



Gichuki v Kenya National Highways Authority; Co-operative Bank of Kenya Limited (Interested Party) (Judicial Review E184 of 2022) [2023] KEHC 23639 (KLR) (Judicial Review) (13 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E184 OF 2022
JM CHIGITI, J
OCTOBER 13, 2023**

BETWEEN

JOHN NDERITU GICHUKI APPLICANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY RESPONDENT

AND

CO-OPERATIVE BANK OF KENYA LIMITED INTERESTED PARTY

JUDGMENT

Brief Background

1. The applicant is engaged in the transport business which he does with motor vehicle registration number KDB 167C which he utilizes commercially to transport building materials including sand.
2. On the 20th November 2022, the Respondent's officers impounded the subject motor vehicle at the Athi River/Mlolongo weighbridge along Mombasa Road under alleging that it was overloaded. The Applicant's driver inquired from the Respondent's officers as to why the vehicle had been impounded and he was presented with a weighbridge ticket which had a handwritten demand for the sum of Kshs. 705,220/= to be paid to the Respondent with no further explanation. The ticket was printed, dated, signed and stamped on 20th November 2022.
3. The applicant argues that he was not accorded an opportunity to be heard before the demand for Kshs. 705,220/= was made which goes against the rules of natural justice and the *Fair Administrative Action Act* as enshrined by Articles 47 and 50 of *the Constitution* of Kenya.



4. It is his case that The Respondent failed to lay a legal basis for the detention of the motor vehicle and the subsequent money demand using the weighbridge ticket that did not quote any law that justified the sum demanded hence the Applicant was at a loss as to what legal options were available to him.
5. The Applicant believes that the decision taken by the Respondent is oppressive, arbitral, unfair and unreasonable and hence the Honourable court should intervene urgently to ensure that the administrative action taken by the Respondent, a public entity conforms with the relevant laws.
6. What is before this court is the Notice of Motion dated 3rd January 2023 wherein the Applicant seeking;
 1. An order of Certiorarito remove and bring to this Honourable Court, for purposes of quashing, the decision of the Respondent to detain motor vehicle registration number KDB 167C, at the Athiriver/Mlolongo weighbridge along Mombasa Road, and ordering him to pay Kshs. 705,200/=to have it released as contained in the weighbridge ticket dated 20th November 2022.
 2. An order of Mandamuscompelling the Respondent to unconditionally release motor vehicle registration number KDB 167C.
 3. The costs of this application; and
 4. Such other or further relief as the court shall deem appropriate.
7. The application is supported by the statutory statement dated 18th December 2022, the affidavit sworn by the applicant John Nderitu Gichuki on 18th December 2022, and 2 supplementary affidavits dated 10th and 11th May 2023 by the same applicant in response to the Respondent and Interested Party's Replying Affidavits respectively.

The Applicants case:

8. According to the Applicant, the objective and purpose of Judicial Review proceedings was well espoused in the case of Republic V Kenya National Highways Authority Ex Parte Applicant Benjo Super Stores Limited [2021] eKLR where the court stated:

“The objective of seeking judicial review orders is to cushion or protect litigants against suffering consequences out of decisions arrived at by public bodies, institutions or public officers without due regard to due process, procedural propriety, observance of the principles of natural justice by treating everybody equally and fairly, rational and prudent consideration and treatment of issues before them, due regard to the people they are serving and upholding the rule of law.

He relies on the case of Civil service unions v Minister for civil service (1985)A,C374 at 401 where Lord Diplock stated that Judicial Review has developed to a stage where one can classify the grounds for consideration as that of Irrationality, illegality and procedural impropriety”

9. Section 17 of the East African Community Vehicle Load Control Act, provides:

“(1) When an authorized officer determines that a vehicle is carrying a load in excess of the legal load limit under this Act, he or she shall issue a weighing report setting out the overload particulars and the amount of overload fees payable...



