



**Premji Patel Company Limited v Director General Kenya National Highways Authority (KENHA)  
& 3 others (Civil Appeal 67 of 2019) [2022] KECA 738 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KECA 738 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL 67 OF 2019  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
MAY 27, 2022**

**BETWEEN**

**PREMJI PATEL COMPANY LIMITED ..... APPELLANT**

**AND**

**DIRECTOR GENERAL KENYA NATIONAL HIGHWAYS AUTHORITY  
(KENHA) ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL NATIONAL POLICE SERVICE ..... 2<sup>ND</sup> RESPONDENT**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**OFFICER COMMANDING STATION MTWAPA POLICE STATION .... 4<sup>TH</sup>  
RESPONDENT**

*(An appeal from the Ruling/Order of the High Court of Kenya at Malindi  
(Chitembwe, J.) dated 28<sup>th</sup> July 2017 and delivered by (Korir, J.) on 17<sup>th</sup> October 2017)*

**JUDGMENT**

1. Premji Patel Company Limited, the appellant, is dissatisfied with a ruling of the High Court at Malindi (Chitembwe, J.) dated 28<sup>th</sup> July 2017 and delivered on 17<sup>th</sup> October 2017 rejecting its judicial review application in which it had sought an order of certiorari to quash a decision of Kenya National Highways Authority (KENHA), the 2<sup>nd</sup> respondent, to detain its vehicle; and an order of mandamus to compel KENHA to release the said vehicle without imposing what it contended was an illegal penalty.
2. There is controversy as to the events that led up to the proceedings before the lower court. According to the appellant, on 18<sup>th</sup> March 2015 at about 9.00 p.m., its vehicle KBN 343N Isuzu Truck, loaded with river sand, broke down along Malindi-Mombasa Road and was parked by the roadside awaiting repairs. Early the following morning, at about 1.10 a.m., the appellant's director Hitesh Patel, received information that persons who had alighted from a vehicle, described as Probox KBP 413F, were



removing the number plate from the truck; that on his way to take a mechanic and spare parts to the truck, he encountered the said vehicle KBP 413F and stopped it and inquired from the occupants, an Inspector of Police and SGS Personnel, why they had removed the number plate but did not get a satisfactory answer; that he proceeded with the mechanic to where the truck was and repaired it and it was ready to continue with its journey by 4.30 a.m.; that thereafter the driver drove the truck and reached Mtwapa Weigh Bridge at 6.00 a.m. on 19<sup>th</sup> March 2015 but the personnel there refused to weigh it on grounds that it did not have a number plate and clearance was required from the people who had removed the number plate; that when the truck was finally weighed about 3.00 p.m. on 19<sup>th</sup> March 2015, it was found to be fully compliant with the legal weight limits and had no excess cargo weight and a weighbridge ticket to that effect was issued.

3. According to the said Hitesh Patel, after the truck was weighed, he was issued with an order, titled “To Resume Vehicle From Road Or Public Place, To Offload Excess Weight, Or To Effect Repairs” (the Order). On the face of it, the Order was issued at 2.30 hour on 19<sup>th</sup> March 2015 and stipulated, in the relevant part, as follows:

“ To the owner or servant of owner or driver of Vehicle Registration

KBN 343 N Make Isuzu...

1. I Grace Roselyn/Gideon Sanganyi a Police Officer/ Licensing Officer/ Inspector acting under sections 106 and 107 of Traffic Act:
  - a. ...
  - b. Have inspected and found the above vehicle is being used at Mombasa Malindi Road in contravention of section 55 and 56 of the traffic rules in respect of loading and construction of vehicle and I order that the vehicle shall not be further used until its load is properly distributed, the excess load of-kgs. is offloaded; the necessary repair, that is to say... pay a fee of USD 2000 for absconding mobile weigh Bridge are carried out And for the purpose I Further Order that the vehicle shall be moved to Mtwapa Holding Yard and there detained until this Order is complied with in accordance with the Traffic Act.
2. This Order is without prejudice to any proceedings that may be brought for the contravention with the Traffic Act or the Traffic Rules.
3. it is an offence to disobey this order.
4. Attention is drawn to subsection (3) of section 0106 of the Traffic Act that any loss or damage incurred as a result of this Order shall not be the responsibility of the police officer, licensing officer or inspector.” [words in bold represent words inserted into a pre- printed form]
4. According to the appellant, the personnel manning the weighbridge thereafter declined to release the truck maintaining that a release order could only be made by the people who had removed the number plate.
5. On 20<sup>th</sup> March 2015, the appellant reported the incident at the offices of KENHA in Mombasa where the said Hitesh Patel recorded a statement but the vehicle was not released. Thereafter the appellant instructed its advocates who despite making demands, the vehicle was still not released, and the appellant was constrained to institute the judicial review proceedings before the lower court.



