



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

PETITION NO.3 OF 2015

RUMIC CONSTRUCTION &

CIVIL ENGINEERING LIMITED.....PETITIONER

VERSUS

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

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

HEAD OF TRAFFIC POLICE DEPARTMENT.....3RD RESPONDENT

OFFICE COMMANDING STATION,

BOMET POLICE STATION.....4TH RESPONDENT

RULING.

1. **Rumic Construction and Civil Engineering Limited** filed this Petition dated 3rd September 2015, in which it alleges violation of its rights by the Respondents, by the unlawful detention of its motor vehicle registration no. KCA 773Z. The motor vehicle is said to be detained at Bomet Police Station, since 24th August, 2015 or thereabout.
2. Contemporaneously with the Petition, the Petitioner filed a Notice of Motion seeking the following orders:
 1. *This application be certified urgent and service upon the Respondents be dispensed with in the first instance.*
 2. *This Honourable court be pleased to direct the release of motor vehicle registration no. KCA 773Z pending the hearing and determination of this Application on condition that the said vehicle will be produced in court as and when required by court.*
 3. *This Honourable Court be pleased to direct the release of motor vehicle registration no. KCA 773Z pending the hearing and determination of this Petition on condition that the said vehicle will be produced in court as and when required.*
 4. *An order directing the defendants to weigh the load in the said vehicle for purposes of ascertaining volume.*

5. That costs of this application be provided for.

3. The Application is supported by several grounds which are stated on the face on the application plus a Supporting Affidavit. The Petitioner/Applicant's contention is that it is a limited liability company and is the registered owner of motor vehicle registration no. KCA 773Z Tata make jointly with National Industrial Credit Bank Limited.
4. That on 24th August, 2015 the said motor vehicle was detained at Bomet Police Station on allegations of overloading but no charges have been preferred against any person. That its business is suffering as a result.
5. Further that the Respondents illegally removed the insurance sticker and number plate from the said motor vehicle hence grounding it.

It's prayer is for the release of the motor vehicle pending the hearing of this Petition.

6. A long Replying Affidavit was filed by **Dennis Higen Cheruiyot** who is an officer at the 1st Respondent Authority attached to the 1st Respondent mobile weigh bridge team. He has explained the functions of the 1st Respondent in relation to the detention of the said motor vehicle.
7. He further states that the Regulations, Rules and the Act empower them to do what they did save for investigating and prosecuting offenders. He cites **Regulation 15 (3) and (4) of the Kenya Roads (Kenya National Highways) Regulations 2013** as their point of reference.
8. He further says the Orders prayed for are final in nature and should not issue. A further Replying Affidavit by Engineer Muita Ngatia sworn on 30th October, 2015 was filed. In it he explains at paragraph 14 how the excess load was arrived at. That the Petitioner/Applicant is to pay Kshs. 400,000 overloading fees plus the weigh bridge absconding fee of 2000 USD which is about Kshs. 200,000.
9. In his submissions Mr. Langat for the Petitioner/Applicant pointed out that save for the 1st Respondent the rest of the Respondents had not filed any papers.

It was his prayer that the motor vehicle KCA 773Z lying at the Bomet Police Station be weighed and released to the Applicant pending the hearing and determination of the Petition herein.

10. He submitted that the 1st Respondent has no authority to fine offenders as that is a duty for Courts and Tribunals. There has been no due process in the determination of the overload he said. To him provisions of **Article 50 (1) of the Constitution** are paramount. He referred the court to the case of **MARGARET MIANO VS. KENYA NATIONAL HIGHWAY AUTHORITY MOMBASA HIGH COURT PETITION NO.23 OF 2015** where Justice A. Emukule dealt with a similar matter.
11. He also referred to the case of **JACINTA W. KAMAU V D.C.I.O KISII COUNTY & ANOR. KISII HIGH COURT PETITION NO.22 OF 2012** where Justice Sitati ordered for release of a motor vehicle for failure by the DCIO to conduct investigations in a timely manner.
12. He said the Petitioner is suffering because the lorry which is on loan is detained, yet he has to service the loan.
13. In reply Mr. Litoro for the 1st Respondent opposing the application said he relied on the two Replying Affidavits. He submitted that the Applicant had not demonstrated any *prima facie* case. Further that no prejudice would be suffered if the motor vehicle was not released. That there was no document to show that the motor vehicle is on loan.

