Mombasa Water Products Limited v Kenya National Highways Authority (Petition E037 of 2021) [2021] KEHC 238 (KLR) (9 November 2021) (Judgment)

Neutral citation: [2021] KEHC 238 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION E037 OF 2021

JM MATIVO, J

NOVEMBER 9, 2021

BETWEEN

MOMBASA WATER PRODUCTS LIMITED .... PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY .... RESPONDENT

JUDGMENT

The Petitioner's case

1. The gist of the Petitioner's case as disclosed in its Petition dated 29thJune 2021 is that it owns the motor vehicle Reg No. KBY 469R, Make FAW which earns it an average of Kshs. 25,000/= per day from transport business. It avers that in March, 2021, it leased the vehicle to a one Mr. Richard Mwambi Lundi and subsequently it learnt that the Respondent unlawfully detained on 18th March, 2021 at the Dongo Kundu weigh-bridge claiming that it had exceeded the axle weight.

2. It contends that the Respondent unlawfully condemned it to pay a fine of $1,308.05 @ Kshs. 109.79 in default the vehicle would remain detained. It also claims that it was never tried in any court, hence, the condemnation a nullity abnitio. It states that the Respondent violated its right to natural justice and Articles 2, 47, 50, 28 and 40 of the *Constitution*.

3. As a consequence of the foregoing, the Petitioner prays for a declaration that the Respondent has violated Articles 10, 28, 40, 47, and 50 of the Constitution. It also prays that the Respondent be restrained by the way of an injunction from interfering with the said vehicle. Also, the Petitioner prays for an order compelling the Respondent to unconditionally release the said motor vehicle. Further, the Petitioner prays for compensation for the losses it has suffered as a result of the Respondent's wrongful actions. It also seeks claims General damages for violation of its fundamental rights and cost of this Petition.

   The Respondent's grounds of opposition

4. In its grounds of opposition dated 2nd August 2021, the Respondent states:- (a) that the suit has been filed without the Plaintiff's authority and a valid resolution appointing the Petitioner's firm; (b) that the suit offends Order 4 Rule 1(4) of the Civil Procedure Rules because the affidavit of Joseph Mbuhua Gichanga was not accompanied by a Board Resolution; and (c) that the court lacks jurisdiction to entertain the suit by dint of section 67 (a) of the *Kenya Roads Act*[1] which requires a 30 days' notice to the Director General prior to filing of a suit.

The Respondent's Replying affidavit

5. From the Petitioner's supplementary affidavit, it appears that the Respondent filed a Replying affidavit dated 13th October 2021. However, the said affidavit is not on record. On 29th October 2020, I notified the parties that their pleadings and submissions were not in the file and requested them to avail hard and soft copies to the court. It was only after being reminded by the court assistant that the Respondents counsel forwarded a hard copy of their submissions and after a further reminder, she forwarded a soft copy but failed to avail the said affidavit, so, the court did not have the opportunity of considering it.

The Petitioner's supplementary affidavit

6. The Petitioner filed the supplementary affidavit of Joseph Mbugua Gichanga its managing director in reply to the Respondent's replying affidavit dated 13th October, 2021 stating that the Respondent did not serve the Petitioner with any notice before or after detaining the vehicle, but instead it only cited provisions of the law but it failed to comply with the rules of natural justice nor did it explain to it its right to appeal against the decision, but instead it give it a copy of the axle load control print which does not show under which law it was issued. He also averred that the Respondent's authority, to charge penalties and detain motor vehicles without complying with the rules of natural justice and fair hearing was the subject in Mombasa High Court Petition No. 199 of 2019; Chania Genesis Limited v Kenya National Highways Authority (KeNHA) but on 29th June, 2021 upheld the right to fair administrative action.

7. He averred that under Article 47 and 50 of the Constitution, the Respondent ought to have allowed the Petitioner the opportunity to be heard before detaining the vehicle and imposing the fine. He also averred that the Petitioner was not issued with the weighing report at the time the motor vehicle was detained, and it was asked to pay to pay a fine of $1,308.05 @ Kshs. 109.79 before it could be released.

