



Kiarie & another v Kenya National Highway Authority (Petition E005 of 2024) [2024] KEHC 5576 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
PETITION E005 OF 2024**

FROO OLEL, J

MAY 9, 2024

N THE MATTER OF THE ALLEGED CONTRAVENTION OF THE CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10,25,27,28,35,40,43,47 AND 50 OF THE CONSTITUTION OF KENYA, 2010ANDIN THE MATTER OF THE KENYA ROADS ACT, CAP 408 LAWS OF KENYAANDIN THE MATTER OF THE KENYA ROADS (KENYA NATIONAL HIGHWAY AUTHORITY) REGULATION, 2013ANDIN THE MATTER OF THE TRAFFIC ACT, CAP 403 LAW OF KENYA

BETWEEN

JOHN MWANIKI KIARIE 1ST PETITIONER

TRADENETS CONSTRUCTION WORKS LIMITED 2ND PETITIONER

AND

KENYA NATIONAL HIGHWAY AUTHORITY RESPONDENT

RULING

A. Introduction

1. The application before court for determination is the notice of motion application dated 15th March, 2024 seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That this honourable court be pleased to issue a temporary order of injunction restraining the Respondents, their servants, agents or any other person acting on their behalf, or directions from unlawfully, illegally or arbitrarily taking, keeping and holding the petitioner’s semi-truck (including the cargo trailer) registration number KDN 093C Isuzu FVZ chassis no.



JALFV234TK7001178 pending the hearing and determination of this petition.

- d. Spent.
 - e. That the honourable court do issue an order compelling the Respondents to unconditionally release the transports semi-truck (including the cargo trailer) that has been unlawfully impounded pending the hearing and determination of this petition.
 - f. That costs of this application be provided for.
2. The said application is supported by grounds made on the face thereof, the supporting affidavit of the applicant John Mwaniki Kiarie dated 15.03.2022 and a further affidavit sworn by one Jahaziel Mwangi Maina dated 05.04.2024. This application was strenuously opposed by the Respondent who filed a notice of preliminary objection dated 02.04.2024, their replying Affidavit and supplementary Affidavit sworn by one Willie Shem Waithanje Thuku dated 03.04.2024 and 19.04.2024 respectively.
 3. The parties also orally highlighted the submissions made. At this point it should be noted that the applicants did request the court to expunge the supplementary affidavit dated 17.04.2024 filed by the respondent on the basis that it was filed out of time and without leave of court. Secondly it was filed after the applicant had filed their submissions and raised new issues which they could not respond to.

B. The Pleadings

i. The Application

4. The 1st applicant averred that he is a director of the 2nd applicant company, and they engaged in the business of building and construction, transportation of materials such as sand, ballast and murrum, while using semi track (including the cargo trailer) registration number KDN 093C ISUZU FVZ and trailer registration No. ZH2648, which, they jointly owned with Sidian bank limited and would rely on the earnings generated from the transportation business to service the monthly loan premiums payable to the said Bank. (The lorry registration number KDN 093C Isuzu FVZ and trailer registration No. ZH2648 are hereinafter referred to as the suit lorry and trailer).
5. The applicants did aver that on 06.02.2024, their driver one Jahaziel Mwangi Maina was driving the suit lorry, while fully loaded with sand from Mashuru in Kajiado County and was destined to deliver the same at Malili within Makueni County. After passing Petro city Petroleum depot, the suit lorry was flagged down by officials of the Respondent at around 2.00am while on Ulu road, Makueni. They commandeered the suit lorry, bundled the applicant's driver in their pick-up motor vehicle and the Respondents officials took charge and drove the said suit lorry to Mlolongo Weigh Bridge.
6. When the applicant driver sighted the lorry at 6.30am, he noticed a clear disparity between the initial load which he was carrying and the new load on the lorry when it was brought to the weigh bridge. His 'suspicion' was soon confirmed when the suit lorry and trailer were weighed and found to be 'overloaded'. Consequences whereof the Respondent did levy a fee of ksh.28,891.951/= being overload fee as calculated under East Africa community vehicle load control Act and demanded that the applicants settle the same before the suit lorry could be released.
7. The applicant further averred that the Respondent had as a result insisted on detaining the suit lorry and trailer as collateral for payment of the unjustified and illegal fee. The whole process of arresting his driver and weighing the said motor lorry was faulted as being pertinently unlawful as the purported offence should have been governed by the [Traffic Act](#), but the Respondent had acted maliciously and



