



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 201 OF 2014

HORIZON CARGO LIMITEDPETITIONER/APPLICANT

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITYRESPONDENT

JUDGMENT

Introduction

1. By its petition dated 28th April 2014, the petitioner alleges violation of its constitutional right to property by the respondent through the issuance, in April 2014, of a directive to all truck owners to remove or tamper with Airbag/springs on the Tag Axle of all the 6x2 heavy commercial trucks. The petitioner alleges that this directive was given on the ground that some drivers of these trucks have been in the habit of lifting the said Tag Axle when the trucks are loaded thereby causing damage to the roads.
2. Both parties filed submissions on their respective cases which they asked the Court to rely on. This judgment therefore pertains to the petition and is based on the pleadings and submissions of the parties on record.

The Petitioner's Case

3. In his affidavit in support of the petition sworn on 28th April 2014, Mr. Robert Njagi, a director of the petitioner, avers that the petitioner is in the transport business operating heavy commercial trucks and trailers with a load capacity of 5000 kgs. The petitioner's trucks are of Renault DX1 and DCI model that are fitted with Airbag/Springs on the Tag Axle at the point of manufacture, the purpose of which is to reduce damage caused to roads as a result of the load being carried on the trailer. He states further that the petitioner's trucks are fitted with automatic load sensors which cause the Tag Axle to lower on the ground and remain on the ground when the trucks are loaded and in motion, and also allows the Tag Axle to be raised when lightly loaded or while moving without a trailer for purposes of saving on tyre wear and increasing traction.
4. It is also the petitioner's deposition that its trucks have been manufactured in a manner that can allow the easy manoeuvre and operation of the trucks in emergency situations. According to the petitioner, the Tag Axle can lift temporarily for 30-60 seconds with the help of the Airbag/Springs when a truck is loaded to allow increased traction for the third drive axle to propel the truck forward if stuck uphill or when on a rough and/or wet road.
5. The petitioner avers that it had sourced its trucks from outside the jurisdiction of this Court, and at

the point of registration, the trucks were duly inspected by Customs, found to meet the standards set under the law, and were duly registered and licenced according to the strict terms and provisions of the Traffic Act Cap 403 of the Laws of Kenya.

6. The petitioner avers that sometime in April 2014, the respondent issued a directive to all truck owners to remove and/or tamper with the Airbag/Springs on the Tag Axle of all the 6x2 heavy commercial trucks on the ground that some drivers of these trucks have been in the habit of lifting the said Tag Axle when the trucks are loaded thereby causing damage to roads. It contends that it has in its possession dealer certificates which certify that the applicant's heavy commercial trucks, and in this case the Tag Axle, cannot be interfered with due to the automated system that can only allow the Tag Axle to be lifted as and when the trucks are loaded. It is its case that its drivers cannot tamper with the axle or operate the trucks in the manner complained of by the respondent.
7. The petitioner avers further that if it was at all possible for its drivers to interfere with the Tag Axle as claimed by the respondent, it has put in place self-regulatory measures that involve taking its drivers through defensive driving courses, orientating the drivers on how to best operate the trucks, and sanctioning the said drivers against any illegal or unlawful operation of the load sensor valves on the trucks.
8. The petitioner therefore alleges that the respondent's directive is unlawful and ill-advised since it is inconsistent with the Constitution of Kenya and outside the strict provisions of the Traffic Act and Legal Notice No 93 of June 2013.
9. It is its case that the removal of or tampering with the Airbag/Springs on the Tag Axle has numerous negative ripple effects. It alleges that such removal compromises the safe operation of the pressure system which is essential for the effective braking system and the running of gear and clutch systems, thereby making it impossible to operate the truck; that the removal and/or tampering with the airbag/Springs which play a secondary role in supporting the suspension system for the Tag Axle will mean that the Tag Axle will have inadequate suspension that may easily lead to its malfunction and increased damage to roads and highways; the failure of the truck's braking system and suspension will lead to accidents leading to damage of property and loss of lives; and any accidents that may arise from the removal and/or interference with the Airbag/Springs will expose the applicant to several and unnecessary litigation arising from claims that may be lodged against the applicant in the event that the respondent's directive is upheld.
10. The petitioner further alleges that it risks not being indemnified by its insurers for any losses suffered since it is a policy that the insurance company does not compensate a party for any loss where the manufacturer's design for safe equipment operation has been tampered with; and further, that it is also highly likely to lose the manufacturers/dealers warranty in respect of its trucks and will be forced to take responsibility for repairs, to its detriment.
11. The petitioner further contends that it has entered into several agreements with financial institutions with its trucks as collateral and it will be to its detriment when the trucks are tampered with since the financial institutions may in turn require that the facilities be secured by different assets which the applicant does not have. It is its contention that it will thereby be exposed to unnecessary litigation and great financial loss and to its not being considered credit worthy, thereby losing its current and future business and clientele.
12. It is the petitioner's case that the respondent acted in a manner that was a travesty of justice by unilaterally issuing the directive in question without involving or seeking the views of all the stakeholders in the sector. It contends that the directive was meant to harass, embarrass, intimidate and ambush the petitioner and other stakeholders at various weigh bridge stations where two of its trucks and many others belonging to other stakeholders have since been illegally detained.
13. The petitioner contends that the respondent has not indicated what other measures it has explored to curb the damage caused to roads by the heavy commercial trucks instead of the removal of the

