



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 50 OF 2016**

**1. RICRAC COMPANY LTD**

**2. ERIC KIBAARA NDERITU .....PETITIONERS**

**VERSUS**

**1. KENYA NATIONAL HIGHWAYS AUTHORITY**

**2. THE O.C.S. KALOLENI POLICE STATION .....RESPONDENTS**

**RULING**

1. In the petition dated 21.9. 2016, the petitioner has sought orders that his right have been violated and threatened With violation; a declaration that Regulation 15 (3) of the Kenya National Highways Authority Regulations is Unconstitutional and therefore null and void; an order for the release of **Motor Vehicle Reg No.KCG 475L, Scania** by the OCS Kaloleni police station and its number plates by the 1st Respondent as well as loss of income from the motor vehicle at the rate of Kshs 18, 000/= per day from 23. 8. 2016 till its release to the petitioners.

2. Simultaneously filed with the application was the Notice of Motion also dated the 21. 9. 2016 and seeking Conservatory orders for the return of the motor vehicle number plates and the release of the motor vehicle itself to the petitioner.

3. The basis for seeking the conservatory orders are essentially the same as the grounds upon which petition has been brought . The reasons can be summarised that:- on the 22. 8. 2016, the 1st Respondent's agents found the motor vehicle KCG 475L Parked off the Kaloleni-Mazeras Road near RHINO CEMENT Factory unattended. They removed its number plates and left a notice headed "**ORDER TO RESUME VEHICLE FROM ROAD OR PUBLIC PLACE TO OFF LOAD EXCESS WEIGHT OR EFFECT REPAIRS**". That the motor vehicle was not on Kaloleni- Mazeras Road and further that no charges have been preferred as against the driver or the registered owner. Additional explanation is given in the affidavit in support that having seen the notice, the motor vehicle was driven to Kaloleni police station by the driver, where it remains parked to date but no charges relating to overweight or avoidance of a weigh bridge have been preferred except the charge of driving a motor vehicle without number plates to which the driver pleaded guilty, was convicted and fined Kshs 2,000/- in **Kaloleni Traffic Case No. 1050 of 2016**. The deponent then proceeds to assert that as a result of the detention of the motor vehicle and its number plates, it cannot be used on any public road and therefore the petitioner has lost and continues to lose Kshs. 18,000 per day and it stands to breach obligations under 3rd Party contracts. The court is therefore urged to grant the application as the Respondents stand to suffer no prejudice if the orders are granted.

4. In opposition to the application, the 1st Respondent filed an affidavit sworn by one Oscar Mwangome who describes himself as the team leader - monitoring unit, Axle Load Control Department and a person conversant with the facts and circumstances giving rise to the petition who has the authority to swear the affidavit. The deponent then sets out the statutory obligations and mandate of the 1st Respondent as being the responsibility for management, development, rehabilitation and maintenance National Roads and the duty to ensure adherence to dictates and guidelines on axle load control under the Traffic Act and the Regulations made thereunder. The deponent maintains that pursuant to the legal mandate it is bound to enforce the provisions of Regulation 15(3) of the Kenya Roads [Kenya National Highways) Regulations which provides:-

**"Where a vehicle is found to have bypassed or absconded from the weigh bridge station, whether overloaded or not, the registered owner shall be liable to pay a bypassing or absconding fee of two thousand and United States Dollars or its equivalent in Kenya shillings".**

5. On the basis of that provision the deponent contends that the motor vehicle was found unattended and without driver while parked along an access road; took photographs and without finding that it was overloaded removed the number plates and left the Notice adverted to by petitioner. The deponent then adds that the actions taken over motor vehicle were not arbitrary but lawful and that it has always been willing to weigh the motor vehicle, but that the petitioner who has ignored the legal notification to have the motor vehicle weighed to conform with the prescribed weight limits hence they have come to court without clean hands and are attempting to prevent the respondent from executing its legal mandates. In summary the 1st Respondent contends that the petition is an attempt to avoid the petitioners' obligation to comply with legal provisions under the Act and the Regulations made thereunder.

6. When the advocates appeared in court to argue the application, Mr Olendi Advocate appeared for the petitioner / applicant while Mr Tindi appeared for the Respondent. They, in submission stressed the merits and demerits of the petition and therefore the application founded on it. With a hindsight this was one of those situations that a lot of court's time would have been saved had the parties opted to urge the petition rather than the application in the interim.

