



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**PETITION NO. 23 OF 2015**

**IN THE MATTER OF: ARTICLE 22, 23 & 40 OF THE CONSTITUTION OF KENYA AND SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL (HIGH COURT PRACTISE AND PROCEDURE RULES 2006)**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 40, 47 AND 50 OF THE CONSTITUTION REGARDING PROTECTION OF RIGHT TO PROPERTY RELATING TO MOTOR VEHICLE REGISTRATION NO. KAH 589R**

**AND**

**IN THE MATTER OF: ABUSE OF LEGAL POWER BY THE KENYA NATIONAL HIGHWAYS AUTHORITY IN THE CAPRICIOUS MANNER IN WHICH THEY HAVE DETAINED MOTOR VEHICLE REGISTRATION NUMBER KAH 589R**

**BETWEEN**

**MARGARET MIANO.....PETITIONER**

**VERSUS**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT**

**JUDGMENT**

1. The Petitioner **Margaret Miano** was on 13/4/2015 and prior thereto, the registered owner of motor vehicle registration No. KAH 589R Canter, which she used in the business of ferrying building blocks from Kilifi to Mombasa for commercial purposes. On 13/4/2015 the Respondent seized the motor vehicle allegedly pursuant to the provisions of Regulation 15 of the Kenya Roads (Kenya National Highways Authority) Regulations which provides that:

***“Where a vehicle is found to have bypassed or absconded from the weighbridge station, whether overloaded or not, the registered owner shall be liable to pay a bypassing or absconding fee of two thousand United States Dollars or its equivalent Kenya Shilling...”***

2. The Petitioner avers that she was condemned to pay the 2000 US Dollars without the due process of law, and because she was unable to pay the said sum, the respondents detained the said motor vehicle until the same was released by an order of this Court in a ruling delivered on 8/5/2015.

3. The Petitioner states that she earns an average of Kshs. 30,000/=a day from the two trips between Mombasa and Kilifi and elsewhere within the Coast province and that the unwarranted detention of her Motor Vehicle caused her to incur irreparable losses by way of loss of income and loss of credibility with her customers as she is unable to fulfill commitments on delivery of building materials because of the unlawful detention.

4. The Petitioner avers that the Respondent detained her Motor Vehicle for a further 37 days despite her producing proof of payment of the weighbridge charge in the form of KENHA tickets for such other days that she had transported construction material through Mtwapa Weighbridge and it is as a result of the detention that her contract with a **Mr. David Mayombe** entered into vide agreement dated 16/3/2015 for a period three months at a sum of Kshs 18,000/= daily to the exclusion of Sundays effective from 1/4/2015 to 30/6/2015 was prematurely terminated.

5. However, by an order of this court delivered on 8/5/2015 by **Emukule J**, the said seizure was found unlawful, and the said motor vehicle

was released to the Petitioner. The issue now before the court is about losses and damages allegedly suffered by the Petitioner.

6. It is the Petitioner's case that her fundamental right to natural justice was violated by the Respondent whose acts were not only illegal but were also a nullity as the Respondent operated as a "kangaroo Court." Consequently, the Petitioner seeks the Court to grant the following prayers:

**a) An order that the Respondent be restrained by way of an injunction order restraining the Respondent from interfering with the motor vehicle Reg. KAH 589R.**

**b) An order to compel the Respondent to release the said motor vehicle Reg. No. KAH 589R to the Petitioner forthwith and unconditionally.**

**c) Further, the Petitioner prays for compensation for losses she has suffered as a result of the Respondent wrongful actions as set out in the body of this Petition.**

**d) Costs of this Petition.**

7. The 1<sup>st</sup> Respondent opposed the Petition vide Replying Affidavit sworn on 4/5/2015 by **Engineer Isaiah J. Onsongo** described as a senior Engineer with the Respondent. It is deponed *inter-a-lia*, that the Respondent acted under the provisions of Regulation 15 of the Kenya Roads (Kenya National Highways Authority) Regulations 2013, aforesaid.

8. The 1<sup>st</sup> Respondent's Engineer depones that on 26/11/2014, the subject motor vehicle by-passed the Mtwapa Weighbridge in Kilifi County, and that where a motor vehicle by-passed a weighbridge, such by-passing is tagged into the Respondent's electronic system, and that the vehicle was therefore flagged out on 13/4/2015 and detained when the Petitioner failed to pay the fees prescribed in the aforesaid Regulations.

9. It is the 1<sup>st</sup> Respondent's case that the Petitioner's motor vehicle was lawfully held in accordance with the Regulations and the 1<sup>st</sup> Respondent is enjoined to ensure that all motor vehicle designated to be weighed under the regulations are weighed and the owners of vehicles which exceed and/or absconds or by pass a weighbridge shall pay the prescribed sums. Consequently, the 1<sup>st</sup> Respondent asked this Court to dismiss the instant Petition.

