IN THE COURT OF APPEAL

AT NAIROBI

[CORAM : WAKI, NAMBUYE & MAKHANDIA, JJ.A]

CIVIL APPEAL NO. 182 OF 2012

BETWEEN

REPUBLIC.....APPELLANT

=VERSUS=

THE MINISTER FOR ROADS AND PUBLIC WORKS.....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

EX-PARTE: KYEVALUKI SERVICES LIMITED

(Being an appeal from the Judgment of the High Court of Kenya

at Nairobi, (**Lady Justice C.W. Githua, J.**) Dated 29th May, 2012

in

Misc. Application No. 365 of 2010)

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JUDGMENT OF THE COURT

This appeal arises from the Judgment of the High Court, **Hon. Lady Justice C.W. Githua,** dated 29th May 2012.

The background to the appeal is that the 2nd respondent while in the discharge of its mandate under the Traffic Act Cap **403**,Laws of Kenya (The Act), on diverse dates as more particularly specified in the substantive notice of motion for the Judicial Review(JR),served the appellant with orders directing it to remove from the road its motor vehicles, variously found with excess loads capacities at various weigh bridges. The appellant was aggrieved by the said directives and was granted leave to apply for Judicial Review (JR), order of *certiorari to* quash the entire decision by the 1st and 2nd respondent; an order of *mandamus* compelling and directing the 1st and 2nd respondents to forthwith apply the use of the chasis load capacities specified by the manufacturers and adopt the gross vehicle weight in that regard in ascertaining the maximum permitted weight; and lastly, an order of *prohibition* prohibiting the 1st and 2nd respondents from adopting the sole use of the load capacity determined by an inspector in the assessment of the load limits of cargo vehicles.

The Notice of Motion was supported by the grounds in the body of the Chamber Summons for leave dated 6th December, 2010, the statutory statement, and a verifying affidavit together with annexures thereto. In summary, the appellant contended *inter alia*, that the method employed by the 1st and 2nd respondents when determining the load capacity for cargo motor vehicles was inconsistent as they gave different vehicle load capacities at different weigh bridges; and second that the said method was also not only erroneous, but was also arrived at arbitrarily, irrationally, unreasonably and in breach of the rules of natural justice as the decision was arrived at without the participation of the appellant.

The first respondent whom we were informed never participated in the proceedings before the High Court filed no reply. The 2nd respondent on the other hand, filed a replying affidavit deposed by Engineer **Kungu Ndung'u** on 16thFebruary, 2011, contending *inter alia*, that an Inspector appointed under section **3** of the Act is mandated under section 56 (1) of the Act to determine the load capacities besides those specified by the chasis manufacturers; that in arriving at the maximum legal weight, both the manufacturer and the inspector are guided by Rule 41 of the rules of the Act which sets out weights and dimensions of vehicles that are supposed to be used on the road; conceded that the

respondents variously positioned weigh bridges on public roads manned by Inspectors to verify the load capacities for motor vehicles; that the inspectors correctly determined the load capacities for the appellant's cargo motor vehicles in accordance with the legal weight permissible in terms of legal notice No. 118 of 2008.

In addition to the above assertions, the 2nd respondent also raised two preliminary objections to the appellant's JR proceedings namely: on want of form and want of Jurisdiction.

The JR was canvassed by way of written submissions, fully adopted and as orally highlighted by learned counsel for the parties.

The learned trial Judge assessed and analyzed the record, first of all in light of the two preliminary objections raised by the 2nd respondent against the JR proceedings and rejected the 1st preliminary objection on the ground that the heading of the substantive Notice of Motion which in her view, formed the basis for the 1st preliminary objection indicated clearly that the JR had been brought in the name of the Republic, which was the proper mode of tilting a JR application.

As for the second preliminary objection on want of jurisdiction, the Judge construed the provisions of Order **53** Rule **7** of the former Civil Procedure Rules (CPR), applied the threshold therein to the rival pleadings and submissions on the issue and made findings thereon that in light of the above threshold, it was mandatory for the appellant to annex to the application, the impugned decision, and in default to give an explanation for the default, neither of which the appellant complied with. That the weighbridge tickets together with the attendant orders issued for the removal of the appellant's motor vehicles from the road, did not constitute a decision capable of being quashed in terms of order **53** Rule **7** of the CPR, as these were merely generated by way of calibration of the weigh bridge machines and had nothing to do with an Inspectors' individual subjective decision making process. The second preliminary objection on want of jurisdiction was sustained.

