



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 173 OF 2018

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS

UNDER ARTICLES 24, 47, 50 OF THE CONSTITUTION

AND

IN THE MATTER OF: PROTECTION OF RIGHT TO

PROPERTY UNDER SECTION 40 OF THE CONSTITUTION

AND

IN THE MATTER OF: KENYA ROADS ACT & KENYA ROADS

(KENYA NATIONAL HIGHWAY AUTHORITY) REGULATIONS

AND

IN THE MATTER OF: SECTIONS 4 & 6 OF THE

FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF: UNLAWFUL DETENTION OF MOTOR

VEHICLE REGISTRATION NUMBER KBR 771C

AND

IN THE MATTER OF: SECTION 3 OF THE KENYA ROADS ACT

BETWEEN

JOSEPH NDOLO MUTUA.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

JUDGMENT

The Petition

1. By petition herein dated 26th June, 2018 the Petitioner alleges to be the beneficial owner and legal operator of motor vehicle registration number KBK 771C carrying out transport business within the Republic of Kenya. The Petitioner avers that on or about 15/09/2016 at Mariakani, while the subject motor vehicle was lawfully transporting a consignment of cement from Mombasa to Nairobi, it was seized and detained by the Respondent at the Mariakani Weigh Bridge on account of overloading. Consequently the subject motor vehicle was charged at the Mariakani Law Courts in Traffic Case 7878/16 and a fine of Kshs. 100,000.00 imposed. The said fine was duly paid in court on 16/09/2016. Upon payment of the fine, the motor vehicle was issued with a certificate of compliance by the Respondent on 19/09/2016 and consequently released from detention. On the very day 19/09/2016, without reason or justifiable cause or regard to the law, the Respondent through its agents and/or servants re-arrested the said motor vehicle with allegations that it had overloaded again. These were the same allegations that had been cleared by court. The Respondent's agents demanded another fine of Kshs. 200,000.00. The Petitioner avers that the allegations that the vehicle was overloaded were untrue. The Petitioner had offloaded the excess weight of 5,920 kilograms into relief motor vehicle KCG 625S. The load remaining in the subject vehicle was within what was accepted in law. The Petitioner further avers the vehicle was not weighed so as to ascertain the excess load. Moreover, the Petitioner was never accorded an opportunity to respond to the allegations that the vehicle carried excess load. Further, the fee of Kshs. 200,000.00 which the Respondent demanded for release of the motor vehicle was levied arbitrarily, and without according the Petitioner a chance to be heard in defence. The Petitioner avers that the unilateral declaration that the subject motor vehicle was overloaded displays the Respondent as the complainant, prosecution jury, judge and executioner. That the motor vehicle is continuing to waste away at Mariakani Police Station Yard/Weigh Bridge Station hence rendering the vehicle not worthy for the road and ruining its economic value. As a result, the Petitioner alleges that he is incurring loss of business at the rate of Kshs. 210,000.00 per week. The Vehicle registration plate number has also been removed and allegedly handed over to another agency arbitrarily and without informing the Petitioner. The Petitioner states that he has on several occasions visited the OCS at Mariakani Police Station and the Respondent at Mariakani Weigh Bridge to plead with them to release the subject motor vehicle but they have refused to do so.

2. The Petitioner's case is that the effect of impounding of the motor vehicle is to deprive the Petitioner of his fundamental right to property. These allegedly infringed rights are:

- a) Article 19 which guarantees the right and fundamental freedoms to your petitioner
- b) Article 20 of the Constitution on the Bill of Rights, which applies to all and binds all state organs and all persons.
- c) Article 22 which grants the Petitioner *locus standi* to move this Court for purpose of claiming rights and freedoms likely to be or are threatened.
- d) Article 40 (3) (b) (ii) which gives *locus standi* to a party whose rights to property has been infringed, the right to access a court of law.
- e) Article 47 which entitles every person to administrative action that is, among other things, lawful, reasonable and procedurally fair.
- f) Article 23 which grants the court the jurisdiction to issue remedies in case of violation of the Bill of Rights. These remedies include an injunctive orders and an order for compensation.
- g) Article 40 which guarantee protection of the right to property.
- h) Article 50 which guarantees a fair trial in all matters properly before a competent judicial body.

