



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT KERICHO

#### PETITION NO. 2 OF 2017

**NEPRO CAPITAL INVESTMENT LIMITED.....PETITIONER**

**VERSUS**

**S.G.S (KENYA) LIMITED.....1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL HIGHWAY AUTHORITY.....2<sup>ND</sup> RESPONDENT**

#### JUDGMENT

1. The petitioner, Nepro Capital Investments Limited, describes itself as a limited liability company having its registered office in Kericho. It has filed the present petition dated 31<sup>st</sup> March 2017 against the 1<sup>st</sup> and 2<sup>nd</sup> respondents with respect to certain action taken against it in the exercise of the 2<sup>nd</sup> respondent's statutory powers. The 1<sup>st</sup> respondent is a limited liability company which, according to the petitioner, the 2<sup>nd</sup> respondent from time to time delegates its function to measure and assess the weights, dimensions and capacities of vehicles using any road, and to provide measures to ensure compliance with rules relating to axle and load control under the provisions of the Traffic Act.

2. The petitioner describes the 2<sup>nd</sup> respondent as a statutory body capable of suing and being sued. Its functions include, among other things, implementing policies relating to road transport and safety in Kenya.

3. The facts giving rise to this petition as set out in the petition and the affidavit in support sworn by Ronoh Julius Kipkemoi are that the petitioner leased motor vehicle registration number KCE 849 R Faw Tipper from Paul Kipkurui Mitei which it used for general transport and earns kshs,31,500 per day. On 12<sup>th</sup> January 2016, the vehicle was parked at Taidy's Hotel, off the Nakuru Kericho Highway opposite Kaisugu Tea factory at around 9.30 p.m by the driver, one Wesley Yego. On coming out of Taidy's Hotel, the driver found officers of the 1<sup>st</sup> respondent removing the certificate of insurance, speed governor and number plates of the said lorry. They instructed the driver to inform the deponent to follow the concerned officers to the Gilgil weighbridge. The deponent did as instructed and went to the Gilgil weighbridge where the officer in charge instructed his officers to accompany the deponent to Kericho for purposes of taking the weight the vehicle was carrying at the material time.

4. When the vehicle was weighed, it was found to have the correct weight. The officers, however, alleged that the weighing machine was defective and agreed to return the following day, 14<sup>th</sup> January 2016, to weigh the vehicle again. It was also agreed that the vehicle could in the meantime, be moved to the Kericho Police Station.

5. The officers did not, however, go to weigh the vehicle as agreed, and the petitioner therefore sought orders for the release of the certificate of insurance, speed governor and number plates from the respondents which order was granted by the Chief Magistrate's Court in Kericho CMCC No. 13 of 2016, but the respondents declined to release the said items. The 1<sup>st</sup> respondent stated that it had forwarded the items to the 2<sup>nd</sup> respondent. The Chief Magistrate's Court ruled in its decision dated 21<sup>st</sup> March 2017 that it had no jurisdiction to hear and determine the issues arising in this matter, hence the filing of this petition in which the petitioner seeks the following orders:

***a) The 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly and severally be directed to forthwith release certificate of insurance, speed governor and number plates relating to motor vehicle reg. no.KCE 849R to the petitioner.***

***b) That a permanent injunction to be issued jointly and severally against both respondents from impounding and/or seizing motor vehicle reg. No.KCE 849R.***

***c) An order directed to the respondents to jointly and severally pay monetary compensation to the petitioner being Kshs.31,500/- per day for the days it has been out of business following the infringement of its rights to property as complained herein.***

6. The petition is supported by an affidavit sworn by **Ronoh Julius Kipkemoi** on 31<sup>st</sup> March 2016 (sic). In his affidavit, the deponent

deposes that he is a director of the petitioner duly authorised pursuant to a resolution made on 15<sup>th</sup> January 2016 to swear the affidavit on behalf of the petitioner. He describes the petitioner as a lessee of motor vehicle registration number KCE 849R which it had leased from one Paul Kipkurui Mitei the registered owner of the vehicle. He has annexed to his affidavit a copy of the logbook for the vehicle and the lease agreement with the registered owner.

