REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 208 of 2012

REPUBLIC.....APPLICANT

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY.....RESPONDENT

EX PARTE

1. KENYA TRANSPORTERS ASSOCIATION

2. ANWARALI BROTHERS CROWN PETROLEUM (K) LIMITED

3. AWADH OMAR BAYUSUF

4. KYOGA HAULIERS (K) LIMITED

5. MOTREX LIMITED

6. MODERN COAST BUILDERS & CONTRACTORS LIMITED

7. AWALE TRANSPORTERS

8. BASH HAULIERS LIMITED

9. BUZEKI ENTERPRISES LIMITED

JUDGEMENT

INTRODUCTION

1.By a Notice of Motion dated 24th May 2012, the *ex parte* applicants herein seek the following orders:

1) AN ORDER OF CERTIORARI to remove to this Honourable Court to be quashed the decision of Kenya National Highway Authority contained in the letter dated 23rd April 2012 purporting to reduce/limit the allowable maximum gross vehicle weights for vehicles fitted with 'dummy/dead' axles.

2) AN ORDER OF CERTIORARI to remove this Honourable Court to be quashed the decision of Kenya National Highway Authority signified by the letter dated 23rd April 2012 purporting to prohibit the fitting of 'dummy/dead' axles.

3) AN ORDER OF PROHIBITION prohibiting the implementation of the decision of Kenya National Highway Authority contained in the letter dated 23rd April 2012 purporting to reduce/limit the allowable maximum Gross Vehicle Weight fitted with 'dummy/dead' axles.

4) Costs.

***EX PARTE* APPLICANT'S CASE**

2. The application is grounded on the Statutory Statement and Verifying Affidavit filed on 17th May 2012 and sworn by **Richard Kimutai** on 16th May 2012.

3. According to the said documents, Kenya Transporters Association (hereinafter referred to as "the Association") is membership association duly registered and established in Kenya for purposes of representing the rights and interests of road transport operators in Kenya while the other applicants are companies incorporated in Kenya and engaged in long haul transportation business. The Kenya National Highway Authority (hereinafter referred to as the Authority") is a state corporation established under ***Kenya Roads Act***, No. 2 of 2007. On 23rd April 2012 the Authority communicated its decision to prohibit the fitting of 'dummy/dead' axles and conveyed its decision that with effect from 25th May 2012 any dummy/dead axles on a vehicle will be ignored/disregarded at the Authority's weighbridges in computing allowable maximum gross vehicle weights (GVW). The said decision also vests in weighbridges attendants' wide discretion to consider lift axles as dummy/dead for purposes of computing the allowable maximum gross weights. According to the advise received from applicants' advocates, the dimension and axle configuration of motor vehicles is governed by the Traffic Act, Cap 403 Laws of Kenya and the Rules made thereunder while the weights and dimensions of vehicles operating on Kenyan roads are similarly governed by the same Act more particularly section 55(2) thereof with specific weights and dimensions of vehicles being prescribed in the Twelfth schedule to the Rules which schedule was amended by Legal Notice Nos. 112 of 1999, 145 of 2007 and 118 of 2008. According to the said Rules the maximum gross vehicle weights should range between 18,000 kgs and 48,000 kgs depending on the prescribed vehicle types and any vehicle whose weights and dimensions do not conform to the foregoing provisions is not allowed use on the roads under section 58(1) of the ***Traffic Act*** hence a vehicle will be abiding the law where it is loaded with the permitted weights according to its vehicle type and axle configuration.

4. In the deponent's view, the use of lift axles sought to be treated as dummy/dead axles under the subject circular has not been outlawed by any law and more particularly by the ***Traffic Act*** and Rules made thereunder and that for the purposes of ascertaining the weight of a vehicle, the Authority usually weighs a vehicle on all it axles and computes the allowable gross vehicle weights tallying the individual axles weights. The effect of implementing the decision, according to the deponent, will have the consequence of reducing the weight carried by the subject vehicles by a whole 8,000 kgs and will have the consequence of rendering unusable thousands of vehicles, which have been operating as such with the government's full authority has stepped out of its mandate and its threatened actions amount to gross violations of the constitution, the ***Traffic Act*** and the Rules made thereunder. According to the applicants, the Respondent has no power to criminalise actions that are otherwise lawful in the manner it has purported to do or at all hence its actions are ultra vires the relevant law, null and void for purporting to criminalising actions which have not been classified as such by any existing law. It is therefore contended that the Respondent's actions border on gross constitutional violations for intending to indict members of the Applicant Association for acts which have not been criminalised by any law. Further the above measures if implemented will render the trucks owned and operated by the Applicant's membership as unusable leading to the colossal losses in the long haul transport industry yet the said circular has been issued without due regard to the relevant provisions of the law and without any or any sufficient and proper consultations with the industry players.

