



IN THE MATTER OF: AN APPLICATION BY KYEVALUKI SERVICES LIMITED FOR LEAVE FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: THE TRAFFIC ACT, CAP.403 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: KYEVALUKI SERVICES LIMITED

REPUBLIC.....APPLICANT

VERSUS

**THE MINISTER OF ROADS AND PUBLIC WORKS.....1ST RESPONDENT
KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT**

EX-PARTE

KYEVALUKI SERVICES LIMITED

J U D G M E N T

The Exparte Applicant herein Kyevaluki Services Limited (*hereinafter referred to as the Applicant*) moved this court by way of Notice of Motion dated 16th December 2010 and filed on 21st December 2010 seeking the following orders:

(1) An order of *certiorari* be issued to remove into the High Court and quash the entire decisions by the 1st and 2nd Respondents adopting the sole use of the load capacity determined by an inspector in the assessment of the load limits of cargo vehicles and contained in the following weigh bridge tickets and orders to remove motor vehicles from the road addressed to the Ex-parte Applicant.

ITEM	DATE	MOTOR VEHICLE TICKET AND/OR ORDER NUMBER	BRIDGE
1.	23/1/10	KAS 649L M10011089	Mariakani
2.	24/1/10	KAS 649L 112753	Athi River
3.	24/1/10	KAS 649L/ 112754	Athi River

ZC 1306

4.	24/1/10	KAS 649L/ ZC 1306	112753	Athi River
5.	31/10/10	KAS 628L	W200002361	Athi River
6.	30/10/10	KAS 628L	TA00039945	Mariakani 2
7.	31/10/10	KAS 628L/ ZC 1070	118761	Athi River
8.	31/10/10	KAS 628L/ ZC 1070	118762	Athi River
9.	21/1/10	KBG 589B	MC0008050	Mariakani (c)
10.	22/1/10	KBG 589B	97242/43	Athi River
11.	22/1/10	KBG 589B	97243	Athi River
12.	22/1/10	KBG 589B	97242	Athi River
13.	19/11/09	KAV 497C	68150	
14.	20/11/09	KAV 497C		Athi River
15.	20/11/09	KAV 497C	107623	Athi River
16.	20/11/09	KAV 497C	107622	Athi River
17.	30/10/10	KBG 586V	TA00040286	Mariakani 1
18.	1/11/10	KBG 586V	W200002630	Athi River
19.	1/10/10	KBG 586V	118793	Athi River
20.	1/10/10	KBG 586V	118792	Athi River
21.	25/10/10	KBG 584V	TA00033516	Mariakani 2
22.	25/10/10	KBG 584V/ ZD 0432	1651	Mombasa/ Nairobi
23.	4/11/10	KBG 589V	TA00046006	Mariakani 1
24.	6/11/10	KBG 589V	W200003621	Athi River
25.	4/11/10	KBG 589V/ ZD 0399	1761	Mombasa/ Nairobi
26.	4/11/10	KBB 681B	G100005414	Gilgil
27.	12/11/10	KAS 628L	W200005059	Athi River
28.	11/11/10	KBG 589V	TA00054171	Mariakani A

(2) An order of *mandamus* be issued, compelling and directing the 1st and 2nd Respondents to forthwith apply the use of the load specified by the manufacturer of the chassis of the vehicle in the assessment of the load limits of cargo vehicles and adopt the gross vehicle weight in that regard in ascertaining the maximum permitted weight.

(3) An order of prohibition be issued, prohibiting the 1st and 2nd Respondents from adopting the sole use of the load capacity determined by an inspector in the assessment of the load limits of cargo vehicles.

(4) The costs of this application be provided for.

The application was filed pursuant to leave granted on 15th December 2010 and is supported by the statutory statement dated 6th December 2010 and the verifying affidavit sworn by Ben Kanui, the Managing Director of the applicant.

The application is premised on the following main grounds:

(1) That Section 56 of the Traffic Act, Cap.403 of the Laws of Kenya, specifies that any vehicle load on the road is the one specified by the manufacturer of the chassis of the vehicle or the load capacity determined by an inspector under the Act.

(2) The 1st and 2nd Respondents have solely adopted the use of the load capacity determined by an inspector under the Act in way bridges yet the system is inconsistent and gives different vehicle loads at different way bridges and have proceeded to penalize the Applicant for claimed excess load before any conviction by a Court of Law.

(3) The 1st and 2nd Respondents' sole use of the load capacity determined by an inspector under the Act is erroneous, is always arrived at arbitrarily, irrationally, unreasonably and without hearing the Exparte Applicant.

