



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 7 OF 2016**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLES 22(3) (C), 29A, 331A,  
35(1)(B), 40(3) AND 47(1)**

**BENSON RUIYI NJANE.....PETITIONER**

**VERSUS**

**1. KENYA RURAL ROADS AUTHORITY**

**2. DIRECTOR GENERAL KENYA RURAL ROADS**

**AUTHORITY ENGINEER J.O. OGANGO**

**3. INSPECTOR-GENERAL OF POLICE.....RESPONDENTS**

**AND**

**SHADRACK KAMBI & 34 OTHERS.....INTERESTED PARTIES**

**JUDGMENT**

1. By an Amended Petition dated 19<sup>th</sup> April, 2016 and filed on 20<sup>th</sup> April, 2016, the Petitioner, Benson Ruiyi Njane sought the following nine orders –

(i) a declaration that the Respondents have violated Articles 35(1) (b), 29(a) and 40(3) of the Constitution of the Republic of Kenya by refusing to release motor vehicle registration number KBB 112 K to the Petitioner, leaving it without security prone to vandalism and by refusing to reveal the names of the officers who detained the vehicle;

(ii) a declaration that the Second Respondent has violated Article 47(1) of the Constitution of the Republic of Kenya by failing to provide an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair;

(iii) a declaration that the detention of motor vehicle registration number KBB 112 K by officers of the First Respondent working under instruction or command of the Second Respondent is illegal and unlawful;

(iv) a declaration that the Second Respondent refusal to release motor vehicle registration number

KBB 112 K to the Petitioner was unnecessary, callous, malicious and illegitimate and has rendered necessary the filing of this Petition since the Respondent must be compelled to comply;

(v) an order for compensation for loss of earnings from motor vehicle registration number KBB 112 K at the rate of Kshs. 18,000 per day from 1/3/2016 when it was unlawfully detained to the date it will be released to the Petitioner;

(vi) general damages, punitive and aggravated damages against the First and Second Respondents for the refusal to release the motor vehicle and for behavior that can only be punished by an order for adequate general and aggravated damages to be assessed with reference to the loss of earnings and the eminent risk of a suit being levelled against the Petitioner for breach of contract following the illegal detention of his vehicle. The amount should be in a sum that would be felt by the Respondents so that the Respondents will not in the future behave in a similar manner;

(vii) a declaration that the Second Respondent is not fit and competent to hold public office;

(viii) an order that the Respondents be compelled to release and return the insurance sticker, ignition keys and number plates in respect of motor vehicle registration number KBB 112 K to the Petitioner and in default the Petitioner be allowed to move the vehicle using self-made number plates or Kenya garage number plates pending the hearing and determination of this Petition;

(ix) an order that all costs of this Petition irrespective of the outcome be paid by the Respondents jointly and severally.

2. The Petition was supported by the Affidavit of the Petitioner, Benson Ruiyi Njane sworn on 19<sup>th</sup> April, 2016, in which the Petitioner details the circumstances under which his motor vehicle registration number KBB 112 K Faw Tipper was detained at Lunga Lunga, Kwale County.

3. The Amended Petition was followed by a Chamber Summons dated and filed on the same date with the Petition, under a Certificate of Urgency. The Petitioner sought one order, that pending the hearing and determination of the Petition, the motor vehicle be released to the Petitioner. The Chamber Summons was heard on 21<sup>st</sup> April, 2016, and an order was made for the release of the motor vehicle to the Petitioner together with its ignition key, insurance sticker and number plates and in default the Petitioner be allowed to use self-made number plates or Kenya Garage Number Plates to move the vehicle.

4. In his Replying Affidavit Livingstone Kinyanjui Ngugi like the Petitioner describes the circumstances under which the Petitioner's motor vehicle was detained, and vehicle's number plates removed and taken to the National Safety Authority in Nairobi for safe keeping until collected by the owner. He depones that the driver of the motor vehicle ran away when he went to call the owner of the motor vehicle, the Petitioner. The deponent says that when he failed to return, he and his colleague decided to, and removed the vehicle number plates.

