



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 27 OF 2015

REPUBLIC.....APPLICA
NT

VERSUS

OFFICER IN CHARGE OF AXLE LOAD MONITORING UNIT.....1ST
RESPONDENT

DIRECTOR GENERAL, KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND
RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....3RD
RESPONDENT

EX-PARTE

LAZARUS KYALO

MUSYOKA

JUDGEMENT

1. By way of the Notice of Motion application dated 17th February, 2015, the ex-parte Applicant, Lazarus Kyalo Musyoka prays for orders:

“ i) THAT an order of certiorari do issue to remove the orders by the Officer-in-charge Axle Load Monitoring Unit dated 26th October 2014 and 23rd January 2015 and bring the same to this honourable court for the purposes of being quash, and quash the same.

ii) THAT the Respondents herein, their agents and/or officers be prohibited from continuing to detain the registration number plates belonging to vehicles registration number KAE 583M and KAM 258M Isuzu trucks on the basis of and/or the authority of the orders dated 26th October 2014 and 23rd January 2015 issued by the Respondents.

iii) Costs of this application be awarded to the applicant.”

2. The Officer-in-charge Axle Load Monitoring Unit is the 1st Respondent. The 2nd Respondent is

the Director General of Kenya National Highways Authority and the 3rd Respondent is the Kenya National Highways Authority (KeNHA).

3. In brief, the Applicant's case is that he is the registered owner of motor vehicles KAE 583M and KAM 258M Isuzu trucks. On 26th October, 2014 motor vehicle registration number KAE 583M was parked at Kithimani Market loaded with sand. The respondents' officers went and pinned a notice on the motor vehicle and plucked its registration plates. They alleged that the driver of the lorry was avoiding their mobile weighbridge.
4. It is the Applicant's case that the actions of the respondents were unlawful as they had no jurisdiction over the said vehicle which was parked at the market and not on the highway. The Applicant asserts that when he visited Matuu Police Station on 29th October, 2014 in compliance with the orders pinned on the vehicle, the officer in charge of the Police Station informed him that he was not aware of the respondents' orders and neither did have a weighbridge for weighing the vehicle.
5. As for motor vehicle registration number KAM 258M, it is the Applicant's case that on 23rd January, 2015 the respondents' officers travelled to Masinga market upon learning that the said vehicle had been impounded by the police for loading sand in an unauthorised area. According to the Applicant, the roads leading to Masinga market are earth roads and the nearest tarmacked road or highway is 15 Kilometres away. The Applicant asserts that the respondents' officers plucked the registration plates of the second motor vehicle and refused to return them to him. It is the Applicant's case that the respondents' actions were unlawful and malicious.
6. The respondents opposed the application through a replying affidavit sworn by Engineer Isaiah Onsongo of the 3rd Respondent's Axle Load Control Section and filed in Court on 27th March, 2015. From the said affidavit, it is the respondents' case that the 3rd Respondent (KeNHA) is a state corporation established under Section 3 of the Kenya Roads Act, 2007 ("the Act"). In accordance with Section 4 of the Act its functions includes ensuring adherence to the rules and guidelines on axle load as prescribed under the Traffic Act, Cap 403.
7. Engineer Onsongo averred that KeNHA's Axle Load Monitoring Unit is responsible for the enforcement of rules and guidelines on axle load management along Kenyan roads. It uses both static and mobile weighbridges to weigh vehicles to confirm that they carry loads within the prescribed legal limits.
8. In regard to the first motor vehicle, the respondents' case is that on 26th October, 2014 Mobile Axle Load Unit officers were on patrol along Matuu-Thika Road when they spotted motor vehicle registration number KAE 583E carrying sand. They flagged it down but the driver refused to stop and instead drove towards Kithimani Road where he parked the vehicle about 100 meters off the main road and escaped. The truck's number plates had been covered with mud to conceal them. At the scene they found the lorry loader. They asked him to call the driver so that he could come and drive the vehicle to the weighbridge. The driver did not turn up. The number plates were then removed in accordance with the Traffic Act and a prohibition order issued to the Applicant. The Applicant never availed the truck for weighing.
9. As for motor vehicle registration number KAM 258M, the respondents' case is that their officers were called by law enforcement officers to Masinga Police Station and requested to weigh the vehicle which was at the yard. The Applicant or his agent refused to switch on the engine to enable the vehicle mount the mobile weighing scale for weighing. The number plates were thus removed and a prohibition notice issued to the Applicant requiring him to avail the vehicle for weighing. It is the respondents' case that the number plates were subsequently forwarded to the National Transport and Safety Authority for safekeeping pending the resolution of the matters.
10. It is the respondents' case that by abandoning the truck thereby rendering the officers unable to weigh it, the driver acted in violation of Section 15(2) and 15(4) of Legal Notice No. 86 of 2013, the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 ("the Legal Notice") which provides that the driver shall follow the instructions of the authorized officer and prescribe the penalty for failure to adhere to the instructions of the authorised officer or police officer. Further, that Section 15(4) of the Legal Notice provides that bypassing or absconding a weighbridge makes the owner of the truck liable to pay a fee of 2000 United States dollars or its equivalent in Kenyan shillings. According to the respondents, the Applicant's failure to avail the vehicles for weighing means he had absconded a weighbridge and he ought to pay the fee

