



Thuo v Kenya National Highways Authority & 3 others (Constitutional Petition E003 of 2022) [2024] KEHC 2103 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEHC 2103 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CONSTITUTIONAL PETITION E003 OF 2022**

DK KEMEL, J

JANUARY 31, 2024

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF SECTION 17, 20 & 22(2) OF THE EAST
AFRICAN COMMUNITY VEHICLE LOAD CONTROL ACT, 2016**

AND

IN THE MATTER OF THE NATIONAL TRANSPORT & SAFETY ACT NO. 33 OF 2012

AND

IN THE MATTER OF SECTIONS 55 & 56 OF THE TRAFFIC ACT

AND

**IN THE MATTER OF SECTION 8 & 9 OF THE LAW
REFORM ACT, CHAPTER 26 LAWS OF KENYA**

BETWEEN

BETWEEN

JOHN WAITHAKA THUO PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT

NATIONAL TRANSPORT & SAFETY AUTHORITY 2ND RESPONDENT

KENYA BUREAU OF STANDARDS (KEBS) 3RD RESPONDENT

MASTER FABRICATORS 4TH RESPONDENT



JUDGMENT

1. The Petitioner through his Petition dated 13th May 2022 and amended on 25th November 2022 seeks the following reliefs:-
 - i. A declaration that the rights and/or fundamental freedoms of the Petitioner as enshrined under Articles 40, 47, 48 and 50(2) of the Constitution of Kenya 2010 were infringed and/or violated by the actions of the Respondent.
 - ii. A declaration that the Petitioner is not in contravention with section 56 of the Traffic Act CAP 403 of the Laws of Kenya as the petitioner's motor vehicle was inspected by the 2nd Respondent and given a greenlight to begin operations pursuant to section 56.
 - iii. A declaration that the detention and subsequent impoundment of the Petitioner's motor vehicle registration number KCL 068A is illegal, unlawful and/or unconstitutional.
 - iv. An order of certiorari in judicial review do issue to quash the decision of the 1st Respondent to prefer charges against the Petitioner's driver in Nyando, Webuye and Kikuyu law Court respectively.
 - v. An order of mandamus in judicial review directed at the Respondents to have the said motor vehicles log books amended as per the ascertained weights.
 - vi. An order of permanent injunction directed at the 1st Respondent, its agents and/or employees from subjecting and charging the Petitioner, his agents and/or employees under the East African Community Vehicle Load Control Act, 2016.
 - vii. An order of permanent injunction directed at the 1st Respondent, its agents, representatives, assigns or other person acting through its direction from detaining and charging motor vehicle registration number KCL 068A.
 - viii. Compensation for loss of user for the period between 26th May 2022 and 22nd July 2022 to a tune of Kshs. 2, 016,990.03.
2. Vide directions issued on 22nd November 2022, the Petitioner was granted leave to amend his Petition within 14 days while the Respondents were granted leave to file their responses to the amended Petition within 14 days of service.

The Petitioner's case

3. The Petitioner's case as presented in the amended Petition and supporting affidavit sworn by John Waithaka Thuo on 25th November 2022 is that the 1st Respondent on 10th May 2022 unlawfully detained his driver/employee and his motor vehicle registration number KCL 068A at Webuye weighbridge on the allegations of an overload on diverse dates between 17th February 2019 and 13th November 2019 as per Kenya National Highways Authority ticket numbers. He further averred that on diverse dates between 17th February 2019 and 13th November 2019 while the said motor vehicle was passing different weighbridges at Ahero, Kikuyu and Webuye it was recorded that an unspecified overload was cited. As a result, the Petitioner's driver/employee was summoned by the 1st Respondent to appear at Webuye Law Courts on 17th May 2022 respectively to answer to charges of using a motor vehicle on road with a load greater than the load specified under section 58(2) and Rule 41 of the Traffic Act.



