



Onduso & another v Kenya National Highways Authority (Petition E008 of 2024) [2024] KEHC 16664 (KLR) (12 November 2024) (Ruling)

Neutral citation: [2024] KEHC 16664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
PETITION E008 OF 2024**

JL TAMAR, J

NOVEMBER 12, 2024

**IN THE MATTER OF ARTICLE 2(1), 2(5), 3(1), 10,19,20,22(1),
23(3) & 24 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTIONAL
RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE
10,25,27,28,35, 40, 43, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE KENYA ROADS ACT, CAP 408 LAWS OF KENYA

AND

**IN THE MATTER OF KENYA ROADS (FORMALLY
NATIONAL HIGHWAY AUTHORITY) REGULATIONS, 2013**

AND

IN THE MATTER OF THE TRAFFIC ACTS, CAP 403 LAWS OF KENYA

AND

**IN THE MATTER OF EAST AFRICAN COMMUNITY
VEHICLE LOAD CONTROL ACT, 2016**

BETWEEN

DOUGLAS JUMA ONDUSO 1ST PETITIONER

GEOSPOTHE CONCEPTS LIMITED 2ND PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY RESPONDENT



RULING

Introduction

1. By a constitutional petition dated 30th may 2024, the petitioner herein moved this court alleging violations of various constitutional rights by the respondent citing specific Articles of *the constitution* and seeking declaratory, mandamus and injunctive orders against the respondent. Contemporaneous with the petition, the petitioner/applicant file a notice of motion application seeking the following orders;
 - i. Spent...
 - ii. That this Honourable Court be pleased to issue temporary Order of Injunction restraining the Respondents, their servants, agents or any other person acting on their behest, behalf or directions from unlawfully, illegally or arbitrarily taking, keeping and holding the petitioners motor vehicle registration number KDH 987N, Isuzu FVZ chassis no JALFVZ3XXXX pending the hearing and determination of this application
 - iii. That this Honourable Court be pleased to issue temporary Order of Injunction restraining the Respondents, their servants, agents or any other person acting on their behest, behalf or directions from unlawfully, illegally or arbitrarily taking, keeping and holding the petitioners motor vehicle registration number KDH 987N, Isuzu FVZ chassis no JALFVZ3XXXX pending the hearing and determination of this petition.
 - iv. That this Honourable court do issue a temporary order compelling the respondent to unconditionally release the transporters vehicle that has been unlawfully impounded pending the hearing and determination of this application
 - v. That this Honourable court do issue a temporary order compelling the respondent to unconditionally release the transporters vehicle that has been unlawfully impounded pending the hearing and determination of this Petition.
 - vi. That the cost of this application be provided for.
2. The application is supported by 28 grounds on the face of it and the supporting affidavit of Douglas Juma Onduso reiterating the grounds thereof. Upon service of the petition and the application, the Respondent Willie Shem Waithanje Thuku filed a Replying affidavit in response to the said application dated 27th June 2024.

Petitioner/Applicant case

3. The 1st applicant is a Director of the second petitioner, a company duly registered in Kenya and engages in the business of transporting building and construction material such as sand, ballast and marram while using motor vehicle reg no. KDH 987N. The motor vehicle is jointly owned with Co-operative Bank on account of financial facility extended to the applicant. The applicant avers that he relies on the income generated by the use of the vehicle to service the loan premium as and when they are due.
4. The applicant stated that on the night of 16th August 2023, the driver of the said motor vehicle truck one Jackson Mutuku Munyao was in physical possession of the vehicle being loaded with sand at Kibini area when the respondent's officers approached and demanding to take control of the truck which was refused by the driver. Ultimately, after protesting, the Respondent officers adjudged the truck



overloaded and immediately seized and took control of the truck and drove it from Kibini to Isinya weigh Bridge. The applicant contend that the respondent had the control of the truck from 10:00pm to 11:00pm on 16th August 2023 until the following morning when it was weighed at 05:11 in his absence or that of his agents. Upon being found to be overload, the respondent charged a fee of 28,563,572.673 in breach of procedural propriety and in disregard of the tenets of natural justice. The applicant avers that the amount of fees adjudged payable by the respondent is exorbitant and the continued detention of the truck, the only source of his livelihood, has occasioned the applicant hardship as he is unable to meet his obligations and service the loan advanced to him by the bank.