3. Accordingly, the Petitioner prays for:

- (i) A declaration that the seizure and detention of the Petitioner's motor vehicle registration No. KBR 771C, and continued retention thereof is unlawful and amounts to a violation of the Petitioner's constitutional rights to property under Article 40 of the constitution.
- (ii) An order compelling he Respondent herein to unconditionally release the Petitioner's property being motor vehicle registration number KBR 771C which was unlawfully impounded on 19th September, 2016, and is lying at Mariakani Police Station yard/weigh bridge station (impound yard).
- (iii) An order directed to the Respondent to pay the Petitioner for loss of income at the rate of Kshs. 210,000.00per week with effect from 19th September, 2016 until its release.
- (iv) Costs of this petition.

4. The petition is supported by affidavit sworn by the Petitioner on 26th June, 2019.

The Response

5. The Respondent oppose the petition vide a Notice of Preliminary Objection filed herein on 15th July, 2018. The Preliminary Objection is

premised on grounds summarized as follows:

- a) That the Petition and the Application are non-starters, incurably defective, bad in law, incompetent and offend the mandatory provisions of statute and ought to be struck out as they are filed out of time contrary to the provisions of Section 67 (b) of the Kenya Roads Act which provides that an action or legal proceedings against the Respondent ought to be instituted within twelve (12) months next after the act, neglect or default complained of, or in the case of a continuing injury or damage, within six (6) months next after the cessation thereof.
- b) The Petition and the Application are in direct contravention of Section 67(a) of the Kenya Roads Act which clearly states that any action or legal proceedings shall not be commenced against the Respondent until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings has been served upon the Director General by the Petitioner.
- c) Other grounds and reasons as may be adduced at the hearing thereof.
- d) In light of the foregoing, the Petition and the Application herein should be struck out with costs to the Respondent.

6. The Respondent also filed a Replying Affidavit sworn by **Maurice Ademba** on 11th January, 2019. The Respondent's case is that it is a state corporation established pursuant to Section 3 of the Kenya Roads Act, No. 2 of 2007 Laws of Kenya with the mandate to *inter alia* manage, develop, rehabilitate and maintain national roads as provided under section 4(1) of the Kenya Roads Act 2007. The Authority, in discharging its responsibility as set out in Section 4(2) of the Kenya Roads Act, is obligated to construct, upgrade, rehabilitate, and maintain national roads under its control; to control national roads and road reserves and access to roadside developments; to implement road policies in relation to national roads; to ensure adherence to the rules and guidelines on axle load control prescribed under the Traffic Act and regulations under the Kenya Roads Act. The Respondent states that on 15th September, 2016 at Mariakani Weighbridge, the motor vehicle registration number KBK 771C was duly weighed and found to be carrying an excess weight of 5920kg, which is an offence contrary to Sections 55, 56, 57 and 58 of the Traffic Act, Cap 403 of the Laws of Kenya as read with the Traffic Rules. That P.C Nuru Abdulahi, a Police Officer, acting under Section 106 and 107 of the Traffic Act issued a prohibition order directing that the vehicle be detained at Mariakani Weigh Bridge Yard. After the said motor vehicle paid the fine of Kshs. 100,000/= it was released to the owner. However, on the same day a few kilometers from the weigh bridge, the same motor vehicle was intercepted again by another police officer and held on allegations of carrying excess weight. The owner was charged USD 2000 but he failed to pay the amount and the vehicle has since that time been detained for failure to pay the penalty. The Respondent states that the petition should be dismissed.

Submissions

7. Parties filed submissions. It was also agreed that the Preliminary Objection would be determined together with the petition.

