



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. E019 OF 2020

ROSALIA WANGUI.....1ST PLAINTIFF/APPLICANT

ELMAX PETROLEUM LIMITED.....2ND PLAINTIFF/APPLICANT

-VERSUS-

NATIONAL POLICE SERVICE COMMISSION.....1ST DEFENDANT/RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND DEFENDANT/RESPONDENT

THE OCS WEBUYE WEIGH BRIDGE POLICE STATION.....3RD DEFENDANT/RESPONDENT

RULING

- 1) Rosalia Wangui and Elmax Petroleum Ltd, the 1st and 2nd plaintiffs took out the motion dated 9th July in which they sought for inter alia:
- i. THAT this application be certified as urgent and be heard ex parte in the first instance and service be dispensed with in the first instance.*
 - ii. THAT an order of this honourable court do issue compelling the 1st, 2nd and 3rd respondents to release the motor vehicle registration number ZF 4777 forthwith to the applicant pending the hearing and determination of this application.*
 - iii. THAT an order of this honourable court do issue compelling the 1st, 2nd and 3rd respondents to release the motor vehicle registration number KBS 664K forthwith to the applicant pending the hearing and determination of this application.*
 - iv. THAT an order of this honourable court do issue preventing the 1st and 2nd applicants from paying any costs to the 1st, 2nd and 3rd respondents and/or their agents, officials and assigns that may have accrued on storage of the motor vehicle registration number ZF 4777 pending the hearing and determination of this application.*
 - v. THAT an order of this honourable court do issue preventing the 1st and 2nd applicants from paying any costs to the 1st, 2nd and 3rd respondents and/or their agents, officials and assigns that may have accrued on storage of the motor vehicles registration number KBS 664K pending the hearing and determination of this application.*
 - vi. THAT an order of this honorable court do issue restraining the 1st, 2nd and 3rd respondents and/or its agents, officials and assigns from harassing and/or interfering with the 1st and 2nd applicants and/or the ordinary course of business of the applicant's motor vehicle registration number ZF 4777 pending the hearing and determination of this application.*
 - vii. THAT an order of this honourable court do issue restraining the 1st, 2nd and 3rd respondents and/or its agents, official and assigns from harassing and/or interfering with the 1st and 2nd applicants and/or the ordinary course of business of the applicant's motor vehicle registration number KBS 664K pending the hearing and determination of this application.*
 - viii. THAT an order of this honourable court do issue compelling the respondents to release the motor vehicle registration number ZF 4777 forthwith to the applicant pending the hearing and determination of this suit.*
 - ix. THAT an order of this honourable court do issue compelling the respondents to release the motor vehicle registration number KBS 664K forthwith to the applicant pending the hearing and determination of this suit.*

x. **THAT an order of this honourable court do issue preventing the applicants from paying any costs that may have accrued on storage of the motor vehicle registration number ZF 4777 pending the hearing and determination of this suit.**

xi. **THAT an order of this honourable court do issue preventing the applicants from paying any costs that may have accrued on storage of the motor vehicle registration number KBS 664K pending the hearing and determination of this suit.**

xii. **THAT an order of this honourable court do issue restraining the 1st, 2nd and 3rd respondents and/or its agents, official and assigns from harassing and/or interfering with the 1st and 2nd applicants and/or the ordinary course of business of the applicant's motor vehicle registration number ZF 4777 pending the hearing and determination of this suit.**

xiii. **THAT an order of this honourable court do issue restraining the 1st, 2nd and 3rd respondents and/or its agents, official and assigns from harassing and/or interfering with the 1st and 2nd applicants and/or the ordinary course of business of the applicant's motor vehicle registration number KBS 664K pending the hearing and determination of this suit.**

xiv. **THAT an order of this honourable court do award any other orders it may deem just, fit and expedient to award in the interests of justice.**

xv. **THAT the cost of this application be provided for.**

2) The plaintiffs filed the affidavits sworn by the 1st plaintiff to buttress the motion. When served the 2nd defendant filed a replying, a supplementary and a further replying affidavits sworn by Kingsley Maina and Andrew Muchina to oppose the motion. Learned counsels appearing in the matter recorded a consent order to have the application disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion.