5. The applicant further contend that respondent maliciously coerced the truck to the weighbridge governed under the East Africa Community Vehicle Load Control Act,2016 herein (EACVLCA) and the regulations made thereunder as opposed to the *traffic Act* Cap 403. That the application of the East Africa Community Vehicle Load Act is limited and apply only to implementation of vehicle load control along the Regional Trunk Road Network set out in the first schedule. It is contended that KIBINI area of Kajiado county where the truck was found is not within Regional Trunk Road Network and therefore the application of the EACVLCA is illegal. The applicants aver that in so far as the penalty disguised as a fee exceeds the value of the motor vehicle in question is maintained, he will be kept away from its ordinary use and condemned to loss of livelihood while the Bank actively seeks for premiums in satisfaction of the loan agreement.

Respondent response to the application

6. The application is strongly opposed by the respondent via an affidavit of Willie Shem Waithanje Thuku who avers that the respondent is a state corporation established pursuant to section 3 of the *Kenya Roads Act*, no 2 of 2007 with the mandate to inter alia manage, develop, rehabilitate and maintain national roads as provided for under section 4(1) of the Act.
7. That the authority in discharge of its function as set out in the Act is obligated to construct, upgrade, rehabilitate and maintain national trunk roads under its control: to control national roads and road reserves and access to road side development, and implement road policies in relation to national roads and ensure adherence to the rules, and guidelines on axle load control prescribed under the *traffic Act* and the regulations under the *Kenya roads act* 2007.
8. The deponent avers in paragraph 6 that under section 22(1)(c) of the *Kenya roads Act*, the authority is conferred with powers to measure and assess the weight dimensions and capacities of vehicles using any road and provide measures to ensure compliance with the rules relating to axle load control. Further in performance of its mandate the authority in addition to domestic legislation relies on East Africa Community Vehicle Load Control (EACVLC)Act 2016 which harmonizes enforcement of the Regional Trunk Road Networks within the community.
9. As it relates to the petitioner's application, the respondent contends that on 17th August 2023 at around 0100hrs, the petitioners motor vehicle reg no KDH 987N was being driven along Namanga- Isinya Road when it was stopped by the respondent's officials and police officers at a junction known as Curio near the Mashuru-Namanga road while they were on axle load monitoring duties. The vehicle, it is stated had no front and rear number plates and when it was flagged by the police officers the drivers defied the order to stop and drove towards Isinya and abandoned it 200 meters when he realized that he was being pursued.
10. The officers escorted the motor vehicle to Isinya Weighbridge located within the Regional Trunk Road Network as defined under the EACVLC Act weighed and found to be overloaded on the Gross Vehicle Weight by 29,800kgs having carried 55,800kgs against the permissible legal limit of 26,000 kgs on Gross



Vehicle Weight. Further it was also established that the vehicle had an overload on the axles of 2,960 kgs having carried 11,360 kgs instead of the permissible legal limit of 8,400 kgs on group one axle and an overload of 25,540 kgs having carried 44,440 kgs instead of the permissible legal limit of 18,900 kgs on Group two Grouping. And since the motor vehicle was abandoned, according to the respondent, it was moved to Isinya Holding Yard where it was detained until the excess load is distributed or offloaded in line with the provision of section 17(2) of the Act. The transporter was subsequently notified and advised to pay the overload fees of ksh.28,563,572.673 as computed based on the East Africa Community Vehicle Load Control Act, 2006 and the enforcements measures regulations 2018.

