**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. E004 OF 2021**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW BY BENJO SUPER STORE LIMITED.**

**AND**

**IN THE MATTER OF: SECTION 47,48,49,50 AND 159 OF THE CONSTITUTION OF KENYA 2010**

**AND**

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

**AND**

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

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT**

**BENJO SUPER STORES LIMITED.....EXPARTE APPLICANT**

**RULING**

**Introduction**

**1.**Pursuant to an Exparte chamber summons dated 22/1/21, leave to commence judicial review proceedings in the nature of certiorari and mandamus orders by the applicants (hereinafter the Exparte applicant) against the respondents was granted on 25/1/2021. Consequently, the Ex-parte Applicant vide a Notice of Motion dated 3/2/2021, sought the following orders:

> ***a) That an order of certiorari to remove into the High Court staying and/or quashing all the decision of the Kenya National Highway Authority ("the Respondent") through his agents and/or employees to maliciously, unfairly and unlawfully impound the Applicant's motor vehicle registration number KCH 386V and order the Applicant to pay Kshs. 283,886/= being the fees for overloading without an opportunity to be heard through a Court process and in the alternative Order the release of the Applicant's motor vehicle registration number KCH 386V forthwith.***
>
> ***b) That an Order of Mandamus do issue compelling the Respondents to allow for redistribution and re-weighing of the Applicant's motor vehicle registration number KCH 386V to ascertain the weight and release of the said vehicle pending hearing and determination of this Application.***
>
> ***c) Costs of this Application.***

**2.** The motion is premised on the grounds set out therein and further supported by an Affidavit sworn on 22/1/2021 by **Peter Karuga Kariuki** who is the Ex-parte Applicant's Director. According to the Applicant, it is the owner of the motor vehicle registration number KCH

386V, which was on or about 22/12/2020, impounded maliciously, unfairly and unlawfully by officers/employees from the Respondent who ordered it to pay a sum of Kshs. 283,886/= being the fees for overloading. That the said order was imposed without affording it an opportunity to be heard through a Court process, which was in utter violation of its Natural Justice rights by going ahead and issuing an unsigned demand notice of Kshs. 283,886.

**3.** The Applicant averred that the continued detainment of the subject motor vehicle together with the merchandise belonging to a client has greatly prejudiced its business thus resulting into huge losses. That there is an imminent danger that the Respondent may sell the subject motor vehicle via public auction if 60 days lapse pursuant to section 17(8) of the East African Community Vehicle Load Control Act, 2016 (hereafter the Act) to recover fees for overloading and other attendant expenses.

**4.** The Applicant's case is that, the Respondent ought to have obtained its written consent pursuant to Section 22 (2) of the East African Community Vehicle Load Control Act 2016 before proceeding to issue an order for payment of a fine.

**5.** Though the Respondent was duly served as per the Affidavit of service dated 10/2/2021, they neither entered appearance nor filed a Reply to the Application. The respondent having failed to respond to the application nor file submissions as directed on several occasions, the Court proceeded exparte with Mr Kedeki highlighting on their written submissions.

**Exparte Applicant's Submissions.**

**6.** The firm of Kedeki appearing for the exparte applicant submitted on 3 issues namely;

> **(i) Whether the respondent abused its powers and or acted ultravires when they ordered the exparte applicant to pay Ksh 283,886**
>
> **(ii) Whether the applicant's right to a fair administrative action was violated by the respondent.**
>
> (iii) **Whether the applicant has suffered damages as result of the respondent's action**

**7.** Counsel literally reiterated the averments contained in the affidavit in support of the application. It was submitted that the respondent was deliberately misinterpreting the law by calling the amount imposed as a penalty or fees yet the two are distinct. In support of that argument, counsel relied on the holding in the case of **Margaret Miano Vs Kenya National Highway Authority Mombasa High court petition No. 23 of 2015** where the court held that;

> **"There is 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,… 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… It is a penal provision, and like all penal provisions, it must be construed strictly…"**