Despite that finding, the Judge considered merits of the JR. Relying on **Halsbury's Laws of England 4th Edition, vol. 1** (reliefs) at page **202,** paragraph **109** and considering the exposition of the principle of law on the writ of certiorari expounded therein, the Judge formed the view that the appellant had not demonstrated that the 2nd respondent through its Inspectors made a decision that was in excess of or outside their jurisdiction or contrary to the law; that the appellant had by its own admission in its supportive evidence indicated that the respondent's choice to use only one of the two methods provided for in section **56 (1)** of the Act was permissible and within the law; that the appellant had not demonstrated that the Inspectors acted arbitrarily, unreasonably or capriciously to the detriment of the appellant. In light of the above reasoning, it was held that although existence of inconsistencies in the weigh bridge tickets may have given rise to a genuine source of concern for the appellant, they did not of themselves form sufficient basis upon which an order of Certiorari could issue. The writ of certiorari was declined.

Turning to the scope and efficacy of the remedy of mandamus, the Judge relied on the principle enunciated in **Kenya National Examination Council -versus-Republic, Exparte Geoffrey Gathenji& 9 Others, and Civil Appeal No. 266 of 1996,** and found that since section **56(1)** of the Act gave the 2nd respondent discretion in deciding which of the two methods specified therein was appropriate to use in the execution of its statutory mandate under the Act, the 2nd respondent could not be faulted for choosing to use Inspectors in the determination of maximum load capacities for the appellants motor vehicles; that if an order of mandamus were to issue in the manner applied for by the appellant, then that would have amounted to compelling the respondents to use only the chasis load capacity which in the Judge's view, would have amounted to an interference with the respondents' lawful discretion under the Act. On that account, the Judge declined to grant the writ of mandamus Turning to the request for the order of prohibition, the Judge also relied on the same decision of **Kenya National Examination Council –versus Exparte, Geoffrey Gathanjui& 7 Others** (Supra) and declined to grant the writ of prohibition for the reason that prohibition looks to the future and since the respondents had already adopted the use of Inspectors appointed under the Act, there was no way an order of prohibition could have issued in favour of the appellant to rectify or quash a decision already made.

The appellant was aggrieved by that decision and filed this appeal raising six (6) grounds of appeal. It is the appellant's complaints that the learned Judge of the Superior Court erred in fact and in law:

> ***(1) In holding that the 28 weighbridge tickets and /or orders to remove motor vehicles from the road addressed to the Appellant and exhibited to the Verifying Affidavit of the Appellant were not decisions liable to be quashed by an order of certiorari in terms of Order 53, rule 7 of the Civil Procedure Rules, 2010.***
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> ***(2) In holding that the 2nd respondent had not made any decision detrimental to the appellant's interest, notwithstanding the 28th weighbridge tickets and /or orders to remove motor vehicles from the road addressed to the appellant.***
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> ***(3) In holding that the 2nd respondent's use of the load capacities determined by an inspector was not erroneous, notwithstanding the evidence contained in the 28 weighbridge tickets and /or orders to remove motor vehicles from the road addressed to the appellant which confirmed that the load capacities so determined were inconsistent and gave different load capacities at different weighbridges.***
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> ***(4) In holding that the 2nd Respondent's sole use of the load capacities determined by an inspector was not erroneous, notwithstanding the requirement of paragraph 2 of the Twelfth Schedule of the Traffic Act that where the total axle load differed with the total weight of the vehicle, the lower or lowest weight would be the maximum weight of the vehicle for the purposes of Section 55 (2) of the Traffic Act and that the 2nd Respondent's failure in taking the requirement into consideration was not arbitrary, unreasonable and/or capricious.***
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> ***(5) In misconstruing the provisions of Section 55 and 56 of the Traffic Act and the Appellant's submissions on the same in holding that the 2nd respondent could not be faulted in the use of load capacities determined by an inspector, despite the learned Judge's findings that such determinations by an inspector produce inconsistent results at different weighbridges and was a genuine source of concern.***

(6) In holding that the remedies of mandamus and prohibition could not issue, despite her findings that load capacities determined by an inspector produce inconsistent results at different weighbridges and was a genuine source of concern.