(4) The Exparte Applicant has suffered and will continue suffering substantial irreparable loss if the 1st and 2nd Respondents' decision to adopt the sole use of the load capacity determined by an inspector under the Act is not quashed and the 1st and 2nd Respondents prohibited from enforcing the sole use of the load capacity determined by an inspector under the Act.

The application is opposed by the 2nd respondent, the Kenya National Highway Authority (**hereinafter referred to as the Authority**) through a replying affidavit sworn by Engineer Kungu Ndungu, the Manager In-charge of Axle Load in the Authority

The 1st respondent, the Minister of Roads and Public Works though served with the application did not file any response thereto and chose not to participate in these proceedings.

Briefly, the case for the applicant is that it is a cargo transporter with a fleet of over 16 vehicles which are periodically inspected to ensure their road worthiness as can be seen from copies of vehicle inspection reports annexed to the application and collectively marked BK2. The applicant states that the vehicle load capacities are specified by the manufacturer of the chassis of the vehicles as shown in their logbooks (**exhibits marked BK1**).

It is the applicant's case that in compliance with Section 56 of the Traffic Act Cap.403 Laws of Kenya (**hereinafter referred to as the Act**), the applicant ensures that its vehicles leave the port or godowns in Mombasa loaded with specific weight of cargo as per the load capacity specified by the manufacturer on the chassis of the vehicles but that the 1st and 2nd respondents in weighbridges positioned on the roads to verify load capacities on motor vehicles have unilaterally and arbitrarily adopted the use of determining load capacity by inspectors appointed under the Traffic Act which has proved to be erroneous as it produces inconsistent results by giving different vehicle loads at different weighbridges.

The applicant contends that under Section 56 (1) of the Act, the applicant has two options of determining vehicle's load capacity i.e. a load greater than the load specified by the manufacturer on the chassis of the vehicle or the load capacity determined by an inspector under the Act and that the decision by the Respondent to use the latter option without giving the applicant an opportunity to be heard amounts to a breach of the rules of natural justice and is also oppressive to the applicant and other members of the public who are affected by the said decision.

The applicant contends that the decision of the 2nd Respondent to use the inspectors in determining vehicle loads on the perceived basis that it would be erroneous to determine loads of vehicles by their gross weights is irrational and unreasonable and that the 2nd respondent should be compelled to use the 1st option of gross weight specified by the manufacturer on the vehicles chassis since it is likely to produce more consistent results.

It was argued on behalf of the applicant that the use of the latter option by the 2nd respondent had adversely affected the applicant's business and source of livelihood by the imposition of penalties based on erroneous application of procedure and provisions of the law.

Relying on the case of Commissioner of Income Tax –Vs- Westmont Power Ltd {2006} IEA 54, the applicant urged the court to interpret and apply Section 56 of the Act in favour of the applicant and grant

it the orders sought.

On its part, the 2nd respondent in opposing the applicant's motion stated that the application was defective and amounted to an abuse of the court process in that the 2nd respondent had not made any decision which was capable of being challenged or quashed by orders of certiorari. The 2nd respondent contended that orders of certiorari are not available to the applicant since no decision had been attached to the application as required by Order 53 Rule 7 of the Civil Procedure Rules.

It is also the 2nd respondent's case that in preferring to use inspectors appointed under Section 3 of the Traffic Act to determine vehicles load capacities, the 2nd respondent was acting within the law as empowered by the Traffic Act and in execution of its statutory mandate of designing, building and maintaining national highways within the Republic of Kenya.

The 2nd respondent claims that it would be erroneous to determine load capacity of vehicles by their gross weight as damage to the road is caused by weight on axles not gross weight. The 2nd respondent is of the view that there was a direct connection between damage and maintenance of roads and axle loads and that emphasis should be placed on axle loads which are determined by inspectors in order to serve the wider public interest of maintaining good roads.

Lastly, the 2nd respondent averred that in performing his duties under the Act, an inspector is merely an expert who relies on the calibration machines to determine the weight of a motor vehicle and the 2nd respondent's calibration machines are updated as shown by certificates annexed as "KNI". It is the respondent's position that the applicant was not entitled to any of the reliefs sought and the Notice of Motion should be dismissed with costs.

To further advance their respective positions, each of the parties herein filed written submissions which were highlighted before me on 6th March 2012.

Before delving into the merits or otherwise of the applicant's motion, I propose to first deal with the preliminary objections raised by Mr. T.J. Kajwang on behalf of the 2nd respondent.

