



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 197 OF 2016

CHARWINS LIMITED.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY.....1<sup>ST</sup> RESPONDENT

INSPECTOR GENERAL, KENYA POLICE.....2<sup>ND</sup> RESPONDENT

ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

JUDGMENT

1. The Petitioner, Charwins Limited, through the petition dated 17<sup>th</sup> May, 2016 seeks the following reliefs:-

a) A DECLARATION that the removal of the Petitioner's registration number plates and insurance cover of the motor vehicle registration number KBW 728W and KBX 493A is a breach of the Petitioner's constitutional rights against unlawful deprivation of its property and its economic and social rights to earn a living as enshrined in Articles 40 and 43 of the Constitution respectively.

b) A DECLARATION that the decision therefore to require the Petitioner to drive an unauthorized motor vehicle on the road without proper documents, the number plates and insurance cover is in breach of his constitutional right to fair, reasonable and lawful administrative action as enshrined in Article 47 of the Constitution.

c) A DECLARATION that the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the Petitioner's vehicle to remove the number plates and insurance cover makes the Respondents to be complainant, prosecutor, jury, judge and executioner all in one which is in breach of the Petitioner's right to a fair trial as enshrined in Article 50 of the Constitution.

d) A DECLARATION that by unconditionally releasing other vehicles that had been seized together with the Petitioner's vehicle and failing to release the Petitioner's motor vehicle number plates and insurance cover in the same terms for no apparent reason the Respondent has discriminated against the Petitioner contrary to Article 47 of the Constitution.

e) Damages.

f) An Order that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally to bear the costs of these proceedings.

g) Any other relief.

2. The 1<sup>st</sup> Respondent, Kenya National Highway Authority (KENHA), the 2<sup>nd</sup> Respondent, Inspector General-Kenya Police and the 3<sup>rd</sup> Respondent, Attorney General all opposed the petition.

3. The Petitioner's case as conveyed through the pleadings filed in Court is that it is the registered owner of motor vehicles registration number KBW 728W and KBX 493A. It is the Petitioner's case that on 13<sup>th</sup> May, 2016, its drivers were driving the two motor vehicles along Kenyatta road off Thika Super Highway at a place known as Kamiitu when they were stopped by the officers of the 1<sup>st</sup> and 2<sup>nd</sup> respondents who removed the number plates and insurance covers from the vehicles alleging that they were overloaded. It is the Petitioner's case that although the officers had a mobile weighing machine, they did not weigh the vehicles and neither had they charged the drivers or the Petitioner by the time the petition was filed in Court.

4. It is the Petitioner's case that after removing the number plates and insurance covers, the officers asked the drivers to drive the vehicles to the weigh bridge at Ruiru which was several kilometers away despite the fact that the vehicles now lacked the requisite documents to be on the road.

5. The Petitioner avers that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents violated its constitutional rights by unlawfully depriving it of its property and its economic and social rights to earn a living. Further, that the respondents had violated the right which requires that an accused person be charged in court within 24 hours of arrest. Additionally, that the respondents had discriminated against the Petitioner hence violating Article 27 of the Constitution by releasing, under unclear circumstances, the vehicles seized on the same day with those of the Petitioner.

6. The 1<sup>st</sup> Respondent opposed the petition through an affidavit sworn by Engineer Isaiah Onsongo on 10<sup>th</sup> June, 2016. Engineer Onsongo avers that the petition does not allege contravention of fundamental rights and freedoms by the 1<sup>st</sup> Respondent hence failing the test that requires a petition to clearly state the provisions of the Constitution allegedly violated and the manner in which they have been violated.

7. On the facts of the case, Engineer Onsongo avers that the two trucks were intercepted by SGS staff and police officers on the 13<sup>th</sup> May, 2016 while ferrying murram along Gatundu-Ruiru road. The drivers were instructed to drive the vehicles to Juja weighbridge for weighing but along the way the drivers parked them by the road side and declined to proceed further with the journey.

8. It is averred that the officers in exercise of the statutory powers under the Traffic Act determined the weights of the lorries using the prescribed formula. Engineer Onsongo avers that as prescribed by statute, the officers removed the number plates and issued a prohibition order to remove the motor vehicles from the road. The number plates were then forwarded to the 1<sup>st</sup> Respondent as stipulated under Section 106(4A) of the Traffic Act.