**8.** Counsel contended that the amount imposed was irrational and biased with the sole intention of intimidating its clients into paying the amount in order to salvage the merchandise on board. Learned counsel further submitted that the exparte applicant had established a primafacie case by proving that the respondent's action was tainted with irrationality, illegality and procedural impropriety. To fortify this, the court was referred to the holding in the case of **Republic Vs Director Public Prosecutions and Another exparte Justus Ongera (2019) e KLR and Republic V the Chief Magistrate's Mombasa and 2 others exparte Tusker Mattresses Ltd and 3 others HC Misc Civil Application No.179/2012.**

**9.** Counsel went ahead to submit that the court has powers to issue a mandamus order directing the respondent to comply with Section 17 (1) of the East African Vehicle Load Control Act 2016 which allows redistribution of weight and reweighing.

**10.** Lastly, counsel urged the court to find that any action arrived at unprocedurally or illegally without considering the principles of natural justice is void. In this regard, the court was referred to the holding in the case of **Ridge vs Bakdwin ( 1963) 2 all ER 66 and 81** where the court held that;

> **"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."**
>
> **Determination**

**11.** I have considered the affidavit evidence, annexures thereto, submissions by the Applicant's advocates on record and the relevant applicable law and precedents relied upon. In my view, the following issues arise for determination.

> **a. Whether the Applicant's rights to a fair administrative action and a fair hearing have been infringed.**
>
> b. **Whether the Applicant is entitled to the reliefs sought.**

**12.** As earlier on stated, the application herein was not opposed by the respondent. I am however cautious and alive to the principle that the fact that a suit is not defended or challenged does not mean that the Court will just automatically grant the orders sought without interrogating the veracity of the evidence placed before it and determine the same on its own merit. In that regard, the Applicant is still

required to prove its claim on the required standard of balance of probabilities. See Supreme Court decision in the case of Gideon **Sitelu Konchellah vs Julius Lekakeny Ole Sunkuli & 2 others (2018)Eklr**

**13.** The objective of seeking judicial review orders is to cushion or protect litigants against suffering consequences out of decisions arrived at by public bodies, institutions or public officers without due regard to due process, procedural propriety, observance of the principles of natural justice by treating everybody equally and fairly, rational and prudent consideration and treatment of issues before them, due regard to the people they are serving and upholding the rule of law.

**14.** It is trite law that decisions that are arrived at irrationally, illegally, unprocedurally, through consideration of extraneous factors or in breach of principles of natural justice are null void abnitio hence subject to quashing through the tool of Judicial review. See **Civil service unions v Minister for civil service (1985)A,C374 at 401** where Lord Diplock stated that Judicial Review has developed to a stage where one can classify the grounds for consideration as that of Irrationality, illegality and procedural impropriety

**15.** As a general principle, judicial review is not concern with merits or demerits of the decision but rather, the procedural impropriety aspect. However, with the advent of the 2010 Constitution and the enactment of the Fair Administrative Action Act 2015, it is difficult sometimes to isolate judicial review proceedings challenging legality of the processes without touching on its merits. Therefore, it is incumbent upon the applicant to prove the extent to which the alleged irrationality, illegality or procedural impropriety has affected or is likely to affect them. However, the court reserves the discretion to issue or not to issue judicial review orders while being cautious that public bodies or officers too have a duty to deliver to the public and the people they serve and therefore where appropriate public interest outweighs individual interest.

**16.** In the instant case, the exparte applicant is alleging violation of its fundamental right in that it was not given an opportunity to express its side of the story before being ordered to pay a sum of Kshs 283,886 being the fees for the alleged overloading. The right to be heard before being condemned is an inalienable and unlimited right which cannot be compromised. This right is anchored under Article 50(1) of the Constitution which provides interalia;

> ***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

**17.** To what extent was the applicants' right to fair hearing violated? To advance its case, the Respondent has relied on Sections 17, 20, and 22(2) of the ***East African Community Vehicle Load Control Act, 2016 which for ease of reference I wish to reproduce as hereunder***.