The objections were to the effect that the Notice of Motion was defective as it had not been made in the Name of the Republic or the Crown as per the established practice in commencing judicial review proceedings. Mr. Kajwang also raised the issue of whether the court had jurisdiction to issue orders of certiorari where no decision had been annexed to the application as required by Order 53 Rule 7 of the Civil Procedure Rules.

On the first objection, I find with much respect to Mr. Kajwang that the objection is misplaced since looking at the applicant's Notice of Motion, it is clear on the face of it that it was made in the Name of the Republic as the applicant. The application is therefore not defective and is properly before the court.

Even if the application was not made in the Name of the Republic, such omission would be a matter of form which would not go to the substance of the application and bearing in mind the new constitutional dispensation emphasizing on substantive justice as opposed to procedural technicalities, it is my view that such want of form would not render the application incompetent or defective.

On the 2nd objection, it is noted that in Prayer 1, the applicant has sought orders of certiorari to quash decisions allegedly made by the 1st and 2nd respondent adopting the use of the system of determining load limits of cargo vehicles by inspectors as shown in weighbridge tickets and orders to remove motor vehicles from the road addressed to the applicant exhibited as annexures marked BK3.

Order 53 Rule 7 of the Civil Procedure Rules provides as follows:

“In the case of an application for an order of certiorari to remove any proceedings for the purpose

of their being quashed, the applicant shall not 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.

Where an order of certiorari is made in any such case as aforesaid, the order shall direct that the proceedings shall be quashed forthwith on their removal into the High Court”

It is important to note that Order 53 Rule 7 is couched in mandatory terms.

A plain and literal interpretation of that section shows clearly that any proceedings, decisions or order or other record whose validity is being challenged must be in writing. This is why the aforesaid provision of the law requires that a copy thereof verified by affidavit be lodged with the court's registrar before the hearing of the Notice of Motion perhaps to prove its existence. A party who fails to avail a copy of the impugned decision, order, warrant, commitment, inquisition or other record to the court before hearing of the Notice of Motion must explain his failure to do so to the satisfaction of the court.

In this case, the applicant is challenging the validity of a decision allegedly made by the respondents to adopt the use of inspectors appointed under Section 3 of the Act to determine load capacities of cargo vehicles instead of using weight specified by manufacturers of such vehicles on their chassis. I have carefully gone through the applicant's pleadings and I have not come across the said decision attached to any of them. The applicant has also not given any explanation for the failure or omission to provide a copy of the impugned decision to the court that is, assuming it exists.

I agree with Mr. Kajwang for the 2nd respondent that the weighbridge tickets and orders to remove the applicant's cargo vehicles from the road do not constitute the alleged decision made by the respondents. In my view, they are evidence of excess load capacity ascertained in the applicant's vehicles at different times and places leading to traffic charges being preferred against the applicant under the Traffic Act. They are also evidence of orders made for the removal of vehicles from the road found to have exceeded their load capacities.

The tickets do not show the method used to determine the excess load capacity and therefore they cannot be said to reflect the decision of the applicant to determine load capacity of vehicles using inspectors as opposed to the gross weight specified by their manufacturers.

In the circumstances, it is safe to conclude that the applicant has failed to avail a copy of the alleged decision and has not given any explanation for failure to do so. The applicant has therefore failed to comply with the requirements of Order 53 Rule 7 of the Civil Procedure Rules which as noted earlier is in mandatory terms.

The 2nd respondent has argued that no such decision has been made and in the absence of evidence to the contrary, I am inclined to accept the 2nd respondent's position. This may possibly explain why no such decision was annexed to the applicant's pleadings and why no account satisfactory or otherwise was given to explain failure to avail the impugned decision.

In my opinion, 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 enforcement.

As the applicant has failed to prove that the respondent had made any decision detrimental to its interest which was capable of being investigated by way of Judicial Review or which was capable of being quashed by orders of certiorari, I find that the applicant has failed to properly invoke the jurisdiction of the court to issue orders of certiorari.

In the event that I am wrong on that score, I find that even if the 2nd respondent had made the decision sought to be impugned herein, the applicant has failed to demonstrate that it is entitled to orders of certiorari as sought in the Notice of Motion.

Though it is not disputed that the 2nd respondent is a public body which is amenable to judicial review, the applicant has not established the grounds upon which the court can issue orders of certiorari.