5. This deponent also depones that all the actions he and his colleagues took were in accord with the statutory mandate of the Kenya Rural Roads Authority (the First Respondent) and in particular Section 7(2) (d) and (f) of the Roads Act, [Cap 403, Laws of Kenya] and the regulations thereunder which mandate it to oversee the management of traffic on rural roads and other issues related to road safety.

6. This deponent admits that they did not weigh the motor vehicle because the driver ran away, and that they did not tow it because of the road conditions. That they just left it where it was stopped after removing the registration plates, that they did not take the licence, or the ignition key of the motor vehicle. He denies detention of the motor vehicle, that by stopping the motor vehicle they did not violate the law or the Constitution, and they could not charge any one because they did not know whether an offence had been committed as the vehicle was not weighed because the driver had ran away. He urged that the Petition and the Chamber Summons under it were unwarranted and that it should be dismissed with costs.

7. However, in a **Further Affidavit** sworn and filed on 5<sup>th</sup> May, 2016, by Sammy Kamau, the driver of the subject motor vehicle denies completely, the averments in the Replying Affidavit of Livingstone Kinyanjui Ngugi, and says –

(a) He informed the First Respondent's officers that the vehicle was not overloaded since it had been weighed at site and he was aware of the tonnage he had carried;

(b) He challenged the officers to weigh the vehicle but officers ordered him to drive to Diani where the vehicle would be weighed, and they followed him to Lunga Lunga cess station and he parked the vehicle off the road and alighted to call the Petitioner to send him money to pay the cess station;

(c) While making the call the officers of the First Respondent came out of their vehicle and started to remove the number plates. They climbed into the truck's cabin and removed the vehicle's insurance sticker and ignition key;

(d) The two officials of the First Respondent asked me to meet them at Rongai Restaurant in Ukunda at 4 p.m. with Kshs. 50,000 so that I could get back the items they took away;

(e) I pleaded with them to at least give back the insurance sticker and ignition key to enable me drive to Diani but they refused. I even requested them to weigh the vehicle using the portable weighing machine and they declined;

(f) I did not run away as alleged in the affidavit. I was left with the vehicle after the officers left with the ignition key and the number plates;

(g) He was the only driver to that vehicle. The officers did not even ask for my driving license. It is therefore very suspicious for the deponent of the replying affidavit to say that I was making a call to the driver of the vehicle when I ran away while they admit that I was the one driving the vehicle when they stopped it;

(h) I met with the two offices of the First Respondent in Ukunda on 2/3/2016 on that date they demanded Kshs. 30,000. The Petitioner refused to pay saying that the vehicle had not overloaded, and that is when they told me that the vehicle will rot at Lunga Lunga since they were forwarding the number plates and the other items to their Nairobi office;

(i) The allegation that I ran away is therefore a lie. I was with the officers of First Respondent from the time they stopped the vehicle, when they removed the number plates and on two occasions at Ukunda. At no time did they ask for my details or driving licence or demand the weighing of the vehicle to establish tonnage of the load carried. They did not even tag me for any suspected wrong doing, in this instance over-loading;

(j) The officers refused to give me the ignition key and insurance sticker to enable me drive the truck to Diani for weighing. They refused to weigh the vehicle at Lunga Lunga using the portable weighing machine. Efforts to have the vehicle weighed were thus frustrated by the officers of the First Respondent who kept asking for money without subjecting the vehicle to weighing. We did not know what else to do other than seek a court order to allow us move the vehicle;

(k) As a truck driver I know that offences related to over-loading are brought against both the driver and owner of the vehicle. The vehicle carries ballast and sand and has the owner's telephone number written in large font on the carrier. If I ran away the officers could have called the owner of the truck and notify him or even charge him.

8. There is no reply by the Respondents representative to the Further Affidavit of Sammy Kamau, his averments on oath are therefore uncontroverted.

