



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI ELC PETITION NO. E006 OF 2021

IN THE MATTER OF ARTICLES: 2,3,19,20,21, 22 (1), (3), 25, 27 (1), AND (2), 28, 29

(a), (b), (d) and (f), 31 (1), 40 (1), (2) and (3), 47, 48, 159 (1), (2), (a), (b), and (e) & 165 (3) (a) (b) OF THE

CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF : CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 20, 21, 22(1), (3),25, 27(1) and (2), 28, 29 (a), (b), (d) and (f), 31 (b), 39 (1), 40 (1), (2) and (3), 47, 48 OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE CONSTITUTION

AND

IN THE MATTER OF VIOLATION OF THE RIGHT TO PROPERTY, DIGNITY AND

PROTECTION OF FREEDOM OF SECURITY OF PERSON

AND

IN THE MATTER OF THAT VEHICLE REGISTRATION NUMBER KCY 266N MITSUBISHI FUSO TRUCK

BETWEEN

JOHN KIPKOECH MARITIM

T/A JOLLY SUPER ENTERPRISES LIMITEDPETITIONER

-VERSUS-

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

HEAD OF TRAFFIC POLICE DEPARTMENT.....3RD RESPONDENT

OFFICE COMMANDING STATION, RONGO WEIGHBRIDGE.....4TH RESPONDENT

CABINET SECRETARY, MINISTER OF INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....5TH RESPONDENT

MINISTRY OF TRANSPORT AND INFRASTRUCTURE.....6TH RESPONDENT

RULING

The petitioner, **John Kipkoech Maritim T/A Jolly Super Enterprises Limited** filed this petition dated 5/8/2021 on 9/8/2021. The dispute revolves around the detention of motor vehicle registration number **KCY 266N Mitsubishi Fuso Lorry** at the Rongo Weighbridge holding yard on or about 23/7/2021 for allegations of excess loading. The petitioner claims violation of his fundamental rights and freedoms collectively by the respondents herein.

Contemporaneously filed with the petition, is a notice of motion dated evenly with the petition seeking the following orders:-

i. Spent.

ii. Spent.

iii. Subject to offloading excess weight (if any) this court be pleased to direct the release of motor vehicle registration number KCY 266N pending the hearing and determination of this application on condition that the said vehicle be produced in court as and when required by court.

iv. Subject to off-loading excess weight (if any) this court be pleased to direct the release of motor vehicle registration number KCY 266N pending the hearing and determination of this petition on condition that the said vehicle be produced in court as and when required.

v. Costs be provided for.

The application is supported by several grounds found on the face of the application, the supporting affidavit and a further supporting affidavit dated 23/8/2021. The petitioner also filed written submissions dated 2/9/2021.

The petitioner avers that he is a director of Jolly Super Enterprises Limited, the registered owner of motor vehicle registration number KCY 266N a Mitsubishi Fuso Lorry (**'the motor vehicle'**); that on or about 23/7/2021, his driver was pulled over by the 1st respondent's agent one Cpl. Charles Chacha on allegations of overloading by an excess weight of 2,660Kgs; that the motor vehicle is currently detained at the Rongo weighbridge holding yard and no charges have been preferred against it.

Further, the petitioner contends that the actions of the 4th respondent in detaining the motor vehicle, under the directions of the 1st and 3rd respondents has occasioned a violation of his constitutional rights to quiet, peaceful and unrestricted use of his property; that the respondents in their various capacities failed to discharge their duties properly thus leading to miscarriage of justice and a violation of his rights.

The petitioner argued that his business has been brought to a halt making losses of about Kshs. 300,000/= per month and so are the livelihoods of his employees and he urged this court to allow release of the subject vehicle.

The 1st respondent entered appearance on 24/8/2021 and filed a reply to the application vide an undated replying affidavit sworn by **Willie Shem Waithanje Thuku** its contracted Cluster Manager in the Busia - Rongo weighbridge.

While denying the claim of the petitioner, the 1st respondent contended that it is a State Corporation established pursuant to Section 3 of the Roads Act; that under various provisions of the law in the Traffic Act and East Africa Community Vehicle Load Control Act, it is tasked with the responsibility to manage, develop, rehabilitate, and maintain national roads.

