



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MALINDI  
CIVIL APPEAL NO. E035 OF 2021

**KENYA NATIONAL HIGHWAYS AUTHORITY....APPELLANT**

**VERSUS**

**GEOFFREY MUGA.....RESPONDENT**

(Being an appeal against the Ruling of the Senior Principal Magistrate's Court at Mariakani by Hon. N. C. Adalo (SRM) delivered 16<sup>th</sup> April, 2021)

**Coram: Hon. Justice R. Nyakundi**

**Ian Mudavadi advocate for the appellant**

**Kirui Kamwibua advocates for respondent**

**J U D G M E N T**

On 16.4.2021, the Learned trial Magistrate **Hon. N. C. Adalo** pronounced herself as follows based on the notice of motions dated 12.4.2021 and 14.4.2021 filed by the respective parties – Kenya National Highways Authority and Manager Mariakani Weighbridge.

- (a). That the respondent be and is hereby ordered to reweigh motor vehicle registration number KBC 749R, have any excess load removed and the motor vehicle be released to the appellant immediately forthwith upon payment of the requisite fees.**
- (b). That in the event that the assessment of the overloading fees is disputed, the assessment shall be subjected to independent expert determination, or if further disputed, to the national Court for determination pursuant to Section 6 (7) & (8) of the EACVLCA.**
- (c). That the Officer Commanding Station (OCS) Mariakani Weighbridge to comply with the orders of the Court.**

The appellant, Kenya National Highways Authority apparently was aggrieved with the orders of the Court and did challenge them by lodging an appeal based on the following grounds:

- (1). The Learned trial Magistrate erred in Law and in fact by failing to address the issue of jurisdiction at the earliest, which issue had been raised by the appellant by a Preliminary Objection dated 16<sup>th</sup> April, 2021.**
- (2). The Learned trial Magistrate erred in Law and in fact in making findings contrary to the provisions of the East African Community Vehicle Load Control Act 2016 with regard to overload vehicles.**
- (3). The Learned trial Magistrate erred in Law by failing to interpret the provisions of the East African Community Vehicle Load Control Act 2016 in a manner that gives effect to the intentions of the East African Community Partner States in controlling overload within the regional trunk road network.**
- (4). The Learned trial Magistrate erred in Law by failing to interpret the provisions of the East African Community Vehicle Load Control Act, 2016 giving rise to absurd results in the course of the implementation of the East African Community Vehicle Load Control Act, 2016.**

(5). The Learned Magistrate erred in Law and in fact by varying and/or reviewing her Order issued on 16<sup>th</sup> April, 2021 without a formal application being made to that effect.

(6). The Learned trial Magistrate erred in Law and in fact by varying the earlier Order issued on 16<sup>th</sup> April, 2021 and failed to appreciate the fact that the motor vehicle Registration Number KBC 749R had been weighed and the evidence (weights) preserved as it was demonstrated by the appellant in the Replying Affidavit of Kennedy Ndugire sworn on 15<sup>th</sup> April, 2021 and it was impracticable to reweigh the motor vehicle and issue fresh tickets on account that the motor vehicle was carrying wet sand which has since dried therefore reducing the weight of the vehicle.

(7). The Learned trial Magistrate erred in Law and in fact by ordering the motor vehicle to be released by the appellants without storage charges being levied contrary to the express provisions of the East African Community Vehicle Load Control Act, 2016.

Permission to serve the appeal as filed was granted for the arguments on the merits of the issues raised in the Memorandum by the appellant. The appeal was directed to be canvassed by way of written submissions. Learned Counsel for the appellant submitted and construed the various provisions of the East African Community Vehicle Load Control hereinafter referred as **EACVeLCA** which was the substantive source for the relief granted by the Learned trial Magistrate in her Ruling.