- ... (3) Where the fact of overloading is not disputed by the transporter, the transporter shall sign and acknowledge the weighing report in the prescribed manner and the transporter shall be liable for the overload fees, which may be recovered as a summary debt by the national roads authority.
- (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 fees on a without prejudice basis to secure the release of the vehicle, make such necessary adjustment on the load as may be directed by the authorized officer and lodge an appeal against the fees as provided for by regulations made under this Act; or 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. (Emphasis mine)
10. The ticket that was presented to the Applicant dated 20th November 2022, did not indicate whether the Kshs. 705,220/= was a fee, charge, penalty or levy as required by Section 17 (1) of the Act.
 11. Section 17 (4) of the East African Community Vehicle Load Control Act stipulates that if the overloading was disputed as was the case herein, then the respondent’s officer should have indicated the same on the ticket and supplied it to the transporter. The transporter is thereafter at liberty to pursue a range of legal options available to them under the said sub-section.
 12. According to the Applicant, the ticket presented to him was neither signed by the Applicant and it did not indicate whether the sum demanded was disputed which went against the laid down procedures of the Act.
 13. He believes that this was intentional on the part of the Respondent in order to deprive the Applicant of his rights under Article 50 and 47 of *the Constitution* of Kenya 2010.
 14. Section 22 of the Act further provides:
 1. The National Road Authority, where it is satisfied that any person has committed an offence under paragraphs (a), (b), (c), (e), (f) and (g) of subsection (1) of Section 20, may compound the offence and may order such person to pay a sum of money, as the National Road Authority may deem fit not exceeding the amount of the fine to which the person would have been liable if the person had been prosecuted and convicted for the offence.
 2. The National Road Authority shall not exercise its powers under subsection (1) unless the person admits in a prescribed form that the person has committed the offence and requests the National Road Authority to deal with such offence under this section-
 15. He argues that the onus is on the Respondent to disclose to the transporter whether the money demanded is a penalty, fine or fees as per Act. The handwritten demand made by the Respondent fell short of this and the said decision is fit for quashing by this court.
 16. It is his case that the Respondent’s decision was fraught with irregularities and unfairness, attempted to sanitize its actions by presenting the weigh ticket attached as KeNHA 2 in the Replying Affidavit.
 17. The said ticket was printed and stamped on 6th February 2023 after this matter had already been filed. In an attempt to explain that the amount demanded is “overload fees” as per Section 7 of the Act. This is an afterthought and a feeble attempt at rewriting a wrong that has already been committed.



18. Article 47 of *the Constitution* is further amplified by section 4(3) of the *Fair Administrative Action Act*, provides:

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.
19. In this instance case, the court should ponder on whether before making the demand; the Applicant was granted a fair hearing; the Applicant was given notice of the legal options available to him to enable him make an informed decision; and whether the Applicant was made aware of his right to appeal. The answer to all this is a resounding NO and it is our humble prayer that the Respondent's decision and demand be quashed is well founded. The Respondent should thereafter be compelled to release the subject motor vehicle unconditionally. He relies on the case of Republic V Kenya National Highways Authority Ex Parte Applicant Benjo Super Stores Limited [2021] eKLR where it was held:

“Having found that the respondent was not accorded a fair hearing, not given any notice in writing requiring him to exercise the option of pleading guilty or not and, not explained to about his right of appeal, is sufficient proof that the respondent acted totally in breach of the tenets of fair administrative action espoused and contemplated under Article 47 of *the Constitution*. For the above reasons stated, it is my finding that the prayer for certiorari orders in the application dated 3/2/2020 is merited and is hereby allowed as prayed”

The Respondents Case:

20. The Respondent argues that the law relied upon in detaining the Applicant's motor vehicle and the levying fines is the East Africa Community Vehicle Load Control Act (EACVeLCA).
21. The Respondent stated that the East Africa Community Vehicle Load Control Act that was duly ratified and made an integral part of Kenyan law pursuant to Article 2(6) of *the Constitution* of Kenya, 2010. Reliance is placed in the case of Office of the Director of Public Prosecutions v Juma Chemomerwu Batuli the East Africa Community Vehicle Load Control Act (EACVeLCA, takes precedence over other Kenyan laws or statutes in respect of matters to which its provisions relate.
22. The court stated that:

“The Act was assented to by all the East Africa Community Heads of State on different dates between 1st August, 2013 and 1st December 2015. A signed version is easily accessible on the East Africa Legislative Assembly website and specifically eala.org/uploads/



scans_20160921. Having been assented to the Act is fully operational pursuant to the East Africa Community Treaty ratified by Kenya.