- placed this matter under East African community vehicle local control Act, 2016 (EACVLCA) and East African Community vehicle local control (enforcement measures) regulating 2018 which were irrelevant and not applicable as the suit lorry was not being driven along the ‘Regional trunk road/ Network’ as set out in the first schedule of EACVLCA, when it was intercepted.
8. Further the petitioners/Applicants did depone that subjecting them to the EACVLCA and the imposition of exorbitant penalties amounted to unfair trade practices which were abhorred by the EAC treaty, the penalty imposed too was unlawfully and far exceeded even the value of the suit lorry and condemned him to become a destitute. In light of the above, the respondent’s action had rendered him to become a destitute and indeed necessitated urgent court intervention to correct the arbitrary nature of infringement of their fundamental rights, which was perpetrated by the Respondent.
 - ii. The Response.
 9. The Respondent did file a notice of preliminary objection dated 02.04.2024 and oppose this petition on grounds that;
 - a. This honourable court lacks jurisdiction to hear and determine the notice of motion application & petition aforesaid, both of which are premature and filed contrary to Section 17(1)(4) of the East African Community vehicle local control Act 2016.
 10. Further the Respondent did file a substantive & comprehensive Replying Affidavit, sworn by one William Shem Waithanje Thuku who deponed that he was currently working as a weighbridge manager, Athi river weighbridge station employed by Ebenezer commercial works Ltd, a company contracted by the Respondent to manage, operate and maintain Athi river, Juja & Isinya weighbridge stations and 2853 kilometers of adjacent road network and was therefore competent to respond to application/Petition filed.
 11. The Respondent was a state corporation established under Section 3 of the Kenya Road Act number 2 of 2007 and pursuant to 4(1) of the said Act, they were responsible for the management development, rehabilitation of all roads classified as national roads, road reserves and access to road side development, amongst other duties and implementation of road policies in relation to national roads.
 12. The Respondents mandate was set out under Section 22 of the *Kenya Roads Act* and in particular Section 22(1)(c) as read with Section 55(c) of the *Traffic Act*, and the regulations made in support thereof, mandated the Respondent to measure and assess the weights, dimensions and capacities of vehicles using any road and to ensure compliance with the said rules and regulations with regard to axle load control limits as provided for in law. In addition to the foregoing provisions, the Respondent while undertaking its duties was also guided by the provisions East African Community Vehicle load control Act, 2016 (EACVLCA) as read together with East Africa Community Vehicle Load control (Enforcement measures) Regulations 2018 (the Regulations).
 13. It was the Respondent’s contention that the applicants version of events was inaccurate and completely false. The suit lorry and trailer had been intercepted at Malili town, which is located along the Regional trunk road network (along Mombasa road) and was weighed at Weighbridge station situated at Athi river along Mombasa road. Subsequently a weighbridge ticket, Weighbridge certificate and overload fees were procedurally issued to them on the same date.
 14. The applicant could also not rely on the motor vehicle tracking report (exhibit JMK – 5) as it was not accurate and the details contained therein could not be vouched for. The entries/log as at 2.02am indicated that the suit lorry was travelling along Ulu road until 2.43am. Then the said motor vehicle



- is seen travelling along Mombasa road from 2.59am upto 6.06am. These time stamps demonstrated that the suit lorry was in motion and correlated with the total mileage, travel time and average speed resulting to the suit lorry being weighed at 6.20am.
15. The Respondent also averred that they had also tracked the suit lorry from the point of interception until weighing at the weighbridge station at Athi river and their log clearly showed that the suit lorry was stopped and driven along Mombasa road until they arrived at the Athi River weighbridge station without any diversion. The applicant's allegations that the suit motor vehicle was commandeered was therefore denied nor did they add any other load onto the said suit lorry.
 16. Upon weighing the said suit lorry/trailer was found to be overloaded by 27,120kg. It was carrying 81,120kg instead of the legally permissible limit of 54,000kg on the gross weight. Subsequently the weighbridge ticket and certificate were generated and calculated for settlement as is statutorily required under Section 17 (the EACVLCA) as read together with part III of the EACVLC (enforcement measures) Regulations 2018. The total fee for overloading was assessed and charged at USD 180,353.1/ = which upon conversion translates to ksh.28,947,898.951/=at the prevailing dollar rate at the time (USD to Ksh.160.5068).
 17. The applicant's driver was furnished and given the weighbridge ticket, certificate and overload fee invoice and the same had not been settled. The suit lorry/trailer was therefore lawfully detained at Athi River weighbridge station holding yard pursuant to provisions of Section 15(1)(a) as read with Section 17(6) to 17(11) of EACVLCA and Regulation 13 of part III EACVLC (enforcement measures) Regulations 2018. Further, the Applicant had not exhausted the dispute resolution mechanism provided under the EACVLC and the Regulations provided thereunder. Specifically, if the applicants were dissatisfied with the overloading fee surcharged, they were required in law to pay the fee (on a without prejudice basis) to secure the release of the suit lorry and lodge an appeal against the fee as provided for under the said Act and Regulations. They had failed to do so as contemplated under the EACVLA and its regulations and therefore were prematurely before court without exhausting the dispute resolution mechanism provided for under the said Act.
 18. The Respondent also averred that the applicant was not entitled to the temporary orders of injunction as sought for the reason that they had not demonstrated and/or met the three (3) principles, the basis upon which the said orders could be granted. In particular the Applicant had not established a prima facie case with any possibility of success for the reason that they had not identified nor demonstrated which right had been infringed or violated, as the weighing of the suit lorry, assessment, charge of overloading fee and detention were all carried out in accordance with the above cited provisions of EACVLA and its supporting regulations. The applicant had also not demonstrated that the weighing machine and its support system was faulty, damaged or dysfunctional and/or otherwise affected by any technical, mechanical or manual errors so as to render the weighing process defective.
 19. The doctrine of legitimate expectation did not arise at all as the law applicable was EACVLA and not the *Traffic Act* for purposes of weighing the motor vehicle and assessing/charging the overload fee. The tracking system they had provided also confirmed that the suit lorry was intercepted along Mombasa road and not along Ulu road as alleged. They had therefore properly applied EACVLCA as Mombasa Road was part of the Northern corridor in the regional trunk road network.
 20. The Respondent also noted that the Applicants had also not produced the suit lorry/trailer financing agreement/loan agreement with Sidian Bank Ltd, to prove the losses they alleged they would suffer if the suit lorry was detained and therefore had not proved that they would suffer irreparable loss. But conversely even if they were to suffer any loss the Respondent was a state corporation and was in a position to pay damages in the unlikely event that the petitioner was successful.



