



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CONSTITUTIONAL PETITION 21 OF 2014

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40, 46, 47 AND 48 OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 22 AND 23, OF THE CONSTITUTION

IN THE MATTER OF TRAFFIC ACT, CHAPTER 403 LAWS OF KENYA

AND

IN THE MATTER OF KENYA ROADS ACT (2007)

BETWEEN

BUZEKI ENTERPRISES LIMITED.....PETITIONER/APPLICANT

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITYRESPONDENT

RULING

1. The Petitioner/Applicant herein filed an application pursuant to the provisions of **Article 22, 23, 40, 46, 47 of the Constitution, the Traffic Act, the Kenya Roads Act and Legal Notice Number, 86** of 2013. It seeks orders that:-
 - i. Motor vehicle registration KBQ 620B/ZE 4797 be released on terms the court may deem fair and just pending hearing and determination of the petition lodged herein.
 - ii. The respondent be restrained from impounding and detaining the motor-vehicle of the petitioner without preferring criminal charges as contemplated in the Constitution under Article 50 as read together with Articles 47, 48 and 49 pending hearing and determination of this application.
 - iii. The respondent be restrained from impounding and detaining the motor-vehicle of the petitioner without preferring criminal charges as contemplated in the Constitution under Article 50 as read together with Articles 47, 48 and 49 pending hearing and determination of the petition.
2. The application is supported by an affidavit deposed by **Dennis Wanyonyi** an employee of the applicant who reiterated the establishment of the respondent as provided by **Section 3** of the **Kenya Roads Act (the Act)** and its mandate per **Section 4** of the **Act**. He alluded to the provisions of **Section 22** and **46** of the **Act**.
3. Further, he stated that the respondent's right to prescribe and collect fees is accompanied by the

responsibility to offer services as mandated under **Section 4** of the **Act**. **Regulations** made by the **Minister** (The **Kenya Roads (Kenya National Highways Authority) Regulations, 2013**) create several offences and prescribe '**fees**' corresponding to the offences. This sum of money disguised as '**fees**' is indeed fines which is unlawful.

4. The applicant's motor-vehicle registration number KBQ 620B/ZE 4797 Mercedes Benz passed the weighbridge on 8th September, 2014 and was issued with ticket **No, KAT 1402E6EE/1**. Instead of letting it proceed to **Tororo Uganda**, its destination it was detained for an offence of absconding the weighbridge.
5. He averred that the offence is not provided for by the Traffic Act. The offence of absconding from a weighbridge is however created by the **Regulations, 2013**. That the fine of **USD 2000** is null and void since **Section 46(1)** of the Kenya Roads Act provides;-

“An authority may with the approval of the Minister make regulations for the better performance of its functions under this Act”

The fines should not to exceed one hundred thousand or imprisonment for a term not exceeding a year or both and an additional daily penalty.

6. The respondent failed to prefer charges against the petitioner and have it in court but instead purported to vest in itself powers of collecting fines. This was a denial of its rights as envisaged by **Article 50** of the **Constitution**. The action also amounts to a violation of the applicant's right to property guaranteed by **Article 40** of the **Constitution**.
7. The detention of the motor-vehicle was therefore motivated by bad faith.
8. In a further affidavit dated **6th October, 2014**, he stated that in addition the respondent had detained their motor-vehicle registration **Number KBP 6395/28 559S** under similar circumstances of the alleged transgression.
9. In a replying affidavit, **Eng. Charles D. Okeyo** the general Manager of the respondent stated that the respondent had power to impose and levy rates, tolls, charges, dues or fees for its service. It also has wide powers stipulated by the Act and Regulations to prescribed offences and their corresponding penalties
10. He alluded to Regulation **14** that provides for the procedure to be followed in event of overloading and **Regulation 15(3)** which provides for the procedure to be adopted in an instant where a motor-vehicle is found to have bypassed or absconded from the weighbridge station. A fee of **USD 2000** is payable in such an instant.
11. Further, he stated that had parliament intended to have such offences adjudicated upon by courts it would have expressly stated so.
12. Admitting that the motor-vehicle was weighed and found carrying cargo whose weight was within the Gross vehicle weight and axle load weight as prescribed by the law. He stated that it was called into the weighbridge at **Mlolongo, Athi River** previously on suspicion of overload on the gross vehicle weight but its driver failed, refused and/or neglected to stop.
13. Following the refusal to stop, the vehicle was tagged in the weighbridge system which did alert officers. As a result, the motor-vehicle was stopped on its return. Pursuant to the prohibition order the motor-vehicle had to be detained until compliance.
14. The detention was not as a result of contravention of **Section 55** and **56** of the **Traffic Act**. It is a requirement that absconding fee be paid.
15. In detaining the motor-vehicles the respondent acted without bias or malice. It did so pursuant to the law.
16. The respondent raised a preliminary objection on the grounds that:-
 - i. The substance of both the chamber summons application and the petition is based on a gross misunderstanding and misinterpretation of the Kenya Roads Act, the Regulations made thereunder and the provisions of the Constitution.
 - ii. KENHA is the Authority tasked with the mandate of ensuring adherence to the rules and guidelines on axle load control prescribed under **Section 4(2) (d)** of the **Kenya Roads Act 2007**.
 - iii. KENHA through an authorized officer is tasked with the mandate of enforcing the said regulations where a vehicle is found to have bypassed or absconded from a weighbridge station whether

