



No. 13

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 4 OF 2014 (JR)

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW
ORDERS OF PROHIBITION**

AND

IN THE MATTER OF: THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: THE ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: THE ROADS ACT CHAPTER 408

AND

IN THE MATTER OF: THE TRAFFIC ACT

BETWEEN

KENYA TRANSPORTERS ASSOCIATION LIMITED APPLICANT

AND

THE KENYA NATIONAL HIGHWAYS AUTHORITY RESPONDENT

RULING

0. Before the Court is an *ex parte* application dated the 11th February 2014 brought under Order 53 of the Civil Procedure Rules for leave to commence judicial review proceedings seeking the following specific orders:

2. *Leave be granted to the applicants to apply for:-*

a) *An order of Prohibition do issue prohibiting the respondent from reneging from own*

representation that implementation of Rule 12 of the Traffic (Amendment) Rules 2013 [and] the decision published in the dailies of the 11th November 2013 against the Applicant's membership in respect of vehicles registered before 14th June 2013 is to be staggered so that full compliance is to be attained by the end of June 2014 in terms of the detailed programme contained in the Applicant's letter of 18th October 2013.

b) The grant of leave do operate as a stay of the implementation of Rule 12 of the Traffic (Amendment) Rules 2013 and the decision in the Notice published in the dailies of 11th November 2013 as against the Applicant's membership in respect of vehicles registered before 14th June 2013 and further operate as a temporary suspension of interference of the Applicant's membership vehicles operations along the public roads or in any other way on account of the impugned rule and decisions till further orders of the court in the present proceedings.

The application is based on the Statement and supported by the verifying affidavit of the Ag. Chief Executive Officer of sworn on the 11th February 2014.

0. The brief background to the application is that the Respondent has sought to implement Rule 12 of the Traffic (Amendment) Rules 2013 made by the Cabinet Secretary (Minister) for Transport & Infrastructure and published in the Kenya Gazette as Legal Notice No. 93 of 14th June 2013 in respect of vehicle registered before the said date despite a representation by the respondent that the implementation would be staggered so that full compliance is attained by the end of June 2014. Rule 12 of the Traffic (Amendment) Rules 2013 prohibits operation of vehicles with additional axels in the following terms:

“(12) A person shall not operate a vehicle on a public road with dummy or dead axle, defective suspension or dead man's switch or other mechanisms in the vehicle that affects the weight transmitted to the road pavement.”

0. The representation by the respondent is alleged to have been given by a letter of 2nd January 2014 by the Director General of the Respondent to the Chief Executive Officer of the applicant following negotiations between the parties in December 2013 and subject to terms specified in the said letter including a programme for the intended compliance with the law, which terms the applicant contends to have fully complied within time. The applicants proposed to have the implantation staggered until full compliance by the end of June 2014.
0. Counsel for the applicant, Mr. Mogaka, submitted that the applicant's members who own about 10,000 vehicles which had been fitted with additional axels and duly registered in accordance with the law and regulations existing prior to the Traffic (Amendment) Rules 2013 and are now be required to remove the additional axels on their vehicles in order to comply with the Rules. As the removal of the axels requires technical expertise and substantial financial involvement, it was contended, counsel argued, it would take time to effect on all the vehicles and hence the proposal for staggered implementation. The applicants emphasise that they do not oppose the enactment of the Rules and only seek the suspension of the Rule relating to the axels for a period of six months to enable to comply with the new rules, and that 357 vehicles had at the time of the application complied with the rule. The applicants also point out that they do not wish to overload their vehicles.
0. The applicants contend that the subsequent actions of the Respondent in refusing to deal with the applicant members' vehicles at Weighbridges on account of the additional axels despite the representation aforesaid had paralysed their economic operations. Counsel submitted that the respondent's actions are unreasonable within the **Wednesbury Principles** [*Associate Provincial Picture Houses v. Wednesbury Corporation* (1948) 1 KB 223] and amount to unfair administrative action. Counsel cited an English Court of Appeal decision in *R. v. Secretary of State for Education and Science ex parte Avon County Council* [1991] 1 ALL ER 282 for the proposition that the grant of a stay would not nullify the statutory provision of the Rules under which the respondent's action was made but merely have the effect of deferring the date of implementation of the Rule

- until the judicial review proceedings were concluded.
0. Applying the test for the grant of leave in *Meixner v Attorney General* (2005) 2 KLR 189, I find that the applicants have demonstrated an arguable case for the grant of the orders sought on the basis of the judicial review principles of the reasonableness and proportionality of the decision and on the constitutional principle of fair administrative action in view of the want of reasonable timelines for the removal of the axels and the legitimate expectation of the applicants in reliance of fair administrative action principle, especially following the negotiations of December 2013, and the subsequent representation by the Respondent. Accordingly, I grant leave of court to the applicant to file judicial review proceedings as prayed in Prayer 2 (a) of the Chamber Summons dated 11th February 2014. The applicant will file the Notice of Motion within 21 days in accordance with the Order 53 of the Civil Procedure Rules.
 0. As regards the question of leave granted operating as a stay, I consider that the respondent's axel-load limit concerns that the Rules appear to address should be considered before a blanket stay is granted which will result in the suspension of the implementation of the Rule the subject of these proceedings for a long period of time in view of the court's capacity to grant an early hearing date, which as shown in the *Avon County Council* case is always a crucial consideration in the grant of stay.
 0. Moreover, as the applicant's main prayer in these proceedings is for the prohibition of implementation of the rule to be suspended until the full compliance of their vehicles by the end of June 2014, a grant of a stay pending hearing and determination of the judicial review proceedings will have the effect of granting the prayer in the main motion at this *ex parte* stage, without hearing the respondent, because the hearing and determination of the judicial review proceedings are in view of the court's business not likely to be concluded before June 2014. I consider that such are the circumstances contemplated by Order 53 rule 4 of the Civil Procedure Rules which permits *inter partes* hearing of the question of leave operating as stay in the following terms:

“(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave.

Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

[emphasis added]

0. Accordingly, pursuant to the Order 53 rule 4 for the hearing of the issue for leave operating as a stay, the application will be listed for hearing on the 19th February 2014 for the hearing and determination of prayer 2 (b) of the Chamber Summons dated 11th February 2014.
0. In the meantime, in order that the applicants' operations are not grounded before a final decision of the question of leave operating as a stay, I grant a limited stay for seven (7) days only until the application is heard *inter partes* on the 19th February 2014 at 10.00am.

Dated, signed and delivered on the 12th February 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Mogaka for the Applicant

No appearance for the Respondent

Miss Linda - Court Assistant