



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 97 OF 2020

IN THE MATTER OF ARTICLE 2, 3, 10, 19, 20, 21, 22, 23, 159(2), 165(3), 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 24, 25, 27, 40, 48 AND 50(1)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF CONSTITUTIONAL PROVISIONS UNDER ARTICLES 73, 75 AND 232 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, 2015, SECTIONS 106 OF THE TRAFFIC ACT CAP 403

AND

IN THE MATTER OF MALICIOUS AND IRREGULAR DETENTION OF MOTOR VEHICLE KCG 240F

BETWEEN

PONTY PRIDD KENYA LIMITED.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

JUDGMENT

THE PETITION

1. The Petitioner through its Petition dated 10th March 2020 seeks the following reliefs:-

a) A declaration that the seizure of the Petitioner/ Applicant's motor vehicle registration No. KCG 240 F, the unlawful removal of the vehicle number plates is in breach of the Petitioner / Applicant's constitutional rights against unlawful deprivation of his property and his economic and social rights to earn a living as enshrined in Article 40 of the Constitution.

b) An order be issued directing the Respondent Kenya National Highways Authority to immediately release to the Petitioner / Applicant the registration plates for motor vehicle number KCG 240 F.

c) An order be issued directing the Respondent Kenya National Highways Authority to immediately release to the Petitioner / Applicant the motor vehicle registration number KCG 240 F.

d) Damages.

e) An order that the Respondent to bear the costs of these proceedings.

f) Any other relief.

THE PETITIONER'S CASE

2. The Petitioner's case as presented in the Petition and supporting affidavit sworn by Anthony Mburu Wainaina on 5th March 2020 is that, the Respondent has continued to detain the Petitioner's motor vehicle registration number KCG 240 F together with its number plates removed from its vehicle on 20th February 2020 by the Respondent's officers over an alleged offence of overloading contrary to *Articles 10, 24, 27, 40, 47, 48 and 232 of the Constitution*.

RESPONDENT'S CASE

3. The Respondent filed a replying affidavit sworn by Shadrack Kimanzi on 1st July 2020. It denied contravening *Articles 2, 3(1), 10, 73, 75, 24, 25, 27, 40, 47, 48 and 50 of the Constitution*; the provisions of *Section 4(1) and 4(3) of the Fair administrative Actions Act and Sections 8,9,10, 12, 18 and 19 of the Public Officer Ethics Act*.

4. The Respondent avers that the Petitioner's motor vehicle and number plates were seized on 20th February 2020 because the Petitioner had contravened *Sections 56 (1) and 58 and Rule 41(2) of the Traffic Act* on seven occasions to wit 6th February 2020 at Southern by pass Nairobi; 21st March 2019, 15th March, 2019, 26th March 2019 at Sagana; and 11th March 2019, 4th January, 2019 and 23rd January 2019 at Ahero and as such had been flagged and tagged by the Respondent's virtual stations and given adequate notice of the nature and reasons for each of the tags in each instance. It is therefore Respondent's contention that it acted within the provisions of the law and according to its mandate under *Section 106, 106 (A) and 107 of the Traffic Act*.

5. The Respondent further contends that the confiscation of the Number plates was done in accordance to the law and to ensure compliance by the Petitioner as the vehicle was immobile due to a mechanical problem as per documentary evidence and that more administrative action was to follow as was recorded in OB 31/20/02/2020.

6. The Respondent avers that the driver was thereafter charged with the offence of overloading contrary to section to *Section 56(1), 58 and Rule 41 (2) of the Traffic Rules 1953 Revised Edition, 2018 of the Traffic Act Cap. 403 (Traffic case No. 307 of 2020)* to which a plea had been taken and a cash bail of Kshs. 250,000/- or a bond of Kshs. 500,000/- had been given to the driver and owner of the vehicle.