6. KENHA's version of events, on the other hand is somewhat different. It is that on 19<sup>th</sup> March 2015, the weighbridge manager Mariakani, Gideon Sanganyi and Chief Inspector Elias Kiptoo, OCS Mariakani and other police officers were on "normal snap checks for over loaders along Mombasa Malindi" when at about 00.05 hours they came across the appellant's said truck vehicle KBN 343N; that on stopping it, the driver moved the vehicle off the road, switched off the ignition, alighted from the vehicle and ran away behind the shops and disappeared; that when the driver of the truck did not return, they removed the number plates of the truck and drove off; that along the way they were stopped by two gentlemen who were driving behind them and who claimed to be the owners of the vehicle; that the said owners declined to go back to where the truck was packed in order to weigh it, whereupon the weighbridge manager Mariakani, Mr. Sanganyi and Chief Inspector Elias Kiptoo drove off to continue with their mobile weighbridge and snap checks.
7. According to KENHA, before the appellant took the vehicle to Mtwapa weighbridge, some of the cargo had been off loaded; that at Mtwapa weighbridge the truck could not be weighed without the number plates which had been removed.
8. In any event, on 28<sup>th</sup> May 2015, the appellant filed an application before the High Court at Malindi seeking leave to apply for: an order of prohibition prohibiting the OCS Mtwapa Police Station and Police Officers under his control from further detaining the truck pursuant to "the unlawful and irregular" Order; an order of *Certiorari* to quash the decision and or directive contained in the Order; and an order of Mandamus compelling the respondents to release the truck. Leave was duly granted on 2<sup>nd</sup> June 2015 and thereafter, on 18<sup>th</sup> June 2015, the appellant filed the motion dated 17<sup>th</sup> June 2015 seeking orders of prohibition, certiorari and mandamus which were declined by the court in the impugned ruling.
9. The appellant's case before the lower court was that the respondents in issuing the Order of 19<sup>th</sup> March 2015 and in detaining the appellant's truck did so arbitrarily and capriciously; that the actions of KENHA complained of are ultra vires its powers under the *Kenya Roads Act* and the *Traffic Act*; that the alleged offence of "absconding mobile weighbridge" cited in the Order does not exist as it is not provided for under Section 55 and 56 of the *Traffic Act* or the *Kenya Roads Act*; that detention of the truck and the penalty of imposing a fine of USD 2000 is illegal, irregular and ultra vires and a usurpation of the jurisdiction provided under Sections 55, 56 and 58 of the *Traffic Act*; that the respondent's officers acted unreasonably and in excess of their powers by failing to consider that the appellant's truck had broken down; that the Order was issued prior to any inspection to determine what excess weight, if any, was carried by the truck; that the acts complained of are unreasonable, irrational, unfair, perverse within Wednesbury principle, in breach of rules of natural justice and a violation of the constitutional protection from deprivation of property.
10. KENHA on its part asserted that the number plates were removed from the truck in compliance with Section 106 subsection 4A; that the appellant was issued with the Order for absconding mobile weighbridge and the truck could not be released without the appellant paying the USD 2,000 as provided under Regulation 15(3) of the *Kenya Roads (Kenya National Highways Authority) Regulations, 2013*; that the offence of absconding a weighbridge is provided for under Regulation 15(3) of the *Kenya Roads (Kenya National Highways Authority) Regulations, 2013*; that the weighbridge can be an installed one or a mobile one as was the case in this matter; that in impounding the truck, the officers of the 2<sup>nd</sup> respondent together with the OCS and his police officers were exercising their statutory powers under the *Kenya Roads Act* and *Kenya Roads (Kenya National Highways Authority) Regulations, 2013*; that the appellant committed an offence and is bound to pay the prescribed fees for the truck to be released.



