



**Space Geo Enterprises Limited v Kenya National Highways Authority (Constitutional  
Petition 3 of 2019) [2023] KEHC 20127 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20127 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CONSTITUTIONAL PETITION 3 OF 2019  
LM NJUGUNA, J  
JULY 12, 2023**

**BETWEEN**

**SPACE GEO ENTERPRISES LIMITED ..... PETITIONER**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner filed a petition dated 29<sup>th</sup> April 2019 together with two supporting affidavits of even date. With the leave of the court, the petitioner filed an amended petition dated 24<sup>th</sup> February 2022 which included the quantum.
2. The petition is premised on the grounds on its face and on the supporting affidavit. In the petition, the petitioner prays for the following orders:
  - i. A declaration that removal of the insurance sticker and the registration plates from the petitioner's motor vehicle registration number KBH 024Y on 08 April 2019 was unlawful, arbitrary, unconstitutional and an infringement of the petitioner's economic and property rights and the right to fair, expedient and just administrative action;
  - ii. Spent
  - iii. Loss of income and general damages for breach/infringement of the petitioner's constitutional rights to fair administrative action, property and economic rights and illegal action by the respondent;
  - iv. An order and /or a declaration that the respondent do pay the petitioner a sum of KShs.3,898,000/= being special damages incurred by the petitioner in repairs of motor vehicle registration number KBH 024Y and loss of business and/or income for the five months the motor vehicle remained out of use, with interest at the court's rates until the same is paid in full;



- v. General damages for breach/ infringement of the petitioner's constitutional right to fair administrative action, to own property and infringement of its economic rights to earn an income due to the illegal action by the respondent; and
  - vi. Costs of the petition.
3. The respondent filed its response to the amended petition dated 29<sup>th</sup> December 2022 together with a further affidavit of even date by Bernard Bii. In the said response, the respondent avers that its officers flagged the motor vehicle suspecting it of carrying more weight than the recommended. They requested the driver to allow them to weigh the truck, but the driver drove off the highway into a feeder road. That by the driver running away, it necessitated removal of the registration plates and insurance sticker in line with Section 106(4A) of the *Traffic Act* Cap. 403 of the Laws of Kenya. The respondent also denied that the petitioner suffered loss of income and incurred expenses as computed, in repairing the immobile motor vehicle. Further, it was the respondent's case that the petitioner's driver attacked them with a gun causing them to run away before stamping the weighbridge ticket. However, they did not report this incident at any police station. That the driver and one of the directors of the petitioner were charged with criminal offenses vide Mavoko Traffic Case No. 19 and 20 of 2019 wherein they failed to attend court and there are pending warrants of arrest against them.
  4. The court directed that the petition be dispensed with by way of written submissions.
  5. The Petitioner submitted that it suffered loss of income because of the action of the respondent which rendered the motor vehicle unusable for business purposes. They cited Article 47 of *the Constitution* of Kenya 2010 which provides:

47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Further, Section 4 of *Fair Administrative Action Act* 2015 which provides:

1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
2. Every person has the right to be given written reasons for any administrative action that is taken against him.
3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—
  - a. prior and adequate notice of the nature and reasons for the proposed administrative action;
  - b. an opportunity to be heard and to make representations in that regard;
  - c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
  - d. a statement of reasons pursuant to section 6;



- e. notice of the right to legal representation, where applicable;
  - f. notice of the right to cross-examine or where applicable; or
  - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.
6. They relied on the South African case of *President of the Republic of South Africa and Others Vs. South African Rugby Football Union and others (CCT16/98) 2000 (1)SA 1* which reiterated the position in the above-cited laws. It is also their case that the courts have affirmed the position of natural justice in the case of *Republic Vs KENHA Exparte John Mwaniki Kiarie*[2016] eKLR where the court cited the case of *Onyango Oloo Vs Attorney General (1986-1989) EA 456* in which the principles of natural justice were discussed.
  7. On its part the respondent submitted that it did not act ultra vires in exercise of its powers under Section 22(1) of the *Kenya Roads Act* which powers include weighing of vehicles. That the absence of the driver necessitated removal of the number plate and insurance sticker in accordance with Section 106 (4A) of the *Traffic Act* thereby rendering the vehicle immobile. They also relied on Sections 55 and 56 of the *Traffic Act* which empowered them to monitor road usage and maximum weights to be exerted on the roads. They further relied on the case of *Mombasa Water Products limited Vs Kenya National Highways Authority (Petition E037 of 2021) (2021) KEHC 238 (KLR)* where the court stated that failure by the respondent to ensure adherence to rules and guidelines of axle load control prescribed under the *Traffic Act* amounts to their dereliction of duty.
  8. The respondent also averred that the petitioner was not entitled to the damages as the amounts claimed were not substantiated. In support of this, they cited *Swalleh C. Kariuki & another Vs Violet Owiso Okuyu* [2021] eKLR where the court with approval cited *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited Vs Janevams Limited* [2015] eKLR; *Zacharia Waweru Thumbi Vs Samuel Njoroge Thuku* [2006] eKLR; *Sanya Hassan Vs Soma Properties Ltd.* On Special damages, the respondents contested the petitioner’s claim citing the case of *China Wu Yi Limited and another Vs Irene Leah Musau* (2022) eKLR.
  9. From the foregoing, the issues for determination are Firstly, whether or not the respondent acted ultra vires in removing the registration numbers and insurance sticker of the subject motor vehicle, thereby infringing on the constitutional rights of the Petitioner. In addressing this issue, Sections 55 and 56 of the *Traffic Act* provide;

“

“55.

