As long as the Prohibition Order is in place, the Petitioner is bound to comply. There is no demonstration that the Petitioner sought to pay the fine. What was the Respondent expected to do with the suit motor vehicle when the Petitioner has not made any attempt to claim the vehicle?

The applicant's contention that the driver has not been charged is incorrect since Section 17 (6) of the Act does not envisage one to be charged. The Act in fact decriminalizes overloading.

Having found that the applicant has not demonstrated that he has complied with the prohibitory order issued and this suit not being an appeal against the prohibitory order, there is no merit in the application which is hereby dismissed. Each party to bear its own costs.

DATED and SIGNED at BUNGOMA this 30th day July, 2021.

S N RIECHI

JUDGE