7. That having been said however, the conservatory orders sought are in the nature of mandatory injunction and the principles to be considered are, to this court, well settled. An applicant must demonstrate special and an extraordinarily clear case to convince the court that the matter is one capable of being decided at once. The court need to have the confidence and assurance that at the end of the matter it would not entertain the thought that the order ought not to have been given in the interim. The principles underscore the fact that interim mandatory injunction have determinative effects and ought to be granted very sparingly and only in the exceptional and clearest of the cases. Being an equitable relief, even where the case is strong and straight forward case, the court may decline granting an order if it views the conduct of the applicant as not deserving or not meeting the approval of the court or where the equity has been defeated by laches.

In making a determination the court looks at the pending dispute and tries, as it were, to assess the odds or prospects of success.

8. I have set out the foregoing principles very well aware that I am dealing with an application for conservatory orders intended to last and preserve the subject matter pending the determination of the petition. As much the conservatory orders sought herein may be seen to be in the nature and purport of injunction, in reality, conservatory orders are not ordinary civil law remedies. They are remedies created under the constitution not as tools to be employed in ordinary litigation between private individuals but kits to keep alive and in situation the subject matter of the litigation. See *Judicial Service Commission - vs- Speaker of National Assembly & Another [2013] eKLR*.

In *Wilson Kaberia Nkunja –v- The Magistrate and Judges Vetting Board and Other Petition No.154 of 2016* the court set out the prerequisites of grant of conservatory orders to be fulfilled when:-

**“(a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.**

**(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and**

**(c) The public interest must be considered before grant of a conservatory order.”**

9. In the context of this matter, while it can be said that the subject matter is the disclosed motor vehicle, the foundation of the petition and therefore, the dispute, is the propriety of the conduct of the Respondent in detaining motor vehicle without a criminal charge and the Constitutionality of the Regulation 15(3) which the Respondent contends permit it to compel petitioners to pay a sum of money called bypassing or absconding fee. The Regulation as relied upon by the Respondent does not seem to make an adjudication as a precondition of the question of whether or not there was bypassing or abscondment by the person so alleged. I have studied the Regulations and prima facie I am not in doubt that it is rife with the prospect of interpretation that an officer of the Respondent may stop or spot any motor vehicle or come by it anywhere and pronounce it having bypassed or absconded a weigh bridge. Without making a definitive determination, which must await the hearing of the petition, I hold that prima facie, an arguable case has been presented. Where a prima facie case is shown, the next question for determination is what injury awaits the Respondent if the orders are not granted.

10. I take Cognisance that a motor vehicle is a property as defined under Article 260 and protected by Article 40 of the Constitution and arbitrary deprivation of any kind is not permitted. It would have been a different matter had it been contended that the motor vehicle has been detained pending arrest of the driver or the owner. In this matter the Respondent do not contest that the motor vehicle was driven to the police station and the driver was thereafter charged with the offence of driving a motor vehicle on a public road without prescribed Registration number plate. I find that before the dispute between parties concerning the right of the Respondent to insist on collecting the bypassing or absconding fee the detention will persist with the inevitable result that the motor vehicle will be kept away from the petitioners. That to this Court will not be without substantial injury which even if not financial or monetary in nature, the very act of keeping away the property from the owner without due process anticipated under article 50 of the constitution is an injury enough to be avoided by grant of conservatory orders. No injury to a citizen is comparable with an act capable of being conceived as condemning one unheard.

The decision of the Supreme Court in *Gitirau Peter Munya v Dickson Mwenda Kithinji and 2 Others [2014] eKLR* adopted a similar position and held as follows:

**“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”**

11. I find that the petitioner is entitled to and therefore granted orders in terms of prayers 5 & 6 of the Notice of Motion dated 21. 9. 20 16 pending the hearing and determination of the petition. This however shall not be construed to mean that the petitioners have been granted any immunity against due process including prosecution if the prosecutorial agencies shall establish the desire and need to prefer any legitimate charges.

For purposes of case management, the Respondent may file response to the petition within 14 days from today for a Case Conference to be conducted on the 5th day of December 2016.

I award the Costs of the application to the petitioner.

Dated and delivered on this 7<sup>th</sup> day of **November 2016**.

**HON. P.J.O. OTIENO**

**JUDGE**