- (1) No vehicle shall be used on a road unless such vehicle and all parts and equipment thereof, including lights and tyres, comply with the requirements of this Act, and such parts and equipment shall at all times be maintained in such a condition that the driving of the vehicle is not likely to be a danger to other users of the road or to persons travelling on the vehicle.
- (2) No motor vehicle the weight or dimensions of which laden or unladen exceeds the maximum weight or dimensions provided for such vehicles by rules made under this Act shall be used on a road.



56.

- (1) 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 or as provided for under the East African Community Vehicle Load Control Act, 2013.
- (2) No vehicle shall be used on a road if it is loaded in such a manner as to make it a danger to other persons using the road or to persons travelling on the vehicle; and should any load or part of a load fall from any vehicle on to a road such fact shall be prima facie evidence that the vehicle was loaded in a dangerous manner until the contrary is proved to the satisfaction of the court.
- (3) For the purpose of this section, persons travelling on a vehicle shall be deemed to be part of the load.

In the same breath, section 106 of the *Traffic Act* states:

“ 106.

- (1) Where any vehicle is found in use on a road in contravention of the provisions of this Act, or the East African Community Vehicle Load Control Act, 2016 or where any vehicle has been left on any road or other public place in such circumstances as to make it appear that such vehicle has been abandoned or should be removed to a place of safety, or where any vehicle has been left on a road in a position which causes or is likely to cause danger to other road users and the owner or driver cannot readily be found, it shall be lawful for any police officer or any inspector to take the vehicle or cause it to be taken to a police station or other place of safety by such method, route and under such conditions as he may consider necessary, having regard to all the circumstances of the case.
- (2) Where under subsection (1) it is considered necessary to have a vehicle towed, transported, driven or otherwise removed, or where it is considered necessary to carry out emergency repairs or to adjust or off-load any part of the load of such vehicle, any expense incurred thereby shall be payable by the owner of the vehicle, and no such vehicle shall be released from the police station or other place of safety until either—
  - a. such expenses have been paid to the person to whom they are due; or
  - b. such person certifies in writing that he is willing to allow the vehicle to be



removed before he receives such expenses due to him.

3. A police officer or inspector who orders the removal of a vehicle under this section shall not be held liable for any damage to or loss of any item from such vehicle during its removal to or detention at a police station or other place of safety.
  4. Any police officer, licensing officer or inspector, if he is of the opinion that any vehicle is being used in contravention of section 55 or section 56 or in contravention of any rules relating to the construction, use and equipment of vehicles, may by order prohibit the use of such vehicle, under such conditions and for such purposes as he may consider necessary for the safety of the public or to ensure that such vehicle does comply with the provisions of section 55 or 56; and any such order shall remain in force until the repairs specified therein have been satisfactorily completed and the vehicle has been certified as complying with the rules relating to construction, use, equipment and weight.
10. According to evidence adduced by the respondent, its officers rightfully calculated, according to their approved matrix/formula, the excess load onboard the motor vehicle. The additional weight that is likely to cause the motor vehicle to damage the road, hence affecting the general public. In doing so, the respondent acted within its powers.
11. However, Section 106 of the *Traffic Act* requires that the police officers should facilitate movement of such impounded vehicle to a police station or such other safe place, even where the driver or owner of the vehicle is not readily found. Evidence was placed before this court to the effect that the number plates and insurance sticker were removed by the respondent. Section 107(4A) of the *Traffic Act* states:
- “(4A) Where a police officer, licensing officer or inspector makes an order under subsection (4) he may remove the vehicle identification plates and the vehicle licence and, if he does so, shall deliver them to the Authority to be kept while that order remains in force.”
- The Authority referred to, in this section means the National Transport and Safety Authority established under the *National Transport and Safety Authority Act* as defined under section 2 of the *Traffic Act*.
12. In the present case, the motor vehicle was left along the road, exposed to deterioration and vandalism. Despite the court issuing orders twice for release of the registration number plates and insurance sticker to the petitioner, it took the respondent about 5 months to have them returned to the petitioner to



enable movement of the motor vehicle from the place where it was stationed. I therefore find that, the respondent to this extent, acted in excess of its powers and caused infringement of the petitioner's right to property under Article 40(1) and Article 47 of *the constitution* of Kenya 2010.

