



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 211 OF 2014**

REPUBLIC.....APPLICANT

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....1<sup>ST</sup> RESPONDENT

INSPECTOR GENERAL OF POLICE .....2<sup>ND</sup> RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT

ATTORNEY GENERAL .....4<sup>TH</sup> RESPONDENT

EX-PARTE

YH WHOLESALERS LIMITED

**JUDGMENT**

1. Through the notice of motion application dated 3<sup>rd</sup> July, 2014 the ex-parte Applicant, YH Wholesalers Limited prays for orders against the 1<sup>st</sup> to 4<sup>th</sup> respondents namely Kenya National Highways Authority, Inspector General of Police, Director of Public Prosecutions and Attorney General as follows:

**“1. That the application herein be certified as urgent and service thereof be dispensed with in the first instance.**

**2. An order do issue to the Respondents to be stopped from holding and unconditionally release truck registration No. KBH 644S or any other security they may be holding to the Applicant, his authorised employees or agents.**

**3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents be penalized or otherwise do compensate for the losses incurred by the applicant and damages for irregularly impounding motor vehicle registration No KBH 644S.**

**4. The 1<sup>st</sup> Respondent be hereby compelled to publish and deliver up to the Applicant a notice pursuant to law stipulating reasons with evidence for holding or impounding motor-vehicle registration No KBH 644S.**

**5. A conservatory order or injunction do issue to restrain the Respondents or any of them by themselves, their agents, servants or employees from carrying out any further investigations, or any intended prosecution of the petitioner in any manner whatsoever or summoning any of the agents, servants or employees of the Petitioner for questioning on any matters relating to the illegal and irregular detention of truck registration No. KBH 644S.**

**6. The Court be pleased to grant any other orders that it may deem necessary in the interest of justice.**

**7. 7. That the costs of this Application be provided for.”**

2. The Application is supported by the statement of facts, the verifying affidavit of Khaleed Omar, a supporting affidavit of the same Khaleed Omar and annexures to the affidavits all filed together with chamber summons application for leave on 3<sup>rd</sup> June, 2014.

3. Although in its pleadings the Applicant referred to the motor vehicle which is the subject these proceedings as registration number KBH 644S, the correct registration number as per the copy of the logbook exhibited by the Applicant is KBH 664S.

4. The Applicant's case is that it is the registered owner of Motor Vehicle KBH 664S. On 23<sup>rd</sup> May, 2014 the Applicant's employee one Khaleed Omar was dispatched to deliver goods from Mombasa to Congo using the truck in question. At Mlolongo Weighbridge in Athi River, the respondents impounded and detained the truck. It is the Applicant's case that the impounding and detention of the truck was unwarranted and unjustified and had caused the company huge losses.

5. After the Applicant filed this matter, the Court issued remedial orders which included the release of the goods and the truck to the Applicant. The order for the release of the truck was subject to the Applicant depositing 2000 US dollars with the 1<sup>st</sup> Respondent.

6. In paragraph 2 of the statement of facts, the Applicant asserts that its application is based on the following provisions of the Constitution:

**“2.1 ARTICLE 2 of the Constitution cites the supremacy of the Constitution.**

**2.2. ARTICLE 3 of the Constitution obligates every person to respect, uphold and defend the Constitution.**

**2.3. ARTICLE 10 of the Constitution sets out the national values and principles of governance for Kenya which include the Rule of Law, equality, human rights, transparency and accountability.**

**2.4 ARTICLE 19 of the Constitution provides the place of the Bill of Rights in Kenya as a state and the rationale for the recognition and protection of human rights and fundamental freedoms.**

**2.5. ARTICLE 20 of the Constitution makes provision for the application of the Bill of Rights and in particular provides that the Bill of Rights applies to all law and binds all state organs and all persons.**

**2.6 ARTICLE 21 of the Constitution makes provision for the implementation of rights and fundamental freedoms and in particular makes it a fundamental duty of the state and every state organ to observe, respect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.**

**2.7 ARTICLE 22 of the Constitution provides for the right of every person to institute proceedings before this court for the enforcement of fundamental rights and freedoms.**

**2.8 ARTICLE 23 of the Constitution vests coercive power in this court to make orders necessary for enforcement of fundamental rights and freedoms.**