The Petitioner's advocates submissions

8. Regarding the Respondent's Preliminary Objection, the Petitioner's counsel submitted that the *Civil Procedure Act*[2] and the Civil Procedure Rules, 2010 do not apply to constitutional Petitions which are governed by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013. Regarding the objection that the Board's Resolution has not been annexed, he submitted that the Petitioner has annexed the Petitioner's Board Resolution authorizing the filing of the suit. On the objection premised on section 67 (a) of the *Kenya Roads Act*, he submitted that the said provision is not applicable herein. He argued that constitutionally guaranteed fundamental rights cannot be taken away by a mere requirement to issue a notice to sue and cited *Benson Ruiyi Njane v Kenya Rural Roads Authority & 36 others*[3] which held that "The limitation set out in Section 67 of the *Kenya Roads Act* requiring notice of thirty days' notice to the Authority before instituting a suit only applies to ordinary civil claims. It does not apply to cases (Petitions/Applications) alleging that a

1 Act No. 2 of 2007.

2 Cap 21, Laws of Kenya.

3 {2016} e KLR.

right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened. The Respondent's claim to the contrary is not borne out by the Constitution and that leg of defense therefore fails."

9. He also relied on *Joseph Ndolo Mutua v Kenya National Highways Authority*[4] which upheld *Anthony Ngili Mungutu & 12 others v Kenya National Highways Authority & another*[5] and Benson Ruiyi (supra) that: - "…the Notice under Section 67 of the *Kenya Roads Act* does not apply to constitutional petitions or applications…"

10. Counsel argued that the decision to detain the vehicle and impose the fine is untenable in law because the Petitioner was not afforded as provided under Articles 47 and 50 of the Constitution. He argued that the Respondents actions are illegal because it is not a judicial body ordained to resolve disputes. He argued that relying on section 17(1) of the *East African Community Vehicle Load Control Act*, 2016, Regulations 14 and 15 of Kenya Roads (*Kenya National Highways Authority) Regulations 2013* the Respondent improperly constituted itself into a judicial body. He submitted that the said provisions offend Article 159 of the Constitution, hence, they are unconstitutional for offending Articles 2 (4) and 50 of the Constitution. (Also cited *Margret Miano v Kenya National Highways Authority*[6]).

11. Counsel submitted that the axle notice does not state the provisions of the law under which it was issued nor did it mention that the Petitioner had a right to challenge the said notice. He cited *Chania Genesis Limited v Kenya National Highways Authority* (KeNHA)[7] in which the court faulted the Respondent detaining a vehicle despite a court order. (Also cited *Martin Mbatha Mutisya v Kenya National Highways Authority*[8] and *Disaranio Limited v Kenya National Highways Authority & Attorney General).*[9]

The Respondent's advocates submissions

12. The Respondent's counsel referred to section 25 of the East African Community Vehicle Control Act (EACVC Act) and cited *Office of the Director of Public Prosecutions v Juma Chemomenyu Batuli*[10] which held that the foresaid statute was duly ratified and made an integral part of Kenyan law pursuant to Article 2 (6) of the Constitution. She submitted that the objective of the act was to control vehicle loads, harmonize enforcement, institutional arrangements for regional Trunk Road Netwok within the Community and to provide for other related matters. She submitted that pursuant to section 25 of the act, various provision of the Act have been integrated into the *Traffic Act*.[11]

13. On the alleged violation of the Petitioner's right to property, fair administrative action and fair hearing, she submitted that the act prohibits the use of overloaded vehicles on any part of the Regional Trunk Road Network and defines an overloaded vehicle as a vehicle that is detected to have exceeded the

4 {2019} e KLR.

5 {2017} e KLR.

6 High Court Petition No. 23 of 2015.

7 {2021} e KLR.

8 {2017} e KLR.

9 {2017} e KLR.

10 {2020} e KLR.

11 Cap 403, Laws of Kenya.

prescribed legal limits for the axle weight or gross vehicle weight. To buttress her argument, she cited section 6(1) of the act which provides:

> " A person shall not drive, use or permit to be driven or used, any vehicle on the Regional Trunk Road Network while overloaded".

14. She submitted that the act makes it mandatory for a transporter operating a vehicle of a gross vehicle weight of 3500 kilograms or more to weigh at every weighbridge station that is situated along the regional trunk road network traversed in the course of its journey as required by section 8(1) of the act which provides: -

> " A transporter operating a vehicle of a gross vehicle weight of 3,500 kilogrammes or more shall present such vehicle to be weighed at every weighing station that is situated along the Regional Trunk Road Network traversed by such vehicle or that is designated for this purpose by a national roads authority."