21. Lastly it was the respondent's contention that the balance of convenience tilts in favour of continuing to detain the suit lorry/trailer until settlement of the overloading fee. If the suit lorry was released, there was no mechanism in place to guarantee the recovery of the overloading fee from the applicants and that would be to disadvantage of the general public. The Respondent also urged the court not to issue the mandatory order directing release of the lorry as no special circumstances had been demonstrated to warrant the grant of the said order. On the strength of the above averments the Respondent prayed that the court finds that this application is unmerited and it be dismissed with costs.
- (iii)The Applicants Further Affidavit and Respondent Supplementary Affidavit.
22. The applicants did file a further Affidavit dated 05.04.2024 sworn by one Jahaziel Mwangi Maina, the driver of the suit lorry/trailer. He reiterated the fact/point that on the 06.02.2014 he was driving the truck while fully loaded with sand from Mashuru in Kajiado county and was destined for Malili in Makueni, when he was flagged down by the Respondent's officers at about 2.00am while driving along Ulu road and was about 800 meters off the main road. The said officers commandeered the suit lorry and drove it to Mlolongo weighbridge despite having a mobile weighbridge and at about 6.30am when he was able to see the suit lorry/trailer, he realized that there was a disparity on the load initial carried and what was on the track. It was his suspicion and 'as explained by the tracking report of the Respondents marked WSWT,' which showed that the respondents driver had stopped the lorry between 3.00am and 3.27am at Machakos - Mombasa road, 8km East of Konza and he presumed that it is at that point that they added some extra load on the said suit lorry.
23. Further he averred that he did not witness the lorry being weighed and was just handed the EAC (weighbridge) certificate and overload fee invoice where they had been charged a penalty fee of ksh.28,947,891/= for overloading and this was in clear breach of procedural requirements of the law and in utter disregard to the tenets of natural justice. They had therefore made out a prima facie case and humbly requested that the suit lorry be released during pendency of the petition to enable him and his assistance resume work in return for daily wages.
24. The Respondent (without leave of court) deemed it proper to file their supplementary Affidavit sworn by the said William Shem Waithanje Thuku and dated 19.04.2024. He did reiterate the earlier averments that the suit lorry/trailer was intercepted on Mombasa road and not on Ulu road as alleged and their tracking report did support this contention. The applicant had not complied with the weight requirements on the regional trunk road, and therefore they were properly/legally surcharged for the overweight pursuant to provision of EACVLCA as read together with EACVLC (enforcement measures) regulations 2018. Section 15(1)(6) of the EACVLCA specifically mandated and empowered the Respondent officers to enter into a motor vehicle and inspect any record related to load carried.
25. Also under Section 15(1)(5) of the EACVLCA, its officers were allowed/empowered to cause a motor vehicle to be driven to designated location, " If the driver is incapable or unwilling to comply with an instruction of the officer". The suit lorry driver had admitted to refusing to drive the suit lorry and it was therefore in order for the Respondent officers to drive the lorry to weighbridge Athi River for weight measurements. The respondent reiterated that the application under consideration was not merited and prayed that it be dismissed.