**2.9 ARTICLE 40 of the constitution provides subject to Article 65, every person has the right, individually or in association with others, to acquire and own property-**

**(a) of any description; and**

**(b) in any part of Kenya.**

**(2) Parliament shall not enact a law that permits the State or any person-**

**(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**

**(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in a Article 27 (4).**

**2.10 ARTICLE 47 of the Constitution of Kenya provides for the right to fair administrative action which is an administrative action that is lawful, reasonable and procedurally fair.**

**2.11 ARTICLE 48 of the Constitution provides that the State shall ensure access to justice for all persons and, if any fees is required, it shall be reasonable and shall not impede access to justice.**

**2.12 ARTICLE 50 of the Constitution provides every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

**2.13 Article 159 of the Constitution cites the judicial authority to determine this matter.”**

7. The application is opposed through the replying affidavit of Engineer Isaiah J. Onsongo of the 1<sup>st</sup> Respondent’s Axle Load Department. The 1<sup>st</sup> Respondent’s case is as follows. On 17<sup>th</sup> May, 2014 the Applicant’s motor vehicle registration number KBH 664S was called into Athi River Weighbridge to be weighed using the static scale as it had been found to have been off scale on the High Speed Weigh in Motion that is positioned on the highway, meaning that the motor vehicle had not been appropriately positioned on the scale to give clear readings of its weight on each axle. The driver did not heed the call to get into the weighbridge and drove off. The motor vehicle was then tagged in the system as having bypassed the weighbridge.

8. On the return trip on 23<sup>rd</sup> May, 2014, as the motor vehicle was being weighed, the weighing system flagged it out as having bypassed the weighbridge on 17<sup>th</sup> May, 2014. The motor vehicle was impounded for bypassing the weighbridge in accordance with Section 15(3) of the Kenya Roads (Kenya National Highways) Regulations, 2013 (the “Regulations”). The motor vehicle was then parked at the Athi River Weighbridge yard pending the payment of 2000 US dollars as prescribed by the said Section 15(3) of the Regulations.

9. Engineer Onsongo exhibited a document showing that motor vehicle registration No. KBH 664S was tagged for action on 17<sup>th</sup> May, 2014 at 21:15:14 hours by one Erick Wasonga and given Tag. No TVKA 113. It is therefore the 1<sup>st</sup> Respondent’s case that the Applicant’s motor vehicle was held lawfully and this application has no merit and should be dismissed with costs.

10. The 2<sup>nd</sup> to 4<sup>th</sup> respondents supported the 1<sup>st</sup> Respondent’s position. They were also of the view that their role in this matter is peripheral.

11. The only question to be answered is whether the remedy of judicial review is available to the Applicant in light of the facts placed before the Court. Judicial review steps in to correct illegalities, irrationalities and breaches of the rules of natural justice by public bodies and or public officers. For one to succeed in a judicial review matter there is need to demonstrate that there is illegality and or irrationality and or procedural impropriety in the actions of a public body.

12. Commenting on the role of judicial review in the case of **Council of Civil Service Unions v Minister for the Civil Service [1984] 3 ALL ER 935** Lord Diplock opined that:

**“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community ; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.**

**By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.**

**By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.....**

**I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”**

13. From the uncontroverted evidence placed before the Court by the 1<sup>st</sup> Respondent, it is clear that the driver of the Applicant’s vehicle evaded a weighbridge. Regulation 15 provides that:

**“Procedures to control overload.**

**15. (1) Where a vehicle is overloaded or is in contravention of these Regulations, an authorized 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.”**

14. The 1<sup>st</sup> Respondent complied with the Regulation to the letter and as was noted by L.N. Mutende, J in Machakos **H.C. Civil Misc. Application No. 122 of 2014 Blue Jay Investment Limited v Kenya National Highways Authority;**

**“The regulations do not provide for a situation where the offender is charged in a court of law and a fine imposed. What is provided for is payment of a fee. In the circumstances the action that was taken by the respondent was justified.”**

15. None of the constitutional provisions cited by the Applicant was offended by the 1<sup>st</sup> Respondent. The application fails and the same is dismissed with costs to the respondents. The 2000 US dollars deposited with the 1<sup>st</sup> Respondent will act as the fee envisaged by Section 15(3) of the Regulations.

Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of May, 2015

**W. KORIR,**

**JUDGE OF THE HIGH COURT**