The 1st respondent admitted that on 23/7/2021, the suit motor vehicle which was loaded with sand, was impounded at the Rongo Static weighbridge with an overload of 2,660Kgs; that the act of overloading was in contravention to Section 5 of the East Africa Community Vehicle Load Control Act and the penalty thereof is payment of fees; that pursuant to the foregoing, the suit motor vehicle was issued with Weighbridge Ticket No. KR021021464/1 and Serial No. KENHA/WBT271579 and required to pay the overload fees; that the suit motor vehicle was removed from the road and issued with a prohibition order pending the offloading of excess/redistribution of the load and payment of the prescribed fees as per the provisions in Sections 6 (9) and 17 (2) of the East Africa Community Vehicle Load Control Act.

Further to the foregoing, the 1st respondent stated that Sections 17 (3) and 17 (4) of the East African Community Vehicle Load Control Act makes provision for where there is an overload, the fee is not disputed and the procedure where the overload is disputed respectively. The 1st respondent avers that there is no dispute to date. The 1st respondent further argues that the penalty for overloading is a creature of statute and it is mandated to provide for payments of overloading fees at weigh stations or such other designated locations.

In asking this court to dismiss the application with costs, the 1st respondent averred that the petitioner has brought this claim to avoid payment of the overloading fees which if allowed, will result in the petitioner benefitting from his own unlawful acts.

In a quick rejoinder, the petitioner filed a further affidavit and deposed that on 24/7/2021, he visited the Rongo Weighbridge and was informed that if he failed to pay the overload fees, he would be summoned to court to answer to the charges; that through his advocate, he

objected to the assessment of the overload fees, through a letter dated 26/7/2021; that on 2/8/2021, he was called by a representative of the 1st respondent to confirm the objection to the payment of the overload fees; that the 1st respondent was notified on a without prejudice basis of their willingness to pay the overload fees as assessed.

Further to the foregoing, the petitioner's advocates did visit the Rongo weighbridge to follow up on summons to attend court if any, which went unheeded prompting the current action. The petitioner avers that failure to charge him infringed his constitutional rights and the actions of the 1st respondent are in flagrant breach of the rules of natural justice. The 1st respondent will not suffer prejudice if the vehicle is released pending the hearing and determination of this matter.

The 2nd - 8th respondents did not enter appearance nor did they file any responses despite service.

Briefly, the petitioner submitted that as per annexure 'JMK3' the 1st respondent ordered the removal of the suit motor vehicle from the road and payment of the overload fees without giving him a right to be heard contrary to Article 50 of the Constitution. To buttress this position, the petitioner relied on the finding of Hon. Ong'udi J in **Rumic Construction & Civil Engineering Limited vs Kenya National Highways Authority & 3 Others (2015) eKLR**.

In support of his prayer to release the subject motor vehicle due to his loss of Kshs. 300,000/=, the petitioner relied on the case of **Margaret Miano vs Kenya National Highways Authority (eKLR)**. The petitioner asked the court to allow his prayer for the release of the motor vehicle.

The 1st respondent submitted on four (4) issues. First, that the applicable law in this matter is the East Africa Community Vehicle Load Control Act, 2016 and cited several provisions to support its submission. In particular, the 1st respondent led the court to the Second and Third Schedules of the Act which sets the permissible maximum axle load limits and the Gross Vehicle Weight Limits respectively.

On the second issue, the 1st respondent submitted that once an overload is detected, Section 6 of the Act requires payment of the overload fees. The petitioner was issued with the tickets ("**WSWT-1**") on account of the overload. Under Section 17 of the Act, when an authorized officer detects an overload, the officer shall not allow the journey to be continued unless the load is redistributed to comply with the load limit and the amount due paid. Under Section 3, the transporter shall pay if the overloading is undisputed but if disputed, the authorized officer shall note the same on the weighing report and on a without prejudice basis, the overloading fees is paid by the transporter to secure the release of the vehicle and make adjustments to the load and lodge an appeal against the fees.

