



**REPUBLIC OF KENYA**

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

**JR MISC APPLICATION NO. 1 OF 2016**

**IN THE MATTER OF AN APPLICATION BY MANYOTA LIMITED FOR JUDICIAL  
REVIEW FOR ORDERS OF CERTIORARI**

**AND**

**IN THE MATTER OF MOTOR VEHICLE REGISTRATION NUMBER KBR 449E**

**AND**

**IN THE MATTER OF KENYA NATIONAL HIGHWAYS AUTHORITY  
AND IN THE MATTER OF THE TRAFFIC ACT CAP 403 LAWS OF KENYA**

**MANYOTA LTD.....APPLICANT**

**VERSUS**

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

**J U D G M E N T**

1. The ex-parte applicant in the notice of motion dated 23rd of February 2016 seeks for the following orders that an ORDER OF CERTIORARI quashing the decision by Kenya National Highways Authority to confiscate the number plates for motor vehicle registration number KBR 449E as well as quashing the prohibition order issued by the said Kenya National Highways Authority touching on motor vehicle registration number KBR 449E. It also seeks for an ORDER OF MANDAMUS be issued compelling the Kenya National Highways Authority to return the number plates for motor vehicle registration number KBR 449E to the registered owner of the motor vehicle viz MANYOTA LIMITED.

2. The application is supported by the affidavit of James Njukia Ihura in which he depones that the subject motor vehicle KBR 499E belongs to the Ex-parte applicant Manyota Limited where he is a director and duly authorized to swear the affidavit. He states that the vehicle was lawfully being driven by the company's driver along Kiritiri- Mbeere road ferrying sand when a motor vehicle registration number KBN 530P sped ahead and blocked the applicant's vehicle. The driver stopped and was informed by the police officers and other officials in the said vehicle that they were acting on behalf of Kenya National Highways Authority (KENHA) and that they needed money from him.

3. The driver told them that he had no money and the police officers cocked their guns and immediately descended on him with kicks and blows before finally hitting him on the head with the butt of the gun. The officers are said to have damaged the window and the side mirrors of the Ex-parte applicant's vehicle

using a metal rod before removing the number plates of the vehicle. The passenger's door as well as the left headlight were also damaged.

4. It was stated that the company driver was never charged with any offence or summoned by the said officers and neither was the vehicle detained. The Ex-parte applicant instructed his advocate to demand his vehicle number plates but this did not bear fruit. However, the advocates obtained a copy of the prohibition order from the said officers.

5. It is contended that the acts complained of were done in bad faith, were unreasonable and unjustified. Further that the decision to remove and confiscate the number plates was done in total compliance with the law. The applicant contends that the decision of the KENHA officers is oppressive, illegal, irregular and without jurisdiction. The prohibition order issued was defective and void of all intents and purposes.

6. These proceedings were opposed by respondent in the replying affidavit of Dennis Higen in which he outlined the functions of the respondent as constructing, upgrading, rehabilitating and maintaining roads under its control and ensuring adherence to Rules and Guidelines on Axle Road rules are prescribed under the Traffic Act, Cap 403, among other duties. It was stated that in discharging the aforesaid function, the Axle Road Unit uses both Static and Mobile Weigh Bridges to weigh vehicles so as to confirm that the vehicular roads confirm to the prescribed legal limits.

7. It is admitted that motor vehicle registration number KBR 449E was intercepted on the 19th of August 2015 for having been suspected to be overloaded with sand along Embu-Kanyonyo road. The driver was ordered to stop but failed to comply and instead diverted off the highway to an access road where he attempted to tip over the load and hit against a tree damaging the truck. The officers were unable to weigh the truck to determine its compliance or otherwise with the requisite vehicular load limits.

8. The action of the driver caused the officers to remove the number plates and proceeded to issue a prohibition order. The driver having violated Section 15 Sub Section 4 of the Kenya Roads (Kenya National Highways Authority) Regulations 2013 Legal Notice Number 86 of 2013 is liable to pay a penalty of USD 2,000. The owner of the vehicle was required to avail the vehicle for weighing in order to have the licensed number plates released to him.

9. The officers were licensed to remove the number plates in view of the non-compliance by the driver and there is no illegality in the retention of the plates. It is argued that the prayer for an order of certiorari is not merited.

10. Both parties filed written submissions through their advocates. Mr. Kabue Thumi & Co. represented the Ex-parte applicant while Kithure Kindiki & Associates represented the respondents.

11. The Ex-parte applicant submitted that the alleged overloading was not confirmed as stated in the affidavit of Dennis Higen. The vehicle required to be weighed to meet the requirements of Section 106(4) of the Traffic Act which was not done. It is alleged that the conduct of the respondent's officers shows that they acted in bad faith in the manner they handled the matter.