#### **Submissions**

10. On the 3/6/2020 when the Petition came up for hearing, the parties agreed to dispense with the Petition via written submission. The Petitioner's submissions were filed on 15/6/2020, while the 1<sup>st</sup> Respondent's submissions were filed on 29/6/2020.

11. **Mr. Gikandi** learned Counsel for the Petitioner submitted that the Petitioner had discharged the burden of proof on a balance of probability as envisaged in Section 107-109 of the Evidence Act, Cap 80 Laws of Kenya; that the 1<sup>st</sup> Respondent's action of impounding and detaining the Petitioner's motor vehicle was illegal, unprocedural and amounted to a gross violation of the Petitioner's fundamental right to property and dignity hence occasioning the Petitioner to suffer irreparable economic losses.

12. Counsel further submitted that there was no rebuttal evidence from the Respondent and considering the said holding by **Emukule J** the Petitioner has proved her Petition.

13. On the issue of loss of income, **Mr. Gikandi** submitted that the detaining of the Petitioner's motor vehicle for a duration of 37 days has not been challenged by the Respondent. Counsel urged this Court therefore to award the Petitioner under the head of loss of user Kshs. 660,000 which was equivalent to the loss incurred during the 37 days the motor vehicle was detained.

14. **Mr. Gikandi** urged this Court to award general damages in the sum of Kshs. 3,000,000/= as there can be no wrong without a remedy.

15. **Mr. Oduor** Learned Counsel for the Respondent reiterated the contents of the Respondent's Replying Affidavit, and submitted that the instant Petition ought to be dismissed with costs.

16. On the issue of loss of user, Counsel submitted that the claim herein is unsubstantiated, unproven, and speculative at best as no shred of evidence has been placed before Court to demonstrate that the motor vehicle generated Kshs. 30,000/=. Counsel cited the finding in **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR** where the Court of Appeal held that:

***"The appellants in this case did not specifically plead and prove the damages from the losses they allegedly suffered. This could have been done by proof of receipts, bank statements or any invoices to show the liquidated losses incurred as a result of their Constitutional violations. In this case, we find the particulars lacking."***

17. On the issue of award of General damages. **Mr. Oduor** submitted that though the Respondent is not opposed to the award of general damages to the Petitioner, the amount of Kshs. 3,000,000/= sought by the Petitioner is excessive and has been blown out of proportion. Counsel proposed a sum of Kshs. 300,000/= as general damages which in his view was reasonable and fair to both parties.

#### **Determination**

18. This Court has carefully considered the Petition, evidence, Replying Affidavit, and submissions. The court has also considered the relevant law and jurisprudence on the key issues falling for determination, namely:

**a) Whether the Petitioner’s constitutional rights to property, fair administrative action and fair hearing have been infringed by the Respondent.**

**b) Whether the Petitioner is entitled to the relief sought.**

**a) Whether the Petitioner’s constitutional rights to property, fair administrative action and fair hearing have been infringed by the Respondent.**

19. This Court in ruling delivered on the 8/5/2015 pronounced itself on the issue and the circumstances that led to that conclusion have not changed. Therefore, it remains unchanged that the Petitioner’s right to a fair hearing and the right to property were infringed by the 1<sup>st</sup> Respondent’s action of detaining the subject motor vehicle and demanding that a fine/fees be paid without giving the Petitioner an opportunity to be heard. The issue is whether or not the actions of the Respondent was within the law so as to deny the Petitioner a right to be paid for losses and damages suffered. In **Marius Wahome Gitonga v Kenya National Highways Authority [2019] eKLR**, the Court held that:

*“This fee is what Emukule (J) in the Miano case (supra) referred to as a euphemism for a fine and held the view that it was unconstitutional.*

*The Respondent’s actions may have been unconstitutional to the extent that the law directed to them what amounts to give in exercise of judicial authority BUT it was not illegal, because they were acting within the provisions of the existing law. I think what is required is a harmonization of these provisions so as to be in line with the constitution being a legislative amendment to either require that such offenders be charged in court of course the converse is that it will only be over burdening on already groaning judiciary with more cases.”*

20. Similarly, Mutende J in **Blue Jay Investment Ltd v Kenya National Highways Authority [2014] eKLR** held that the regulations do not provide for a situation where the offender is charged in a court of law and a fine imposed. What is provided for is the payment of a fee, which in her view was justified.

21. It is not in doubt that the Petitioner’s right to a fair hearing was violated. The issue now is whether or not the 1<sup>st</sup> Respondent acted within the law in detaining the Petitioner’s motor vehicle. The fact that the motor vehicle was released by a Court order means that the Respondent had violated either a substantive rule of law or the Constitution, and that the Petitioner has suffered a wrong capable of being remedied either in law or in equity.