11. Reference was also made to: Section 56 (1) of the [Traffic Act](#) which provides that no vehicle shall be used on a road with a load greater than the load specified by the manufacturer of the chassis of the vehicle or than the load capacity determined by an inspector under the [Traffic Act](#); Section 105 of the [Traffic Act](#) empowering the 2<sup>nd</sup> respondent to stop any vehicle on reasonable suspicion of any offence under the Traffic act; and Sections 106 and 107 of the [Traffic Act](#) for the power of the 2<sup>nd</sup> respondent to take a vehicle, and to detain the same at a police station or other place where the same is found in use on a road in contravention of the provisions of the [Traffic Act](#). The 1<sup>st</sup> and 2<sup>nd</sup> respondent maintained that the appellant's vehicle was detained for failure to divert to the weighbridge.
12. In dismissing the appellant's application, the Judge found that the appellant's truck was stopped for weighing during snap checks, but the driver and the owner refused to have it weighed; that the refusal to do so constituted an offence and that it was immaterial whether the weighbridge was a mobile one or uninstalled; the Judge found that there was no violation of the appellant's constitutional rights as it was given an opportunity to have the vehicle weighed after it was stopped but the driver ran away and it was impossible to weigh the truck. The Judge further found that the police are empowered to detain an overloaded vehicle; that the regulation permitting detention of the vehicle until the fee of USD 2000 is paid "is proper and is intended to control the weight of loads carried by vehicles on Kenyan roads" the "underlying principle" being that "an overloaded vehicle should not be allowed to continue using the road until the overloaded fee is paid."; that Section 106(4A) of the [Traffic Act](#) allows a police officer to remove the identification plates and the vehicle licence when a vehicle is found not to complying with the rules and the police officers suspected the truck was overloaded.
13. Citing Regulation 15, the Judge held that "an absconding fee is payable where a vehicle is found to have bypassed or absconded a weighbridge" and that "it does not matter whether the vehicle is overloaded or not"; that in the present case the appellant's "vehicle was stopped but avoided being weighed" and "there is no need for the respondent to have the culprit charged in court" as "all the law provides is that the absconding or bypassing fee becomes automatically payable." In that regard, the Judge stated: "if the owner avoids having the vehicle weighed, the presumption would be that the vehicle is overloaded. The respondents will be within their rights to issue the absconding or bypassing order." The Judge expressed that the police acted because the owners of the truck declined to take the vehicle for weighing and the action taken was within the law.
14. Aggrieved, the appellant lodged the present appeal on four grounds as set out in the memorandum of appeal. During the hearing of the appeal on 23<sup>rd</sup> February 2022, there was no appearance for the appellant despite service of notice of hearing. The firm of Muturi Gakuo & Kibara Advocates had however filed written submissions dated 25<sup>th</sup> January 2021 in which it was submitted that the Judge erred in finding that the respondents were empowered, under Regulations 14 and 15 of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013, to impound and detain the truck until the appellant paid USD 2,000 for the alleged offence of absconding weighbridge; that the said provisions are illegal and ultra vires the Constitution; that the said provisions purport to give powers to officers of KENHA to imposed, through extra judicial process, powers to impose penalties without due process; that the said provisions are unreasonable and clogged the appellant's right to fair hearing. In support, the decisions of the High Court in *Martin Mbatha Mutisya vs Kenya National Highways Authority* [2017] eKLR; *Margaret Miano vs. Kenya National Highway Authority*, Mombasa Petition No. 23 of 2015; *R vs Kenya National Highways Authority, Ex parte John Mwaniki Kiarie*; and *Disaranio Limited vs. Kenya National Highways Authority & Attorney General* [2017] eKLR were cited.