Airbags/ Springs from the Tag Axle. It contends that the actions of the respondent are meant to deny it the quiet enjoyment of its property and the sweat of its labour.

14. The petitioner has annexed to the supplementary affidavit of Mr. Robert Njagi sworn on 4th August 2014 what it terms as evidence of its ownership of the trucks it alleges were detained by the respondent. Mr. Njagi deposes that the petitioner is the registered owner of vehicle registration Numbers KBS 398N, which was detained at Mlolongo and released after two days, KBV 439Y which was detained at Mariakani, and KBV 441Y, which was detained at Gilgil. He avers further that following the detention, the petitioner was forced to remove the Tag Axle airbags from the said vehicles so that the trucks could continue with their respective journeys.
15. The petitioner avers that the respondent acted in blatant disregard of the Constitution, the Traffic Act and Legal Notice No 93 of June 2013 by denying it a fair hearing without any justification whatsoever. It therefore asks the Court to grant the following orders:
 1. ***A declaration the unilateral decision by the respondent to issue the directive of April 2014 is in violation of Article 40(2)(a) & (b) of the Constitution of Kenya 2010 and is therefore unconstitutional.***
 2. ***A declaration that the declaration that the directive of April 2014 cannot be implemented whatsoever since the same will be unconstitutional and a great violation of the petitioner's fundamental Constitutional right.***
 3. ***A declaration that the directive of April 2014 is null and void.***
 4. ***A declaration that the impounding of heavy commercial trucks which have not complied with the respondent's directive of April 2014 is unconstitutional and therefore null and void.***
 5. ***The respondent to pay the petitioner costs of these proceedings in any event.***