prescribed by the Legal Notice. It is the respondents' assertion that Matuu–Thika Highway is a national road and the Applicant's vehicles were found on that road.

10. Did the respondents act in excess of their powers? It is the Applicant's case that the respondents had no authority to do what they did. On their part the respondents contend that their actions were lawful.

12. In respect of motor vehicle registration number KAE 583M the Applicant's case is that the same was parked at a market place as the driver had gone to a funeral. The respondents' case is that the driver refused to stop at a mobile weighbridge. Which is the correct version? The more plausible case is that of the respondents. They have availed photographs to show that the lorry was loaded with sand. Its front number plate was covered with mud in order to conceal the registration number. It is not believable that a person can load sand on a lorry and proceed to a funeral. Funerals do not happen without prior notice and a person who intends to attend a burial will always plan their itinerary. There is no reason why the respondents would target the Applicant's said truck. Section 15 of the Legal Notice provides that bypassing or absconding a weighbridge attracts a fee of USD 2000. The actions of the respondents cannot be said to be unreasonable and neither were they unlawful.

13. Section 106(4A) of the Traffic Act allows a police officer, a licensing officer or inspector to remove the vehicle identification plates and the vehicle licence where a vehicle has been used in contravention of Section 55 or Section 56 or in contravention of any rules relating to the construction, use and equipment of vehicles. Section 56 of the Traffic Act provides for limitation of loads. No vehicle is to be used on a road with a load greater than the load specified by the manufacturer of the chassis of the vehicle or than the load capacity determined by an inspector under the Traffic Act. The respondents' action of removing the registration plates of motor vehicle Registration No. KAE 583M was therefore backed by the law.

15. The evidence in regard to motor vehicle registration number KAM 258M is that the same had been detained at Masinga Police Station and the respondents' officers were called to the Police Station. There is no specific offence allegedly committed by the driver or owner of this particular vehicle. They did not abscond any weighbridge. Nobody has been charged with any offence under the Traffic Act. The decision to detain the said motor vehicle and pluck its number plates was therefore not lawful as no offence had been committed.

16. In summary, I find that the decision to detain Motor vehicle Registration Number KAE 583M was lawful. I note that the bank guarantee for Kshs.300,000/= issued by Equity Bank on 18th March, 2015 expired on 16th June, 2015. In the circumstances the Applicant is directed to pay to the respondents the sum of 2000 US dollars or its equivalent in Kenyan shillings within seven days from the date of this judgment. If the Applicant fails to do so, the respondents are at liberty to seize and detain the said motor vehicle until the money is paid.

17. The seizure and detention of motor vehicle Registration No. KAM 258M was unlawful. Since the vehicle together with its registration plates have been released to the Applicant, I find no need to issue any orders.

18. Considering the outcome of these proceedings, I direct that each party will meet own costs of the same.

Dated, signed & delivered at Nairobi this 18th day of August, 2015

W. KORIR,

JUDGE OF THE HIGH COURT