C. Parties Submissions

(i)Applicant Submissions

26. The applicant did aver that the preliminary objection filed on account of lack of exhaustion of statutory remedy based on Section 17(1)(4) of the East African Community vehicle load control Act 2016 was not pure point of law and was based on a non-existence law as the EACVLC (Enforcements measures)



- Regulations 2018 did not provide any appellate mechanism. Secondly the preliminary objection could not be determined without ascertaining the facts in the pleadings. It was the applicant's contention that the suit lorry was intercepted along Ulu road which is not a road set out in the first schedule of the EACVLC Act as a truck road, thereby ousting the applicability of the said Act.
27. On the other hand, the Respondents alleged that the suit lorry was intercepted and stopped at Malili town along Mombasa road which is a trunk road under the first schedule of the EACVLC Act. Under the circumstances, clearly there was a sharp contrast between the factual narrations presented by both parties and the preliminary objection could not be determined without ascertaining which the true position was. Reliance was placed on *Mukisa Biscuits Manufacturing & Co. Ltd vs West end Distributors Ltd (1969) EA 696*, *Karanta Ernest & others vrs Attorney General (Civil Revision no. 10 of 2020) (2010) TZCA 30*, *Bio systems Consultants vrs Nyali Links Arcade (Civil Appeal E185 of 2023 (2023) KEHC 21068 (KLR) & HCTR E045 of 2023 REpublci vrs Ezra Okoth Olodi & others Exparte Jasckonia Oyoo & others*.
 28. With respect to the prayers sought in the main injunction application, the applicant stated that the guiding principles were famously fashioned in the celebrated case of *Giella vrs Cassman Brown (1973) EA 358* and was reiterated in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others CA no. 77 of 2012 (2014)eKLR* where it was held that the Applicant had to satisfy the triple requirements to establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted and show that the balance of convenience lies in his favour.
 29. It was the applicant's further contention that the EACVLCA 2016 was not applicable since the impugned semi track was intercepted along Ulu road which was not a regional truck road as defined by Section 3 of EACVLCA and this fact was supported by the tracking report. (document marked JMK – 5) Reliance was placed on *Disarano Limited vrs Kenya National Highways Authority & Attorney General (2017)* where it was noted that the nature of decision made by the Respondent was one that would result either in the loss of a motor vehicle and payment of a substantial sum of money as fee, which were both onerous penalties, affecting the rights of persons involved and therefore would definitely attract the requirements of procedural fairness.
 30. The applicant further averred that even if the EACVLCA were to apply, the process undertaken by the Respondent, provided for under the said EACVLCA were similar to the powers provided to them under regulation 14 & 15 of the Kenya Roads (Kenya National Highway Authority) Regulations (2013) and such powers had been held to be unconstitutional. Reliance was placed on *CA in Premji Patel Co Ltd vrs Director General Kenya National Highways Authority (KENHA) & 3 others (2022)eKLR* where it was held that a notification of the weighbridge report cannot constitutionally form the basis of imposing fee where a motor vehicle was found to be overloaded.
 31. The Applicants further submitted that the actions of the Respondent were littered with procedural impropriety which gravely offended the provision of Article 47 of *the constitution* on right to fair administrative action and rules of natural justice. The applicant's driver did not have control over the suit lorry for over six (6) hours during which period the Respondents agents had an opportunity to interfere with the truck load. The Respondent in this matter too was acting as the complainant, prosecution, judge and executioner in this entire process and that too had been held to be unprocedural, were inconsistent with, and in violation of the right to fair trial guaranteed under Article 50(2) of *the Constitution* and to that extent the said actions, were therefore null & void under Article 2(4) of *the Constitution* of Kenya 2010. Reliance was placed on *Republic vs Kenya National Highway Authority Exparte John Mwaniki Kiarie & Margaret Miano vs Kenya Naitoanl highways Authority (2015) eKLR* where it was held that to allow the Respondent to continue detaining the truck would



- violate the applicant proprietary rights under Article 40 of *the constitution*. The applicant therefore posited that they had established an irrefutable prima facie case which merited courts intervention.
32. On irreparable damage the applicant did contend that they had already suffered irreparable harm by the suit lorry being detained un-procedurally, they were unable to service the loan from Sidian Bank, the suit lorry driver and lorry assistant had been rendered jobless and the truck was wasting away as evidenced by the photographs presented, which shows that its tyres had since been removed. Unless the court intervened, the bank would recall the loan and sell the suit motor vehicle to their loss and detriment. Further there was not greater irreparable harm than the petitioner's property being withheld on account of arbitrary abuse of power and excess application of a non-applicable law.
33. The Applicant also submitted that they stand to be more inconvenienced as compared to the Respondent if the injunction was not awarded. They were already unable to repay the bank loan and this exposed the lorry to being repossessed. Further they were suffering financial loss due to continued detention of the suit lorry and unless the situation was remedied it would lead to the applicant being declared bankrupt. The respondent on the other hand was a statutory body funded by tax payer's money and had nothing to lose. If for any consolation the court could still order the truck to operate within jurisdiction of the court during the pendency of the suit. Based on the foregoing, the applicant humbly beseeched this court to dismiss the preliminary objection and allow the prayers sought for in the application.