14. It was his submission that Constitutional rights were not absolute and Article 24 allows for limitation in public interest. In the instant case he said the detention was by law as the Petitioner's agent made it difficult for the lorry to be weighed.
15. He submitted that what the 1st Respondent charged was fees and not fines as paid under the Traffic Act. He said upon confiscation of the number plates and insurance certificates the same are handed over to the National Transport and Safety Authority.
16. I have considered all the affidavits, annexures, submissions and authorities cited. The issue to be determined is whether the Petitioner/Applicant has established a *prima facie* case to warrant the issuance of the Orders sought.
17. There is no dispute that the Applicants motor vehicle registration no. KCA 773Z is lying together with its cargo at the Bomet Police Station pursuant to an order issued by the 1st Respondent marked MKR4. This order was indeed issued by Cpl Mwangome and Sgt. Thurania none of whom have filed any affidavit herein to state what transpired on that day.

The Order (MKR4) further directs that the motor vehicle be removed to Bomet Police Station, to be charged for overload and not weighing, and that the excess load of 10,500Kg should be off loaded.

18. From what has been stated before this Court, the directions in that Order (MKR4) save for removal to Bomet Police Station have not been complied with at all. To this the Respondent says it is not responsible for investigating and prosecuting, Motorists. Its work is to weigh trucks estimate weights, remove number plates and insurance certificates and impose fees. Its not its business to know whether vehicles have been taken to the Police Stations, excess loads offloaded, and offenders charged.
19. In this particular case Counsel submitted that the Petitioner's agent locked the lorry and disappeared. If that is true how was he served with the Order/notification and how was the insurance certificate removed from inside the vehicle?
20. It is not disputed that the lorry in question was not weighed. Is there a weigh bridge along Narok/Bomet road?

Regulation 9 of the Kenya Roads (Kenya National Highways Authority) 2013 makes Provision for the installation of weigh bridges. It states that there shall be installed weigh bridges and static ones. Other devices for detection shall be installed on roads and road signs may be erected.

21. It is important for the public to know where any of these weigh bridges have been installed. It is within public knowledge that there is no weigh bridge along Narok/Bomet road. There was no weighing done on the Applicant's vehicle. Engineer Muita was not at the scene for him to explain how the weight of 10,500Kgs was arrived at. What he says in his Further Replying Affidavit is an explanation of what ought to be done and not what was done.
22. It is those officers whose names appear in the Order (MKR4) who can tell this Court how they arrived at that weight. It is their writing which is in that document and not that of the Engineer or Mr. Cheruiyot. The weight in the MKR4 is disputed and the response by the 1st Respondent is like it is the final determiner and what it says is what should be done, and people must pay the fees/fines as penalties which to them is the law.
23. Before the overload is determined it is important to know the standard weight of the motor vehicle. If one is told to be carrying an overload of 10,500Kg there must be an accepted weight which has been surpassed. It is not shown in this Order. (MKR4).
24. The Regulations/Rules under this Act are supposed to regulate and moderate the transport

activities on our roads and not to become a monster to road users. I very well agree with Justice A. Emukule in the case of **Margaret Miano** (*supra*) when he says at paragraph 11;

“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 conclude without reasonable delay.”*

25. The question I ask myself is what happens to a motorist who is dissatisfied with the 1st Respondent's calculation of overload weights by its officers? From what is on record one's vehicle is disabled and left on the road or detained while the driver is slammed with an Order and/or Notification and directed to pay the absconding fee of an unknown weigh bridge and unsupervised figures of overloads.

26. The right to be heard is a fundamental human right which can never be curtailed or limited (see **Article 24** and **25** of the **Constitution**.)

27. This petition raises serious issues about the **Regulations of 2013** of the **Kenya National Highway Authority** especially **Regulations 15 (3)** which seems to give the 1st Respondent the powers to be the Judge, Jury and Executioner of some orders of sorts leaving the poor motorist with no option but to reel under the wheels of poverty by paying extremely heavy fines baptized fees, or losing their vehicles.

28. For the above reasons and pending the hearing and determination of the Petition herein I make the following Orders;

(a) The 1st Respondent to arrange and weigh the motor vehicle KCA 773Z lying at Bomet Police Station within the next **three (3)** days upon delivery of this Ruling.

(b) Any excess load to be off loaded and the Petitioner/Applicant to organize for its transportation.

(c) Once the excess load (if any) is off loaded the lorry be released to the Applicant forthwith pending the hearing and determination of this Petition.

(d) The 1st Respondent to surrender or cause to be surrendered to the Petitioner/Applicant the number plates and insurance certificates confiscated from the said lorry within **five (5)** days of this Order. Failure to comply will attract penal consequences against the concerned officer.

(e) The Petition to be fixed for hearing within the next three months before the High Court Bomet.

(f) The Petitioner/Applicant to avail the motor vehicle registration no.KCA 733Z 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