Section 17 of the ***East African Community Vehicle Load Control Act, provides:***

> ***(1) When an authorized officer determines that a vehicle is carrying a load in excess of the legal load limit under this Act, he or she shall issue a weighing report setting out the overload particulars and the amount of overload fees payable.***
>
> ***(2)Where an authorized officer, while a journey is being undertaken, determines that a vehicle is carrying a load in excess of the legal load limit, the authorized officer shall in consultation with relevant implementing agencies, not allow the vehicle in question to continue its journey, unless the load is redistributed and the vehicle is, upon being reweighed, found to be within the legal 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.***
>
> ***(3) Where the fact of overloading is not disputed by the transporter, 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.***
>
> ***(4) 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 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.***
>
> ***(5) It shall be the duty of the driver to notify the owner and other relevant parties of an overload as indicated in the weighing report and such fees required to be paid for the overloading.***
>
> ***(6) An overloaded vehicle shall be detained without a charge by the national roads authority for the period prescribed in the regional operation and procedures regulations and, thereafter, a fee as prescribed by the national roads authority or its agents who may be operating the parking lots where the vehicle is detained shall be charged for each extra day until proof of payment is produced.***
>
> ***(7) Subject to the provisions of this section, a detained vehicle shall be held under the transporter's responsibility and payment of charges and costs for storage and removal of the detained vehicle shall be made in the manner prescribed by the national roads authority.***
>
> ***(8) If the overloading fees provided for under this Act are not paid within sixty days after imposition, the national roads authority or any institution designated by a Partner State may issue a notice of sale published in the Gazette, official community website and one newspaper in the vehicle's country of registration if the vehicle is registered in a Partner State, for the transporter to***

*claim the vehicle and its goods.*

*(9) If the transporter does not claim the vehicle within sixty days of the notice under sub-section (8) the national roads authority or any institution designated by a Partner State may apply to the national court for orders to auction the vehicle and its goods.*

*(10) The proceeds of any such sale shall, subject to other national laws, first be utilized to cover overloading fees, the charges arising from the sale including the cost of storage, the advertisement and removal of the vehicle, and any other charges as determined by the Partner State, while the remaining proceeds if any, shall be payable to the transporter, or, where the transporter fails to claim within six months of the sale, the proceeds shall be deposited to the national roads authority.*

*(11). For security reasons the national roads authority shall immediately, but not later than one hour, notify the police regarding which vehicle is being detained at the weighing stations or gazetted place.*

*18. Section 20 further provides:*

*(1) A person commits an offence under this Act if that person—*

*(a) being a transporter, bypasses, absconds or evades a weighbridge or weighing station;*

*(b)transports any load specified under section 9 or such other load specified by the Council in regulations without a special permit;*

*(c) fails to comply with any terms and conditions of the Special Permit for carrying any load specified under section 8;*

*(d)…*

*(e)fails to comply with any request, demand, requirement or order properly made or given to him or her by an authorized officer in accordance with the provisions of this Act;*

*(f) without reasonable cause, fails to give to an authorized officer any assistance or information which the authorized officer may reasonably require of that person for the purpose of the performance of the authorized officer's duties under this Act; Offences. East African Community Vehicle Load Control Act, 2016*

*(g)causes damage to any weighbridge, weigh station, any weighing equipment or installation;*

*(h)…*

*(i)…*

*(j)…*

*(k)…*

*(m)…*

*(n)…*

*(2) …*

*19. Section 22 of the Act also provides:*

*(1) The National Road Authority, where it is satisfied that any person has committed an offence under paragraphs (a), (b), (c), (e,), (f) and (g) of subsection (1) of Section 20, may compound the offence and may order such person to pay a sum of money, as the National Road Authority may deem fit not exceeding the amount of the fine to which the person would have been liable if the person had been prosecuted and convicted for the offence.*

*(2) The National Road Authority shall not exercise its powers under subsection (1) unless the person admits in a prescribed form that the person has committed the offence and requests the National Road Authority to deal with such offence under this section-*

*(3) Where the National authority makes any order under this section.*

*(a) the order shall be in writing and shall have attached to it the request of the person to the National Road Authority to deal with the matter;*

