



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 16 OF 2014**

**IN THE MATTER OF: CONTRAVENTION OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED BREACH/INFRINGEMENT OF RIGHTS AND  
FUNDAMENTAL FREEDOMS**

**AND**

**IN THE MATTER OF: ARTICLE 3, 10, 19, 20, 21, 22, 23, 27, 40, 46, 47, 165, 258 AND 259 OF  
THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE TRAFFIC ACT CHAPTER 403 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE RESTRICTIVE TRADE PRACTICES, MONOPOLIES AND  
PRICE CONTROL**

**AND**

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSALS ACT NO. 3 OF 2005**

**BETWEEN**

**KENYA TRANSPORT ASSOCIATION LIMITED ..... PETITIONER**

**AND**

**CABINET SECRETARY TRANSPORT**

**AND INFRASTRUCTURE ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

AND

**DALCOM ENTERPRISES AND 14 OTHERS ..... INTERESTED PARTIES**

**RULING**

0. By an Amended Notice of Motion dated 8<sup>th</sup> April 2014, the applicant association which has on behalf of its members owners of commercial vehicles filed a constitutional petition challenging the 1<sup>st</sup> Respondent's Legal Notice No. 217 of 2013 which requires the fitting of specified speed limiters on motor vehicles sought conservatory orders in principal terms as follows:
  1. *There be a conservatory Order staying, suspending and postponing implementation by the Respondent's Legal Notice No. 217 of 16<sup>th</sup> December, 2013 that requires installation/fitting of the impugned approved speed limiters/governors to commercial vehicles in conformity with the Kenya Bureau of Standard specification as tested and approved by KBS and the Chief Mechanical and transport Engineer pending inter parte hearing and determination of the Application.*
  2. *There be an Injunction restraining the Respondents from **implementing Legal Notice No. 217 of 16<sup>th</sup> December, 2013** by the Cabinet Secretary Transport and Infrastructure that requires installation/fitting of approved speed limiters/governors **to commercial vehicles** conforming to the Kenya Bureau of Standard specification and tested and approved by KBS and the Chief Mechanical and transport Engineer pending hearing determination of the main petition.*
0. The application was based on grounds set out in the application as follows:
  1. *The Petitioner/Applicant is a corporate entity.*
  2. *The Petitioner's members are business person/entities who own and operate numerous and assorted transportation lorries, trailers/semi trailers, fuel tankers and trucks.*
  3. *The Petitioner's vehicles are manufactured and source out of jurisdiction as Kenyan Industries do not manufacture any prime movers.*
  4. *The prime movers/trucks have inbuilt speed limiters/governors that have always met the Kenyan requirements.*
  5. *Truck owners have a three (3) years warranty or a warranty for 250,000 Kms covered by a truck whichever is earlier during which period the manufacturers are liable for any malfunction to engine, electronic, electrical and other motor vehicle accessories replacement through their approved/appointed dealers qualified technicians failing which the warranty lapses.*
  6. *Without any consultation of stakeholders (truck manufacturers, appointed manufacturers' dealers and truck owners) and public participation the Respondents decided vide **Legal Notice No. 217 of 16<sup>th</sup> December, 2013** and Notification in the Dailies of **02<sup>nd</sup> January** and **22<sup>nd</sup> January, 2014** are seeking implementation by way of requiring of fitting/installation of speed limiters/governors and recorders to trucks.*
  7. *The suitability of the gadget/speed limiter approved by Kenya Bureau of Standards has not been sanctioned/approved by the truck manufacturers to be compatible with the truck engine computers, electronic and electrical installations.*
  8. *Indeed the truck manufacturers views or expertise or input was not sought at all as to the compatibility of the impugned gadget/speed limiters to be fitted on Trucks.*
  9. *It is common knowledge that Kenyan Industries do not manufacture any prime movers nor does the Government of Kenya have any Truck manufacturing factory where the Chief Transport and Mechanical Engineer as well as Kenya Bureau of Standard staff may have gained sufficient Factory knowledge as to the possible negative effects on the truck engine computers electronic and electrical installation to justify unilateral and arbitrary decision without consulting truck manufacturers and other stake holders.*
  10. *The approval of the gadgets and their suppliers was done in secrecy contrary and in contravention of the spirit of the Constitution which requires open, transparent and competitive procurement process through publicised invitation for bids.*
  11. *Installation of a foreign gadget not approved by the Truck Manufacturers to the Petitioner's*

