



REPUBLIC OF KENYA

IN THE HIGH COURT AT KENYA AT KISII

CONSTITUTIONAL PETITION NO. 1 OF 2019

IN THE MATTER OF ARTICLES 22,23,24,47,4,50,159,165,258 AND 59 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 40, 47, 48 AND 50(2) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE UNLAWFUL DETENTION OF MOTOR VEHICLE REGISTRATION NUMBER KCG 111M

BETWEEN

ELDORET GRAIN LIMITED.....PETITIONER/APPLICANT

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

JUDGMENT

1. **Eldoret Grains Limited** the petitioner(hereinafter referred as the (Petitioner) filed a Petition dated the 11th January 2019 seeking the following orders that;

- a) *A declaration that the Respondent is in serious breach and / or violation of the Constitution in particular Article 40 (1).*
- b) *An Order do issue compelling the Respondent and/ or its agents herein to release Motor Vehicle Registration No. KCG 111M, Mercedes Benz now at Rongo Weigh Bridge Yard to the Petitioner forthwith being the Registered owner*
- c) *General damages*
- d) *Costs of the Petition*
- e) *Any other order that the Honourable court deems fit and just in the circumstances.*

2. Simultaneous with the petition the petitioner filed a Notice of Motion dated the 11th January 2019. The motion is brought under Articles 22,23,47,48,50,159,165,258 and 259 of the Constitution of the Republic of Kenya, 2010, Rules 19 & 23 (1) & (2) of the Constitution of Kenya (Protection of rights and fundamental freedoms) practise and procedure Rules, 2013.

The petitioner in the said motion seeks the release of Motor Vehicle Registration No. KCG 111M Mercedes Benz and the goods on board which was being held at Rongo Weigh Bridge Yard. On the 22/1/2019 the parties recorded a consent that *the said motor vehicle registration number KCG 111M held at Rongo Weigh Bridge be released to the petitioner upon the petitioner depositing a sum of Kshs. 245,130/- in Court.* The petitioner deposited the said amount in court and the vehicle the subject of this petition was released.

3. On the 11/2/2019 directions were given that parties file and exchange written submissions. Parties highlighted their submissions in court on the 30/4/2019.

4. The background of this matter is that the petitioner is the registered owner of motor vehicle registration number KCG111M Mercedes

Benz (hereinafter referred to as the ('vehicle')). On the 7th day of January 2019 Mohamed Omar Said Bajoh the operations manager of the petitioner received a call from their driver informing him that the Respondent through its agents at Rongo weigh bridge had without any lawful justification, unlawfully impounded and detained the petitioner's vehicle at the Rongo weigh bridge yard without any reasonable justification reason. That the Respondent alleged the vehicle had excess weight of 8833 kg as per a purported order from the respondent required the petitioner to pay an alleged fine of Kshs.245,130/-. According to the petitioner the vehicle was weighed and had no excess weight. The petitioner's driver informed Omar that he has been issued by the respondent with a report of the vehicle tagged for action on the 30th of October 2018 which outlines the tag reason as 'disobeyed instructions'. The petitioner claims that no such action has ever occurred. That the respondent has failed to charge the driver in a court of law and the vehicle as per the documents was carrying the right weight measures on the 31.1.2018. That on the 7.1.2019 the petitioner's driver drove the motor vehicle to the weigh bridge en-route to Migori Town when the same was weighed and impounded against natural justice. That this amounts to condemning the petitioner without being heard and being afforded a fair trial. The respondent has become both the accuser and judge through its actions.