*(b) the order shall specify the offence which the person committed and the penalty imposed by the National Road*

***Authority;***

***(c) a copy of the order shall be given to the person if the transporter so requests;***

***(d) the person shall not be liable to any further prosecution in respect of the offence upon payment of the fine; and***

***(e) the order shall be final and shall not be subject to appeal and may be enforced in the same manner as a decree or order of the High court.***

**20.** There is no dispute that the applicant's lorry was impounded by the respondents' officials and the impugned amount described as fees imposed allegedly pursuant to Section 7 of EAC Vehicle Load Control Act 2016. This is evidenced by annexture "pkk2" attached to the affidavit in support of the application which is a notification for payment. Section 7 provides thus;

**"A national roads authority or any other institution designated by a partner state shall provide for payment of overloading fees at weighing stations or such other designated locations"**

**21.** The respondent claimed that the Exparte applicant's motor vehicle was overloaded. What procedure was the respondent supposed to follow? What remedy was at their disposal? One of relevant provisions which automatically comes to play is section 17 of the Act. This provision requires the respondent's authorized officer to issue a weighing report to the affected person or owner of the m/v setting out particulars and amount of overload and fees payable. Such officer is then empowered not to allow the concern m/v to continue with its journey unless the load is redistributed or offloaded and the m/v reweighed to confirm compliance with the legal weight. In addition to those conditions, the fees directed to be paid under sub-section 1 must be paid or a guarantee in a prescribed form provided by the transporter.

**22.** Sub –section 3 goes further to provide that, where the fact of overloading is not disputed, the transporter is made to sign to acknowledge the weight and subsequently pay the overload fees which is recoverable summarily as a debt. In case of a dispute on the overloading, such dispute is recorded by the authorizing officer and a copy issued to the transporter who may opt to pay the amount of fees assessed on a without prejudice basis, adjust the load as may be required and then lodge an appeal against the fees.

**23.** While the said appeal is pending, the overloaded m/v is detained at the cost of the transporter and is liable to auction if not claimed within 60 days upon securing a court order to conduct such auction.

**24.** From the pleadings and submissions by the applicant, this procedure or remedy was not followed nor utilized as required. Instead, the respondent opted to apply section 22 of the Act which is a penalty section to impose the disputed amount. Section 22 of the said Act does recognize and provide a system a keen to pre-bargaining or an out of court settlement system where the National Roads Authority finds a transporter to have committed an offence under section 20 paragraphs (a),(b),(c),(e) (f) and (g) may compound the offence and order such person (transporter) to pay a sum of money as they (Authority) may deem fit but not exceeding the amount which the person would have paid had he been prosecuted before court and convicted. Sub-section 2 further provides that, the Authority will not exercise its powers under section 22(1) unless the person admits in a prescribed form that he had committed an offence and has requested the authority to deal with such offence under this section. This provision was intended to avoid unnecessary inconvenience and reduce the cost of litigation in court.

**25.** Where the Authority decides or makes an order to apply this section rather than take the person to court, it shall execute the order in writing attaching the request by the person who is alleged to have committed the offence, specifying the offence, stating that the order shall be final if the prescribed fine is paid and not be subject to appeal and, that the fine ordered shall be enforced like a decree of the high court. In the absence of any voluntary admission of the offence as contemplated under Section 22 of the Act, then, the transporter is liable to prosecution before a court of law. The Authority cannot take shortcut to impose an illegal fine in lieu of prosecution if the transporter does not willingly admit the offence in writing.

**26.** In the circumstances of this case, the procedure prescribed under section 22 of the Act was not followed by the respondent at all.

**27.** From the foregoing, I find that for the Applicant to be penalised under the ***East African Community Vehicle Load Control Act***, it ought to have admitted that it had committed the offence in a prescribed form, and thereafter, the Applicant needed to have requested the National Road Authority to deal with the said offence in accordance with Section 22 of ***East African Community Vehicle Load Control Act***. Considering that the Applicant had not requested to plead guilty to the alleged charges nor admitted to the offence of "overloading", the respondent did act erroneously by unilaterally imposing a fine through an illegal process thus abusing its authority and mandate by penalizing the Exparte applicant before subjecting him to due process.