*members Truck shall deprive them the warranty applicable.*

12. *The impugned gadget's compatibility/suitability is not truck manufacturers factory approved and hence it is reasonably apprehended that it is to occasion total collapse of the truck engine computers, electronic and electrical installations to the total detriment of the Truck owners property rights and economic interest enshrined in **Article 40 and 46.***
0. The application was opposed and the 2<sup>nd</sup> respondent filed a replying affidavit sworn by its Director General on the 9<sup>th</sup> April 2014. Counsel for the parties - Mr. Mogaka for applicant, Mr. Eredi for 1st respondent, Mr. Agwara for 2nd respondent, Mr. Nyakundi for the 1-5 Interested Parties. Mr. Mutiso for the Interested Party No. 11 - made oral submissions and ruling was reserved. The court also heard a representative of 1<sup>st</sup> interested party present before the court.
0. For the applicant, it was contended that in breach of the rule of law, the respondent had made the regulations the subject of this suit without giving the applicant a right to be heard contrary to the right to fair administrative action and the principle of people participation and without parliamentary sanction of the regulations; that the interested parties appointed as fitters of the speed gadget were non-professionals who were appointed without compliance with the public procurement law and there was a danger that fitting by unauthorized person would damage the vehicles engines and also defeat the manufacturers' warranty on the vehicles; and consequently that the applicants constitutional rights to protection of property and protection of economic interests would be defeated. It was contended that if the conservatory order as not granted to preserve the status quo the applicant's case would be rendered nugatory and academic.
0. The case for the respondents, which the interested parties supported, was that the applicants could not demonstrate violation of constitutional rights as the impugned regulations were made under statutory authority designed for the prevention of road accidents in Kenya following concerns of increasing number of road accidents and the tamperability of previously prescribed speed governors; that the gazette speed limiters were developed by the Kenya Bureau of Standards the body charged with determination of standards and gazette with consultation of various industry players. The respondent's opposition to the conservatory orders was emphasized at paragraph 32 of the replying affidavit that:

“that every human life is worth protecting through ensuring safety in the roads and the Respondents being the custodians of that duty must not watch as road accidents increase and more lives are lost merely because the Applicants have a business interest and are keen to, make profits.”

0. The relevant statutory provision is section 41A of the Traffic Act which is in the following terms:

*41A (1) The engine of-*

- a. *every public service vehicle except taxi cabs;*  
b. *every commercial vehicle whose tare weight exceeds 3048 kg shall be fitted with a speed governor which-*
- i. *conforms to such specifications as the minister may by notice in the Gazette prescribe;*  
ii. *is adjusted so that all times, and in any load condition, the vehicle cannot exceed the speed of 80kph.*

*(2) Every vehicle to which this rule applies shall have exhibited on it a certificate issued by certifying officer to the effect that it is fitted with the speed governor complying with the prescribed specifications.*

0. The issue before the court is whether the court will in the circumstances of this case grant a conservatory order staying the implementation of the regulations in Legal Notice No. 217 of 2013 with respect to the applicant's commercial vehicles.
0. The court is at this stage not required to make any final findings on the merit of the constitutional application. The court will therefore not consider the submissions on the respective merits of the