5. The application was opposed. The respondent filed a replying affidavit dated the 25.1.2019. The affidavit is sworn by the operations manager at Ebenezer Commercial Work Ltd who are contracted by the respondent to manager to operate and maintain Busia and Rongo weighbridge stations of the 1140 km adjacent road network within Nyanza and Western region in Kenya. According to him the respondent is a state corporation established pursuant to section 3 of the Kenya Roads Act, No. 2 of 2007 Laws of Kenya with the mandate to inter alia manage , develop , rehabilitate and maintain national roads as provided under section 4 (1) of the Kenya Roads Act 2007. He averred that on the 3.10.2018 the petitioner's vehicle registration number KCG 111M was captured passing through Ahero Virtual Weighbridge station with the 2nd Axle Lifted and not stepping on the ground while loaded. The petitioner's vehicle is a 6-axle but was being driven with 5 axles while one was lifted which is contrary to Section 5 (3) East African Community Vehicle Load Control Act, 2016 which restricts the driver from lifting any axle which the truck is loaded unless such axles are fitted with the manufacturer's certified dead man's switch or an air suspension system or an automatic dropdown when loaded. That due to the lifting of one Axle the truck was captured to have carried an excess weight of 8833kg and in this light the 3rd Axle was carrying its own limited weight of 10,000 kgs plus the weight of the lifted 2nd Axle. That this has been a norm of the petitioner's driver to lift one Axle and in some cases where the Axle is not lifted the truck remains complaint on 6 Axles. On the 7.1.2019 the respondent's officers in charge of Rongo Weighbridge impounded the petitioners vehicle in relation to an overload tag that had been relayed to the systems from Ahero Virtual weigh bridge on 3.10.2018 that showed that the said vehicle had an excess load of 8833 Kgs for which the petitioner was required to pay an instant overload for fees of Kshs. 245,130.00. The vehicle was therefore detained in accordance to the provisions of East Africa Community motor vehicle Load Control Act, 2016 that empowers the Respondent to detain any vehicle found to be overloaded from the Regional/ National trunk roads until such a time when an overload fee has been paid. That the respondent does not intent to charge the petitioner or his driver in the Court of Law because the East Africa Community motor vehicle load Control Act, 2016 empowers it to impose instant overload fees and detain an overload vehicle for a period of 60 days and issue a notice of sale of the motor vehicle at the expiry of the said parcel. That the suit as presented is misconceived and constitutes an abuse of the due process of the law on account of the petitioner's failure to issue and serve the requisite and mandatory notice of the intention to sue contemplated under the provisions of section 67 of the Kenya Roads Act, 2007 which would have constituted due diligence on his part both by way of inquiry and an early opportunity for the parties to engage formally on the issue before the case was filed. There in no way has the respondent or its officers hindered any of the applicant's rights as alleged.

6. In a further affidavit dated the 15.2.2019 the petitioner avers that the company was not aware of any incident when it failed to adhere to the rules and guidelines on axle load control as set out in the Roads Act 2007 and the East Africa Community Load Control Act 2007. That on the 30.10.2018 the petitioner's vehicle was plying the Kisumu – Ahero Highway and the same was carrying bags of Dola Bakers and bags of whole meal and the same were delivered to Mayfair Holding Limited. That the total weight was the said vehicle was carrying was paid for and was within the right metrics as per the Road Acts 2007 and the East Africa Community Load Control Act 2016. The petitioner is not aware of carrying any excess load of Kshs.8833 Kgs as alleged by the respondent. That by causing the petitioner to deposit the sum of Kshs. 245,130/- to facilitate the release of the vehicle reg. no.KCG 111M is contrary to the rules of natural justice as the applicant has been condemned unheard as act which contravenes Article 50 of the Constitution of Kenya 2010. That the photos attached and produced do not meet the threshold as per the Rules of the Evidence Act. That section 67 of the Kenya Roads Act 2007 is only directive but not mandatory and the same does not prejudice the respondent in any manner.

7. The respondents countered this affidavit through an affidavit filed on the 25/4/2019 sworn by George Ngugi the operations manager. He deponed that the applicant's averment of lack of knowledge on its part does not in any way mean that the incident did not occur. That the petitioner's driver was dully served with a Prohibition order and an overload Tag Ticket that had been relayed to the systems from Ahero Virtual weighbridge on the 30.10.2018 and the petitioner acknowledged the same and that the driver was aware of the excess weight as he was served with an overload Tag Ticket that had been relayed to the systems from Ahero Virtual weighbridge. That the deposit of Kshs. 245,130/- in Court was as a result of a consent of both parties recorded in Court and the petitioner is being dishonest to claim that such an action arrived at after consent of both parties amounted to condemning it unheard. He attached a Certificate of Authentication Electronic evidence as required under section 106 (A) and (B) of the Evidence Act, Cap 80.

