



IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. JUDICIAL REVIEW NO. 59 OF 2014

REPUBLIC APPLICANT

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY RESPONDENT

RULING

0. By Chamber Summons dated 13th November 2014 made pursuant to Order 53 Rule 1 of the Civil Procedure Rules and sections 8(2) and 9 of the Law Reform Act, cap. 26 Laws of Kenya, the ex parte applicant has sought leave of court to file judicial review proceedings in terms of the following specific orders:
 1. *That this Honourable Court be pleased to grant leave to **AINU SHAMSI HAULIERS LIMITED** to file an application for an order of certiorari to quash the decision/order made by JUSTINE KEITANY, a police officer/licensing officer/inspector based along **A 109** at MARIAKANI WEIGH BRIDGE to stop or detain the motor vehicle registration number KBK 882E and trailer registration number ZD2516.*
 2. *That this Honourable Court be pleased to grant leave to **AINU SHAMSI HAULIERS LIMITED** to file an application for an order of mandamus directed to compel KENYA NATIONAL HIGHWAY AUTHORITY, ministry of roads officers based at Mariakani Weigh Bridge Station along MOMBASA-NAIROBI HIGHWAY to re-weigh all the three axles of the motor vehicle known as KBK 882E and further the trailer registration number ZD2516 to ascertain if indeed there is an excess load in respect to the capacity of the said vehicle which is a 3 axle and thereafter release the same to deliver its consignment/cargo to its destination at NAIROBI.*
 3. *That this Honourable Court be pleased to grant leave to the ex parte applicant for an order of prohibition prohibiting the KENYA NATIONAL HIGHWAY AUTHORITY, ministry of roads officers based at Mariakani Weigh Bridge Station from taking any further steps of commencing traffic proceedings and also giving such orders in future regarding the 3 axles of the motor vehicle known as KBK 882E and trailer registration number ZD2516.*
 4. *That the said leave upon being granted to operate as a stay of the order/decision made on the 5th day of November 2014.*
0. Upon direction by the Court, the applications for the grant of leave of Court to file judicial review proceedings herein and for the leave so granted to operate as a stay of the impugned decision were heard together pursuant to the Proviso to Order 53 Rule 1 (4) of the Civil Procedure Rules. The Court considered it appropriate to have the two issues argued *inter partes* because of the urgent and final nature of the interim order of stay of the decision to remove from the road the motor vehicle alleged to be over-loaded with goods and the obvious public interest of the respondent in

enforcing road weight Rules. The court took the view that a grant of the leave and an order for leave to operate as a stay might have the effect of granting the final orders sought in the proceedings being the reversal of the respondent's decision to remove the *ex-parte* applicant's vehicle from the road for overloading. Hence the direction for *inter partes* hearing of both application for leave and for the leave granted to operate as a stay of the respondent's decision.

0. Upon being served with the application the respondent filed grounds of objection dated the 26th November 2014 urging, principally, that the Respondent had acted within the provisions of the Traffic Act and that the vehicle the subject of the proceedings had after a weighing inspection found to be overloaded at 45,920 kgs against the maximum Gross Vehicle Weight of 42,000kgs, and that the applicant had therefore committed an offence under the Traffic Act for which he must expect to be charged.
0. Counsel for the parties – Mr. Attancha for the *ex parte* applicant and Mr. Muchiri for the Respondent then made oral submissions on the 1st December 2014 and ruling was reserved for the 5th December 2014.
0. Having considered the respective cases for the parties, I find that the applicant has an arguable case with regard to the presence and effect of the load weight, of a third axel on the motor vehicle the subject of the application. If the vehicle has a third axel which has not been taken into account in the weighing and allocation of the weight among the axels of the motor vehicle, it would mean that the total weight of the vehicle would be within the weight allowed under the Traffic Rules, and I therefore grant leave of the court for the applicant to file judicial review proceedings for certiorari, mandamus and prohibition as prayed in the Chamber Summons dated 13th November 2014.
0. As regards leave granted operating as a stay, a stoppage of the decision requiring the applicant to properly distribute or off-load the alleged excess cargo would facilitate the commission of an offence under the Traffic Act and Rules on loading capacity of vehicles on the road, if the decision is finally established as correct. The Vehicle would then continue on its journey overloaded, posing a danger to the state of the road and exposing the vehicle's crew and other road users to possible accident by reason of excess weight, which the Traffic Rules are designed to prevent.
0. On the other hand, if stay upon leave is declined, the *ex parte* applicant will be compelled to off-load the alleged excess load before the vehicle could be released to proceed on its journey on Kenyan roads. As stated in the 2nd Respondent's order of 10.11.2014, the *ex parte* applicant, is of course, still liable to prosecution under the Traffic Act for overloading. The *ex parte* applicant will also lose the profit anticipated from the carriage of the off-loaded cargo as well as incur liability for a fine if found guilty of the traffic offence of overloading.
0. On the balance, I find that the factors in favour of the refusal of leave granted operating as a stay outweigh the considerations of profit and loss account which is affected by the off-loading of excess weight and the penal consequences of payment of any fines upon conviction therefor should traffic charges be preferred against the *ex parte* applicant.
0. In exercising its discretion, therefore, the court will grant a conditional stay which preserves the integrity of the road and prevents accident resulting from overloading. This, I consider, would be the outcome of an Order that the *ex parte* applicant will off-load the alleged excess load, without prejudice to the right of the Respondent to bring charges under the Traffic Act for overloading, but, only upon the hearing and determination of the Judicial Review proceedings by this court.
0. For purposes of any subsequent prosecution under the Traffic Act, the off-loading of the alleged excess cargo will be processed by the Scenes of Crime officers for the preservation of evidence to be used in such prosecution, subject to the outcome of the judicial review proceedings herein.
0. Accordingly, for the reasons set out above, I make the following orders on the Chamber Summons application dated 13th November 2014 for leave and stay upon leave:
 1. **Leave of the court is granted to the *ex parte* applicant to file judicial review proceedings as prayed within 21 days in accordance with Order 53 Rule 1 of the Civil Procedure Rules.**
 2. **The Leave granted shall operate as a stay of the decision of the Respondents on condition that the alleged excess load is off-loaded under the supervision of Scenes of Crime personnel and without prejudice to the prosecution of the *ex parte* applicant for offences under the Traffic Act and Rules made there-under.**

3. **There shall be a stay of any criminal proceedings against the Applicant for the alleged overloading, as indicated in paragraph (2) of the 2nd Respondent's order of 10.11.2014 pending hearing and determination of the Judicial Review proceedings herein.**
4. **The costs of the application will be costs in the cause.**

Dated, signed and delivered on the 5th December 2014.

EDWARD M. MUIITHI

JUDGE

In the presence of:

No appearance for the Exparte Applicant

Mr. Sichanji for Mr. Muchiri for the Repondent

Ms. Linda - Court Assistant