12. It is further submitted that the prohibitory order was defective in that it alludes in clause (a) that the motor vehicle was being used at Nairobi- Meru road while clause (b) states that it was abandoned along Nairobi-Meru road. This creates doubt as to whether the vehicle was in use when it was intercepted or it was abandoned. The annexed letter from the respondent dated 21st of December 2015 alleges that the motor vehicle was being used along Embu-Kanyonyo road.

13. The applicant respondents acted in excess of their jurisdiction in levying absconding fees contrary to Section 106 and 107 of the Traffic Act. The offence of absconding a weigh bridge is not provided for under the Act but under Section 46(1) of the Kenya Roads Act Cap 408 and carries a fine of not more than Kshs.100,000/-. The respondents have no authority to impose the fine in form of US Dollars and to exceed the maximum allowed by the law.

14. The applicant contends that the due process of the law was not followed in imposing the fine for the law requires that the affected party be afforded an opportunity to be heard. The applicant relied on the case of **MARGARET MIANO VS KENYA NATIONAL HIGHWAYS AUTHORITY** petition no. 23 of 2015.

15. It is further argued that the removal and retention of the number plates violated Section 106 (4) and 4(a) of the Traffic Act. Upon removal of the plates, the respondents were required to deliver them to the Registrar to be kept while that order remains in force. The respondents instead handed over the number plates to the National Transport and Safety Authority (NTSA).

16. The respondents submitted that its actions of removing the number plates and retaining them is provided for by the law in its function of ensuring that road users adhere to the rules and guidelines on Axle Road are prescribed under the Traffic Act and regulations by the Cabinet Secretary under the Kenya Roads Act.

17. The Ex parte applicants submitted that Traffic Act deals with limitation of use of roads and prohibits use of overloaded vehicles on the road and that is only by weighing a motor vehicle that it can be determined whether it has carried a load within the prescribed limits or not. The respondents said that either a static or mobile weigh bridge may be used to weigh a vehicle. The respondent said they computed the vehicles weight through the method of volume and density to determine the weight of vehicle registration number KCC 677D after the driver switched off its engine. It was not explained which vehicle this was because that of the applicant is registration number KBR 449E.

18. The respondent is empowered to issue a prohibition order under Section 106(4) which calls for compliance by the owner of the vehicle. In this case the owner of the vehicle was required to pay the absconding fee of USD 2,000 or its equivalent in shillings. Pending the truck owner's compliance, the vehicle was to remain detained.

19. It further submitted that this judicial review proceedings are unmerited since the respondent acted within the law. It is denied that there was no illegality, lack of jurisdiction, bad faith or unreasonableness in the acts of the respondents as alleged.

20. The applicant raised several issues for determination to which were responded to by the respondent. For the court to determine the issues, it is important to identify the very essence of judicial review. In the case of **REPUBLIC VS KAJIADO LANDS DISPUTES AND TRIBUNAL AND OTHERS EX PARTE JOYCE WAMBUI AND ANOTHER NAIROBI HIGH COURT MISCELLANEOUS APPEAL NUMBER 689 OF 2001 NYAMU J.** (On 27 January 2006);

*a) Judicial review deals with decisions and the decision making process and where the award has merged with the judgment and no certiorari is sought against the judgment an order prohibiting further steps in enforcing the judgment, decree, or order would only hang in the air without an order for certiorari against the award and the judgment.*

*b) It is always necessary that the order, judgment, or decree to be quashed be availed and verified by an affidavit as stipulated in Order LIII, rule 7 of the Civil Procedure rules and the registrar is the only person who can verify the genuineness of the order e.t.c.*

21. In the case of **REPUBLIC VS PERMANENT SECRETARY MINISTRY OF WATER RESOURCES MANAGEMENT AND DEVELOPMENT EX PARTE AKAMBA TIMBER AND HARDWARE LTD MACHAKOS HIGH COURT MISCELLANEOUS APPEAL NUMBER 173 OF 2004 ONYANCHA J** (on 3 March 2006);

*“Judicial review orders are intended to correct a wrong or illegal performance or non performance of the inferior tribunals or bodies or persons who could be judicial and quasi judicial but now include administrative bodies or persons. Properly used, these orders are intended to bring out faster but more effective results.”*

22. Bearing in mind the purpose of judicial review, the issues for determination are identified as follows:

a) Whether the respondents acted in excess of their jurisdiction in removing the number plates of the applicant's vehicle and in imposing the penalty for absconding a weigh bridge.

b) Whether the respondent accorded the applicant or his driver fair hearing in pursuance with Article 50 (2) of the constitution and whether the rules of natural justice were observed.