SUBMISSIONS

8. According to the petitioner the issues for determination are; ***whether the rights and or fundamental freedoms of the petitioner enshrined under Articles 40,47,48 and 50(2) of the Constitution of Kenya 2010 were infringed and/or violated by the actions of the respondent and whether the detention and subsequent impoundment of motor vehicle registration no. KCG 111M Mercedes Benz was illegal, unlawful and/ or unconstitutional.*** The petitioner argues that the applicant's right to own property has been violated and/ or infringed by the respondent to detain and/ or impound the applicant's vehicle without affording the petitioner an opportunity to be heard as is prerequisite before taking any form of action that is likely to adversely affect the rights and /or fundamental freedoms of an individual as is provided for under Articles 47, 48 and 50 of the Constitution 2010. (*see Disaranio Limited v Kenya National Highways Authority & Attorney General (2017) eKLR*) That Article 260 of the Constitution defines a person to include a company, association or other body of persons whether incorporated or unincorporated. It was submitted that Parliament shall not allow law that slows the State or any person to arbitrarily deprive another person of their property and that the respondent's reliance on the East Africa Community Vehicle Load Control Act 2016 to arbitrarily deprive the petitioner of its property is in violation of the supremacy of the Constitution in that the same is inconsistent with the provisions of Article 40, and therefore the actions of the respondents employees of agents are invalid, unlawful and /or unconstitutional as they contravene the provisions of the Constitution and the petitioner's right to property. It was further submitted that the respondents went against the rules of natural justice, fair hearing and fair administrative action enshrined under Article 47, 48 and 50 of the

Constitution (*see Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR; R vs. Kenya National Highway Authority ex-parte John Mwaniki Kiarie Nairobi J.R. Application No. 437 of 2015 Odunga J;*) That the decision made by the respondent to detain and impound the petitioner's vehicle and demand fees to secure its release is on that results to the loss of the subject motor vehicle and loss of a substantial sum of money paid as the required fees Kshs. 245,130/- both of which are onerous penalties and adversely affects the rights and /or fundamental freedoms of the petitioner. That whilst the statutes and laws relied on by the respondent expressly create offences the rules of natural justice and the Constitution dictates that an offender alleged to have committed an offence to be charged and the perquisites set out in Article 50 (2) be met before any penalty or fee is imposed. On the 2nd issue it was submitted that the petitioner was denied the right to a fair trial before its vehicle was detained and impounded by the respondent without a fair trial that the detention and subsequent impoundment amounts to a nullity and was illegal, unlawful and/or unconstitutional. Hence the petitioner seeks an order of declaration that the respondent was in serious breach and/ or violation of the Constitution in particular Articles 40, 47, 48 and 50(1) and (2).

9. The respondent submitted as follows that ; the issues for determination are;

- (i) *Whether the Authority acted unlawfully by detaining the applicant's motor vehicle*
- (ii) *Whether the respondent violated the applicant's rights under Article 47 and 50 of the Constitution*
- (iii) *Whether it was necessary for the Respondent to charge applicant and/ or driver of the motor vehicle*
- (iv) *Whether the court has jurisdiction to entertain the application.*

On issue no. 1, *whether the Authority acted unlawfully by detaining the applicant's motor vehicle*, it was submitted that the East Africa Vehicle Load Control Act, 2016 (the Act) makes provisions for the control of vehicle weight loads, harmonised enforcement and institutional arrangements for the Regional Trunk Road Network within the Community. Reference was made to section 5(3), 6 (1) & (9), 15 (1) (h) and section 17 (1) and (2) of the Act. It was argued that there is no requirement under the Act for charging the errant party over and above the requiring the payment of an overload fee where it is assessed and determined to be due. That the effect of the provisions of the Act are to decriminalise overloading and dispense with the requirement for charging save for instances which are enumerated under the Act. That respondent acted lawfully and in accordance with the provisions of the Act to detain the vehicle owing to the applicant's action of driving a vehicle with lifted axles while the same was over loaded on the road.

On issues no. 2, *whether the respondent violated the applicant's rights under Article 47 and 50 of the Constitution* it was submitted that the court should find as was held in the case of *Dry Associates Limited vs Capital Markets authority & Another Interested Party Crown Berger (K) Ltd [2012] eKLR* where the High Court held that;

"Article 50 applies to a court, impartial tribunal or abody established to resolve a dispute while Article 47 applies to administrative action generally. There lies the distinction".

That the court should strictly determine this matter as per the provisions of the Act as relates to the respondent's action in detaining the vehicle. That section 17 (2) of the Act provides an avenue through which the applicant can challenge the administrative action of the respondent to detain the vehicle as a result of an overload. That the driver of the vehicle was informed of the reason why the vehicle was being detained. That despite receiving the information from Rongo weighbridge the petitioner did not challenge the overloading incident as required under section 17 (4) of the Act. That the petitioner failed to counter the respondent evidence that the vehicle was captured at Ahero Virtual weighbridge as stated and contrary to section 5(3) of the Act. Therefore the petitioner's rights to a fair administration was not violated as the applicant was given a chance to explain as to why the vehicle was detained and he failed to challenge the same under section 17 (4) of the Act.