Further, Article 2(6) of *the Constitution* of Kenya provides that:

"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

There is therefore no doubt that the EACVeLCA constitutes part of Kenyan Law. 15. In addition to the Act constituting an integral part of Kenyan Law by ratification, Section 25 of the EACVeLCA provides that it has precedence over the national laws of the Partner States. Section 25 provides that:

"This Act shall take precedence over the Partner States' laws with respect to any matter to which its provisions relate." (Emphasis added)"

23. The EACVeLCA is an integral part of the Kenyan law, which is applicable and supersedes other laws. In view of this the argument that the law does not apply and cannot be relied upon cannot stand. Section 3 clearly identifies the Regional Trunk Road Networks Z 0_ 0 to which it applies as those in the First Schedule to the Act.
24. The First Schedule of EACVeLCA sets out the Regional Trunk Road Networks in Kenya to include those in the Northern Corridor and its links, inter alia as follows: "Athi River - Nairobi - Uplands - Kimende Naivasha - Nakuru - Timboroa Eldoret Webuye Bungoma - Malaba - 467 kilometres."
25. Second Schedule of the Act sets the permissible maximum axle load limits, and the Third Schedule sets out the Gross Vehicle Weight limits. The decision by the Respondent to detain the subject motor vehicle was therefore well grounded in law.
26. The action by the Respondent was well within the provided law governing the road load measures and offences and the decision was arrived after carefully following the laid procedure.
27. The Ex-Parte Applicant's main contention is that the Respondent's action conflict with the provisions of Article 47 of *the Constitution* of Kenya, the provisions of the Fair Administration Act and Section 17, 20 and 22 of the East African Community Vehicle Load Control Act, 2016 for acting without power or rather ultra vires is misplaced.
28. Section 20(1)(b) provides that a person commits an offence if the person:
 - a. transports a super load as specified under section 9(e) or such other load in without a special permit.
29. The subject dispute vehicle upon being weighed was found to be carrying 25,700 Kgs on the gross weight instead of the maximum permissible gross weight of 18,000 Kgs and as such was overloaded by 7,700 Kgs on the gross weight. The Applicant's driver was duly notified of the overloading offence and advised in writing of what penalty to pay in order to have the truck released.
30. The vehicle was further overloaded on the axles and was carrying 18,280 Kgs on the group two axles instead of permissible 10,500 and as such was overloaded by 7,780 Kgs. A finding that the Ex-Applicant has not denied and does not challenge.
31. Section 17(1) of EACVeLCA that when an authorized officer determines that a vehicle is carrying a load in excess of the legal load limit under this Act, (as was the case here) he or she shall issue a weighing report setting out the overload particulars and the amount of overload fees payable.



32. The Respondent argues that the weighing report setting out the overload particulars and the amount of overload fees payable was issued to the Applicant's driver and all that was needed for the Applicant and/or his driver was to pay the overload fees, ensure the load is redistributed and continue with the journey without engaging in the unnecessary contest.
33. According to the Respondent, the weighbridge ticket presented to the Applicant's transporter clearly captured the details of the said motor vehicle, the overload, the total penalty for the overload in USD and the same converted into Ksh (only information that was handwritten) and the immediate action to be taken. This document was duly stamped by the Respondent stamp and availed to the Applicant's transporter.
34. Section 17(2) EACVeLCA that: -
- “where an authorized officer, while a journey is being undertaken, determines that a vehicle is carrying a load in excess of the legal load limit, the authorized officer shall in consultation with relevant implementing agencies, not allow the vehicle in question to continue its journey, unless the load is redistributed and the vehicle is, upon being reweighed, found to be within the legal load limit, or the vehicle is offloaded to lower its weight to the legal load limit and: -
- any amounts due under subsection (1) have been paid to the national roads authority or its duly appointed agent; or
- a guarantee in the prescribed format is provided by the transporter that such amounts shall be paid.”
35. It is its case that it was guided by Section 17 of EACVeLCA and the Third Schedule of the East African Community Vehicle Control (Enforcement) Measures Regulations 2018, overload fees were duly tabulated and amounted to USD 5,779.1 converted to Kshs 705,220/= and the transporter was advised of the amounts in writing.
36. The Respondent detained the overloaded vehicle without a charge by the national roads authority for the period prescribed in the regional operation and procedures regulations and, thereafter, a fee of fifty dollars shall be charged for each extra day of detention until proof of payment is produced in line with Section 17 as read together with Section 13(2) East African Community Vehicle Control (Enforcement) Measures Regulations 2018 until the transporter pays the overloading fees.
37. Where the fact of overloading is disputed by the transporter, according to Section 17(4) 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 fees on a without prejudice basis to secure the release of the vehicle, make such necessary adjustment on the load as may be directed by the authorized officer and lodge an appeal against the fees as provided for by regulations made under the Act; or
 - b. appeal against the fees, using regulations made under the Act, during which period the vehicle will remain detained at such designated place at the cost of the transporter.
38. Regardless of whether there is a dispute on the overloading fees, as per Section 17(4) (a) EACVeLCA the applicant is obligated to pay the fees, and then subsequently appeal the fee and overloading amount to the Authority as per the guidelines in 17(4) (b).