15. Based on the foregoing, counsel urged that the conclusion by the trial Judge that the said regulations and actions of the 2<sup>nd</sup> respondent were proper and lawful is erroneous.
16. Opposing the appeal, learned counsel Mrs. Olembo holding brief for Mr. Nyiha learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents relied entirely on written submissions dated 18<sup>th</sup> May 2021. Counsel submitted that the only issue in the appeal is “whether Regulations 14(4) and 15 of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 empowered the 2<sup>nd</sup> respondent to automatically impose a bypassing or absconding fee, and to detain the truck until payment of absconding fee and the constitutionality of those provisions.”
17. Counsel urged that the High Court was right that the law, Regulation 15(3) of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013, provides that a fee is automatically payable for absconding or by passing a weighbridge; that on being flagged down on suspicion of overload, the driver of the truck pulled the truck to the side of the road and ran off avoiding ascertainment, by mobile weighbridge, whether the vehicle was overloaded; that the director of the appellant equally declined to return to where the truck was packed for purpose of weighing; that the 2<sup>nd</sup> respondent was therefore justified under Section 106(4A) of the [Traffic Act](#), to remove the number plates of the truck; that the following day, the truck was taken to Mtwapa Weighbridge but could not be weighed without the number plates.
18. Counsel submitted that the functions of KENHA are provided under Section 4 of the [Kenya Roads Act](#) which include ensuring adherence to the rules and guidelines on axle load prescribed under the Traffic Act and monitoring and evaluating the use of national roads; that the actions of the 2<sup>nd</sup> respondent are therefore provided for and supported by the [Kenya Roads Act](#) and Kenya Roads (Kenya National Highways Authority) Regulations, 2013 (Legal Notice Number 86). In that regard, specific reference was made to Regulations 14(4) and 15(3).
19. Counsel urged that owing to refusal of the appellant to have the vehicle weighed, Regulation 15(3), came into effect. That because the appellant did not pay the prescribed USD 2,000 until 4<sup>th</sup> June 2015, then the truck was detained in accordance with Regulation 14(4). That the lower court rightly found that absconding fee is payable where the vehicle is found to have bypassed or absconded a weighbridge.
20. Counsel submitted that the fee prescribed is not a fine, but a fee “for a regulatory infraction” like that imposed under Section 44 of the [VAT Act](#) for failure to submit returns and is therefore legal. In support, counsel referred to decisions of the High Court in *Agnes Ongadi vs. The Attorney General & Kenya National Highways Authority*, HCCC No. 3 of 2015; [Blue Jay Investment Limited vs. Kenya National Highways Authority](#) [2014] eKLR; [Buzeki Enterprises Limited vs. Kenya National Highways Authority](#) [2014] eKLR. It was urged that Regulation 15(3) constitutes a statutory fee and if a person infringes a particular statute for which a fee is provided, there is no need for a hearing as the matter is one of strict liability; and that it was clearly shown at the trial that the driver absconded.
21. Counsel submitted that the argument raised that the appellant’s right to due process and fair hearing is not a matter that was taken before the High Court and it cannot therefore be entertained at this point. In that regard reference was made to the decision of this Court in [Republic vs. Tribunal of Inquiry to investigate the conduct of Tom Mbaluto & others, Ex parte Tom Mbaluto](#) [2018] eKLR; and also [George Owen Nandy vs. Ruth Watiri Kibe](#) Civil Appeal No. 39 of 2015.
22. According to counsel, all the decisions cited by the appellant on the legality of the regulations in question were decided after 19<sup>th</sup> March 2015, when the acts complained of in this matter occurred; that those decisions can only be prospective and cannot therefore apply retrospectively. Based on the



foregoing, counsel submitted that the High Court rightly dismissed the appellant’s motion and urged that this appeal should equally be dismissed.

23. There was no appearance for the 3<sup>rd</sup> and 4<sup>th</sup> respondents during the hearing although despite notice of hearing having been served.
24. We have considered the appeal and submissions. There is one issue for determination in this appeal. Counsel for the appellant framed it thus: whether the respondents were empowered, under Regulations 14 and 15 of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013, to impound and detain the truck until the appellant paid USD 2,000 for the alleged offence of absconding weighbridge and whether the said provisions are illegal ultra vires the Constitution. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, on the other hand framed it thus: whether Regulations 14(4) and 15 of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 empowered the 2<sup>nd</sup> respondent to automatically impose a bypassing or absconding fee, and to detain the truck until payment of absconding fee and the constitutionality of those provisions.
25. Kenya National Highways Authority is established under Section 3 of that *Act* and its functions under Section 4 include ensuring adherence to the rules and guidelines on axle load control prescribed under the *Traffic Act* and under any regulations under the Traffic Act. Under Section 22 (1)(c) of that Act, the powers of the Authority include power to measure and assess the weights, dimensions and capacities of vehicles using any road and provide measures to ensure compliance with rules relating to axle load control, other provisions of the Traffic Act and any regulations under that Act. Under Section 22(2) (d) the powers include, “with the approval of the Minister, to determine, impose and levy rates, tolls, charges, dues or fees for any of its services or for the use by any person of its facilities”. Under Section 22(3) it is provided that, “For the avoidance of doubt, it is hereby declared that subsections (1) and (2) relate only to the capacity of the Authority as a statutory body and nothing in those provisions shall be construed as authorising the disregard by the Authority of any law.”
26. The Kenya Roads (Kenya National Highways Authority) Regulations, 2013 published in Legal Notice No. 86 dated 10<sup>th</sup> May 2013, of which Regulations 14(4) and 15 are part, were made pursuant to Section 22(2)(d) and 46 of the *Kenya Roads Act*, Act No. 2 of 2007. Regulation 10 under which the “overload offence” is created/referred to, provides, among other things that a driver of a motor vehicle or a person in charge of a motor vehicle, who when required to submit a motor vehicle to be weighed on a weighbridge by an authorized officer fails to submit the vehicle to being weighed commits an overload offence. Regulation 14 titled “notification of overload offence and payment of overload fee” provides that a notification in weighbridge report shall form the basis of imposing fees where a vehicle is found to be overloaded. Under Regulation 14(2) upon issuance of a weighbridge report form, the driver has a duty to notify the registered owner of an overload offence and the registered owner shall be required to pay the overload fee. And under Regulation 14(4) it is provided that:

