



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BOMET
CIVIL CASE NO.5 OF 2015

CHEPKOECH MARITIM.....PLAINTIFF/APPLICANT

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....1.ST DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....2ND DEFENDANT/RESPONDENT

R U L I N G.

1. Chepkoech Maritim filed this suit dated 21st September, 2015 seeking an order of injunction and damages for loss of use of her motor vehicle registration no. KCD 052B, against the Defendant/Respondent.

2. Contemporaneously with the Plaint, she filed a Notice of Motion seeking the following orders;

1. That this honourable court be pleased to issue an injunction to the 1st defendant compelling it to return the number plates and insurance certificates for motor vehicle of registration number KCD 052 B FAW lorry.

2. That costs of this application be provided for.

3. The application is supported by the grounds on the face of the application and a Supporting Affidavit by the Plaintiff/Applicant sworn on 17th September, 2015.

3. Its the Applicant's contention that she is the owner of the lorry registration no. KCD 052B FAW Lorry which she purchased through a loan from Family Bank Limited (“CM”).

The said lorry was impounded within Bomet town by officers of the Defendants. This was on 12th September, 2015.

4. The said officers then removed the number plates and insurance certificate from the windscreen of the motor vehicle. She says she cannot use the motor vehicle in that condition yet she is servicing a loan on it. She further stated that her driver has never been charged with the said offences.

5. The 1st Defendant/Respondent filed two Replying Affidavits.

Mr. Dennis Higen Cheruiyot the 1st deponent has explained the functions of the 1st Defendant/Respondents, and how the subject motor vehicle was impounded, for overloading and absconding a weigh bridge.

6. That overloading and absconding the weigh bridge are offences for which fees are charged and fines imposed under the law. For this case he says the Applicant should pay the prescribed fees for the number plates and his certificate to be returned. He quoted **Regulation 15 (3) and (4) of the Kenya Roads (Kenya National Highways) Regulations 2013** to support his averments.

7. He denies that the Plaintiff/Applicant will suffer any loss.

8. The 2nd deponent was **Eng. Muita Ngatia** who explains how the overload is calculated, and how this was done in respect of the subject vehicle. He further states that the 1st defendant/respondent cannot be blamed for failure to charge the offending driver or motor vehicle owner because it does not have investigative and prosecutorial powers.

9. Mr. Mitey for the Plaintiff/Applicant submitted that the Order (PK1) was issued to the Plaintiff/Applicant's driver when he failed to give the Defendant/Respondent's officer the Kshs. 200,000 asked for. The Applicant did not know how the overload of 10,640Kgs was arrived at.

10. Secondly, he submitted that the Replying Affidavit of Dennis Cheruiyot at paragraph 9 shows that the subject vehicle is at Bomet Police Station. The Plaintiff/Applicant's driver (Peter Kones) in his Further Affidavit avers that the motor vehicle is at the Plaintiff/Applicant's home. That the excess load was also not offloaded.

11. He also raised issue with the affidavit of Mr. Dennis Cheruiyot who was not at the scene yet he was deponing to facts unknown to him. The same applies to the affidavit of Eng. Muita.

12. Mr. Litoro for the 1st Defendant/Respondent in response opposed the application relying on Replying Affidavits of Mr. Cheruiyot and Eng. Muita. He said the said affidavits are properly on record.

13. It was his submission that the Plaintiff/Applicant had not established a *prima facie* case to warrant the issuance of the orders sought. That she was in breach of the Traffic Act, Kenya Roads Act and the Regulations thereto.

14. Its the 1st Respondent's case that since the driver of the motor vehicle absconded, the 1st Respondent had to determine the weight as explained by Eng. Muita at paragraph 4 of his Replying Affidavit and it was found to be 10,640 Kg. The permitted net was 26,000 Kgs. The Notification was placed on the vehicle. The number plates and insurance certificate were removed under **Section 106 (1) (a) of the Traffic Act** and handed over to the National Transport and Safety Authority.

15. It was his further submission that the law allows them to charge fees and penalties for overloading and absconding the weigh bridge. In the instant case the fees has not been paid.

16. I have considered the submissions, affidavits, annexures before me. The issue is whether the Plaintiff/Applicant has demonstrated a *prima facie* case for the issuance of the Orders sought.

17. Her claim is based on the removal of the number plates and insurance certificate from the subject vehicle KCD 052B, which has caused the motor vehicle to be grounded. The Order (PK1) to detain the motor vehicle was issued by the 1st defendant/respondent.

18. A scrutiny of it shows that the said Order was issued by Jareb/Geoffrey/Douglas/P.C Ruoba/Cpl Epara who I believe are officers of the 1st and 2nd Defendants/Respondents.

It also shows that the motor vehicle was found abandoned at Bomet Centre. It further shows that the motor vehicle was inspected and it was found that it was being used at Narok-Bomet Highway. It finally shows that there was an excess load of 10,640Kgs.