I have further considered the facts deponed in the affidavits filed in support and against the application. I have also considered the rival written submissions and oral highlights. Though the plaintiffs sought for various orders, it is apparent that the main order which was prominently urged is that of an injunction to compel the defendants to release motor vehicle registration no. KBS 664K and Trailer registration no. ZF 4777 pending the hearing and determination of this suit.

4) It is the submission of the plaintiffs that on or about 3rd July 2020, the subject motor vehicle was in the course of business ferrying highly perishable clinker from Mombasa to Malaba when it was ambushed and impounded by the 1st, 2nd and 3rd defendants/ respondents.

5) The plaintiffs further argued that the 1st and 2nd respondents impounded the truck and trailer without prior notice to them and that they were only informed of the reason for the impoundment at the time of seizure.

6) It is also stated that upon impoundment, the 1st, 2nd and 3rd defendants demanded from the plaintiffs payment of ksh.2,350,000/= as a condition for the release of the seized truck and trailer.

7) The plaintiffs stated that the 2nd defendant claimed that their motor vehicle was impounded by dint of a virtual overload fee summary of the 1st, 2nd and 3rd defendants showing that the motor vehicle was overloaded on diverse dates between 28th November 2018 and 9th June 2020.

8) The plaintiffs disputed the defendant's assertion stating that the particular motor vehicle has in several occasions ferried goods where it was subjected to several and thorough checks in the various road blocks and at all material times been in compliance.

9) It is also argued that during these checks, if any motor vehicle is found to have been overloaded then the same is impounded, offloaded to the right weight limits and a fine is imposed thereon subject to the release of the motor vehicle to continue with its journey.

10) The plaintiffs have also argued that the 2nd defendant/respondent has failed to adduce any reasons on why the subject motor vehicle if at all it was overloaded as claimed has been allowed to roam freely from the year 2018 to the year 2020 so as to warrant a sudden ambush and seizure while the motor vehicle is loaded with goods for transportation.

11) It was further argued that at the time of impoundment the plaintiffs' motor vehicle was not overloaded and therefore its seizure was motivated by malice. The plaintiffs have argued that they have shown they have a prima facie case with high chances of success and that unless the order sought is granted they will suffer irreparable loss in that the goods on board the subject motor are likely to perish thus opening floodgates of suits against them by the owners of the clinker on board.

12) The plaintiffs also submitted that the penalty of ksh.2,350,000/= imposed by the 2nd defendant is illegal since it has no authority to impose such a fine under the East Africa Community Vehicle Control Act, 2013.

13) The plaintiffs also stated that they purchased the motor vehicle using a loan facility with CFC Stanbic Bank Ltd and that they service the loan by paying a monthly instalment of ksh.400,000/= from the proceeds of the transport business it undertakes.

14) It is argued that the continued seizure of the motor vehicle will make them default in servicing the loan facility hence causing untold financial ruin. The plaintiffs undertook to return the motor vehicle upon delivering the goods on board.

15) The 2nd respondent opposed the motion arguing that the same lacks merit. It is pointed out that the plaintiffs' motor vehicle had been flagged on various dates between 28th November 2018 and 9th June 2020 via the 2nd defendant's virtual camera. The 2nd defendant attached to the affidavit of Kingsley Maina copies of virtual tickets electronically produced showing the date, time speed driven, number plate, permissible weight, actual weight and overload percentage.

16) The 2nd defendant argued that it was justified to impound the motor vehicle stating that ordinarily a vehicle that is captured in virtual weighbridge would be intercepted in the next physical weighbridge, however the 2nd defendant averred that the plaintiffs' motor vehicle was notorious in avoiding the weighbridges hence the reason why it had not been intercepted since 2018.

17) The 2nd defendant further stated that the plaintiffs' motor vehicle was spotted in Webuye Weighbridge while enroute to Tororo, Uganda, and was impounded after the plaintiffs' driver was given the reasons for its seizure and after being served with a prohibition order and the virtual overload fee summary.

18) The 2nd defendant further stated that it has jurisdiction to determine the amount payable for a load in excess under Section 17(1) of the East Africa Community Motor Vehicle Control Act.

19) The 2nd defendant also argued that the motor vehicle can only be released upon payment of the amount demanded. It is further argued by the 2nd defendant that the plaintiffs did not exhaust the available avenues to resolve the dispute in respect of overloads before filing this suit.