7. Mr. Ronoh continues to make depositions with respect to the events leading to the present petition which I have set out above. The depositions are made on the basis of information which he says he obtained from his driver, one Wesley Yego, whom he believes. The information he obtained was that on 12<sup>th</sup> January, 2016, the driver lawfully parked the aforesaid motor vehicle off the road opposite Kaisugu Tea Factory along Kericho-Nakuru Highway at around 9.30 p.m. The deponent deposes that in the circumstances, according to information that he has received from his advocate, the 2<sup>nd</sup> respondent had no jurisdiction or mandate to remove the certificate of insurance, speed governor and number plates from the said motor vehicle as the motor vehicle was not subject to the weighing process by the 2<sup>nd</sup> respondent.

8. He further deposes, again on the basis of information from his driver, that on coming out of Taidy's Hotel the driver found a team of officers of the 1<sup>st</sup> respondent removing the number plates, certificate of insurance and the speed governor from the subject vehicle and on inquiring why they were doing this, he was told to inform the deponent to follow the concerned officer to Gilgil weighbridge the following morning. Mr. Ronoh therefore proceeded on 13<sup>th</sup> January 2016 to the Gilgil weighbridge. He found an officer in charge of the weighbridge and the said officer instructed his officers to accompany the deponent to Kericho for the purpose of taking the weight of the motor vehicle at the material time.

9. Upon arrival at Kericho, the officers of the 1<sup>st</sup> respondent set up a weighing machine and upon weighing various axles the result indicated in the weighing machine read legal for each axle. The officers, however, refused to give him a print out of the result, alleging that the weighing machine was defective. They proposed to return the following day, 14<sup>th</sup> January 2016, to repeat the exercise. It was also mutually agreed that the motor vehicle with the load would be parked at Kericho Police Station.

10. On 14<sup>th</sup> January 2016, the officers of the 1<sup>st</sup> respondent did not come to Kericho to weigh the vehicle as had been agreed, and the petitioner went to seek redress in court. Mr. Ronoh avers that he obtained an order from the Chief Magistrate Court at Kericho in Civil Suit No. 13 of 2016 directing the 1<sup>st</sup> respondent to release the vehicle's certificate of insurance, speed governor and the number plates.

11. Although the 1<sup>st</sup> respondent was served with the order on 25<sup>th</sup> January 2016, the 1<sup>st</sup> respondent did not release the said items as it alleged that it had forwarded them to the 2<sup>nd</sup> respondent. The petitioner then joined the 2<sup>nd</sup> respondent as a party to the suit before the Chief Magistrate, but the 2<sup>nd</sup> respondent did not release the items, and has not done so to date.

12. The petitioner avers that as a result of the unjustified detention of the said items, it has suffered loss and damages as the vehicle cannot move without these items. It contends that it used to earn Kshs. 31,500/= per day when the vehicle was offering transport services. In support of this contention, it annexes to the affidavit in support of the petition what it refers to as copies of the invoices and bank statement showing earnings from the vehicle.

13. The petitioner contends therefore that its constitutional rights have been infringed, and it seeks the intervention of this court to order the respondent to release the said items and compensate the petitioner for the days the motor vehicle has been out of business.

## **The Response**

14. In opposition to the petition, the 1<sup>st</sup> respondent filed an affidavit sworn on 19<sup>th</sup> April 2017 by one of its employees, Mr. Jared Midega, who stated that he was currently employed as a computer operator- weighing. His deposition is that the 2<sup>nd</sup> respondent is a statutory body mandated by law to, among other things, manage weighbridges in Kenya in order to ensure that only lorries bearing the statutory weight are allowed onto the roads so as to preserve the roads. In carrying out its mandate, the 2<sup>nd</sup> respondent has contracted the 1<sup>st</sup> respondent as its agent for purposes of operating the weighbridges in Kenya.

15. The version of the events of 12<sup>th</sup> January 2016 given by Jared Midega is that at around 7.45 hours on the material day, he was on a routine mobile weighbridge operation along the Nakuru Kericho highway in the company of fellow employees, one Julius Injira, Robert Okeyo and police officers whom he only knew as corporal Epara and police constable Kimweli. They were in a pick-up truck branded with the 1<sup>st</sup> respondent's name.

