



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 437 OF 2015

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
PROHIBITION AND CERTIORARI**

AND

IN THE MATTER OF LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

EX PARTE: JOHN MWANIKI KIARIE

JUDGEMENT

Introduction

1. By a Notice of Motion dated 21st December, 2015, the *ex parte* applicant herein, **John Mwaniki Kiarie**, seeks the following orders:

1. That an order of prohibition does issue to prohibit the respondent whether acting by itself, its agents, officers, servant or whosoever from continuing to detain the number plates and insurance stickers of motor vehicle registration number KCC 677D Isuzu Lorry belonging to the applicant and/or from impounding and/or detaining the said vehicle and/or imposing a fine/fees against the applicant without adhering to the rules of natural justice, fair hearing and generally the due process of the law.
2. That an order of Certiorari does issue to quash the decision of the respondent whether acting by itself, its agents officers, servants or whosoever to remove and detain the number plates and insurance stickers of motor vehicle registration number KCC 677D Isuzu Lorry belonging to the Applicant without jurisdiction, in excess of powers, without adhering to the rules of natural justice, fair hearing and generally the due process of the law.
3. That the respondent be condemned to bear the costs of this application.

Ex Parte Applicant's Case

2. According to the applicant, he is the owner of the motor vehicle registration number KCC 677D Isuzu Lorry, which he purchased by means of a loan advanced to him by Trans National Bank Limited for business purposes and is indeed his primary source of income.

3. However, on or about 2nd December 2015 officers from the respondent descended on the said motor vehicle, which was parked at a construction site at Ruai awaiting offloading and arbitrarily and without a colour of right proceeded to remove and cart away the number plates and insurance sticker of the said vehicle on the pretext that of the same was overloaded. It was however contended that the vehicle was not weighed by the officers and the vehicle was not plying on the highway or at all where the respondent has jurisdiction. To the contrary, the applicant averred that the said vehicle is duly inspected and licensed and indeed the said order does not state that his vehicle is unroadworthy or in a state of disrepair. Moreover, neither the applicant nor his driver has been charged let alone convicted of any offence. He however averred that he was never accorded a fair opportunity to be heard or even a fair process yet the said order required him to pay for overload. The applicant therefore contended that he had been condemned unheard.

4. However due to the foregoing the said vehicle has been grounded and remains at the said construction site much to the applicant's prejudice and his workers who have been rendered jobless. This is notwithstanding the fact that he has a loan to service as is evidenced by the logbook hence the continued grounding of the lorry will inevitably prejudice him and lead to the repossession of the same of the Financier.

5. The applicant however disclosed that he was ready, able and willing to cooperate with the respondent and the law enforcement agencies and to comply with any lawful orders as well to submit to a proper and fair trial process. Accordingly, he averred that he was willing to have the said vehicle weighed accordingly and the due process of the law to take its course. The applicant however asserted that there is no just cause for the action taken by the respondent whilst requiring him to pay for overload before being convicted of an offence and even before being afforded an opportunity to make any demands if at all.

6. The applicant's case was that it is utterly unjust and oppressive to remove the said number plates and insurance stickers in the circumstances so as to coerce him to capitulate and make payments even before being convicted of the offence. In his view, he has a constitutional right to a fair and just administrative process, the right to a fair hearing and to the equal protection of the law as well as a right to be presumed innocent until proven guilty and in the same vein the respondent cannot purport to be a judge in its own cause.

7. The applicant averred that despite his earnest appeals and undertaking to comply with lawful directions by the respondent coupled with a formal demand, the respondent has refused to heed to his plight and/or even respond thereto. To him, in the circumstances, the conduct of the respondent smacks of impropriety irregularity, arbitrariness, illegality, jurisdictional error, ultra vires, abuse of power, manifestly unjust and in flagrant breach of the rules of natural justice.

8. The applicant asserted that this Court is clothed with the power to review and examine the conduct of the respondent herein and to protect him against the excesses and abuses by the respondent manifested herein and that there is no other mechanism of enforcing compliance by the respondent with the said legal, statutory and constitutional duties and principles save for the prerogative orders sought herein.

9. This Court was urged to signal directions of compliance by the state organs including the respondent with the principles, values and prescriptions of the constitution particularly as regards the purpose and objects of the Constitution.