“In order to secure a payment of fees, an overloaded vehicle shall be detained free of charge by the Authority for the first three consecutive days, and subsequently, a fee of two thousand shillings shall be charged for each extra day until proof of payment is produced.”
27. Regulation 15 titled “procedures to control overload” provides in subsection 3 as follows:

“(3) Where a vehicle is found to have bypassed or the 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 procedures provided in these Regulations shall be instituted in addition to the absconding fee.”

28. As counsel on both sides have submitted, the legality and constitutionality of those provisions have been the subject of previous litigation. Counsel referred us to numerous decisions of the High Court in that regard. In *Blue Jay Investment Limited vs. Kenya National Highways Authority* [2014] eKLR a ruling delivered on 13<sup>th</sup> August 2014, the High Court at Machakos (Mutende, J.) declined to order release of a vehicle that had been impounded and detained for alleged violation of Regulation 15(3) in that the driver failed to divert into a weighbridge station. In doing so, the Judge stated:

“Having by passed the weighbridge the registered owner of the motor-vehicle must pay the requisite fee in the sum of USD 2000 – or its equivalent in Kenya Shillings. The motor-vehicle was detained. It has been stated that it was carrying cargo owned by Unilever Kenya. The vehicle and cargo have been detained at the risk of the registered owner of the motor-vehicle. According to sub-regulation (5) of Regulation 15 of the Regulations, if the fee is not paid within 90 days, then a notice of sale by auction of the vehicle and cargo shall issue.

The regulations do not provide for a situation where the offender is charged in a court of law and a fine imposed. What is provided for is payment of a fee. In the circumstances the action that was taken by the respondent was justified.”

29. In the same year, the same issue arose in *Buzeki Enterprises Limited vs. Kenya National Highways Authority* [2014] eKLR where the petitioner’s vehicle therein was detained for absconding a weighbridge. It was contended that that the ‘fees’ prescribed for the offence of absconding the weighbridge is indeed a disguise, as in actual sense, it is a fine imposed for an offence that must be proved in a court of law. The Judge, Mutende J., in her ruling delivered on 9<sup>th</sup> October 2014 concluded that:

“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.”

30. Later, the case of Agnes Ongadi vs The Hon. Attorney General and Kenya National Highways Authority HCCC No. 3 of 2015, involved an application for the release of the plaintiff’s vehicle detained at Rongo Weighbridge on the basis that the order requiring the plaintiff to pay USD 2000 for absconding from the weighbridge was illegal. It was contended that only a court of law could impose a fine and therefore the detention was illegal. In rejecting that argument and in dismissing the plaintiff’s application for the release of the vehicle, Majanja, J. in a short ruling delivered on 27<sup>th</sup> April 2015 determined that Regulation 15(3):

“Establishes a basis for levying a fee in USD 2000. Like the court in *Blue Jay Investment Limited vs. Kenya National Highways Authority* MKS HCMisc. App. No. 122 of 2014 (UR) I am persuaded to find at this stage that the fee imposed is not a fine but a penalty for regulatory infraction. It is therefore lawful and as such I decline to issue the mandatory order sought by the plaintiff.”