20) It is also submitted that the plaintiffs failed to issue a written notice of intention to sue under Section 67 of the Kenya Roads Act before filing this suit.

21) Having considered the material placed before this court plus the rival submissions, it is apparent that learned counsels appearing in this matter have raised serious arguments touching on the substantive suit. This court has to remind itself that it is dealing with an interlocutory application for injunction.

22) The principles to be considered in determining an application for injunction were well stated in the case of **Giella vs Cassman Brown & Co. Ltd (1973) E.A** inter alia as follows:

First, an applicant must show a prima facie case with a probability of success.

Secondly, an interlocutory application will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages.

Thirdly, if the court is in doubt it will decide an application on the balance of convenience.

23) On the first principle, the plaintiffs are of the submission that

There has been no due process in determining the overload by the 2nd respondent. They argued that the seizure of their motor vehicle is not anchored in law and that a proper penalty can only be imposed upon a successful prosecution under Section 58 of the Traffic Act (cap. 403 Laws of Kenya).

24) The plaintiffs have further argued that it is only a court of law which can prescribe the penalty and not the 2nd defendant. The defendants on the other hand have stated that the plaintiffs have not established a prima facie case in that this case is pre-mature having failed to exhaust the avenues provided for under Section 17(4) of the East Africa Community Motor Vehicle Control Act.

25) The defendants have also stated that the 2nd defendant has authority to indicate the amount payable for the overload. It is further stated that the plaintiffs have failed to issue the requisite notice under Section 67 of the Kenya Roads Act.

26) In response to the argument that the suit is premature for want of notice under Section 67 of the Kenya Roads Act, the plaintiffs are of the submission that the issue cannot dispose of a suit at this stage without filing a formal application that has to be considered.

27) With respect, I agree with the plaintiffs that the issue raised by the 2nd defendant is fundamental and may lead to the striking out of the suit, hence it has to be canvassed by way of a formal application so that the same can be determined on its merits. The issue can either be determined as a preliminary point at the trial or by way of a formal application.

28) Upon considering the rival submissions, it is apparent that this court has been beseeched to determine the following issues:

First, whether or not the plaintiffs have exhausted the dispute resolution mechanisms provided for by the statute before approaching this court.

29) The plaintiffs have not disputed the fact that they did not exhaust the mechanisms provided for under 17(4) of the East Africa Community Motor Vehicle Control Act. The question is whether the failure to exhaust such an avenue before approaching the court is fatal.

30) Section 17(4) of East Africa Community Motor Vehicle Control Act provides for inter alia as follows:

“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 transport 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 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.

31) It is clear from the above provisions that where a party is dissatisfied with a weighing report, he can either pay the amount demanded on a without prejudice basis to secure the release of the seized motor vehicle after which he can lodge an appeal against the fees as provided for by the regulations made under the Act. It is further clear that the motor shall continue to be detained pending appeal if the amount claimed to be payable as overload fee is not paid.

32) A critical examination of the aforesaid provision reveals that the law does not expressly bar the court from entertaining an action before a party exhausts the mechanism prescribed in section 17(4).

33) I am of the view that the aforesaid section was meant to enable disputes resolved expeditiously without bogging down the courts with a myriad of suits. In essence, it is an alternative dispute resolution mechanism which expands avenues for access of justice. The failure to take advantage of such an avenue in itself is not fatal.

34) The second issue which was ably argued by the parties is on the question as to whether the 2nd defendant had jurisdiction to fix the amount chargeable on the excess load. I have already stated the position taken by each party.

35) Having considered the rival submissions, I think the answer to the question can easily be discerned from the provisions of Section 17(1) of the East Africa Community Motor Vehicle Control act which provides:

When an authorized officer determines that a vehicle is carrying a load in excess of the legal load limit under this Act, he or she shall issue a weighing report setting out the overload particulars and the amount of overload fees payable.

36) It is apparent from the above provision that the 2nd defendant has jurisdiction to determine the overloads and the amount of overload fees payable. The issue which has to be determined at the trial is whether there were actual overloads by the plaintiffs' motor vehicle and if yes whether the same were properly calculated and whether the penalty imposed was lawful.

37) In the end I am convinced that the plaintiffs have shown they have a prima facie case with some prospects of success.