10. On issue no. 3, *whether it was necessary for the Respondent to charge applicant and/ or driver of the motor vehicle*; it was submitted that the Act allows the respondent to charge instant overload fees as elaborated in section 6(2) and (9) of the Act. Section 17 (8) grants that respondent the mandate to detain the overloaded vehicle for a period of up to 60 days pending the payment of the prescribed overload fees with the option of exercising the power of sale if the overload fees remains unpaid. That the vehicle was stopped from proceeding with the journey before the overload fees was paid. That section 17 (4) provides that the transporter can challenge the allegations the issue of overload as provided in the said section. That in this case the applicant did not challenge the fact that the vehicle was driven on the road while overloaded rather it challenged the fact that there were no criminal charges brought against the driver and that the vehicle was detained. That there was no requirement or duty placed upon the respondent to charge the applicant in court in the enforcement of the provisions of the Act.

On issue no. 4, *whether the court has jurisdiction to entertain the applicants' application*; it was submitted that the applicant filed the application and suit on the 11.1.2019 without having served the Director General of the respondent with the requisite mandatory one month's notice outlining his grievances for redress as provided under section 67 of the Kenya Roads Act 2007 (**see Sumac Development Company Limited vs George Munyui Kigathi & 2 others [2017] eKLR**). It was further submitted that the one month's notice serves an integral purpose in giving the respondent an opportunity to resolve any disputes that may have arisen amicably (**see Michael Otieno Nyaguti & 5 others vs. Kenya national Highways Authority & 5 others [2015] eKLR. ; Simonash Investment Limited vs. Kenya National Highway Authority & 2 others [2009]eKLR**). That the provisions of section 67 of the Act regards the Court as a tool of last resort after the transporter has sort various avenues to challenge the decisions of the Authority.

DETERMINATION

11. I have considered the contents of the petitioner's petition, the affidavits, the submissions and the law. The undisputed facts are as follows; the petitioner's vehicle registration number KCG 111M was impounded on the 7.1.2019 at Rongo virtual weighbridge on allegations of having excess weight on one Axle on the 30.10.2018 whilst on transit along Ahero weighbridge. That the petitioner and the respondent entered into a consent that the vehicle be released on payment of the sum of Kshs. 245,130/-.

12. In the petition the petitioner prays for a declaration that the respondent was in breach and /or violation of the Constitution in particular Article 40. The petitioner also seeks that the respondent be compelled to release the motor vehicle reg no. KCG111M Mercedes Benz and that the applicant be awarded damages. In the case of **Anarita Karimi Njeru vs. RMiscellaneous Criminal ApplicationNo 4 of 1979** the court as follows;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”

13. I have read the petition the petitioner does not set out with precision the rights which have been infringed in his petition in relation to Article 40. Article 40 is mentioned in the prayers sought. The petitioner sets out the facts at paragraph 1 to 12. The said paragraphs do not indicate the alleged rights that are said to be violated under Article 40(1). It is in the petitioner’s/ applicant’s submissions that the petitioner has elaborated on the rights infringed. Submission cannot take the place of pleadings or evidence pleadings (see **Daniel Toroitich Moi vs. Stephen Muriithi & Another [2014] eKLR.**) I therefore find that the petition must fail as the applicant has failed to detail the rights that were infringed.

14. From the facts the respondent has a duty to ensure that any vehicle the carrying goods or a load carries the correct weight. The notice served on the petitioner on the excess weight that the said vehicle had on the 30.10.2018 has not been challenged. There was service of the said notice upon the driver. The respondents on the 7.1.2019 carried out its duties through its officers as provided under the Act. Section 67 of the Kenya Roads Act 2007 provides how the notice served can be challenged. The provisions of the said section are in mandatory terms. The applicant has a recourse in serving the requisite notice as provided under section 67 of the Kenya Roads Act 2007. I agree with the findings of Justice Kibunja in the case of **Michael Otieno Nyaguti & 5 Others vs. Kenya Highways Authority & 5 others [2015] (supra)** that the requirement of a notice being served on Director General would not amount to hindering a litigant from accessing the seat of justice, court. The applicant should pursue this avenue as provided in the Kenya Roads Act 2007. I therefore find no merit in the petition and dismiss it with costs.

Dated signed and delivered at Kisii this 24th day of July 2019.

R.E.OUGO

JUDGE

In the presence of;

Mr. Nyangacha h/b Mr. Mainga For the Petitioner

Respondent

Absent

Rael

Court clerk