16. He deposes that when they reached near Kaisugu Tea Factory, they intercepted a FAW Truck with no registration numbers which was carrying building stones popularly known as 'hardcore'. When the driver of the truck spotted their vehicle, he hurriedly parked the truck beside the road and literally jumped out and ran into the tea bushes, possibly to avoid being subjected to the mobile weighbridge. In his hurry, according to Mr. Midega, the driver dropped something from his hands which Midega and his colleagues later realized were number plates for KCE 849 R. The number plates were taken by the police officer who was with Midega and his colleagues to the weighbridge manager at Gilgil and later they were sent to the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent's principal, and the number plates, certificate of insurance and the speed governor are not in the hands of the 1<sup>st</sup> respondent.

17. The 2<sup>nd</sup> respondent filed an affidavit in response sworn by Dennis Cheruiyot Higgins on 18<sup>th</sup> April 2017 in opposition to the petition. Mr. Higgins describes himself as a Roads Inspector in the Axle Load Control Department of the 2<sup>nd</sup> respondent. He deposes that the 2<sup>nd</sup> respondent is a statutory body established under section 3 of the Kenya Roads Act, 2007 and is responsible for, *inter alia*, the management, development, rehabilitation and maintenance of international trunk roads linking centers of international importance and crossing international boundaries or terminating at international ports.

18. The 2<sup>nd</sup> respondent also has the mandate of ensuring adherence to the rules and guidelines on axle load control prescribed under section 4 (2) (d) of the Kenya Roads Act 2007. It is also tasked with ensuring that trucks using the roads are not overloaded beyond the axle load limit as this would cause danger to other road users and degrade the roads.

19. Mr. Higgins further deposes that section 55 and 56 of the Traffic Act Cap 403 of the Laws of Kenya prohibits use on a road of a vehicle the weight or dimensions of which exceeds the maximum weight or dimensions provided or a load greater than the load specified by the manufacturer of the chassis of the vehicle. Under section 106 (4) and (4A) of the Traffic Act, the 2<sup>nd</sup> respondent, its agents or police are mandated to remove the vehicle identification plates and the vehicle licence and issue a prohibition order when they are of the opinion that the vehicle is in contravention of the conditions set under section 55 and 56 of the Traffic Act with regard to overloading.

20. With respect to the facts giving rise to the present petition, Mr. Higgins deposes that the petitioner's motor vehicle was intercepted on 12<sup>th</sup> January 2016 at around 2100 hours, fully loaded with building stones, along the Nakuru-Kericho road by the Kenya Police and officers from the 1<sup>st</sup> respondent who were on patrol. The officers of the 1<sup>st</sup> respondent had, during their regular patrol, spotted the FAW tipper parked on the roadside loaded with building materials and suspected it to be overloaded. He confirms that the 1<sup>st</sup> respondent is an appointed agent of the 2<sup>nd</sup> respondent attached to the Gilgil mobile weighbridge. The said officers stopped at the scene where the motor vehicle was parked in order to verify their suspicions and were shocked to find two men removing the front registration number plates. On realising that the agents were police officers in uniform, the two men abandoned the number plates and fled the scene into a nearby tea plantation.

21. The agents inspected the truck and found the truck fully loaded with building stones and overloaded with 10,000 kgs, a weight Mr. Higgins deposes was computed based on volume and density. He has attached to his affidavit copies of photographs which he avers show the overloaded and abandoned motor vehicle. He deposes that the 2<sup>nd</sup> respondent's agents confiscated the abandoned number plates in order to effect an arrest and issued a prohibition order to remove the vehicle from the road as is required under section 106 and 107 of the Traffic Act. A copy of the prohibition order is attached to the affidavit.

22. Mr. Higgins avers that section 106 (4A) of the Traffic Act empowers police officers and agents of the 2<sup>nd</sup> respondent to remove a vehicle's identification plates and the vehicle licence upon issuing a prohibition order under section 106 (4) of the Traffic Act. He further deposes that it is within his knowledge that overloading is an offence for which fees are charged and fines imposed under the law. According to the 2<sup>nd</sup> respondent, the petitioner's truck was overloaded and the petitioner should pay the prescribed fees for the number plates and his certificate to be returned.