23. The indisputable facts are that the applicant's vehicle KBR 449E was seized and number plates removed by the officers of the respondent on allegations that the vehicle was overloaded and that the penalty of USD 2,000 was subsequently imposed. The applicant stated that he was not served with the prohibition order which was not disputed by the respondent. It was later demanded by his advocate in his letter dated 8th of December 2015. In response to this letter the respondent in his reply dated 21st December 2015 explained why they were holding the applicant's number plates and that he was required to pay a penalty. A copy of the prohibition order was attached to the respondent's letter.

24. The copy of the prohibition order in Clause 1(b) does not indicate the excess load as required by the law. Neither does it prescribe the fine to be paid. It was explained in the respondent's letter paragraph 4 that the applicant was required to pay the penalty prescribed in the prohibition order before the number plates could be released. The penalty had not been communicated to the applicant or his driver about four (4) months after the number plates were confiscated. The applicant had a right to be provided with all the necessary information regarding the seizure of the number plates and what was expected of him.

25. The respondent stated that Section 106 of the Traffic Act empowers a police officer or inspector to remove a vehicle's identification plates where a vehicle has been used in contravention with Section 55 and Section 56 or contravention of any rules to the construction use and equipment of the vehicles.

Section 106 provides:

*(1) "Where any vehicle is found in use on a road in contravention of the provisions of this Act, or where any vehicle has been left on any road or other public place in such circumstances as to make it appear that such vehicle has been abandoned or should be removed to a place of safety, or where any vehicle has been left on a road in a position which causes or is likely to cause danger to other road users and the owner or driver cannot readily be found, it shall be lawful for any police officer or any inspector to take the vehicle or cause it to be taken to a police station or other place of safety by such method, route and under such conditions as he may consider necessary, having regard to all the circumstances of the case."*

Section 106(4) provides:

*"Any police officer, licensing officer or inspector, if he is of the opinion that any vehicle is being used in contravention of section 55 or section 56 or in contravention of any rules relating to the construction, use and equipment of vehicles, may by order prohibit the use of such vehicle, under such conditions and for such purposes as he may consider necessary for the safety of the public or to ensure that such vehicle does comply with the provisions of section 55 or 56; and any such order shall remain in force until the repairs specified therein have been satisfactorily completed and the vehicle has been certified as complying with the rules relating to construction, use, equipment and weight."*

Section 55 deals with the condition of a vehicle while Section 56 deals with limitation of loads as referred to in Section 106(4) of the Act.

26. Section 107 is also relevant and it provides:

*"It shall be lawful for any police officer to detain at a police station or other place of safety any*

*vehicle which has been removed from a road or other public place under section 106 until such inquiries have been made by the police as they may think necessary in the circumstances of the case.”*

27. It is not in dispute that the truck was not weighed so as to determine the excess load. The respondent submits that they used the method of volume and density to determine the weight. However, no excess load has been shown in any of the documents filed by the respondent including the prohibition order. The respondent relied in the case of **REPUBLIC VS OFFICER IN CHARGE OF AXLE LOAD MONITORING UNIT AND TWO OTHERS EX PARTE LAZARUSKYALO MUSYOKA [2015] eKLR** where the respondents claimed that they had availed photographs to show that the lorry was loaded with sand and that its number plates had been covered with mud in order to conceal the registration number.

28. In this case the respondent did not produce any photographs which could suggest that the truck was overloaded. It is the applicant who annexed photographs of the truck but do not relate to overloading. It was not explained why the driver was not arrested and the vehicle towed to the nearest police station for weighing as required by Section 106(1) of the Act.

29. This leads to the conclusion that the truck was not weighed and that the penalty of USD 2,000 was imposed without determining whether the truck was overloaded or not. The respondents having not established an offence of overloading under Section 56 of the Act had no justification to remove the number plates bearing in mind the provisions of the Kenya roads (KENHA) Regulations, 2013.

30. Section 106 and 107 of the Traffic Act under which the prohibitory order was issued do not impose jurisdiction to impose a penalty for absconding. The power is donated by Regulations 15(3) of the Kenya Roads (KENHA) Regulations, 2013 which provides;

*“Where a vehicle is found to have by passed or absconded from a 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 in Kenya Shillings, and subject to the provisions of these Regulations if the vehicle is found to be overloaded, the overloading fee and charging fee.”*

31. The said regulations are made by the Cabinet Secretary under Section 46(1) of the Kenya Roads Act Cap, 408.

32. Section 46 (3) provides that any fine or penalty imposed shall not exceed Kshs.100,000/- It is trite law that statutes take priority over regulations. It follows that where a statute has limited the penalty, any regulations made thereunder shall be in conformity with the statutory provisions.