The Respondent's Case

16. The respondent opposes the petition and has filed an affidavit in reply sworn by Eng. Charles Okeyo, its Manager, Maintenance, (Lower Eastern and Coast Region), on 9th January 2014.
17. The respondent describes itself as a statutory body established under Section 3 of the Kenya Roads Act Cap 408 Laws of Kenya. It states that it is responsible for the management, development, rehabilitation and maintenance of, national roads. Its functions and duties include implementing road policies in relation to, and rehabilitation and maintenance of national roads. It also has the mandate of ensuring adherence to the rules and guidelines on axle load control prescribed under the Traffic Act.
18. In his affidavit in response to the averments by the petitioner, Eng. Okeyo argues that what the petitioner refers to as automatic sensors are actually dead axles which is an addition not fitted and certified by the vehicle manufacturer, are normally installed to aid transporters carry excess weight, and are not intended to save wear and tear or to increase traction as the petitioner alleges.
19. He avers that the purpose for which the dummy axles have been installed is to aid the carrying of excess tonnage, and that the drivers of the trucks only engage the dead man's switch at the Weighbridge so that the axles seem to have the statutorily permitted weights.
20. Eng. Okeyo avers further that the fact that the petitioner may have sourced its vehicles from outside the jurisdiction, and that the trucks were inspected after importation, does not mean the trucks cannot be interfered with after entering the country. It is the respondent's deposition that the purpose for which the alterations to trucks have been made by many fleet owners is to defeat the provisions on axle control, and that machines can be tampered with by fleet owners in cahoots

with the drivers.

21. According to the respondent, this petition was precipitated by its implementation of **Rule 12 of the Traffic (Amendment) Rules 2013** which prohibits operation of vehicles with additional axles. The rule is in the following terms:

“ A person shall not operate a vehicle on a public road with dummy or dead axle, defective suspension or dead man’s switch or other mechanisms in the vehicle that affects the weight transmitted to the road pavement.”

22. The respondent therefore denies the petitioner’s allegation that it put in place the alleged directive in respect of axle load arbitrarily arguing that the rule with respect to the axle load was put in place in accordance with the law.

23. The respondent submits further that the petition raises the question whether legislation and regulations made thereunder are unconstitutional. It contends that the petitioner has not demonstrated that its constitutional rights have been violated, and relies on the decision in **East African Breweries Limited vs Attorney General & 2 Others [2013] eKLR**, in which the Court (Lenaola J) reiterated the principle that a party alleging violation of a constitutional right must demonstrate, with a reasonable degree of precision, what provisions of the Constitution have been violated, as well as the manner of violation.

24. According to the respondent, the petitioner is a juristic, not a natural, person, and neither is it a citizen. It submitted therefore that the petitioner, as a juristic person, was not entitled to seek enforcement of the Bill of rights. The respondent urged the Court to be guided by the decision in **Nairobi Law Monthly Company Limited –vs- Kenya Electricity Generating Company & 2 Others [2013] eKLR**. In its submission that in that case, the Court declined to issue the orders sought on the basis that the term “citizen” in the Constitution referred to a natural, not a juristic person.

25. The respondent submitted further that the petitioner is guilty of laches. According to the respondent, the petitioner alleges that its claim arises as a result of the directive issued by the respondent in April 2014. It contends that the rule in question, which is contained in **Legal Notice No. 93 of 2013**, came into effect in June 2013. It submitted that the petitioner should have brought its claim diligently as constitutional applications should be brought expeditiously with due regard to fundamental principles of the law.

26. It was also its submission that it had not made any decision as alleged by the petitioner, and that if its communication could be termed a decision, the respondent was only communicating the law as it is and did not deprive the petitioner of any benefit. The respondent has relied on the decision in **Kenya National Highway Authority & 7 Others Ex-parte Kenya Transporters Association & 8 Others [2013] eKLR**.

27. It was also the respondent’s contention that the object of the rules fall within the State’s obligation to protect life and property. According to the respondent, Section 55(2) as read with 58(1) and Rule 41(2) and (2) of the Twelfth Schedule of the Traffic Act outlaws motor vehicles exceeding the maximum set axle loads limits. It is its case that it is duty bound to ensure adherence to the law, rules and guidelines on axle load control as provided under the Traffic Act.

28. With regard to the petitioner’s contention that there had been a violation of its right to property, the respondent submitted that the petitioner has not demonstrated how its right to property has been violated. It submitted that in the present case, the petitioner is alleged to have contravened Traffic Regulations as provided under Legal Notice 93 of 2013, and there was therefore no violation of the provisions of Article 40. It was its submission that having acted in accordance with the law, it cannot be said to have acted arbitrarily.