23. It is his deposition further that he is aware that the 2<sup>nd</sup> respondent does not have the power to investigate and prosecute, or power to seize or impound the motor vehicle as alleged by the petitioner. He denies that the 2<sup>nd</sup> respondent has threatened to impound, seize and/or alienate the petitioner's motor vehicles and as such the apprehension is unfounded. He also deposes that an order was issued by the Chief Magistrates Court Kericho in CC No. 13 of 2016 on 13<sup>th</sup> September 2016 staying the orders issued on 4<sup>th</sup> August 2016 for the release of the certificate of insurance, speed governor and number plate to the petitioner herein. He contends that the 2<sup>nd</sup> respondent is willing and ready to release the certificate of insurance, speed governor and number plate belonging to the petitioner upon payment of the prescribed fees for overloading.

24. The parties have filed their respective submissions on this matter which I shall consider in the course of this judgment. The 1<sup>st</sup> respondent had filed a notice of preliminary objection challenging the claim against it, which I shall also address in the course of this judgment.

### **Analysis and Determination**

25. I have considered the pleadings and submissions of the parties in this matter. In his submissions, the petitioner identifies the following as the issues for determination:

- a. Whether the preliminary objection dated 6<sup>th</sup> April 2017 is sustainable.*
- b. Whether its right to property has been infringed by the 1<sup>st</sup> and 2<sup>nd</sup> respondent*
- c. Whether the loss complained of has occasioned the petitioner loss of income.*

26. I will consider each of these issues against the law and the evidence placed before me.

### **Whether the preliminary objection dated 6<sup>th</sup> April 2017 is sustainable.**

27. In its notice of preliminary objection dated 5<sup>th</sup> April 2017, the 1<sup>st</sup> respondent challenges its joinder as a party to these proceedings. It argues that it is an agent of a known principal and is therefore not liable in law for any action done as such agent. It submits that this fact is confirmed in the petition and in the affidavit of Jared Midega sworn on its behalf and that of Dennis Cheruiyot Higgins sworn on behalf of the 2<sup>nd</sup> respondent. As an agent of a disclosed principal, it is not liable for any acts done as such agent. It therefore prays that the petition as against it be dismissed. The 1<sup>st</sup> respondent relies on the decision in **Victor Mabachi & Another vs Nurtun Bates Ltd (2013) eKLR**.

28. The petitioner's response on this issue is that the 1<sup>st</sup> respondent cannot be separated from the 2<sup>nd</sup> respondent in this matter. It submits that it is the 1<sup>st</sup> respondent which seized the items at issue and forwarded them to the 2<sup>nd</sup> respondent. The petitioner contends that the 2<sup>nd</sup> respondent was obligated to inquire from the 1<sup>st</sup> respondent whether it had taken appropriate action before forwarding the seized items to the 2<sup>nd</sup> respondent. The appropriate action in this case, in the petitioner's view, is to investigate, charge and prosecute the petitioner's driver. The

petitioner does not address itself to the law with respect to an agent of a disclosed principal.

29. The position with respect to actions taken on behalf of a disclosed principal has been the subject of judicial decisions in this jurisdiction and I believe is fairly well settled. It is, as was stated in **Civil Application Nos. Nai 5 and 48 of 2002 (consolidated) Anthony Francis Wareheim t/a A. F. Wareheim & 2 Others vs Kenya Post Office Savings Bank**, that where the principal is disclosed, the agent is not to be sued. The court in that case stated as follows:

*“It was also prima facie imperative that the court should have dismissed the respondent’s claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued.”*

30. The petitioner argues that the 1<sup>st</sup> respondent cannot be separated from the 2<sup>nd</sup> respondent, and that the 2<sup>nd</sup> respondent was bound to inquire from the 1<sup>st</sup> respondent whether it had taken the appropriate action before forwarding the seized items to the 2<sup>nd</sup> respondent. The point, however, is that the actions of the 1<sup>st</sup> respondent are the actions of its principal, the 2<sup>nd</sup> respondent. Any action of the 1<sup>st</sup> respondent, lawful or otherwise, is the act of the principal. The 1<sup>st</sup> respondent is accordingly improperly joined to these proceedings. I will therefore in this petition consider the petitioner’s claim against the principal, the 2<sup>nd</sup> respondent though I will make reference to the averments of the 1<sup>st</sup> respondent.