22. In **Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority [2009] eKLR** the Court of Appeal held that equity would not allow a wrong to be suffered without a remedy and went ahead to assess damages for illegal seizure and detention of a motor vehicle. The Court of Appeal stated as follows:

*“In our view from the fact that general damages was pleaded in the body of the Plaint and evidence led to show that the appellant was actively using the subject vehicle it followed that it would suffer loss even if special damages were not properly proved.*

*Considering all the above and mindful of the legal position that the superior court ought to have considered that it was sitting both as a Court of law and a court of equity, and noting that equity would not allow a wrong to be suffered without a remedy, we hold that the appellant was entitled to an award of general damages...The Court of Appeal then went on to assess damages at Kshs. 500,000/= which was for a period of six months. The Court of Appeal assessed the damages after considering that the Appellant had done nothing to mitigate the loss.”*

23. A right to property is now constitutionally protected, and no authority has the right to deny a person of his or her right to earn a living or to own property. It appears Regulation 15(3) of the Kenya Roads (Kenya Highways Authority) Regulation needs to be harmonized with the Constitution. Until that is done, the Respondent must bear the consequences of such unconstitutionality. It has been submitted that because the 1<sup>st</sup> Respondent acted within the law when it seized the said motor vehicle, the 1<sup>st</sup> Respondent should not be condemned to pay for the losses suffered by the Petitioner. This argument is against the equitable principle that equity cannot suffer a loss without a remedy. This principle is further fortified in Article 23(3) of the Constitution as follows:

**“(1) ...**

**(2) ...**

**(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—**

**(a) a declaration of rights;**

**(b) an injunction;**

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.”

24. It is the position taken by this Court that the Respondent must shoulder the consequences of the unconstitutional Regulation, and all losses suffered as a result of that unconstitutionality shall fall to be remedied by the Respondent. However, because the Respondent's officers were operating within the law, they cannot suffer general or any other punitive damages. Their liability ends at satisfying the immediate loss occasioned by such unconstitutionality.

#### Loss of income/user

25. According to evidence, there was no doubt that the subject motor vehicle was being used by the Petitioner for commercial purposes. Further, the Petitioner produced an agreement dated 16/3/2015. In the said agreement, it was agreed that the subject motor vehicle was hired by one **David Mayombe** for a duration of three months effective 1<sup>st</sup> April 2015 to June 2015.

26. It is noteworthy, that the agreement and its contents has not been challenged by the Respondents. In fact, the said agreement was adopted by consent of the parties. Consequently, since it is the Petitioner's evidence that it lost business as a result of the further detention of its motor vehicle for a period of 37 days, I find that the claim on loss of income/user is not controverted by the Respondent.

27. In **Haji Asuman Mutekanga v Equator Growers(u) Limited (Civil Appeal No. 7 of 1995)** the Court when dealing with the issue of special damages noted thus:

*“...Again, it is trite law that special damages and loss of profit must be specifically pleaded, as it was done in the instant case. They must also be proved exactly, that is to say, on the balance of probability. This rule applies where a suit proceeds inter parties or exparte. It follows that even where as in the instant case, the defendant neither enters appearance nor files a defence, the plaintiff bears the burden to prove his case to the required standard. The burden and standard of proof does not become any less. As the learned author stated in MC Gregor on Damages 4th Edition page 1028, the evidence in special damages must show the same particularity as is necessary from its pleading. It should therefore, normally consist of evidence of particular losses such as the loss of specific customers or specific contracts. However with the proof as with pleadings, the Courts are realistic and accept that the particularity must be tailored to the facts... General damages consist, in all, items of normal loss which the plaintiff is not required to specify in his pleading in order to permit proof in respect of them at the trial. Its distinction from special damages was defined by Lord Wright in Monarch S.S. Co. V Karlshanus Oliefabriker (1949) AC, 196 at 221 as being: “damages arising naturally (which means in the normal course of things) and cases where there were special and extra ordinary circumstances beyond the reasonable provision of the parties. In the latter event it is laid down that the special fact must be communicated by and between the parties.”*

28. I agree with the above holding. It is noteworthy that in this Petition, loss of income/user was pleaded and particularized at paragraph 8 of the Petition. Consequently, I find that the Petitioner has specifically pleaded and strictly proved on a balance of probability the loss of user and income as a result of the detaining of the subject motor vehicle for 37 days and the loss of income as a result of cancellation of a three months contract between one **David Mayombe** and the Petitioner which was frustrated as a result of the detaining of the subject motor vehicle. Accordingly, the loss suffered by the Petitioner is the loss of the said contract calculated as follows:

Kshs. 18,000 x 68 days= Kshs. 1,224,000/=

*To this add interest at Court rates from 30/6/2015.*

29. In the upshot Judgment is entered for the Petitioner in the sum of Kshs. 1,224,000/= plus interest at court rates from 30/6/2015 to the date the same shall be fully paid.

Costs shall be for the Petitioner.

**Dated, Signed and Delivered in Mombasa this 6<sup>th</sup> day of October, 2020.**

**E.K. OGOLA**

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Ondeng for Petitioner

No appearance for Respondent