7. It is the Respondent's case that the petitioner did not raise a complaint with the respondent regarding the same and has since presented themselves to Court and taken plea for various counts for the offence of overloading; hence there cannot be a claim for a breach of *Article 47 of the Constitution*. It is further stated that the Petitioner were also indolent as when they were served with notices of their offences by the Respondent they never sought for fair hearing and since they have been charged there is not infringement on *Article 50 of the Constitution*.

8. The Respondent further contend that the Petitioner upon being charged before the Mavoko Law Courts and having taken plea, the petitioner has not moved the said court to have its number plates released to them.

ANALYSIS AND DETERMINATION

9. Having carefully considered the petition, the respondent's response, and parties' submissions, I find that the following issues arise for determination:-

a) Whether the Petition offends Section 67 of the Kenya Roads Act.

b) Whether the Petitioner's rights were violated.

A. WHETHER THE PETITION OFFENDS SECTION 67 OF THE KENYA ROADS ACT.

10. The Respondent through its submissions dated 3rd September 2020, argued that this Petition should fall as the Petitioner did not issue a month's notice to the respondent before instituting a suit contrary to the provisions of *Section 67 of the Kenya Roads Act, 2007*. It has also averred in its replying affidavit that the Petitioner has not moved the court at Mavoko for the release of the said number plates or motor vehicle. Reliance is placed in the case of *Michael Otieno Nyaguti & 5 others v Kenya National Highways Authority & 5 others [2015] eKLR; International Centre for Policy and Conflict and 5 others vs The Hon. Attorney General & 4 others [2013] eKLR; and Eldoret Grain Limited v Kenya National Highways Authority [2019] eKLR*.

11. The Petitioner herein did not adduce any evidence that the notice as required under *Section 67 of the Kenya Roads Act* was ever issued to the Respondent. It also did not adduce evidence that it has made an application before the Lower Court at Mavoko in Traffic Case No. 307 of 2020 for the release of the said items. *Rule 4(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* provides that any person whose rights have been violated or are likely to be violated, may make an application to the High Court according to these Rules. *Rule 10(1)* of the said rules provides that such an application shall be by way of a Petition.

12. The rules do not have a requirement of giving statutory notice to the respondent before filing the petition as was held in *Space Geo Enterprises Limited vs Kenya National Highways Authority [2019] eKLR and Anthony Nguli Muguti & 12 others vs Kenya National Highways Authority & Another [2017] eKLR*. Further, the limitation set out in *Section 67 of the Roads Act* requiring notice of thirty days to the authority before instituting suit only applies to ordinary civil suits and not Petitions as was observed in *Benson Ruiyi Njane vs Kenya Rural Roads Authority & 36 others [2016] eKLR*.

13. This issue I note has only been raised in the submissions and not in its pleadings. The Petitioner has therefore not been given an opportunity to respond to that allegation. The same ought to have been raised in its pleadings as it is clear that each party is bound by its own pleadings.

14. The Respondent indicated that the Petitioner has not moved the Court at Mavoko for the release of the number plates. The issues raised in the Petition are matters concerning violation of constitutional rights and freedoms. The Lower Court does not have the jurisdiction to determine matters touching on breach of fundamental rights and freedoms which is a precinct of this Court.

B. WHETHER THE PETITIONER'S RIGHTS WERE VIOLATED.

15. The Petitioner submits that the facts as to whether the motor vehicle was overloaded or not on the material day are not controverted and the Respondent has not proved otherwise. It relied on *Joram Nyaga Mutegi vs National Highway Authority [2017] eKLR*. The removal of the number plates and subsequent detention are said to have been unjustified as, the Respondent did not weigh the motor vehicle to prove that it was overloaded on the material date; and it did not adduce any evidence to show that the vehicle was causing danger to other road users as envisaged under *Section 106 of the Traffic Act*. In any event it argued that removing the number plates could not in any way caution other road users and they did not have the authority to remove the number plates and order that the same be driven to a Police Station. As such, it is contended that the Respondent acted arbitrary and unjustifiably. The Petitioner relied on *Joram Nyaga Mutegi case (supra)*, urging that such removal and detention was a breach of its rights under *Article 40 and 43 of the Constitution*.

