



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 69 OF 2016

ERASTUS GITUMA T/A MUCHUI BUILDERS &

TIMBER SUPPLIERS.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

RULING

Introduction

1. By his application dated 23rd February 2016, the Petitioner seeks conservatory orders that:

- a. ...[spent]
- b. ...[spent]
- c. *Pending the hearing and determination of this Petition, a temporary injunction be and is hereby issued restraining the Respondent's whether by themselves, agents or police officers from detaining and or confiscating the motor vehicles registration number KBR 500K and KBS 500K until further orders of the Honorable court.*
- d. *Pending the hearing and determination of this application, a temporary injunction be and is hereby issued restraining the Respondent's whether by themselves, agents or police officers from arbitrarily demanding unlawful 'absconding fees' until further orders of the Honorable Court.*
- e. *Pending the hearing and determination of this Petition, a temporary injunction be and is hereby issued restraining the Respondent's whether by themselves, agents or police officers from arbitrarily demanding unlawful 'absconding fees' until further orders of the Honourable court.*
- f. ...
- g. ...

2. The Petitioner also seeks costs of the application.

The Parties' cases and arguments

3. The Petitioner who is the registered proprietor of motor vehicles registration number KBR 500K and KBS 500K has pegged his application on the ground that the Respondent's officers impounded and detained the Petitioner's motor vehicles on 16th February 2016 on allegations that

- the Petitioner's drivers had absconded a weigh bridge on the same dated and that the Respondent insisted on the payment of USD. 2000 for each vehicle prior to release.
4. The Petitioner contends that such action is illegal and contrary to Articles 40 and 50 of the Constitution as the Petitioner's right to property as well as right to fair hearing have been violated. The Petitioner further adds that the Respondent's action is arbitrary and contrary to Article 47 of the Constitution as it violates the right to fair administrative action.
 5. The facts as outlined in the Petitioner's Supporting Affidavit filed on 24 February 2016 are largely not disputed. That the Respondent has custody of the Petitioner's subject motor vehicles is not contested.
 6. The Respondent has through a Replying Affidavit of David Higenes contested the application. The Respondent contends that the Petitioner's motor vehicles have been impounded on a temporary basis until the Petitioner pays an absconding or by-passing fees of United States dollars Two thousand or its equivalent in Kenya shillings. The by-passage is stated to have occurred at the Respondent's Isinya Weigh-bridge station.
 7. The Respondent maintains that its action of impounding and detaining the Petitioner's motor vehicle is justified as Regulation 15(3) of the Kenya Roads (Kenya National Highways Authority) Regulations made pursuant to Section 4(2)(d) of the Kenya Roads Act, 2009 authorizes and mandates the Respondent to take the action it has taken. The Respondent adds that it has the mandate to manage, develop, rehabilitate and maintain national roads and that such mandate includes controlling axle-loads.
 8. The Respondent further adds that the evidence in its possession shows that the Petitioner's drivers were intercepted by the Respondent's officials driving on a service lane. There was suspicion that the motor vehicles were overloaded with sand. The Respondent's officials gave chase but the former lost control of their motor vehicles.
 9. Subsequently, the Petitioner's motor vehicles were impounded and the Petitioner served with a prohibition notice which led to the detention of the motor vehicles until payment of the absconding fee of USD 2000. The Respondent adds that the statutory amount together with parking charges of Kshs. 2000/= per day have to be paid before the motor vehicles are released.
 10. The Petitioner in the meantime denies that his driver or agent absconded or by-passed any weigh bridge.

Discussion and Determination

11. I must on the onset point out that I am considering an interlocutory application for conservatory orders. At this stage of the proceedings, I need not make any specific and definitive findings of either fact or law. That must be left for the court at the final determination of the Petition. At this stage, the Petitioner need only demonstrate to me a prima facie case with a likelihood of success and also demonstrate the prejudice it is likely to suffer.
12. For any conservatory orders to issue, the court must be satisfied as well that Constitutional values and objects specific to the rights or freedoms in the Bill of Rights will be enhanced. The court needs to be satisfied as well by the Petitioner that the substratum of the Petition may be rendered nugatory, if the conservatory order is not granted.
13. Finally, there is the principle of public interest and public policy which the court must ascertain favours the granting or rejection of the conservatory application. In these respects the court must also weigh the proportionate effect, of any order to be granted, upon the Petitioner and the Respondent as well as the larger public.
14. The above principles have been neatly established in various cases including **Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011**, **Muslims for Human Rights & Others –v- Attorney General & Others HCCP No. 7 of 2011**, **Gatirau Peter Munya –v- Dickson Mwenda Githinji & Others [2014]eKLR** and **Kenya Small Scale Farmers Forum –v- Cabinet Secretary Ministry of Education Science & Technology [2015] eKLR**.
15. The conservatory orders sought herein are mandatory in nature. The court must consequently exercise additional caution and be satisfied that there is patent merit in granting the orders. There is need for the court to be clear that at the hearing of the Petition it will be vindicated and the interlocutory mandatory orders literally confirmed by the trial court. The court must ensure that

