



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CONSTITUTIONAL PETITION NO. 11 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE NATIONAL TRANSPORT & SAFETY ACT NO. 33 OF 2012

AND

IN THE MATTER OF SECTIONS 55 AND 56 OF THE TRAFFIC ACT

BETWEEN

MARTIN NYONGESA BARASA T/A

BRIGHTSHINE CONTRACTORS.....PETITIONER

AND

THE TRAFFIC COMMANDANT.....1ST RESPONDENT

THE KENYA NATIONAL

HIGHWAYS AUTHORITY.....2ND RESPONDENT

OFFICER COMMANDING WEIGHBRIDGE

STATION WEBUYE..... 3RD RESPONDENT

JUDGEMENT

By his petition dated 4th December, 2019, the petitioner seeks;

a. A declaration to issue that the action by the officer of the National Transport and Safety Authority of Kenya National Highway Authority in removing the registration plates from the petitioner's truck was unconstitutional.

b. The respondents do pay the costs of these proceedings.

The petitioner avers that he is the owner a Truck Registration Number KCA 337R and carries on the business of building contractor and hire in Bungoma and its environs.

He avers that on the 1st December, 2019 while his truck was parked at Kanduyi on the Bungoma-Webuye Highway, officers acting on the respondent's instructions approached the petitioner's driver who was taking the truck for repairs and maintenance in readiness for inspection and demanded the driver to alight.

That upon alighting, one of the officers forcefully and without explanation removed the Registration Plates and took them away.

The petitioner avers that the respondent's actions are unconstitutional, capricious, arbitrary, pre-determined, injudicious, and contaminated

by and actuated by malice, self-interest and improper motive and violates the rules of natural justice.

The petitioner states that the respondent's actions infringe on his rights as espoused in Articles 10(1), 40(1) and (2)(a) and (b), 47(1) and (2), 50(1) and (2).

The 2nd respondent filed its response stating that they intercepted the petitioner's truck on the 1st December, 2019 when it was being driven towards Kanduyi on the Eldoret-Malaba Highway carrying wet sand and visibly overloaded.

When the driver was flagged to stop, he sped-off and the respondents gave a chase. When he lost the chase, he offloaded the sand beside the road and the volume of the load was determined scientifically where it was discovered that the truck had an overload of 8,000 Kgs. By this time the driver had run away abandoning the truck. The number plates were then removed and delivered to the Registrar of Motor Vehicles for keeping.

On the 29th March, 2020, the truck was found again along Bungoma-Mumias road without number plates and in contravention of the order given on 1/12/2019 whereupon the truck was towed to Bungoma Police Station and Miscellaneous Criminal Application Number 78 of 2020 preferred in Chief Magistrate's Court-Bungoma seeking to detain the truck pending compliance by the owner. The order was granted.

The respondent has also faulted the petitioner for rushing to court prematurely before exhausting the procedure contained in section 12 of the East African Community Vehicle Load Control Act, 2016.

The 2nd respondent also filed a preliminary objection dated 16th December 2020 on the ground that the court lacks jurisdiction to handle this matter and that the application and petition fail to comply with section 67 of the Kenya Roads Act, 2007.

By the orders of this court, the petition together with the preliminary objection were heard together by way of written submissions. Both parties filed their respective submissions.

On the Preliminary objection, Mr Wasilwa, learned counsel for the petitioner submits that the provisions of section 67 of the Kenya Roads Act cannot disentitle the petitioner access to the High Court where it is alleged that his fundamental rights have been violated.

He submits that this court has jurisdiction by virtue of articles 23(1), (3), 27 (4), 40(2) and 165 of the Constitution to entertain this matter as it involves violation of the petitioner's fundamental rights. The case of ***Felix Ochieng Omolo Vs Attorney General & Another (2018)eKLR*** has been cited.

On the petition, counsel submits that there was no justification whatsoever for the respondent to remove the registration plates and the subsequent impounding and parking of the petitioner's truck at Bungoma Police Station. Counsel relies on the authority in ***Nepro Capital Investments Limited Vs SGS(Kenya) Limited and Kenya National Highways Authority (Petition No 2/2017-Kericho)***.

The 2nd respondent on its part submits on the following issues;

1. ***Which law is applicable in the instant case relating to overload.***
2. ***Whether the East African Community Vehicle Load Control Act, 2016 requires that a party be charged in court.***
3. ***Whether the petitioner's application and affidavit in support of the petition meet the threshold in law.***

On the first issue, the respondent submits that since the suit truck was found in use along the Regional Trunk Road Network(RTRN), the applicable law is the East African Community Vehicle Load Control Act, 2016 (EACVLCA) as opposed to the Traffic Act Cap 403.