9. In addition to the Petition, the Supporting Affidavit, the Replying Affidavit, and the Further Affidavit

aforesaid, respective counsel filed written submissions in support of the Petitioner's and Respondents' positions. The Petitioner's counsel's submissions dated 27<sup>th</sup> June, 2016 were filed on 29<sup>th</sup> June, 2016. The Respondent's counsel's submissions dated 22<sup>nd</sup> July, 2016, were filed on 25<sup>th</sup> July, 2016. The two submissions are diametrically opposed to each other. Whereas the Respondents' counsel submits that the Respondents' officers or personnel were exercising their statutory mandate under the Traffic Act and other enabling provisions, the Petitioner's counsel pleads that the Respondents' officers or personnel acted contrary to both the Constitution, and the Fair Administrative Action Act 2015, and that the Petition should be allowed with costs. I will begin with the Respondents' case.

### **The Respondents' Submissions**

10. The facts are not disputed. Counsel for the Respondents submits that, one Livingstone Kinyanjui Ngugi, the officer in charge of Axle Load Unit, Kenya Rural Roads Authority (KERA) was directed by the Director-General of KERA, along with other officers from KERA, accompanied by Police Officers (who are unnamed), but headed by Corporal Amos Munyiri left Nairobi to the Coast Region for inspection of axle load weights of motor vehicles using roads managed by KERA in the Coast region. He admits the officers were using motor vehicles KCD 315G and KBL 120G.

11. Counsel reiterates the contents of the Replying Affidavit of Livingstone Kinyanjui Ngugi, that while on their inspection, they encountered a lorry, make FAW Tipper which joined the Lunga Lunga Mombasa Road from a side road. They stopped it and introduced themselves to the driver, and demanded that the lorry which they said was carrying sand, be weighed for them to ascertain it was carrying the lawful load.

12. However, contrary to the claim by the Respondents' personnel that the driver of the lorry informed them that he was not the lorry's usual driver, of the vehicle, and that he should be allowed to call usual driver of the vehicle, the Further Affidavit of Sammy Kamau is categorical that he, Sammy Kamau, was the driver of lorry and had been the driver since the owner of the lorry, the Petitioner, had been awarded a contract to supply building materials to Ryanja Enterprises Limited at a cost of Kshs. 18,000/= per day and that the contract had been terminated as the lorry had been detained for over forty (40) days. He had not ran away. He had gone to call the owner of the vehicle, the Petitioner, for money to pay at the cess station. The officers of the Respondents had ripped off the number plates of the vehicle, the insurance sticker and ignition key by the time he turned to them. The Petitioner had refused to give him money for payment at the cess station, he had refused to pay him Kshs. 50,000/= bribe to the officers even when it was reduced to Kshs. 30,000/=

13. The Replying Affidavit of Livingstone Kinyanjui Ngugi has not replied to the claims of bribery, insisting that they (the officers) carried out their mandate in accordance with the law applicable, and cannot be accused of any administrative impropriety let alone a breach of any provision of the Constitution.

14. In their submissions, counsel reduced their submissions into two issues, **firstly** whether the Petitioner's constitutional rights were infringed by the Respondents, sub-divided into specific sub-issues –

(i) the right to fair administrative action;

(ii) the right of access to information held by another person and required for the exercise or protection of any right of fundamental freedom;

(iii) right not to be arbitrarily deprived of property of any description or any interest in, or right over any property of any description;

and

(2) **secondly**, whether the Petitioner is entitled to damages.

### **The Petitioner's Case**

15. The Petitioner's counsel too, raised the same two issues raised by counsel for the Respondents, but added a third issue, whether the Petitioner is entitled to costs for the Petition. But before the court can deal with the basic substantive issues set out above, I think it is necessary to deal with what would have been a preliminary objection, if it had been raised at the hearing of the Petition.