9. It is the 1<sup>st</sup> Respondent's case that it is established under Section 3 of the Kenya Roads Act, 2007 and Section 22(1)(c) empowers it to measure and assess the weights, dimensions and capacities of vehicles using any road and provide measures to ensure compliance with rules relating to axle load, other provisions of the Traffic Act, Cap. 403 and any regulations under the Act. Further, that the 1<sup>st</sup> Respondent is mandated by section 22(2)(d) of the Roads Act to, with the approval of the minister, determine, impose and levy rates, tolls, charges, dues or fees for any of its services or for use by any person of its facilities. Also, that it is empowered to prohibit, control or regulate the use of any vehicle on any road falling within its mandate. Additionally, that Section 46 of the Roads Act gives the 1<sup>st</sup> Respondent the power to, with the approval of the Minister, make regulations relating to *inter alia*; the use, safety or maintenance of the roads falling within its responsibility and most importantly the fees payable for its services.

10. It is the 1<sup>st</sup> Respondent's case that based on the stated statutory framework it had promulgated the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 ("the Regulations"). The 1<sup>st</sup> Respondent states that any person who complies with the provisions of rules 10, 11, 12, 13 and 14 of the Regulations is permitted to use public roads notwithstanding that the motor vehicles were overloaded and would therefore not be subjected to the control measures stipulated under Rule 15 of the Regulations.

11. It is the 1<sup>st</sup> Respondent's case that rules 10, 11, 12, 13 and 14 of the Regulations provide for an efficient, lawful, reasonable and procedurally fair mechanism for controlling the transportation of abnormal loads. It is therefore the 1<sup>st</sup> Respondent's position that the removal of the Petitioner's motor vehicle from the road did not violate the rights protected under Articles 40 and 43 of the Constitution. According to the 1<sup>st</sup> Respondent, granting the orders sought would render it powerless and incapable of discharging its functions as conferred under Section 4 of the Roads Act.

12. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents opposed the petition through grounds of opposition dated 11<sup>th</sup> July 2016 as follows;

**a) That the Petition does not disclose any constitutional violation by the Respondents upon the Petitioner;**

**b) That the Petition is speculative, odious, bad in law, vexatious and a total sham;**

**c) That the Petitioner has not demonstrated the violation or threatened violation of their fundamental rights and the manner in which his rights have been violated by the Respondents;**

**d) That there is no violation of the constitutional rights of the Petitioner disclosed hence no justifiable cause;**

**e) That the rights of the Petitioner are not absolute under Article 24 of the Constitution; that the Petitioner's rights are not absolute and even while the Constitution guarantees the enjoyment of fundamental rights and freedoms by all Kenyans, such enjoyment must be within the confines of the law;**

**f) That there is no proof on the Petitioner's allegation that the vehicles were not overloaded, that the confiscation was in their day to day work hence their conduct was in good faith;**

**g) That the orders that the Petitioner seeks are not tenable as against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents."**

13. The Petitioner filed submissions dated 15<sup>th</sup> September, 2016 and the 1<sup>st</sup> Respondent filed submissions dated 2<sup>nd</sup> May, 2017. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not file any submissions.

14. The only issue for the determination of this Court is whether the Petitioner has established constitutional violations against it by any or all of the respondents, and if so, the appropriate remedy to grant.

15. Although the 1<sup>st</sup> Respondent took a defensive posture in regard to the Regulations, I note that the Petitioner did not challenge the constitutionality of those Regulations. It is, however, noted for purposes of record that Rules 14 and 15 of the Regulations were found unconstitutional and declared null and void on 30<sup>th</sup> January, 2017 in **Disaranio Limited v Kenya National Highways Authority & Attorney General [2017] eKLR**.

16. The case before this Court is very simple. The Petitioner alleges that its motor vehicles were impounded and no charges were preferred against it or the drivers within 24 hours; that the seizure of the vehicles unlawfully deprived it of its property and denied it the right to engage in economic and social activities; and it was discriminated against as other vehicles impounded together with its vehicles were released under unclear circumstances.