In Halisbury's laws of England, 4th Edition, Vol.(1reliefs) at page 202 paragraph 109, it is stated:

"Certiorari will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record, breach of the rules of natural justice or where the determination is procured by fraud, collusion or perjury"

In this case the applicant has not produced any evidence to show that the 2nd respondent through its officers namely inspectors appointed under Section 3 of the Act made any decision that was in excess of or outside its jurisdiction or was contrary to the law.

In the applicant's own admission, the 2nd respondent only chose to use one of the two methods prescribed by Section 56(1) of the Act in determining limitation of loads on vehicles.

Section 56(1) of the Act is in the following terms:

"No vehicle shall 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 this Act".

My understanding of this section is that the respondents were empowered to use any of the two methods specified under Section 56(1) to determine load capacity of vehicles so that use of any one of them would be lawful and within the law.

The adoption of the 2nd method by the 2nd respondent to determine the load capacity on the applicant's vehicles cannot therefore be said to have been done without jurisdiction or contrary to the law. It is clear that the respondent's actions were authorized by Section 56(1) of the Act and the inspectors were executing their statutory obligations of enforcing the provisions of Section 55(2) of the Act. Adopting the 2nd option as opposed to the first one did not make the respondent's actions illegal or unlawful. It has not been demonstrated that in issuing the weighbridge tickets and orders exhibited in the instant application, the inspectors acted arbitrarily, unreasonably or capriciously to the detriment of the applicant.

The 2nd respondent's claim that the said inspectors are just experts who use calibration machines to determine weights and loads on vehicles has not been disputed by the applicant or countered by any evidence to the contrary.

In the absence of any evidence to the contrary, this court accepts the 2nd respondent's position that the determination of excess vehicle load is done using machines and has nothing to do with an individual inspector's subjective decision. This in my view destroys the credibility of claims by the applicant that the inspector's determination of excess loads in its vehicles has been done unreasonably or arbitrarily.

The fact that use of the method adopted or preferred by the respondents produces inconsistent results at different weighbridges though important and may be a genuine source of concern for the applicant does not establish sufficient basis upon which this court can issue orders of certiorari. It may however be a good reason for the applicant and other players in the transport industry to lobby Parliament to amend the Traffic Act to provide for a specific method of determining the weight and load capacities of cargo vehicles which is consistent in its outcomes and which is responsive to maintaining good condition on our roads.

Unless such an amendment is put in place and a different method prescribed for determining weight and loads of vehicles, this court cannot fault the respondents for choosing one of the options provided by the law for the performance of their statutory obligations and duties under the Traffic Act.

The court was invited by the applicant to interpret the provisions of Section 56(1) of the Act in a way that favours the applicant guided by the holding in Commissioner of Income Tax -Vs- Westmont Power (K) Ltd [Supra].

In this case, the court held that taxation laws that have an effect of depriving citizens of their property by imposing pecuniary burdens and leading to penal consequences must be clear and express so as to leave no room for ambiguity. If there was any ambiguity, the same should be resolved in favour of the taxpayer and not the Public Revenue Authorities.

With respect to M/s Munyando for the applicant, I do not find any ambiguity in Section 56 (1) of the Act which can be resolved in favour of the applicant. Section 56(1) is clear and explicit and it leaves no room for ambiguity.

In view of the foregoing, I am persuaded to find that the applicant has not demonstrated that it is entitled to orders of certiorari as prayed. I therefore decline to issue the said order.

I will now turn to a consideration of whether the applicant has proved that it is entitled to the reliefs sought in Prayer s 2 and 3.

In Prayer 2, the applicant seeks orders of mandamus to compel the respondents to apply the method of using gross weight shown by manufacturers on chassis of vehicles to determine maximum permitted weight of cargo vehicles.

It has been argued on behalf of the applicant that the respondents' use of the 1st method of using inspectors to determine load capacities of vehicles has proved erroneous since it has been producing inconsistent results. The applicant claims that the use of this system had adversely affected its business and source of livelihood. In order to determine the issue of whether the applicant is entitled to orders of mandamus, it is important to first establish the scope and nature of the remedy of mandamus and when it can be lawfully issued.

Let me start by stating from the outset that mandamus is a discretionary remedy. It is in the nature of a command issuing from the High Court directed to a public body, inferior tribunal or any person requiring them to do a particular act or thing specified therein which concerns their office and is in the nature of a public duty which that person or tribunal has failed or refused to do to the detriment of the aggrieved party.

The Court of Appeal had opportunity to discuss the scope and efficacy of the remedy of mandamus in the case of Kenya National Examination Council –Vs- Republic, Exparte Geoffrey Gathenji & 9 Others, C/Appeal No.266 of 1996 where the court after describing the scope of mandamus went on to state:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, mandamus cannot command the duty in question to be carried out in a specific way.