The appeal was canvassed by way of written submissions, adopted fully and highlighted by learned counsel, **Miss. Elizabeth Akinyi Ochieng(Miss. Ochieng),** instructed by the firm of**Havi& Company Advocates** for the appellant; and learned Counsel **Miss Velo** holding brief for **Mr. Okumu,** instructed by the firm of G**.A. Okumu& Company Advocates**(**Miss Velo**), for the 2nd respondent. There was no appearance for the 1st respondent who we were informed had not participated in the proceedings before the High Court. Being satisfied that the office of the Attorney General on record for the 1st respondent had due notice of the hearing date having been served with a hearing notice on 3rd July, 2018, allowed the appellant and the 2nd respondent to prosecute the appeal.

In support of grounds 1 and 2 of the appeal, learned counsel **Miss Ochieng** conceded that it was a mandatory requirement in law for cargo vehicles to comply with the load capacity limits prescribed for under section **55(2**) of the Act, which provision prohibits the use on the road of vehicles whose maximum laden or unladen weight exceeds the maximum weight and dimensions prescribed for under the Act. She also stated that there was no issue raised with the Judge's findings that a determination as to whether a vehicle should be cleared to carry cargo on the road is by law required to be determined in the manner prescribed for in section **56(1)** of the Act, which provision outlaws the use of a cargo motor vehicle on the road with a load greater than the load specified either by the manufacturer on the vehicles' chasis or as determined by an Inspectors duly appointed under the Act. The issue raised was on the finding that there was neither a decision nor a record before Court capable of being quashed by an order of Certiorari. In counsels' view, the weigh bridge tickets together with the attendant orders variously issued by the Inspectors for the removal of the appellant's cargo motor vehicles from the road were in writing, and therefore these went to satisfy the prerequisites under order **53** Rule **7** of the CPR. The writ of certiorari should therefore have been granted in favour of the appellant in the circumstances, urged counsel.

In support of grounds 3 and 4 of the appeal, Counsel submitted that the Judge's appreciation that section **56 (1)** of the Act provides for two modes of ascertaining the maximum loads limits for cargo vehicles, coupled with the acknowledgement that there were inconsistencies in the weigh bridge tickets on the basis of which the respondents issued removal orders against the appellant's motor vehicles were sufficient basis for the Judge to grant the writ of mandamus to compel the respondent to apply the gross weight mode of determining the load capacity of cargo motor vehicles to resolve the inconsistencies in the weigh bridge tickets. It was contended that since this mode of determination of the load capacity was provided for in the twelfth schedule, it bestowed a right to the appellant to demand its application in its favour on the one hand, and a duty on the respondents to apply it in favour of the appellant on the other hand. The failure of the respondents to apply that mode when determining the load capacities to resolve the inconsistencies in the weigh bridge tickets amounted to an exercise of statutory discretion blindly, to the detriment of the appellant, which was amenable to correction by way of a writ of mandamus, urged counsel.

In support of grounds 5 & 6 of the appeal, counsel submitted that on the basis of the record, the appellant had demonstrated sufficiently that any ambiguity that may have arisen both in the construction and application of section **56(1)** of the Act, to the appellant's complaints in the JR proceedings as observed by the Judge and correctly so in counsels view, should have been resolved in favour of the appellant by granting the JR reliefs in favour of the appellant as prayed for; as opposed to the Judge merely recommending legislative amendment to the said provision.

To buttress the above submissions, counsel relied on the case of **Edward – versus- S.O.G.A.T (1971)1 Ch.38;theCommissioner of Income Tax –versus- West Mont Power (K) Limited (2006) IEA (HCK)**; **Republic –versus- Birmingharm Appeal Tribunal, Exparte Simper (1973) 2 All ER 461**; **Errington –versus-Minister for Health [1935] IKB.249; Sushan Investment Limited –versus- Ministry of National Heritage & Culture & 3 Others [2016] eKLR; SirWilliam Wade, the 10thEdition** pages **37– 38** and **Craies on Statute Law, 6th Edition** page **34,**all to the effect that the appellant's complaints were well founded in law and that theJudge should therefore be faulted for the failure to find that the respondents exercised their discretion under the Act blindly.

In opposition to grounds 1& 2 of the appeal, learned counsel **Miss Velo** urged us to affirm the Judge's finding that weigh bridge tickets and orders for the removal of the appellants' cargo motor vehicles from the road after finding them with excess loads capacities did not in themselves satisfy the threshold in order **53** rule **7** of the CPR as in counsels view, these merely amounted to pieces of information and or charges.