ii. Respondents Submissions

34. The respondent filed their submissions dated 19th April 2024 and in support of the preliminary objection submitted that this court did not have jurisdiction to hear and determine this petition as it had been filed prematurely contrary to provisions of section 17(4) of EACVLCA which provided that where the fact of overloading was disputed by the transporter, then the authorized officer weighing the vehicle would indicate such dispute in the weighing report and transporter would be at liberty to appeal against the fees using the regulation made under this said Act. To that extent, the preliminary objection raised a pure point of law the basis upon which a determination could be made. Reliance was also placed on *Mukisa Biscuits vrs West End* (1969) EA 696 & on *Samuel Kamau Machaira & Another vrs Kenya Commercial Bank ltd & 2 others* (2012) eKLR, *Phoenia (EA) Assurance Company Ltd vrs SM Thiga T/A Newspapers Service* (2019), *Mutie Mutuku T/A Diani Tour Travel* (2016) eKLR & owners of Motor Vessel 'lilian S' vrs Caltex Oil (Kenya) Ltd (1989) KLR where the court emphasized that jurisdiction is everything and without it, a court would have no power to make one more step and had to down it tools.
35. In view of the foregoing it was clear that the EACVLCA through its regulations did provide for a clear procedure for redress, being an appeal to dispute the assessment and charging of overloading fee by the Respondent as captured in the weighbridge certificate. The applicant had failed to comply with these clear provisions of law and as a consequence of which they had not exhausted the internal dispute mechanism provided for and fell foul of the doctrine of exhaustion. This court therefore lacked jurisdiction to hear and determine the dispute before it and had no option but to dismiss application and petition. Reliance was placed on *Mombasa Water Products ltd vrs Kenya National Highways Authority (Petition E037 of 2021)* (2021) KEHC 238 (KLR), Judicial Review Application No. E001 of 2023, Republic vrs Director General, Kenya National Highways Authority & 2 others *ex parte Daniel Ochieng Wafula & high Court Constitutional Petition no. E001 of 2023, Republic vrs Director General, Kenya National Highways Authority & 2 others Ex-parte Daniel Ochieng Wafula & High Court Constitutional Petition No. E001 of 2020 Frank Kiprotich Mutai vrs Kenya National Highway Authority.*



36. Without prejudice to the arguments made in support of the preliminary objection, if the court were to find otherwise, it was the respondent's contention that the applicants were still not entitled to the temporary orders of injunction as sought in prayer (3) of the said application as they had failed to establish and satisfy the three principles the basis upon which the orders sought could be granted. Reliance was placed on *Ace Engineering & Building contractors Ltd vrs National Bank of Kenya Ltd* (2019) eKLR & *Nguruman Ltd vrs Jan Bonde Nielson & 2 others* (2014) eKLR where the three principals were outlined and it was further explained that a party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material & Substantive and further there must be an urgent necessity to prevent irreparable damage that may result from the said invasion.
37. The respondent submitted that the applicants had failed to establish a prima facie case and reiterated the averments made in paragraphs 25 – 37 of the Replying Affidavit, which basically was to the effect that the applicable law was EACVLCA & its regulations, which allowed the Respondent to take legal/punitive action against the applicants for plying overweight suit lorry on regional truck road. The respondent further submitted that the citation relied upon by the applicants *Discrenio Ltd vrs Kenya National Highways Authority & anor* (2017) eKLR & *Prenj Patal Company Limited vrs Direction General Kenya National Highways Authority (KENHA) & 3 others* civil appeal no, 67 of 2019 (2022) KECA 738 (KLR) were distinguishable as they dealt with provision of regulations 14 & 15 of the Kenya Roads (Kenya National Highways Regulations 2013 and not EACVLCA.
38. Even though the applicant complained about overweight fee being charged of ksh.28,947,891/= the same was lawful and charged based on the provisions of EACVLCA and its regulations. Further the Respondent submitted that the applicants right under Article 40 of *the constitution* had not been violated as the suit lorry/trailer was detained under justifiable circumstances and its detention was expressly allowed by law; pursuant to Section 15(1)(h) as read with Section 17(6) to 17(11) of EACVLCA and Regulations 13 in part III of the EACVLCA regulations after the applicant had failed to settle the overloading fee. Reliance was placed on High Court Const Petition no. E001 of 2020 *Frank Kiprotich Mutai vrs Kenya National Highway Authority* where it was held that the law was settled through various decisions that detention of a motor vehicle in execution of lawful mandate by an authorized agent does not amount to infringement of owner rights.
39. Reliance was also placed on *Mombasa water products vrs Kenya National Highway Authority* (Petition E037/2021 (2021) KEHC238 (KLR) & *Timothy Fundo Ruwa T/A Ruwa Cargo Contractors vrs Kenya National Highway Authority* (2020) eKLR to emphasis on this point. The respondent therefore urged this court to find that a prima facie case had not been established to warrant granting of the orders sought. This position was also emphasized in *Nguruman Limited* (supra) where it was stated that “if a prima facie case is not established then irreparable injury & balance of convenience need no consideration.
40. In so far as the second principle was concern, the respondent did submit that the Applicants would not suffer irreparable harm that could not be compensated by way of damages. The applicant had not proved that indeed the detained suit lorry was financed by Sidian Bank Ltd and even if that was the position, the Respondent was a body corporate & state corporation, therefore was in a position to compensate the applicant for any damage suffered in the unlikely event the petition succeeds. The balance of convenience too favored the Respondent continuing to detain the suit lorry until the overloading fee charged was settled by the Applicant. The Respondent would be greatly inconvenienced if the suit lorry was released and there was no mechanism in place to guarantee the recovery of the assessed overloading fee.