17. The Petitioner made the allegations and it had a duty to prove the allegations. There is no dispute that the Petitioner's two motor vehicles were indeed impounded by the 1<sup>st</sup> and 2<sup>nd</sup> respondents' officers on allegation that they were overloaded. The Petitioner contends that the motor vehicles were not overloaded. Through the affidavit sworn on 15<sup>th</sup> September, 2016, James Rubui Kariba who was driving motor vehicle registration number KBW 728W on the material day averred that they were first stopped by the 1<sup>st</sup> Respondent's officers who were using a motor vehicle with private plates. They were told that the loads they were carrying exceeded the capacity of the motor vehicles. He immediately called his supervisor who talked to the officers and they were allowed to proceed with their journey.

18. Mr. Kariba deposed that after driving for a few kilometers, they met another team of the 1<sup>st</sup> Respondent's officers. This time they had an official vehicle. They were told to surrender their driving licences. One officer entered his vehicle and removed the insurance cover. Another officer was directed to remove the registration plates. The officers left them at the scene and drove off. He further averred that they were not told to drive to the weighbridge and neither were the vehicles weighed at the scene or photographs taken.

19. Mr. Kariba deposed that he had been using the same road to deliver construction materials to the construction site to which they were taking the materials and he believed the load was within the weight allowed by the law as he had regularly carried similar loads. He denied disobeying any orders from the officers as alleged by the 1<sup>st</sup> Respondent stating that police officers were present and they should have directed them to comply.

20. In his affidavit of 17<sup>th</sup> May, 2016 in support of the application for conservatory orders, Charles Mwaniki Kamau who introduced himself as a director of the Petitioner, averred that no charges had been preferred against anybody and the motor vehicles had not been weighed to determine the extent of the alleged excess load.

21. I have carefully read the relying affidavit of Engineer Onsongo and the only attempt to rebut the Petitioner's averments is found at paragraph 10 where he states:-

**“THAT the officers in exercise of the statutory powers under the Traffic Act, determined the weight thereof by using the prescribed formulae....”**

22. Engineer Onsongo justified the removal of the registration plates by averring at paragraph 11 as follows:-

**“THAT as further prescribed by statute, the officers removed the number plates and issued a prohibition order to remove the motor vehicle from the road. The said number plates were forwarded to the 1<sup>st</sup> Respondent as stipulated under Section 106 (4A) of the Traffic Act.”**

23. It is noted that the weights of the lorries are not disclosed and neither are the prohibition orders allegedly issued exhibited. The Petitioner's averments therefore remains unchallenged.

24. I note that in the 1<sup>st</sup> Respondent's written submissions, it is urged that:-

**“Regulation 12 and the schedule to the Traffic Act prescribe overloading fees payable depending on the excess weight. Under regulation 14, a notification of payment of the overload fee ought to be issued. In the instant case the motor vehicle carried an excess weight of 14, 880 kg whereof the fees under the schedule is Kshs 400,000. The Petitioner was thus required to pay the amount as prescribed under the schedule. The appropriate notices were issued which the drivers must have failed to disclose to the Petitioner”**

25. It is noted that the submissions are not supported by any evidence. Submissions cannot take the place of evidence. The alleged notices issued to the drivers are not exhibited anywhere by the respondents.

26. Even assuming that prohibition notices were issued under Section 106(4A) of the Traffic Act, CAP 403, I still find that the 1<sup>st</sup> Respondent did not follow the law. Section 106(4) of the Traffic Act provides for issuance of prohibition orders as follows:-

**“Any police officer, licensing officer or inspector, if he is of the opinion that any vehicle is being used in contravention of section 55 or section 56 or in contravention of any rules relating to the construction, use and equipment of vehicles, may by order prohibit the use of such vehicle, under such conditions and for such purposes as he may consider necessary for the**

**safety of the public or to ensure that such vehicle does comply with the provisions of section 55 or 56; and any such order shall remain in force until the repairs specified therein have been satisfactorily completed and the vehicle has been certified as complying with the rules relating to construction, use, equipment and weight.”**

As already observed, the respondents have not exhibited the prohibition orders they allegedly issued in respect of the Petitioner’s motor vehicles.

27. Section 106 (4A) of the Traffic Act then proceeds to state that:-

**“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 Authority to be kept while that order remains in force.”**

28. It is noted that the said provision which the 1<sup>st</sup> Respondent cites in support of the action it took does not mention removal of the insurance cover. It only authorizes removal of registration plates and vehicle license. Once the registration plates are removed, they shall be delivered to the Authority to be kept while the prohibition order remains in force. Section 2 of the Traffic Act defines “Authority” as the National Transport and Safety Authority (NTSA) established under the National Transport and Safety Authority Act. The 1<sup>st</sup> Respondent cannot purport to be the NTSA.