16. The preliminary issue is essentially a procedural objection. Since the advent of the Constitution of Kenya, 2010 and the provisions of Article 159(2)(d) of the Constitution – **“that justice shall be administered without undue regard to procedural technicalities”** our jurisprudence has tended to ignore procedural rules as merely technical, and should be disregarded to achieve substantial justice. I think however Article 159(2)(d) should be read with the procedural article, per excellence, Article 47 of the Constitution. That Article provides –

**“(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”.**

17. Tied to this provision (47(1)(2)) are the provisions of Section 67 of the Roads Act,(Cap 408) which provides –

**“Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect—**

**(a) the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent; and**

**(b) such action or legal proceedings shall be instituted within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.**

18. In this case the act of neglect or default complained of occurred on 1<sup>st</sup> March, 2016 at Lunga Lunga and did not cease until some fifty two (52) days later. The complainant, the Petitioner was required to give the Respondents at least thirty (30) days' notice in writing. The Petition was filed on 11<sup>th</sup> March, 2016, that is ten (10) days after occurrence of the act complained of, that is the detention of the Petitioner's vehicle on 1<sup>st</sup> March, 2016. That was contrary to the provisions of Section 67(1) of the Roads Act. Procedurally therefore, the Petitioner did not give the Respondents the thirty (30) days statutory notice which the law required.

19. Article 22(3) provides that the Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that –

**(a) ...**

**(b) Formalities relating to proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation.**

20. Rule 4(1) of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (LN No. 117 of 2013) provides that –

**“4(1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High court in accordance with these rules.”**

21. Thus reading Article 22(3) and rule 4(1) above, it is clear that there is no statutory or other limitation to instituting proceedings alleging that a right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened. The only condition is that the Applicant/Petitioner must **inter alia** disclose –

(a)

(b)

(c) **the constitutional provision violated;**

(d) **the nature of injury caused or likely to be caused to the Petitioner or the person in whose name the Petitioner has instituted the suit, or in a public interest case to the public, the class of persons or community.**

22. The limitation set out in Section 67 of the Roads requiring notice of thirty days to the Authority before instituting suit only applies to ordinary civil claims. It does not apply to cases (Petitions/Applications) alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened. The Respondents’ claim to the contrary is not borne out by the Constitution, and that leg of defence therefore fails.

### **The Petitioner’s and Respondents’ Common Issue**

23. The common issue between the Petitioner and the Respondents is whether the Petitioner’s right to property as guaranteed under Article 40 of the Constitution was violated.

24. Article 40(3) of the Constitution of Kenya 2010 provides –

**“40(1)**

**(2)**

**(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**

**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that— (i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.”**

25. It was contended by counsel for the Petitioner that his right to property had been violated by detention of his vehicle for over fifty two (52) days. Detention, is, with respect is not taking over of property in terms of Article 40(3) of the Constitution. Article 40(3) contemplates, an “expropriation” the permanent taking away of property usually land or building for public purposes which attracts **just** compensation in terms of both the Constitution and the Land Acquisition Act, [Cap 295, Laws of Kenya]. The detention of a motor vehicle, a vessel, aircraft, may give rise to an action in damages, not a Constitutional Petition. That is why these sort of Petitions are frowned upon by courts. For instance in the Indian case between **DR. B. SINGH vs. UNION OF INDIA & OTHERS**, decided on 11<sup>th</sup> March, 2004, in Writ (Petition) No. 122 of 2004, the court said –

**“...Public Interest Litigation which has now come to occupy an important field in the administration of law should not be “publicity interest litigation” or “private interest litigation” or “politics interest litigation” or the latest trend “paise income litigation”. If not properly and strictly regulated at least in certain vital areas or spheres and abuse averted it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well to malign not only an incumbent to be in office but demoralise and deter reasonable or sensible and prudent people even agreeing to accept highly sensitive and responsible offices for fear of being brought into disrepute with baseless allegations. There must be real and genuine public interest involved in the litigation and concrete or credible basis for maintaining a cause before court and not merely an adventure of knight errant borne out of wishful thinking. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction.”**