5. According to the *ex parte* applicants, it is only fair and just that the legality of the aforementioned circular be determined forthwith as this is an issue which bears great significance on whether or not the Applicant's membership will remain in long haul transport business and the grave effect on its employees

who number in their thousands. Furthermore, the notice is too short and will expose the membership of the Applicant Association in particular to grave financial losses and potential unenforceable contractual breaches. It is deposed that the Respondent Authority failed to grant the Applicant Association any or any due hearing and failed to engage in any or any meaningful consultations with the Association hence the Respondent's decision is improper, unfair and unjustified curtailment of the rights of the membership of applicant Association to fair administrative actions. It is reiterated that the Respondent failed to take into account the law and other relevant factors or considerations in purporting to criminalise the fitting and use of dummy/dead axles and threatening to ignore the dead/dummy axles in computing a vehicles allowable gross vehicle weight and that the Respondent's decision is mischievous, against public interest, public policy, contrary to law and meant to undermine the proceedings in Constitutional Petition Number 144 of 2012. Therefore, it is the applicant's case that it is only fair and just that the orders sought herein be granted as the implementation of the decision impugned herein has the direct consequence of completely shutting the membership of the Applicant Association from engaging in the long haul transport business.

RESPONDENTS' CASE

6 In opposition to the application, the respondent on 24th May 2012 filed a replying affidavit sworn by **Engineer Muita S. Ngatia**, a Manager with the Respondent in charge of Axle Load Control According to him the decision being challenged by the Applicant was not made by the Respondent but by the Axle Load Oversight Committee of which the Applicant is member. The said Committee, it is deposed was inaugurated on the 9th day of March 2010 by the Permanent Secretary, Ministry of Roads and whose membership is composed of several bodies and whose role is *inter alia* to provide a forum for coordination and communication of efforts by making it easier for stakeholders to liaise on curbing of overloading; controlling axle loads at loading points, and having standardised vehicles which are compliant when fully loaded. The said Committee, it is deposed deliberated on the dummy/dead axles and resolved that the said axles were illegal and a threat to safety to other road users and was contributing to overloading on axles and exerting more stress on the road pavement and hence irrevocable damage. According to the deponent the Applicant was duly represented at the workshop at which the said resolutions were made and no objection was raised by the said representatives. As a result of the request by the Applicants they were given one month to communicate with their members. Therefore, it is the Respondent's position that the Respondent's letter simply communicated the Committee's resolutions and not those of the Respondent hence there is no decision made by the Respondent capable of being quashed while the Committee not being a public body is not amenable to orders of judicial review. While outlining the Respondent's duties which are aimed at undertaking management, development, rehabilitation and maintenance of national roads, it is deposed that there is no law which authorises dummy axles to be fitted in motor vehicles after registration and inspection by the registrar of motor vehicles before being authorised on the road. Section 56(1) of the Traffic Act provides limitation of loads and does not provide for dummy/dead axles not fitted by the manufacturer. Allowing the Applicants to modify the vehicles by introduction of dummy/dead axles would therefore contravene the provisions of ***Traffic Act*** since it is a deception meant to carry more load than that provided for by the manufacturer and vehicle registration documents and overload other axles. In the Respondent's view, the Applicant's application is mischievous as the other Committee partners are not joined in these proceedings and is brought to undermine other pending Constitutional Petitions hence ought not to be granted.

SUBMISSIONS IN SUPPORT OF THE *EX PARTE* APPLICANT'S APPLICATION

7. While reiterating the contents of the Motion, the Statement and the affidavits, the *ex parte* applicant submitted that it is the Minister who vested with the power to make rules dealing with the weight or dimension on the roads. It is submitted that the use of lift axles sought to be treated as dummy/dead axles under the subject circular has not been outlawed by any law hence the Respondent has out stepped its mandate and usurped the Minister's powers. It is submitted that all axles fitted on a vehicle are lawful if falling within the prescribed dimensions and configuration and since the laws provide for lift axle mechanism, this cannot be outlawed by mere letter from the Respondent. As the Respondent Authority has usurped the rule making decision impugned amount to the making of rules by the Authority and the Respondent's decision is an attempt to amend the law and rules by backhand without gazettement, is unreasonable, unprocedural and contrary to the Applicant's legitimate expectations.

