



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 350 OF 2016

KENMUT AGENCIES LIMITED.....PETITIONER

VERSUS

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

SGS KENYA LIMITED.....2ND RESPONDENT

NATIONAL TRANSPORT AND SAFETY AUTHORITY.....3RD RESPONDENT

JUDGMENT

1. In a petition amended on 21st June 2017 and filed on 27th June 2017, *Kenmut Agencies Limited*, the petitioner, sued the *Kenya National Highways Authority*, *SGS Kenya Limited* and *National Transport and Safety Authority*, the 1st, 2nd and 3rd respondents respectively, for actions it considered violation of its rights and fundamental freedoms.

2. The petitioner averred in its amended petition, that it is the registered owner of Motor Vehicle Registration No. KCD 309V , a Truck/Tipper' that on `17th December 2016 at about 4 a.m, the motor vehicle was lawfully parked at National Oil Petrol Station in Ruiru when the 2nd respondent who has been contracted by the 1st respondent to manage Weigh breaches, removed the Truck's registration plates without any justifiable or lawful cause and surrendered the plates to the 1st respondent, contending that they would prefer charges against the petitioner but none were preferred despite the fact that they are still holding the registration plates.

3. According to the petitioner, it has not received communication from the respondents on the fate of the confiscated registration plate to date despite attempts made by the petitioner to have the plates released. Instead, the 1st respondent has handed over the registration plates to the 3rd respondent.

4. It is the petitioner's case, that although it has the motor vehicle, it has been rendered un roadworthy because it cannot move without the registration plates thus violating the petitioners right to equal protection of the law, dignity, privacy and property. The petitioner therefore sought the following reliefs:-

a. A declaration that the petitioners rights under articles 27, 28, 29, 31, 40, 47 and 50 of the Constitution have been violated by the respondents.

b. A declaration that the seizure of the number plates for motor vehicle registration no KCD 309 V was unlawful and in violation of the Constitution.

c. As order to the respondents to unconditionally release the number plates for motor vehicle registration no KCD 309V to the petitioner.

d. An order that the respondents, jointly and severally, compensate the petitioner for the loss of use of the said motor vehicle from 17th February 2016 till the date of release of the said number plates at a daily rate of Ksh20,000/-.

e. Costs of the petition.

Response

5. The 2nd respondent filed a replying affidavit by **Mark Mwangangi**, the duty manager at 2nd respondent, sworn on 19th September 2016 and filed in court on 21st September 2016. He deposed that on 17th February 2016 at about 5.36 in the morning, the petitioner's Truck registration No KCD 309V was parked at the roadside outside National Oil Petrol Station along Thika Road within the proximity to the Juja Weigh bridge. The vehicle was intercepted by police officers, SGS mobile weigh bridge officers and the 1st respondent's agents attached to Juja Weigh Bridge; that the truck was fully loaded with soil mud and was suspected to be overloaded. He deposed that the police ordered the occupants to drive the truck to the weigh bridge for weight confirmation but the occupants declined claiming that the driver was not around.

6. **Mr Mwangangi** deposed that after the occupants refused to cooperate, the officers exercised their powers to determine the weight by scientific method which showed that the truck had an overload of 16,150kg. He contended that the authority had powers to detain the truck and its cargo, **Mr Mwangangi** deposed that the 1st respondent was merely carrying out its mandate and performing its duties as provided by section 4(2) (d), and 22(2)(d) of the Roads Act as read with regulations 14 and 15 of the Act as well as sections 55, 56, 58, 106 and 107 of the Traffic Act.

7. He contended that the Act does not provide for arrest and arraignment in court offenders hence Article 50 of the constitution does not apply to this case and that is why a prohibitory order was issued to the petitioner and that section 58 of the Traffic Act provides for payment of a fee for overloading in terms of a scale; and that the envisaged scale is that contained in legal notice No 118 of the 2008 which prescribed overloading fee hence the regulations have been properly used.

Petitioner's Submissions

8. **Mr Osoro**, learned counsel for the petitioner, submitted highlighting their written submissions dated and filed on 17th February 2016, the Truck was parked at a petrol station in Ruiru when registration plates were removed by the 1st respondents' agents and later surrendered to the 3rd respondent; that the plates have not been released to dates; that the petitioner has not been charged of any offence and that no reason has been given for the respondents' action. **Mr Osoro** contended that the confiscation of the plates violated the petitioner's right to property; right to a fair administrative action and right to fair hearing.

1st and 2nd Respondents' Submissions

9. **Mr Moenga**, learned counsel for the 1st respondent who also held brief for **Mr. Obura** for the 2nd respondent; submitted that they had just been served with the petitioner's list of documents in court and urged the court not to look at them.