- the Respondent's rights are also not unduly prejudiced.
16. The Petitioner in the instant case contends that his rights to property and fair trial under Articles 40 as well as Articles 47 and 50 (1) of the Constitution have been impinged by the Respondent impounding the motor vehicles registration no KBR 500K and KBS 500K and insisting that an absconding fees of USD 2000 be paid by the Petitioner prior to release of the motor vehicles.
 17. It is not in controversy that the Petitioner is the owner of the motor vehicles. It is also not in controversy that the motor vehicles were impounded and detained by the Respondent on or about the 15th day of February 2015.
 18. The Petitioner on the face of the affidavit evidence before me was denied access to his property. The denial still continues.
 19. A violation of the right to property does not only occur where there is deprivation or where property is expropriated. It may also occur where a person is deprived of his right to access or use the property. The whole essence of Article 40 of the Constitution was not merely to protect the physical property but also to protect the known common law rights appurtenant to ownership of property. These include the right to user to the exclusion of every other person and the right to sell the same property: see **Githunguri Dairy Farmers Co-operative Society -v- Attorney General & others [2015]eKLR**.
 20. It must however be noted that the right under Article 40 of the Constitution is not absolute. Pursuant to Article 24 of the Constitution, a right or fundamental freedom may by law be limited provided that such limitation is reasonable and justifiable in an open and democratic society.
 21. The Respondent has sought to discharge its burden of justification by contending that the fact of impounding and detention the Petitioner's motor vehicles was on the basis of the provisions of Regulation 15 of the Kenya Roads (Kenya National Highways Authority) Regulations 2013 which allows such detention. Regulation 15 reads as follows:

15. Procedure to control overload

(1) Where a vehicle is overloaded or is in contravention of these Regulations, an authorised officer shall undertake overload control measures and enforce these regulations.

(2) Subject to sub-regulation (1), the driver shall follow all the instructions issued by an authorised officer so that road safety and overload control procedures can be adhered to.

(3) Where a vehicle is found to have bypassed 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 procedures provided in these Regulations shall be instituted in addition to the absconding fee.

(4) Failure to adhere to the instructions of the Authority or the police shall constitute an offence, punishable by detention of the vehicle and cargo at the expense and risk of the registered owner.

(5) If the fee provided in this regulation is not paid within ninety days from the date of imposition, the Authority shall issue a notice of sale by auction of the vehicle and the cargo.

(6) Subject to sub-regulation (5), before the cargo is disposed of, the Authority shall publish a notice in the Gazette and in two newspapers of national circulation within fourteen days after the motor vehicle or trailer has been impounded requiring the owner to claim for the goods failure to which the goods will be disposed off.

(7) *The proceeds of any such sale shall cover the charges occasioned by sale and may include, the cost of the advertisement and removal of the vehicle or trailer while the remaining proceeds, if any shall be payable to the registered owner, or where the owner fails to claim within six months of the sale, the proceeds shall be deposited to the Authority.*

(8) *For security reasons the Authority shall notify the nearest police station within twenty four hours concerning a vehicle detained at the weigh bridge station.*