15. Flowing from the above statutory requirements, counsel submitted that on 18thMarch, 2021 a weight ticket number KNDKNBB20210300007286 was issued to the applicant showing the extent of overload as well as the overload fees payable and cited section 6(2) and (4) of the act which provides that: -

> " Any person who drives, uses, causes or permits to be driven or used, any vehicle on the Regional Trunk Road Network while overloaded shall be liable to pay overloading fees to the national roads authority or any institution designated by a Partner State where the overloading is detected, such overloading fees as may be from time to time be prescribed and published in the Gazette by the Council".
>
> "A vehicle is said to be overloaded when used on any part of the Regional Trunk Road Network in contravention of the weight limits set out in the Second and Third Schedules."

16. She submitted that the vehicle was overloaded by 2,280Kgs kilograms and in line with the Second and Third Schedule to the Act, an overloading fee of Kshs. 143,610.00 was charged and the Petitioner was required to offload the overload. It was her submission that the above provision decriminalize overloading and it does not require a person found to have overloaded a vehicle to be charged in court but he is required to pay overload fees and to correct the loading levels to the permissible legal limits. She argued that the act provides a detailed procedure and requires that in instances where an overload has been detected, the overloaded vehicle is detained pending payment of overload fees and correction of the overload. She submitted that a detained vehicle can only be released upon payment of the overload fees or issuance of a guarantee in the prescribed form to the Respondent. To buttress her argument, she cited section 15(1)(a), (c) - (h) of the act which provides: -

> " An authorised officer shall have the power to—
>
> (a) require the driver of a vehicle to stop the vehicle for the purposes of weighing and inspecting the vehicle;
>
> (c) direct a driver to proceed to a weighing station for the purposes of weighing the vehicle;
>
> (d) weigh the vehicle and any load being carried in or on the vehicle;

(e) verify the weight of all axles or axle units on a vehicle or combination of vehicles in accordance with this Act;

(f) issue a weighing certificate for the vehicle providing required particulars;

(g) in consultation with relevant implementing agencies, cause the offloading of a vehicle at a designated place or the adjustment of the load to ensure that the vehicle is loaded within limits;

(h) detain a vehicle until such time as an overloading fee has been paid or proof, in the manner prescribed has been provided that payment has been made;

17. Counsel argued that the Petitioner has exhibited ignorance of the law by arguing that the Respondent failed to inform the Petitioner and pointed out that the Petitioner in his Replying affidavit referred to a weighing report issued in conformity with section 17 (1) of the act. She submitted that the act provides for instances where the fact of overloading is disputed, the transporter is still required to pay the requisite overloading fees on a without prejudice basis to secure release of the vehicle, make such necessary adjustments on the load and pursue an appeal against the fees as provided. She cited section 17 (4) (a) and (b) which provides: -

> " 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
>
> 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."

18. She submitted that the Petitioner failed to indicate the dispute in the weighting report as provided in the act and has also failed to pay the overloading fees to secure the release of the vehicle. She submitted that under the act, weight ticket issued to the applicant remains undisputed. Further, she submitted that the Petitioner did not exhaust all avenues of appeal provided under the act before approaching this court and cited *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others*;[12]*Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others*[13] and *Republic v National Environment Management Authority*.[14]

19. Counsel cited section 13(2) of the East African Community Vehicle Load Control (Enforcement Measures) Regulations, 2018 which requires that a vehicle to be detained without charge of parking fees for the first three days but parking fee equivalent to 50 USD per day accrues for every extra day until proof of payment is produced which continues to accrue. She submitted that the said provision is couched in mandatory terms.

[12] {2015} e KLR.

[13] {2018} e KLR.

[14] {2011} e KLR.

20. She dismissed the Petitioner's argument that the Respondent acts as the judge, the jury and the executioner as misplaced because the act provides for an appellate mechanism. She maintained that the Respondent complied with the provisions of the act and submitted that Disaranio Limited v Kenya National Highways Autority & Attorney General[15] and Martin Mbatha Mutisya v Kenya National Highways Authority[16] cited by the Petitioner did not declare act the act unconstitutional. She submitted that the act can only be challenged in the East African Court of Justice.

21. Lastly, counsel submitted that the Respondents did not violate Articles 10, 47 and 50 of the Constitution as alleged nor does the Petitioner merit the reliefs sought. (Citing *Office of the Director of Public Prosecutions (ODPP) v Juma Chemomenyu Batu*li[17]).

