



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 14 OF 2013

REPUBLIC.....APPLICANT

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY.....RESPONDENT

MARY MUTHONI & 25 OTHERS.....EX-PARTE APPLICANTS

JUDGMENT

1. The *Ex-parte* Applicants are owners of various commercial vehicles and are also members of an incorporated organisation known as Lorry Owners Association. By the Notice of Motion dated 25th April 2013, which was filed pursuant to the leave of court granted on 8th April 2013, they seek the following orders:

(a) an order of prohibition to prohibit the Kenya National Highways Authority whether by itself or its agents from weighing the *Ex-parte* Applicants' motor vehicles for the purpose of enforcing axle and gross weight regulations.

(b) the costs of the application be provided for.

2. This application was premised upon the Supporting Affidavit of Mary Muthoni sworn on 25th April 2013, the Statement of Facts dated 5th April 2013 and the Verifying Affidavit of Mary Muthoni sworn on 5th April 2013.

3. The *Ex-parte* Applicants' case is that the Respondent has unlawfully been weighing their vehicles for purposes of ensuring that their axle and gross weight is in compliance with the law. This is notwithstanding that in its press statement (see exhibit “MMIII”), the Respondent indicated that only heavy commercial vehicles, defined under Section 2 of the **Traffic Act Cap 403** as vehicles

“whose tare weight exceeds six thousand seven hundred and twenty pounds”

should be weighed.

4. Further, they allege that they have been using the Highways for a long time without their vehicles being weighed. This practice only began recently against their legitimate expectation that their vehicles

would not be weighed. As a result, the *Ex-parte* Applicants have been forced to pay arbitrary fines.

5. The Respondent opposed the application by the Replying Affidavit of Eng. Muita Ngatia sworn on 25th October 2013. The Respondent averred that it had the mandate under the **Kenya Roads Act, 2007** to enforce the rules and guidelines on axle load control prescribed under the Traffic Act and any regulations under the Kenya Roads Act.

6. It is also vested with the power to weigh and assess the weights, dimensions and capacities of vehicles using any road in Kenya by virtue of **Section 22** of the said Act. The maximum axle weights are provided for under the Twelfth Schedule to the Traffic Rules enacted under the Traffic Act.

7. By virtue of the above provisions, the Respondent state that all vehicles including the *Ex-parte* Applicants' vehicles, are weighed at the various weighing bridges it has set up.

8. The Respondent denied the *Ex-parte* Applicants' contention that the persons found in contravention of the law are subjected to arbitrary fines because under the Traffic Act a person has to be prosecuted before a court of law before he can be fined.

9. Counsel for the parties made submissions reiterating in substance the averments in the documents filed in support of their respective submissions.

10. For the *ex-parte* Applicants' it was submitted that although the Respondent has the legal authority to weigh motor vehicles, it must afford the *ex-parte* Applicants a right to be heard. In addition, they were entitled to a notice before the Respondent purported to enforce the law. The status until recently was that only heavy commercial vehicles would be weighed. The *ex-parte* Applicants' therefore expected that if this situation was to change, they would be notified.

11. The Respondent's Counsel argued that there is no provision of law that exempts the *ex-parte* Applicants' vehicles from being weighed. The term “*vehicle*” under the Traffic Act includes both commercial and heavy commercial vehicles. The guidelines regarding axle weight under the Twelfth Schedule of the Traffic Act Rules, must be adhered to by all vehicles and irrespective of the load that is being carried.

12. He also submitted that the Respondent had no obligation to issue a notice before applying the law which has been in existence. That if the court were to grant the orders sought, it would be unjustifiably preventing the Respondent from carrying out the duties imposed on it by statute.

ISSUES FOR DETERMINATION

13. The issue found for determination in this case are whether the *ex-parte* Applicants' vehicles are exempted from being weighed by the Respondent thereby rendering its actions unlawful.

ANALYSIS

14. The *Ex-parte* Applicants seek an order of prohibition to restrain the Respondent from weighing their vehicles. The scope of an order of prohibition was elaborated by the Court of Appeal in the case of **Kenya National Examinations Council vs Republic [1997] eKLR** as follows:

“What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings - See HALSBURY'S LAWS OF ENGLAND, 4th Edition, Vol.1 at pg. 37 Paragraph 128.”

15. Accordingly, an order of prohibition will only issue to restrain an *ultra vires* or illegal act. It was common ground that the Respondent, a body established under **Section 3** of the **Kenya Roads Act**, has the mandate under **Section 4(2)**:

“to ensure adherence to the rules and guidelines on axle load control prescribed under the Traffic Act and under any Regulations made thereunder.”

16. To this end, the same Act at **Section 22 (1) (c)**, vests in it powers to:

“measure and assess the weights dimensions and capacities of vehicles using any road and provide measures to ensure compliance with rules relating to axle load control, other provisions of the Traffic Act and Regulations under this Act. “

17. The *Ex-parte* Applicants' contention is that their vehicles are exempted by the law and the Respondent's press statement from being weighed. This submission is a misapprehension of the law. Section 56 (1) of the Traffic Act provides:

“(1) No vehicle shall be used on a road with a load greater than the load specified by the manufacturer of the chassis of the vehicle or than the load capacity determined by an inspector under this Act.”

18. The term vehicle is then defined under Section 2 as:

“vehicle” includes a motor vehicle, a trailer and any other conveyance used on a road.”

19. Under the above section no distinction has been made between a *“heavy commercial vehicle”* and a *“commercial vehicle”*. All vehicles, including the *ex-parte* Applicants', must comply with the regulations under the Twelfth Schedule that provide for the maximum weights and dimensions of motor vehicles.

20. The Respondent's obligation is to enforce this law and are thus empowered to weigh any vehicle using the roads to ensure that it is compliant. Its press statement wherein it only referred to heavy commercial vehicles has no force of law and cannot be deemed to supersede the clear provisions of the statute.

21. In addition, it was not mandatory for the Respondent to issue a notice notifying road users that it shall enforce the law. A law comes into force on the date indicated in that statute. All citizens have an obligation to inform themselves of the laws that are in force hence the legal maxim **“ignorance of the law is no defence.”** The legitimate expectation of any citizen should therefore be that the law will be enforced. The Respondent abdicated its duties when it failed to enforce the law regarding to weights and it has a right to correct its error.

22. The *Ex-parte* Applicants are aggrieved by the fact that as a result of the Respondent's actions they have been compelled to pay arbitrary fines and sometimes under unreasonable circumstances. Section 58 of the Traffic Act makes it an offence for any person to use an overloaded vehicle contrary to Sections 55 and 56. If found in contravention that person is liable to fine not exceeding Kshs. 400,000 or imprisonment for a term not exceeding two years or both. The culpability of a person charged with this offence can only be determined by a court of law which will then mete out the appropriate penalty.

23. Any objections to evidence or mitigating factors should then be presented before the court determining the case. The criminal process allows an accused person to present evidence to counter that offered by the Prosecutor.

FINDINGS:

24. For the reasons stated above, I find that the *ex-parte Applicants'* have failed to prove any illegality or impropriety on the part of the Respondent. Their vehicles are subject to the law and must be weighed in order to ensure that they are road worthy in terms of the regulations provided. The Respondent being the

body that is vested with the duty to enforce compliance cannot be prohibited from discharging its duty.

DETERMINATION

25. In the circumstances there is no need to issue the order of Prohibition.

26. The application is dismissed with costs to the Respondent.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 8th day of May, 2015.

A. MSHILA

JUDGE