



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO. 16 OF 2015

IN THE MATTER OF THE CONSTITUTION OF KENYA
(SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)

HIGH COURT PRACTICE AND PROCEDURE RULES 2006

IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 19(2)
& (3), 20, 21, 22, 23, 25, 27, 28, 29, 31, 40, 47, 50, 159, 165, 258 & 259
REGARDING PROTECTION OF RIGHT TO PROPERTY RELATING
TO MOTOR VEHICLE REGISTRATION NUMBER KBN 889Z, THE
RIGHT TO A FAIR TRIAL AND THE RIGHT TO FAIR
ADMINISTRATIVE ACTION OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE TRAFFIC ACT, CHAPTER 403, LAWS OF KENYA

AND

IN THE MATTER OF THE KENYA ROADS ACT (2007) (CAP 408) &
LEGAL NOTICE NO. 86 OF 2013

BETWEEN

NDUGU TRANSPORT COMPANY LIMITED.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

RULING

By the Petition filed herein on 17th September 2015 the Petitioner prays for:-

“

- (a) A declaration that the Petitioner's fundamental rights of protection of its right to property, fair administrative action and fair hearing under the Constitution have been violated, infringed and contravened;***
- (b) THAT the Respondents and anyone acting on their behalf be ordered to return the registration plates of Motor Vehicle Registration Number KBN 889Z to the Petitioner forthwith;***
- (c) THAT the imposition of a fine disguised as a “fee” of \$ 2,000 be declared to be unconstitutional;***
- (d) THAT considering that this application is brought in the public spirit to defend the constitutional rights of a citizen, orders for costs be reasonable and commensurate to the cause in any event;***
- (e) Such other order(s) as the Honourable Court shall deem just”.***

It is the Petitioner's case that she has been operating a quarry and supplies sand and ballast to her customers using her own vehicles; That on 13th July 2015 at about 11.15AM the Respondent through its officers, or agents trailed her Motor Vehicle Registration Number KBZ 889Z which had a legally accepted load of 14 tons of Ballast and which was to be delivered to one Israel Agina along the Kisumu – Busia Road. The driver and turnboy thinking that the vehicle behind was carrying carjackers parked the vehicle at the customer's gate and ran off only to see the Respondent's officers remove the vehicle's number plates. The officers also left inside the vehicle an order for the removal of the vehicle from the road. They also required the owner of the vehicle to pay an absconding fee of 2,000 dollars. The Petitioner disputes that the vehicle absconded a weigh bridge and that the vehicle was weighed and hence contends it was impossible for the Respondent's officers to conclude it had an access of 9,500 kilograms. She also disputes that the vehicle was abandoned on the Ugunja – Maseno road. She argues that the fee of US Dollars , levied upon her by the Respondent is a penalty and as such she was entitled to a fair hearing and due process before being condemned. That the fee contravenes the provisions of Section 46(1) of the Kenya Roads Act and Article 50 of the Constitution and hence is null and void under Article 2(4) of the Constitution. She further avers that as a result of the wrongful and illegal actions of the Respondent her rights to property and her economic rights have been grossly denied, violated, infringed and denied as have her rights to fair hearing, fair administrative action and equal benefit of the law and she is entitled to the prayers sought.

Simultaneously with the petition the applicant filed a Notice of Motion seeking release of the number plates seized by the officers pending the hearing and determination of the petition. That application was allowed by consent on condition that the Petitioner deposit the sum of US Dollars 2,000 in Court a condition which was met and the identification plates subsequently released.

The Petition is opposed. According to the Respondent its officers attached to the Busia Mobile Monitoring Weighbridge Unit intercepted the Petitioner's motor vehicle upon suspecting it was overloaded and having bypassed the Busia weighbridge. However the driver diverted off the highway and abandoned the vehicle. The officers proceeded to weigh the ballast the vehicle was carrying and found it was overloaded by 9,500 kilograms contrary to Sections 55 and 56 of the Traffic Act. It was then that the officers issued an “Order To Remove Vehicle From Road Or Public Place, To Offload Excess Weight Or to effect repairs” and also removed the vehicle's identification plates pending removal of the excess weight as well as payment of the fees prescribed under the Highways Regulations by the registered

