



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

JUDICIAL REVIEW NO. 5 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF AN ORDER TO REMOVE VEHICLE FROM ROAD OR PUBLIC PLACE

AND

IN THE MATTER OF THE TRAFFIC ACT, CAP 403

AND

IN THE MATTER OF SECTION 8(2) AND 9 OF THE LAW REFORM ACT AND ORDER 53 RULE 1(1), 3 & 4 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF ARTICLES 50(1) & (2), 27(1), (4) & (5) OF THE CONSTITUTION, 2010

ABDI GHAFOW HILOWLE.....APPLICANT

-VERSUS-

THE DIRECTOR GENERAL,

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

THE BASE COMMANDER (Kiunuguni Police

Station.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. For determination is the substantive notice of motion filed on 21st March, 2018 and *inter alia* expressed to be brought under Order 53 of the Civil Procedure Rules (2010), Article 23, 27 and 159(2) of the Constitution of Kenya. **ABDI GHAFOW HILOWLE**, the *ex parte* Applicant, seeks the following orders:-

a) an order of Certiorari be issued to remove into this Honourable court for quashing the offending order and/or decision dated 23rd October, 2017 issued by the 1st Respondent.

b) an order of Prohibition restraining the Respondents from implementing and/or enforcing the offending order dated 23rd October, 2017.

2. The application is premised on the key ground that the offending order of the Kenya National Highways Authority, (the 1st Respondent)

requiring the removal from the road of the *ex parte* Applicant's motor vehicle violates the Applicant's constitutional rights and is in excess of the jurisdiction of the 1st Respondent.

3. The *ex parte* Applicant swore two supporting affidavits in which he deposed that he is the legal owner of motor vehicle registration number **KBP 952X**-make **Isuzu lorry** against which an order was issued for removal from the road, allegedly, in blatant disregard of the rules of natural justice and in excess of the 1st Respondent's jurisdiction. He contended that the said order curtails his right to carry on his business.

4. Through **OSCAR MWANGOME**, a Roads Inspector with Kenya National Highways Authority, the 1st Respondent filed a replying affidavit on 13th September, 2018. He deposed that the Authority's officers in the company of police officers, while performing duties pursuant to the execution of their mandate, had come across the motor vehicle registration number **KBP 952X** which they suspected to be overloaded; that upon weighing the vehicle, had confirmed the vehicle weighed 42,300 Kilograms instead of the legal limit of 26,000 Kilograms; that the driver of the said motor vehicle when directed refused to take the said motor vehicle to the nearest police station whereupon the officers issued a Prohibition Order, and removed the vehicle's registration plates which were forwarded to the Registrar of Motor Vehicles for safe keeping. He averred that the exercise was carried out in conformity with the law and that the Applicant has failed to demonstrate how the issuance of the prohibition order was *ultra vires* or discriminatory.

5. The court directed the parties to file written submissions. The *ex parte* Applicant submits that the removal of his motor vehicle from the road was illegal for being *ultra vires* and that the confiscation of the registration plates violated his constitutional rights. Reliance was placed on the case of **Msagha vs Chief Justice & 7 others (2016) 2 KLR** where it was held that decision makers should observe the principles of natural justice in arriving at decisions. Similarly he relies on the case of **Joram Mwenda Guantai vs The Chief Magistrate (2007) 2 EA 170**, for the proposition that an order of prohibition is an order from the high court directed to an inferior body which forbids the said body from continuing with the proceedings in excess of its jurisdiction or in contravention of the laws of the land. In conclusion, the court was urged to grant the prayers sought.

6. The 1st Respondent submitted that it acted within its powers in discharging its lawful duties in the control of axle loads on highways under the Traffic Act and Kenya Roads Act. Counsel for the 1st Respondent relied on the case of **Republic vs National Employment Authority & 3 others Ex parte Middle East Consultancy Services Ltd (2012) eKLR** where the court held that an administrative or quasi-judicial decision can only be challenged for illegality, irrationality and procedural impropriety. Counsel further argued that the Applicant herein has failed to establish such grounds or set out the alleged rights that have been violated and the manner in which the Respondents have violated those rights as was stated in the case of **Anarita Karimi Njeru vs Republic (1976-1980) KLR, 1272**. Lastly, it was contended that the actions leading to the removal of the number plate were not arbitrary as alleged by the Applicant as the Officers acted in line with various cited provisions of the Traffic Act. The court was urged to dismiss the Application with costs.