8. In prosecuting the Preliminary Objection the Respondent submitted that the Preliminary Objection is premised on the provisions of Section 67 of the Kenya Roads Act No. 2 of 2007.

Section 67 of the Kenya Roads Act, 2007 provides that:

“Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect-”

Sub-paragraph (a) thereof provides:

“.....the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent”

9. The Authority, the respondent herein is established under Section 3 of the Kenya Roads Act, No.2 of 2007. The Authority is responsible for the management, development, rehabilitation and maintenance of national roads. Section 4 (2) of the Kenya Roads Act provides for the functions of the Authority to include *inter alia* constructing, upgrading, rehabilitating and maintaining roads under its control, controlling national roads and road reserves and access to roadside developments and ensuring that the quality of road works is in accordance with such standards as may be prescribed by the Minister. In the current matter, the Petitioner filed this Petition on 26th June, 2018 without having served the Director General of the Authority with the requisite and mandatory one month's notice outlining his grievances for redress as outlined in the Kenya Roads Act. It is the Authority's submission that the essence of the notice being served is to give the Authority an opportunity to deal with the issues raised and resolve them in an amicable and appropriate manner. The Respondent submitted that the said notice is a must as the same is couched in mandatory terms. It was submitted that in **Sumac Development Company Limited vs. George Munyui Kigathi & 2 others [2017] eKLR** the Court held that:-

“I have considered the provisions of section 67 (a). The word used therein is SHALL which therefore means that it is mandatory for any party wishing to institute proceedings against Kenya National Highway Authority to give at least 30 days' notice.

10. On the basis of that authority it was submitted that this Court adopts the decision therein and finds that the Petitioner herein ought to have given the prerequisite one month's notice before commencing legal action against the Authority, the Respondent herein. The Respondent

also cited the decision of Michael Otieno Nyaguti & 5 others vs. Kenya National Highways Authority & 5 others [2015] eKLR where S.M Kibunja J held with regard to Section 67(a) that:-

“indeed Section 67 (a) of the Kenya Roads Act No.2 of 2007 requires a one month notice containing particulars of the claim and the intention to commence legal action to be served upon the Director – General by the party or its agent before legal proceedings are commenced. The requirement is couched in mandatory terms”. The court holds the view that the requirement of a notice being served on the Director General would not amount to hindering a litigant from accessing the seat of justice (court). It only creates an opportunity to the Director General's office of exploring an out of court settlement and is in line with the provision of Article 159 of the constitution, which at sub-article 2(c) encourages " alternative forums of dispute resolutions". The provision of section 67 of the Kenya Road Act 2007 is not in contravention with the constitution 2010.”

11. The Respondent further submitted that the Petitioner's Petition is statute bared by virtue of section 67 (b) of the Road Act, 2007. Section 67 provide for limitation of actions. The section provides that:

“Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect-”

(b) such action or legal proceedings shall be instituted within twelve months next, after the act, neglect, default complained of or, in ease or continuing injury or damage, within six months next after the cessation thereof.

12. The Respondent submitted that as per Supporting Affidavit sworn on 26th June, 2018 the cause of action arose on 19th September, 2016. This clearly shows that the suit was filed two years after the cause of action is alleged to have arisen, and hence statute bared. The Respondent urged this Court to find the Petitioner's suit in its totality to be premature and fatally incompetent, and the same be dismissed with costs.

13. On his part the Petitioner submitted that the substratum of the petition is violation of the Petitioner's right to property as enshrined under Article 40 of the constitution. The Petitioner has also averred that his rights as protected under Article 24, 47, 50 of the constitution have been violated. Article 22(3) of the Constitution gives power to the Chief Justice to **'make rules governing proceeding touching on infringements of rights enshrined in the constitution.'** The Petitioner submitted that on 28/06/2013, Pursuant to the power donated by Article 22(3) the Chief Justice, Justice Mutunga (as he then was) Gazetted **the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (hereinafter the **'Mutunga Rules'**). Rule 3 of the Mutunga Rules provide that the rules shall apply to all proceedings made under Article 22 of the Constitution. Article 22 of the Constitution provides that **Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.** Article 40 under which the petitioner's petition is premised on falls under the Bill of Rights in Chapter Four of the Constitution.