**28.** In the alternative, if they found section 22 was not appropriate for them, then, they should have preferred necessary criminal charges where appropriate in compliance with section 20 of the said Act. In this case, the respondent acted irrationally and in utter disregard of the principles of natural justice that one shall not be condemned unheard.

***29.*** M/s Kyalo learned Counsel for the Applicant submitted that the Respondent acted *ultra-vires*, and with impunity, whereof it took the position of being the complainant, the prosecutor and the judge over the same matter hence violated the principle of natural justice where an accused person has a right to defend himself through a judicial and/or fair process. Indeed, the respondent did not distinguish the difference between what amounts to a penalty and a fees.

**30.** In this case, fees would have been applicable under section 17 and not under section 22 of the Act which provides for a penalty in the event of admission of the offence committed under Section 20. Section 22 contemplates a situation where an offence has been committed and a penalty prescribed thereof. See **Emukule, J** in **Margaret Miano vs. Kenya National Highway Authority Mombasa High Court Petition No. 23 of 2015** where the learned Judge expressed himself on the difference between "fees and penalty"interalia as follows:

> **"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 like fees referred to in Regulation 6 and prescribed in Part A of the Schedule to the said Regulations. Therefore, 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."**

**31.** In my view, I find that the decision by the Respondent to penalise the Applicant without giving it an opportunity to be heard makes the Respondent to be the complainant, witness, the investigator, prosecutor, a judge and executioner in its own cause or proceedings which is irrational and improper. This is the principle of *nemo judex 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 in the administration of justice is that a man may not be a Judge in his own cause.

**32.** Since in this case the Applicant was never accorded an opportunity of being heard before the impugned decision was made, I find that there was a violation of the Applicant's right to be heard. The right to be heard also known as "*audi alteram partem*" was enumerated by the Court of Appeal in **Pashito Holdings & Another vs Ndungu & 2 Others [1197] eKLR** as follows-

> a. **"The rule of *"audi alteram partem,"* which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition).**
>
> b. **"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him".**
>
> c. **There is an unpronounceable (sic) Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right."**

**33.** Similarly, in **Msagha vs Chief Justice & 7 others [2006] 2 KLR 553**, a three judge bench agreed that a person has a legitimate expectation to be heard before a decision is made against him. The court was guided by the English decision of **Ridge –vs- Baldwin (Supra),** where it was observed that;

> **"An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice",**
>
> and the Court at page 102 said-
>
> **"a decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision."**

**34.** The consequence of a decision made in contravention of the rules of natural justice is that the said decision is void ab initio and will be set aside or quashed. **See Onyango Oloo** V. **Attorney General [1986-1989]EA 456**. Similarly, in **Ridge vs. Baldwin [supra]**, **Lord Reid** expressed himself as follows:

> **"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."**

Having found that the decision by the respondent was procedurally defective or improper, the same is liable to being quashed.

**35.** Was the action by the respondent in conformity with the fair administrative Action Act 2015? The right to fair administrative action is a constitutional edict based on Article 47 of the Constitution, which provides that:

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

**36.** Article 47 of the Constitution is further amplified by section 4(3) of the ***Fair Administrative Action Act, 2015*** which provides as follows:

> ***"Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***
>
> ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
>
> ***(b) an opportunity to be heard and to make representations in that regard;***

***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***

***(d)a statement of reasons pursuant to section 6;***

***(e) notice of the right to legal representation, where applicable;***

***(f)notice of the right to cross-examine or where applicable; or***

***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

**37.** Having found that the respondent was not accorded a fair hearing, not given any notice in writing requiring him to exercise the option of pleading guilty or not and, not explained to about his right of appeal, is sufficient proof that the respondent acted totally in breach of the tenets of fair administrative action espoused and contemplated under Article 47 of the Constitution. For the above reasons stated, it is my finding that the prayer for certiorari orders in the application dated 3/2/2020 is merited and is hereby allowed as prayed.