7. The Court has considered the material canvassed by the respective parties. The key grounds upon which the *ex parte* Applicant's motion was premised were that the prohibition order made on 23rd October 2017 by the 1st Respondent concerning the Applicant's vehicle **KBP 952 X**, and the confiscation of the vehicle's registration plates was:

- a) in violation of the rules of natural justice.
- b) in excess of jurisdiction and therefore *ultra vires*.

8. The basic facts surrounding the impugned decision and action are not in dispute. These are that on 23rd October 2017 officers of the 1st Respondent, in the company of traffic police officers stopped the *ex parte* Applicant's vehicle which was being driven along Thika – Garissa road. The vehicle was ferrying goods. Suspecting the vehicle to be overloaded, the officers weighed it. A weight ticket was issued and based on the officers' determination that the vehicle had an excess load of 16,300 kilograms, they required that the vehicle be driven to Kinuiguni Police Station. The driver declined and the vehicle was not driven to the said station, as a result of which the written prohibition order was issued and registration plates of the vehicle confiscated by the officers. It seemed from the *ex parte* Applicant's fillings that his complaint on the alleged illegality of the impugned order was based on the fact that the Respondent's actions/order was *ultra vires*. In submissions however, all that the Applicant asserted was that the Respondent's actions/order was illegal because the police station known as Kiunuguni was non-existent, a matter not

included in the grounds and affidavits supporting the motion. On the second ground, the Applicant submitted that the Respondent's actions were "arbitrary... and calculated to deny the *ex parte* Applicant the right to administrative action that is lawful and procedurally fair."

9. The scope of judicial review remains as stated by the Court of Appeal in **Municipal Council of Mombasa -v- Republic & Umoja Consultants Ltd. Civil Appeal No. 185 of 2001 (2002) e KLR:**

"(A)s the court has repeatedly said, judicial review is concerned with the decision – making process, not with the merits of the decision itself ...

The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision-maker take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of Judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider. Acting as a court of appeal over the decider would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision."

See also **Civil Servant Union v Minister for Civil Service [1985] AC 2.**

10. First of all, I understood the *ex parte* Applicant's complaint in the motion, supporting affidavit and statutory statement to be that the 1st Respondent did not have the authority to issue the impugned prohibition order and hence it was illegal. Therein the Applicant clearly asserted that the 1st Respondent's actions were ultra vires, or in excess of jurisdiction. This is quite different from saying, an assertion not made in his pleadings, that the actions were illegal because the police station to which the vehicle was ordered to be driven was non-existent. Be that as it may, there is no dispute that it is an offence for a vehicle to be on the road while carrying loads exceeding the limit set in the law. Sections 55, 56, 57 and 58 of the Traffic Act set this out clearly.

11. Section 56 is in the following terms: -

"56. (1) No vehicle shall be used on a road with a load greater than the load specified by the manufacturer of the chassis of the vehicle or than the load capacity determined by an inspector under this Act.

(2) No vehicle shall be used on a road if it is loaded in such a manner as to make it a danger to other persons using the road or to persons travelling on the vehicle; and should any load or part of a load fall from any vehicle on to a road such fact shall be prima facie evidence that the vehicle was loaded in a dangerous manner until the contrary is proved to the satisfaction of the court.

(3) For the purpose of this section, persons travelling on a vehicle shall be deemed to be part of the load."

The penalties are provided for in Section 58.