#### **Whether the petitioner’s rights have been infringed by the 2<sup>nd</sup> respondent**

31. The petition before me alleges violation of the petitioner’s rights under the Constitution. The petitioner argues that the respondents are obligated under Article 20 (1) of the Constitution to observe the Bill of rights as it applies to all law and binds all state organs and all persons. It submits that by seizing the number plates, insurance certificate and speed governor, the respondents contravened the Bill of Rights as the petitioner was condemned unheard.

32. The petitioner further contends that its right to property has been violated. It submits that confiscation of the subject items is a violation of its right to property under Article 40. It places reliance on the decision of Nyamweya, J in **Disaranio Ltd vs Kenya National Highways Authority & another Machakos High Court Petition No.13 of 2015** to submit that the certificate of insurance, speed governor and number plates are property as defined in the above decision. Their seizure, according to the petitioner, was a direct sabotage of its transport business.

33. The petitioner further submits that the three items seized by the respondents have never been returned despite a court order served on the respondents on 25<sup>th</sup> January 2016. Instead, the 2<sup>nd</sup> respondent argued that it would return them on condition that the petitioner pays the prescribed fee for overloading. In this regard, the petitioner argues, first that no documents have been produced to show the fine imposed against its driver. It contends, secondly, that neither of the respondents has the jurisdiction to impose fines as this is a role preserved for the judiciary. It relies on the decision of Ong’udi J in **Rumic Construction, Civil Engineering Ltd vs Kenya National Highway Authority & 3 Others (2013) eKLR**.

34. In its response to this issue, the 1<sup>st</sup> respondent observes that there is no credible evidence that it removed the number plates of the lorry at the centre of this petition. It submits that the evidence set out in the affidavit in support of the petition is hearsay as the Director of the petitioner who swore the affidavit is a stranger to the facts in issue. He was not the driver, nor did he witness the incident but states he was informed by his driver. The driver did not swear an affidavit, and no reason is given why he did not. The 1<sup>st</sup> respondent therefore argues that the only credible evidence is set out in the affidavits in response by the 1<sup>st</sup> and 2<sup>nd</sup> respondent. No evidence had been presented to show that the 1<sup>st</sup> respondent’s employees did anything to breach the petitioner’s constitutional rights.

35. The 2<sup>nd</sup> respondent sets out the facts as narrated in the affidavit in response to the petition by Mr. Higgins. It submits that it has authority to remove and confiscate number plates pursuant to section 106 (4) of the Act. It is not under an obligation to weigh the vehicle before it decides that it is being driven in breach of section 55 or 56 of the Act. It can arrive at the decision based on the opinion of its officers, but it is under an obligation to act reasonably and in this case, its acts were within acceptable standards of reasonableness.

36. It submits further that its action of confiscating the number plates was reasonable and justified under section 106 (4) and (4A) of the Traffic Act. It relies on **Kokebe Kevin Odhiambo & 12 Others vs Council of Legal Education** on the circumstances in which the court can interfere with the exercise of discretion. It further submits that on the facts of the case, the withholding of the number plates, speed governor and certificate of insurance was reasonable and legal in the circumstances and in line with sections 55 and 56 of the Traffic Act.

37. The 2<sup>nd</sup> respondent relies on **Republic vs Cabinet Secretary for Transport and Infrastructure ex-parte Kenya Country Bus Owners Association & Others (2014) eKLR** to submit that its agents acted in compliance with section 55 and 56 of the Traffic Act; that the petitioner’s motor vehicle was overloaded and abandoned by the roadside and was a threat to other road users and in the circumstances it was only reasonable to issue a prohibition order to confiscate the number plates.

38. The 2<sup>nd</sup> respondent further argues that the decision in **Margaret Miano vs Kenya National Highways Authority (2015) eKLR** did not nullify its powers under section 106 (4A) of the Traffic Act but only regulation 15 (3) of the regulations under the Roads Act that prescribed a fee for absconding the weighbridge.

39. According to the 2<sup>nd</sup> respondent, section 106 (4A) permits the respondent to continue holding the number plates for as long as the order issued under section 106 (4) remains in force while section 106 (4) guarantees the life of the orders 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.