Determination

22. First, I will address the Preliminary Objection raised by the Respondent's counsel, even though the Respondent's counsel did not address it in her submissions. The grounds cited in the objection are absence of a valid resolution appointing the Petitioner's firm; that the suit offends Order 4 Rule 1(4) of the *Civil Procedure Rules* for want of a Board Resolution accompanying the affidavit of Joseph Mbuhua Gichanga; and (c) that the court lacks jurisdiction to entertain the suit by dint of section 67 (a) of the *Kenya Roads Act* which requires a 30 days' notice to the Director General prior to filing of a suit.

23. As the outset, I must point out that before me is a constitutional Petition expressed under the provisions of Articles 10, 22, 23, 40, 47 & 50 of the Constitution and the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*[18] (the Rules). The overriding objective of the rules under Rule 3 is to facilitate access to justice for all persons as required under Article 48. In addition, sub-rule 3 provides that the Rules must be interpreted in accordance with Article 259 (1) of the Constitution and shall be applied with a view to advancing and realizing the- (a) rights and fundamental freedoms enshrined in the Bill of Rights; and (b) values and principles in the Constitution. Also relevant is sub-rule 4 which provides that in exercise of its jurisdiction under the Rules, the court shall facilitate the just, expeditious, proportionate and affordable resolution of all cases.

24. The form of Petition is provided for under Rule 10 (1) (2) (a)-(g) which provides for the matters to be disclosed in a Petition. There is no argument before me that the Petition does not comply with the said provision, and even if it did not, sub-rule (3) is explicit that the court may accept an oral application or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom. On this ground alone, the objection collapses. The attempt to invoke the *Civil Procedure Act* and Rules in a constitutional Petition is misguided.

25. The other ground cited is alleged failure to comply with section 67 (a) of the *Kenya Roads Act* which requires a 30 days' notice to the Director General prior to filing a suit. For starters, I am alive to the fact that the High Court in Kenya *Bus Service Ltd & Another v minister for Transport & 2 Others*[19]

[15] {2017} e KLR.

[16] {2017} e KLR.

[17] {2020} e KLR.

[18] Legal Notice No. 117 of 2013.

[19] {2012} e KLR.

declared section 13 A of the *Government Proceedings Act*[20] which required service of a 30 days' notice to the Attorney General before instituting proceedings against the Government to be unconstitutional for offending Article 48 of the Constitution. In the same parity of reasoning, section 67 (a) cited above cannot be used as a shield to block Article 48 rights on accesses to justice and Article 50 of the Constitution which guarantees every person the right to have any dispute determined by an impartial court. As supreme law, the Constitution protects basic rights including the right to access courts.[21]

26. Even long before the promulgation of the 2010 Constitution, decided cases treated provisions ousting court's jurisdiction with suspicion. In *Anisminic Ltd. v Foreign Compensation Committee*,[22] the House of Lords held that ouster clauses cannot prevent the courts from examining an executive decision which, due to an error of law, is a nullity.

27. Under both constitutional and administrative law, the courts possess supervisory jurisdiction over the exercise of executive power and also have power to determine constitutionality of legislation and decisions made by Parliament and the executive arm of the government. When carrying out judicial review of administrative action, the court scrutinizes the legality and not the substantive merits of an act, or decision made by a public authority under the three broad headings of illegality, irrationality and procedural impropriety. The courts also assess the constitutionality of legislation, executive actions and governmental policy. So, part of the role of the judiciary is to ensure that public authorities act lawfully and to serve as a check and balance on the government's power.

28. Article 165 (3) (d) of the Constitution vests the High Court with jurisdiction to hear any question respecting the interpretation of the Constitution including the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. Traditionally, the courts have interpreted provisions ousting the jurisdiction of courts narrowly, that is to mean that, the decision is still subject to judicial review. In other words, the decision under attack may be final on the facts but it is not to be regarded as final on the law. Denning L.J. put is better when he stated: - "I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words."[23]The rationale behind this reasoning is that ouster clauses offend the constitutional principle of the rule of law because an aggrieved citizen is denied the possibility of access to the courts to challenge the decision affecting him. Flowing from the above discourse, it is clear that the objection raised is legally frail and unsustainable.

29. Next, I will address a pertinent issue which the Petitioner omitted to address. This is whether this Petition offends the doctrine of exhaustion. In support of this ground, the Respondent cited 17 (4) (a) and (b) of the Act which provides: -

> " 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] Cap 40, Laws of Kenya.