In addition ancillary and incidental to the statutory provisions, Learned Counsel cited and relied on the following principles in: **Office of the Director of Public Prosecution v Juma Chemomenyu Batuli {2020} eKLR, Benson Ruiyi Njane v Kenya Rural Roads Authority & 36 others {2016} eKLR, Mukhisa Biscuits v Western Distributors {1969} E.A. 969, Owners of Motor Vessel Lillian S' V Caltex Oil (Kenya) Limited {1989} eKLR, Simonash Investment Limited v Kenya National Highway Authority & 2 others {2019} eKLR.**

In the words of Learned Counsel going by the case this appeal does not turn on the facts of the case but aspects of jurisdiction in the making of the decision, by the Learned trial Magistrate. The appellant counsel submitted that in light of Section 15 (1) (a) (c) – (h) of **EACVeLCA**, it was inappropriate for the Learned trial Magistrate to grant the reliefs in respect of motor vehicle registration number KBC 749R on excess load and reweighing. That the respondent was to pay the new fees as assessment and the vehicle be released to the respondent forthwith without storage charges.

In the written submissions, the appellant also faulted the Learned trial Magistrate for altering aforementioned orders issued on 26.4.2021 which contradicted the orders issued in the Ruling dated 16.4.2021. That to the extent of altering the orders on the same subject matter, appellant counsel submitted, to the effect of the Court lacking the inherent jurisdiction to do so in the particular circumstances.

Further, appellant's counsel submitted that a jurisdictional error was committed by the Learned trial Magistrate in exempting the respondents from paying storage fees to the appellant in contradiction of **EACVeLCA**. It was further appellant's Counsel contention that the order by the Learned trial Magistrate to order for the release of the vehicle to the respondent forthwith without storage charges levied was in contrary to Section 13 (1) (2) and Section 17 (6) of **EACVeLCA**.

In appellant's Counsel submissions the above provisions correctly interpreted means that the trial Court lacked the requisite jurisdiction to adequately issue the orders which were in contravention of the Act. In addition appellant's Counsel argued and submitted that the trial Court lacked the jurisdiction to entertain the motion which gave rise to the impugned orders. According to appellant's Counsel that Section 67 of the Act sets the limitation period of (30) thirty days to be issued to the Director General by any aggrieved party before instituting a civil claim which does not fall within the scope of a Constitutional violation. However appellant Counsel submitted that in spite of the motions being simple civil claims, the respondent had failed to issue a notice of thirty days before instituting the suit before the Lower Court.

Again appellant's counsel submitted that in relation to the motions, these Sections appears to speak directly on prohibition of the Courts to hear the civil claim without first taking into account the condition precedent of thirty days notice by the claimant. In sum the appellant's Counsel prayed for the orders as premised in the appeal. Quite, apart from the appellant submissions, in the rejoinder made by the respondents it is clear that a different trajectory identified and in many respects disagreeing with the appellant discourse.

The respondent counsel contention was to the effect that the Learned trial was seized of jurisdiction to entertain the cause of action, contrary to the belief held by the appellant. At paragraph 7 of the respondent submissions, counsel argued and did invite the Court to appraise itself of Section 8 (1) of the Magistrate's Court Act as read conjunctively with Section 6 and 17 of **EACVeLCA** which connotes that issue of jurisdiction raised by the appellant is a non-suited issue. It was the respondent's Counsel submission that were the Court to agree with the appellant perspective on jurisdiction issues, the claim by the respondent would be subjected to the same authority which seized the motor vehicle by subjecting it to with penalties under the Act. For the reasons of due process and right to a fair hearing Counsel for the respondent urged this Court to ignore that line of submissions.

Similarly, on the same vein, Counsel for the respondent submitted that there was no error apparent on the face of the record in the impugned Ruling. What was at stake the appellant's Counsel makes reference to as contradictory orders was in regard to a clarification of what is to be the scope of the order.