4. According to him, the suit motor vehicle is a class two axle category which ought to have a maximum axle load of 18,000kgs and that the suit motor vehicle has a carrying capacity of 67 passengers. The suit motor vehicle was diligently managed on the said highway and that it never carried an overload as alleged by the 1st Respondent since its manufacture. The 2nd Respondent's inspection report indicates that the gross weight of his motor vehicle was 13,000kgs being 8000kgs tare weight and 5000kgs load capacity after body manufacture. The requisite recordings on the motor vehicle's log book are 11,000kg for the tare weight and 5000kgs for load capacity giving a total of 16000kgs. The contradictions on the inspection report and the log book evidently indicated that the suit motor vehicle was never weighed to ascertain its correct weight.
5. On 23rd January 2023, this Court issued further directions granting the Respondents 21 days to file their respective responses to the amended Petition dated 25th November 2022 and the Petitioner was granted 14 days to put in a further affidavit if need be within 14 days of service.

2ND Respondent's case

6. Vide a replying affidavit sworn on 19th September 2023 by James Musausi, the Assistant Motor Vehicle Inspector Motor Vehicle Inspection Department, he averred that the Petitioner's motor vehicle for the first time its tare weight and load capacity prior to its registration by the 2nd Respondent to ensure correct logbooks/registration certificates were issued. According to him, under the Traffic Act the required Tare Weight of the class of the Petitioner's vehicle is 11,000kgs and the load capacity is 5,000Kgs to arrive at a total full body weight of 16,000Kgs as required under the Act.
7. He averred that the Petitioner's motor vehicle was re-weighed recently pursuant to the directions of the Court and it was clear that the tare weight of each and every of his vehicle exceeded 11,000Kgs thus attributing to the possibility of modification of the vehicles over a period of time post registration and failure by the Petitioner to subject the motor vehicle to re-inspection.
8. He termed the Petitioner's allegations that there was a discrepancy or omission on the capturing of the correct tare weight and load capacity of the motor vehicle as untrue.

3rd Respondent's case

9. Vide a replying affidavit sworn on 28th February 2023 by Samuel Okello, the Manager Quality Assurance, he averred that the 3rd Respondent does not conduct inspection of locally fabricated motor vehicles as alleged by the Petitioner and that the Petitioner failed to demonstrate any fault on its part as the standards as set by the 3rd Respondent were not challenged in his Petition.
10. Vide directions issued on 25th April 2023, this Court ordered that the amended Petition be canvassed by way of written submissions. Only the Petitioner, 3rd and 4th Respondents filed and exchanged their written submissions.
11. Counsel for the Petitioner submitted that the Petitioner's rights to own property were violated by the Respondents when his motor vehicle was detained without affording him the opportunity to be heard, a prerequisite prior to taking any form of action that would likely affect his rights. Counsel relied on the case of *Disarano Limited vs Kenya National Highway Authority & Attorney General* (2017) eKLR. Counsel submitted that the reliance on the East Africa Community Load Control Act, 2016 by the Respondent denied the Petitioner his rights under Article 40 of the Constitution.
12. Counsel submitted that the Petitioner was not accorded a fair hearing as no notice was issued in writing requiring him to exercise the option of pleading guilty or not as per dint of sections 17, 20 and 22(2) of