[21] Article 48 of the Constitution.

[22] {1968).

[23] In R vs Medical Appeal Tribunal (ex parte Gilmore) [1957].

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.”

30. The Respondent’s counsel submitted that the Petitioner never indicated the dispute in the weighting report as provided in the act and has also failed to pay the overloading fees to secure the release of the vehicle. She submitted that under the act, weight ticket issued to the applicant remains undisputed. She submitted that the Petitioner did not exhaust all avenues of appeal provided under the act before approaching this court and cited *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others*;[24] *Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others*[25] and *Republic v National Environment Management Authority*.[26]

31. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks to review the action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya.[27] As was stated by the Court of Appeal[28] in *Speaker of National Assembly vs Karume*:-[29]

> “Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

32. The above case was decided before the promulgation of the 2010 Constitution. However, many Post-2010 court decisions have endorsed the reasoning and even proffered justification and rationale for the doctrine under the 2010 Constitution.[30] For instance, the Court of Appeal in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others*[31] provided the constitutional rationale and basis for the doctrine stating: -

> “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 fora of last resort and not the first port of call the moment a storm brews… 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

24 {2015} e KLR.

25 {2018} e KLR.

26 {2011} e KLR.

27 *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) *Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR

28 Ibid.

29 {1992} KLR 21.

30 Ibid.

31 {2015} eKLR.

own interest within the mechanisms in place for resolution outside the courts…This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

33. In the Matter of the *Mui Coal Basin Local Community*[32] the High court stated: -

> "The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases…"

34. At least two principles are discernible from decisional law. First, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[33] Second, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

35. Section 9(2) of the *Fair Administrative Action Act*[34] (the FAA Act) provides that the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section (3) which provides that "the High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that an applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

36. It's important to note that the above provision is couched in mandatory terms. The only way out is the exception provided by section 9(4), which provides that: - "Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Two requirements flow from the above sub-section. First, the applicant must demonstrate exceptional circumstances. Second, an applicant must apply for exemption. None of these has been done in the instant case.

37. The principle running through decided cases is that where there is an alternative remedy, or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted. The other principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that, a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction

32 {2015} eKLR.

33 Ibid.

34 Act no. 4 of 2015.

of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively. The other issue is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. As stated above, the Petitioner never addressed the issue under consideration. I find that and hold that the applicant ought to have exhausted the mechanism provided under the law before approaching the court or apply for exemption.

38. I now address the nub of the Petitioner's case, that is, whether the impugned action violates the various Articles of the Constitution cited and the Petitioner's constitutionally guaranteed rights. When a court is asked to determine the constitutional validity or a decision, act or conduct or to invalidate a decision on grounds of error of law, its task is simply to satisfy itself whether the decision properly construed can be read in a manner that is consistent with the Constitution or whether it was arrived at based upon relevant evidence, and, whether, the decision maker acted in an arbitrary manner and reached a finding of fact not supported by evidence or the enabling statute. It also entails examining whether the decision maker misdirected himself and directed its attention to the wrong issue by misconstruing a statute. Additionally, it involves examining whether the decision maker stepped beyond the legal limits or acted in an arbitrary manner by reaching an unreasonable conclusion based on the material before it.

39. The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as the decision complies with these two rules, their decisions are safe. This fundamental principle requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision or public bodies can be judicially challenged on grounds that the administrative decision does not comply with these basic requirements of legality.

40. The most obvious example of illegality is where a body acts beyond the powers, which are prescribed for it. In other words, it acts ultra vires. Decisions taken for improper purposes may also be illegal. Illegality also extends to circumstances where the decision-maker misdirects itself in law. When exercising a discretionary power, a decision-maker may take into account a range of lawful considerations. If the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court will normally find that the power had been exercised illegally.

41. The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second issue that can be argued under illegality is fettering discretion. This heading for judicial review entails considering whether an administrative body actually exercised the power it has, or whether because of some policy it has adopted, it has in effect failed to exercise its powers as required. In general terms the courts accept that it is legitimate for public authorities to formulate policies that are 'legally relevant of their powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust. An illegality can also occur where a body exercised a power, which was within its functions but exceeded the scope of power that is legally conferred to it. Two critical issues flow from the foregoing discussion. First, whether the impugned decision can be read in a manner consistent with the provisions of law conferring the power to the Respondent. Second, judicial oversight is necessary to ensure that decisions are taken in a manner, which is lawful, reasonable, rational and procedurally fair.[35]

[35] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others {2011} JOL 28061 (ECG)* para 11.