40. I have considered the submissions of the parties on this issue. I note that, as submitted by Counsel for the 1<sup>st</sup> respondent, the facts set out in the affidavit of Mr. Ronoh are deposed to on the basis of what he says he was informed by his driver. It is hearsay. No explanation was given for failure by the petitioner to have the driver who was in charge of the motor vehicle and was therefore able to give a first-hand account of what transpired swear an affidavit on the facts. In the absence of such evidence, the court is left with the averments of the 1<sup>st</sup> respondent's officer, Mr. Midega, and Mr. Higgins for the 2<sup>nd</sup> respondent.

41. The evidence of Mr. Midega is that he and other officers of the 1<sup>st</sup> respondent were on duty at around 7.45 hours (meaning in the morning) when they intercepted, near Kaisugu Tea Factory, the petitioner's FAW Truck with no registration number which was carrying building stones popularly known as 'hardcore'. When the driver of the truck saw them, he hurriedly parked the truck beside the road, jumped out and ran into the tea bushes, according to Mr. Midega, to avoid being subjected to the mobile weighbridge. In his hurry to get away, the driver dropped something from his hands which Midega and his colleagues later realized were number plates for KCE 849 R. The number plates were taken by the police officer who was with Midega and his colleagues to the weighbridge manager at Gilgil. Later, they were sent to the 2<sup>nd</sup> respondent.

42. The 2<sup>nd</sup> respondent's version as set out in the affidavit of Mr. Higgins is that the petitioner's lorry was intercepted on 12<sup>th</sup> January 2016 at around 2100 hours, fully loaded with building stones, along the Nakuru-Kericho road by the Kenya Police and officers of the 1<sup>st</sup> respondent who were on patrol. The said officers had spotted the FAW tipper parked on the roadside loaded with building materials and suspected it to be overloaded. They stopped at the scene where the motor vehicle was parked and were shocked to find two men removing the front registration number plates. The two men abandoned the number plates and fled into a nearby tea plantation. The agents inspected the truck and found the truck fully loaded with building stones and overloaded with 10,000 kgs. The agents confiscated the abandoned number plates in order to effect an arrest and issued a prohibition order to remove the vehicle from the road as is required under section 106 and 107 of the Traffic Act.

43. The court notes that the versions of events from the affidavits of Mr. Midega and Mr. Higgins are quite inconsistent. Did the driver of the petitioner's vehicle jump out and drop the number plates as he fled into a tea plantation? Did the agents of the 2<sup>nd</sup> respondent find two men removing the number plates from the vehicle, two men who fled on seeing the agents and abandoned the number plates? At what point was the insurance certificate and speed governor removed from the vehicle, and by whom? Did these events occur at 7.45 hours, which is morning, as deposed by Mr. Midega, or 2100 hours, which is night time, as deposed by Higgins?

44. While the depositions of the petitioner's director on this point are hearsay, the affidavits of the respondents do not help matters, and the court is left with the distinct impression that the truth cannot be found in these affidavits. Thus, the court has serious reservations about the credibility of the evidence before it with respect to the events of the material day. It would greatly have assisted the court if the driver of the motor vehicle had placed his evidence on record by way of affidavit, but this has not been done. It may well be therefore, as alleged by the respondents, that the petitioner's driver had a lorry that was overloaded, and that he was caught in the act of removing the vehicles number plates and that he fled from the scene.

45. Even assuming the above to be the case, was the 2<sup>nd</sup> respondent entitled to remove the items in contention from the vehicle, and to retain them for a period now in excess of two years? Was due process followed in the manner in which the petitioner has been deprived of the vehicle by the 2<sup>nd</sup> respondent?

46. Mr. Ronoh Julius Kipkemoi deposed on behalf of the petitioner that he went to the Gilgil weighbridge on 13<sup>th</sup> January 2016 as his driver had been informed to tell him to do. He found an officer in charge of the weighbridge who instructed his officers to accompany the director of the petitioner to Kericho for the purpose of weighing the vehicle. The officers set up a weighing machine, weighed various axles, and the result indicated in the weighing machine read legal for each axle. The officers did not give him a print out of the result, alleging that the weighing machine was defective, but proposed that they would come back the next day, 14<sup>th</sup> January 2016, to carry out the exercise, which they failed to do. The petitioner was compelled to seek legal redress, which he did by filing a suit at the magistrate's court. The averments of the petitioner with regard to the events of 13<sup>th</sup> and 14<sup>th</sup> January 2016 have not been responded to by the respondents.