That the EACVLCA does not require the offender of overloading to be charged in court but only requires him or her to offload the excess weight and or redistribute the weight.

That the aforesaid Act is a special law applicable within the RTRN contained in the 1st schedule to the Act and therefore the fact that the petitioner was not charged cannot be a ground for the grant of the orders sought.

On this issue, counsel cites the decisions in; ***Office of the Director of Public Prosecution (ODPP) Vs Juma Chomomenyu Batuli (2020)eKLR*** and ***Timothy Fondo Ruwa t/a Ruwa Cargo Contractors Vs Kenya National Highways Authority (2020)eKLR***

On the 2nd issue, counsel submits that the EACVLCA decriminalized over loading thus a party need not be charged when found overloading along the RTRN. That once one is found to have overloaded, one is required to comply with the provisions of Section 17 of the Act.

Counsel submits that once a procedure is provided by law, the party has to exhaust such procedure before moving court. That in the instant case, the petitioner has not exhausted the remedies provided by the Act. The case of ***Geofrey Muthinja Kabiru & 2 Others Vs Samuel Munga Henry & 1756 Others (2015)eKLR***, ***Okiya Omtatah Okoiti Vs Commissioner General, Kenya Revenue Authority & 2 Others (2018)eKLR*** and ***R Vs National Environment Management Authority (2011)eKLR*** have been cited in proposition.

Determination.

After perusing the petition and the response thereto together with the parties' submissions, the issues to be determined are whether the East African Community Vehicle Load Control Act 2016 is applicable in the circumstance of this petition and if so, whether the petitioner has complied with the dispute resolution mechanisms outlined therein.

It is a fact that the petitioner's truck Registration Number KCA 337R was being driven along the Eldoret-Malaba road. The truck was loaded and upon being weighed scientifically, it was found to have excess weight of 8,000 Kilogrammes. The driver went away and the 2nd respondent's officers removed the registration plates and issued a Prohibition Order Number 14070.

The same truck was found on the 29th March, 2020 along the Mumias-Bungoma Road with an overload of 6897 Kgs. It did not have registration plates and a Prohibition Order was in force. Another prohibition order number 3931 was issued. The truck was towed to Bungoma Police Station pending compliance by the owner who has now moved this court by the instant petition.

The EACVLCA came into force on 1st October, 2016. Kenya is a member of the East African Community and the Act therefore applies. The statute is one of specific application. Its provisions are applicable within the Regional Trunk Road Network and supersedes national legislation thereon.

As per the 1st schedule, the road between Mombasa and Malaba is a Regional Trunk Road Network and the provisions of the Act therefore apply pursuant to the provisions of Section 3. Section 8(1) requires the transporter operating a vehicle of a gross vehicle weight of 3,500 kilogrammes or more to present such vehicle to be weighed at every weighing station that is situated along the Regional Trunk Road Network traversed by such vehicle or that is designated for this purpose by a national roads authority.

Clearly, the petitioner's truck was within the regional trunk road network and therefore the provisions of the East African Community Vehicle Load Control Act, 2016 are applicable to the instant petition.

Having found that the act is applicable, the next issue is whether the petitioner exhausted the dispute resolution mechanisms established therein.

Under 17 of the EACVLCA, when an authorized officer determines that a vehicle is carrying a load in excess of the legal load limit, he or she shall issue a weighing report setting out the overload particulars and the amount of overload fees payable. The officer shall not allow the journey to be continued unless the load is redistributed to comply with the 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.

Under sub section 3, 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 if the fact of overloading is not disputed.

If the fact is disputed however, the authorized officer shall indicate such dispute in the weighing report, and a copy of the disputed report shall be issued to the transporter who may—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.

In *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR* it was held;

The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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 the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution.

In this petition, there is no evidence that the petitioner disputed the fact of his truck being overloaded. There is no evidence that he has paid the requisite fees prescribed under the Act. The petitioner alleges that his truck has been detained and is denying him the enjoyment of his rights to property. That the act of removing the registration plates is unconstitutional.

Taking into consideration the petition herein and the 2nd respondent's response thereto, it is exquisitely clear that there are elaborate mechanisms which should be followed once one is found to have contravened the provisions of this Act. It is the duty of the petitioner to ensure that he has followed and exhausted the remedies therein before approaching the court for appropriate orders.

In the premises, this court finds that the petitioner has not exhausted the remedies under the East African Community Vehicle Load Control Act, 2016 and therefore the petition is prematurely before court. The petition is hereby dismissed with no orders to costs.

DATED AND SIGNED AT BUNGOMA THIS 30TH DAY JULY, 2021.

S N RIECHI

JUDGE