



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW CASE NO.458 OF 2014**

**IN THE MATTER OF AN APPLICATION BY ALICE WANJIKU FOR JUDICIAL REVIEW  
ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF KENYA ROADS ACT, ACT NO. 2 OF 2007**

**AND**

**IN THE MATTER OF LEGAL NOTICE NO. 86 OF 2013**

**AND**

**IN THE MATTER OF ILLEGAL REMOVAL AND DETAINMENT IF NUMBER PLATE FOR  
MOTOR VEHICLE REGISTRATION NO. KBX 168 BY THE 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup>  
RESPONDENTS**

**BETWEEN**

**REPUBLIC**

**VERSUS**

**KENYA NATIONAL HIGHWAY AUTHORITY....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**SGS KENYA LIMITED.....3<sup>RD</sup> RESPONDENT**

**HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**EX PARTE ALICE WANJIKU MWAURA**

**RULING**

**Introduction**

1. By a Notice of Motion dated 16<sup>th</sup> December, 2014, the applicant herein sought an order quashing

the respondents' decision to remove, detain and confiscate the number plates for the applicant's lorry registration number 166T (hereinafter referred to as "the lorry"), an order prohibiting the respondents from carrying out the said actions, an order compelling the respondents to release the said number plates and of course the costs of the application.

### **Ex Parte Applicant's Case**

2. What provoked these proceedings, according to the ex parte applicant, was that on 17<sup>th</sup> November 2014 the lorry was on its way from Embu to Githunguri to deliver charcoal when on stopping at a market known as Kiamwangi for the driver's refreshment, two men in motor vehicle KBU 432R gained access to the vehicle by breaking the window and vandalised its ignition parts with a view to restarting the same.
3. On being confronted by the ex parte applicant's agents, the two men identified themselves as agents of the 1<sup>st</sup> and 3<sup>rd</sup> respondents and informed the applicant's agents that the said vehicle was under their control for offences allegedly committed at the weighbridge along Thika Road before driving away in the two vehicles.
4. On being notified of the foregoing, the ex parte applicant in the company of her driver and conductor pursued the said agents of the 1<sup>st</sup> and 3<sup>rd</sup> respondents only to find the said vehicle having overturned at a place called Kamiitu. Soon thereafter they were joined the motor vehicle KBW 919D Toyota Pro Box ("the Saloon") branded with the names of the 3<sup>rd</sup> Respondent, the 1<sup>st</sup> respondent arrived with a gentleman accompanied by a police officer and a demand for payment of Kshs 150,000.00 up from Kshs 100,000.00 was made.
5. After a brief exchange the said people removed the lorry's number plates and left the scene without any explanation, notice or written document. The ex parte applicant's subsequent efforts to secure the release of the said number plates were fruitless. In the ex parte applicant's view, the said lorry was neither overloaded nor dangerously loaded to warrant the action taken.
6. It was the applicant's case that the action of plucking off the number plates from the lorry was without reason, communication, documentation or justification and amounted to blatant abuse of her constitutional rights.

### **1<sup>st</sup> Respondent's Case**

7. According to the 1<sup>st</sup> Respondent, the information obtained from the Duty Manager at Juja Weighbridge was that at around 1500 hrs the suit lorry which was carrying charcoal and which was heavily loaded was intercepted by the 3<sup>rd</sup> Respondent's officers in the saloon and OCS Juja Weighbridge, IP **George Kipchumba Rotich** in his personal car KBU 432R at Gathage Centre while trying to circumvent the weighbridge. Attempts to direct the lorry to the weighbridge pursuant to section 15(3) of the Legal Notice No. 86 of 2013 of the Kenya Roads Act were ignored by the driver who ran away with the motor vehicle keys leaving his co-driver who became abusive and violent behind. As the lorry was dangerously parked on the road and could easily topple or overturn the ex parte applicant was prevailed upon to convince her driver to come and drive the vehicle to the weighbridge but along the way, the driver of the lorry took opposite direction and drove towards Ruiru Town. On the same being pursued, it was found to have overturned and the driver disappeared. Thereafter the SGS team and police officers left the scene and the lorry under guard of local people in the presence of the ex parte applicant.
8. According to the 1<sup>st</sup> respondent the ex parte applicant later went to its office and sought pardon and was advised to pick the number plates from OCS Juja Weighbridge.

### **2<sup>nd</sup> and 4<sup>th</sup> Respondents' Case**

9. On the part of the 2<sup>nd</sup> and 4<sup>th</sup> Respondents, it was contended that on 17<sup>th</sup> November, 2014, the lorry was intercepted while overloaded with bags of charcoal being driven on a *panya* (clandestine) route to avoid the weighbridge. On being intercepted the lorry crew who were uncooperative became defiant and violent and overpowered the police necessitating reinforcement to be called after a police offer was seriously assaulted. However the suspects ran away leaving

- the lorry on the road.
10. The lorry was then driven by a police officer towards the weighbridge but after 100m a lady claiming to be a sister of the owner of the lorry arrived, apologised for the crew's conduct and requested that the lorry driver be permitted to drive the lorry a request which was acceded.
  11. However instead of the same being driven to the weighbridge the same was diverted towards Ruiru at high speed but lost control and overturned and the driver ran away and disappeared.
  12. Subsequently on 18<sup>th</sup> November, 2015 the applicant sent an emissary who tendered an apology for the conduct of the driver and the truck crew and was informed that the number plate had been taken to the 1<sup>st</sup> Respondents by the 3<sup>rd</sup> Respondent's staff.
  13. According to the 2<sup>nd</sup> and 4<sup>th</sup> Respondents the same number plate was retained by the 1<sup>st</sup> Respondent hence was not in their custody.