11. The respondent contend that the petitioner has not exhausted all the avenues for appeal provided under East Africa Community Vehicle Load Control Act before approaching the court for the remedies sought contrary to section 17 of the Act and therefore the petition is premature and the court lacks jurisdiction to hear and determine the same.
12. The respondent has raised a preliminary objection that in view of section 17 of the East African Community Vehicle Load Control Act, the petitioner ought to have exhausted the available remedies provided for in the Act before moving this court. I shall first deal with this point first as submitted by both counsels.
13. What constitute a Preliminary Objection was stated in the much-celebrated case of Mukisa Biscuits Manufacturing Company Limited –vs- West End Distributors [1969] E A 696 as follows;
 - a.” A Preliminary Objection consists of point of law which has been pleaded or which arises by clear implication out of pleading, and which if argued as a Preliminary point, will dispose of the suit. Examples are an objection to the jurisdiction of the court, and a plea of limitation (emphasis supplied), or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration”.
14. The issue raised by the Respondent is proper point of law contemplated in Mukisa Biscuit case and which if sustained have the potential of disposing the petition herein without the need for a full trial.
 2. In John Musakali –vs- Speaker County of Bungoma & 4 others [2015] EKLR, Justice Chacha Mwita stated “once raised the Preliminary Objection should have the potential of disposing of the suit at that point without the need to go for trial.”
15. For a preliminary objection to succeed, the following tests ought to be satisfied
 - i. It should raise pure point of law
 - ii. It is argued on the assumption that all the facts pleaded by the other side are correct;
 - iii. Finally, it cannot be if any fact has to be ascertained or if what is sought is the exercise of judicial discretion
16. The respondent contends that under section 17(4) of the Act, where the transporter disputes the overloading fees charges, he can pay for the fee on a without prejudice basis to secure the release of the vehicle, make necessary weight adjustments and appeal against the fees or appeal against the fees while the motor vehicle is detained at the cost of the owner of the vehicle. The section provides;
 - I. 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 reported shall be issued to the transporter who



- (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 the regulations 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
17. The respondent contends that the above section of the law avail two options for a transporter where the fees charged are in dispute; where the fees are disputed the transporter is required to appeal against the fees and should only approach the court to challenge the decision of the appeal body. The respondent similarly argues that as the petitioner seeks to challenge the administrative actions of the officers of the respondents of charging overloading fees and detaining motor vehicle, this it is contended is contrary to section 2 of the fair administration Action Act which prohibit the court from reviewing the administrative action unless the mechanism, including the internal mechanism for appeal or review are first exhausted. Reliance was placed in Geoffrey Muthinja & another vs Samuel Muguna Henry (2015) eKLR and Mui Coal Basin Local Community & 15 others vs permanent Secretary Ministry of Energy & 17 other (2015) eKLR
18. In response to these submissions, the petitioner/applicant, contests the applicability of the East African Community Vehicle Load Control Act, 2016. Section 3 of the Act states; that this Act shall apply to the implementation of the vehicle load control along the Regional Trunk Road Network set out in the first schedule. The applicant contend that the vehicle was picked out in Kibini area which is an area outside the applicability of the Act while the respondent on the other hand argues that the vehicle was intercepted along Namanga Isinya Road which is a trunk road. And because the facts as pleaded are contested as it relates to place where the motor vehicle was allegedly found, then section 3 of the Act is inapplicable and a preliminary objection cannot be sustained in controverted facts. The petitioner/applicant relied on the case of John Mwaniki Kiarie & another vs Kenya National Highway Authority where the court held that the court cannot make a definite determination on contested facts and such a determination will have to be made, during the hearing of the petition once the court has determined where exactly the suit lorry was intercepted.
19. The other argument proffered by the petitioner/applicant is that section 17(4) of the EACVL (enforcement measures) does not create an appellate mechanism. it is contended that a closer examination of the regulations reveals that the only appellate procedure is with regard to dispute of a report of a road damage assessment and not a determination of an overload. The petitioner relied on the case of John Mwaniki Kiarie (supra)
20. On this ground raised by the petitioner, it is indeed correct to say that there is no clear, easily ascertainable appellate mechanism inbuilt in the Act or regulations made thereunder that a party dissatisfied with the decision of the officer under section 17 of the Act would invoke to seek redress. In misc. application no E005 OF 2022 Jorame Ontwori Makori vs Kenya National Highway Authority, Justice Muigai stated that;

“I have not come across any procedure and or inference of any internal mechanism that the parties could first exhaust before approaching this court. The respondent has not outlined which internal mechanism they could approach to address their grievances”. The court further stated that; “it is true section 17(4) (a) and (b) of the EACVLA recognizes the aspect of lodging an appeal against the fee but it is not clear the forum under which that appeal is to be lodged making the said provision a mere prescription”