Rule 4 (1) of the Mutunga Rules provide that:

“Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.”

Rule 10 (1) thereof provides that:

“An application under rule 4 shall be made by way of a PETITION as set out in Form A in the Schedule with such alterations as may be necessary.”

14. The Petitioner submitted therefore, that the rules governing the proceeding of constitutional petitions are the **Mutunga Rules**. The Rules do not have a requirement of giving Statutory Notice to a Respondent before filing a petition as alleged in the Notice of Preliminary Objection. The Petitioner cited my decision in **ANTHONY NGILI MUNGUTI & 12 OTHERS VS. KENYA NATIONAL HIGHWAYS AUTHORITY & ANOTHER [2017] eKLR** where the Court was faced with a similar scenario. The Respondent raised a Notice of preliminary objection grounded on section 67(a) of the Kenya Roads Act. Justice E. K. O. Ogola (being myself) made the following findings:

“A fundamental right guaranteed by the Constitution cannot be taken away on the basis that demand notice stating intention to sue was not issued. It is the finding of this court that such a right is so supremely protected, that even a verbal notice such as for example, “Hey, this is our home, do not demolish it” is valid enough to stop the respondent on its track. Such a right cannot be defeated by statutory provision. It is the finding of the court that a constitutional provision on access to justice supersedes any statutory powers limiting enforcement of constitutional rights.”

15. The Petitioner also cited **BENSON RUIYI NJANE VS. KENYA RURAL ROADS AUTHORITY & 36 OTHERS [2016] eKLR** where the Court also had a chance to address a notice of preliminary objection grounded under Section 67 of the Kenya Roads Act. The Court made the following imperative findings:

“The limitation set out in Section 67 of the Roads requiring notice of thirty days to the Authority before instituting suit only applies to ordinary civil claims. It does not apply to cases (Petitions/Applications) alleging that a right or fundamental

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

16. Having reviewed the law and case law, it is the finding of this Court that the Notice under Section 67 of the Kenya Roads Act does not apply to constitutional petitions or applications. On that ground the preliminary objection lacks merit and is dismissed.

The Main Petition

17. The petition was filed on 26/06/2018 and served upon the Respondent on 29/06/2018. The Respondent entered appearance on 12/07/2018. The Respondent thereafter filed a Replying Affidavit in opposition to the Petitioner's Application dated 26/06/2018 (now withdrawn). The Respondent further filed a Notice of Preliminary objection which opposed both the application dated 26/06/2018 and the Petition. The Respondent filed a Replying Affidavit on 15/01/2019 to oppose the factual averments raised in the petition. However, in essence the Replying Affidavit does not deny the factual foundation of the petition, but confirms the same.

18. If that is so, the issue then is whether the Petitioner's rights were violated. The uncontroverted facts of the petition are that on or about 15/09/2016 the Petitioner being the legal owner of motor vehicle Registration Number KBK 771C was transporting a consignment of cement from Mombasa to Nairobi. Upon reaching Mariakani Weigh Bridge, the vehicle was seized by the Respondent's agents on account of overloading. It was charged at the Mariakani Law Courts and a fine of Kshs. 100,000.00 imposed. The petitioner paid the fine and upon payment of the fine he was issued with a certificate of compliance and the motor vehicle was released on 19/09/2016. Upon release, the motor vehicle was re-arrested barely a few kilometers from the weigh bridge on allegations it has overloaded again. It was detained and has been impounded to-date. The Petitioner contends that the allegations of overloading were untrue. When the motor vehicle was first arrested and charged, the excess weight of 5,920Kg was offloaded into a relief motor vehicle KCG 625S. How was it possible for a vehicle that was on detention to be reloaded again? Upon re-arresting, the Respondent's agents demanded a fee of Kshs. 200,000.00. The motor vehicle was never charged and continues to waste away at Mariakani impound yard. The Petitioner was never heard in defence. He was never accorded time and facilities to prepare a defence as required by Article 50 of the constitution.