39. The Act therefore presupposes that before one moves the court for reliefs relating to overloading, the appropriate procedure is to follow the laid down mechanism therein before approaching court. It is trite law that when a certain procedure is prescribed by law, that procedure must be exhausted first. This doctrine was propounded in the case of *Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 others* [2015] OMR where the Court of Appeal held:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

40. Article 47 of *the Constitution* of Kenya, 2010 read together with Section 4 of the *Fair Administrative Action Act*, 2015 states that 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.

41. In the instance case, the Applicant was furnished with written reasons, by way of the weigh ticket and advised on the next steps to take as per the law on overloads. It is therefore not proper for the Applicant to claim that provisions of Article 47 of *the Constitution* of Kenya, 2010 were contravened.

42. Section 6 of the *Fair Administrative Action Act*, 2015 further opines that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review. The information may include: -

- i. the reasons for which the action was taken; and
- ii. any relevant documents relating to the matter.

43. The relevant documents herein including the weight tickets confirming the overloads, annexed and marked KeNHA 2 in the Respondent's Replying Affidavit as well as the duly tabulated overload fees amount reduced in writing is information that was duly availed to the transporter and the Applicant. It is only that the Applicant elected not to pay nor provide an agreeable security for the release of the motor vehicle.

44. The Applicant has not sought any other documentation and/or reasons from the Respondent to enable the application for an appeal/review. In the event of such a request the Respondent would gladly avail the said information to the Applicant, if available. It is the Respondent's case that Section 6 of the Fair Administrative Act, 2015 has been breached and is not sustainable in the circumstances and the same ought to be dismissed.

45. The Applicant cannot therefore claim not have been accorded the relevant documentation to enable him make an informed decision. Be as it may, the Applicant expressly admits in its pleading specifically its submissions that "the said demand was handwritten". This confirms that the Applicant transporter was provided with the weigh bridge ticket containing all the necessary information for the offence committed and the manner in which to remedy it.



The Interested Parties Case:

46. The Interested Party argues that it advanced a loan facility of Kenya Shillings 5,982,300/- to its customer Caroline Karimi Nthiga (the Borrower), to purchase an Isuzu FTR Truck Registration KDB 176C (the subject Motor Vehicle under a Hire Purchase Agreement as set out in the Hire Purchase Agreement dated 11th December 2020 and that the Motor Vehicle is registered in the name of the Interested Party and the Borrower as the Interested Party is the financier of the Motor Vehicle as set out in the log book)
47. That when the Borrower defaulted on repayment of the loan, and on 25th November 2022, the Interested Party instructed Upstate Auctioneers (the Auctioneers) to repossess the subject Motor Vehicle who informed the Interested party that the subject Motor Vehicle had been seized by the Respondent herein at the Mlolongo Weigh Bridge.
48. The Interested Party was surprised to learn that the Applicant herein filed the present suit, claiming ownership of the Motor Vehicle and that it has since discovered that the Borrower entered into a Sale Agreement for the subject Motor Vehicle with the Applicant, to the exclusion of, and without the consent of, the Interested Party. It argues that the Sale Agreement has been illegally entered into, and is null and void.
49. The interested party argues that it is true that the Motor Vehicle has been illegally seized and detained and the Motor Vehicle ought to be released to the Interested Party, as the Interested Party has a vested interest in the Motor Vehicle.
50. It is the Interested Party's case that it will be severely affected if the Motor Vehicle is put out of its reach, as it is the beneficial owner of the said Motor Vehicle.

Analysis and determination:

51. I have considered the pleadings, submissions and authorities by the parties and I have concluded that the following issues commend themselves to my attention in order to dispose of this case:

Whether the court grant the orders sought.