12. There was a ticket, issued upon weighting of the *ex parte* Applicant's vehicle, a fact not disputed, showing that the *ex parte* Applicant's vehicle was overloaded by 14,300 kilograms. This court is not obligated to consider whether or not an offence had been committed in contravention of Sections 55 – 58 of the Traffic Act, but to merely determine whether the 1st Respondent's officers were within their jurisdiction to do what they did in regard to the order complained of. The *ex parte* Applicant does not dispute that the driver of the vehicle after it had been weighed, refused to drive the lorry to Kinunguni police station, while admitting that, his vehicle was, following the prohibition order, **"grounded for fear of harassments, arbitrary arrests and charges being brought up against me and/or my driver."**

13. Section 106(4) of the Traffic Act authorizes the police, licensing officer or inspector to issue an order prohibiting the use of a vehicle which in the opinion of such officer **"is being used in contravention of Section 55 or Section 56"** *inter alia*. Section 106(4A) of Traffic Act provides that:

"4(A) Where a police officer, licensing officer or inspector makes an order under subsection (4) he may remove the vehicle identification plates and the vehicle licence and, if he does so, shall deliver them to the Registrar to be kept while that order remains in force."

14. One of the functions of the 1st Respondent under Section 4(2)(d) of the Kenya Roads Act is “ensuring adherence to the rules and guidelines on axle load control prescribed under the Traffic Act, and under any regulations” under the Kenya Roads Act. The deponent to the Replying affidavit of the 1st Respondent is **Oscar Mwangome**, a Roads Inspector with the said Respondent. He deposes that he and other officers from the Kenya National Highways Authority were accompanied by police on 23.10.17 when they intercepted the *ex parte* Applicant’s vehicle, and had it weighed. He has explained that the driver of the vehicle having refused to drive the vehicle to the police station, the officers issued the prohibition order and in exercise of their authority under Section 106(4 A) of the Traffic Act, removed the vehicle’s registration plates. The prohibition order issued in respect of the vehicle is annexure “**OM3**” to the Replying affidavit. It indicates that the order was issued by the deponent and one **IP Soita**. Nothing therefore turns on the *ex parte* Applicant’s assertion that the 1st Respondent’s officers acted in excess of jurisdiction. For these same reasons the actions of the Respondents officers cannot be said to have been arbitrary.

15. Concerning the second complaint, the *ex parte* Applicant has not demonstrated how the actions taken by the said officers violated the rules of natural justice. The procedure for the removal of offending vehicles from roads through issuance of prohibition orders is contained in Section 106 of the Traffic Act. In this case, it is admitted that prior to issuing the prohibition order, the officers took steps to verify the weight of the vehicle; required the driver to drive to a police station and when he declined, issued the order and removed the registration plates from the vehicle. This was done to ensure compliance with the law relating to axle loads. The *ex parte* Applicant’s driver did not swear an affidavit concerning the events giving rise to this suit. The version proffered in the Replying affidavit is therefore uncontroverted.

16. An offence having been detected by persons mandated to enforce the Traffic Act and Kenya Roads Act, and the driver having declined to proceed to the police station, it is not clear from the *ex parte* Applicant’s material, what further audience the Respondents were required to accord to the driver or owner of the vehicle. Some of the Applicant’s submissions relate to fair trial under Article 50 of the Constitution. There is nothing to suggest that the *ex parte* Applicant was denied the right to a fair trial before a court of law concerning the offences detected. The prohibition order and removal of the vehicle registration plates was only one of many actions that the Respondents were mandated to take in the circumstances of the case. The Applicant has failed to articulate how the actions taken by the Respondents violated the rules of natural justice.

17. In my considered view, even if the *ex parte* Applicant had demonstrated his complaints, his actions through his driver disentitle him from the grant of the orders sought. A party who shows scant respect for the rule of law cannot expect the court to exercise its discretion in his favour. No reason has been given by the *ex parte* Applicant for his servant’s refusal, upon the vehicle being weighed, to drive the vehicle to the police station as directed by the Respondent’s officers. His affidavits were silent on this aspect. Such compliance would have had no relation to culpability for the offences in question but merely a part of due process.

18. As stated in **Republic v Anti Counterfeit Agency and 2 Others, ex parte Surgiharm Ltd [2011] e KLR:**

“The remedies of quashing orders prohibitory orders... mandatory orders ... are all discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief, the court will take into account the conduct of the party applying and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.”

19. The court has found no merit in the *ex parte* Applicant’s motion filed on 21st March 2018 and dismisses it with costs.

SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 12TH DAY OF MAY 2020

C. MEOLI

JUDGE