41. The Respondent also opposed granting of the mandatory injunction sought by the applicants on the grounds that there were no special circumstances prevailing to support granting of such orders. If the suit lorry was released, there was no mechanism in place to guarantee recovery of the overloading fees charged, should the petition ultimately fail. Reliance was placed on *locabail international Finance vrs Agro export & others (1986) I ALL ER & Kenya Breweries Ltd & Another vrs Washington O.Okeyo (2002) eKLR* where it was held that in absence of special circumstances mandatory injunction would not be granted.
42. In light of the objection raised in the preliminary objection and submissions made herein, the respondent did pray that both the application and petition be dismissed with costs.

Analysis & Determination

43. I have considered the entire application, the affidavits made in support thereof and in opposition thereto, the submissions filed by both parties and determine that the following matters arise for consideration;
 - a. Whether the Respondents Supplementary Affidavit dated 19th April 2024 should be struck out.
 - b. Whether the court lacks jurisdiction to hear and determine the notice of motion and the petition aforesaid, both of which were file prematurely contrary to provisions of Section 17(1)(4) of the East African community Vehicle load control Act, 2016.
 - c. Whether the court should grant the temporary/ Mandatory orders as sought by the Applicant.
 - d. Who should bear costs of this Application?

(i) Whether the Respondents Supplementary Affidavit dated 19th April 2024 should be struck out.
44. The respondent did file their supplementary affidavit dated 19th April 2024. The said affidavit was filed without leave of court and way after the Applicant had filed their submissions on 16th April 2024. It goes without saying that the applicant cannot respond to new issues raised therein and its late filing amounts to trial by ambush which must be discouraged. If this court court is to consider the same, it would openly prejudice the applicant. A similar scenario arose in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR* , where Kiage, JA stated that :

“... I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be



anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

45. In *Raila Odinga v. I.E.B.C & others* (2013) eKLR, the Supreme Court observed further:

“Article 159(2) (d) of *the Constitution* simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”

46. It therefore follows that the respondent had a duty to comply with procedural imperatives, and to allow the said supplementary affidavit to remain on record would circumvent the fair and even ground upon which both parties should have this dispute determined. The said Supplementary Affidavit is therefore struck out.

(ii) Whether the court lacks jurisdiction to hear and determine the notice of motion and the petition aforesaid, both of which were filed prematurely contrary to provisions of Section 17(1)(4) of the East African Community Vehicle Load Control Act, 2016.

47. The parameters for consideration in determining a preliminary objection are now well settled and in general it should raise only issues of law. The same were set out in the case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696, Where at page 700 Law JA stated that:

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case, at page 701, Sir Charles Newbold, P. stated:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

48. Section 17(4)(b) of the EACVLCA provides as follows:

- (4) where the fact of overloading is disputed by the transporter, the authorized officer weighing the vehicle shall indicate such dispute in the weighing report, and a copy of the disputed report shall be issued to the transporter who may;
 - (a) pay the requisite overloading fee’s on a without prejudice basis to secure the release of the vehicle, make such necessary adjustments on the load as maybe directed by the authorized officer and lodge an appeal against the fees as provided for by the regulations made under this act; or



- (b) Appeal against the fees, using regulations made under this Act, during which period the vehicle will remain detained at such designated place at the cost of the transporter.

49. The said Section 17(4)(b) of the EACVLCA, should be read together with Section 3 of the said EACVLCA, which provides that; “This Act shall Apply to the implementation of vehicle load control along the Regional Truck Road Network set out in the First schedule.”
50. The petitioner/applicant did aver that the suit lorry was intercepted along Ulu road, Makueni at about 2.00 am, which road was not a regional truck road as defined under EACVLCA, and therefore the said Act did not apply. The respondent on the other hand strongly reject the applicant’s averments and did contend that the said suit lorry was intercepted at Malili, which is located along Mombasa road, which is part of the Regional truck road network and subsequently was driven to Athi River weighbridge station, where it was weighed, found to be overloaded, and the weighbridge certificate and overload fee invoice issued.
51. At this preliminary stage this court cannot make a definite determination on the contested facts and such a determination will have to be made, later during hearing of the petition. Once the court has determined where exactly the suit lorry was intercepted, the relevant law will kick in. To that extent, the preliminary objection on the point of law as raised is deficient as the relevant law cannot be ascertained before testing the veracity of the evidence presented especially, both Motor vehicle tracking analysis as filed by the parties.
52. Secondly the respondent did raise the issue that the applicants had not exhausted the dispute resolution mechanism provided under Section 17(1)(4) of EACVLC as read together with EACVLC (Enforcement measures) Regulations 2018. Thereunder, it was provided that; where a motor vehicle had been weighed and the transporter disputed the fee imposed, he had the option to pay and appeal or appeal against the fee raised using the regulations made under the said Act. The applicants on the other hand defended their position by positing that the said regulations did not provide for any appeal mechanism, for vehicles deemed to be overweight and therefore they were right to file this petition before court.
53. The relevant provision of EACVLC (Enforcement measures) Regulations 2018 is Regulation 17; Regulation 17 thereof which provides that;
- (1) A transporter who disputes a road damage assessment report shall within seven days of receipt of the report notify the national roads authority, stating reasons for the dispute.
- (2) Upon receipt of notification under sub-regulation
- (a), the national roads authority shall, in consultation with the transporter, request the chairperson of the national professional body of engineers to appoint an independent assessor within fourteen days of notification from the transporter.
- (b) The independent assessor shall review the damage assessment report and may receive representations from the national roads authority and the transporter.
- (c) The independent assessor shall issue a final assessment report within thirty days of his or her appointment.