47. The 2<sup>nd</sup> respondent has annexed to the affidavit of Mr. Higgins what is referred to as a prohibition order. The 2<sup>nd</sup> respondent argues that it has the mandate to act as it did due to powers donated to it by sections 55 and 56 of the Traffic Cap 403 of the Laws of Kenya. Section 55 titled "**Condition of vehicles**" provides as follows:

**55 (1) No vehicle shall be used on a road unless such vehicle and all parts and equipment thereof, including lights and tyres, comply with the requirements of this Act, and such parts and equipment shall at all times be maintained in such a condition that the driving of the vehicle is not likely to be a danger to other users of the road or to persons travelling on the vehicle.**

**(2) No motor vehicle the weight or dimensions of which laden or unladen exceeds the maximum weight or dimensions provided for such vehicles by rules made under this Act shall be used on a road.**

48. Section 56 titled "**Limitation of loads**" provides as follows:

**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) ...

49. The respondent contends that it is empowered by section 106 of the Traffic Act to remove a vehicles identification plates and licence under section 106 (4) of the Traffic Act. It contends that the petitioner should pay the prescribed fees for the number plates and his certificate to be returned. It does not state what this prescribed fee that the petitioner should pay is.

50. Section 58 of the Traffic Act provides as follows with respect to penalties for violation of section 55 and 56 of the Traffic Act:

***58(1) Any person who drives or uses on a road a vehicle in contravention of the provisions of section 55 or section 56 shall be guilty of an offence and liable to a fine not exceeding four hundred thousand or to imprisonment for a term not exceeding two years or to both:***

***Provided that rules under this Act may provide that a person who is guilty of an offence under section 55 or 56 shall be liable to pay a fine according to a prescribed scale, and different scales may be prescribed for first offenders, and for second or subsequent offenders, within a prescribed period, but so that no person shall thereby be liable to pay a fine greater than the maximum provided by this subsection; and for the avoidance of doubt it is declared that liability of a person to pay a fine on a prescribed scale shall not affect that person's liability to imprisonment under this subsection as an alternative to, in addition to, or in default of, the payment of a fine.***

***(2) For the purposes of subsection (1), any person who is shown to the satisfaction of the court to be responsible for the maintenance of the vehicle, and any person who is shown to the satisfaction of the court to have been responsible for the loading of the vehicle, shall be deemed to have used the vehicle on the road.***

***(3) (a) In any case where a motor vehicle or trailer is twice or more times, in a period of twelve months, the subject of a successful prosecution under any of the provisions of sections 55 and 56, the court shall, unless for special reasons to be recorded it decides otherwise, order the Authority to suspend the licence of such vehicle for a period of two years.*** (Emphasis added)

51. The law thus contemplates that a judicial process is to be followed should there be reason to believe that the petitioner was in violation of sections 55 and 56 of the Traffic Act. It is not enough for the 2<sup>nd</sup> respondent to assert that it has powers under sections 55, 56 or 106 of the Traffic Act. It cannot read the provisions of section 55 and 56, and conveniently omit what is provided under section 58 of the same Act with respect to the process to be followed. Due process is a cardinal constitutional imperative under Articles 47 and 50, and the Fair Administrative Actions Act.

52. In her decision in **Disaranio Limited vs Kenya National Highways Authority & Attorney General [2017] eKLR** Nyamweya J stated as follows after setting out section 58 of the Traffic Act:

***“The same or similar procedures were required to be followed if regulation 10, 14 or 15 of the Kenya Roads (Kenya National Highway Authority) Regulations of 2013 were alleged to have been contravened, in that the driver and possibly the operator of the motor vehicle involved should be charged with the applicable offence in a court of law, all relevant information obtained and documentation completed in full, and availed to the person charged with the offence to enable his or her defence. The normal provisions and procedural safeguards as regards seizure and arrest of motor vehicles also require to be followed, with such motor vehicles being handed over to the police who become responsible for their safeguarding, and the right accorded to the affected persons to apply for their release.”***

53. In light of the above, I am satisfied that the actions of the respondent in this matter were not lawful, and were in violation of the petitioner's right to due process under Article 50 of the Constitution.