29. The respondent asked that the petition be dismissed with costs, noting that public interest demands that the respondent acts in the best interest of the public, and such interest will not be served if the respondent is restrained from exercising its statutory duties of ensuring maintenance of roads for the safety of the public.

Determination

30. The issue raised by the petition before me is fairly simple: whether there has been a violation of the petitioner's constitutional rights, specifically with respect to property, by the respondent through the enforcement of Legal Notice No. 93 of 2013.

31. The petition is expressed to be brought for alleged violation of the petitioner's constitutional rights under Articles 19, 20, 21, 22, 23, 40 (a) (b), 259 and 165. As is now well established in the dictum of the court in **Anarita Karimi Njeru vs Republic (1979) KLR 54** and **Trusted Society of Human Rights Alliance -v- Attorney General & Others High Court Petition No. 229 of 2012**, the petitioner has an obligation to show, with a reasonable degree of precision, the provisions of the Constitution that have been violated, and the manner of violation with respect to him.

32. As observed by the respondent, Articles 19-23 contain the general provisions relating to the Bill of Rights, including the rules of standing and the powers of the Court in dealing with a matter alleging violation of constitutional rights. Article 165 contains provisions regarding the jurisdiction of the High Court, while Article 259 contains the principles on which the Constitution is to be construed. Thus, the only Article that falls within the Bill of Rights is Article 40, which contains the constitutional protection of property, which so far as is relevant for present purposes, is in the following terms:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person

a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

33. Contrary to the submissions of the respondent, the petitioner, even as a juristic person, is entitled to protection of such fundamental rights as can be said to accrue to a juristic person, such as the right to property. The decision of the Court in the **Nairobi Law Monthly** case relied on by the respondent related specifically to the right to information, which, under Article 35(1) as determined in that case, is limited to natural persons who are citizens. Should the petitioner demonstrate a violation of its right to property, then it would be entitled to reliefs as provided under Article 23. The question is whether it has established a violation of its right as alleged or at all.

34. I have perused the petitioner's pleadings and submissions to find a demonstration of the manner in which the regulations in dispute violate its right to property. Its contention, as I understand it, is that the requirement that it removes the tag axle is meant to deny it the quiet enjoyment of its

property and the sweat of its labour. It has also made allegations that removal of the axle will lead to accidents and claims by parties who may be injured as a consequence of such accidents. It also alleges that its trucks were detained by agents of the respondent, thereby depriving it of its right to property.

35. The difficulty that the Court has with the present petition is that it consists mostly of vague statements, unsupported by any evidence or documents that can assist the Court to determine the issues in dispute. Apart from the letter said to be from the importers of the petitioner's trucks and the email communication and short text messages exchanged between Mr. Njagi and an Eng. Muita which are annexed to the supplementary affidavit sworn by Mr. Njagi on 4th August 2014, there is nothing else that can assist the Court to determine whether there is a violation or threat of violation as alleged.

36. Further, the Court observes that the petitioner does not anywhere in the petition make reference to, or annex the Legal Notice N0. 93 of 2013. It constantly refers to a 'directive' by the respondent, without attaching a copy thereof. The Court is therefore left to suppose, on the basis of the respondent's pleadings and submissions, that the impugned decision or 'directive' is the said Legal Notice.

37. Should that be the document in contention, then the Court is concerned that the petitioner has sought to challenge it more than one year after it came into effect. And since it has not directly challenged it, the Court would have to deal with the Legal Notice by assuming that it is the document under challenge. This the Court cannot properly do.

38. In the circumstances, I can find no merit in the petitioner's case. Its petition is therefore dismissed with costs to the respondent.

Dated, Delivered and Signed at Nairobi this 15th Day of April 2015

MUMBI NGUGI

JUDGE

Mr. Oyombra instructed by the firm of Kerandi Manduku & Co. Advocates for petitioner

Mr. Odhiambo instructed by the firm of Ogola Okello & Co. Advocates for the respondents