On grounds 3 & 4 of the appeal, counsel urged us to uphold the Judge's finding that the use of load capacities determined by an Inspector in the discharge of his/her mandate under the Act, was well founded in section **56(1)** of the Act and was therefore not erroneous, arbitrary or unreasonable, as contended by the appellant. The writ of Mandamus could not therefore issue in the circumstance of this appeal.

Turning to grounds 5 & 6 of the appeal, counsel submitted that notwithstanding the undisputed acknowledged existence of inconsistencies in the weigh bridge tickets on the basis of which the removal orders for the applicant's motor vehicles were issued by the respondent, we should affirm the trial Judge's decision to dismiss the appellant's JR application as the decision was based on sound reasoning and a proper appreciation and application of the law to the facts on the record before her.

The 2nd respondent relied on the case of **Republic–versus- Director General of East African Railways Corporation, Exparte, Kagwa [1977] KLR, 194**, to support their submission that the use of load capacities determined by an Inspector was consonant with the provision of sections **55, 56** as read with the twelfth (12th) schedule of the Act. Counsel further supported the finding that since the Act imposed a duty but left the discretion as to the mode of performing that statutory duty in the hands of the respondents, mandamus could not issue to compel the respondents to perform that statutory duty in the manner the appellant had invited the Court to direct it to do. **The Kenya National Examination Council case (supra)** was relied on for support of their submissions that in light of the provisions on load capacities as provided for in sections 55, 56 and 58 of the Act, the Judge made a correct finding in holding. The case of **Chief Constable of North Wales Police -versus- Evans [1982] 3 All ER 14,** was cited in support of their submission that no decision had been placed before the trial Court for the Court to determine its correctness for purposes of quashing. **Mayor of West Minister Corporation –versus London & North Western Railway Co.[1905] AC 426,**and **The Commissioner of Lands versus Kunste Hotel Limited [1995 – 1998] IEA I (CAK),** were cited in support of the submission that in light of the clear provisions set out in sections 56 (1) & (2) and Rule 41, of the twelfth (12 th) schedule of the Act, the Judge made a correct finding that the 2nd respondent acted within the ambit of its statutory mandate when it opted for

the use of Inspectors in determining the load capacities of the appellant's cargo motor vehicles instead of electing to apply the load capacity indicated by the manufactures on the *chassis* of those vehicle as the same was provided for in law and was therefore lawful. Lastly the case of **COTU (K) –versus Nzioka& others [1990 – 1994] EA 64,**in support of their submission that granting JR remedies in the manner sought for by the appellant would not only have been erroneous but also in vain, considering the clear provisions of the law under which the impugned statutory actions had been executed.

This is a first appeal. In the case of **Selle& Another versus Associated Motor Board Company Ltd and Others [1968] 1 EA 123,** the Court of Appeal for Eastern Africa set out the principles to be considered when determining an appeal from the

High Court as follows:-

> ***"An appeal from the high Court is by way of retrial and the Court of Appeal is not bound to follow the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsitent with the evidence generally guide as above."***

We have applied the above threshold to the record. It is our finding that from the record, it is not disputed that the appellant had premised its substantive JR Notice of Motion on section **8 (2)** of the Law Reform Act, Cap 26 of the Laws of Kenya, and Order **53,** rule **3 (1)** of the Civil Procedure Rules.

The principles that guide the Court in the exercise of its jurisdiction under the above provisions have now been crystallized by case law. We find it prudent to highlight aspects of those relevant to the determination of this appeal, albeit in a summary form, as follows: when the High Court exercises jurisdiction under order LIII of the Civil Procedure Rules, it is neither civil nor criminal but a special jurisdiction donated by section **8** and **9** of the Law Reform Act. Second, that Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the **Commissioner of Lands – versus Hotel Kunste** (supra). That the purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. See **Lord Hailsham of St. Marylebone** in **Chief Constable of the North Wales Police – versus Evans** (Supra). JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See **David Mugo t/a Manyatta**

Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with condour or virtue and temperance. See **Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR,** JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See **Zakayo Michubu Kibwange** case (Supra).The remedy of judicial review is only available where an issue of a public law nature is involved. Also that a person seeking mandamus must show that there resides in him a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature. See **Prabhulal Gulabuland Shah –versus Attorney General & Erastus Gathoni Mlano, Civil Appeal No. 24 of (1985) (UR).**

Following the promulgation of the Kenya Constitution, 2010, Judicial Review is available as a relief to a claim of violation of the rights and fundamental freedoms guaranteed in the Constitution of Kenya 2010. See **Child Welfare Society of Kenya –versus- Republic and 2 others, Exparte Child in Family Forces Kenya [2017] eKLR**. Bearing the above threshold in mind, and considering it in light of the record, it is our finding that the jurisdiction the Judge exercised in the determination of the JR proceedings that gave rise to this appeal was a discretionary jurisdiction. The principles that guide the exercise of such discretionary jurisdiction have been considered in numerous decisions of this Court but we take them from **United India Insurance Company Limited –versus East African Underwriters Kenya Ltd [1985] KLR 898, where Madan JA (as he then was)** stated.

> ***"The Court ofappeal will interfere with discretionary decision of a judge appealed from where it is established that the Judge:***
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> ***(a) misdirected himself in law,***
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> ***(b) misapprehended the facts,***
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> ***(c) took account of consideration which he should not have taken into account,***
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> ***(d) failed to take into account a consideration of which he should have taken into account,***
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> ***(e) his decision, albeit a discretionary one, is plainly wrong."***

Bearing the above threshold in mind, we think the construction and application of sections **55 (2), 56(1), 58** and Rule **41** of the Twelfth (12^{th}) schedule of the Act is the crux of the appeal.

Section **55(2)** prohibits the use of a motor vehicle on a public road whose weight or dimensions whether laden or unladen exceeds the maximum weight or dimensions provided for such a vehicle by the rules made there under. Section **56** (1) on the other hand prohibits the use on the road of any motor vehicle with a load greater than the load specified for either by the manufacturer on the chassis of the vehicle or the load capacity as determined by an Inspector duly appointed under section 3 of the Act. Section **58** is the penalty provision section. It variously prescribes penalties available for the transgressions of the law as provided for in sections **55(2)** and **56(1)** of the Act. Rule **41 (a)** on the other hand makes provision that the maximum weights and dimensions referred to in section **55 (2)** and **56 (1)** are those set out in the twelfth schedule. Paragraph **2(1)** of the twelfth schedule sets out the maximum weights which may be permitted on the road, while paragraph 3 on the other hand provides for the maximum dimensions permissible on the road.

Starting with certiorari, we associate ourselves fully with the exposition on the applicability of this relief as set out in **Halsbury's Laws of England, 4th Edition, and vol. I** (reliefs) at page 202 paragraph**109** and as approved in **Kenya National Examination Council** case (supra) and applying the above threshold to the rival submissions herein on this relief, it is our finding that what the appellant set out to quash was the entire decision by the 1st and 2nd respondents adopting the sole use of the load capacity determined by an Inspector in the assessment of the load limits of cargo motor vehicles and contained in the weigh bridge tickets and orders to remove motor vehicles from the road addressed to the appellant as particularized in the substantive notice of motion.

The uncontroverted assertion by the 2nd respondent was that the twenty eight (28) weigh bridge tickets were generated by weigh bridge machines, regularly inspected, serviced and certificates of compliance issued to that effect. These were therefore serviceable as at the point in time when the twenty eight (28) weigh bridge tickets were generated. It was further the 2nd respondent's contention that those weigh bridge machines were operated by way of calibration, devoid of any Inspectors'

subjective individual input. That it was only after the weigh bridge tickets had been generated through the calibration of the weigh bridge machines that the Inspectors formed an opinion that on the basis of the content of those tickets a case had been made out that the appellants' cargo motor vehicles were laden with excess load capacities.

As correctly found by the trial Judge, Order **53** Rule **7** of the CPR is explicit on what is capable of being quashed by the order of *certiorari* namely, proceedings, a decision, an order, a warrant, a commitment, a conviction, an inquisition or a record. The trial Judge applied the above to the record when she made observations thereon, and correctly so in our view, that what the appellant had moved to Court to challenge was a decision by the respondents to adopt the use of Inspectors appointed under section 3 of the Act, to determine load capacities of its cargo motor vehicles, as opposed to adopting the load capacities specified for by the manufacturer on the *chassis* of the affected motor vehicle.