26. In the case of **HARRIKISSOON vs. ATTORNEY-GENERAL OF TRINIDAD AND TOBAGO [1980] A.C. 202** where the court said -

**“The notion that wherever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the constitution is fallacious. The right to apply to High Court under Section 6 (our Section 23) of the Constitution for redress when any human right or freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures of invoking judicial control of administrative action. The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the Applicant to invoke the jurisdiction of the court under the Section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being solely for the purpose of avoiding the necessity of applying in the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”**

27. The Indian courts used strong language, constitutional jurisdiction should not be **“polluted”** with ordinary claims which can be litigated under the ordinary civil process of the court where oral evidence is given, and the veracity of witness is tested by cross-examination. In this case the right of the Petitioner to property was neither violated nor was it threatened. The claim for violation under Article 40(3) of the Constitution does not lie, and is rejected.

28. Article 47 of the Constitution guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

29. The Respondent argues that its officers were carrying out their mandate under Section 106(4) and (4A) of the Traffic Act, [Cap 403, Laws of Kenya]. These provisions say –

**“106(1) – (3)**

**4 Any police officer, licensing officer or inspector, if he is of the opinion that any vehicle is being used in contravention of section 55 or section 56 or in contravention of any rules relating to the construction, use and equipment of vehicles, may by order prohibit the use of such vehicle, under such conditions and for such purposes as he may consider necessary for the safety of the public or to ensure that such vehicle does comply with the provisions of section 55 or 56; and any such order shall remain in force until the repairs specified therein have been satisfactorily completed and the vehicle has been certified as complying with the rules relating to construction, use, equipment and eight.**

**4A Where a police officer, licensing officer or inspector makes an order under sub-section (40 he may remove the vehicle identification plates and the vehicle licence and, if he does so, shall deliver them to the Authority to be kept while that order remains in force.”**

30. These provisions are however subordinate, and must be implemented in accordance with Article 47 of the Constitution and Section 4(6) of the Fair Administrative Action 2015, which expressly provides that procedure in any other law must conform to the principles in Article 47 of the Constitution. This calls into question the constitutionality of the provisions of Section 106(4) and 4A of the Traffic Act which empower Police Officers at the spar of the moment to ground a person’s motor vehicle without due process. That is of course not an issue for determination in this matter, but it does call into question the consistency of Section 106(4) and (4A) of the Traffic Act, with the clear requirements of Article 47, and Section 4(6) of the Fair Administrative Action Act.

31. In this regard, I am of the considered view that the Petitioner’s rights to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair was infringed by the Respondent’s officers. One cannot separate **“legality”** (lawfulness under Section 106(4) and 4A of the Traffic Act) from reasonableness and procedural propriety. **“Reasonableness”** and **“procedural fairness”** are principles of natural justice – no person may be a judge in his cause, and no person may be condemned unheard, and require the Respondents’ to establish whether indeed the Petitioner’s motor vehicle was being used in contravention of any provision of the Traffic Act including compliance with loading or **“axle”** load requirements. To pluck and rip away the registration number plates of a motor vehicle without compliance with the rules of natural justice, is certainly a violation of Article 4 of the Constitution, and I so find and hold. And the Petitioner is entitled to damages.

32. There was however no evidence to show that the Petitioner had a contract with a third party, nor evidence of the rate of earnings per day. I therefore direct that the parties take a mutually acceptable date in the Registry for hearing and assessment of damages, and of costs.

33. In summary, I find and hold that the Petitioner’s right to fair administrative action was violated, and the Petitioner is entitled to damages (to be proved) for loss of earnings of his motor vehicle and costs.

34. I decline to grant all the other orders sought in paragraphs (i), (iii), (iv), (vi), (vii) and (viii) of the Amended Petition.

35. There shall be orders accordingly.

**Dated, Signed and Delivered at Mombasa this 28<sup>th</sup> day of November, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

Mr. Wachira for Petitioner

Mr. Njengo holding brief Mwangi Wahome for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

No Appearance for 3<sup>rd</sup> Respondent

No Appearance for Interested Parties