



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

PETITION NO.14 OF 2016

MOSES KIPKOECH ROTICH.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY & 7 OTHERS.....RESPONDENTS

RULING

1. This ruling relates to the petitioner's application brought under certificate of urgency dated 13th December 2016. In the said application, the petitioner seeks the following orders:

1. (spent)

2. *This honourable court be pleased to direct the release of motor vehicle registration number KAX 304C pending the hearing and determination of this application on condition that the said vehicle will be produced in court as and when required by court.*

3. *This honourable court be pleased to direct the release of motor vehicle registration number KAX 304C pending the hearing and determination of this petition on condition that the said vehicle will be produced in court as and when required by court.*

4. *An order directing the defendants (sic) to weigh the load in the said vehicle for purposes of ascertaining volume.*

5. *That the costs of this application be provided for.*

2. The petitioner describes himself as the beneficial owner of motor vehicle registration number KAX 304C Isuzu FVZ Lorry which he purchased from Minuteman Auto World Limited pursuant to an agreement for sale dated 16th October 2015. He states that he is yet to cause its transfer and registration in his name.

3. He has brought the present petition, alongside his application, against various state entities alleging violation of his constitutional rights under, among others, Articles 47, 48 and 50 of the Constitution of Kenya 2010. The alleged violations occurred pursuant to the detention of his said motor vehicle on the 3rd day of December 2016. According to the petitioner, his vehicle was on the said date in use in its ordinary course of business of carrying loads along the Kericho-Nakuru Highway when it was ordered to be removed from the road and detained at Kericho Police Station by the respondent's agents, namely Corporal Siadi, Police Constable Rioba, Patrick and Injira on allegations of overloading. The motor vehicle has, according to the petitioner, been illegally and unlawfully detained at Kericho Police Station, and nobody has been charged with any offence in any court in connection with the detention.

4. The petition has been lodged against the 1st respondent, the Kenya National Highways Authority (KENHA) as the 1st respondent. KENHA is described in the petition as an autonomous road agency, whose functions among other things is to ensure adherence to the rules and guidelines on axle load control prescribed under the Traffic Act and any regulations under the said Act. The petitioner has also joined the Inspector General of Police, Head of Traffic Police Department in Kenya, the Officer Commanding Station (OCS), Kericho Police Station and the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government, and the Cabinet Secretary, Ministry of Transport and Infrastructure whose mandates, among others, includes enforcement of axle load control as the 2nd, 3rd, 4th, 5th and 6th respondents respectively.

5. Also joined as a party is the Director of Public Prosecutions, the 7th respondent, who is constitutionally responsible for public prosecutions in Kenya, and the Attorney General of the Republic of Kenya who represent the State in all civil matters in which the State is a party. Though the record indicates that all the parties were served with the petition and the application, it is only the 1st respondent, KENHA, which filed a response thereto and participated in the proceedings.

6. Though the parties filed written submissions and made oral submissions on the substance of the petitioner's claim, I am only required, at this stage in the proceedings, to consider one issue: whether or not to grant the orders sought in the application dated 13th December 2016 - namely to order by way of a mandatory injunction, the release of the petitioner's lorry and to direct that it be weighed to ascertain whether or not it carried an excessive load. I will therefore not delve, at this stage, into the submissions on other issues made so eloquently before me by counsel.

7. In considering this issue, I take note of certain facts, some of which are not in dispute, others which are the subject of disputation and can only be properly addressed at the hearing of the petition.

8. It is not in dispute that the petitioner's vehicle has been detained at the Kericho Police Station since 3rd December 2016 on the instructions of the 1st respondent. It was detained on the allegation that it had carried in excess of the permitted axle load. According to the 1st respondent, the driver of the lorry refused to stop so that the lorry could be weighed, and later abandoned the lorry. The petitioner alleges that the respondents have refused to weigh the lorry, despite his having complied with their order that he takes the lorry to Kericho Police Station.

9. Under Article 23 (3) of the Constitution, the Court is empowered, in a petition alleging violation of constitutional rights, to grant appropriate relief, including, *inter alia*, a declaration of rights, an injunction or a conservatory order.

10. None of the parties addressed the court on the principles to be considered by the court in determining whether or not to grant an injunction or conservatory order, whether to restrain certain action or, as in this case, one that is mandatory in nature. I have, however, considered various decisions on the principles that courts should consider in granting such orders.

11. The first principle is that a party seeking conservatory orders must show a *prima facie* case with a likelihood of success, and that if the conservatory orders are not granted, he is likely to suffer prejudice. In **Centre for Rights Education and Awareness (CREAW) & 7 Others vs Attorney General Petition No. 16 of 2011**, Musinga, J (as he then was) stated as follows:

“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.” (Emphasis added)

12. The second principle was enunciated by Ibrahim J (as he then was) in his decision in **Muslims for Human Rights (MUHURI) & 2 Others vs Attorney General & 2 Others, Petition No.7 of 2011**. While agreeing with the view expressed by Musinga, J in the CREAW case cited above, the Learned Judge observed as follows:

“I would agree with my Brother, that an applicant seeking Conservatory Orders in a constitutional case must demonstrate that he has a “prima facie case with a likelihood of success.”