- (d) A transporter who disputes a road damage assessment report shall not be liable for payment for road damage costs due until the independent assessor has issued his or her final report.
- (e) The report of the independent assessor shall be final and no appeal shall be made on the report unless on the grounds of manifest error or fraud on the part of the independent assessor.
- (f) A person who is dissatisfied with the report of an independent assessor in sub-regulation (5) may appeal in accordance with the national laws of the respective Partner State.

54. Regulation 17 of the EACVLC (Enforcement measures) Regulations 2018 provides for an appellate mechanism under circumstances where a motor vehicle is impounded and its owner is disputing a road damage assessment report issued. There is nowhere in the entire EACVLC (Enforcement measures) Regulations 2018, where an appellate procedure is provided for motor vehicles impounded for being overweight. That being the undisputed position of law, It therefore cannot be said that the petitioners/ applicants jumped the gun by approaching a court of law to intervene in this dispute.

55. Finally, to lay this issue to rest, Article 48 of *the constitution* provides for right to access justice for all persons. In the supreme court case Petition No 007 of 2023 Abidha Nicholus Vs The Attorney General & 7 others; (The National Environmental Complaints Committee & 5 others -Interted Parties) a (a recent five Bench decision) dealt with the “ doctrine of Exhaustion ” at length and established that;

“Para 104. Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of *the Constitution* as read with Section 3(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of *the Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms.

We say this persuaded by the elegant reasoning in William Odhiambo Ramogi & 3 other versus Attorney General & 6 others; Muslims for Human Rights and 2 others (interested parties) (2020)eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) stated;

“In the instance case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere ‘bootstraps’ or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

56. Enough has been said to show that the preliminary objection raised has no merit.

(iii)Whether the court should grant the temporary/Mandatory orders as sought by the Applicant.

57. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in East African Industries vs. Trufoods [1972] EA 420 and Giella vs. Cassman Brown &



Co. Ltd [1973] EA 358. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

58. Also the Court of Appeal in *Esso Kenya Limited. vs. Mark Makwata Okiya* Civil Appeal No. 69 of 1991, stated that;

“The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff’s alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The



principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available.”

59. The applicant simultaneously sought for a mandatory order compelling the respondent to unconditionally release the suit lorry/trailer pending hearing and determination of this petition. The court takes cognizance of the fact that a mandatory injunction is not ordinarily issued at an interlocutory stage except in certain exceptional circumstances. The test on whether or not to grant an order for mandatory injunction has been discussed in several cases. For instance, in the case of *Locabail International Finance Ltd vs Agro Export & Others* [1986] ALLER 901 it was held:

“A mandatory injunction ought to be granted on an interlocutory application in the absence of special circumstances and then only in a clear case either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff.

Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction. The principles of law enunciated by these decisions have received full approval by the court within our jurisdiction. See the case of *Belle Maison Limited vs Yaya Towers Limited* HCC 2225 of 1992, per Bosire J (as he then was) and the *Ripples Limited vs Kamau Mucuha* HCC No.4522 of 1992 per Mwera J.”

60. On the material presented before court I do find that a prima facie case has been established, to show that there is a right which has possibly been infringed so as to call for an explanation from the opposite party. The court has to determine where the suit lorry was intercepted, whether it was along Ulu road, Makueni or at Malili along Mombasa road, which is a trunk road under EACVLCA so as to determine which law is applicable. Whether it is the EACVLCA and its regulations or the *Traffic Act, Kenya Roads Act* and Kenya Roads (Kenya National Highway regulations Authority) Regulations, 2013. Hypothetically if after hearing, if it is determined in the applicants favour that would impeach the law applied by the respondent.
61. Conversely even if the court were to find that the respondents favour, the court still has to determine the aspect of procedural fairness as the nature of decision made by the respondent was one that would result either in the loss of the suit lorry/trailer and/or of a substantial sum of money paid as fee, both of which are onerous penalties and affects the rights of the applicants. Closely tied to this question would be the “suala la msingi” issue of the respondent being the complainant, investigator, prosecutor and judge in its own course and whether the due process prescribed under EACVLCA is lawful in absence of necessary checks and balances.
62. All the material/issues pointed out above clearly show that there are material and substantive issues for determination and forms the basis upon which the court can intervene to prevent irreparable damage which might result from the