13. This leads me to the second issue for determination which is whether or not the actions of the respondent caused loss of business and income to the petitioner. It was pleaded that the petitioner uses the said motor vehicle for business purposes. Upon perusal of the amended petition the petitioner pleaded a total of Kshs. 3,898,000/= being special damages towards repairs to the motor vehicle and loss of business and/or income for the 5 months. Before going any further, I shall emphasize the position of the law on section 107 of the *Evidence Act* which states:

“(1)Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

In the case of *Anne Wambui Ndiritu –Vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

14. Annexure marked as PM4 to the supporting affidavit of the petition shows 3 invoices detailing the expenses that went towards repair of the motor vehicle. I do note that the invoices are not dated and there is no way of confirming that the amounts were spent towards repairs of damage caused by the acts of the respondent herein. It may well be that the amounts were spent at any other time and towards any other vehicle owned by the petitioner. The invoices are merely requests for goods which without being endorsed as “paid” do not prove payment. The presence of a payment receipt or ETR would have sufficed to prove that the goods were actually purchased. In the case of *Mohammed Ali & another Vs Avenue Cargo Enterprises Ltd (supra)* it was stated:

“.....an invoice is not a proof of payment and only a receipt meets that test.....”

15. As to whether or not the petitioner is rightfully claiming the special damages, it must be understood that the purpose of this constitutional petition is to address constitutional matters arising and where necessary recompense the aggrieved party only as far as it is appropriate. In the case of *Mathina Vs Mohammed & 3 others (Constitutional Petition E003 of 2022)* [2022] KEHC 13048 (KLR) The Court of Appeal in *Gitobu Imanyara & 2 others Vs Attorney General Civil Appeal No. 98 of 2014* [2016] eKLR had this to say in regard to damages:

“...It seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise



in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration...”

Further, in the case of *Zachary Kariithi Vs Jashon Otieno Ochola* [2016]eKLR, Majanja J. held that:

“Without proof of payment of an invoice, special damages are not proved and cannot be awarded on the basis of an invoice.”

In the case of *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited Vs Janevams Limited* (supra) the Court of Appeal held:

“an invoice, without it being stamped or endorsed paid, is not proof of special damage. The Court said: “In the case of *Great Lakes Transport Co (U) Ltd Vs Kenya Revenue Authority* (2009) eKLR 720 on the production of proforma invoices, this Court stated thus: “What we mean is that, in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word” paid” on the invoice and that would turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of goods wanted would be, i.e. Quotation given on enquiry as to the price of the goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case none of the two documents would amount to a receipt.”

It is not enough to plead special damages, the same must also be strictly proved with sufficient evidence. In the case of *Herbert Hahn Vs Amrik Singh* [1985] eKLR the court held:

“..... special damages which must be not only claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves. This has been adumbrated by Bowen LJ in *Ratcliffe Vs Evans* (1892), 2 QB 524, 532, 533, Lord Macnaghten in *Stroms Bruks Aktic Bolag Vs John & Peter Hutchinson*, [1905] AC 515, 525, 526, Lutta JA in *Kampala City Council Vs Nakaye*, [1972] EA 446, 447 and Chesoni J, in *Ouma Vs Nairobi City Council*, [1976] KLR 297, 304.”

16. The petitioner made reference to a tender award agreement dated 22 June 2018. The document refers to building materials, quantities and prices that have not been substantiated and the terms and conditions of the tender have not been provided. The document is also signed by one Esther Muchangi and the words “space geo” added in brackets. I also note that the document is lacking the company seal/stamp thereby casting more doubt as to whether the tender was indeed awarded to the petitioner and who is the authorized signatory of the company was. With these scanty details, this court is left to speculate as to the validity of the document and its entire purpose. The petitioner also failed to prove that the company has or had actual capacity to meet the tender requirements (had they been provided) and therefore, I do not know whether the petitioner would have actually been able to make an income from the said tender if the acts of the respondent had not interfered. I find that there is no evidence at all to enable the court to project any future income from the time of the incident. On the same note, I also find that there was no evidence that the company had employees who drew a salary and therefore my hands are tied to that end.



17. In light of the above, I find that the petitioner cannot be awarded any special damages for lack of proof thereof.

18. Regarding the third issue of infringement of the petitioner’s constitutional right to fair administrative action, to own property and infringement of its economic rights, I do award general damages. On this, I am guided by the case of Kenya Human Rights Commission & another Vs Non-Governmental Organizations Co-ordination Board & another [2018] eKLR where the court held:

“In the circumstances of this case, I find that an award of damages is justified, a demonstration that Courts frown upon violation of the law and abuse of power reposed on public officers.”

19. Ultimately, the petition herein is allowed as follows;

- a. A declaration is hereby made that removal of the insurance sticker and the registration plates from the petitioner’s motor vehicle registration number KBH 024Y on 08 April 2019 was unlawful, arbitrary, unconstitutional and an infringement of the petitioner’s property rights and the right to fair, expedient and just administrative action;
- b. The respondent to pay general damages of KShs. 2,000,000/= to the petitioner, with interest at court rates from the date of this judgment until payment in full; and
- c. The petitioner is awarded the costs of the petition.

20. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 12<sup>TH</sup> DAY OF JULY, 2023.**

**L. NJUGUNA**

**JUDGE**

.....Petitioner

.....Respondent