21. It is therefore this court's decision that the facts relating to the location where the vehicle was alleged found is disputed and as such the applicability of section 3 of the Act can only be determined at the hearing of the petition where all the issues in controversy will be canvassed and tested. Secondly, I am not convinced that there exist in the Act a clear, easily ascertainable appellate mechanism where an aggrieved party to a decision of authorized officer under section 17(4) would go to in the event of a dispute. Thirdly, as the petitioner alleges violations of fundamental rights, it's only the High Court under Article 23(3) of *the constitution*, that has the jurisdiction to hear and determine applications for redress of denial, violations or infringement of, or threat to, a right or fundamental freedom in the bill of rights.
22. Consequently, the preliminary objection as to the jurisdiction of this court is dismissed.

Application Date 30th May 2024

23. The petitioner/applicant in the interims seeks temporary mandatory orders of injunction against the respondent. 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) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

24. The Court of Appeal in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* [2014] eKLR had this to say:

“...these are the three pillars on which rest 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... 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 are 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.”

25. The petitioner/applicant submitted that it has met the threshold for grant of an injunction sought on the grounds that;
 - a. The East African Community Vehicle Load Control Act, 2016 is not applicable in the current case
 - b. That the fine imposed by the respondent is marred with the procedural improprieties
 - c. That the respondent violated the applicant's Right under Article 40 of *the Constitution*.



26. For an interlocutory Mandatory injunction to issue, an applicant must demonstrate the existence of special circumstances and in clearest of cases. see Nation Media Group & 2 others vs John Harun Mwau (2014) eKLR and in Locabail international Finance Ltd vs Agro expert & others (1986) 1 ALL ER 901
27. The petitioner/applicant contend that the respondent was not justified in detaining the motor vehicle the subject of this petition for the reason that the same was outside the Regional Trunk Road Network and therefore the EACVLCA does not apply. The applicant also impugns the fused jurisdiction of the respondent as an investigator, prosecutor and a judge and therefore infringe on the petitioners right to a fair trial. The Respondent on the other hand submitted that the motor vehicle tracking device did not indicate at what time the vehicle was at Kibini. According to the respondent the matter squarely falls within the jurisdiction of the EACVLCA. These are in my view important issues that cannot be determined at an interlocutory stage. It requires evidence by both parties at the hearing of the main petition. The petitioners motor vehicle which the applicant avers is a source of his livelihood and which he purchased by taking a loan from a bank, has been in the custody of the respondent since 2023. The Respondent contends that such detention is lawful and in accordance with the law. The applicant is of a contrary view. If at hearing of the petition it turns out that the Respondent was not justified in seizing and detaining the applicant motor vehicle, then the applicant rights to property under Article 40 of *the Constitution* would have been violated.
28. I therefore find that on the materials placed before the court, a prima facie case has been established by the petitioner/applicant requiring the Respondent to controvert.

Irreparable Harm

29. On this the applicant submit they are already undergoing irreparable harm as the truck was financed through a loan which require regular payment. At the moment and because the truck has been detained, the applicant is unable to regularly service the loan and the interest continue to accumulate. The applicant cited the case of John Mwaniki Kiarie & another vs Kenya National Highway Authority where the court observed,

‘on the second issue of irreparable damage, it has been shown that the suit lorry is financed by Sidian Bank and obviously the appellant 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 Respondents yard, both parties will lose as the Bank sooner or later will exercise 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 owed. Further...it is not the Respondent perse who will pay the damages from their own resources but will use tax payer’s money to do so. If the lorry were to be detained and the applicant is successful in the main petition, the damage due plus interest and cost which the applicant will be entitled to will run into several millions to the detriment of ‘Wanjiku’ the tax payer and the ultimate bearer of this burden....’.