RESPONDENT'S SUBMISSIONS

8. On the part of the respondent Authority, it is submitted that what is sought to be quashed is not a decision but a letter communicating to stakeholders outcome of their deliberations hence the applicant has not met the threshold set out in Order 53 rule 7. The Respondent was therefore merely playing the role of a secretarial of a committee at which the Applicant was represented. Relying on **Republic vs. Minister of Roads & Public Works & Another *ex parte* Kyevaluki Services Limited High Court Misc. Civil Appeal No. 365 of 2010 [2012] eKLR** it is submitted that "for orders of certiorari to issue, the applicant must prove the existence of the order, decision or record being challenged by way of judicial review otherwise the court may run the risk of issuing orders in vain. If there is no decision, there would be nothing capable of being removed to the High Court for purposes of being quashed. As a matter of law and practice, courts do not issue orders in vain or orders that are incapable of endorsement."

9.It is submitted that public interest demands that the Respondent do act in the best interest of the public and the same 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 as provided by law.

10. It is submitted that 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 and that the Respondent is duty bound to ensure adherence to the law, rules and guidelines on axle load control as provided under the ***Traffic Act***. By enforcing the law, it is submitted the Respondent would merely enforce its statutory mandate and obligations and the Court cannot stand in the way of a public body executing its legal mandate hence the orders sought for herein cannot apply. Relying on **Republic vs. Vice Chancellor, Jomo Kenyatta University & Technology *ex parte* Dr Cecilia Mwathi and Another [2008] eKLR** it is submitted that the applicant has not demonstrated any excesses/*ultra vires* acts by the Respondent in execution of its mandate. As long as a Tribunal does its work reasonably within the framework of the statutory provision which brought it into being, it is submitted on the authority of **Roshanali Essa Esham vs. Registration of Accountants Board**, the court will not make an order to tell the Tribunal how to conduct its business. Since the said deliberations sought an understanding on enforcement of the law as it exists, there is nothing out of the scope of the law. Since the Applicant was represented at the Committee's workshop, it is submitted that the application herein is aimed at furthering the applicant's mischief. It is further submitted that the Applicants has commenced several law suits against the respondent with a view to causing disharmony and defeating the respondent's statutory mandate on supervision and enforcement of the law some of which are pending ruling hence the Applicant's action amounts to an abuse of the court process. The Respondent hence accuses the Applicant of being guilty of misrepresentation and relies on **Republic vs. Kenya Revenue Authority *ex parte* Aberdare Freight Services Limited [2004] eKLR**.

11. On legitimate expectation, it is submitted that the issue does not arise because there is no decision made by the respondent and, secondly, if the communication by the Respondent would be termed as a decision, the Respondent was only communicating the law as it is and the Applicant was not deprived of any benefit and relies on **Council of Civil Service Unions vs. Ministry for Civil Service**.

DETERMINATIONS

12. Having considered the foregoing, this is the view I form of the matter.

13. The first issue for determination is the competency of the application. The Respondent's position is that there is no decision capable of being quashed since the Respondent was only communicating a decision made at a workshop about the deliberations of the Axle Load Oversight Committee at which the Applicant was represented. In the letter dated 23rd April 2012, it was expressly stated that there were findings made at the said Workshop with respect to dummy/dead axles fitted on trucks at which it was resolved that the dummy/dead axles should be removed within a period of one month. The Director General of the Respondent then went ahead to give a period up to 25th May 2012 for the removal of the said dummy/dead axle otherwise the same would be ignored/disregarded at the weighbridges when computing the allowable maximum gross vehicle weight. The last paragraph of the said letter was not a

decision but information on what the discretion the weigh bridge operators could exercise. It is therefore clear that the letter dated 23rd April 2012 was not a decision but a communication of a decision which had been arrived at, at the said workshop. The worst that the said letter could amount to was an implementation of the decision arrived at the said workshop.

15. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:**

"Where a decision is made and its making has been made known to the Respondents who did not challenge the same within 6 months of its being made by way of *certiorari* to have it moved into the High Court and be quashed, it is not open for them to seek to have the Appellant prohibited from implementing the decision as an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law."