Further Counsel, argued and contended that the Learned trial Magistrate was better placed to determine where the truth lies in light of the orders emanating from the impugned Ruling. In adherence to the Law Counsel for the respondent submitted that there was no judicial restraint of particular importance in relation to the issues raised before the Learned trial Magistrate. That the trial Court is the proper forum to focus upon the real issues of fact and Law raised by the respondent. Within the submissions, Counsel for the respondent cited the following authorities to buttress his submissions. **Anarita Karimi Njeru v R {1976-80} KLR 1272, Kevin Turunga Ithagi v Hon. Justice Fred Ochieng & Others {2015} eKLR., Margaret Miano v Kenya National Highways Authority {2015} eKLR, R v Kenya National Highways Authority Ex parte John Mwaniki Kiarie {2016} eKLR, ODPP v Juma Chemomenyu Batuli {2020} eKLR.**

In a nutshell Counsel for the respondent submitted that this conferred right on the respondent to sue has not been taken away by the provisions of EACVeLCA. He prayed for the dismissal of the appeal.

### **Determination**

The issues involved in all these submissions is at most, identical therefore I find it expedient to decide the titled appeal. Facts forming matrix of the proceedings in hand are that on 12.4.2021 and 14.4.2021. The applicant **Geoffrey Muga** sued the respondent. Kenya National Highways Authority and with joinder of manager Mariakani Weighbridge seeking various reliefs pursuant to Section 1A, 1B and 3A of the Civil Procedure Act Order 51 Rule 1 of the Civil Procedure Rule. Section 3, 5, 6 and 17 of EACVeLCA Act No, 2016 and Article 47, and 50 of the Constitution.

After deliberations before the trial Court, subsequently a Ruling dated 16.4.2021 was delivered whose consequences became the subject matter of this appeal. The Learned trial Magistrate considered the principles of interpretations enunciated by the superior Courts and the special provisions of the Act captured as the East Africa Community Vehicle Load Control Act 2016 to arrive at the conclusion of the impugned orders.

The Learned trial Magistrate to explore issues in the notice of motion had to have a panoramic view of the issues in the substantive suit filed by the respondent against the appellants and interested party. As to the compliant of jurisdiction to grant interim remedies the mirror is the declarations or prayers premised in the main suit. Soon after the trial Court's decision the respondent filed an appeal to this Court challenging the jurisdiction of the Court pursuant to Section 67 of their enabling Act. The preliminary objection consists of a pointer that the respondent **Geoffrey Muga** failed to comply with the requirements of thirty days notice to the Authority (appellant) herein before instituting the aforementioned suit. By dint of Section 67 of the Act which is couched in mandatory language any suit filed without compliance of prerequisite notice to the appellant is void to the extent of its inconsistency with the terms of the statute. It is clear from the provisions of Section 67 of the referred Act that the issuance of statutory notice and its service upon the Director General through it is duly authorized agent is a condition precedent to the validity of the suit against the appellant or the interested party to this appeal for that matter to constitute a valid claim.

In the case of **Germano Guera v The Kenya Posts & Telecommunications Corporation HCC Civil Case No. 2161 of 1997:**

**“Suit filed without serving the mandatory statutory notice on the corporation is incompetent.”**

These principles apply **Mutatis Mutandis** to this appeal.

Further in **Langat v Kenya Posts & Telecommunications Corporation {2000} 1EA 147:**

**“Where the statute requires notice to be served on the corporation before a suit is filed against it, the failure to satisfy the Court that the notice was sent renders the suit incompetent. Failure to file the suit within the time featured by an Act renders the suit incompetent.”**

Whether the trial Court had jurisdiction to hear and determine the issues in the Complaint or not as stipulated in the Magistrate's Court is a matter that does not preclude a party from dispensing with the notice under the cover of certificate of urgency riding on Section 1A, 1B and 3A of the Civil Procedure Act. These provisions and Article 159 (2) (D) of the Constitution were never meant to override the express statutory provisions of a statute.

As the provisions of Section 67 of the Act are mandatory no Court is empowered to dispense with the notice under the guise of judicial discretion. Ordinarily, one would expect Counsel for the plaintiff/now respondent to be at liberty in advising his client on matters of Law demonstrably set out in the statute. Unfortunately, this was not the case for the plaintiff, initial applicant and respondent to the appeal.