**38.** As regards the prayer for Mandamus orders, the Exparte applicant prayed for orders directing or compelling the respondent to allow for redistribution and reweighing of the applicant's m/v to ascertain the actual weight and then release the motor. Since the objective of guarding against overloading is to protect our roads against damage, it is only fair that the subject m/v be reweighed to ascertain the actual weight in the presence of the respondent or his representative and incase of any excess, the same be offloaded or be redistributed. Having found that due process was not followed by enforcing either section 20 or 22 of the Act properly, it is my finding that the respondents abdicated their responsibility or mandate my not discharging the same under the relevant provisions of the law. To that extent, I find the order of mandamus appropriate to issue.

**39.** Having dealt with the substantive issues prayed for, I wish to comment on the aspect of damages prayed for by counsel for the Exparte Applicant during submissions. Mr. Kedeki sought for the award of damages being the ultimate consequence of the loss suffered for loss of income during the period the m/v is being held or detained by the respondent.

**40.** It is trite law that special damages must be pleaded specifically and that a party is bound by his own pleadings. A prayer cannot be pleaded through submissions. See **Equity Bank Ltd Vs Gerald Wang'ombe Thuni (2015) e KLR** where the court held that;

> **"There is no doubt that any amount due to a claimant under the head of loss of user is ascertainable and quantifiable; it is in the nature of special damages which as always must be specifically pleaded and proved;**

**41. In Provincial Insurance Co. East Africa Ltd Vs Nandwa 1995-1998 2EA at page 291** the court of appeal emphasized on the need to plead specifically a claim that is ascertainable and quantifiable thus stating that;

> **"It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead"**

**42.** In the instant case, the Exparte applicant did not specifically plead any quantifiable or ascertainable loss of income suffered for the entire period the m/v has been detained. Although it is natural to infer that the m/ v having been on the road was mechanically sound and therefore capable of generating more income, it is not for the court to generate a figure of the loss incurred. For instance, the court does not know how much the owner was making per day to be able to assess the total loss suffered. For the foregoing reason, the prayer for damages is not applicable as it was not specifically pleaded and proved.

**43.** However, taking into account that the respondent is to blame for the unnecessary detainment of the m/v which would have been avoided had proper procedure been followed, I will hold that, the Exparte applicant shall not be liable to pay any storage charges during the period the m/v has been and is being held by the respondent or at the instruction of the respondent. To that extent the respondent shall be liable to meet such expenses if any.

**44.** To further mitigate on the obvious losses suffered by the Exparte applicant for no mistake of their making, I will exercise my discretion in the interest of justice and direct that the Respondent does release the m/v in question to the Exparte applicant forthwith upon reweighing and offloading the excess weight if any or upon redistribution of the load without subjecting them to any further process as that will amount to double punishment.

**45.** Accordingly, it is my finding that the applicant has met the threshold for grant of Judicial Review orders sought in the nature of Certiorari and mandamus which I hereby grant by directing that;

> **(a) An order of Certiorari be and is hereby issued removing into this Court for the purposes of being quashed which I hereby do by quashing the decision of the respondent whether acting by itself, it's agents, officers, servants or whosoever in removing and detaining motor vehicle registration number KCH 386V belonging to the Applicant without adhering to the rules of natural justice, fair hearing and generally the due process of the law.**
>
> **(b) That an order of Mandamus do and is hereby issued compelling the respondents to allow for reweighing of the Exparte applicant''s M/V Regn No. KCH386 V to ascertain the actual weight and, redistribute or offload any excess weight upon receipt of this order and forthwith release the said m/v without subjecting it to further processes**

**(c) That the respondents shall be liable to meet any necessary storage expenses of the m/v together with the luggage contained therein.**

**(d) That the Respondent shall bear the costs of this application**

**Dated, Signed and Delivered in Mombasa this 15th Day of April 2021.**

**J.N. ONYIEGO**

**JUDGE**