38) The second principle to be considered is whether the plaintiffs have shown the irreparable loss they would suffer if the order for injunction is refused. The plaintiffs put forward two main arguments to show that they are likely to suffer irreparable loss if they are denied the orders.

39) **First**, it is argued that the goods on board the motor vehicle are highly perishable and the continued detention of the motor vehicle may make the goods go to waste. The plaintiffs pointed out that the 2nd defendant is not interested in the goods on board which in any case belong to a third party. The plaintiff aver that they may be faced with a plethora of suits.

40) **Secondly**, it is argued that the plaintiffs motor vehicle does transport business and the proceeds are used to settle a loan facility given to them by CFC Stanbic Bank to purchase the same. The plaintiff further aver that the amount paid per month is kshs.400,000/=.

41) The defendants merely stated that the plaintiff's application does not meet the threshold required in applications for injunction. I am convinced that the goods on board of the detained motor vehicle are highly perishable. It is also not in dispute that the motor vehicle was not overloaded at the time of seizure. It is further not disputed that the defendants have no interest in the goods on board.

42) In my view, the fact that the plaintiffs are likely to face a myriad of suits by the owners of the goods on board the seized motor vehicle is sufficient evidence to show that they may suffer irreparable loss.

43) The fact that the plaintiffs may also fail to meet their financial obligation to settle the loan facility is enough evidence to show that the plaintiffs may suffer irreparable loss.

44) The third and final principle is that of convenience. The plaintiffs are of the submission that the balance of convenience tilts in their favour. It is argued that the continued detention of the motor vehicle will cause great inconvenience to not only the plaintiffs but to third parties whose goods are on board while the defendants have no claim or interest over them.

45) The defendants are of the submission that they are likely to be inconvenienced in that the motor vehicle was headed to Tororo, Uganda and may not be returned.

46) The plaintiffs responded to the defendant's concerns and offered to fund the 2nd defendant's representatives to accompany the motor to Uganda and back.

47) I am satisfied that the plaintiffs are more likely to be inconvenienced as compared to the defendants. The fact that the goods on board may perish and go to waste is sufficient evidence to establish prejudice and inconvenience visited upon the plaintiff.

48) I have already stated in detail the import of the provisions of Section 17(4) (a) of the East Africa Community Motor Vehicle Control Act. It is clear from the plain language used in the section that an impounded motor vehicle can be released to the transporter upon the transporter paying on a without prejudice basis the demanded overloading fees.

49) It is also clear under Section 17(4) (b) of the Act that where a transporter has appealed against the overload fees without paying the amount demanded, the impounded motor vehicle will remain detained pending appeal.

50) In view of the express provisions of the Act, is it therefore appropriate for this court to grant an order releasing the detained motor vehicle?

51) This suit can be regarded as an appeal against the report on overloading and the overloading fees. The law therefore requires the motor vehicle to be detained pending the hearing and determination of the suit(appeal).

52) However, there are unique circumstances which obtains in this case. **First**, the motor vehicle was not overloaded at the time of seizure. **Secondly**, the defendants have no interest in the goods on board the motor vehicle. **Thirdly**, the goods on board are cement which are highly perishable. **Fourthly**, the goods belong to third party. In the circumstances I think balancing the interest of justice, a temporary conditional order of injunction should be granted.

53) In the end, the motion dated 9th July 2020, partially succeeds with the following orders being issued:

i. An order of injunction is issued directing the defendants jointly and severally to release to the plaintiffs motor vehicle registration no. KBS 664K plus trailer registration no. ZF 4777 to transport the goods on board to its destination in Uganda on the following conditions:

a) The plaintiffs to execute a bank guarantee for ksh.2,350,000/= in favour of the 2nd defendant to which shall lapse upon the return of the aforesaid motor vehicle to continue to be detained at Webuye Weighbridge Police Station.

b) The plaintiffs to allow an officer or agent of the defendants to accompany the motor vehicle and trailer to and from Uganda and to further meet the expenses for such an officer or agent.

c) The plaintiffs should execute an undertaking to be filed in court binding themselves to return the aforesaid lorry and trailer in the condition it was at the time of release.

ii. Costs of the motion to abide the outcome of the suit.

Dated, signed and delivered at Nairobi this 17th day of September, 2020.

.....

J.K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Respondent