- the East Africa Community Load Control Act, 2016. Counsel relied on the cases of Pashito Holdings & Another vs Ndungu & 2 Others (1197) eKLR and Onyango Oloo vs Attorney General (1986-1989) EA 456.
13. Counsel for the 3rd Respondent submitted that the role of the 3rd Respondent is to ensure and promote standardization in the industry thus setting the standard KS 372:2019 to ensure manufacture of quality buses. According to Counsel, the Petitioner failed to demonstrate vide his amended Petition any error on the part of the 3rd Respondent as it does not have the requisite jurisdiction to carry out the role of re-weighing and re-inspection as prayed for by the Petitioner. Relying on the case of Isaac Aluoch Polo Aluochier vs Kenya National Commission on Human Rights & 4 Others (2016) eKLR, Counsel beseeched this Court to dismiss the Petitioner's claim against it.
 14. Counsel for the 4th Respondent submitted that the 4th Respondent was responsible for the fabrication of the Petitioner's suit motor vehicle's body and that it applied the standard as supplied to it by the 3rd Respondent and on completion the suit motor vehicle was released to the Petitioner's custody. According to Counsel, the 4th Respondent, on request, did conduct an inspection to confirm if the suit motor vehicle had any addition or subtraction on the fabrications where it established that there were no amendments in terms of additions and subtractions on the fabrications and a report dated 12th April 2023 was prepared to that effect.
 15. Counsel for the Petitioner vide supplementary submissions submitted that the 1st Respondent's on establishing that the Petitioner's motor vehicle was overloaded, the 1st Respondent vide its authorized officer was to issue a weighing report to the affected person or owner of the motor vehicle setting out the particulars and amount of overload and fees payable. The authorized officer was to ensure that the subject motor vehicle was not to continue with its journey unless the load is redistributed or offloaded and the motor vehicle re-weighed to confirm compliance with the legal weight. According to Counsel, this procedure was not done by the 1st Respondent. Counsel relied on section 17; 20 and 22(2) of the East African Community Vehicle Load Control Act.
 16. Counsel for the Petitioner submitted that for the Petitioner to be penalized under the East African Community Vehicle Load Control Act, he ought to have admitted that he had committed the offence as prescribed, and thereafter, the Petitioner needed to have requested the National Road Authority to deal with the said offence in accordance with the provisions of section 22 of the East African Community Vehicle Load Control Act. Counsel submitted that the laid-out procedure as per the East African Community Vehicle Load Control Act was not duly followed considering the fact that the Petitioner had not requested to plead guilty to the alleged charges nor did he admit the said offence of overloading.
 17. Counsel for the Petitioner submitted that the 1st Respondent acted irrationally and in utter disregard of the principles of natural justice that one ought not to be condemned unheard. Counsel relied on the cases of Pashito Holdings & Another vs Ndungu & 2 Others (1197) eKLR and Onyango Oloo vs Attorney General (1986-1989) EA 456.
 18. It is a fact that the Petitioner's truck registration number KCL 068A was being driven along the Eldoret-Webuye Highway. The truck was loaded and upon being weighed scientifically, it was found to have excess weight (unspecified). As a result of the overload, the Petitioner's driver/employee was summoned to appear at Webuye Law Courts on 17th May 2022 to answer to charges of using a motor vehicle on a road with a load greater than the load specified under section 58(2) and Rule 41 of the [Traffic Act](#). On re-weighing the motor vehicle as per the Court order issued on 10th January 2023 by my learned colleague in Nairobi Constitutional Petition No. E251 of 2022, it was established that the suit motor vehicle bore a log book weight of 11,000Kgs while actual re-weight was 14,150Kgs.



19. I will address a pertinent issue which the Petitioner omitted to address. This is whether this Petition offends the doctrine of exhaustion. Section 17 (4) (a) and (b) of the East African Community Vehicle Control Act (EACVC Act) provides: -
- “Where the fact of overloading is disputed by the transporter, the authorized officer weighing the vehicle shall indicate such dispute in the weighing report, and a copy of the disputed report shall be issued to the transporter who may—
- a. pay the requisite overloading fees on a without prejudice basis to secure the release of the vehicle, make such necessary adjustment on the load as may be directed by the authorized officer and lodge an appeal against the fees as provided for by regulations made under this Act; or
 - b. appeal against the fees, using regulations made under this Act, during which period the vehicle will remain detained at such designated place at the cost of the transporter.”
20. The East African Community Vehicle Load Control Act, 2016 came into force on 1st October, 2016. Kenya is a member of the East African Community and the Act therefore applies. The statute is one of specific application. Its provisions are applicable within the Regional Trunk Road Network and supersedes national legislation thereon.
21. As per the 1st schedule, the road between Mombasa and Malaba is a Regional Trunk Road Network and the provisions of the Act therefore apply pursuant to the provisions of section 3. Section 8(1) requires the transporter operating a vehicle of a gross vehicle weight of 3,500 kilogrammes or more to present such vehicle to be weighed at every weighing station that is situated along the Regional Trunk Road Network traversed by such vehicle or that is designated for this purpose by a national roads authority.
22. Clearly, the Petitioner’s truck was within the regional trunk road network and therefore the provisions of the East African Community Vehicle Load Control Act, 2016 are applicable to the instant petition.
23. Under section 17 of the East African Community Vehicle Load Control Act, 2016 when an authorized officer determines that a vehicle is carrying a load in excess of the legal load limit, he or she shall issue a weighing report setting out the overload particulars and the amount of overload fees payable. The officer shall not allow the journey to be continued unless the load is redistributed to comply with the load limit, or the vehicle is offloaded to lower its weight to the legal load limit and-
- a. any amounts due under subsection (1) have been paid to the national roads authority or its duly appointed agent; or
 - b. a guarantee in the prescribed format is provided by the transporter that such amounts shall be paid.
24. Under Sub Section 3 of the East African Community Vehicle Control Act (EACVC Act), the transporter shall sign and acknowledge the weighing report in the prescribed manner and the transporter shall be liable for the overload fees which may be recovered as a summary debt by the national roads authority if the fact of overloading is not disputed.
25. If the fact is disputed however, the authorized officer shall indicate such dispute in the weighing report, and a copy of the disputed report shall be issued to the transporter who may—pay the requisite overloading fees on a without prejudice basis to secure the release of the vehicle, make such necessary adjustment on the load as may be directed by the authorized officer and lodge an appeal against the fees.