A close reading of Section 67 of the Act would show that the condition on notice contemplated in this provision is a primary process to effectuate *locus standi*. *Locus standi* is defined by the Learned Author in **Black's Law Dictionary 9<sup>th</sup> Edition (Pg 1026)** as ***the Right to bring an action or to be heard in a given form under Article 50 (1) of the Constitution.***

More importantly, such notice if duly served upon the appellant/defendant in the main suit, would provide an opportunity for a response which is both a right and a legitimate expectation in adjudication of suits. The right to make an initial response in relation to the intended suit by a public agency or corporation manifestly falls within the safeguards for fair administrative action in the terms of Article 47 of the Constitution. Rights of such a kind moreover are actionable within the framework of judicial powers in relation to the quasi-judicial powers of statutory agencies. (See **Supreme Court discourse in Mumo Matemu v Trusted Society of Human Rights Alliance CA No. 29 of 2014**).

It is crystal clear that under the statute governing weighbridges and Axle load of motor vehicles in Kenya notice to the Authority of 30 days is an essential procedural jurisdiction before commencement of any suit before a Court of Law. Had the legislature intended the Court to bypass the provisions to exercise jurisdiction over such suits against the Authority. It would have said so in clear and unambiguous language. In this context the Supreme Court of Pakistan had this to say in **Syed Mehmood Akhtar Naqvi v Federation of Pakistan PLD {2012} SC 1089:**

**“No provision should be rendered meaningless and there was no scope of placing unnatural interpretation on the meaning of language used by the legislators, especially when the language of legislative provision was clear, it was not the duty of the Court to either to enlarge the scope of legislation or the intention of the legislatures.”**

These provisions are in respect of the legal capacity and *locus standi* of the party deserved of suing the public agency herein referred as the Authority. The Section therefore falls within the category of existing Law that enjoys constitutional protection. The Courts under the Constitutional dispensation are required in exercising jurisdiction in Article 50 (1) of the Constitution to enforce such existing Law in accordance with the Constitution. The claim as pleaded and pursued later through interlocutory applications for interim orders has no constitutional backing under Article 159 (2) (D) of the Constitution.

In view of the arguments by the respondent's counsel such a perspective is not sustainable. The primary test in cases of this nature must always be whether the activities fall within the scope of the appellant. As a threshold question, the application of Section 67 of the Act would be necessary to consider that the jurisdiction of the Court is subject to prior notice being served to the Director General of the appellant. Neither the Court nor a party to the suit has power to circumvent that procedural jurisdiction. The consequence that flows from the conclusion is that the decision appealed from was based on a wrong principle, a wrong approach and a mistaken view as to the extent to the jurisdiction of the Court exercised without compliance of Section 67 of the Act. The appellate Court is therefore required to exercise discretion afresh by interfering in such a situation where the decision exceeds the general ambit within the statute. Bound by the factors listed in Section 67 of the aforesaid Act and bearing in mind that the Courts maintenance of subject matter jurisdiction was dependent in surmounting this hurdle or proceedings in terms of the suit and application are voidable.

By the trial Court agreeing to proceed with the respondent applications she did introduce a procedure unknown in Law and against the provisions of this Act **EACVeLCA**. On the facts of this case, there was no room for taking such an approach in dealing with the dispute between the appellant and the respondent. On the strength of **Mukhisa Biscuits v Western Distributors {1969} E.A. 969** and **Owners of Motor Vessel Lillian S' v Caltex Oil (Kenya) Limited {1989} eKLR**, the trial Court acted in excess of its legal authority as such an order of certiorari would lie to quash the impugned orders issued pursuant to the Ruling dated 16.4.2021. The grant of this remedy forms part of the system of control to prohibit the Court below from exceeding its powers including that of entertaining any issues arising out of the plaint filed by the respondent. Having determined this appeal it is just and equitable to make an order that parties rights be principally regulated by this Act, East African Community Vehicle Load Control, Act 2016. There are no two ways as this appeal succeeds with costs to the appellant.

**DATED, SIGNED DISPATCHED AT MALINDI ON 17<sup>TH</sup> DAY OF DECEMBER, 2021**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. ....
2. ....