42. However, we must bear in mind the fact that the provisions conferring mandate upon the Respondent must be read in the context of not one but three different imperatives. The first is to enable the Respondent to effectively carry out its specially identified statutory mandate. The Constitution and the act clearly envisage an important and active decisional role for the Respondent to perform its functions through the application of the law. In this regard, it is important to point out that the Respondent's functions are stipulated in section 4 of the Roads Act. The section provides that: -

1. The Highways Authority shall be responsible for the management, development, rehabilitation and maintenance of national roads.

(2) For the purposes of discharging its responsibility under subsection (1), the Highways Authority shall have the following functions and duties—

(a) constructing, upgrading, rehabilitating and maintaining roads under its control;

(b) controlling national roads and road reserves and access to roadside developments;

(c) implementing road policies in relation to national roads;

(d) ensuring adherence to the rules and guidelines on axle load control prescribed under the *Traffic Act* (Cap. 403) and under any regulations under this Act;

(e) ensuring that the quality of road works is in accordance with such standards as may be prescribed by the Minister;

(f) in collaboration with the Ministry responsible for Transport and the Police Department, overseeing the management of traffic and road safety on national roads;

(g) collecting and collating all such data related to the use of national roads as may be necessary for efficient forward planning under this Act;

(h) monitoring and evaluating the use of national roads;

(i) planning the development and maintenance of national roads;

(j) advising the Minister on all issues relating to national roads;

(k) preparing the road works programmes for all national roads;

(l) liaising and co-ordinating with other road authorities in planning and on operations in respect of roads; and

(m) performing such other functions related to the implementation of this Act as may be directed by the Minister.

43. Second, the Respondent has a statutory duty to ensure adherence to the rules and guidelines on axle load control prescribed under the *Traffic Act* (Cap. 403) and under any regulations under the Act. In fact, a failure to do so amounts to a dereliction of duty.

44. The above position becomes clear if we read the preamble to the enabling Act, which reads: - An Act of the Community to make provision for the control of vehicle loads, harmonized enforcement, institutional arrangements for the Regional Trunk Road Network within the Community and to provide for other related matters.

45. Section 4(1) of the act provides that the axle load of any vehicle using the Regional Trunk Road Network shall not exceed the maximum permissible weight limits for such vehicle, set out in the Second Schedule. Section 4 (2) provides that the gross vehicle weight of any vehicle using the Regional Trunk Road Network shall not exceed the maximum permissible gross vehicle weight specified in the Third Schedule.

46. Section 5 of the act prohibits overloading in peremptory terms. Also couched in mandatory terms is section 6(1) which provides that a person shall not drive, use, cause or permit to be driven or used, any vehicle on the Regional Trunk Road Network while overloaded. As if to underscore the gravity of the matter section 6 (2) stipulates that any person who drives, uses, causes or permits to be driven or used, any vehicle on the Regional Trunk Road Network while overloaded shall be liable to pay overloading fees to the national roads authority or any institution designated by a Partner State where the overloading is detected, such overloading fees as may be from time to time be prescribed and published in the Gazette by the Council.

47. Part 111 of the act deals with control of vehicle loads and the short title reads" Obligatory weighing of vehicles." So obligatory is the requirement to weigh a vehicle that section 8(1) requires a transporter operating a vehicle of a gross vehicle weight of 3,500 Kg to present such vehicle to be weighed at every weighing station that is situated along the Regional Trunk Road Network traversed by such vehicle or that is designated for this purpose by a national roads authority. This provision uses the word "shall" which connotes a mandatory obligation.