The 1st respondent further submitted that the petitioner has not demonstrated that he disputed his truck was overloaded and that he paid the requisite fees. The 1st respondent argued that the petitioner failed to fully comply with the available administrative remedies before coming to court and relied on the cases of **William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested Parties) (eKLR)** and **Martin Nyongesa Barasa v Traffic Commandant & 2 Others (eKLR)**. From the foregoing, the 1st respondent submitted that on its part, it followed the proper procedure under the law and the application herein is premature.

On whether it was necessary for the respondent to prefer charges against the petitioner or driver of the motor vehicle, the 1st respondent submitted that the East African Vehicle Load Control Act, does not require charging an errant party over and above requiring the payment of an overload fee where it is assessed and determined. The Act intends to decriminalise overloading and dispense with the requirement for charging save for particular instances enumerated under the Act. The 1st respondent placed reliance on the case of **Exon Investment Limited v Kenya Highways Authority (eKLR)**.

On whether the 1st respondent violated the petitioner's rights under the Constitution, the 1st respondent urged the court to determine the matter as per the provisions of the East Africa Vehicle Load Control Act. Section 17 (2) provides the avenue for challenging the administrative action of the 1st respondent; that under Section 17 (4), the petitioner ought to have challenged the detainment of the vehicle but chose not to, therefore his rights were not contravened by the 1st respondent as alleged. The vehicle continues to be detained as it waits compliance on the part of the petitioner.

I have carefully considered the notice of motion application, the responses thereto, the respective exhibits and submissions. On that account, it is this court's opinion that the issue for determination that arise therefrom is **whether the petitioner has established a prima facie case to warrant the orders sought**.

It is not in dispute that motor vehicle registration number KCY 266N was detained on 23/7/2021 at the Rongo Static weighbridge on allegations of excess overload of 2,660Kgs. It is also not in dispute that the petitioner was issued with a weighbridge ticket for payment of the excess fees for the overload of 2,600Kgs ("**WSWT-1**").

I have considered the various provisions of the law under The East African Community Vehicle Load Control Act, 2016 (**EACVLCA**) in particular Section 17 (1) which provides:-

"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." (emphasis).

The aforementioned Section is clear that only an **authorized officer** is allowed to determine whether a vehicle is carrying excess load limit under the **EACVLCA**. The definition of an authorized officer under the **EACVLCA** is one who is appointed under **Section 14** which provides: -

“(1) The Partner States shall by notice in the national gazette appoint authorized officers for the purposes of this Act and notify the Secretary General.”

The functions of the authorized officers are succinctly stated under **Section 15** of the **EACVLCA** being among others, stopping the vehicle for inspection purposes, weighing and prescribing the fees to be paid.

One **Willie Shem Waithanje Thuku** swore a replying affidavit on behalf of the 1st respondent as the Cluster Manager, Busia - Rongo Weighbridge at Ebenezer Commercial Works Limited, a company sub contracted by the 1st respondent to manage, operate and maintain the Rongo - Busia weighbridge and its surrounding networks. He produced an annexure and marked it as **‘WSWT-1’** being copies of the weighbridge ticket and prohibition order. This court has carefully scrutinized the said documents. It shows that they were authored and signed by one **‘Jael Audi’** whose designation is a Scale Operator. The deponent has not attempted to explain to this court whether the said Jael Audi is also an authorized officer as is envisaged under Section 14 of the **EACVLCA** or is in the employment of the company contracted by the 1st respondent. The definition of the term authorized officer does not extend to a Scale Operator under the **EACVLCA** and neither is there a definition of who a Scale Operator is under the **EACVLCA** or its regulations.

Similarly, the petitioner in his supporting affidavit annexed a document **‘JKM3’** being a copy of the order to remove the suit vehicle from the Migori – Kisii Road signed by one **Cpl. Chacha Charles**. The competent persons who would have best explained to this court what transpired leading to the detention of the subject motor vehicle are the said **Jael Audi** and/or **Cpl. Chacha Charles**. I hold the view taken by **Hon. Ong’udi J in Rumic Construction & Civil Engineering Limited (supra)** that:-

“Its those officers whose names appear in the Order (MKR4) who can tell this Court how they arrived at that weight. Its their writing which is in that document and not that of the Engineer or Mr. Cheruiyot. The weight in the MKR4 is disputed and the response by the 1st Respondent is like its the final determiner and what it says is what should be done, and people must pay the fees/fines as penalties which to them is the law.”

