



**REPUBLIC OF KENYA**

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

**CIVIL MISCELLANEOUS APPLICATION 122 OF 2014**

**BLUE JAY INVESTMENT  
LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT/RESPONDENT**

**RULING**

1. The application dated **22<sup>nd</sup> July, 2014** brought by way of Notice of Motion pursuant to the provisions of **Article 40(3)** of the **Constitution**; **Order 51** Rule 1 of the Civil Procedure Rules and **Sections 63(e) 1A, 1b** and **3A** of the **Civil Procedure Act** and all enabling provisions of the law seeks orders as follows:-
  - i. That the court orders the respondent to immediately release and restitute the applicant's property particularly motor-vehicle registration number **KBS 781Z Mercedes Benz** which was unlawfully impounded on the **15/7/2014** and which is being detained by the defendant/respondent pending the hearing and determination of this application.
  - ii. That the court be pleased to declare the impounding and detention by the respondent of motor vehicle registration number **KBS 781Z Mercedes Benz** and subsequent retention unlawful.
2. The application is premised on grounds as follows:-
  - i. **That** the respondent unlawfully impounded the applicant's motor-vehicle registration number **KBS 781 Z Mercedes Benz** and has continued to detain and retain the said motor-vehicle without justification.
  - ii. **That** the applicant has made persistent efforts to be furnished with the reason why the motor-vehicle was impounded and/or detained at the respondent's premises but the respondent has failed and /or refused to co-operate.
  - iii. **That** the applicant has suffered and continues to suffer heavy loss of business and inconvenience as a result of the unavailability of the unlawfully detained motor-vehicle in its fleet.
3. The application is supported by an affidavit deposed by **Said Lugo Mwachiti**, the *Claims Manager* of the applicant. He avers that their driver was stopped at Mlolongo weighbridge on the **15<sup>th</sup> July, 2014** at about **7.00pm** following allegations that he had failed to stop at the weighbridge. The motor-vehicle was impounded. No charges have been preferred against the driver and no reasons have been given why the motor-vehicle is being held.
4. The motor-vehicle had carried a consignment of caustic soda belonging to **Unilever Kenya** situated in **Industrial Area, Nairobi County**. The detention was solely actuated by the respondent's officer's

intention to solicit for a bribe from the applicant.

5. The applicant has exploited all legal avenues to have the matter resolved but the respondent has remained adamant that **USD 2000** be paid to the **Kenya National Authority** to have the motor-vehicle released.

6. In a reply thereto, **Eng. Isaiah J. Onsongo** the **Senior Engineer** attached to the **Axle Load Enforcement Section** of the respondent deposed that according to high speed weigh in motion camera for the **19<sup>th</sup> June, 2014**, the driver of motor-vehicle was called in for weighing at 3.19pm but he failed and/or refused to divert into the weighbridge and was tagged in the system as such, hence having not been weighed.

7. On the **15<sup>th</sup> July, 2014** the motor-vehicle passed at **Mlolongo** only to be detained for having violated **Section 15(3)** of the **Legal Notice Roads (Kenya National Highways Authority) Regulations, 2013** and as provided by the law. Having committed an offence the applicant must pay the requisite fees as prescribed in law for the motor-vehicle to be released.

8. Further, he stated that the applicant had been notified of the reason for detention of the motor-vehicle and the fine to be paid but it neglected and/or refused to comply. He denied allegations of a corrupt intention having existed on their part and purported action taken to resolve the problem. It was stated that the motor-vehicle could only be released upon payment of the requisite fee.

9. I have considered rival submissions by counsels for the applicant and respondents.

10. **Article 40(3)** of the **Constitution** alluded to by the applicant is in respect of Protection of the Right to Property. It is expressly provided that where the State has to deprive of a person property, there ought to be compensation. This is not the case in the subject herein. This is a case where the applicants are alleged to have contravened the Highway Regulations as provided by the Law. The State having acted in accordance with the law cannot be said to have acted arbitrarily.

11. It is not denied by the respondents that the applicant's motor-vehicle was detained. It is however, argued that the vehicle was found having bypassed/absconded the weighbridge station. Counsel for the applicants dismissed annexures to the affidavit as irrelevant. It was his argument that the police should have arrested the motor-vehicle.

12. Regulation **15(3) (4) (5)** of the **Kenya Boards(Kenya National Highways Authority Regulations, 2013** provided thus :-

*(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.*

*(5t. 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.”*

13. It has been demonstrated by affidavit evidence that motor-vehicle Registration Number **KBS 781Z**, a truck was tagged in the system on the **19<sup>th</sup> June, 2014** at **3.19 pm**, its driver having failed to divert into the weighbridge.

14. No evidence was adduced to controvert evidence of the vehicle having failed to divert to the weighbridge as required. The allegation that the photograph was not true was a statement made from the bar which the court cannot rely upon. It is disregarded.

15. Having by passed the weighbridge the registered owner of the motor-vehicle must pay the requisite fee in the sum of **USD 2000** – or its equivalent in **Kenya Shillings**. The motor-vehicle was detained. It has been stated that it was carrying cargo owned by **Unilever Kenya**. The vehicle and cargo have been detained at the risk of the registered owner of the motor-vehicle. According to sub-regulation **(5)** of **Regulation 15** of the Regulations, if the fee is not paid within **90 days**, then a notice of sale by auction of the vehicle and cargo shall issue.

16. The regulations do not provide for a situation where the offender is charged in a court of law and a fine imposed. What is provided for is payment of a fee. In the circumstances the action that was taken by the respondent was justified.

17. Consequently, the application fails. It is dismissed with costs to the respondent.

18. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 13<sup>TH</sup> day of AUGUST, 2014.**

**L.N. MUTENDE**

**JUDGE**