- parties' cases; it only need consider whether an arguable case has been established.
0. The tests for the grant of conservatory orders has been variously expressed by different courts. See Mombasa High Court petition No. 7 of 2011, *Muslim for Human Rights and 2 Ors v the Attorney General*, per Ibrahim J (as he then was), Mombasa High Court Petition No. 47 of 2011 *Harun Barky Yator v. Judicial Service Commission (JSC)*, per Okwengu J, (as she then was), Nairobi High Court Petition No. 557 of 2013, per Majanja J, and *Mecha Magaga v Jackson Obiero Magaga* (2014) eKLR, per Okong'o, J. All the courts require for the grant of conservatory orders a prima facie case or a prima facie arguable case as in *Yator's* case; irretrievability or irreparability if conservatory order is not granted and the subject matter is irretrievably lost (akin to the irreparability by damages test) and a balancing of the interests of the applicant and the respondents. There arises confusion as to whether the test of standard of the applicant's case is on the prima facie or arguable case. Once accept that the court cannot determine the disputed merits of the case at the interlocutory stage, the correct standard must be the standard of arguable case. See *Mbuthia v. Jimba Credit Corporation* (1988) KLR 1. I also consider that Under Article 23(3) of the Constitution, the court may make a broad spectrum of orders as conservatory orders to preserve the status quo where circumstances warrant and that may include fashioning a remedy to fit the particular circumstances of the application before the court.
  0. In the circumstances of this case, the applicants have constitutional rights to protection of their property rights and economic interest and they have demonstrated an arguable case on the breach of these rights and the constitutional principles of people participation with respect to the promulgation by the Legal Notice No. 217 of 2013 and of the Procurement laws with respect to appointment of the interested parties as the dealers and installers of the speed limiters.
  0. The applicant's case will be rendered academic if in the period before it is fully heard and determined, the applicant's are compelled to install the contested speed limiters, as any consequent damage will already have been done. The application will have been rendered nugatory.
  0. However, in balancing the interests of the applicant's members against those of the respondents, the court cannot countenance the possibility or risk of loss of a single life in road accidents that may subsequently be occasioned by the stay of regulations designed for the preservation of road safety.
  0. The court must therefore seek to uphold as paramount interest the right to life of the citizens and prevent any death causing incidents of road accidents that may be occasioned by lack of speed limiters on the applicant's vehicles. However, if the applicants' contention that their vehicles have in built speed governors that are compliant to the statutory speed limit of 80 kilometers per hour and they are not capable of being tampered with, a grant of a stay of regulations contained in Legal Notice no. 217 of 2013 may still be made with respect only to applicant's vehicles without endangering the lives of Kenya road users whose protection the regulations are designed.
  0. I would therefore make an order for stay of the regulations with respect to such of the applicant's vehicles which demonstrate upon inspection by the 2<sup>nd</sup> respondent with participation of the applicant vehicles manufacturers' technicians that they are already fitted with tamperproof speed limiters or governors compliant to the speed limitation set out in section 41A of the Traffic Act. The commercial vehicles must be cleared by the respondents through this alternative system for commercials vehicles already fitted with inbuilt speed limiters.
  0. Accordingly, for the reasons set out above, pending the hearing and determination of the petition, I make a conservatory order in terms that there shall be a suspension or moratorium on the implementation of the regulations in Legal Notice No. 217 of 2013, to take effect after 7 days from the date of the ruling or such shorter or longer period as is necessary for certification, and subject to certification, as aforesaid that the applicant's motor vehicles are fitted with in-built speed limiters or governors that are compliant with the statutory standards of section 41A of the Traffic Act save for the new regulations to be stayed. For that purpose, the applicant's members will present their vehicles for inspection by the respondents and in the presence of the technical experts of the applicants at the applicants cost. Only vehicles that will have been so certified will be permitted to operate on the roads under the moratorium.
  0. For the avoidance of doubt, the stay of the regulations in Legal Notice No. 217 of 2013 is granted only for the benefit of such of applicant's commercial vehicles that are shown upon inspection by the respondents to be fitted with speed limiters that are tamper proof and conforming to the specification of the 80 Kph speed under section 41A of the Traffic Act. Costs in the cause.
  0. The hearing of the petition will, on the basis of urgency shown, be fixed on priority basis.

**Dated and delivered this 7<sup>th</sup> day of May, 2014.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Olwande for Mr. Mogaka for the Petitioner

Mr. Ngari for the 1<sup>st</sup> Respondents

Mr. Sitonik for Mr. Muma for the 2<sup>nd</sup> Respondents

Mr. Mutiso for the 11<sup>th</sup> Interested Party and holding brief for Mr. Nyakundi for the 1<sup>st</sup> to 4<sup>th</sup> Interested Parties

Linda – Court Assistant