31. Subsequently, Emukule, J. in *Margaret Miano vs. Kenya National Highway Authority* Mombasa High Court Petition No. 23 of 2015[2015] eKLR was not in any doubt that the “fee” prescribed in those



regulations was indeed a fine. In his ruling in a constitutional petition delivered on 8<sup>th</sup> May 2015, the Judge ordered the release of a vehicle that had been impounded under those regulations stating:

“ There is in law a difference between a fee and a penalty. A fee is a price or cost exacted for any special privilege, for example a driver’s licence, a transport licence, and the like fees referred to in Regulation 6 and prescribed in Part A of the Schedule to the said Regulations. So a licensing statute will prescribe a fee payable for the grant of a licence. The licensing statute or regulation will also prescribe a penalty for carrying out an activity subject to a licence, for example driving a motor vehicle without such a licence. The penalty is a fine, punishment, suffering or loss imposed for breach of a law, a disadvantage imposed upon a person who fails to obey the rules for example of a game such as penalty in football for fouling an opponent within the penalty area.

By its very language Regulation 15(3) is not a licensing provision. It is a penal provision, and like all penal provisions it must be construed strictly. Because it is euphemistically called a fee does not change its intrinsic character that it is a fine or penalty for the offence of bypassing a weighbridge or absconding therefrom. The offence is subject to proof. The registered owner, like the Police, is required to be informed within twenty four hours of the fact of bypassing or absconding from the weighbridge. There is no presumption in law, or presumption in the Regulations that the driver or person who bypasses the weighbridge is automatically guilty”

32. In the same vein, Odunga J. in a judgment delivered on 31<sup>st</sup> October 2016 in a judicial review application seeking orders of prohibition and certiorari prohibiting and quashing decision to remove number plates of vehicle, *Republic vs. Kenya National Highways Authority Ex parte John Mwaniki Kiarie* [2016] eKLR, had this to say:

“ In my view Regulation 15 above effectively makes the Respondent the complainant, witness, the investigator, prosecutor and judge in the same cause or proceedings and that would be improper. This is the principle of nemo iudex in sua causa. As was held by the *Court of Appeal in Galaxy Paints Company Ltd. vs. Falcon Guards Ltd. Civil Appeal No. 219 of 1998* [1999] 2 EA 83, the fundamental principle is that a man may not be a Judge in his own cause”

33. In the case of *Disaranio Limited vs. Kenya National Highways Authority & Attorney General* [2017] eKLR, the petitioner petitioned the High Court at Machakos following the detention of its vehicle and the levying of a fee of Kshs. 150,000. The petitioner sought: an order to restrain the Kenya National Highways Authority from impounding and detaining its vehicle without preferring criminal charges; an order for release of the vehicle; a declaration that the levying of the fee without affording the petitioner due process violated the petitioner’s rights under Articles 40, 47 and 50 of the *Constitution*; a declaration that regulations 10 and 14(4) of the Regulations contravenes Articles 40, 47 and 50 of the Constitution. In a judgment delivered on 30<sup>th</sup> January 2017, the High Court (Nyamweya, J. as she then was) in allowing the petition granted the following reliefs:

“ It is hereby declared that the action by the Respondents of levying a fee for contravention of regulations 15(5) of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 without affording the Petitioner due process violated the rights of the Petitioner under Articles 40, 47 and 50 of the Constitution of Kenya.

5. It is hereby declared that Regulations 14 and 15 of the Kenya Roads Kenya National Highways Authority) Regulations, 2013 contravene Articles 40, 47,



50 and 159(1) of the Constitution of Kenya and are hereby found to be unconstitutional and are declared null and void.

6. It is hereby declared that Regulations 15(5) of the Kenya Roads Kenya National Highways Authority) Regulations, 2013 is in addition found to be substantively ultra vires for contravening section 46(2) of the Kenya Roads Act, and is declared null and void.”