- overloaded or not as provided for under **Regulation 15(3)** of the **Regulations**.
- iv. KENHA has the mandate to detain a vehicle and the cargo therein at the expense and risk of the owner in the event of failure to adhere to the instructions of the authority or the police as provided for under **Regulation 15(2) and (4)** of the said **Regulations**.
- v. KENHA has the mandate and powers vested in it as an authority under **Section 22(2) (d)** of the said **Act** to determine, impose and levy rates, tolls, charges, dues or fees subject to the approval of the minister.
17. Following the directive of this court due to the urgency of the matter both the Preliminary Objection and the Chamber Summons were canvassed simultaneously.
18. I have duly considered rival submissions of both counsels for the Petitioner/Applicant and Respondents.
19. A preliminary objection as held in the case of ***Mukhisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd [1969] E.A. 66*** – consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued may dispose of the suit.
20. In the Preliminary Objection raised the respondent seeks to argue that the Petition is based on misinterpretation of the law as the respondent has the authority to ensure adherence to regulations proved under the Act. A perusal of the petition clearly indicates that the relief sought by the applicant is declaratory in nature and also injunctive. Where there is an allegation of violation of constitutional rights, a finding that the respondent was seized of some mandate may not dispose off the entire suit. In the premises the Preliminary Objection is unmerited. Accordingly, it is dismissed.
21. Both parties herein are in agreement that the respondent herein is a creature of statute and has the mandate to impose levy rates, tolls, charges dues and fees for services that it provides. In some instance it may cause those offending the regulations to be charged in court. It is however argued by the Petitioner/Applicant that the ‘*fees*’ prescribed for the offence and in the instant case for absconding the weighbridge is indeed a disguise as in actual sense is a fine imposed for an offence that must be proved in a court of law.
22. The applicants motor-vehicle were detained pursuant to the provisions of **Regulation 15(3)** of the **Regulations** which provide thus:-

“where a vehicle is found to have bypassed or absconded from a weighbridge station, whether overloaded or not, the registered owner shall be liable to pay a bypassing or absconding fee of two thousand United States Dollars or its equivalent in Kenya Shillings, and subject to the provisions of these Regulations if the vehicle is found to be overloaded, the overloading fee and charging fee”.

23. In order to control overload, some measures were put in place by the respondent. In event of contravention of the regulations the motor-vehicle together with the cargo is detained at the owners risk and expense (***vide regulation 15(4)***). And in event that the fees is not paid within ninety (90) days a notice of sale is issued (***vide Regulation 15(5)***).
24. This brings us to the question – what is a ‘*fee*’ in the circumstances? Is it fine to be imposed by a court of law as argued? Neither the Act nor the regulations define a ‘*fee*’ or ‘*fine*’. However, the **Concise Oxford English Dictionary** defines a ‘*fee*’ as a charge made for service.

A ‘*fine*’ on the other hand is a sum of money exacted as penalty by either a court of law or other authority’. A fee is therefore paid as prescribed without a person being arraigned in a court of law.

25. The regulations do not provide for the arrest of the owner/driver of the motor-vehicle to be arraigned before court to answer charges. **Article 50** of the **Constitution** would be applicable if the driver or owner of the motor-vehicle had been arrested and arraigned in court. In the circumstances the court should have been expected to accord him a fair trial. Similarly, **Article 49** which is in respect of rights of a person who has been arrested being upheld does not apply.
26. The applicant was entitled to fair administrative action that was procedurally fair as stated. The law was enacted in the year 2007. It has been applicable for the last seven (7) years. It has never been challenged. It has been stated by way of affidavit evidence that following contravention of

the regulations, action was taken by the authorized officer. A notice to that effect was given pursuant to the law. It cannot be alleged that **Article 47** of the **Constitution** was contravened.

27. It is argued that imposing a fee of USD 2000 is in contravention of the law which is *ultravires*. Section **46(3)** of the **Act**. The alluded to Section provides:-

“Rules or regulations made under subsection (1) may prescribe, in respect of any contravention of any provision thereof, a fine not exceeding One Hundred Thousand Shillings or imprisonment for a term not exceeding one year or both, and may also prescribe, in the case of continuing offences, and additional penalty in respect of each day in which the offences continues”.

28. The regulations are made pursuant to section **22(2)(d)** and **46** of the **Act**. The Act gives the Authority the discretion of prescribing a fine which may not exceed one hundred thousand. It is not coached in mandatory terms therefore it would not be right to assert that the regulations are null and void. Therefore unless and until declared otherwise it would be lawful to continue levying the fee.
29. A prescription of the fee in dollars is in tandem with the East African Community Co-operation.
30. In order for this court to order release of the motor-vehicle the applicant had a duty of satisfying the court that the vehicle was detained for no apparent reason.
31. It is stated that the applicant’s motor-vehicle was weighed and the legality of weights of cargo confirmed -that is when a ticket was issued. However, instead of allowing the motor-vehicle to proceed with the journey the respondent, purporting to have authority under the **Traffic Act** and **Kenya Roads Act** had it detained. These were events of the **8th of September, 2014**.
32. Annexure ‘CD01’ is evidence of motor-vehicle KBQ 620B having been captured. It was called into the weighbridge on **24/8/14** at 7.45am or thereabout but failed to enter. There was no response by the applicants rebutting the evidence. In a further affidavit it sought to establish that another motor-vehicle registration No. KBP 6395/ZE 559S had been detained after the inception of the petition. No affidavit was deponed by their drivers to deny the fact that they failed to comply when called into the weighbridge on previous occasions. It is not disputed that they were captured on camera. This being the case, I am not satisfied that the motor-vehicle ought to be released. This will be in contravention of the regulations.
33. In the premises the application fails and stands dismissed.
34. However, I do order that the Petition should be heard on priority basis.

DATED, SIGNED and DELIVERED at MACHAKOS this 9TH day of OCTOBER, 2014.

L.N. MUTENDE

JUDGE