16. The Respondent it is urged has not demonstrated as to when the number plates will be released to the Petitioner and its continued holding onto the said number plates and motor vehicle is urged to be malicious and unjustifiable as the said items are not subject of an investigation.

17. The Respondent admits the vehicle was not overloaded on the material day and it was not weighed. However it is urged that its actions were informed by the fact that the Petitioner had been on its radar for a long time for a number of overloading offences and its officers were searching for it in order to impound it and charge the owner on account of overloading.

18. On the violation of the Petitioner's rights, it is argued that it acted within the law as envisaged in *Section 4 (2) (d) and 62 of the Kenya Roads Act, Sections 55, 56, 106 (1), 106 (4), 106 (4) (A) and 107 of the Traffic Act, Cap. 403 Laws of Kenya, Section 15 (1) (h) of the East African Community Vehicle Load Control Act, 2016 and that Article 40 of the Constitution* is not an absolute right in cases where there are violations of the law. The Respondent therefore urging there is thus no basis for declaring that it acted in violation of *Article 40 and 47 of the Constitution*. It relied on *Marius Wahome Gitonga v Kenya National Highways Authority [2019] eKLR*.

19. In the Instant Petition; it is not disputed and as admitted by the Respondent, that the vehicle was not weighed on the material day to confirm whether it was overloaded or not. The Respondent however acted on previous acts committed by the petitioner. The respondent has also submitted that it acted with due regard to its mandate under *Sections 55, 56, 106(1) 106 (4), 106(4A) and 107 of the Traffic Act, Cap. 403*. While it is true that it is mandated by virtue of the said Sections to act as it did, there is admission that the vehicle was not overloaded on the material day. There is also no proof that the vehicle was unroadworthy on the material day and that it was causing danger to other road users. However there is clear evidence that the Petitioner's vehicle had for long time been on the Respondents radar for a number of offences related to overloading offences for which Respondent's officers were searching for it in order to impound it and charge the owner on account of overloading. The Petitioner currently is facing a charge at Mavoko Law Courts for such offences. Hence there was basis for issuing the prohibition order and removing the vehicle identification plates on the material day.

20. The Respondent has referred to previous incidences where the motor vehicle was overloaded. There is a pending criminal case at Mavoko Law Courts which will determine the charge after hearing both parties therein. The basis for removing the number plates and detaining the Petitioner's motor vehicle were incidences from the past which the Respondents have demonstrated. The Respondent admits through its replying affidavit that it was only after checking its systems that it found out that the Petitioner's motor vehicle had been tagged for overloading offences committed in the past. Should it have not checked its system, then there could have been no basis for acting the way it did. This was not arbitrary, unjust and a contravention of *Section 4(3) of the Fair Administrative Actions Act, 2015*.

21. The Respondent urged that the prayers sought by the Petitioner should not be allowed as it was acting within the law and the Petitioner has not proved the contrary.

22. Upon consideration of the Respondents evidence and the Petitioners evidence, I find that the Respondent was acting within their mandate and within the law. *Article 24 of the Constitution* deals with limitation of rights and fundamental freedoms and clearly provides that a right or fundamental freedom in the Bill of Rights shall not be limited except bylaw and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society. *Article 24(1) of the Constitution* provides as follows:-

“(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

a. the nature of the right or fundamental freedom;

b. the importance of the purpose of the limitation;

c. the nature and extent of the limitation;

d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

e. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

23. On the issue of damages and or loss of user of Kshs.120, 000/- daily sought by the Petitioner, these are special damages which not only need to be specifically pleaded but also should be strictly proved as was held in *Hahn V. Singh, Civil Appeal No. 42 of 1983 (1985) KLR 716, at p. 717 and 721* and *Nepro Capital Investment Limited v S.G.S (Kenya) Limited & another [2018] eKLR*. The Petitioner has not attached evidence to prove the said amount was being generated daily and I find no basis for granting the same.

24. *The upshot is that the Petition is without merits. The same is dismissed with costs.*

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF MARCH, 2022.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA



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