10. Regarding the petition, learned counsel relied fully on their written submissions dated 20th January 2017 and filed in court on 23rd January 2017. He responded with regard to the claim that the petitioner was losing Ksh200,000/- per day, that these are special damages which should be pleaded and specifically proved which was not the case in this petition.

11. In the written submissions it was contended that section 4 of the Roads Act confers on the 1st respondent various functions; that under section 22(1)(c) the authority has mandate to measure and assess weight and deviation and that regulation 14 of the KNHA Regulations 2013 provides for notification of overload offences and payment of overload fees, while regulation 15 provides for procedures for control of overload.

12. The 1st respondent further contended that section 55(2) of the Traffic Act prohibits use of overloaded motor vehicles; that section 56 limits loads, section 58 provides for penalties; section 106 of the Traffic Act as read with section 62(7) the NTSA Act provides for removal of vehicles from the road and subsection 4A allows removal of identification plates.

13. The 1st respondent further contended that there was no violation of Articles 27, 28 and 31 as contended by the petitioner and relied on the case of **Ndungu Transport Company Ltd v Kenya National Highways Authority** [2016]eKLR for the submission that section 106 4(A) authorizes a police officer, licensing officer and inspection to remove vehicle identification. It was contended that due process was followed.

14. Regarding Article 47, it was submitted that the Article was not violated. According to the 1st respondent, the truck was found to be overloaded and action taken to impound it by removing the registration plates. That a notice was issued to the petitioner's agents thus the law was followed. Reliance was placed on the case of **Republic v officer in charge of Axle Load Monitoring Unit & 2 Others Ex parte Lazarus Kyalo Musyoka**[2015]eKLR for the submission was made to the effect that the action of removal of registration plates was backed by law and **Buseki Enterprises Ltd v Kenya National Highways Authority** for the submission that regulations do not provide for arrest of the owner/driver of the overloaded motor vehicle.

15. With regard to Article 40, it was submitted that there was no violation contending that the petitioner was not entitled to use overloaded truck on the road.

Determination

16. I have considered this petition the response; submissions and the authorities relied on. The only issue that arises for determination is whether the respondents violated the petitioner's rights when they removed the registration plates for motor vehicle KCD 309V.

17. The facts of the petition are straight forward and not in dispute. The petitioner's motor vehicle was parked near a petrol station within Ruiru Area. The respondents say it was loaded with soil but the petitioner said nothing about it. There were people in that vehicle but when the respondents' agents sought to have the vehicle weighed to determine the weight of the load the truck was carrying, the occupants declined saying that the driver was not around. The officers were then forced to remove the registration plates to disable the vehicle's

movement. The plates were later surrendered to the 3rd respondent.

18. Due to this action, the petitioner filed this petition contending that his rights and fundamental freedoms were violated including the right to be subjected to equal protections as the law, the right to dignity, the right to property and the right to fair administrative action. The 1st respondent who is the main actor in this matter has denied violating the petitioner's rights and contended that its officers were enforcing the law; that they acted within the law and they took an action that was allowed and within the law.

19. The motor vehicle was parked at a roadside near a petrol station. It was loaded with soil, the respondents' agents merely wanted to determine the weight of the load the truck was carrying. However, there people in the vehicle declined to have the vehicle weighed on the pretext that the driver was not among them. They did not say where the driver was. In short they declined to have the vehicle weighed as required by the law.

20. The question that has not been answered even though the petitioner contends that his rights were violated is why the vehicle was not weighed to determine its load. The respondents asked that the vehicle be weight but the petitioner's agents declined. They never gave a satisfactory explanation. The officers removed the registration plate an action that is allowed by the law.

21. The petitioner has not contended that the truck was not on the road. He has not contended that the truck was not carrying a load as the respondents have alleged. He has remained silent on what the vehicle was carrying and why his agents declined to have the vehicle weighed a requirement of the law. The driver has not sworn an affidavit to say what happened and why the vehicle was not weighed or even what it was carrying to place the burden on the respondent.

22. A person who alleges violation of the constitution must show that the respondent acted outside the constitution or the law. In the present case, the petitioner apart from stating that the respondent violated his rights, he has not shown that they acted outside the law and that their action was not backed by law. The respondent's agents acted the way they did because the petitioner's agents refused to subject the truck to a lawful process to determine the load it was carrying. The petitioner cannot therefore be the one to complain that its rights were violated yet its agents were violating the law.

23. Having evaluated the evidence, submissions and the law, I am unable to agree with the petitioner that its rights were violated or at all. It has not been candid in this petition and for that reason; I am unable to agree with it. Consequently the petition is declined and dismissed with costs to the 1st respondent.

Dated Signed and Delivered at Nairobi this 14th Day of December 2018

E C MWITA

JUDGE