54. In closing on this point, I have noted the submissions of the 2<sup>nd</sup> respondent with respect to the decision in **Margaret Miano vs Kenya National Highways Authority**. While the petitioner did not rely on this decision or make this argument, the 2<sup>nd</sup> respondent argued that the decision in **Miano** did not nullify the powers of the 2<sup>nd</sup> respondent under section 106(4) of the Traffic Act. Rather, according to the 2<sup>nd</sup> respondent, it only nullified regulation 15(3) made under the Roads Act that prescribed a fee for absconding the weighbridge. It further submits that even if this case had concerned regulation 15(3), the court in the **Miano** case did not invalidate the regulation but only cautiously pointed out that it may be unconstitutional.

55. The 2<sup>nd</sup> respondent is, in my view, being rather disingenuous in its arguments on this issue. It has maintained that all that the petitioner has to do to get its licence back is to pay the prescribed fee, but it does not say which fee this is, or how it is to be calculated. The reference to the prescribed fee can only be the fee levied under the **Kenya Roads Act (Kenya National Highways Authority) Regulations of 2013**.

56. While the court in **Miano** may have been cautious in its approach to the regulations, the court in **Disaranio Limited vs Kenya National Highways Authority & Attorney General** (supra) expressly found and held that regulations 14 and 15 of the **Kenya Roads Act (Kenya National Highways Authority) Regulations, 2013** contravene Articles 40, 47, 50 and 159(1) of the Constitution of Kenya and declared them null and void. This is a finding that I am in agreement with.

57. That being the case, I must consider the next alleged violation of the petitioner's rights-the right to property as guaranteed under Article 40 of the Constitution.

58. The petitioner has averred that it was the lessee of the subject motor, vehicle registration number KCE 849R which it had leased from the registered owner, one Paul Kipkurui Mitei. The petitioner produced a copy of the logbook for the vehicle and the lease agreement with the

registered owner. This has not been disputed by the respondent, and neither has the petitioner's averment that he was carrying out business with the said vehicle.

59. In her decision in **Disaranio** (supra) Nyamweya J, in holding that the respondent had violated the petitioner's right to property, observed that property is not confined to direct ownership as argued by the respondent in that case, but covers also any beneficial interest in property. I note that the respondents have not disputed the petitioner's claim to have a property right in the subject vehicle. In my view, the petitioner has made out a case of violation of its right to property in the actions of the respondent in taking away the licence, number plates and speed governors of the subject vehicle. Such use as the petitioner could make of its property rights in the vehicle were made impossible by the acts of the respondent which this court finds unlawful.

**Whether the loss complained of has occasioned the petitioner loss of income.**

60. The petitioner submits that the detention of its items has impacted negatively on its economic fortunes as it has occasioned it loss of income. It submits that it had leased the subject motor vehicle and was earning Kshs. 31,500 per day. It relies on invoices to the County Government and bank statements in support. It submits that since January 2016, it has been put out of business by the respondents. It asks for judgment at the rate of Kshs. 31,500 from the date of seizure to the date of judgment as well as costs of the petition.

61. The amount that the petitioner claims from this court is in the form of special damages. The law is that such damages must be specifically pleaded and strictly proved. The petitioner has relied on invoices to the County Government of Kericho and bank statements. In my view, however, this is not sufficient proof of special damage, and I am therefore unable to find for the plaintiff on this issue.

62. In the event, I find that the petitioner's case is merited, and I accordingly issue orders as follows:

*a) The 2<sup>nd</sup> respondent be and is hereby directed to forthwith release the certificate of insurance, speed governor and number plates relating to motor vehicle registration number KCE 849R to the petitioner.*

*b) A permanent injunction be and is hereby issued restraining the 2<sup>nd</sup> respondent from impounding and/or seizing motor vehicle registration number KCE 849R.*

*c) That 2<sup>nd</sup> the respondent shall meet the petitioner's costs of this petition.*

**Dated Delivered and Signed at Kericho this 7<sup>th</sup> day of March 2018.**

**MUMBI NGUGI**

**JUDGE**