22. It is clear that the regulation allows the Respondent to detain motor vehicles where the motor vehicle is said to have by-passed or absconded from a weighbridge station. Prima facie consequently, the Respondent is apparently authorized and justified by law to detain the motor vehicle and at this stage of the proceedings it would not be appropriate to make a conclusive finding of both law and fact that the Respondent has violated the Petitioner's right to property. A deeper interrogation will be necessary at the hearing of the Petition to determine whether Regulation 15 falls within the reasonable and justifiable limitations. It would however be safe to conclude for now that in view of the mandate of the Respondent to control axle loads, overloaded axle may be detained albeit temporarily.
23. The Petitioner also complained that there has been a violation of Articles 47 and 50 of the Constitution by the Respondent and this has prejudiced the Petitioner. The Articles 47 and 50 have ingrained the natural justice tenets. Both provide for fair administrative action under Article 47 and fair hearing under Article 50. Effectively, Article 47 would apply to non-judicial bodies whilst Article 50 applies to judicial and quasi-judicial bodies applying the law to resolve disputes.
24. The Petitioner's counsel Mr. Robin Mwenda argued that Regulation 15 is in contravention and inconsistent with both Articles 47 and 50 of the Constitution. He placed reliance upon the decision of Emukule J in **Margaret Miano –v- Kenya National Highways Authority HCCP No. 23 of 2015 (MSA) [2015] eKLR**. At an interlocutory stage, Emukule J held that Regulation 15 appeared to be inconsistent with the Constitution as it apparently granted the Respondent “*powers of a Kangaroo court, that is to say an improperly constituted body, a tribunal before which a fair trial is impossible*”.
25. Counsel for the Respondent Mr. P.C Onyango on the other hand stated that Regulation 15 is yet to be declared unconstitutional and a presumption must still be made that it is constitutional. He stated that the motor vehicles were detained for having violated a statutory requirement. Counsel further relied on the two cases of **Buzeki Enterprises Limited –v- Kenya National Highways Authority [2014] eKLR** and **Blue Jay Investment Ltd –v- Kenya National Highway Authority [2014] eKLR**. In both cases, it was held that Regulation 15 provided for payment of “a fee” and not “a fine”. In both cases, the court also held that Regulation 15 did not provide for a person to be taken to court for a penalty to be levied hence there was no contravention of the Constitution.
26. Like the decision in *Margaret Miano's* case, the decisions in **Blue Jay Investments Limited** and **Buzeki Enterprises** cases were also by the High Court. The latter two decisions were also of interlocutory nature. All the decisions are of persuasive value to this court.
27. In the case of **Andrew Muiya Mbithi –v- Inspector General of Police & 2 Others HCCP No. 431 of 2015 [2015] eKLR**, I stated as follows concerning Regulation 15:

“[14.] It is clear that a finding must be made that an automobile has bypassed or absconded from a weigh bridge prior to the fees of USD 2000 being levied. It is however unclear who makes this finding. It is to be noted that the result of such a finding is penal to the owner of the motor vehicle in the form of a fine or fees of USD 2000. The finding is also a matter of fact to be discerned and determined when all circumstances are taken together. It is not made out of simple speculation. The founder of fact is enjoined to put together all the facts leading to when the automobile is impounded.”

28. These observations still stand in good stead.

29. In the current case the Petitioner's drivers are stated to have been driving the motor vehicles

suspected to have been overloaded. It is further stated that when directed to the weigh-bridges, the drivers declined to do so but instead sought to avoid the weigh-bridge altogether. The Petitioner denies that this is the factual position. The Petitioner also denies any liability to pay a fee of USD. 2000. Effectively there emerges a dispute. A controversy which can only be resolved by application of the law. Such a situation would invite an impartial and independent tribunal.

30. In the instant case however the Respondent through its officials appears to be the complainant, the witness, the judge and the executioner. The Petitioner's drivers were condemned as soon as the motor vehicles were impounded and detained to paying USD. 2000 or its equivalent. There was no hearing the Petitioner's side of the story. The Respondent states that the Regulation 15 states so. This appears contrary to provisions of Article 47 if the Respondent states that it is entitled to levy fees or Article 50 if the Respondent states that the USD 2000 is some sort of penalty for violation of the law.

Conclusion

31. I am satisfied that, at this stage, the Petitioner has made out a prima facie case with a likelihood of success. I would tend to agree with Emukule J that the Respondent could be operating "a Kangaroo court". The spirit of our Constitution especially Articles 159 and 50 which anticipate disputes whether of a penal nature or a civil nature to be determined by application of the law before an independent and impartial tribunal appears to be headed for defeat as Regulation 15 does not seem to have taken into account the tenets of natural justice that no person should be condemned unheard and that no man should be a judge in his own cause.

32. The subject motor vehicles may go to waste if they continue to be detained. The role and functions of the Respondent should however, not be gainsaid. The Respondent claims that the reason for detaining the motor vehicles is to ensure that any sanctions meted out are met. It would therefore be more appropriate and proportionate if the motor vehicle were released but on terms.

Disposal and reliefs

33. The upshot is that the application succeeds but on terms. Prayers number 3, 4 & 5 of the application dated 23rd February 2016 are granted. I further order that pending the hearing and determination of this Petition the Respondent do release to Petitioner the Petitioner's motor vehicle registration number KBR 500K and KBS 500K conditional only upon the Petitioner depositing as security in this court the amount of Kshs. 200,000/= prior to the release of the motor vehicles. The Petitioner is also to execute and file an undertaking that he will not sell or lease or dispose of the subject motor vehicles until the Petition is heard and determined.

34. The costs of the application will abide the outcome of the Petition.

35. Orders accordingly.

Dated, signed and delivered at Nairobi this 10th day March, 2016

J.L.ONGUTO

JUDGE