10. In support of his case the applicant relied inter alia on **Margaret Miano vs. Kenya National Highway Authority Mombasa High Court Petition No. 23 of 2015** and **Andrew Muiya Mbithi vs. Inspector General of Police & 2 Others [2015] eKLR.**

Respondent's Case

11. On the part of the Respondent, it was averred that it is a state corporation established vide the provisions of section 3 of the **Roads Act** No. 2. of 2007 under which section 4 outlines the functions of the Respondent as follows:

- a. Constructing upgrading, rehabilitating and maintaining roads under its control;
- b. Controlling National Roads and Roads Reserves, as well as access to roadside developments;
- c. Implementing road policies with respect to National roads;
- d. Ensuring adherence to the rules and guidelines on Axle load prescribed under the **Traffic Act**, Cap 403
- e. Preparing the road works programmes for all National roads.
- f. Overseeing the management of traffic, road safety on National roads in collaboration with the ministry responsible for Transport and the Police Department.
- g. Monitoring and evaluating the use of National roads.

12. According to the Respondent, it is its Axle Load Control Unit responsibility to enforce all Rules, Regulations and guidelines relating to axle load management along roads in Kenya and that in discharging the aforesaid function, the axle load unit uses either static or mobile weighbridges to weigh vehicles in order to confirm whether the motor vehicles have conformed to the specified vehicle load limits or not.

13. It was averred that at around 1706 hours on 2nd December, 2015, motor vehicle registration number KCC 677D was intercepted along the Eastern Bypass road by Police Officers and the Respondent's Officers who are attached to the Mobile Monitoring Weighbridge while loaded with sand. To the Respondent, it is therefore not only wholly untrue but also insincere, for the applicant to allege that the said truck was at a construction site at Ruai and not on transit along the highway. The said interception, it was averred, was informed by the officers' reasonable suspicion that the vehicle's load had exceeded its allowable load limits and, in order to verify the true position, it became necessary to weigh the vehicle. However when directed to weigh the vehicle and its load, the driver flatly refused to comply with the lawful instructions and, instead attempted to drive off and while driving doing so in order to avoid complying with the lawful instructions, the driver took a diversion off the highway onto an adjoining road where he then stopped and parked the truck. The officers followed the truck into the off-road and when they arrived at the scene, they requested the driver again to have the vehicle weighed for confirmation of the weights, but he declined and, instead, took off.

14. It was therefore averred that the driver left the officers with no other option other than to remove the number plates in order to effect an arrest and issue a prohibition order to remove the vehicle from the road as required by the **Traffic Act**. It was averred that by abandoning the motor vehicle and making it impossible for the officers to be able to weigh it, the driver violated section 15(2) and 15(4) of the **Kenya Roads (Kenya National Highways Authority Regulations, 2013** as legislated through Legal Notice No 86 of 2013 which provisions obligate the driver to adhere lawful instructions of authorised officers and prescribes a corresponding penalty for any failure to comply with such instructions. It was further contended that the prohibition order required the transporter to pay for weighing avoidance fee of 2000USD or its equivalent in Kenya shillings i.e. refusal to weigh as stipulated in the **Kenya Roads Act**, Legal Notice No. 86. Further the truck was charged with overload of 10,500 Kgs. It was contended that the weights were computed based on the method of volume and density and that the terms of the prohibition order were such as to require the applicant to pay for the overload.

15. The Respondent contended that while awaiting the truck owner's compliance with the terms of the prohibition order, the vehicle was required to have been driven and held at Mawe-Mbili Police Post from where it was to be detained while awaiting the owner's/operator's full compliance with the law.

However, the driver failed and/or refused to comply with the foregoing instructions as had been directed by the respondent's lawful agents and it was at that point when the officers of the respondent/defendant removed the licence plates of the truck in line with the Authority's powers as outlined under the **Traffic Act**.

16. To the Respondent, it is duly empowered pursuant to its functions under section 4 of the **Roads Act 2007** and **Traffic Act**, to remove the licence plates of any motor vehicle that fails to comply with the Rules and Regulations of Roads use. In its view, there is no illegality in the retention of an offending motor vehicle's number plates as long as the issues that precipitated the said removal remain unresolved hence the grant of the orders sought is absurd as it would, in fact, be tantamount to aiding a party which has violated the law in their illegal designs and that there are no exceptional or special circumstances to warrant the grant of the orders sought.

17. The Respondent's case was that it acted and executed its lawful mandate reasonably, while exercising its powers firmly but fairly, as required and expected under the law and that in light of the foregoing, the instant application is completely unmerited and ought to be dismissed with costs.