19. This Order (PK1) is so revealing. First of all none of the five (5) officers who were at the scene and

issued this Order (PK1) have sworn an affidavit to explain what transpired at the scene. Mr. Dennis Cheruiyot and Eng. Muita were never at the scene for them to make any averments. The Engineer is saying what ought to happen and not what happened.

20. Secondly, the Order shows that the motor vehicle was absconded at Bomet Centre and at the same time it was being used along Narok-bomet highway. Which is which?

21. If this motor vehicle was found abandoned as is claimed how was the Notification Order served, and the insurance certificate obtained from the inside of the motor vehicle? Further more how did the officers know that the motor vehicle had absconded a weigh bridge? Who gave them this information and which weigh bridge was absconded?

22. Contrary to what Mr. Dennis Cheruiyot has stated at paragraph 9 of his Replying Affidavit the driver **Peter Kones** has averred that the motor vehicle is at the Plaintiff/Applicant's home. Why was the vehicle not towed to the police station and the excess load off loaded? To this the 1st Respondent is quick to say that's not its duty. Its duty is to determine weights, issue notification orders, impose fees/fines and collect the fees/ fines and finally auction the vehicles.

23. In other words the 1st respondent is a law unto itself. It determines weights under no supervision, impounds vehicles, imposes fees/ fines/penalties and executes those orders through auctions undeterred.

24. Regulation 9 of the 2013 Regulations under the Act makes provision for the installation of weigh bridges, static ones or other devices. These are not things that are hidden. It is common knowledge that there is no installed weigh bridge along Narok/Bomet Highway let alone Bomet town itself. The driver Peter Kones has averred that the lorry was not overloaded and it was not weighed.

25. The 1st respondent will have to explain how the overweight was arrived at and what was the permitted weight for this lorry. It will explain what the supposedly detained lorry is doing at Plaintiff/Applicant's home and the whereabouts of the overload.

26. The suit herein raises serious issues which must be determined by the court. In as much as we all appreciate the work that the 1st Respondent is doing our roads, motorists must be accorded opportunities to express themselves in line with **Article 50 (1)** of the **Constitution**.

27. Regulation 15 (3) has turned the 1st respondent into a Court or Tribunal of its own kind.

Huge fines/penalties cannot be disguised as fees under the **Regulation 15 (3)** and **(4)** which provide;

“where a vehicle is found to have by passed 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 USD or its equivalent in Kenya Shillings.”

28. Who is to determine the act of the bypassing or absconding? Is it the 1st Defendant or a Court of Law? Before a finding is made evidence must be tendered. The 1st Respondent gets the evidence; tenders it to itself; makes the determination and imposes the sentences and auctions the motor vehicles where the motorist has not paid the fines disguised as fees. This amounts to being a Judge in one's own cause.

29. In the case of **MARGARET MIANO VS. KENYA NATIONAL HIGHWAY AUTHORITY MOMBASA PET NO.23 OF 2015**. Justice A. Emukule stated thus;

“For the authorized officer or deponent to suggest that Regulation 15 (3) does not envisage a judicial process is to make the Respondent, Judge, Jury and Executioner, rolled into the Kenya National Highways Authority. That would be a monstrous situation, and a violation of Article 50 of the Constitution which guarantees a right to fair trial-

- to be presumed innocent until the contrary is proved;
- to be informed of the charge with sufficient detail to answer it;
- to have adequate time and facilities to prepare a defence;
- to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.
- to a public trial before a court of law established under the Constitution.
- to have the trial begin and concluded without reasonable delay.”

I entirely agree with my brother Judge on this.

30. The number plates and weigh bridge certificate were taken away on 24th August, 2015. The driver and/or owner have not been charged in any Court of Law. The 1st respondent washes its hands and says that's the work of the Police. Assuming the police were to charge the Plaintiff/Applicant with overloading and absconding the weigh bridge while the 1st Respondent has on the other hand charged, convicted and sentenced her for the same offences would that not amount to double punishment?

31. I find in the circumstances of this case that the Applicant has established a *prima facie* case to warrant the courts intervention.

32. The Application dated 21st September, 2015 is allowed;

ORDERS

- a. The 1st Defendant/Respondent is hereby ordered to return and/or cause to be returned the number plates and insurance certificates in respect of motor vehicle registration no. KCD 052B FAW Lorry, within **five (5)** days of this Ruling. Failure to comply will attract penal consequences against the concerned officer.
- b. The suit to be fixed for hearing within the next three (3) months before the High Court Bomet.
- c. The Plaintiff/Applicant to avail the motor vehicle registration no. KCD 052B, before the court whenever required by the court.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 6th DAY OF NOVEMBER, 2015.

.....

H.I.ONG'UDI

JUDGE