29. At paragraph 11 of the replying affidavit of the 1<sup>st</sup> Respondent, Engineer Onsongo avers that the registration plates were forwarded to the 1<sup>st</sup> Respondent. That act was a violation of Section 106(4A) of the Traffic Act. In that regard I agree with the statement of Odunga, J in **Republic v Cabinet Secretary for Transport and Infrastructure Principal Secretary and 5 others ex parte Kenya Country Bus Owners Association and 5 others (2014) eKLR** that:-

**“91. Therefore for a licensing officer, a police officer or inspector to remove the vehicle identification plates and the vehicle licence he must form an opinion that the vehicle is being used in contravention of section 55 or section 56 of the Traffic Act which deal with conditions of vehicles and limitation of loads or in contravention of any rules relating to the construction, use and equipment of vehicles. After forming such an opinion, the officer concerned is required to make an order prohibiting the use of the said vehicle. The said identification plates and licences when removed are required to be delivered to the Registrar for keeping while the order is in force.**

**92. It is therefore clear that to remove the said plates or licences in circumstances other than those contemplated under Section 106(4) as read with sections 55 and 56 of Act and without an order of prohibition is illegal. If therefore the Respondents removed the same and are keeping them without surrendering the same to the Registrar, such action is unlawful and they ought to restore the same.”**

30. From the evidence placed before this Court by the parties, it is therefore clear that the 1<sup>st</sup> and 2<sup>nd</sup> respondents impounded the Petitioner’s motor vehicle without any legal reason. If there were valid reasons for the actions taken by the 1<sup>st</sup> and 2<sup>nd</sup> respondents then those reasons have not been disclosed in the pleadings before this Court.

31. Which rights of the Petitioner were violated by the respondents? The claim that the Petitioner’s rights under Article 27 of the Constitution were violated has not been proved. The Petitioner has not shown that other vehicles that had been seized at the same time with its vehicle were released in unclear circumstances. The Petitioner has thus not established that it was treated differently from those in the same circumstances with it.

32. The Petitioner’s allegation that its rights were violated because it was not taken to Court within twenty four hours as required by Article 49 (1) (f) of the Constitution has not been established. There is no evidence that the drivers of the 1<sup>st</sup> Respondent’s motor vehicles were placed in custody. I presume that the Petitioner is referring to the right under article 49(1)(f)(i) of the Constitution which requires that an arrested person be taken to court not later than twenty-four hours after being arrested. It is clear that the said right belongs to an arrested person and not a person who is not in custody.

33. The Petitioner’s claim that its right not to be arbitrarily deprived of property as protected by Article 40 of the Constitution has been proved. However, the Petitioner did not demonstrate how its economic and social rights under Article 43 were violated.

34. The 1<sup>st</sup> Respondent submits that the Petitioner has not clearly stated the constitutional provisions allegedly violated and the manner of their violation. The petition is quite clear on the provisions of the Constitution allegedly violated and the manner in which they were violated.

35. As for the general damages, the Petitioner prays for damages that the Court may deem appropriate. The 1<sup>st</sup> Respondent made no comment on this prayer. The Petitioner’s motor vehicles were seized on 13<sup>th</sup> May, 2016 and released by an order of the Court issued on 27<sup>th</sup> May, 2016. They were therefore illegally held for about fourteen days. Although the daily income from the lorries was not disclosed, it is clear that they were carrying out the business of transporting construction materials at the time they were impounded. In the circumstances, I find an award of Kshs.200,000/- adequate to remedy the injury suffered by the Petitioner as a result of the respondents’ unconstitutional acts. I therefore award Kshs.200,000/- as general damages.

36. In summary, the Petitioner’s case partially succeeds and judgment is entered in its favour as follows:-

a) A declaration is hereby issued that the removal of the registration plates and insurance covers from the Petitioner’s motor vehicles KBW 728W and KBX 493A by the respondents violated the Petitioner’s right not to be arbitrarily deprived of its property under

Article 40 of the Constitution;

b) The Petitioner is awarded Kshs.200,000/- as general damages against the respondents; and

c) The Petitioner will have costs for the proceedings from the respondents.

**Dated, signed and delivered at Nairobi through video conferencing/ email this 14<sup>th</sup> day of May, 2020**

**W. Korir,**

**Judge of the High Court**