14. In this case it is contended by the Respondent that the Applicant was represented at the said workshop and was aware of the decision. However what is challenged in these proceedings is not the decision but the implementation thereof by the Respondent. Whether or not the decision was lawful, without the decision itself being challenged, the Court would be acting in vain if it were to purport to quash the implementation thereof while leaving the decision itself intact.

15. The foregoing determination goes hand in hand with the failure to comply with the provisions of Order 53 rule 7. Under the said provision the applicant is not entitled to question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court. However, in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,** it was held thatthe decision to alienate land or to allocate is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7. The Court further held that in a deserving case the Court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law.

16. On my part, I am of the view that where the *ex parte* applicant for any reason is unable to exhibit the decision sought to be quashed, then he ought to satisfy the Court on his failure to exhibit the decision which decision is required to be verified by affidavit with the registrar. Failure to comply with this mandatory provision renders the application incompetent. In my view it is important to annex a copy of the impugned decision not only for the court to satisfy itself as to the time it was made and also to be certain that the decision actually exists.

17. In this case, it is contended that the decision itself is not capable of being quashed since it was not made a by a public body. The question of what constitutes a public body is not an easy one to determine. This problem was recognized by the Court of Appeal in **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194,** where **Platt, JA** expressed himself as follows:

"The order of judicial review is only available where an issue of "public law" is involved but the expressions "public law" and "private law" are recent immigrants and whilst convenient for descriptive purposes must be used with caution, since the English Law traditionally fastens not so much upon principles as upon remedies. On the other hand to concentrate upon remedies would in the present context involve a degree of circuitry or levitation by traction applied to shoestrings, since the remedy of *certiorari* might well be available if the health authority is in breach of a "public law" obligation but would not be if it is only in breach of a "private law" obligation."

18. On his part **Platt, JA** expressed himself as follows:

"It would, as a general rule, be contrary to public policy and as such an abuse of the process of the Court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was of an ordinary action, and by this means to evade the provisions of Order 53 for the protection of such authorities……By an extension of remedies and a flexible procedure it can be said that something resembling a system of public law is being developed. Before the expression "public law" can be used to deny a subject a right of action in a positive prescription of law by statute or by statutory rules…….If a matter of public law is directly involved then in general (subject to certain exceptions) the prerogative orders should be resorted to since the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decisions……..But if the matter is truly a private matter, then a civil suit would be appropriate……At present it is not entirely easy to decide what is a private law matter as distinct from a public law matter……..Employment by a public authority *per se* does not inject any element of public law. Nor does the fact that the employee is in a higher grade or is an officer as distinct from the holder of an office; this only makes it more likely that there will be special statutory restrictions on dismissal or other underpinning of his employment. A reinstatement made under the Trade Disputes Act is a "private law" matter and a breach of such an order would not give rise to a "public law" remedy. A new cause of action created by a statute and consequent remedies for employees who have been "unfairly" dismissed is by no means simultaneously wrongful dismissal under common law. This new cause of action, however and statutory remedies that go with it, are not enforceable by ordinary action, nor indeed by judicial review; they are only available to an employee on a successful application to an industrial tribunal."

19. Section 3(d) of the ***Interpretation and General Provisions Act*** defines a "public body" as follows: "any authority, board, commission, committee or other body whether paid or unpaid which is invested with or is performing, whether permanently or temporarily functions of a public nature". In my view, whereas the Axle Load Oversight Committee was not purely comprised of public authorities, since it was performing functions of a public nature, it was a "public body" pursuant to section 3 of Cap 2 and its decisions could properly be subjected to judicial review hence the *ex parte* Applicant ought to have challenged its decision rather than implementation thereof.

20. In **Republic vs. Land Disputes Tribunal Court Central Division and Another *Ex parte* Nzioka [2006] 1 EA 321,** it was held that the court has powers to intervene in a matter challenging the decision of unincorporated association where the association dealt with public law matter i.e. regulating the London Stock Exchange. Similarly, in **Re: Bivac International SA (Bureau Veritas) [2006] 1 EA 26**, it was held that judicial review is developing fast and extending itself beyond the traditional targeted areas and grounds and has been extended to non-statutory bodies.

ORDER

21. In the result I find no merit in the Notice of Motion dated 24th May 2012 which I hereby dismiss with costs to the Respondent.

G V ODUNGA
JUDGE

Dated at Nairobi this day 22nd of April 2013

W K KORIR

JUDGE

Delivered in the presence of:

Ms Samba for the ex parte applicant

Ms Mwinzi for Mulekyo for the respondent