Determinations

18. Having considered the foregoing, this is the view I form of the matter.

19. Article 50(1) of the Constitution provides inter alia as follows:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

20. In this case the Respondent has relied on sections 3, 4 and 62 of the **Kenya Roads Act**, No. 2 of 2007, sections 55, 56, 106 of the **Traffic Act** and Regulation 15 of the **Kenya Roads Regulations, 2013 LN 86 of 2013**.

21. This Court has had occasion to deal with sections 55 and 56 of the Traffic Act. In **Republic vs. Cabinet Secretary for Transport & Infrastructure Principal Secretary & 5 Others exparte Kenya Country Bus Owners Association & 8 others [2014] eKLR**, this Court on 6th October, 2014 pronounced itself with respect to the issue of removal of number plates as follows:

“...for a licensing officer, a police officer or inspector to remove the vehicle identification plates and the vehicle licence he must form an opinion that the vehicle is being used in contravention of section 55 or section 56 of the Traffic Act which deal with conditions of vehicles and limitation of loads or in contravention of any rules relating to the construction, use and equipment of vehicles. After forming such an opinion, the officer concerned is required to make an order prohibiting the use of the said vehicle. The said identification plates and licences when removed are required to be delivered to the Registrar for keeping while the order is in force. It is therefore clear that to remove the said plates or licences in

circumstances other than those contemplated under Section 106(4) as read with sections 55 and 56 of Act and without an order of prohibition is illegal. If therefore the Respondents removed the same and are keeping them without surrendering the same to the Registrar, such action is unlawful and they ought to restore the same.”

22. This position was adopted by this Court in **Judicial Review Case No.458 of 2014 – Republic vs. Kenya National Highway Authority ex parte Alice Wanjiku Mwaura.**

23. In this case, the Respondent has not indicated what he did with the identification or number plates of the subject motor vehicle after their removal. In fact the Respondent’s position was that there is no illegality in the retention of an offending motor vehicle’s number plates as long as the issues that precipitated the said removal remain unresolved. If the Respondent’s position is and I understand it to be, that it was entitled to keep the said plates, then its action was tainted with illegality and I so find.

24. The Respondent further based his action on Regulation 15 of the ***Kenya Roads Regulations, 2013 LN 86 of 2013.*** The said regulation provide as follows:

(1) Where a vehicle is overloaded or is in contravention of these Regulations, an authorized officer shall undertake overload control measures and enforce these regulations.

(2) Subject to sub-regulation (1), the driver shall follow all the instructions issued by an authorised officer so that road safety and overload control procedures can be adhered to.

(3) Where a vehicle is found to have bypassed or absconded from a weighbridge station, whether overloaded or not, the registered owner shall be liable to pay a bypassing or absconding fee of two thousand United States dollars or its equivalent in Kenya Shillings, and subject to the provisions of these Regulations if the vehicle is found to be overloaded, the overloading fee and charging procedures provided in these Regulations shall be instituted in addition to the absconding fee.

(4) Failure to adhere to the instructions of the Authority or the police shall constitute an offence, punishable by detention of the vehicle and cargo at the expense and risk of the registered owner.

(5) If the fee provided in this regulation is not paid within ninety days from the date of imposition, the Authority shall issue a notice of sale by auction of the vehicle and the cargo.

(6) Subject to sub-regulation (5), before the cargo is disposed of, the Authority shall publish a notice in the Gazette and in two newspapers of national circulation within fourteen days after the motor vehicle or trailer has been impounded requiring the owner to claim for the goods failure to which the goods will be disposed off.

(7) The proceeds of any such sale shall cover the charges occasioned by sale and may include, the cost of the advertisement and removal of the vehicle or trailer while the remaining proceeds, if any shall be payable to the registered owner, or where the owner fails to claim within six months of the sale, the proceeds shall be deposited to the Authority.

(8) For security reasons the Authority shall notify the nearest police station within twenty four hours concerning a vehicle detained at the weigh bridge station.

25. This provision was the subject of the decision by **Emukule, J** in **Margaret Miano vs. Kenya National Highway Authority Mombasa High Court Petition No. 23 of 2015** where the learned Judge expressed himself inter alia as follows:

“There is in law a difference between a fee and a penalty. A fee is a price or cost exacted for any special privilege, for example a driver’s licence, a transport licence, and the like fees referred to in Regulation 6 and prescribed in Part A of the Schedule to the said Regulations.