### **3<sup>rd</sup> Respondent's Case**

14. According to the 3<sup>rd</sup> Respondent, it is contracted by the 1<sup>st</sup> Respondent on behalf of the Government to run weighbridges in the country.
15. On 17<sup>th</sup> November, 2014 the 3<sup>rd</sup> Respondent was notified that the lorry had been spotted evading the weighbridge and that the lorry was intercepted heavily and dangerously loaded with charcoal.
16. On the driver being asked to drive towards the weighbridge, he obliged but after a few kilometres stopped the vehicle and ran away leaving the conductor who started shouting and issuing threats.
17. After the conductor became violent, **IP George Rotich**, the OCS Juja, ordered **Cpl. Evans Kiboi** to remove the number plates from the lorry and the same were taken to the Police Station.
18. According to the 3<sup>rd</sup> Respondent, its agents did not remove or handle the said number plates. The said lorry apparently got involved in an accident thereafter.

### **Determination**

19. While these proceedings were pending the ex parte applicant herein apparently succumbed to blood pressure and passed away and on 19<sup>th</sup> January, 2015, she was substituted by **Moses Mbuti Wanjiko**. However on 23<sup>rd</sup> February, 2015, the number plates were returned.
20. This ruling is therefore limited to the issue of the costs of these proceedings.
21. In The general rule as to costs is provided for in **section 27** of the **Civil Procedure Act** which provides as follows:

***Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:***

***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.***

22. This provision has been the subject of several judicial pronouncements. In the case of *Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006* the Court of Appeal expressed itself thus:

**“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the**

**Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court’s view the learned Judge’s order was wrong and for the foregoing reasons, the plaintiff’s appeal succeeds as to the award of interest and costs on the principal sum awarded”.**

23. In **Devram Manji Daltani vs. Danda [1949] 16 EACA 35** it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

24. In **Party of Independent Candidate of Kenya & Another vs. Mutula Kilonzo & 2 Others HCEP No. 6 of 2013**, it was held:

**“The main reason why this Petition should be withdrawn is due to the demise of the 1<sup>st</sup> Respondent. This would call upon the Court considering ordering each party to bear their own costs. In the case of *Nedbank Swaziland Ltd verses Sandile Dlamini No.(144/2010) [2013] SZHC30 (2013)* Maphalala J. referred to the holding of *Murray C J in the case of Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227*, who stated as follows:**

***“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”***

25. In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation. See **Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and **Mulla (12<sup>th</sup> Edn) P. 150.**

26. 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 6<sup>th</sup> 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.”**

27. This Court then proceeded to order that the removal of the identification or number plates or licences from the petitioners'/applicants' motor vehicles 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 was illegal and directed the Respondents to restore the same.

40. The applicant contended that the action of plucking off the number plates from the lorry was without reason, communication, documentation or justification and amounted to blatant abuse of her constitutional rights. Whereas the police could properly pluck out the number plates where the aforesaid legal provisions were satisfied, such power has to be exercised within the law. An issue of jurisdiction may arise in one of two instances or both. The first scenario is where the authority has no jurisdiction to embark upon the investigation of the matter before it *ab initio*. The second scenario is where though the authority though seised of jurisdiction at inception, subsequent events, actions or circumstances deprive the authority of the jurisdiction to move further. This clarification was made succinctly by **Madan, J** (as he then was) in **Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC NO. 1546 of 1971 (HCK) [1972] EA 525** where he held:

**“Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction. What is forbidden is to question the correctness of a decision or determination which it was within the area of their jurisdiction to make.....The phrase “to make such order thereon as it deemed fit” giving powers to a statutory tribunal must be strictly construed. Powers must be expressly conferred; they cannot be a matter of implication.”**

41. Similarly, in **Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1** it was held that a limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics and that if the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction.

28. In this case, it comes out from the position adopted by the 3<sup>rd</sup> Respondent which position was not controverted that the number plates were plucked by police officers. The said police officers have not adduced any evidence that they complied with sections 55 and 56 of the **Traffic Act**. Accordingly their actions were *prima facie* illegal and the ex parte applicant is entitled to costs.

29. However, since the respondents have made the applicant's work easier by not taking her through the submissions of an otherwise hopelessly un-defendable application, the 2<sup>nd</sup> Respondent will bear half the costs of the applicant.

30. It is so ordered.

**Dated at Nairobi this 28<sup>th</sup> day of April, 2015.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Miss Kamende for Mr Narangui for the Applicant***

***Mr Ochieng Odhiambo for the 1<sup>st</sup> Respondent***

***Cc Patricia***