13. In **Martin Nyaga Wambora vs Speaker of The County Assembly of Embu & 3 Others Petition No. 7 of 2014**, the court cited with approval the principles set out above and summarized the law in the following terms:

[59]“In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: “... [an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”

[60] To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention”.

[61] The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory”.

14. A final principle to be taken into consideration when a court seeks to determine whether or not to grant conservatory orders in a constitutional petition before it was enunciated by the Supreme Court in the case of **Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013**. This principle is to the effect that the Court must consider the public interest in determining whether or not to grant conservatory orders, particularly in cases where orders are sought to stop a public agency from carrying out its mandate. In the decision, the court (Ojwang and Wanjala, JJSC) stated as follows:

[86]“...Conservancy Orders bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes”

[63] Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest.”

15. In the case before me, the petitioner seeks the release of his vehicle which has been held at the Kericho Police Station since 3rd December 2016. It was detained on the orders of the 1st respondent, in exercise of its statutory mandate to control the axle load of vehicles in use on the roads. It has not, according to the petitioner, been weighed to date, though the 1st respondent alleges the contrary, but has presented no evidence that indeed it was weighed, and how much above the maximum permitted load it was carrying.

16. I take into account the fact that the 1st respondent was carrying out its statutory mandate. It ordered the detention of the vehicle. However, it has not, on the material before me, made any effort to weigh the vehicle and inform the petitioner what it should pay as a penalty for carrying a weight above the permitted axle load. I note from the averments by Mr. Dennis Higgs that the police officers estimated the weight on the basis of what Mr. Higgs terms “volume and density.”

17. The court further notes that the petitioner has been deprived of the use of his lorry since December 2016, on the basis of an estimation by police officers that his lorry was carrying a load above the maximum axle load permitted. The petitioner appears to have voluntarily surrendered his vehicle to the police at the Kericho Police Station, where the 1st respondent, which avers that it has a mobile scale, could have ascertained the load.

18. The 1st respondent alleged that the petitioner and or his driver or agent by-passed the mobile weighbridge and subsequently abandoned the truck by the road side. However, it did not place anything before the court in proof of this assertion, and on the material before me, I am inclined to accept the petitioner’s assertion that he voluntarily surrendered the vehicle to the police at Kericho Police Station.

19. The 1st respondent submitted at the hearing of this application that there was no *prima face* case for grant of a mandatory order at this stage in view of the fact that the petitioner had violated a statute. I agree that a mandatory injunction should be granted in only exceptional circumstances. I bear in mind in this regard the words of the court in **Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR** in which the Court of Appeal stated as follows:

The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4th Edn. para 948 which reads:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application”.

20. The court went on to cite the decision in the English case of **Locabail International Finance Ltd. vs. Agroexport and Others [1986] 1 ALL ER 901 at pg. 901** in which it was stated:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

21. In a more recent decision, **Nation Media Group Ltd & 2 Others vs John Harun Mwau [2014] eKLR** the Court of Appeal expressed the following view:

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated; as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

22. It seems to me that the justice of this case, as well as the circumstances before me, warrant the grant

of a mandatory injunction in favour of the petitioner. While the 1st respondent was entitled to carry out its statutory mandate to ensure that vehicles carry the permitted load, a party in the position of the petitioner was entitled to expect that his lorry would be weighed, if suspected to have exceeded the permitted weight, and subjected to a fine or fee. It does not appear to this court to be a reasonable act to detain the petitioner's vehicle indefinitely, without establishing how far he had contravened the law, and what the penalty should be.

23. The act of the respondents in detaining the vehicle for a period in excess of 9 months, without taking any action that would enable the petitioner comply with the statutory requirements that he was alleged to have breached present, in my view, exceptional and special circumstances that warrant the grant of a mandatory injunction directed at the respondents, more so the 1st respondent, notwithstanding the fact that it acted, ostensibly, in pursuit of its statutory duty.

24. Accordingly, I am satisfied that the orders sought are merited. I therefore grant orders as follows:

i. That the respondents do weigh the load in motor vehicle registration number KAX 304C within seven (7) days hereof for the purpose of ascertaining volume.

ii. That the respondents do thereafter release the said motor vehicle registration number KAX 304C pending the hearing and determination of this petition on condition that the said vehicle shall be produced in court as and when required by court.

25. I note from the affidavit of Dennis Higgins that after the motor vehicle's registration plates were removed, they were forwarded to the National Transport and Safety Authority under cover of a letter from the 1st respondent dated 25th January 2017. This was after the present petition was filed and served on the respondents.

26. Without the number plates, the petitioner cannot operate his vehicle, and the orders issued above will therefore be in vain. Accordingly, I direct the 1st respondent to facilitate the release of the number plates for motor vehicle registration number KAX 304C to the petitioner upon release of the said vehicle in accordance with order ii above.

27. The costs of this application shall await the determination of the petition.

Dated Delivered and Signed at Kericho this 20th day of September 2017.

MUMBI NGUGI

JUDGE