So a licensing statute will prescribe a fee payable for the grant of a licence. The licensing statute or regulation will also prescribe a penalty for carrying out an activity subject to a licence, for example driving a motor vehicle without such a licence. The penalty is a fine, punishment, suffering or loss imposed for breach of a law, a disadvantage imposed upon a person who fails to obey the rules for example of a game such as penalty in football for fouling an opponent within the penalty area. By its very language Regulation 15(3) is not a licensing provision. It is a penal provision, and like all penal provisions it must be construed strictly. Because it is euphemistically called a fee does not change its intrinsic character that it is a fine or penalty for the offence of bypassing a weighbridge or absconding therefrom. The offence is subject to proof. The registered owner, like the Police, is required to be informed within twenty four hours of the fact of bypassing or absconding from the weighbridge. There is no presumption in law, or presumption in the Regulations that the driver or person who bypasses the weighbridge is automatically guilty...It is therefore not correct...that Regulation 15(3) does not envisage a trial or court process...For the authorized officer or deponent to suggest that Regulation 15(3) does not envisage a judicial process is to make the Respondent, Judge, Jury and Executioner, rolled into the Kenya National Highways Authority. That would be a monstrous situation, and a violation of Article 50 of the Constitution which guarantees a right to fair trial...This court and indeed the Judiciary is well aware of the efforts made by the Kenya National Highways Authority among other onerous functions, to ensuring adherence to the rules and guidelines on axle load control prescribed under the Traffic Act and other regulations made under that Act, and the Kenya Roads Act 2012 (Chapter 408/Revised Edition 2012 (2007)). This function must however be subject to due process, as prescribed by the Constitution.”

26. The learned Judge continued:

“The judicial function under Articles 23 and 159 of the Constitution as delegated by the people of Kenya to the Judiciary and relevant tribunals is to interpret and declare what the law is. It is not, again with profound respect, and we take great exception to the suggestion by the Respondent’s Engineer in paragraphs 16, 17 and 18 of his Replying Affidavit, to protect and shield any litigant who is alleged to have violated axle load or other regulations by bypassing or absconding from a weighbridge. All that the litigant seeks in this case, is to establish the legitimacy of the fee collected at the Mtwapa and other Weighbridges in the country. The inquiry into that legitimacy is what is called due process...The Kenya National Highways Authority is however not any of the tribunals established under the Constitution for resolution of disputes. The provisions of Regulation 15(3) may have unwittingly and therefore unlawfully constituted an Authority with powers of a Kangaroo court, that is to say, an improperly constituted body, a tribunal before which a fair trial is impossible. The provisions of Regulation 15(3) may also be contrary to Article 159 of the Constitution by purporting to confer upon the Kenya National Highways Authority power to collect fee/fines without due process by donating to such fines the euphemism of a “fee”. The provision may therefore be inconsistent with, and be a violation of the right to fair trial guaranteed under Article 50 of the Constitution, and to that extent therefore null and void under Article 2(4) of the Constitution.”

27. The learned Judge proceeded to direct the release of the subject motor vehicle pending the hearing of the petition.

28. **Onguto, J** on his part while dealing with the forum at which the penalty is to be levied expressed himself in Andrew Muiya Mbithi vs. Inspector General of Police & 2 Others [2015] eKLR as hereunder:

“I note that the Petitioner had admitted to being served with a notice of intended prosecution. No prosecution has however been preferred thus far. In my view nothing stops the Respondents, either through public or private prosecution, from pursuing the Petitioner proving that an offence has been committed and having the court levy the appropriate fine

once proof is rendered. The Petitioner will also then be obliged to pay the USD 2000.”

29. In my view Regulation 15 above effectively makes the Respondent the complainant, witness, the investigator, prosecutor and judge in the same cause or proceedings and that would be improper. This is the principle of *nemo iudex in sua causa*. As was held by the Court of Appeal in *Galaxy Paints Company Ltd. vs. Falcon Guards Ltd.* Civil Appeal No. 219 of 1998 [1999] 2 EA 83, the fundamental principle is that a man may not be a Judge in his own cause. This was the position adopted by the Supreme Court of Philippines in **Cojuangco vs. PCGG, 190 SCRA** 226, 227) where the Court held at pages 227-228 as follows :