owner. Relying on Sections 55 and 56 of the Traffic Act Counsel for the Respondent submitted that the respondent has the mandate to ensure there is sanity and full adherence to the road and traffic laws and also to ensure that roads are not destroyed by vehicles carrying loads over and above those prescribed by law; that the removal of the identification plates is supported by law and the fee imposed was a compliance measure under Section 106 (4A) of the Traffic Act failure to which an offending motor vehicle shall not be in use until compliance is made. Citing the decision of Mutende J in **Blue Jay Investment Limited V. Kenya National Highways Authority [2014] eKLR** he submitted that there is no requirement that the offending party be first charged in a court of law before the motor vehicle plates are removed. He contended that the plates are removed to ensure the vehicle does not go back on the road as to do so would pose a danger to other road users. That moreover the plates are removed by the police and as such the Respondent cannot be held liable. On this he relied on **Republic V. Officer in-charge of Axle Load Monitoring Unit & 2 Others Ex-parte Lazarus Kyalo Musyoka [2015] eKLR**. He urged this Court to find that the Respondent acted lawfully both in removing the plates and in imposing the fee of US \$2,000. He prayed that this petition be dismissed and the money deposited in Court be released to the Respondent.

Counsel for the Petitioner relied on **Margret Miano V. Kenya National Highways Authority [2015] eKLR** to support his submission that the demand of US \$2,000 is unconstitutional.

The Petitioner's grievance in this case arises from the removal of his vehicle's identification plates and the imposition of the \$2,000 fee and he wants this Court to make a declaration that his fundamental rights to property, to fair administrative action and fair hearing were violated and secondly that the imposition of the fee of \$2,000 is unconstitutional. He had also asked for an order for the release of the vehicle's identification plates which prayer is spent the plates having been released.

The Petitioner concedes that on the material day her motor vehicle Registration Number KBN 889Z was used on the road to transport ballast to a customer. She also concedes that at one point the crew of the vehicle drove it off the main road and parked it somewhere (according to her in front of the customer's gate) and ran away. This is an admission that the crew abandoned the vehicle never mind the reason. It has now come to light that those trailing the truck were not criminals but officers of the Respondent together with police officers attached to the Busia Mobile Monitoring Weighbridge Unit on a routine compliance check. It is the Petitioner's case that the truck's crew observed, from their hideout, the officers go to the truck and remove its identification plates. The Respondent's position is that they weighed the vehicle and found it overloaded. Whether the truck was in fact weighed and found to have an excess weight or not is not a question for this Court but for the traffic court. Suffice it to say here that Section 106(4) of the Traffic Act authorizes any police officer, licensing officer or inspector, if he is of the opinion that a vehicle is being used in contravention of Section 55 or 56 of the Act to 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. Both the driver and turn boy of the truck admit that such an order was left in the truck by the officers: Section 106(4A) authorizes a police officer, licensing officer or inspector to then remove the vehicle's identification plates and the vehicle licence. In effect the removal of the Petitioner's identification plates the crew having abandoned the truck and the officers being of the opinion it was being used in contravention of Section 56 of the Traffic Act was therefore sanctioned by the law and could be said to have breached her rights to property, fair hearing and fair administrative action.

What about the imposition of the US \$2,000 fee? I am of the view that this would not be a proper case to determine the constitutionality or otherwise of this fee as clearly the officers here overreached themselves. According to regulation 15(3) of the Kenya Roads (Kenya National Highways Authority) Regulations 2013 this fee is payable where a vehicle is found to have bypassed or absconded from the weigh bridge station,

whether overloaded or not. In the instant case there was no weigh bridge on the road at all. At paragraph 6 of the replying affidavit Road Inspector Dennis Cheruiyot Higenes deposes that they intercepted this vehicle along the Ugunja – Maseno road with the aim of undertaking routine compliance check and at paragraph 7 he states that upon stopping the vehicle for weighing the driver diverted. The crew's

assertion that the officers were trailing them is more probable as nowhere does the Road Inspector allege that upon the driver diverting off the highway they quickly jumped into their vehicle and pursued him. My finding is that in the circumstances of this case the imposition of the \$2,000 fee was arbitrary as the driver had not absconded or bypassed a weigh bridge. If there indeed was a weigh bridge it has not been proved to the satisfaction of this Court. Accordingly whereas this Court has declined to grant the declarations sought it has come to the conclusion that the levying of the fee in this case was unlawful and directs that the money deposited in Court be released to the Petitioner. As for the costs of the petition each party shall bear their own costs. It is so ordered.

Signed, dated and delivered at Kisumu this 3rd day of November 2016

E. N. MAINA

JUDGE

In the presence of:-

N/A for the Petitioner

Mr. Kouko for the Respondent

C/A: Serah Sidera