In *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR it was held;

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*.”

26. The pertinent issue of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks to review the action without pursuing available remedies before the agency itself. The Court must decide whether to review the agency’s action or to remit the case to the agency, permitting Judicial review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya (see *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR).

27. As was further stated by the Court of Appeal in *Speaker of National Assembly vs Karume* {1992} KLR 21 that:

“Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

28. The above case was decided before the promulgation of the 2010 Constitution. However, many Post-2010 Court decisions have endorsed the reasoning and even proffered justification and rationale for the doctrine under the 2010 Constitution. For instance, the Court of Appeal in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* {2015} eKLR provided the constitutional rationale and basis for the doctrine stating: -

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

29. Section 9(2) of the *Fair Administrative Action Act* (Act no. 4 of 2015) (the FAA Act) provides that the High Court or a subordinate court under Sub-Section (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is Sub-Section (3) which provides that “the High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in Sub-Section (2) have been exhausted, direct that an Applicant shall first exhaust such remedy before instituting proceedings under Sub-Section (1).



30. It's important to note that the above provision is couched in mandatory terms. The only way out is the exception provided by Section 9(4), which provides that: - "Notwithstanding Sub-Section (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the Applicant, exempt such person from the obligation to exhaust any remedy if the Court considers such exemption to be in the interest of justice. Two requirements flow from the above Sub-Section. First, the Applicant must demonstrate exceptional circumstances. Second, an Applicant must apply for exemption. None of these has been done in the instant case.
31. The postulate running through decided cases is that where there is an alternative remedy, or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted. The other philosophy suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that, a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to topple the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The *raison d'être* behind this reasoning is that statutory provisions ousting Courts jurisdiction must be construed restrictively. The other issue is whether the dispute resolution mechanism established under the East African Community Vehicle Control Act (EACVC Act) is competent to resolve the issues raised in this application. As stated above, the Petitioner never addressed the issue under consideration. I find and hold that the Petitioner ought to have exhausted the mechanism provided under the law before approaching the Court or apply for exemption.
32. I now address the crux of the Petitioner's case, that is, whether the impugned action violates the various Articles of *the Constitution* cited and the Petitioner's constitutionally guaranteed rights. When a Court is asked to determine the constitutional validity of a decision, act to invalidate a decision on grounds of error of law, its task is simply to satisfy itself whether the decision properly construed can be read in a manner that is consistent with *the Constitution* or whether it was arrived at based upon relevant evidence, and, whether, the decision maker acted in an arbitrary manner and reached a finding of fact not supported by evidence or the enabling statute. Additionally, it involves examining whether the decision maker stepped beyond the legal limits or acted in an arbitrary manner by reaching an unreasonable conclusion based on the material before it.
33. The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. It follows, therefore, that the legality of an administrative decision can be judicially challenged on grounds that the same fails to comply with these basic requirements of legality.
34. The most obvious example of illegality is where a body acts beyond the powers, which are prescribed for it. In other words, it acts *ultra vires*. The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. *The Constitution* and the East African Community Vehicle Load Control Act clearly envisage an important and active decisional role for the 1st Respondent to perform its functions through the application of the law. In this regard, it is important to point out that the 1st Respondent's functions are stipulated in section 4 of the *Kenya Roads Act*. The section provides that: -
1. The Highways Authority shall be responsible for the management, development, rehabilitation and maintenance of national roads.