From the above decision the question that begs at this stage is whether the authorized officers have explained how the disputed weights were arrived at.

It is not in denial that the **EACVLCA** and its schedules prohibit overloads of both the permissible axle load limits and the gross vehicle weight and this is evidenced by the annexed document marked as **‘WSWT-1’** to the 1st respondent’s replying affidavit. On the face of the documents **‘Axle Load Control’** and **‘Weighbridge Ticket’** the excess **GVW** indicate different weights respectively and the petitioner is being penalized for the overweight of only one overload. It therefore rests, that the uncertainty on the overloads may have led the petitioner to file the dispute.

The 1st respondent has further submitted that there is no dispute that has been lodged by the petitioner. Section 17 (4) (a) & (b) of the **EACVLCA** provides a dispute or an appeal lodged shall be as prescribed under its Regulations. I have gone through the trouble of establishing whether such Regulations exist which state on the appeal process. The closest I have come across is the **East African Community Vehicle Load Control (Enforcement Measures) Regulations, 2018 (the Regulations)**. The only instance where there is a proper laid down procedure of a dispute process is under **Section 17 Part II which provides for disputes in connection with road damage**. For disputes relating to excess overload and fees, there seems to be no proper guidance under the **EACVLCA** or its Regulations on how the dispute resolution procedure unless this court is guided otherwise.

The facts as laid out in **Martin Nyongesa Barasa v Traffic Commandant & 2 Others (supra)** relied upon by the 1st respondent are distinguishable. The petitioner in that matter, deliberately concealed the overload in his truck by speeding off when he was flagged down by police officers before it was towed to the police station and weighed. There is no indication from the court proceedings that there was an attempt to lodge a dispute unlike in this instance where there is a letter disputing the overload weight and the fees. The question that begs is whether a dispute was lodged and whether this petition is premature.

In addition, the 1st respondent has submitted that there is no evidence that the petitioner has paid the requisite fees as prescribed under the **EACVLCA**. The petitioner in his further affidavit admitted that he was willing on a without prejudice basis to pay the overload fees assessed. I have scrutinized the documents on record and there is no evidence that a demand note containing computation of the fee payable was issued. The petitioner showed the willingness to pay. How then was he expected to pay an amount without being guided on the exact amounts payable.

Taking into account all the circumstances surrounding this case, I find that the petitioner has established a **prima facie** case and is deserving of the orders as prayed.

For the above reasons, pending the hearing and determination of the petition, I hereby grant the following orders: -

a) The 1st Respondent through its authorized officer (s) be and is hereby directed, at their own cost, arrange and weigh the motor vehicle registration number KCY 266N Mitsubishi Fuso Lorry lying at Rongo Weighbridge Holding Yard within the next three (3) days upon delivery of this Ruling.

b) Any excess load to be off loaded and the Petitioner to organize for transportation and/or disposal of the excess load.

c) Once the excess load (if any) is off loaded the suit motor vehicle motor vehicle registration number KCY 266N Mitsubishi Fuso Lorry be released to the petitioner unconditionally forthwith pending the hearing and determination of this Petition.

d) Failure to comply with the above orders will attract penal consequences against the concerned officer (s).

e) The Petition to be fixed for hearing.

f) The Petitioner to avail the suit motor vehicle motor vehicle registration number KCY 266N Mitsubishi Fuso Lorry before the court whenever required by the Court.

g) Costs do abide the outcome of the petition.

DATED, SIGNED and DELIVERED at MIGORI this 11th day of November , 2021

R. WENDOH

JUDGE

Ruling delivered in the presence of;

Mr. Langat for the Petitioner.

Mr. Oduor for the 1st Respondent.

No appearance for the 2nd Respondent.

No appearance for the 3rd Respondent.

No appearance for the 4th Respondent.

No appearance for the 5th Respondent.

No appearance for the 6th Respondent.

No appearance for the 7th Respondent.

No appearance for the 8th Respondent.

Nyauke Court Assistant