In the Concise Oxford English Dictionary, Twelfth Edition, the word *"decision" is defined as "a conclusion or resolution reached after consideration. The action of deciding. The quality of being decisive. ---"*When the above definition is considered in light of the manner the appellant's relief for *certiorari* was framed on the one hand, and the observations made thereon by the Judge as already highlighted above on the other hand, we entertain no doubt in our minds that the trial Judge's observation that the decision which in law should have formed the basis for the appellant's attack and which should have been in writing and annexed to the verifying affidavit for purposes of quashing and which the appellant set out to challenge was **the respondents' decision to use the Inspectors appointed under section 3 of the Act to determine the load capacities for the cargo vehicles as opposed to applying the load capacities specified by the manufacturer on the *chassis* of those vehicles** (emphasis ours).No such a decision was annexed to the verifying affidavit by the appellant. Neither was any explanation given by the appellant for the failure to so annex it. All that the appellant annexed to the verifying affidavit were undoubtedly the twenty eight weigh bridge tickets and the attendant removal orders. In light of all the above reasoning, we find no error in the position taken by the Judge when she declined to grant the appellant the relief of *certiorari.* We accordingly affirm the Judge's holding that no decision had been attached to the verifying affidavit for purposes of quashing; and that the relief of *certiorari* could not therefore issue in the circumstances of this appeal to quash the twenty eight (28) weigh bridge tickets generated by means of calibration of weigh bridge machines independent of the Inspectors' prior individual subjective in put before the issuing of the attendant removal orders.

As for mandamus, our re-evaluation of the record in light of the construction and application of the relevant statutory provisions of law under which the respondents executed their statutory actions complained of by the appellant also as already highlighted above, it is our finding that the subject provision, gave the respondents unconditional discretion to choose either of the two modes provided for in law for determining load capacities for the appellant's cargo motor vehicles. In other words, the said provision donated an unconditional exercise of discretion in favour of the respondents which was exercised when the respondents elected to use Inspectors in the discharge of their mandate under the Act. It is appreciated that the Inspectors also had an option to adopt the gross weight as provided for in the twelfth (12) schedule as the applicable mode for determining the capacity loads of the appellants motor vehicles. However, as already highlighted above, it was an open discretion with no conditions attached. The Inspectors could apply that provision or the method settled for. We therefore find nothing with regard thereto which can support the appellant's submission that the said discretion was exercised blindly to the detriment of the appellant.

In light of all the above reasoning, we affirm the Judge's finding that in the circumstances of this appeal, the writ of mandamus could not issue to curtail the exercise of discretion statutorily underpinned and which could only be interfered with through an amendment to the legislation under which the discretion was exercised. Further, no provision of law was cited either before the Judge at the trial or before us on appeal which obligated the respondents to consult the appellant or hear him before settling for the mode of procedure employed in the execution of its statutory functions under the Act. There was therefore no enforceable legal right in this regard vested in the appellant with a corresponding legal duty on the respondents to bestow that right upon the appellant, on the basis of which the Court could have issued a writ of mandamus to compel the respondent to perform that duty in the manner suggested by the appellant. Not even the prescriptions in the twelfth (12) schedules could be construed as bestoring such a right.

Turning to the relief of prohibition as borne out by the principles of case law assessed above, this relief looks to the future, while the appellant's complaints related to a past event of the respondents action previously taken to use Inspectors appointed under Section **3** of the Act to determine load capacities for the appellant motor vehicles permissible on the road, resulting in the generation of the twenty eight (28) impugned weigh bridge tickets together with the attendant removal orders. We therefore affirm the Judge's refusal to grant the appellant the relief of prohibition. We also find that on the record as assessed above, the said relief was also not available as a preemptive remedy in the circumstances of this appeal, to prevent such future action on the part of the respondents in the absence of an amendment to the statutory provisions of law under which the exercise of that function was underpinned and exercised.

The upshot of all the above assessment and reasoning is that we find no merit in this appeal. It is accordingly dismissed in its entirety with costs to the2ndrespondent who participated in the prosecution of the appeal.

Dated and delivered at Nairobi this 9th Day of November, 2018.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

…….……..

JUDGE OF APPEAL

ASIKE MAKHANDIA

…….……

JUDGE OF APPEAL

I certify that this a

true copy of the original.

Deputy Registrar