2. For the purposes of discharging its responsibility under subsection (1), the Highways Authority shall have the following functions and duties—
 - a. constructing, upgrading, rehabilitating and maintaining roads under its control;
 - b. controlling national roads and road reserves and access to roadside developments;
 - c. implementing road policies in relation to national roads;
 - d. ensuring adherence to the rules and guidelines on axle load control prescribed under the *Traffic Act* (Cap. 403) and under any regulations under this Act;
 - e. ensuring that the quality of road works is in accordance with such standards as may be prescribed by the Minister;
 - f. in collaboration with the Ministry responsible for Transport and the Police Department, overseeing the management of traffic and road safety on national roads;
 - g. collecting and collating all such data related to the use of national roads as may be necessary for efficient forward planning under this Act;
 - h. monitoring and evaluating the use of national roads; planning the development and maintenance of national roads;
 - i. advising the Minister on all issues relating to national roads;
 - j. preparing the road works programmes for all national roads;
 - k. liaising and co-ordinating with other road authorities in planning and on operations in respect of roads; and
 - l. performing such other functions related to the implementation of this Act as may be directed by the Minister.
35. Secondly, the 1st Respondent has a statutory duty to ensure adherence to the rules and guidelines on axle load control prescribed under the *Traffic Act* (Cap. 403) and under any regulations under the East African Community Vehicle Load Control Act. In fact, a failure to do so amounts to a dereliction of duty.
36. The above position becomes clear if we read the preamble to the enabling Act, which reads: - An Act of the Community to make provision for the control of vehicle loads, harmonized enforcement, institutional arrangements for the Regional Trunk Road Network within the Community and to provide for other related matters.
37. Section 4(1) of the East African Community Vehicle Load Control Act provides that the axle load of any vehicle using the Regional Trunk Road Network shall not exceed the maximum permissible weight limits for such vehicle, set out in the Second Schedule. Section 4 (2) provides that the gross vehicle weight of any vehicle using the Regional Trunk Road Network shall not exceed the maximum permissible gross vehicle weight specified in the Third Schedule.
38. Section 5 of the East African Community Vehicle Load Control Act prohibits overloading in peremptory terms. Also couched in mandatory terms is Section 6(1) which provides that a person shall not drive, use, cause or permit to be driven or used, any vehicle on the Regional Trunk Road Network while overloaded. As if to underscore the gravity of the matter Section 6(2) of the East African Community Vehicle Load Control Act stipulates that any person who drives, uses, causes or permits



- to be driven or used, any vehicle on the Regional Trunk Road Network while overloaded shall be liable to pay overloading fees to the national roads authority or any institution designated by a Partner State where the overloading is detected, such overloading fees as may be from time to time be prescribed and published in the Gazette by the Council.
39. Part 111 of the East African Community Vehicle Load Control Act deals with control of vehicle loads and the short title reads "Obligatory weighing of vehicles." So obligatory is the requirement to weigh a vehicle that Section 8(1) of the East African Community Vehicle Load Control Act requires a transporter operating a vehicle of a gross vehicle weight of 3,500 Kg to present such vehicle to be weighed at every weighing station that is situated along the Regional Trunk Road Network traversed by such vehicle or that is designated for this purpose by a national roads authority. This provision uses the word "shall" which connotes a mandatory obligation.
40. With the above clear statutory dictates, there is no contest about the Respondent's mandate. The question now turns on the enforcement process. On enforcement, Section 15 of the East African Community Vehicle Load Control Act grants authorized officers power to— (a) require the driver of a vehicle to stop the vehicle for the purposes of weighing and inspecting the vehicle;(b) in accordance with relevant laws, enter the vehicle and inspect any record relating to any load carried in or on the vehicle; (c) direct a driver to proceed to a weighing station for the purposes of weighing the vehicle; (d) weigh the vehicle and any load being carried in or on the vehicle; (e) verify the weight of all axles or axle units on a vehicle or combination of vehicles in accordance with this Act; (f) issue a weighing certificate for the vehicle providing required particulars; (g) in consultation with relevant implementing agencies, cause the offloading of a vehicle at a designated place or the adjustment of the load to ensure that the vehicle is loaded within limits; (h) detain a vehicle until such time as an overloading fee has been paid or proof, in the manner prescribed has been provided that payment has been made; (i) direct the driver of a vehicle carrying an abnormal, awkward or hazardous load to proceed to an appropriate place determined by the officer to ensure the safety of the cargo, persons, or property; (j) cause the vehicle to be driven to a designated location if the driver is incapable or unwilling to comply with an instruction of the officer; (k) inspect any relevant record relating to, issued, or required under this Act; (l) make inquiries of any person who owns or operates the vehicle being inspected; and (m) cause to be performed, tests or examinations as provided for in this Act in respect of the vehicle or any load carried in or on the vehicle.
41. It is also important to point out that Section 15 (2) of the East African Community Vehicle Load Control Act insulates the authorized officer from liability for any damage to or loss in respect of a vehicle or its load, unless it is shown that the authorized officer acted maliciously or recklessly. Section 17 of the Act lays down a very elaborate procedures in case of vehicle overloading. There is nothing before me to suggest that these processes were not adhered to. The Petitioner's argument, as i see it is that he was not accorded a hearing, that no reasons were offered and alleged breach of Articles 27 (1) (2) & (4), 40, 47, 48, 50(2) and 22 of *the Constitution*.
42. A decision suffers from procedural impropriety if in the process of making it the procedures prescribed by statute are not followed or if the "rules of natural justice' are not adhered to. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.
43. Section 4 of the *Fair Administrative Action Act* (Act No. 4 of 2015-) re-echoes Article 47 of *the Constitution* and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a