52. In the case of *Pastoli vs. Kabale District Local Government Council and Others* [2008] 2 EA 300 in which the Court citing *Council of Civil Unions vs. Minister for the Civil Service* [1985] AC 2 and an *Application by Bukoba Gymkhana Club* [1963] EA 478 at 479 held that:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe



procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

53. I find that the Respondents decision was illegal in that the Respondent committed an error of law in the process of taking or making the decision, the subject of the complaint.
54. According to Sections 20, 21 and 22 of the Act, the Respondent has the powers to order a transporter to pay a certain amount of money after having been satisfied that the transporter had committed an offence.
55. The Applicant in this suit had a legitimate expectation and had a right to know whether the money demanded by the Respondent is a penalty, fine or fees as per the Act. The handwritten demand made by the Respondent did not communicate this.
56. The weighing ticket that is attached as KeNHA 2 in the Replying Affidavit was printed and stamped on 6th February 2023 after this matter had already been filed. It is clear that the ticket presented by the Respondent is a belated attempt to explain that the amount demanded is “overload fees” as per Section 7 of the Act.
57. Article 47 of *the Constitution* as further amplified by section 4(3) of the *Fair Administrative Action Act*, provides:
 - “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. (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
58. Further to the above, Section 17(4) East African Community Vehicle Load Control Act, 2016 where the fact of overloading is disputed by the transporter, the authorized officer weighing the vehicle shall indicate such a dispute in the weighing report, and a copy of the disputed report shall be issued to the transporter who may pay the requisite overloading fees on a without prejudice basis to secure the release of the vehicle, make such necessary adjustment on the load as may be directed by the authorized officer and lodge an appeal against the fees as provided for by regulations made under this Act; or 20 East African Community Vehicle Load Control Act, 2016 (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.
59. The Applicants case falls in the category of Section 17(4). He has not paid nor appealed. On its part, the Respondent has not tendered nor furnished the court with any report weighing report. This generates



the inference that none was prepared. The Applicant could not have acted without the above statutory information.

60. The Respondent argued that in the instance case, the Applicant was furnished with written reasons, by way of the weigh ticket and advised on the next steps to take as per the law on overloads. It is therefore not proper for the Applicant to claim that provisions of Article 47 of *the Constitution* of Kenya, 2010 were contravened.
61. A weighing report is a statutory document that accords with the *Fair Administrative Action Act*. The report is what helps the driver who is faced with a possibility of sanctions to understand the reasons behind the sanctions. It is very different from a weigh ticket.
62. It was further the Respondents case that Section 6 of the *Fair Administrative Action Act*, 2015 further opines that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review. The information may include:
 - a. the reasons for which the action was taken; and
 - b. any relevant documents relating to the matter.
63. The Respondent believes that the relevant documents herein including the weight tickets confirming the overloads, annexed and marked KeNHA 2 in the Respondent's Replying Affidavit as well as the duly tabulated overload fees amount reduced in writing is information that was duly availed to the Applicant. It is only that the Applicant elected not to pay nor provide an agreeable security for the release of the motor vehicle.
64. The Respondents case is that the Applicant has not sought any other documentation and/or reasons from the Respondent to enable the application for an appeal/review. In the event of such a request the Respondent would gladly avail the said information to the Applicant, if available.
65. This court finds that the onus was on The Respondent to furnish the Applicant with the weighing report and not for the Applicant to ask for it. The Respondent was under a duty to do so without waiting for the driver to request for it.
66. In the case Republic V Kenya National Highways Authority Ex Parte Applicant Benjo Super Stores Limited [2021] eKLR it was held:

“Having found that the respondent was not accorded a fair hearing, not given any notice in writing requiring him to exercise the option of pleading guilty or not and, not explained to about his right of appeal, is sufficient proof that the respondent acted totally in breach of the tenets of fair administrative action espoused and contemplated under Article 47 of *the Constitution*.”

It is my finding that the Respondent did not act reasonably and fairly in the way the Applicant was handled.

The Doctrine of exhaustion:

67. Section 17(4) East African Community Vehicle Load Control Act, 2016 stipulates that 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 fees on a without prejudice basis to secure the release of the vehicle, make such necessary adjustment on the load as may be directed by the authorized officer and



lodge an appeal against the fees as provided for by regulations made under this Act; or 20 East African Community Vehicle Load Control Act, 2016 (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.