48. With the above clear statutory dictates, there is no contest about the Respondent's mandate. The question now turns on the enforcement process. On enforcement, section 15 grants authorized officers power to— (a) require the driver of a vehicle to stop the vehicle for the purposes of weighing and inspecting the vehicle;(b) in accordance with relevant laws, enter the vehicle and inspect any record relating to any load carried in or on the vehicle; (c) direct a driver to proceed to a weighing station for the purposes of weighing the vehicle; (d) weigh the vehicle and any load being carried in or on the vehicle; (e) verify the weight of all axles or axle units on a vehicle or combination of vehicles in accordance with this Act; (f) issue a weighing certificate for the vehicle providing required particulars; (g) in consultation with relevant implementing agencies, cause the offloading of a vehicle at a designated place or the adjustment of the load to ensure that the vehicle is loaded within limits; (h) detain a vehicle until such time as an overloading fee has been paid or proof, in the manner prescribed has been provided that payment has been made; (i) direct the driver of a vehicle carrying an abnormal, awkward or hazardous load to proceed to an appropriate place determined by the officer to ensure the safety of the cargo, persons, or property; (j) cause the vehicle to be driven to a designated location if the driver is incapable or unwilling to comply with an instruction of the officer; (k) inspect any relevant record relating to, issued, or required under this Act; (l) make inquiries of any person who owns or operates the vehicle being inspected; and (m) cause to be performed, tests or examinations as provided for in this Act in respect of the vehicle or any load carried in or on the vehicle.

49. It is also important to point out that section 15 (2) insulates the authorized officer from liability for any damage to or loss in respect of a vehicle or its load, unless it is shown that the authorized officer acted maliciously or recklessly. Section 17 of the Act lays down a very elaborate procedures in case of vehicle overloading. There is nothing before me to suggest that these processes were not adhered to.

The applicant's argument, as I see it is that he was not accorded a hearing, that no reasons were offered and alleged breach or Articles 10 and 50 of the Constitution.

50. A decision suffers from procedural impropriety if in the process of making it the procedures prescribed by statute are not followed or if the "rules of natural justice' are not adhered to. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached. The term procedural impropriety was used by Lord Diplock in the House of Lords decision Council of Civil Service Unions v Minister for the Civil Service[36] to explain that a public authority could be acting ultra vires (that is, beyond the power given to it by statute) if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of judicial review, the other two being illegality and irrationality.[37]

51. Procedural impropriety generally encompasses two things: procedural ultra vires, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness.[38] Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice," is a form of procedural impropriety.[39]

52. In recent years, the common law relating to Judicial Review of administrative action on the basis of procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness", have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.[40] That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such that the person appealing has not had his case properly considered by the Judge who decided it.

53. Section 4 of the *Fair Administrative Action Act*[41] re-echoes Article 47 of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

36 *Council of Civil Service Unions v. Minister for the Civil Service* [1984] UKHL 9, [1985] 1 A.C. 374, House of Lords (UK).

37 Ibid.

38 *Peter Leyland; Gordon Anthony (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness", Textbook on Administrative Law (6th ed.), Oxford: Oxford University Press, pp. 342–360 at 331, ISBN 978-0-19-921776-2.*

39 Supra, note 18.

40 David J. Mullan, *Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?* http://www.lawjournal.mcgill.ca/userfiles/other/6927003-mullan.pdf.

41 Act No. 4 of 2015.

54. Subsection 4 further obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing. The right of a person to defend him/herself in the face of a decision potentially affecting his/ her rights or interests necessarily implies that the person must receive prior notice of the facts on which the decision will be based. Failure to give proper notice is itself a denial of natural justice and of fairness. In this case, the applicant was given notice of the allegations against him and also an opportunity to reply, which he did.

55. Equally important is the fact that whether or not a person was given a fair hearing of his case depends on the circumstances and the type of the decision to be made. Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[42] On this point, we can usefully benefit from the Court of Appeal decision in J.S.C. v Mbalu Mutava[43] which succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article 47 is a distinct right from the right to a fair hearing under Article 50(1) (2) of the Constitution. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.[44] Fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies. In this regard, the applicants attempt to invoke Article 47 and 50 of the Constitution is misdirected. The Respondent followed the procedure set out in the governing statute. It is not sufficient to cite provisions of the Constitution. The alleged breach must not only be pleaded but must be proved.

56. It is not sufficient for the Petitioner to claim he was earning Kshs. 25,000/= per day. He has the burden of proving the loss. I do not know how the Petitioner expected to succeed in such a claim without adducing oral evidence in court.

57. In conclusion, I find that this Petition has no merits at all. Accordingly, I dismiss the Petition with costs to the Respondent.

Orders accordingly

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 9TH DAY OF NOVEMBER 2021

JOHN M. MATIVO

JUDGE

[42] See also *McInnes v. Onslow*-Fane [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

[43] {2015}eKLR

[44] Ibid.