34. In making those declarations, the learned Judge expressed that the procedure under the regulations where a person’s property is at risk of being confiscated without being given an opportunity to respond to the charges amounted to arbitrary deprivation of property. With specific reference to regulation 14, the Judge noted that a person who is merely notified of having committed an offence may suffer the penalty of paying a fee, having his property confiscated, and the property possibly eventually sold under those provisions without ever being given an opportunity to be heard. In addressing the question whether the powers given to the Kenya National Highway Authority were exercised lawfully and constitutionally in impounding the Petitioner’s motor vehicle and imposing a fee for its release, the Judge expressed that the respondent in that case made a decision in the process of implementing regulations that adversely affected the rights to property of the Petitioner without undertaking any procedures or hearing to determine the Petitioner’s liability; that the proceedings that took place were beyond mere administrative proceedings, as the Petitioner’s motor vehicle was not merely being weighed, but in addition the Petitioner was found culpable of an offence and penalized for it by its vehicle being impounded and being asked to pay a fee; that both Article 47 and Article 50 of the Constitution are applicable as both administrative and quasi-judicial procedures were employed by the Respondent, who did not provide any evidence of compliance with the provisions of the Constitution in this regard; that Article 47 and 50 required that notice and the relevant information be given, as well as a hearing be accorded to the Petitioner, who had the right to present evidence and argument in response to the Respondent’s allegations or findings.
35. The circumstances in the present case are not dissimilar to those in *Disaranio Limited vs. Kenya National Highways Authority & Attorney General* (above). There are, in the present case, material factual differences as regard what precipitated the detention of the vehicle. As already noted, KENHA’s version of events is that the driver of the truck abandoned it by the roadside when stopped by KENHA’s personnel. Grace I/P Roselyn and Gideon Sanganyi, the persons who issued the Order in question did not depose as to what happened. The appellant’s version on the other hand was that the vehicle broke down and was packed by the roadside to await repairs. The driver of the truck also did depose to the matter. In effect there was only the contested and untested word by KENHA that the vehicle had absconded or bypassed a snap weighbridge based on which the appellant was effectively convicted, its vehicle detained, and a penalty of USD 2,000 imposed. It is therefore not clear how the learned Judge reached the finding of fact that the appellant’s truck was stopped for weighing during snap checks, and that the driver and the owner of the truck refused to have it weighed.
36. There are other troubling issues in this case. A weighbridge ticket was exhibited showing that the axle load was within limits. KENHA asserted that the driver had offloaded some of the cargo. Was that the same driver who was said to have disappeared? How was it established that some cargo had been off loaded? As Nyamweya, J. stated about Regulations 14 and 15 in *Disaranio Limited vs. Kenya National Highways Authority & Attorney General* (above):

“It evident that these regulations expressly create offences, and if a person is alleged to have committed an offence under any of the above-cited regulations, the Constitution requires that person to be charged, be informed of the charges, and the trial be held in public



before a Court of law established under the Constitution. Therefore, a notification of the weighbridge report cannot constitutionally form the basis for imposing fees where a vehicle is found to be overloaded, and can only be the initiation document as regards the bringing of charges against anyone alleged to have committed the offence, which offence must be proved before any fee or penalty is imposed.”

37. We also agree, as held in that case, that Regulation 15(5) of [Kenya Roads \(Kenya National Highway Authority\) Regulations](#), 2013 is substantively ultra vires for reasons that it provides for fines that are not allowed by, and are beyond the powers given by the parent Act. See also in [Martin Mbatia Mutisya vs Kenya National Highways Authority](#) [2017] eKLR.
38. We conclude, therefore that there is merit in this appeal. The ruling and order of the High Court dated 28<sup>th</sup> July 2017 and delivered on 17<sup>th</sup> October 2017 dismissing the appellant’s application dated 17<sup>th</sup> June 2015 is hereby set aside. We substitute therefore and order allowing prayers 1 and 2 of the said application. In the result:
- a. The Officer Commanding Mtwapa Police Station (OCS Mtwapa) and police officers under his control are hereby prohibited from further detaining, holding, confining and or otherwise impounding the applicant’s motor vehicle registration number KBN 343N Isuzu Truck at Mtwapa Holding Yard or at any other police station or other location pursuant to the unlawful and irregular order issued on 19<sup>th</sup> March 2015.
  - b. The decision and or directive of the respondents contained in the unlawful and irregular order to resume vehicle from road or public place issued on 19<sup>th</sup> March 2015 wherein the said respondents ordered and or directed that the applicant’s motor vehicle registration number KBN 343N Isuzu Truck be removed to and detained at Mtwapa Holding Yard until payment of USD 2000 by the applicant is hereby quashed.
39. The appellant will have the costs of the application before the lower court and of this appeal to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF MAY 2022.**

**S. GATEMBU KAIRU, (FCIArb)**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

**J. LESIIT**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