- review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.
44. Sub-Section 4 of the *Fair Administrative Action Act* (Act No. 4 of 2015-) further obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing. The right of a person to defend him/herself in the face of a decision potentially affecting his/ her rights or interests necessarily implies that the person must receive prior notice of the facts on which the decision will be based. Failure to give proper notice is itself a denial of natural justice and of fairness. In this case, the Petitioner was given notice of the allegations against him and also an opportunity to reply, which he did.
 45. Equally important is the fact that whether or not a person was given a fair hearing of his case depends on the circumstances and the type of the decision to be made. Accordingly, the Courts look at all the circumstances of the case to determine how the demands of fairness should be met. In this Petition, there is no evidence that the Petitioner disputed on his report the fact of his truck being overloaded. There is no evidence that he has paid the requisite fees prescribed under the East African Community Vehicle Load Control Act. The Petitioner alleges that his truck has been detained and is denying him the enjoyment of his rights to property. That, he was indeed served with an order directing him to remove the motor vehicle from the road, or the weight found on the vehicle or the method used for weighing the said motor vehicle. On the act of impounding his motor vehicle being unconstitutional, Section 13(2) of the East African Community Vehicle Load Control (Enforcement Measures) Regulations, 2018 which requires that a vehicle to be detained without charge of parking fees for the first three days but parking fee equivalent to 50 USD per day accrues for every extra day until proof of payment is produced which continues to accrue. The said provision is couched in mandatory terms. The 1st Respondent followed the procedure set out in the governing statute. It is not sufficient to cite provisions of *the Constitution*. The alleged breach must not only be pleaded but must be proved.
 46. Taking into consideration the Petition herein and the 2nd Respondent's response thereto, it is exquisitely clear that there are elaborate mechanisms which should be followed once one is found to have contravened the provisions of the East African Community Vehicle Load Control Act. It is elaborate that the 4th Respondent concurred with the averments of the Petitioner that no amendment was done on the fabrication body of the motor vehicle herein and produced a report dated 12th April 2023. This simply means that the error arose at the log book section which is within the purview of the 2nd Respondent. However, it is the duty of the Petitioner to ensure that he has followed and exhausted the remedies therein before approaching the Court for appropriate orders. As the parties have gone ahead with the weighing of the vehicle in question, it is now upon them to handle the matter through the available mechanism and thereafter reach a settlement one way or the other and that in the event of disagreement, the aggrieved party is at liberty to lodge an appeal as provided for by the relevant Act.
 47. In the premises, this Court finds that the Petitioner has not exhausted the remedies under the East African Community Vehicle Load Control Act, 2016 and therefore the Petition is premature before Court. The Petitioner should proceed to exhaust the available remedies and engage the Respondents over his claims before approaching the courts.
 48. In the result, it is my finding that the petition herein lacks merit. The same is dismissed with no order as to costs.



It is hereby ordered.

DATED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JANUARY, 2024.

D. KEMEI

JUDGE

In the presence of:

No appearance Otieno for Petitioner

Munga for 1st Respondent

Miss Sirai for 2nd Respondent

Miss Kioho for Bachagwa for 3rd Respondent

No appearance for 4th Respondent

Kizito Court Assistant