said invasion. On the second issue of irreparable damage, it has been shown that the suit lorry is financed by Sidian Bank and obviously the applicant pays his monthly obligation when the suit lorry is hired for reward on normal business days. If the same is to be left at the respondent's yard, both parties will lose as the Bank sooner or later will exercise its lien over the same, (which lien is a priority to all other debts/ liabilities) and will simply stake its claim and sell the suit lorry to recover the debt owned.

63. Further, while the law as stated in *Nguruman Limited (Supra)* case, that; "In other words if damages recoverable in law is adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage", it is not the respondent per se, who will pay damages from their own resources but will use tax payer's money to do so. If the suit lorry were to remain detained and the applicant is to succeed in this petition, the damage's due, plus interest and costs which the applicants will be entitled to will run into several millions to the detriment of "Wanjiku, the taxpayer and ultimate bearer of this burden". That would not promote prudent use of the scarce resources, which can be put to better use by the Government and also will run foul of Article 201(d) of *the constitution*, which expressly provides that public money shall be used in a prudent and responsible way.
64. As regards the issue of balance of convenience, I associate myself with the decision in *Pius Kipchirchir Kogo vs. Frank Kimeli Tenai* [2018] eKLR where it was held as follows:
- "The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."
65. It is obvious that it is the applicant who will be more inconvenienced the longer the suit lorry is detained. The suit lorry stands to be repossessed and he will still be liable to the bank to settle the loan due even if the suit lorry is sold and there is still outstanding debt. The fee imposed is also astronomical and still increasing based on daily yard fee and there is also tear and wear of the suit lorry being parked in the open sun over a long period of time as parties litigate. Further were they to succeed in this petition, the petitioners will still have to file a suit for loss of user and other quantified special damages, which no doubt will cost more money and time. The applicants thus would be more inconvenienced and the balance tilts in their favour.
66. Finally as regards the mandatory order sought, for the above reasons I do find that the same is merited and the special circumstances have been demonstrated above. The said circumstances also extend to balancing between the right of a citizen to engage in lawful business and to be punished adequately for infringements of the law after due process is undertaken as provided for under Article 50(2) of *the constitution*. To impound the suit lorry and instantly levy the heavy fee, literally strangles life out of the



applicant and he must be given a small window to breath and prove his innocence, even if eventually he will be found culpable and punished appropriately.

Disposition

67. The upshot is that I find that the orders sought in prayers (3) and (5) of the Notice of motion Application dated 15th March 2024 are merited. The court while granting these orders is also alive to the great menace and damage caused on highways by overloaded trucks and the difficult job the respondents have to ensure compliance with load limits.

68. At this point the court appreciate the sentiments expressed by the High Court in John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another [2016] eKLR that:

“..... However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in *the Constitution* as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.”

69. Public interest must also prevail in such matters. The respondent has solemn duty to ensure that truckers do not overload and damage the good roads built at great expense. This in turn greatly enhances fast movement of goods, which is good for business and enhances road safety. In the circumstances and in order balance the interest of both parties I do therefore order as follows;

- a) The applicant will deposit Kshs.500,000/= into court and this will act as security for his obligation should he be found culpable of breaking any law relating to overloading, and this shall be done within 21 days of this Ruling.
- b) The applicant director(s) will further give a written irrevocable undertaking not to remove the said suit lorry and trailer from the jurisdiction of this court nor will they lease, and/or dispose it off during the pendency of this petition.
- c) Upon deposit of the said amount, giving a written irrevocable undertaking and confirmation by the deputy registrar, a mandatory order of injunction will issue directed at the respondent to release motor vehicle registration Number KDN 093C ISUZU FVZ and Trailer registration Number ZH2648 after ensuring that the excess weight is offloaded and the said exercise is to be carried out in the presence of both parties’ representatives. For avoidance of doubt this order must be complied with within 72 hours after confirmation by deputy registrar of compliance of order (a) and (b) above.
- c) The costs of this application will abide by the petition.

70. The court commends both counsels herein for the extensive and incisive legal submissions filed and oral submissions made in this matter.

71. Matter be mentioned on 27th July 2024 to confirm compliance.

72. It is so ordered.

Judgment written, dated and signed at Machakos this 9th day of May, 2024.

FRANCIS RAYOLA OLEL

JUDGE



Delivered on the **virtual platform, Teams** this **9th** day of **May, 2024.**

In the presence of;

No appearance for Petitioner/Applicant

No appearance for Respondent

Sam Court Assistant

PET NO. E005/2024 - JUDGMENT	0
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