19. In **DISARANIO LIMITED VS. KENYA NATIONAL HIGHWAYS AUTHORITY & ATTORNEY GENERAL [2017] eKLR** the court was faced with a similar scenario. It made the following observation:

"It has already been noted that in the present Petition the nature of the decision made by the Respondent was one that would result either in the loss of a motor vehicle or of a substantial sum of money paid as a fee, which are both onerous penalties and affect the rights of persons involved, and therefore would definitely attract the requirements of procedural fairness detailed out in the foregoing."

20. The Court in **DISARANIO** (Supra) further quoted in Odunga J. in **R VS. KENYA NATIONAL HIGHWAYS AUTHORITY EX PARTE JOHN MWANIKI KIARIE**, (supra) where he stated that:

"I therefore agree with Emukule, J that to the extent that aforesaid Regulation 15 tends to place the roles of the complainant, witness, investigator, prosecutor and judge in one entity, regulation 15 clearly violates Article 50 of the Constitution and pursuant to Article 2(4) of the Constitution, is null and void. In my view, the only institutions legally mandated to impose penalties are the Courts and independent Tribunals established pursuant to constitutional provisions and whose powers meet the constitutional threshold. "

21. Secondly, it is worthy to note that the vehicle was never weighed to ascertain the excess load when it was re-arrested. In **JORAM NYAGA MUTEGI VS. KENYA NATIONAL HIGHWAY AUTHORITY [2017] eKLR** the Court commented on the issue of not weighing a vehicle:

"Whether or not the truck was over loaded is a question of fact. The respondent's officers did not weigh the truck and cannot therefore state with certainty that it was over loaded. An assumption per se cannot, in law, be a basis for determining one's culpability in a traffic offence. There was no evidence therefore that the truck was overloaded and what police officers did was to assume that the vehicle was over loaded and proceeded as though the driver was guilty."

22. In my view, there was no basis upon which the Respondent determined that the Petitioner's motor vehicle was overloaded. Further, there was no basis upon which a penalty of Kshs. 200,000/= was imposed. Accordingly, it is the finding of this Court that the Petitioner's motor vehicle has been illegally and unlawfully detained by the Defendant and that detention amounted to a violation of Petitioner's right to property under Article 40 of the Constitution. The Respondent's action of re-arresting the motor vehicle and alleging that it had overloaded without weighing it was unreasonable and unjustifiable. Further the Petitioner was not given an opportunity to be heard in defence as envisaged by Article 50 of the constitution.

23. Article 23(3) of the constitution outlines remedies available when rights of an individual are infringed. It provide as follows:

"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. The Petitioner averred at paragraph 10 of the petition that he was incurring losses of Kshs. 210,000.00 per week. This figure has not been challenged by the Respondent, but neither has it been proved by the Petitioner. No basis has been provided for this figure. No past invoices or contracts were attached to prove this loss. This leaves this Court with no option but to consider the least income per month which the suit motor vehicle, being a vehicle in business, can bring in in terms of profits after factoring in days not worked, breakdowns, possible lack of business and sickness.

25. For the foregoing reasons the petition herein is allowed as prayed with costs.

26. This Court also awards a sum of Kshs. 160,000/= per month as damages in compensation for loss of profits effective 19th September, 2016 to the date of full payment.

That is the Judgment of the Court.

Dated, Signed and Delivered in Mombasa this 4th day of April, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Mudavadi holding brief Riro for Respondent

Mr. Mwamboje for Petitioner

Mr. Kaunda Court Assistant