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed”.

Applying the aforesaid principles to the instant case, it is clear that the order of mandamus is also not

available to the applicant as prayed in this case. I make this finding because no evidence has been tendered by the applicant to show that the respondents have failed or refused to perform their statutory duties under the Act to the detriment of the applicant. On the contrary, the evidence on record shows that the respondents and in particular the 2nd respondent has been performing its statutory duties under the Act through duly appointed inspectors by ensuring that no vehicle exceeding its load capacity is driven on Kenyan roads.

Secondly, the law is that if a statute gives a person or statutory body discretion in the exercise of its statutory functions, the court cannot issue orders of mandamus to compel the said body or person to perform its duty in a specific way.

In the instant case, Section 56(1) of the Act has given the 2nd respondent discretion in deciding which of the two methods specified therein it was going to use to execute its mandate of determining the load capacity of cargo vehicles.

In the exercise of that discretion, it is evident that the 2nd respondent chose to use the 2nd option of using inspectors which it was in law entitled to do.

Given the material placed before me in this case, if the court were to issue orders of mandamus as it has been invited to do, the order would have the effect of compelling the 2nd respondent to use only the 1st option in determining vehicle loads which would in turn amount to interference with its lawful discretion under the law to choose the method it considers most appropriate in the execution of its mandate and duties under the Act. Issuing such an order would be tantamount to directing the 2nd respondent to exercise its discretion in a specific or certain way which is not permissible in law.

Consequently, I am persuaded to find that the applicant has not proved that it is deserving of the orders of mandamus as prayed and I accordingly decline to grant the said orders.

Lastly, the court has been urged to issue orders of prohibition forbidding the 2nd respondent from adopting the sole use of load capacity determined by an inspector.

An order of prohibition just like an order of certiorari is a judicial review remedy used by the High Court in its supervisory jurisdiction to control inferior tribunals, public officers and statutory bodies to ensure that they perform their statutory functions or public duties in accordance with the law and that they treat individuals who are affected by their decisions fairly.

Judicial review is designed to prevent the excess and abuse of power by public authorities. However, unlike the orders of certiorari, prohibition does not issue to rectify wrong decisions already made. Rather, it looks into the future and seeks to stop contemplated decisions which if made would be contrary to the law.

I will once again seek to be guided by the Court of Appeal in the case of Kenya National Examination Council –Vs- Exparte Geoffrey Gathenji & 9 Others [Supra] where the court spelt out instances where orders of prohibition would lawfully issue. At page 11 & 12, the Court expressed itself as follows:

“What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however lie to correct the course, practice or procedure of the inferior tribunal, or a wrong decision on the merits of the proceedings”

That is why it is said that prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice, the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. Prohibition cannot quash a decision which

has already been made, it can only prevent the making of a contemplated decision”

Taking into account the principles enunciated by the Court of Appeal regarding when orders of prohibition would issue, it is my considered view that the applicant has not established any basis upon which this court can issue an order of prohibition as sought in Prayer 3.

From the evidence placed before the court, it is obvious that the 1st & 2nd respondents have already adopted the use of inspectors in determining load limits of cargo vehicles and this they have done within the confines of the law. If the applicant’s are of the view that the respondents were wrong in adopting the said method of determining load limits of vehicles, then prohibition is not an appropriate remedy for them since as stated earlier, it cannot rectify or quash decisions already made. It can only issue to prevent the implementation of contemplated unlawful acts or decisions.

In this case the respondents are mandated by law to use inspectors to determine load limits of vehicles and the court has not been told that they intend to make any decision or take any action concerning the way the said inspectors carry out their duties that would be in contravention of the law.

As a general rule, the court cannot issue orders of prohibition to stop a statutory body from executing its statutory functions unless it can be established that the said body plans to violate the rules of natural justice or act contrary to the law in the performance of its statutory obligations and functions.

In this case no evidence has been tendered to show that the respondents in performing their statutory duties and obligations intend to act contrary to the law or to violate the rules of natural justice. Consequently, I am of the considered view that this is not an appropriate case for issuance of the order of prohibition as prayed.

In the end and for all the foregoing reasons and findings, it is my decision that the Notice of Motion dated 16th December 2010 lacks merit and it is hereby dismissed with costs to the 2nd respondent.

Dated, Signed and Delivered by me at Nairobi this 29th day of May, 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk

Mr. Kelwony holding brief for Havil for Applicant

Mr. Kimani holding brief for T.J. Kajwang for Respondents