30. The respondent submitted that the question as to whether the applicant will suffer irreparable harm cannot be answered in the affirmative as the applicant had failed to mitigate their loss by paying the overloading fees in August, 2023 on without prejudice basis or moving the court for orders as soon as the vehicle was detained. The respondent further argues that it would be prejudicial to order the release of the motor vehicle unconditionally yet the fees due to the respondent are colossal and at the very least, the applicant should be ordered to deposit the amount due into court pending the determination



of the petition. In Robert Ochanda Abuya *vs Kenya Power and Lighting Company case No E034 OF 2021* the court stated as follows as regard irreparable harm;

“The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

The petitioner /applicant contend that the motor vehicle the subject of this petition is jointly owned with Co-operative Bank on account of loan advanced. The said motor vehicle is source of livelihood and he is unable to meet his financial obligations to bank and that there are chances that he may be called upon to make good the payment in default the vehicle may be sold to recover the outstanding amount. I agree with the applicant that were the motor vehicle to be sold, then the damage would be actual and substantial and the Respondent a government corporation funded by the tax payers may not be able to adequately compensate the applicant without occasioning hardship to the tax payers who will ultimately bear the burden.

Balance of convenience

31. As regards the balance of convenience, the court in petition No E005 of 2024; John Mwaniki Kiarie Supra a case in all fours with the present one the court observed that;

“It is obvious that the 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 be liable to the bank to settle the loan due even if the suit lorry is sold and there is still outstanding debt. The fees imposed is still astronomical and still increasing based on daily yard fee and there is also tear and wear of the suit lorry being parked in open sun over a long period of time as parties litigate. Further were they to succeed in the petition, the petitioners will have to file a suit for loss of user and other quantified special damages, which no doubt will cost more money and time. The applicant would be more inconvenienced the balance tilts in their favour”

32. The Respondent on the other hand submitted that the balance tilts in their favour as the applicant is in clear breach of the law, committed acts of overloading which have very adverse effects on the roads as it causes serious damage which are expensive resource to construct and maintain. Reliance was placed in the case of Aziz vs Kenya national Highway Authority (2023) eKLR, where the court held that;

“I concur with the learned judge and find that the petitioner has not shown that the penalties under the Act are unreasonable and unjustified in an open and democratic society. Further, the protection of our roads which are built at great cost to the tax payer is a matter of public interest that this court must be alive to. I also agree with the learned judge that the reasonableness and convenience of the overloading fees levied to a transporter whose vehicle has been found to be overloaded cannot be gainsaid. This in my view saves time to both the state and the offender and is a less restrictive means which satisfies the Article 24 analysis test. Further a transporter who disputes an overload finding by the 1st respondent is free under section 17 of the Act to appeal the decision. I therefore find and hold that the petitioner has not demonstrated to the satisfaction of the court, that the impugned provisions of the Act are unconstitutional”



33. It is indeed true that the protection of our road infrastructure which are built at great expense to the taxpayers is a matter of public interest.
34. In *Rutongot farm Ltd vs Kenya Forest Service & 3 others* (2018) eKLR the Supreme court stated that;
 “once proprietary interest has been lawfully acquired, and I add established, the guarantee to the protection of the right to property under Article 40 of *the Constitution* is then expressed in terms that no person shall be arbitrarily deprived of the property “
35. I am of the view that the balance of convenience tilts in favour of the petitioner/applicant. In the end I am satisfied that the orders sought are merited. I grant the orders sought in prayers no 4 of the application dated 30th may 2024 in the following terms;
1. That an Order be and is hereby issued, Compelling the Respondent to release Motor Vehicle Reg No KDH 987N, Isuzu FVZ Chassis number No JALFVZ3XXXX Pending the hearing and determination of the petition herein on Condition that the Petitioner/Applicant do deposit in court Ksh. 500,000/= as a security within 30 days of today’s Order.
 2. That the petitioner /applicant shall give a written undertaking not to remove the said vehicle from the Jurisdiction of this court nor sale or in any other way dispose it off pending the hearing and determination of this petition
 3. That upon payment of the deposit amount and making of a written undertaking by the petitioner/applicant, the Respondent shall release the said motor vehicle not later than seven days of making of the deposit and/or giving of the written undertaking.
 4. That the cost shall be in the cause.
 5. That the matter shall be mentioned on 10th December 2024 to confirm compliance.

DATED AND DELIVERED THIS 12TH DAY OF NOVEMBER 2024 VIRTUALLY

JOHN. T. LOLWATAN

JUDGE

In presence of;

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