" . . . In our criminal justice system, the law enforcer who conducted the criminal investigation, gathered the evidence and thereafter filed the complaint for the purpose of preliminary investigation cannot be allowed to conduct the preliminary investigation of his own complaint. It is, to say the least, arbitrary and unjust. It is in such instances that we say one cannot be 'a prosecutor and judge at the same time.' Having gathered the evidence and filed the complaint as a law enforcer, he cannot be expected to handle with impartiality the preliminary investigation of his own complaint, this time as a public prosecutor. The circumstances of the instant petition are even worse. To repeat, the PCGG and the Solicitor General, finding a prima facie basis, filed a civil complaint against petitioner and intervenors alleging substantially the same illegal or criminal acts subject of the subsequent criminal complaints the Solicitor General filed with the PCGG for preliminary investigation. While ostensibly, it is only the Solicitor General who is the complainant in the criminal cases filed with the PCGG, in reality the PCGG is an unidentified co-complainant. Moreover, when the PCGG issued the sequestration and freeze orders against petitioner's properties, it was on the basis of a prima facie finding that the same were ill-gotten and/or were acquired in relation to the illegal disposition of coconut levy funds. Thus, the Court finds that the PCGG cannot possibly conduct the preliminary investigation of said criminal complaints with the 'cold neutrality of an impartial judge,' as it has prejudged the matter." (Ibid, pp. 227-228.)

30. I therefore agree with **Emukule, J** that to the extent that aforesaid Regulation 15 tends to place the roles of the complainant, witness, investigator, prosecutor and judge in one entity, regulation 15 clearly violates Article 50 of the Constitution and pursuant to Article 2(4) of the Constitution, is null and void. In my view, the only institutions legally mandated to impose penalties are the Courts and independent Tribunals established pursuant to constitutional provisions and whose powers meet the constitutional threshold.

31. Therefore to the extent that the Respondent relies on a provision which clearly violates the letter and spirit of the Constitution, such action cannot be upheld by this Court. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** the Court expressed itself as follows:

“So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law.”

32. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that:

“... like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness...”

33. In this case, the issue is compounded by the fact that the applicant as never accorded an opportunity of being heard before the impugned decision was made. It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

34. The general position was restated in *Halsbury’s Laws of England Fourth Edition Vol. 1 page 90 para 74* as follows:

“The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available.”

35. Lord Denning, MR in *Selvarajan vs. Race Relations Board* [1976] 1 All ER 12 at page 19 observed that:

“In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice if the broad grounds are given. It need not

name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.”

36. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in **Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

37. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker.

38. In **Republic vs. The Registrar of Companies Ex Parte Transglobal Freight Logistics Limited Nairobi HCMA No. 711 of 2005**, Emukule, J held *inter alia* that:

39. The consequences of failure to afford a person adversely affected by the decision were outlined in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone’s advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio.”

40. This was a restatement of **Lord Wright's** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

“If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision.”

41. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

“Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void.”

42. The right to fair administrative action, in our jurisdiction is no longer just a common law requirement but is a constitutional edict based on Article 47 of the Constitution which provides that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

43. Similarly, section 4(3) of the ***Fair Administrative Action Act, 2015*** provides as follows:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

44. This position is similar to the South African position where the South African Supreme Court emphasised the importance of fair administrative action as a Constitutional right in **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1**, at paragraphs 135 -136 where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to

ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

45. Therefore where the action of an authority violates the provisions of the Constitution, this Court is not only properly entitled to intervene but is enjoined to do so in order to protect the Constitution and promote constitutionalism.

Order

46. In the result I find merit in the Notice of Motion dated 21st December, 2015, and issue the following orders:

1. An order of prohibition prohibiting the respondent whether acting by itself, its agents, officers, servant or whosoever from continuing to detain the number plates and insurance stickers of motor vehicle registration number KCC 677D Isuzu Lorry belonging to the applicant and/or from impounding and/or detaining the said vehicle and/or imposing a fine/fees against the applicant without adhering to the rules of natural justice, fair hearing and generally the due process of the law.

2. An order of Certiorari removing into this Court for the purposes of being quashed and quashing the decision of the respondent whether acting by itself, its agents officers, servants or whosoever to remove and detain the number plates and insurance stickers of motor vehicle registration number KCC 677D Isuzu Lorry belonging to the Applicant without adhering to the rules of natural justice, fair hearing and generally the due process of the law.

3. The respondent shall bear the costs of this application.

47. It is so ordered.

Dated at Nairobi this 31st day of October, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Odhiambo for the Respondent

CA Mwangi