68. Having failed to furnish the Applicant with the weighing report, the Respondent technically blocked the avenue for the Applicant to comply with Section 17 of the East African Community Vehicle Load Control Act, 2016 or the [Fair Administrative Action Act](#).
69. The Respondent cannot then accuse the Applicant for failing to comply with the doctrine of exhaustion and I so hold.

Can the orders sought be granted?

70. Having found that the Respondent acted illegally, the court has to address its mind to the next issue which is whether the orders sought should be granted. The issue of the ownership of the subject motor vehicle is at the heart of the reliefs sought.
71. The Applicants case is that he is the Actual and beneficial owner of the vehicle. To demonstrate this, he relies on the sale agreement dated 12th May 2022 and attached to the Verifying Affidavit dated 18th December 2022.
72. He argues that the interested parties' interests are well captured in the said agreement and will not suffer any prejudice if the said motor vehicle is released.
73. On the part of the interest party, it believes that it is the owner of the vehicle as set out in the logbook. The interested party is relying on a hire purchase agreement for the same vehicle between it and one Caroline Karimi Nthiga inter alia.
74. I made a cursory look at the agreement and noted that the interested party did not execute the sale agreement. I intentionally decided not to get into the legal implication of that since this court is not doing a merit analysis.
75. I am in full agreement with the Applicant's argument that issues of ownership of the said vehicle should be settled separately in a different forum of the court.
76. Where the ownership of the suit subject or the vehicle in this case cannot be ascertained by the judicial review court, then the court cannot issue the orders of certiorari or mandamus.
77. Granting the orders sought will no doubt indirectly settle the question of ownership of the car. Granting the orders sought will have the effect of prejudicing interested parties claim.
78. There being a hot contest and dispute around the ownership of the suit vehicle it will not be proper for the court to grant any orders in favor of any of the two warring parties at the expense of the other and I so hold.
79. In Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo it was held: -

“ 55. ... where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining



contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.” (Emphasis supplied)

80. Judicial review looks into the legality of the dispute not contested matters of evidence. To reconcile the diametrically opposed positions presented in this case, it is necessary for the court to hear oral evidence, which is outside the scope of judicial review jurisdiction. Further, as stated later, determining the said issues will involve a merit review, a function that is outside the purview of Judicial Review jurisdiction.
81. The applicants are simply inviting this court to determine contested issues of facts without hearing evidence. This court cannot do so. It is a dangerous invitation to this court to determine a strictly civil dispute without hearing evidence.
82. I am further fortified by *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another* where it was held that: -
- “...Where the determination of the dispute before the court requires the court to make a determination on disputed issues of fact that is not a suitable case for judicial review since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the *Civil Procedure Act* does not apply. It is governed by sections 8 and 9 of the *Law Reform Act* being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law....” (Emphasis added)
83. In the case of *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* it was held that: -
- “...where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the court to determine the merits of two or more different versions presented by the parties the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. ...”(Emphasis added)
84. The above excerpts illuminate the legal position with sufficient clarity and settle the issue at hand. The ownership of the car should be settled in a court where the parties will be able to tender evidence, carry out chief and cross examination of witnesses. That cannot happen in the Judicial review court.
85. In *Republic v Registrar of Societies & 3 others ex parte Lydia Cherubet & 2 others* the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact. On this ground alone, the applicant’s case collapses. The Application cannot be granted.



Costs:

86. The general rule flowing from Section 27 of the *Civil Procedure Act*, Cap 21, Laws of Kenya is that costs should follow the event. That is to say, the successful party should be awarded its costs. This general rule is elaborated by Justice Kuloba in his book, *Judicial Hints on Civil Procedure*, Vol. 1 at p. 99 as follows:

“The first question is what is meant by “the event” in the proviso to subsection (1) of this section? The words “the event” mean the result of all the proceedings incidental to the litigation. The event is the result of the entire litigation. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action. (Emphasis provided).

87. It is this court’s finding that the Applicants did not succeed in securing the orders sought. He shall bear the costs of the Application.

Disposition:

88. This court cannot lack jurisdiction to determine the suit.

Order:

The Application dated 3rd January 2023 is dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 13TH DAY OF OCTOBER 2023

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J.CHIGITI (SC)

JUDGE