33. The respondent argued that the penalty is valid relying on the case of **BUZEKI ENTERPRISES LTD VS. KENYA NATIONAL HIGHWAYS AUTHORITY CONSTITUTIONAL PETITION NO. 21 OF 2014 [2014] eKLR** where the court held that the provisions were lawful. However, there have been cases decided thereafter in which the penalty has been declared illegal for being in contravention with the rules of natural justice.

34. It was held in the case of **MARGARET MIANO VS. KENYA NATIONAL HIGHWAY AUTHORITY MOMBASA PETITION NO. 23 OF 2015** that:-

*“The issue to be determined here is whether the respondent had lawful cause to detain the applicant’s motor vehicle and to demand a fee of US Dollars 2,000 without due process.”*

I totally agree with this decision that KENHA is not an established tribunal for resolution of disputes. It is wrong for them to act as prosecutor and judge.

35. The penalty of USD 2,000 imposed by the respondent is unlawful in view of Section 46(3) of the Roads Act. As much as the core functions of the respondent are appreciated, the fine imposed for

absconding is contrary to the law, illegal, null and void.

36. Article 50 (2) provides that “every accused person has the right to a fair trial which includes the right to:-

- i. be presumed innocent until proven guilty;
- ii. to be informed of the charge with sufficient detail to answer it;
- iii. to have adequate time and facilities to prepare a defence;
- iv. to be informed in advance of the evidence the prosecution intends to rely on;
- v. to adduce and challenge the evidence.

37. It was held in the case of **MARGARET MIANO** case (supra):

*“ For the authorized officer or deponent to suggest that Regulation 15(3) does not envisage a judicial process is to make the Respondent, Judge, Jury and Executioner, rolled into the Kenya National Highways Authority. That would be a monstrous situation, and a violation of Article 50 of the Constitution which guarantees a right to fair trial.*

*“The number plates and weigh bridge certificate were taken away on 24th August 2015. The driver and/owner have not been charged in any Court of Law. The 1st respondent washes its hands and says that’s the work of the Police. Assuming the police were to charge the Plaintiff/Applicant with overloading and absconding the weigh bridge while the 1st Respondent has on the other hand charged, convicted and sentenced her for the same offences would that not amount to double punishment?”*

38. It is not in dispute that the respondent failed to comply with the rights of the applicant and his driver in convicting them of the offence of absconding a weigh bridge without taking them before a court of law for the adjudication of the dispute. The Constitution is the superior law and overrides the statutes and regulations on which the respondent heavily relied. The owner of the vehicle or his driver had not been served with any charges let alone being condemned unheard. The prohibition order is not a charge, a committal warrant or a notification of fine.

39. The applicant relied on the case of **CHEPKOECH MARITIM VS KENYA NATIONAL HIGHWAYS AUTHORITY AND ANOTHER [2015] eKLR** a case with similar facts, where it was held;

*“In other words the 1st respondent is a law unto itself. It determines weights under no supervision, impounds vehicles, imposes fees/fines/penalties and executes those orders through auctions undeterred.*

*“Regulation 9 of the 2013 Regulations under the Act makes provision for the installation of weigh bridges, static ones or other devices. These are not things that are hidden. It is common knowledge that there is no installed weigh bridge along Narok/Bomet Highway let alone Bomet town itself. The driver Peter Kones has averred that the lorry was not overloaded and it was not weighed.*

*“The 1st respondent will have to explain how the overweight was arrived at and what was the permitted weight for this lorry. It will explain what the supposedly detained lorry is doing at Plaintiff/Applicant’s home and the whereabouts of the overload.”*

40. The respondent in carrying out its duties under the Kenya Roads Act, 2007 should not impose on itself the duties of prosecution and adjudication of traffic or criminal charges. The Constitution and the

relevant statutes are very clear as to the jurisdiction in the adjudication of disputes as well as the hearing and disposal of criminal matters.

41. I reach the conclusion that the respondent acted in excess of their jurisdiction in imposing the penalty for absconding and in failing to afford the applicant and his driver a fair trial before a court of Law.

42. The decision of the respondent is hereby called into this court and quashed accordingly.

43. An order of mandamus shall issue against the respondent to release the number plates of vehicle registration number KBR 449E to the applicant within seven (7) days.

44. It is hereby so ordered.

45. The respondent will meet the costs these proceedings.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF APRIL, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Muriuki for Mr. Kabue for the Plaintiff/Applicant**